

questions & answers

with ANTON ROSKAM



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Labour market flexibility

Have the new LRA amendments yielded to the clamour for greater labour market flexibility for small business?

No, they have not. There was indeed a large noise during the run up to the LRA amendments to create greater 'labour market flexibility' for small business. This didn't happen. It is difficult to establish the exact reasons for this, but I would speculate that they include the following:

- The LRA deals adequately with small business. For example, section 30(1)(b) requires a bargaining council's constitution to provide for the representation of small and medium enterprises on the council. The LRA therefore gives small and medium businesses the scope to influence the nature of collective agreements. Section 32(3)(e) allows the Minister of Labour to refuse to extend a collective agreement concluded in a bargaining council to non-parties if the agreement does not establish or appoint an independent body to grant exemptions to non-parties. Section 32(3)(f) allows the Minister to refuse to extend such a collective agreement if the agreement does not contain criteria that are fair and promote the objects of the LRA.
- In November 1999 the Minister, under a barrage of criticism from the labour movement, made a determination lowering the BCEA standards for small business with regard to overtime, averaging of hours and family responsibility leave.
- The argument for small business exemptions was often racist. It motivated the need for small business to be exempt from many of the provisions of the LRA and BCEA on the basis that emerging small black business could not afford them.
- Many of the arguments for small business to be exempt actually showed people's ignorance about the provisions of the LRA and BCEA.
- Much of the noise about labour market flexibility was shown to be an ideological commotion for business to be freed from the constraints of collective bargaining.
- Perhaps the most important reason lies, unfortunately, with the death of workers locked into the Lenasia factory that caught alight. It was unfortunate that this incident was necessary to refocus the debate from one about escaping labour market regulation to enforcing regulations. The death of the twins born to a woman who could not get to hospital because she was locked in her place of work in Newcastle emphasises this point all too vividly.

Against this one had to juxtapose the fact that small business often employed non-unionised workers who are most vulnerable to excessive exploitation. A report by the International Labour Organisation (ILO) in February 1999 concluded that:

- South Africa's labour regulations had been reformed to allow for labour market adaptability and employment security;
- our labour regulations on dismissal, fixed-term contracts and working

conditions do not appear to be particularly burdensome when compared to other middle income countries;

- the regulatory environment had not obstructed rationalisation and 'right-sizing', especially in export industries; and
- 'inflexible' labour markets are not at the heart of the employment problem.

You talk of vulnerable workers. How adequately are they protected?

The law covers them adequately, especially in the light of the amendments to section 33 and the introduction of the new section 33A in the LRA. The problem is not with the law itself, but with its enforcement. Are employers complying with the BCEA's minimum terms and conditions of employment, various sectoral determinations, bargaining council main agreements, health and safety legislation, etc? We have no scientific measurement of the extent of compliance, but my sense is that it is very poor, especially for 'vulnerable' workers.

What are the amendments to sections 33 of the LRA?

Presently, designated agents of bargaining councils have the same powers as CCMA commissioners. These powers were designed to be used by commissioners when conducting conciliations and arbitrations. However, the role of the designated agents more closely resembles that of labour inspectors. The amendment to section 33 of the LRA gives designated agents powers of inspection and inquiry similar to those of labour inspectors in terms of the BCEA. These powers will be set out in Part 1 of Schedule 11 of the Labour Relations Act.

What does the new section 33A provide for?

In terms of the 1956 LRA, failure to comply with industrial council agreements was a criminal offence. The 1995 LRA decriminalised enforcement of collective agreements. Disputes concerning compliance with bargaining council agreements that cannot be resolved by conciliation are now referred to arbitration.

The LRA does not deal expressly with disputes in which a bargaining council is a party, whether to claim payments on behalf of an employee or payments such as levies that are due to the council or contributions to funds established by councils.

Many bargaining councils have provided for these arbitrations by collective agreement and the Labour Court has recently confirmed their validity. Nevertheless, the status of these arbitrations required clarification.

A new section 33A is included to provide an explicit statutory basis for arbitrations dealing with the enforcement of bargaining council collective agreements. It is proposed that these arbitrations should be conducted by arbitrators appointed by the CCMA so as to ensure the independence of the arbitration process. The powers of arbitrators are modelled on those of the Labour Court in dealing with violations of the BCEA.

After consulting Nedlac, the Minister will be able to publish a notice setting out the maximum fines that may be imposed by an arbitrator. If any employer brings an application to review and set aside an award imposing a fine on it, the fine is automatically suspended pending the outcome of the review application.

Will this resolve the problem for vulnerable workers?

The amendments are good news, but they will not solve the problem. The issue is not only the nature of the legislation. It extends to the actual enforcement of legislation. If workers are locked up in a factory at night or only paid half the amount prescribed by a sectoral determination or main agreement that has been extended by the Minister, the problem lies with enforcement. We need to build capacity in government and our labour market institutions to make it very costly to flout the law.