From Social Exclusion to Social Security: To what extent does the LRAA of 2014 strike a balance between employers and employees?

1. Introduction

The Constitution of the Republic of South provides every one with a right to fair labour practice,[1] and this has been given effect to through the enactment of the Labour Relations Act (LRA).[2] The right to fair labour practice has been extended to employees who would ordinarily not fall within the meaning of employee such as sex workers, illegal immigrants, and armed forces.[3] On the other hand, a group of employees falling under what is termed non-standard employees did not get to enjoy this constitutional provision, in other words they were excluded from the ambit of labour protections espoused in the LRA. In particular, non-standard employees faced difficulties in identifying their employer, their employment contracts contained restraint of trade clauses, they worked for long hours and were not paid for overtime work contrary to the Basic Conditions of Employment Act, the duration of their contracts would endure for years even though they were appointed as temporary employees, the circumstances under which they are employed as non-standard employees were not spelled out leading to employers resorting to this type of employees without any regulation, their salaries were below those of standard employees of the 'employer' or client, the client was largely immune from litigation and they could not exercise their right to collective bargaining.[4] Consequently, trade unions in South Africa such as COSATU called for complete ban of the use of non-standard employees reasoning that these contracts are akin to trading of human beings as commodities given exploitation and low protection for these employees.[5] On the other hand, employers favour these contracts for obvious reasons; maximisation of profits because employers do not have to finance certain benefits and also because salaries are low as indicated above. Ironically, employees preferred these non-standard employment arrangements as opposed to being unemployed.

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[1] The Constitution of the Republic of South Africa 1996, sec 23.
[2] Labour Relations Act
[3] *Kylie v CCMA* (2010) 31 ILJ 1600 (LC); *Discovery Health Limited v CCMA & Others* [2008] 7 BLLR 633 (LC); *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469 (CC).
[4] See generally, Tshoose & Tsweledi 'A Critique of the Protection Afforded to Non-Standard Workers in a Temporary Employment Context in South Africa' (2014) 18 *Law, Democracy & Development*, 334; Van Niekerk et all *Law@work* 3ed (2015).
[5] Cohen & Moodley 'Achieving Decent Work in South Africa?' (2012) 15 *PER/PELJ* 2 at 320; Van Eck 'Revisiting Agency Work in Namibia and South Africa: Any Lessons from Decent Work Agenda and Flexicurity Approach? (2014) 30 *Int Journal of Comp Lab Law & Ind Rel* 49.

As a result of the cry from trade unions but bearing in mind the need to stimulate growth and create jobs, the Labour Relations Act was amended in 2015 to regulate non-standard employment arrangements. This paper therefore seeks to determine the extent to which the new amendments strike a balance between the needs of trade unions and the duty to create jobs through use of non-standard employment contracts. Whereas the many types of non-standard employment relationships, this paper is limited to temporary employment services and fixed term contracts only.

2. Triangular Relationship and Fixed-Term Contract under the 2014 Labour Relations Amendment Act

2.1 Duration and Requirements for engaging temporary employment services and fixed-term contracts

As the names denote, these kinds of employment settings are supposed to be of temporary nature yet they continued indefinitely because there was no provision spelling out circumstances under which employers were to engage temporary services or employees on a fixed-term basis, and the limit of the length of time that such contract were to endure. Consequently, one would be rendering temporary services to the client unabated resulting into injustice to employees who naturally are hoping for indefinite contracts or an employee will be on endless fixed-term contracts, with renewal after another without offering such employee a permanent job thereby making employees "permanent temps."

Starting with temporary employment services, one of the new provisions coming with the Amendment Act is regulation of temporary employment services. Specifically, the client can only engage the employee on temporary service only for three months,[6] beyond which such employee becomes the employee of client and not TES.[7] If the work were to be performed beyond three months, it should be that the temporary employee is replacing an employee who is temporarily absence such as an employee who has taken unpaid leave for a year or on study leave for a year or two year or away for more three months for whatever reason.[8] There is no limit set by the legislature for the employee to be temporarily away and this means it can be any period as long as the employee will eventually come back to his employ. Otherwise, certain jobs are regarded as temporary in nature and anyone who is employed to such jobs will be viewed as temporary employee even if the contract were to continue for a year or so.[9] The determination of which jobs are temporary will be done by the bargaining council or sectoral determination or by the Minister.

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The most intriguing among these conditions for engaging employees on temporary service is the three-month duration. Does it mean the contract with TES employer terminates automatically and the new contract with client as the new employer kicks in immediately? One needs to recall that an employee would have concluded a contract with TES employer and it is presumed that the contract between TES and employee will automatically terminate upon the conclusion of three-month service by operation of the law and all rights and obligations of TES employer will be transferred to client in respect of the employee concerned. The Act is silent however on this point and scholars in the field have already interpreted this provision as not making TES employee an employee of the client; rather, it means such employee can enforce rights against the client.[10] In particular, Tshoose and Tweledi conclude that the employee remains the employee of TES without giving reasons to their conclusion except by saying that they have adopted a purposive approach to statutory interpretation.[11] It is argued herein that by adopting a purposive approach, the object and purpose of the legislature in passing this Amendment Act has to be taken into account; thus, it is not disputed that by looking at the provisions of the 2014 Amendments in totality on non-standard employment contract, there is no doubt that the legislature wants employers to engage workers on temporary services or on fixed term contract for genuine reasons. Thus, in adopting the purposive approach, one is inclined to conclude that after three months of services, the TES employer falls off and the client is deemed to be an employer. This argument is further strengthened by the fact that the Amendment Act makes termination of TES employee's contract a dismissal if it is done to avoid employing him.[12] This therefore indicates that the purpose of the deeming provision is for the client to be the employer. Further, the Act requires TES employees who are deemed to be employees of the client after three months to be given treatment not less favourable than treatment given to employees of the client doing similar job.[13] One would recall that the reason fir why employers engage in outsourcing is because they want to get access to specialised skills for a short period and at the fraction of the cost associated with permanent jobs.[14]Thus, TES employees are paid lower salaries, they do not have access to pension and medical aid benefits, they work for long hours without overtime payment contrary to the BCEA and they do not have leave days. Therefore, if TES employees are to be treated equally with the employees of the client, it means that they will now be entitled to salaries that are same as employees of the client doing similar job, they would be entitled to medical aid and pension benefits, overtime payment and leave days in line with the BCEA. On the other hand, one would recall that one of the reasons that TES employees get lower salaries is because TES employer must get a commission from TES employee salary. Thus, assuming client pays TES R2000 for services rendered by TES employee, which is the same amount he pays to his employee doing the same job as TES employer (excluding benefits). Assuming further that since TES must get a commission of about 20%, TES employee then gets R1600 because R400 goes to TES. After the

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[10] Van Niekerk and Smit Law@work 3rd ed (2015), 70.

[11] Tshoose & Tsweledi, "A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa" (2014) 18 *Law and Democrary,* p342.

[12] Labour Relations Amendment Act 2014, s 198A. 4.

[13] Labour Relations Amendment Act 2014, s 198A.5

[14] Hutchinson and Le Roux "Temporary Employment Services and the LRA: Labour Brokers, their Clients and the Dismissal of Employees" 2000 9 *CLL* 51.

deeming provision kicks it, it would mean that the client has to pay this "joint" employee more so that employee can get R2000 excluding other benefits, which is the same amount that employees of the client doing similar job gets and for TES to still get its share. This would be an expensive relationship and it cannot be the intention of the legislature to make TES employees to be indebted to TES for the rest of their employment relationship because the deeming provision requires client to employ TES employee on an indefinite basis after three months. In sum, to allege that an employee may not be regarded as an employee of client after three months when they get same leave days, salary, pension and medical aid as other permanent employees of the client is difficult to comprehend.

Similar to Tshoose and Tsweledi, Van Niekerk and Smit argue that the deeming provision does not make the client an employer of the TES employee. Thus, they point the potential problems if this provision were to be regarded as transferring the employer responsibilities to client and they make an example of a situation where TES employer demotes the employee concerned and the question becomes whether the employee can sue the client for the unfair demotion occasioned by the TES employer? It is submitted herein herein that since TES employer would have fallen off, it is not possible that TES can be involved in issues of demotion and dismissal of the employee. Also, this example is problematic because it would mean that TES employer and client both assume the responsibilities of the employer and this would be absurd formulation. Therefore, the likely interpretation is that this provision means that the relationship between TES employer and employee terminates after three months and the new one between client and employee is formed.

One may counter-argue the submissions raised herein on the basis of the clause on joint and several liability of TES employer and the client. The argument could be that TES employer cannot be regarded to have fallen off when the Amendment Act provides for joint and several liability.[15] In response, the provision on joint and several liability can be seen as applicable only before the deeming provision kicks in or only to the exclusions. Such that before three months expires or for TES employees who fall in the ambit of exclusions, the client and TES employer can be held jointly and severally liable for any conduct of dismissal or unfair labour practice.

The effect of the deeming provision will undoubtedly be undesirable to many clients and even for TES employers and they are likely to shift employees around to avoid expectation of substantive employment after three months has lapsed. Aware that clients or TES may avoid employing temporary employee on an indefinite basis when the three-month period expires, the legislature makes it a dismissal any act of terminating the contract with temporary employee in order to avoid employing him.[16] Therefore, it is seems the loop is tightened for the benefit of the employees.

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[15] Labour Relations Amendment Act 6 of 2014, s198.4A
[16] Sec 198A(4).

Regarding fixed-term contracts, although fixed term contract is defined as a contract that terminates on occurrence of a specified event or completion of a specified task or a fixed date other than normal retirement age,[17] it seems the duration for a fixed term contract is also three months.[18] Beyond three months, an employer can only engage employee on fixed term contract provided the employment is of limited duration or if the employer has a justifiable reason. To show the seriousness of this provision, the Act requires that the employer must state in writing the reason for extending fixed term contract or for employing a person on a fixed term contract beyond three months.[19] The Act is silent on what the justifiable reason is but this can be inferred from subsection 4, which lists the grounds for concluding fixed term contract in the first place. Thus, employer can only fix the contract provided employee:

(a) is replacing another employee who is temporarily absent from work;
(b) is employed on account of a temporary increase in volume of work which is expected to endure beyond 12 months;
(c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
(d) is employed to work exclusively on a specific project that has a limited or defined duration;
(e) is a non-citizen who has been granted a work permit for a definite period;
(f) is employed to perform a seasonal work;
(g) is employed for the purpose of an official public works scheme or similar public job creation scheme;
(h) is employed in a position which is funded by an external source for a limited period; or
(i) has reached the normal or agreed retirement age applicable in the employer's business.

Looking at these requirements, it is going to be increasingly difficult for the employers to engage employees on fixed term contract. However, employers can always package their departments to take a nature of project which completes its life cycle after three years for instance especially because it is not a requirement for employers to get approval of fixed term contracts from Labour Department unlike with employment of foreigners where employers need to get a certificate that indicates that no South African citizen or permanent resident is suitable for the job from the Labour Department. In so doing, Immigration Act has made it difficult for employers to overlook citizens or permanent residents in favour of foreigners.

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[17] Labour Relations Amendment Act 6 of 2014, s 198B.(1).
[18] Labour Relations Amendment Act 6 of 2014, s 198B.(3).
[19] Labour Relations Amendment Act 6 of 2014, s 198B.(6)

2.2 Identifying the employer

Fixed-term employees never had problems identifying their employer, and this only became the problem with regard to TES employees. Therefore, the discussion here will be limited to TES.

Although scholars have argued that it was difficult for the employee to identify the employer;[20] the employer was always known and it was the TES. Of course, TES is shielding the true employer, who for all intents and purposes is the client. But, the nature of this kind of relationship is such that the client is not an employer but TES is the employer.[21] Therefore, the argument that the employee did not know the employer is oblivious of the nature of outsourcing – the client does not want have a relationship with the person rendering services (employee) hence the middle man (TES), who then assumes the responsibilities of the employer. Therefore, to argue that employees were not vest with the identity of the employer is out of question. What trade unions and some authors wanted was for the client, who is always hidden away, to be regarded as the employer and assume responsibilities of the employer. If the client were to be regarded as the employer, what then is the purpose of the outsourcing? Nevertheless, the Amendment Act now requires the employee to be furnished with full particulars of employment in accordance with the Basic Conditions of Employment Act (BCEA) upon commencement of duties.[22]

Among the many items that the BCEA requires is the name and address of the employer and this can be regarded as potentially settling the uncertainty that was alleged to have existed regarding the identity of the employer. Arguably, this provision does not give unions or employees what they had hoped for – which is that the client is the employer. The name and address of TES can always be reflected in the particulars of employment. In fact, looking at the Amendment Act in its entirety on non-standard employees, it does not entirely abolish this triangular relationship; it affirms it at least in the first three months of one's employment as non-standard employee.[23] Therefore, the particulars of employment will reflect TES as employer and the address will be that of TES especially given that clients resort to use of outsourcing because they want to cut costs. Consequently, a provision such as this one cannot compel clients to appear as employers in the contract of employment.

Nevertheless, the above discussion does not reflect the true nature of problems of employer identity in TES arrangements as reflected in case law. To this effect, employers shift employees to TES and still continue with the services of such employees. Consequently, employees end up not knowing who the true employer is. Equally, there are those employees who are given the label of independent contractors yet they are employees for either TES or client for all intents and purposes. Starting with employees

[20] Ezette Gericke 'Temporary Employment Services: Closing a Loophole in section 198 of the Labour Relations Act 66 of 1995' *Obiter* (2010)April v Workforce Group Holdings
[21] Labour Relations Amendment Act 6 of 2014, s 198 3(a)
[22] Labour Relations Amendment Act 6 of 2014,s 198.4B(a).
[23] Labour Relations Amendment Act 6 of 2014, s 198.3(a)

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who are being shifted to TES, reference can be made to *Dyokwe v De Cock.*[24] The issue in this case was who the employer is between labour broker and client at the time of dismissal of the applicant. The facts are that the applicant was employed by Mondi for two years and he was informed by Mondi to sign a new contract with the third party – Adecco, which a temporary employment service. After doing so, the applicant continued working for Mondi, with everything being still the same except his salary which was now paid by Adecco and which has also become less than what he used to earn before signing the contract. In determining who the employer was at the time of the dismissal, the court looked at the meaning of TES and concluded that Adecco never procured or provided Mondi with the employee; rather, it was the opposite that occurred, Mondi secured the applicant for Adecco.[25] And further that the employment relationship between the applicant and Mondi is such that Mondi never terminated employment contract between itself and the applicant. On the basis of the above, Mondi was found to have been the employer at the time of the dismissal.

The question is whether the provision such as this one requiring the employee to be furnished with the particulars of employment can solve the problem of identifying the true employer where a sham TES agreement has been concluded. The answer is undoubtedly in the negative. Rather, the solution would come from the deeming provision which makes the client an employer after three months of service provided the exclusions do not apply. Cases such as *Dyokwe* would be in the history because employers can no longer shift their employees to TES hoping to exploit them.

2.3 Restraint of trade clauses in employment contracts

The job market requires candidates to have experience, and employees resort to this kind of employment setting as a way of acquiring experience. Further, employees are hoping to get a full-time and indefinite job with the client yet the contracts of employment that employees concluded with TES often have a restraint of trade clause.[26] Restraint of trade clauses were never a problem with fixed term contracts but employees on fixed term contracts were often overlooked for permanent jobs. As a result the Act now requires employers to grant employees on fixed term contracts same opportunity to apply for vacancies as those granted to permanent employees.[27]

By their nature, such clauses prohibit employees from applying for jobs with clients. Consequently, the employee remains bound to TES and becomes TES employee perpetually contrary to the expectation to get a job once a suitable opening arises with the client.

[24] *Dyokwe v De Cock* (2012) 33 ILJ 2401 (LC)
[25] Dyokwe v De Cock, p17.
[26] Van Niekerk and Smit *Law@work* 3rd ed (2015),71
[27] Labour Relations Amendment Act 6 of 2014, s 198B.(9).

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The Amendment Act does not address the issue of restraint of trade clauses directly but the solution to this problem can be found from other provisions. Specifically, if the employee is working for the client for more than three months, and the provisions of sections 198.A (1)(b) and (c) do not apply to such employee,[28] he is regarded as employee of the client. Therefore, even if a restraint of trade clause prohibiting employee from applying jobs with the client is in place, such clause is rendered ineffective by the Amendment because after three months with the client because the client is regarded as employer. The restraint of trade clause will be applicable only before the period of three months lapses or if one has been with the client for more than three months but replacing an employee who is temporarily away.

Of course, these clauses are immoral and can be challenged in a court of law because they impact on the employee's ability to earn a livelihood. However, the difficulty is that these clauses may not be known to the employee concerned as they may be incorporated in a contract between TES and client and not between TES and employee thereby making it difficult for employees to challenge them.

2.4 Overall Treatment: Working hours, overtime and Salary

Once the employee becomes the employee of the client by virtue of having spent more than three months with the client, the Act requires that such employee should not be given a treatment less favourable than the employee of the client performing the similar job without a justifiable reason.[29] This provision similarly applies to fixed term contracts.[30] Thus, an employee who has been employed for a period exceeding three months must not be treated less favourably than the employee employed on a permanent basis performing similar work unless there is a justifiable reason for differential treatment.[31] The justifiable reason can be length of service or seniority.[32] Two issues become important in relation to treatment: TES employees were known to be working long hours without payment for overtime as prescribed by BCEA and they were also being paid less than employees of the client doing similar job. This provision is therefore presumed to be referring to working hours and salaries among other things. Thus, once an employee is deemed an employee of client following the period of three months with that particular client, the former is expecting to work normal hours and be paid overtime in accordance with the provisions of BCEA and most importantly to be remunerated in the same way as other employees of the client doing similar job. Clearly, TES employees are going to add a

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[28] According to the Amendment Act, an employee is performing a temporary service only if the work is for only three months. If exceeding three months, he should be replacing someone who is temporarily away, section 198A(1)(b) or if the work is deemed to be of temporary nature by a collective agreement concluded in a bargaining council, sectoral determination or a notice published by a Minister, section 198A.1(c).
[29] Sec 198A.(5).
[30] Sec 198B.(8)(a).
[31] Sec 198B.(8)(a).
[32] Sec 198D (2)

huge cost to the company after the deeming provision kicks; consequently, the industry is going to be less lucrative and employers may have to cut down use of TES beyond three months. However, with regard to fixed term contracts, there has not been much of a cost added since they were usually not entitled to pension but to and severance pay at the end of their contracts.

2.5 Unfair dismissals and unfair labour practices – joint and several liability

The Labour Relations Act was silent on joint liability between TES and client regarding cases of unfair dismissal or unfair labour practices yet the client exercised control over the employee and would even dismiss employees without any kind of recourse from labour institutions more so because clients exempted themselves from liability as evidenced in *April v Workforce Group Holdings*.[33] . It was only in limited cases such as violation of BCEA or collective agreement regulating a contract of employment that the client and TES were jointly and severally liable.[34] Thus, in *April*, one of contractual terms was that should the client for whatever reason no longer wishes to make use of employee services, the contract shall terminate.[35] Although the CCMA commissioner found this provision to be unfair, he could not find it invalid because of the common law sanctity of contracts, which CCMA commissioners do not have jurisdiction over.[36] Further, the commissioner found it difficult to declare this clause invalid merely because it exploited loopholes in the LRA.[37]

The question is whether the loopholes have been closed by the 2014 Amendment Act. To this effect, since employees are now deemed employees of the employee after three months and because clients can be held jointly and severally liable, it is unlikely that cases such as *April* can happen.

2.6 Collective Bargaining

The importance of unionising especially in South Africa cannot be underestimated. Employees are able to asset their demands and seek enforcement of the labour statues as a collective. In addition, many cases have been brought to the labour institutions by the trade unions on behalf of the employees that they represent. Consequently, employers tread carefully in dealing with employee issues. On the other hand, TES employees could

[33] *April v Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* 2005 26 *ILJ* 2224 (CCMA)

[34] s 198(4)(a)
[35] April, p2228.
[36] April, p2228 – 2234.
[37] April, p2228 – 2234.

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not be part of trade unions despite the problems highlighted above that TES employees faced. This is so because the Labour Relations Act only accords only those trade unions which are sufficiently representative of employees at the workplace.[38] This provision became inhibiting for TES employees to organise because they do not work at their employer (TES) workplace but at the workplace of the client.[39] In addition, TES employees are always in the minority and they cannot satisfy this requirement to be accorded these rights.

With the amendments to the LRA, there is no doubt that TES employees will now be behind the shield of trade unions. This is an important development because already there was scepticism as to whether employers will enforce the new provisions especially the deeming provision and its accompanying provisions. With unions rallying behind TES employees, there will be too much pressure on employers to implement or enforce the Amendments which are undoubtedly beneficial to TES employees and to fixed terms employees.

3. Does the Amendment Act Strike a Balance between the needs of employers and employee [should employers resort to TES or fixed term contracts?]

As one would remember, the government is confronted with two competing interests; on one hand is the obligation to protect employees employed under non-standard employment contracts while on the other hand is the obligation to grow economy and create jobs to curb the skyrocketing levels of unemployment. One of the ways to create employment is through flexible labour laws especially in the form of non-standard employment forms as many people tend to be employed although this is disputed. Nevertheless, confronted with these competing interests, the government passed Amendment to Labour Relations Act regulating non-standard contracts. Having looked at the prominent provisions of LRAA dealing with temporary employment services and fixed term contracts, the question that we are addressing now is whether the legislature has managed to strike a balance between these two interests or whether the Amendment Act is skewed towards one interest over the other.

Mindful of the fact that small businesses can be adversely impacted by limiting the extent to which they can operate using non-standard employees, the legislature exempted employers who employ less than 10 employees from the new provisions regulating fixed term contracts. The comparable provision does not exist with regard to temporary employment services. Consequently, the assumption is that it does not matter how small the business is, clients can only engage temporary employees for reasons and duration stated in the Amendment Act. Further, the Amendment Act

[38] Sec 11, LRA.
[39] Sec 213, LRA.

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exempts employers who employ less than 50 employees and whose business has been in operation for less than two years from the strict provisions of the Act regarding fixed term contracts. By so doing, the legislature is mindful of the need for business to recoup start-up costs before engaging in expensive human resources. Similar to small business, there is no comparable provision on temporary employment services exempting medium businesses which have been in operation for less than two years from the strict regulation of the Act. It is arguable that the severity of temporary employment services on employees in comparison to fixed term contracts warranted exclusion of these flexibilities for temporary employment services. Consequently, it may be prudent for employers to engage non-standard employees on fixed term contracts rather than temporary employment services in order to rip the benefits under the Amendment Act. On the basis of the above, it can be concluded that the legislature managed to strike a balance between the needs of employers to grow business by limiting application of the Act to large businesses especially in the first two years of operation while also ensuring that employees are protected beyond the initial years of operation of business. Yet with regard to TES, the scale is tilted towards the employees thereby leaving employers with little or no incentive at all to use employees on temporary services.

The point of departure from the above discussion is that employers are encouraged to engage employees under fixed term contract instead of temporary employment services if they are to benefit from the flexibilities available in the Amendment Act. Now the issue that follows relates to the flexibilities found under fixed term contracts. The overall cost to the company of using fixed term employees is less in comparison to using TES employees. This is so because once the TES employee has completed three months with the client, he is deemed as the employee of client provided the exceptions do not apply to him, and he is therefore entitled to all benefits. This means such employee would be permanent and pensionable whereas with fixed term contracts, the company can save on pension and to some extent even on medical aid contributions since fixed term employees are not entitled to pension; they get their salary without any deductions except statutory deductions. Also, only those employees on defined duration of employment are entitled to severance package while other categories of fixed term employees are seemingly not entitled to severance package.

There are only two ways under which clients can use temporary employment services beyond three months without bearing the burden of assuming the responsibilities of the employers. As seen above, this can only be where TES employee is replacing a client employee who is temporarily away for more than three months or if the employee is performing a temporary job as classified by the bargaining council or the Minister. Clearly the reasons are protracted and clients seldom use temporary employment services for filling in the gap while the substantive employee is temporarily away; rather, clients used to engage temporary employment services for reasons other than replacing a permanent employee who is temporarily away. On the other hand, the reasons for engaging employees on fixed term contract are broad, and this gives employers flexibility to engage employees on fixed term contracts taking into consideration the needs of the business.

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The issue of joint and several liability on unfair dismissals or unfair labour practices is a thorny one to employers as many resorted to the use of TES to avoid labour disputes, which are costly. Now the Act eliminates this safe house for employers. Given that client may be held jointly liable for circumstances that were directly linked to the TES employer, it makes this hideout non-attractive any longer. Consequently, it becomes a better option for employers to engage fixed term employees instead of TES because fixed term employees are under the sole control of employer given that there is no third party (labour broker) involved. Therefore, the employer can choose to avoid instances where a claim of unfair labour practice or unfair dismissal arises while it is not the case with TES. The same goes for TES employers, they have been found to have unfairly dismissed employees through actions of clients.

The Act also excludes employees earning above the minimum threshold from the provisions dealing with temporary employment services and fixed term contracts respectively.

4. Conclusion

Whereas the Labour Relations Act protected of sorts of employees even sex workers and illegal immigrants, atypical employees were excluded from the safety net of the law. Thus, they earned low salaries, worked for long hours without overtime pay, they did not have leave days and public holidays were not paid unless one is working, they did not have benefits such as medical aid or pension and they could be unfairly dismissed by the client with no recourse from the client. With the 2014 Amendment to the Labour Relations Act, these employees are now included in the protections of the law. They can no longer be dismissed at the whim of the client for no reason. Most importantly, they have security of job after three months of services and could not have been a better form of protection and security that came with the Amendment Act.

The extent of protection given to employees especially TES employees is so much that many employees are likely to lose their jobs before the deeming provision kicks in provided there is a correlation between flexibilities that existed before the Amendment. Further, it is highly likely many people in the low-income levels will struggle to get employed since the Amendments have not closed the holes for employers to exploit employees. There is likely to be a rise in fixed term contracts than in temporary employment services because the scale is tilted towards employees in respect of temporary employment services.

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