

The Changing Face of Labour Legislation



MOLENAAR & GRIFFITHS INC.

ATTORNEYS, NOTARIES AND CONVEYANCERS

Proposed Amendments to the Labour Relations Act (LRA): Topics Covered

1. The Threshold – who the protections apply to.
2. Regulation of Non-Standard Employment :
 - (a) Labour Broker employees
 - (b) Fixed Term Contract Employees
 - (c) Part Time Employees

Continued:

- Meaning of dismissal – amended
- Section 143 – the effect of Arbitration Awards
- Change with regard to Review Proceedings
- NB: The Amended Act is not yet in operation.



The Threshold

- The Threshold of earnings is set by the Minister of Labour and is increased yearly.
- The current threshold is at: R 205 433.30 since 1 July 2014.
- Those employees earning above the Threshold are not entitled to overtime payments, double pay on public holidays, and are further not restricted to the 45 hours work week. Certain Sections of BCEA don't apply to them.

Threshold

- The R17 119.44 is regular remuneration before deductions, i.e. income tax, pension and medical aid and such like,
- Subsistence and transport allowances, achievement awards and overtime payment is not regarded as remuneration for purposes of the R17 119.44 income.



The Amended Sec 198

Regulation of Non-Standard Employment

- Creates increased protections for employees in Non-Standard Work
- 3 Categories of Non Standard Work employees have been identified in the LRA:
 - (a) employees placed by Temporary Employment Services (TES), also known as labour brokers,
 - (b) employees engaged in Fixed Term Contracts and
 - (c) Part – Time employees
- * the majority of the protections only apply to employees after they have been in employment for 3 months and who earn below the threshold.

Section 198A: Labour Broker Employees

- [Temporary Service Defined:](#)
- Employment via labour broker must genuinely be temporary;
- Employment lasts less than 3 months or;
- It replaces a temporarily absent employee who is going to return (maternity leave, sabbatical etc, even if longer than 3 months) or
- It is a category of work defined as temporary by a Ministerial Notice, Sectoral Determination or in a Collective Agreement

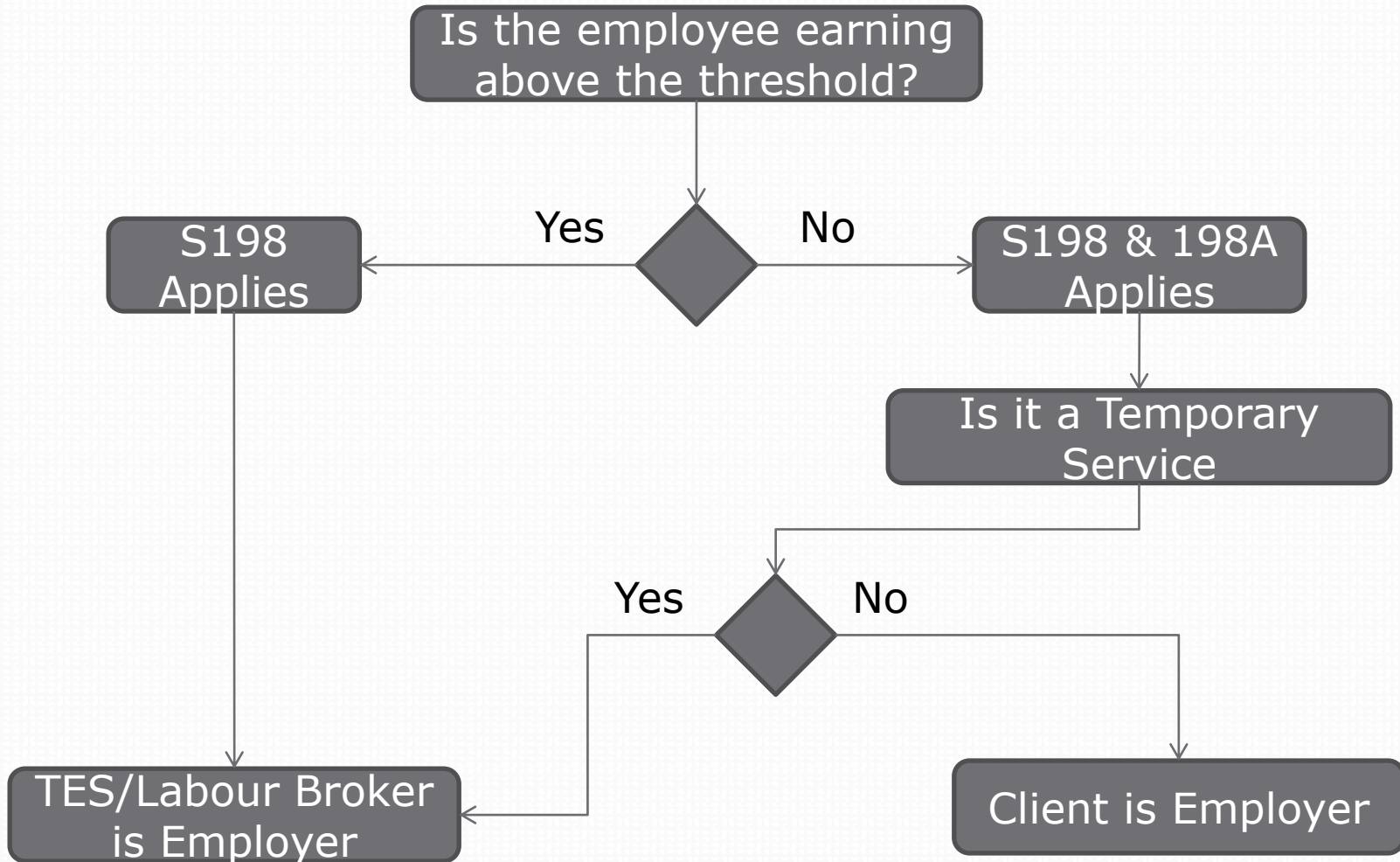


Who is the correct Employer?

- If the work is not genuinely temporary, and the employee earns below the threshold, then after 3 months, the employee is deemed the employee of the client and not the labour broker.
- Where the employee is seen as not performing such temporary service for the client, then the employee is deemed to be employed by the client on an indefinite basis, subject to the provisions of Section 198B.

A Labour Broker Employee

Who is the Employer?



Impact on Payroll

- Payroll together with HR must be aware of the employees being provided by the TES/labour brokers (earning under the threshold) that are working for the company,
- Must further be aware of the fact that if they work longer than 3 months, there is the risk of the employee being deemed an employee of the company,
- Once this deeming occurs, this employee will be entitled to be placed on the company's payroll and will most likely be entitled to all employee benefits as well.

Added Responsibility



- There is as such, an added responsibility on payroll department to keep a close evaluation on the nature of the work of the employee and the period of employment.
- If the employee is deemed in terms of these amendments, to be the employee of the client (company), all alleged unfair dismissal disputes are then levelled against the company and not the labour broker.

Termination to Avoid Deeming: Sec 198A(4)

- If the employee's contract was terminated in order to avoid deeming, such a termination constitutes a dismissal,
- This could be even if termination date was determined well in advance (example, the contract was simply limited to 3 months without any other reason other than to avoid deeming),
- Such a dismissal is automatically unfair and goes to Labour Court for Adjudication and not CCMA arbitration, i.e. compensation not limited to 12 months.

The Old Section 198

- The old Sec 198 still applies and protects all Labour Broker employees, even those earning above the threshold.
- Additional Sections have merely been added to protect the lower earning employees (under the threshold employees).
- Sec 198A will only apply once the amended Act comes into operation. There is a general rule against retrospective application of amendments when it impacts on substantive rights.
- If the employee was employed before the amended Act came into force, the employee will only benefit 3 months after the commencement date.

Section 198B: FTC's

- Fixed Term Contracts of Employment:
- Does not apply if employee earns above the threshold
- Definition: the contract expires upon:
 - (a) occurrence of a specific event,
 - (b) completion of a specified task or project,
 - (c) a fixed date other than employee's normal or agreed retirement age (company policies may differ on retirement age as opposed to those set by social security legislation)

Exclusions from Section 198 B

- Employees earning above the threshold,
- Employees whose Sectoral Determinations or Collective Agreements allow for Fixed Term employment,
- An employer that employs less than 10 employees,
- An employer who employs less than 50 employees and whose business is less than 2 years old (unless he conducts more than 1 business or the business was formed by the division or dissolution for any reason of an existing business)
- *purpose of last 2 points – afford flexibility for small businesses and new companies.

Successive FTC's 198B(3)

- Employers may employ on FTC for longer than 3 months or on successive FTCs only if:
 - (a) the nature of the work is of limited or definite duration ;
 - (b) the employer can demonstrate any other justifiable reason for fixing the term.
- The list of justifiable reasons is non exhaustive

Justifiable reasons: 198B(4)

- Replace a temporary absent employee
- Temp work which will not endure beyond 12 months,
- A student / graduate,
- Project has limited or defined duration,
- Seasonal work
- Public works of job creation scheme,
- Non citizen on a valid work permit,
- Project funded by external source,
- Employee has reached normal retirement age

Breach of Section: Payroll

- The employee is deemed to be employed on an indefinite contract and considered permanent with all the benefits applicable.
- If this were to happen, it is likely that there will be retrospective back payments being ordered as well by the CCMA/BC in terms of loss of benefits.
- This will include then a back calculation to include the FT employee onto the permanent payroll as employee could very well be deemed to be permanent from the start of employment.



Legal Formalities for FTCs



- Section 198 B (6) :
- (a) contract must be in writing &
- (b) state the reasons for fixing the term.
- If no valid FTC is in place, the employee is by default deemed to be employed for an indefinite period. This section seeks to clarify this point in law that a contract is by nature, indefinite in duration. An agreement to limit the term of employment **MUST** be in writing and **MUST** cite the reasons therefore and **MUST** be justifiable.

Impact from Payroll perspective: What is required

- If you are issued an instruction that a particular employee is on a FTC, you **MUST** *insist* on viewing a copy of the contract (a signed copy), failing which, you should by default place the employee on the permanent payroll staff.
- Remember FTC employees are almost always **NOT** given benefits as permanent staff, example medical aid, pension, group life policies etc.

FTC exceeding 24 months

- Section 198B (10) :
- Employees working a specific project exceeding 24 months, will be entitled to severance pay of 1 week for every year of completed service on expiry of the FTC.
- Severance wont apply if the employer procures alternative employment with a different employer prior to expiry of the FTC, and new contract is on same or similar terms.
- A Collective Agreement may legislate otherwise, i.e. it may state that employees will not be entitled to severance pay, then this will supersede the above section.

Amended Sec 186

Old Section 186 (1) (b)

- Employee whose FTC expires (to prove dismissal) must show that he reasonably expected to be given a new contract on the same or similar terms and employer failed to renew, or offered renewal on less favourable terms.

Amended Section

- Position has now changed to provide that a FTC employee is dismissed if he had a reasonable expectation of ***permanent employment*** and employer failed to retain him or offered to retain on less favourable terms.

Commentary: meaning of dismissal

- This amendment then does away with the whole debate by the Labour Courts as to whether the legislator had the intention to provide the employees on FTCs with the legitimate expectation of permanency or whether it was just an expectation of yet another FTC, on similar terms.
- Again, this clause applies to ALL employees and not just those earning below the threshold.



Payroll Impact

- From a payroll administrator perspective, should there be an employee who is on a FTC that is continually renewed, this employee, once dismissed by virtue of expiry of the FTC, will have a claim for *reasonable expectation of permanent employment*, if indeed that post can be viewed as a permanent post and especially if that post is then suddenly filled by another employee, who may be new to the company.
- Although payroll has normally no control over who management hires or fires, a simple email, warning management of the effects of this amendment may save the company money in the long run, in terms of litigation costs and retrospective back pay awards.

Part Time Employees :

Sec 198C

- **Definition: An employee**
- (a) who works fewer hours than comparable full – time employees, and
- (b) who is remunerated according to their actual time worked.

- Does not apply to:
- Employees above the threshold,
- Working less than 24 hours per month,
- During the first 3 months of employment

Exclusions from S 198C

- Other exclusions:
- The Section does not apply where the employer :
 - (a) employs less than 10 employees, or
 - (b) employs less than 50 employees and whose business has been in operation for less than 2 years



Justifiable reasons for different treatment

Part Time employees may not be treated less favourably than full-time employees performing same/similar work unless justified. Reasons could entail:

- (a) seniority, experience, length of service,
- (b) Merit,
- (c) Quality or quantity of work,
- (d) Any other similar criteria as the list is not exhaustive

*Affordability is not a justification

Sec 143: Effect of Arbitration Awards



- The Labour Court has been removed from the process,
- A certified award may be presented to the Sheriff for execution if payment is not made.
- No longer have to approach the Labour Court for a writ of execution as once certified, the award may be enforced, as if it were an order of the court.
- This effectively will reduce the costs of enforcement proceedings in respect of an award for the payment of an amount of money.

Impact on Payroll

- Should you receive a certified award from the CCMA, be aware of the fact that if the Award is not being taken on review or rescinded, it should be paid out. The failure to do so, will involve the sheriff attaching goods in execution as it is no longer necessary for the award to issued with a writ of execution by the Labour Court.



Change with regard to Review proceedings

- Sec 145 amended to state that a party seeking to review an award, must apply for a court date within 6 months of applying for a review.
- NB change: Review proceedings do not suspend the operation of an Award unless security is furnished.
- For reinstatement/re-employment orders, security equivalent to 24 months remuneration to be furnished by employer,
- In the case of compensation, an amount equivalent to the compensation awarded.

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