TEMPORARY EMPLOYMENT SERVICES GUIDELINE

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Introduction

Temporary employment services (TESs) are commonly referred to as labour brokers in South Africa.

TESs are regulated primarily by the Labour Relations Act 66 of 1995 (LRA), the Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Employment Services Act 4 of 2014 (ESA).

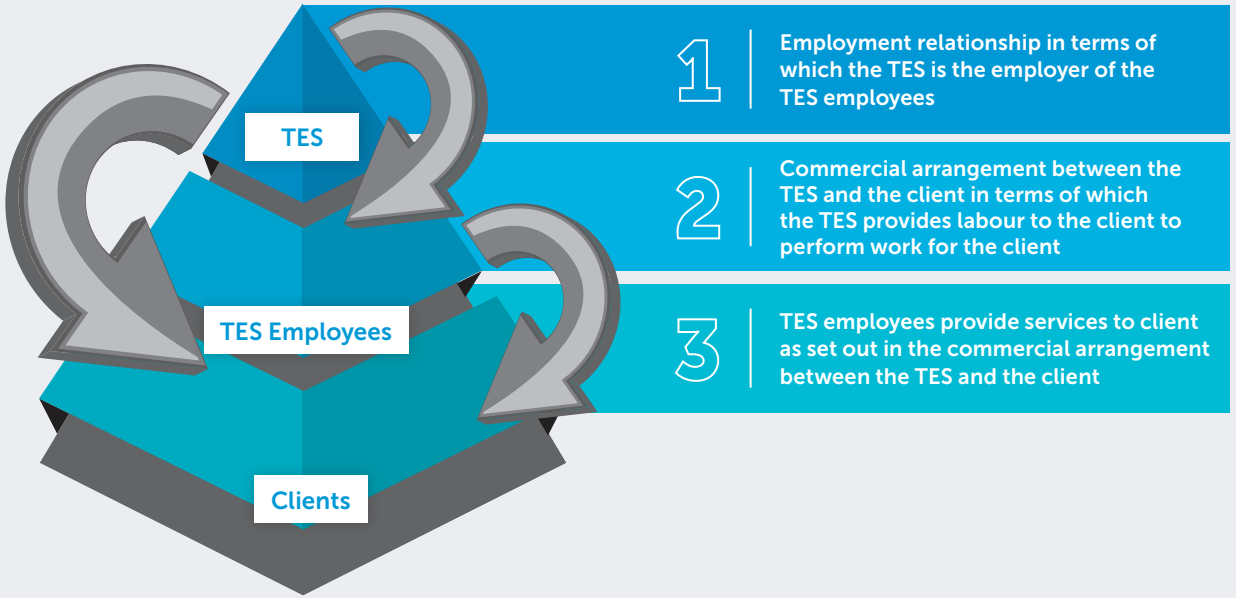
Amendments to the LRA, which came into effect in January 2015, affect sections 198 and 198A of the LRA, and brought about changes to the way a relationship between a TES, its employees and its clients is regulated.

Some of the amendments and their interpretations have been tested in the courts and the outcomes of the interpretations have significant consequences for employers in South Africa.

What is a temporary employment service?

The LRA defines a TES as:

> *"... any person who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client and who are remunerated by the temporary employment service."*



Must a TES register itself with the Department of Employment and Labour (Department)?

A TES must register to conduct business in terms of section 13 of the ESA, but the fact that it is not registered is not a defence to any claim instituted in terms of section 198A of the LRA, which is discussed below. The effective date of this requirement is yet to be proclaimed. The developments in this regard are likely to happen soon and are currently being discussed at the National Economic Development and Labour Council.

Why would a TES need to register itself as a private employment agency in terms of the ESA?

In terms of the currently inoperative section 13 of the ESA, all private employment agencies must register with the Department and a public registry of private employment services and TESs must be made available to the public. Accordingly, all private employment agencies must register with the Department. A private employment agency is defined as an entity that renders employment services for gains. "*Employment services*" are defined widely in the ESA and include providing the services of a TES.

Does the LRA differentiate between TES employees?

The LRA contains general provisions that apply to a TES and all of its employees, and specific provisions that apply to the TES and its employees earning below the prescribed BCEA threshold. With effect from 1 April 2024, the Minister of Employment and Labour has increased the annual earnings threshold to R254,371.67 per annum.

Section 198A of the LRA (which introduced the concept of "*deemed*" employment) applies only to employees earning below the threshold. These employees are often considered to be vulnerable employees and are afforded additional protections in terms of section 198A and the LRA and BCEA more generally.

What are temporary services?

The term "*temporary services*" is defined in the LRA as:

Time period:
Services limited to a fixed time period of not more than three months.

Substitution:
Where the TES employee is a substitute for a temporarily absent employee of another employer (i.e. the client of the TES, in instances of maternity leave, temporary incapacity, etc.)

Collective agreement:
Where a collective agreement or sectoral determination designated a particular work category as a temporary service, or designated the maximum temporary period.

Why is it important to distinguish between a TES and an independent contractor or service provider?

A person who is an independent contractor or service provider is not an employee of a client and is not a TES or an employee of a TES. Please refer to the infographic further on that sets out the distinction.

The employees of the independent contractor or service provider cannot claim that a TES relationship exists between the company outsourcing the work and the independent contractor or service provider rendering the service.

The employees of an independent contractor or service provider cannot be deemed employees of the company outsourcing the work, even after the expiry of the three-month period. This differs in the case of TES employees who are earning below the threshold and who have been rendering services to the client of the TES for a period exceeding three months.

In *Victor and Others v Chep South Africa (Pty) Ltd [2021] 1 BLLR 53 (LAC)*, the employees were employed, by Contracta Force Corporate Solutions (Pty) Limited (C-Force), to repair wooden pallets for the client. A service level agreement (SLA) was in place which indicated that C-Force was a service provider. At the Commission for Conciliation, Mediation and Arbitration (CCMA), the commissioner, scrutinising the SLA, the nature of the relationship between the parties, the degree of control, who directed the work to be performed by the employees and who had the right to discipline the employees, found that the true nature of the relationship was a TES relationship.

A review of the commissioner's findings was referred to the Labour Court (LC). At the LC, it was found that the commissioner erred and in fact no TES relationship existed. On appeal, the Labour Appeal Court (LAC) found the LC's approach too restrictive and agreed with the commissioner. It held that the first question in deciding if a company is a TES in terms of section 198(1) of the LRA is whether it has provided other persons to a client for reward, where employees are brought to the client by a third party to perform work at its premises, this would normally be at least an indication that the employees were procured to work for the client, especially if the client retains overarching control over the work process and can determine whether the employee continues to perform their work at all.

Secondly, whether the provider procured the employees for reward. The LAC found that there is no reason why the reward payment to a TES cannot be calculated by reference to tasks or products. All that section 198(1) of the LRA requires is that employees be provided to a client for reward and that the employee be remunerated by the provider. The method for computing the reward payable, by the client to the provider, is not alone a sufficient basis to exclude the provider from the TES category. The substance of the arrangement is more definitive than the form. The LAC further held that the factors in deciding if procured to *"perform work for the client"* are the following:

- Questions of control and integration, including the manner in which the employees work
- The degree they are integrated into the functioning of the organisation
- The authority to which they are subjected
- The provision of the tools of the trade and work equipment

What is an independent contractor?

An independent contractor is a person or entity undertaking to perform a specific service or task and on completion of the task or production of the result, its client pays the independent contractor for the result or product. The services are provided directly, and it is not an individual or entity that provides labour to another.

In terms of section 198(3) of the LRA, an independent contractor is not an employee of a TES, nor is the TES their employer.

There is no employment (or even co-employment) relationship between the client and the independent contractor or any relationship between the employees of the independent contractor and the client.

Employment Law

Employee vs Independent Contractor vs TES

The test for determining who is an employee and who is an independent contractor differs with reference to persons who earns above or below the threshold in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997 (BCEA). An independent contractor, unlike TES employees, is not an employee either of the client or the TES. Independent contractors render services for a fee, whereas a TES provides labour to a client for reward. Ultimately the test is always substance over form and the nature of the agreement is not definitive.

ABOVE THRESHOLD (NEDLAC CODE OF GOOD PRACTICE)

[1]

Factors contained in section 200A (1) of the LRA are merely a guideline to determine whether a person is an employee.

The determination for persons who earn above the threshold is subject to the following tests:

CONTROL TEST

1.Person[2] formed integral part of organisation.

2. Extent to which the person was economically dependent on the company.

DOMINANT CONTROL TEST

The courts will consider the dominant impression created having regard to all relevant factors upon examining the reality of the relationship between the parties.

In ***Goliath v SA Broadcasting Corporation SOC Ltd and Others (2023) 44 ILJ 185 (LC) ZALCCT 10 (20 September 2022)***, the court held that the regularity of the work and the fact that the applicant sought no other avenues of income did not render the relationship an employment one. All factors must be considered to determine the true legal relationship between the parties.

REALITY TEST

The courts will have regard to all relevant factors which indicate the factual relationship between the parties.

SERVICE PROVIDER ⟷ CLIENT

BELOW THRESHOLD (PRESUMPTIONS IN TERMS OF SECTION 200A (1) OF THE LABOUR RELATIONS ACT 66 OF 1995 (LRA)

In terms of section 200A (1) of the LRA, persons who earn below the threshold are rebuttably presumed to be employees where one or more of the following factors are present. The courts will however determine the relationship on the whole:

SINGLE EMPLOYER

The person in question only renders service/works for one person.

TOOLS OF TRADE

The person in question is provided with tools/equipment by the other party.

ECONOMIC DEPENDENCE

The person in question is economically dependent on the other party.

CONTROL

- The person's hours of work are subject to the control or direction of the other party.
- The manner in which the person works is subject to the control or direction of the other party.

TIME WORKED

The person in question has worked for at least 40 hours per month, over the last three months.

INTEGRAL TO COMPANY

In the case of a person who works for a company, the person forms part of the company.

NB:
The abovementioned factors will ordinarily **not** apply to **independent contractors**. However, the courts have adopted the *"reality approach"*, in terms of which they consider the holistic relationship between the parties. The facts of the case rather than the nature of the agreement is the determining factor.

TES

"Any person who, for reward, procures for or provides to a client other persons who perform work for the client; and who are remunerated by the temporary employment service."

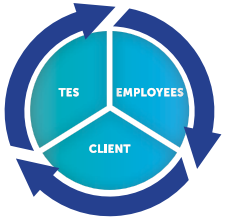
GENERAL GUIDELINES FOR TES RELATIONSHIP

"Temporary services" is defined in the LRA as (i) services limited to a fixed time period of not more than three months, (ii) where the TES employee is a substitute for a temporarily absent employee of the client, or (iii) where a collective agreement or sectoral determination designated a particular work category as a temporary service or designated the maximum temporary period. Determining whether service providers are TES is determined with reference to the following (***Victor and others v Chep South Africa (Pty) Ltd [2021] 1 BLLR 53 (LAC)) ("Chep")***:

Has the company provided persons to a client or procured persons to perform work for a client? Do the persons operate from the client's premises and the client retains overarching control over the work process and continuity of the delivery of the services by the TES employees?

Does the company procure the employees for the client for reward – which may be calculated with reference to tasks or products?

In the *Chep* judgment, the LAC held as follows: "*Questions of control and integration, including the manner in which the workers work; the authority to which they are subjected; the degree they are integrated into the functioning of the organisation; and the provision of the tools of the trade and work equipment are relevant (possibly the only) factors in deciding if procured persons 'perform work for the client".* The more the client has control over the employees of the company or service provider, the degree to which the employees use the client's tools of the trade, and where the degree of integration in the organisation is greater than that of a general service provider, the more likely the relationship is one of a TES and not that of an independent contractor.



BELOW THE THRESHOLD (Deeming provision section 198A (3) of the LRA)

In instances where TES employees earn below the threshold; do not perform temporary services as defined in the LRA and where the TES employee is assigned to the client for longer than three-months; not as a substitute for a temporarily absent employee of the client; nor assigned to a particular work category designated by a collective agreement or sectoral determination as a temporary service; then the TES employee is deemed to be the employee of the client and the client is deemed to be the employer of the TES employee. ***Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others (2018) 39 ILJ 1911 (CC)***.

The effect of the deeming provision is therefore as follows:

- The TES is considered to be the employer of the placed employee until the employee is deemed to be the employee of the client. At that point the TES ceases to be considered as the employer of the placed employee.
- Once the deeming provision kicks in the client becomes the sole employer of the employee.
- The employee is deemed, subject to the provisions of the LRA relating to fixed-term contracts for employees earning below the threshold, to be the permanent employee of the client.

Food and Allied Workers Union obo Mkhaliphi and others/Kempston Employment Solutions and another [2020] 3 BALR 240 (CCMA)

[1] *The earnings threshold as at 1 March 2023, was R241 110.59 per annum. This is subject to change every year on 1 March. Where an individual earns below the earnings threshold, they are more likely to be found to be an employee notwithstanding what their contract states, as these persons are considered vulnerable and in need of further protection by the law.*

[2] *The deeming provision of section 198A(3) in respect of TES employees of the LRA does not apply to independent contractors even after the 3 month period.*

What does joint and several liability mean?

In terms of section 198(4) of the LRA, the TES and its client are jointly and severally liable if the TES contravenes a collective agreement it concluded with its employees in a bargaining council that regulates terms and conditions of employment or a binding arbitration award regulating terms and conditions of employment, the BCEA and/or a sectoral determination made in terms of the BCEA.

The employee may institute proceedings against the TES, the client of the TES, or both, where there is joint and several liability or where the employee (earning below the threshold) is deemed to be an employee of the client of the TES.

In addition, an employee may enforce an order or award made against the TES or the client against either party.

Who is responsible for the remuneration and employment contracts of the TES employee?

The employees, unless otherwise "*deemed*" in law to be the employees of the client remain employees of the TES. The TES must therefore provide the employee with written particulars of employment that comply with section 29 of the BCEA when the employee commences employment. If the TES fails to remunerate its employees placed with a client, the failure constitutes a breach of the BCEA, and the TES and its client are jointly and severally liable for payment of remuneration.

Who enforces the provisions relating to temporary employment?

The Department of Employment and Labour may intervene.

A bargaining council that has jurisdiction over the client may enforce the provisions of an agreement concluded in the bargaining council relating to temporary employment.

The employees may seek relief in the CCMA.

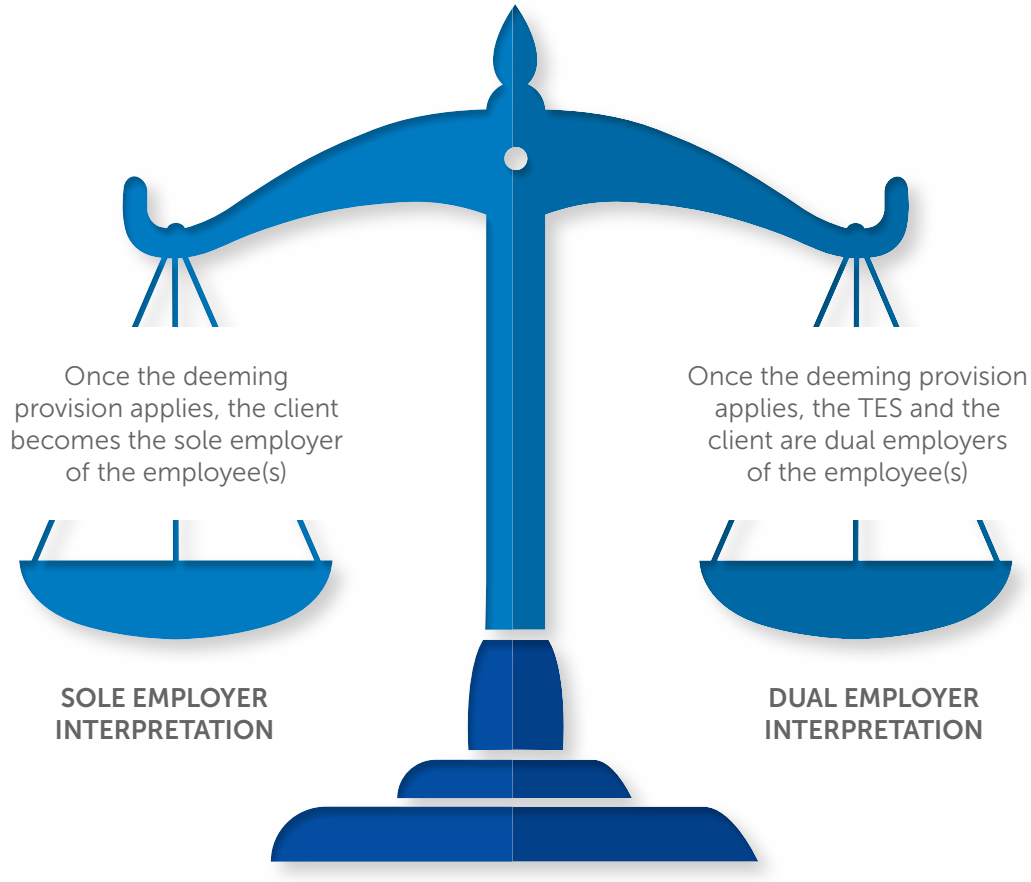
What is "*deemed employment*"?

The LRA amendments (specifically section 198A(3)(b) of the LRA) introduced the concept of "*deemed employment*" in instances where TES employees, who earn below the threshold and where the TES employees do not perform a temporary service as defined in the LRA (i.e. where the TES employee is assigned to the client for longer than three months, not as a substitute for a temporarily absent employee of the client, nor assigned to a particular work category designated by a collective agreement or sectoral determination as a temporary service).

In such circumstances, the employee is "*deemed to be the employee of that client and the client is deemed to be the employer*". Unless the provisions in the LRA relating to fixed-term contracts in respect of employees earning below the threshold apply, the employees will be deemed to be employed on an indefinite basis by the client. In other words, the TES will no longer be considered to be the employer of the TES employee at the expiry of the three-month period. The client of the TES then becomes the employer of the TES employee.

What is the effect of the deeming provision?

In *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others (CCT194/17) [2018] ZACC 22 (26 July 2018) (Assign Services)*, the Constitutional Court considered the deeming provision created in section 198A(3)(b) of the LRA. The court confirmed that there are two competing interpretations of the deeming provision:



The Constitutional Court held that the sole employer interpretation of the deeming provision is the correct interpretation. This interpretation ensures that the provision of temporary services is in fact temporary. After the expiry of the three-month period, the client becomes the sole employer of the previously TES employee(s). The client is then under an obligation to ensure that the employee(s) are fully integrated into the workplace.

The effect of the deeming provision is therefore as follows:

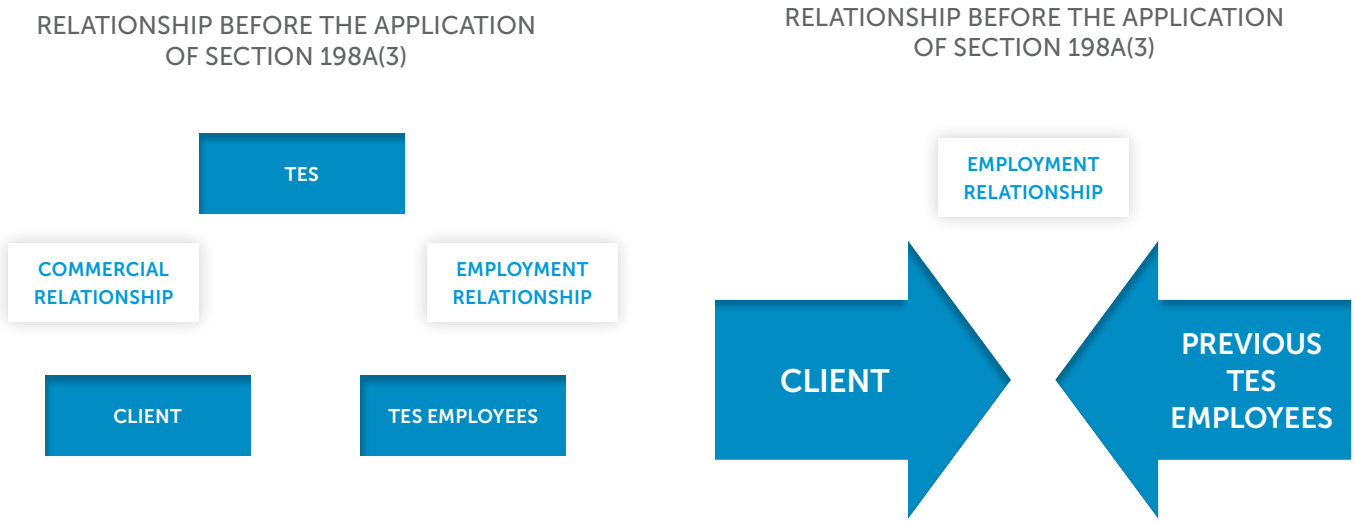
- The TES is considered to be the employer of the placed employee until the employee is deemed to be the employee of the client. At that point the TES ceases to be considered as the employer of the placed employee
- Once the deeming provision kicks in the client becomes the sole employer of the employee
- The employee is deemed, subject to the provisions of the LRA relating to fixed-term contracts for employees earning below the threshold, to be the permanent employee of the client

It is important to note that the judgment applies to TES employees earning below the BCEA earnings threshold, i.e. lower-paid employees. The judgment does not apply to "*substitute*" employees or fixed-term contract employees. However, TES employees who are employed on a fixed-term basis are covered by the judgment.

The judgment applies retrospectively – i.e. three months after the commencement of the Labour Relations Amendment Act 6 of 2014 (LRAA). The LRAA came into force on 1 January 2015. Therefore, TES employees assigned to a client on 1 January 2015 are deemed employees of that client with effect 1 April 2015. At this stage, it is presumed that the deeming provision will be triggered by three continuous and consecutive months of work by the TES employee.

In *Food and Allied Workers Union obo Mkhaliphi and Others/Kempston Employment Solutions and Another* [2020] 3 BALR 240 (CCMA), the employees sought an order declaring that they were permanent employees of the client and not the TES, given that they had been working (at the client) for longer than three months. The client alleged that the CCMA lacked jurisdiction in determining that the employees were in fact employees of the client. The commissioner cited *Assign Services* and, following the sole employer interpretation, found that the employees had been working for longer than three months at the client, through the TES, and having considered section 198A(3)(b) of the LRA, found that the employees were in fact employed by the client and thereby concluded the jurisdictional point raised by the client.

EFFECT OF DEEMING PROVISION ON THE TES RELATIONSHIP



What is the position in respect of employees earning above the earnings threshold?

Both TES employees and fixed-term contract employees who earn above the earnings threshold fall outside of the scope of the deeming provision and are thus unaffected by it.

Is there a ban on labour broking?

No. The intention of the amendments to the LRA was not to ban labour broking. The *Assign Services* judgment also does not ban labour broking. Read together, the aim of the amendments (LRAA) and the *Assign Services* judgment is to protect lower-paid workers and to ensure that temporary services are truly temporary in nature. **The deeming provisions of section 198A do not apply to employees who earn above the threshold or where the services are truly temporary in nature.**

What conduct would amount to avoiding the deeming provision?

Termination of the assignment of TES employees to a client, whether at the instance of the TES or the client, to avoid the deeming provision or because the employee exercised a right in terms of the LRA, will constitute a dismissal. This will particularly be the case where the client elects to terminate the employment of the TES employees immediately after expiry of the three-month period.

May a client request that TES employees apply for permanent posts after the deeming provision applies?

Once the client becomes the employer, by operation of law, there is no basis for the employees (earning below the threshold) to apply for their own positions that have been accorded to them by operation of law in terms of the deeming provision.

Conduct, such as subjecting deemed employees to job interviews for their own positions at the client, will be viewed as an ill-disguised attempt to undermine the status of the applicants as employees of the client and the provisions of the LRA.

Is there a transfer of employment from the TES to the client?

Once the deeming provision applies, there is no transfer of employment. The *Assign Services* judgment expressly finds that there is no transfer to a new employment relationship once section 198A(3)(b) is triggered. Once the deeming provision applies, the deemed employees will automatically become the employees of the client by operation of law and not because the deeming provision triggers the application of section 197 of the LRA.

What is the meaning of "*no less favourable treatment*"?

In terms of section 198A(5) of the LRA, an employee (earning below the threshold) is deemed to be an employee of the client and must be treated on the whole no less favourably than an actual employee of the client performing the same or similar work, unless the distinction is justifiable. This means that the client must treat the deemed employee on the whole not less favourably than its employees performing the same or similar work from the date upon which the employee becomes a deemed employee.

The *Assign Services* judgment states that once the deeming provision applies:

"*The employee automatically becomes employed on the same terms and conditions of similar employees with the same benefits, the same prospects of internal growth and the same job security that follows.*"

This part of the judgment differs slightly from the wording used in section 198A(5) of the LRA. The judgment suggests that deemed employees need to be employed on the same terms and conditions as permanent employees performing the same of similar work. This is different to deemed employees being employed on terms and conditions that are "*on the whole not less favourable*" to permanent employees of the client. Included within the terms and conditions of employment are remuneration and benefits (such as medical aid, bonuses, provident funds and any other benefit) that are granted to permanent employees by the client.

May a TES employ employees on any conditions of employment?

A TES may not employ any employee (above and below the threshold) on terms and conditions contrary to the various employment laws and collective agreements applicable to the client with whom the TES places the employee.

Section 6(1) of the Employment Equity Act 55 of 1998 (EEA) prohibits unfair discrimination against an employee on any of the grounds contained in this section. The reason for different treatment may, therefore, not be one that is prohibited in terms of section 6(1) of the EEA as it would constitute unfair discrimination. A justifiable reason for different treatment for purposes of the EEA may include:

Seniority

Experience or length of service

Merit

The quality or quantity of work performed

Any other criteria of a similar nature

In *Makaepeya and Others/National Brands Ltd t/a Snackworks and Another* [2019] 11 BALR 1209 (CCMA) the issue before the commissioner was whether the client was complying with section 198A(5) of the LRA when the deemed employees were not provided with guaranteed 44 hours of work per week and were not paid a guaranteed basic salary equal to their fellow colleagues. The commissioner noted that section 198(5) of the LRA provides that "*deemed*" employees must be treated no less favourably than the client's permanent employees doing the same or similar work. The only reference to employees working fewer hours than comparable fulltime employees was in section 198C of the LRA, which deals with part-time employees.

Section 198A of the LRA makes no reference to hours of work. Reliance should have been had on section 198D(2) of the LRA, which sets out justifiable reasons for employing employees for longer than three months on fixed-term contracts. A justifiable reason includes that the different treatment is a result of the application of a system that takes into account: (i) seniority, experience or length of service; (ii) merit; (iii) the quantity or quality of work performed; or (iv) any other criteria of a similar nature, and such reason is not prohibited by section 6(1) of the EEA.

The commissioner held that the client had engaged the TES to provide employees when needed, with no guarantee of minimum working hours. To order the client to employ the "*deemed*" employees for a guaranteed 44 hours a week would be contrary to the purpose of the arrangement between the parties and would amount to writing a contract for the employees.

Who is entitled to discipline the employee in light of the deeming provisions?

In *General Industrial Workers Union of South Africa obo Hlophe/Little Green Beverages (Pty) Ltd t/a The Beverage Company and Another* [2020] 3 BALR 248 (CCMA), the employee was dismissed by the TES and not the client (for threating violence against a fellow employee). The employee contended that the dismissal was unfair, given the triggering of the deeming provision in terms of section 198A(3)(b) of the LRA and was, therefore, to be disciplined by the client itself.

The CCMA commissioner agreed citing that the Constitutional Court has adopted the interpretation that the triggering of section 198A(3)(b) resulted in, *inter alia, "a change in the statutory attribution of responsibility which will now fall on the client as an employer within the triangular relationship"*. The mere fact, therefore, that the TES still paid the employee's salary merely indicated that the TES was to act as a payroll administrator on behalf of the client and not as an employer. The commissioner found that the client should have disciplined the employee and that the disciplinary hearing was fatally defective. The employee was retrospectively reinstated and received back pay.

Is a TES entitled to participate in an unfair dismissal arbitration once the deeming provision comes into effect?

In *Khumalo and Another and Adcorp Blu, a division of Workforce Solutions (Pty) Ltd and Another* [2019] 40 ILJ 1910 (CCMA) the CCMA held that once section 198A(3)(b) is triggered, the client is the employer of the deemed employees irrespective of the continued triangular relationship. The only party to the dispute is then the client and the TES could no longer be considered the employer of the placed employees in respect of unfair labour practice and unfair dismissal disputes. Accordingly, the TES lacks *locus standi* to be a party to the dispute before the CCMA.

Who bears the onus to reinstate a TES employee after an unfair dismissal?

In the case of an unfair dismissal, where the client is the deemed employer of the TES employee, the client must reinstate the employee into employment with the client. If the employee is not a deemed employee, the TES must reinstate its employee.

Can an employee enforce an award against a client that was not cited as a party to the dispute in which the award was made in favour of the deemed employee?

A deemed employee can enforce such order or award against the client, the TES, or both. The employee, therefore, has a choice. However, they should cite both the TES and client.

A client should obtain a suitable undertaking or indemnity from the TES against any adverse order that may impact the client. It is advisable that the TES, by agreement, should notify the client of any claim brought against the TES that may affect the client, thus allowing the client the option to participate in the proceedings.

In the event that a claim is brought solely against the client, the client may request that the TES be joined as an interested party. However, the client may only do so if there is still a contractual relationship between the client and the TES.

When will a TES relationship not exist?

If a company decides to outsource the work or service to an independent contractor or service provider, there is no TES relationship in existence. Provided that there is a genuine outsourcing arrangement in place, the employees of the independent contractor or service provider may not claim a TES relationship with the client as their employer. A TES triangular relationship may cease to exist where the TES and/or the client elect to terminate the commercial agreement between them.

Is the TES entitled to a commercial relationship with the client when the client is the sole employer?

In *African Meat Industry & Allied Trade Union on behalf of Members and National Brands Ltd t/a Snackworks and Another* [2019] 40 ILJ 1894 (CCMA) the dispute was whether the TES could administer the payroll in relation to the deemed employees. The commissioner concluded that nothing in the wording of the LRA or the court's finding in *Assign Services* prevented the TES from continuing its commercial relationship with the client, or from continuing to play the same role that it had played before the deeming provision came into effect. The court's references to the triangular relationship clearly envisaged the possibility of an ongoing relationship between the parties. This, therefore, meant that the client was not prevented from continuing to utilise the service of the TES to pay the deemed employees, to administer its payroll and to provide human resources functions. The fact that it performed this service did not detract from the client's status as their employer or its obligations under the LRA.

What is outsourcing?

Outsourcing is the strategic use of outside resources such as an independent contractor or a service provider which, independently from the client, perform activities or services required by the client. Outsourcing does not amount to a TES relationship as a TES providers labour to perform services rather than the services themselves.

How does one establish if it is a relationship with a TES or an independent contractor?

A TES provides employees to the client to render services to the client. An independent contractor renders a service to the client. The terms of an outsourcing agreement that covers specific work or services, how the parties are described in the agreement and other relevant terms of the agreement are indicative of an independent contractor arrangement.

If a fee is paid for the provision of a specialised service/task, it is indicative of an independent contractor arrangement, while if the fee is paid for the provision of specific employees, it is indicative of a TES arrangement.

The relevance of some other factors are:

Employees of a TES	Employees of a Service Provider
Provide labour directly to the client	Provide labour to the service provider or outsource company
Subject to the client's control and supervision	Subject to the service provider or outsource company's control and supervision
The TES or the client monitors individual employees' performance	The client monitors the service provider's performance against the service level agreement
Employees of the TES may become deemed employees of the client	Remain employees of the service provider
Remunerated by the TES, in instances of "*deemed*" employment, may be remunerated by the client	Remunerated by the service provider only
May, in limited instances, claim to be employees of the client	Cannot claim to be an employee of the client

The fact that the work is performed at the premises of the client is not in itself evidence of a TES relationship, as sometimes for operational necessity work may have to be rendered on the premises of the client and not at the outsourced company's premises.

In *Mzukwa v Commission for Conciliation Mediation and Arbitration and Others [2024] JOL 63255 (LC)*, the court was called upon to determine whether the service level agreement between the client and the service provider was in fact a TES relationship or whether it was a genuine service provider relationship. In overturning the decision made by the CCMA at arbitration, the court held that the commissioner erred in their findings that the service provider was not a TES on the basis that the service provider was not providing services of a temporary nature. The court held that the true test to determine whether the relationship is that of a TES is:

> *The commissioner was conflating the above provision which deals with the nature of the service for a client by an employee (the applicant clearly does not fall into the category of providing a temporary service) with whether ATMS [sic] is a TES. The definition in question that had to be interrogated to answer this, is that provided in section 198(1) which deals with what a TES means: (1) In this section, 'temporary employment service' means any person who, for reward, procures for or provides to a client other persons – (a)who perform work for the client; and (b) who are remunerated by the temporary employment service.*

The court held that, notwithstanding the provisions of the SLA and the fact that the service provider had an HR manager on the client's site to deal with HR matters, the relationship was in fact that of a TES. The court held as follows:

> *In conclusion, I find that the commissioner did not consider (i) the nature of the SLA; (ii) the degree of control exercised by the NPA over ATMS [sic] and its workers in terms of the SLA; and (iii) the degree that the applicant was integrated into the NPA's workplace and organisation. As the LAC stated in the Victor v Chep matter, these are legitimate and relevant factors, the consideration of which is essential to determining the substance of the relationship and whether (in fact and in law) work is performed for the client rather than the TES.*

In *Masoga and Another v Pick 'n Pay Retailers (Pty) Ltd and Others [2019] JOL 45929 (LAC)*, the employer (AB) employed the applicants on a fixed-term basis for 12 months to supply Pick 'n Pay with baked goods in terms of a commercial arrangement with Pick 'n Pay which was part of an empowerment scheme. The court was called upon to determine whether the commercial arrangement between the employer and Pick 'n Pay was in fact a TES relationship. The court found that there was nothing sinister in the commercial arrangement between AB and Pick 'n Pay and that the scheme was not used by either party to circumvent their obligations. The fact that AB operated from the premises of Pick 'n Pay and that they used the equipment and tools of Pick 'n Pay was not an indication of a TES relationship when assessed within the context of the intended empowerment scheme.

Are automatic termination clauses between a TES and its employees valid?

There are many instances in which an employee's continued employment is dependent upon the operational requirements of a client of the TES. A typical clause in an employment contract of a TES employee may provide that the TES employee's employment automatically terminates if the contract between the TES and its client comes to an end. This would amount to an automatic termination clause.

There are occasions when such clauses are, however, invalid. Advice should be sought around the inclusion of these in order to determine their validity. Generally, the TES, as the employer, would need to undergo a retrenchment process in terms of section 189 of the LRA.

What is the general rule in respect of automatic termination clauses?

Our courts do not permit parties to contract out of the protections in the LRA against unfair dismissal through an automatic termination clause or otherwise. Where the operational requirements of an employer do not support continued employment, the employer must follow the retrenchment process as set out in section 189 of the LRA.

When is an automatic termination clause valid?

A TES must demonstrate, as must any other employer, that there was *"a justifiable reason"* for a fixed-term contract, as contemplated by section 198B(3)(b) of the LRA, between the TES and its employee and that the fixed-term contract expired upon a fixed date or specified event. If the TES employer discharges that onus in reliance on the expiry of a fixed-term contract with its employee, the TES's reliance on an automatic termination clause should succeed.

The following are relevant considerations for determining if there is a valid and justifiable fixed-term contract:

- The precise wording of the clause and the context of the entire agreement
- Whether the client or the employer unfairly used the clause to target a particular employee
- Whether the event that triggers the termination of the agreement between the TES and its client is based on proper economic and commercial considerations
- Whether the TES intended the clause to circumvent the TES's fair dismissal obligations

There are some instances where an automatic termination clause that provides for the termination of the contract of employment on termination of the contract between the TES employer and the client have been held to be valid:

- Where the TES employer played no role in the client's decision to terminate its contract with the TES.
- Where the underlying cause of the termination is one for which employers typically dismiss employees. In this determination, one should have regard to the real reason for termination and not the form only.
- Fixed-term contracts terminating on events other than the unilateral exercise of a client's will are usually in the clear.

The CDH Retrenchment guideline is available at the following link.

May a TES retrench its employees?

The TES may terminate the contract of an employee for operational requirements when the client terminates the contract between the TES and the client. The TES must, however, comply with the requirements in terms of section 189 of the LRA.

Where a TES employee is employed in terms of a fixed-term contract, the fixed-term contract must also make express provision for termination by way of operational requirements. The courts in *Buthelezi v Municipal Demarcation Board [2005] 2 BLLR 115 (LAC)* held that the premature termination of a fixed-term employee's contract by way of operational requirements is substantively unfair unless such termination is expressly provided for in the contract of employment of the employee.

Once the deeming provision applies, the TES will not be permitted to retrench the deemed employees. The client may elect to retrench deemed employees. However, the client must comply with the requirements in terms of section 189 of the LRA. Severance pay will be calculated from the date upon which the TES employee was deemed to be the employee of the client. Statutory severance pay is calculated on the basis of one week's remuneration for every year of completed service.

The client must ensure that it does not retrench employees purely on the basis of the deeming provision. Such action will amount to a contravention of section 198A(4) of the LRA and, in all likelihood, constitutes an unfair dismissal.

Organisational rights and TES employees

A trade union is entitled to seek organisational rights in the workplace of an employer and a commissioner must consider the composition of the workforce at the workplace, including employees of an independent contractor or TES.

The union may seek organisational rights in respect of the TES employees either at the workplace of the TES or that of the TES and one or more of its clients.

Each individual site of a client of a TES constitutes a workplace for the purposes of section 21 of the LRA in which a union may exercise organisational rights.

Once the deeming provision applies, deemed employees will be permitted to join the union(s) and participate in union activities at the workplace of the employer.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2024 recommended Anli Bezuidenhout for employment.

Chambers Global 2018–2024 ranked Fiona Leppan in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from *2012–2018.*

Chambers Global 2021–2024 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended Phetheni Nkuna for employment.

The Legal 500 EMEA 2022–2024 recommended Desmond Odhiambo for dispute resolution.

The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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