

## **FEEDBACK FROM THE DEPARTMENT OF LABOUR ROADSHOW**

The Department of Labour recently released the Labour Relations and Basic Conditions of Employment Bills. Following this the Department scheduled roadshows around the country. Attached is the schedule of sessions.

As we did last year, CAPES has sent a representative from Jonathan Goldberg's office to each session to provide comment and to ask questions on our behalf.

The sessions started off with a bang in Johannesburg where we were represented by Dave Pattle. The session was attended by about 300 people with 75% representing organised labour. Since then Grant Wilkinson attended in Cape Town where the turnout came in drips and drabs and then Denver Brandt attended in Port Elizabeth and Durban where there were packed houses and a more equal turnout of representation.

The format of the sessions is an introduction by the local Department representative and then a handover to presentation to Mr Mkalipi. Throughout the country so far the Department has emphasised that whilst they are taking questions these will not change things. After the presentations the floor has been open for questions.

CAPES has been represented quite admirably with pertinent questions regarding the industry being posed to the Department. The Department has been evasive in its responses generally and when answering some questions, also quite fervent and adamant in their approach.

Some issues that have consistently arisen in the areas are:

- 1) COSATU's unhappiness with the regulation of labour brokers : This has been raised consistently and led to heated debates between Mr Mkalipi and the COSATU representatives in Port Elizabeth
- 2) The 6 month provision around deemed employment. This has led to confusion across the board with a number of opinions being expressed. CAPES view is clear and is clearly set out in the attached legal opinion of Craig Kirchmann, a respected, well-seasoned labour lawyer, who has been around in the labour market for some 25 years.
- 3) The fact that no Regulatory Impact Assessment was done prior to these revised Bills being proposed. It is our view that this should have been done, however the Department holds firm that this is unnecessary and will just lead to delays in the process.
- 4) Equal treatment clause : This is an area of substantial concern to business, but whenever it is raised it is used by the Department to refer to the history of the country and questioning business' motives. Clearly there is a failure from the Department to see the bigger picture on the negative impact this will have on labour and business overall.
- 5) Ballots for strikes and the fact that the **majority of those who vote, not the majority of employees** justify the go-ahead.
- 6) Picketing rules affecting outside 3<sup>rd</sup> parties.
- 7) Lowering threshold of representation for unions
- 8) Clearly there is still disagreement between the three parties

There is an overwhelming feeling that the Department is having a higher degree of confidence in the presentation the more the process continues and is incorporating the feedback from questions in sessions in the presentation. This has the impact of limiting the Question and Answer session.

What is disconcerting is that there are a fair number of attendees leaving the session straight after the presentation or during the question and answer portion of proceedings.

Members are urged to attend the remainder of the roadshows, ask questions and to feel free engage with Grant Wilkinson, who will be representing us in the remainder of the sessions either before, during or after the sessions.

Grant's details are 082 570 8595 or [grant@globalbusiness.co.za](mailto:grant@globalbusiness.co.za). You are also welcome to follow him on twitter at Wilkinson\_SA where he will be updating us on the sessions.

Other twitter accounts that you can follow include : nats\_singer ; JGoldbergsnr ; WeszMadz ; APSOZA ; CAPESZA .

Regards

Grant Wilkinson

## MEMORANDUM

**EX PARTE:**           **CAPES**

**IN RE:**               **LABOUR RELATIONS AMENDMENT BILL, 2012**

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### **A. INTRODUCTION**

1. We have been requested by Confederation of Associations in the Private Employment Sector (“client”) to provide it with an opinion in respect of the implication of clause 198A of the Labour Relations Amendment Bill 2012, which Cabinet approved for submission to Parliament on 20 March 2012<sup>1</sup> (“the Bill”).
2. The Bill envisages wide-ranging amendments to the Labour Relations Act 66 of 1995 (“the Act”). However, this opinion focuses on the interpretation of clause 198A of the Bill.
3. For convenience and the sake of clarity, it is intended to refer to a “*section*” of the Act and a “*clause*” of the Bill.
4. This opinion has been requested on an extremely urgent basis. Accordingly, this opinion will deal more with our conclusions and not with general and underlying legal principles such as the principles applicable when interpreting statutes. Should a full and comprehensive opinion be required, this will be done in due course.

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<sup>1</sup> See: Minister of Labour’s media briefing of 22 March 2012.

**B. CLAUSE 198A OF THE BILL**

5. Clause 198A of the Bill reads as follows:

***“198A Application of section 198 to employees earning below earnings threshold***

*(1) In this section, “temporary services” means work for a client by an employee –*

*(a) for a period not exceeding 6 months;*

*(b) as a substitute for an employee of the client who is temporarily absent; or*

*(c) in a category of work and for any period of time which is determined to be temporary services by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).*

*(2) This section does not apply to employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.*

*(3) For the purposes of this Act, an employee referred to in subsection (2)<sup>-2</sup>*

*(a) performing temporary services for the client is the employee of the temporary employment service in terms of section 198(2);*

*(b) not performing temporary services for the client is deemed to be the employee of that client and the client is deemed to be the employer.*

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<sup>2</sup>

Reference to sub-section (2) appears to be an obvious error. This must be so because sub-section 2 serves to exclude employees earning in excess of the threshold prescribed in terms of section 6(3) of the BCEA. It appears that it is intended to refer to sub-section (1).

- (4) *The termination by the temporary employment service of an employee's assignment with a client for the purpose of avoiding the operation of subsection (3)(b) is a dismissal.*
- (5) *An employee deemed to be an employee of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.*
- (6) *At least three months prior to the coming into effect of this section, the Minister must by notice in the Government Gazette invite representations from the public on which categories of work should be deemed to be temporary service by notice issued by the Minister in terms of subsection (1)(c).*
- (7) *The Minister must consult with NEDLAC before publishing a notice or a provision in a sectoral determination contemplated in subsection (1)(c).*
- (8) *If there is conflict between a collective agreement concluded in a bargaining council, a sectoral determination or a notice by the Minister contemplated in subsection (1)(c) –*
- (a) the collective agreement takes precedence over a sectoral determination or notice; and*
- (b) the notice takes precedence over the sectoral determination.”*

**C. OPINION SOUGHT**

6. We have been requested to advise client of the implication of clause 198A(3) of the Bill.

7. More particularly, we have been requested to express an opinion on the consequences of clause 198A(3)(b) Bill being operative.
8. We are advised that there is a school of thought that is to the effect that once clause 198A(3)(b) becomes operative, for the purposes of the Act, the employee becomes an employee of the client and ceases to be an employee of the temporary employment services ("TES") ("the first school of thought").
9. On the other hand, there is also a school of thought to the effect that the employee remains an employee of the TES but is also deemed (for the purposes of the Act) to be an employee of the client ("the second school of thought").
10. We have been requested to give an opinion as to which of the two aforementioned schools of thought is correct.

**D. OPINION**

**Reasons for differing schools of thought**

11. In our view, the confusion/differences of opinion stem from the fact that the explanation found in the Memorandum of Objectives and a proper application of the principles of interpretation of statutes leads to different results. This is indeed an unfortunate situation.
12. The comments made in the Memorandum of Objectives leads one towards the first school of thought.
13. If one applies the principles applicable to interpretation of statutes, the second school of thought triumphs.

## The second school of thought

14. It is our view that the second school of thought is the correct school because we are constrained to interpret the Bill with reference to principles of interpretation.
15. We are of this opinion despite the fact that the memorandum of objects which accompanied the Bill, in regard to clause 198A that if employees earning below the threshold:<sup>3</sup>

*“are not employed to perform temporary services, they are deemed for the purposes of the LRA to be employees of the client and not the TES.”<sup>4</sup> (emphasis added)*

16. Despite what is recorded in the Memorandum of Objects and quoted in paragraph 12 above, clause 198A(3)(b) does not contain the underlined words.
17. It is trite that in South African law an employee can have more than one employer.<sup>5</sup> It must be assumed that the drafters were aware of this principle.
18. If the drafters/Cabinet had intended the employee to cease being an employee of the TES and become an employee of the client only, the clause could have said so in simple and plain language. For example, if the intention was to automatically substitute the TES for the client, words similar to those used in section 197(2)(a) of the Act could have been used.
19. Furthermore, the sub-clause uses the word “*deemed*”.
20. The word “*deem*” is defined as “*regard, consider, judge*”.<sup>6</sup>

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<sup>3</sup> Referred to in clause 198A(2), ie Threshold Prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act 75 of 1997.

<sup>4</sup> See: Memorandum of Objectives: Labour Relations Amendment Bill, 2012, p 27.

<sup>5</sup> See for example: Board of Executors Ltd v McCafferty [1997] 7 BLLR 835(LAC).

21. Accordingly, it is our view that when clause 198A(3)(b) is operative, the employee is regarded to be the employee of the client and the client is regarded to be the employer. However, this does not automatically do away with the LRA rights and obligations between the employee and the TES.<sup>7</sup>
22. The foregoing gives effect to the plain meaning of the word, gives effect to the intention of the amendments and does not result in absurdities.

### **The first school of thought**

23. On the other hand, the first school of thought offends the plain meaning of the words, does not accord with the intention of the amendments and potentially leads to absurdities.
24. The first school of thought offends the ordinary meaning of the words because clause 198A(3)(b) it does not say that there is automatic substitution of employers and/or that the TES ceases to be an employer, under circumstances where our law permits an employee to have two employers.
25. The second school of thought does not accord with the intention of the amendments. The Memorandum of Objectives records, *inter alia*, that the intention includes “*responses to the increased informalisation of labour to ensure that vulnerable categories of workers received adequate protection and are employed in conditions of decent work*”.<sup>8</sup>

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<sup>6</sup> See: The Concise Oxford English Dictionary, 9<sup>th</sup> edition.

<sup>7</sup> A presumption that applies to interpretation of statutes is that legislation must be interpreted to not change existing law more than is necessary. Therefore, if a change as drastic as one doing away with the LRA employer/employee relationship in respect of the TES was intended, this should have been expressly addressed.

<sup>8</sup> See: Memorandum of Objectives, page 1.

26. It is also clear that a primary intention behind the amendment is to “*further protect workers placed by temporary employment services*”.<sup>9</sup>
27. There can be little doubt that “*vulnerable*” employees who remain with a client for more than 6 months (and hence are no longer performing a temporary service) would be better protected if they remain (for the purposes of the Act) employees of the TES and are also deemed to be employees of the client.
28. If after 6 months the employees are no longer employees of the TES (as suggested by the first school of thought) that would deprive the employees of a number of rights and/or benefits contemplated in the Act. A simple example would be that they would lose the right to participate in a primary strike against the TES (their true/contractual employer). Another example is that they would lose the benefit of being in a position to enjoy the benefits of organizational rights against the TES.
29. The second school of thought could also lead to absurdities. It would be absurd if TES employees/assignees acquire the right to strike against their true employer (the TES) but lose that right after six months (ie when they cease to be performing a temporary service).
30. If clause 198A(3)(b) is to be interpreted as meaning that the employee is (for the purposes of the LRA) no longer an employee of the TES, this would serve to negate the application of section 198 of the Act. This is because that interpretation would mean that the employee is (for the purposes of the Act) an employee of the TES and hence the three way relationship contemplated in section 198 would be deemed to be destroyed. This is absurd and could not have been intended.

#### **Clause 198A(5) of the Bill**

31. In our view, the insertion of clause 198A(3) is further support for the fact that the second school of thought is correct.

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<sup>9</sup> See: Preamble to Amendment Bill.

32. If clause 198A(3)(b) was to be interpreted as per the first school of thought, there would be no need for clause 198A(5) because affected employees would be protected by the general principle of “*equal pay for equal work*” (for the same employer).
33. Put another way, if the principle “*equal pay for equal work*” does not adequately protect employees (of the same employer) then the effect of clause 198A(5) would then mean that employees governed by clause 198A(3)(b) enjoy more statutory protection than employees who were employed directly by the client.
34. In our view, clause 198(5) of the Bill is necessary to clarify that the “*equal pay for equal work*” principle must be applied as between the section 198A(3)(b) employee and the client. In the absence of this clarity, there would be confusion as to whether the equal pay for equal work principle would apply to the client or the TES.

#### **E. CONCLUSION**

35. For the reasons given above, we are of the view that the second school of thought (referred to in paragraph 9 above) is the correct interpretation in the event of the effect of clause 198A(3)(b) being of application.
36. In reaching our conclusion, we are alive to the comments made in the Memorandum of Objectives (and quoted in paragraphs 15 above) but are satisfied that proper interpretation of the Bill leads to the second school of thought prevailing.

Dated at **EAST LONDON** on this the **12<sup>th</sup>** day of **APRIL 2012**.

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**KIRCHMANN INC.**  
**PER: MR M C KIRCHMANN**