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Newsletter

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NEWSLETTER

WHO IS THE EMPLOYER, THE LABOUR BROKER OR THE CLIENT?

The recent judgment by the Labour Appeal Court (LAC) in respect of Assign Services v NUMSA and others has sparked yet another interesting debate around the interpretation of Section 198A(3)(b)(i) of the Labour Relations Act (LRA), in as far as whether the status of the employment relationship of employees placed with the client are "deemed" to be employees of the very client or of the Labour Broker (TES).

Simply put, Section 198A(3)(b)(i) records that only those employees falling under the ambit of "temporary services" as defined will be "deemed" to be the actual employees of the temporary employment service itself. Employees that fall outside the ambit of the definition are considered to be employees of the client of TES and not the TES.

The CCMA in respect of Assign Services v NUMSA was tasked to provide clarity with regards to the meaning of "deeming" as defined in Section 198A(3)(b)(i) of the LRA, furthermore to pronounce on the proper construction of statutory innovations governing the relationship between TES, the workers it engages and the client with whom they are placed.

In its ruling The CCMA was unwavering that the deeming provision in section 198A(3)(b)(i) of the Labour Relations Act was to be interpreted to mean that the client of the labour broker becomes the sole employer.

The labour broker obviously dissatisfied with the ruling of the CCMA referred the matter to the Labour Court (LC) for a review and much to the Labour broker's delight, the LC overturned the CCMA's ruling in *Assign Services (Pty) Ltd v CCMA and Others (JR1230/15) [2015] ZALCJHB 283; [2015] 11 BLLR 1160 (LC); (2015) 36 ILJ 2853 (LC)(8 September 2015,* finding that the deeming provision is to be interpreted so as to create a dual and parallel employment relationship with the labour broker as the primary employer and the client the "deemed" employer for the purposes of the LRA only.

NUMSA disgruntled about the decision of the LC to overturn the CCMA's ruling in the case above challenged this interpretation and referred the matter to the Labour Appeal Court (LAC), wherein the LAC upheld the initial decision of the CCMA, finding that TES and their clients would only be jointly and severally liable in limited instances after three (3) months.

In the judgment delivered on the 10th of July 2017, the judge in the LAC found that the client of the TES is the statutory employer after 3 (three) months for purposes of the LRA under section 198(3)(b)(i), which as highlighted herein above the sole purpose was to protect the vulnerable employees being abused by TES by ensuring that these employees are not treated differently from employees employed

directly by the client. The logical consequence of this provision is that a client can only use a temporary employment service for 3 (three) months, before itself becoming the actual employer of the employees of the temporary employment service.

Simply put, if at the end of the 3 (three) months fixed term contract entered into by an employee placed by the TES at a client and the client still requires the services of the "brokered" employee, continued placement of such an employee thereafter by the client will be deemed that the client is now the sole employer of the employee.

Contact Information:

Contact Strata-g for more information on this newsletter or for our service offerings

info@strata-g.co.za

or

011 462 5408