

**Regulated Flexibility:
Revisiting the LRA and the BCEA**

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Purpose of Paper

The purpose of the policy brief is to identify the underlying concepts, particularly regulated flexibility, behind the labour law reforms which took place during the 1990s with regard to the regulation of the individual employment relation. The paper explores whether the new laws have lived up to the original thinking, and if not, the ways in which the laws could be improved.

General Statement

Because South Africa is a Constitutional state with an entrenched Bill of Rights, and in particular, a suite of labour rights, labour market policy choices are constrained in South Africa, and the justification for any limitation of these rights is not simply a matter of economic choice.

Regulated Flexibility

The concept of regulated flexibility underpinned the recommendations of the Labour Market Commission and the Minister of Labour's approach to labour law reform during the 1990s.

Regulated Flexibility is the framework, comprising of limits and mechanisms, through which an appropriate balance is determined between the employers' interest in flexibility¹ and the employees' interest in security.² Regulated flexibility recognises that due to the dynamic and diverse nature of the

1 There are three kinds of flexibility: employment flexibility (the freedom to change employment levels quickly and cheaply), wage flexibility (the freedom to determine wage levels without constraint) and, functional flexibility (the freedom to alter work processes, terms and conditions of employment quickly and cheaply).

2 Security comprises labour market security (opportunities for employment), employment security (protection against arbitrary loss of employment), job security (protection against arbitrary loss or alteration of the job), work security (health and safety in the workplace) and representation security (representation in the workplace).

labour market, there is a need for employers and workers to be able to adapt standards to suit the particular needs of a sector, workplace or subsector.

The various mechanisms which are employed to achieve a balance include:

- Various forms of dialogue between role players such as collective bargaining (at workplace or sectoral level) and social dialogue (at national or regional level),
- Administrative discretion bounded by clear guidelines,
- Administrative determinations made by the minister in respect of any category of employers or employees,
- Soft law in the form of codes,
- The setting of floors and ceilings for enterprises,
- And the selective application of legislative standards or requirements.

The Individual Employment Relation

According to section 23(1) of the Final Constitution³, everyone has the right to fair labour practices. Both the LRA⁴ and the BCEA⁵ gave effect to this right by giving protection to certain incidents of the individual employment relationship. The 1995 LRA fully codified the existing jurisprudence in respect of dismissal. It preserved what was left of

the unfair labour practices jurisprudence in respect of the individual employment relationship (promotion, training, suspension, disciplinary action and the failure to reinstate or re-employ a former employee in

3 Constitution of the Republic of South Africa (Act 108 of 1996)

4 Labour Relations Act 66 of 1995.

5 Basic Conditions of Employment Act 75 of 1997

terms of an agreement) in a transitional provision for later deliberation and incorporation into the BCEA. This provision was, however, retained in the final LRA with little change, with no serious policy review of the residual unfair labour practices.

The paper (on which this Policy Brief is based) argues that, had the residual unfair labour practices been subjected to searching policy scrutiny, it would have become clear that they do not meet the requirement of regulated flexibility and that there is no need to regulate these practices.

The paper reviews the specific incidents of the individual employment relationship and offers proposals to amend the law.

Recruitment and Hiring Practices

Hiring and recruitment practices are not listed in the definition of unfair labour practices and accordingly they are not subject to judicial oversight. There are, however, three exceptions: the prohibition of discrimination in hiring and recruitment decisions under the EEA⁶, the prohibition of victimisation in recruitment or hiring decisions, and the judicial review of appointment decisions under administrative law.

The paper argues that recruitment and hiring practices are sufficiently regulated by the EEA's prohibition of discrimination and the prohibition of victimisation by the LRA and there is no need to regulate it any further. Therefore, the administrative law remedy with respect of hiring in the public service ought to be restricted to corrupt and inept appointments only.

Additionally the remedy for unfair discrimination in appointment decisions ought to be restricted to damages only.

6 Employment Equity Act 55 of 1998

Probation

At present, the LRA sets a stringent test and complicated test for the dismissal of employees on probation, placing a heavy burden on employers and little room for flexibility.

The paper proposes that ordinary dismissal protections (other than automatically unfair dismissals) do not apply to employees with less than a stipulated period of service. In order to prevent abuse of terminating and re-employing just before the expiry of the stipulated period to avoid the onset of protections, an employee's period of service should include all previous service with *that* employer or a related employer.

Training

There is no need for the judicial regulation of training, particularly given the Department of Labour's extensive programmes to train, re-skill and educate employees in terms of the Skills Development Act.

Promotion

There is little to distinguish the decision to promote an employee from the decision to hire an employee. The decision to promote an employee should, therefore, be excluded from judicial review as is the case with hiring decisions. Of course, the same exceptions (discrimination, victimization and corruption) that apply to hiring decisions should apply to promotion.

Demotion

The LRA provides a remedy for unfair conduct relating to demotion. There is, however, sufficient protection for the employee under the law of contract (demotion is not permissible unless the employee agrees to it) and unfair dismissal (a refusal to agree to demotion as an alternative to dismissal will be tested for fairness like any other dismissal).

Benefits

The courts have decided that unfair conduct relating to benefits should be restricted to a contractual or a statutory right to benefits. There is therefore no need for an unfair labour practice remedy for this form of conduct since remedies already exist in contract and delict.

Discipline (short of dismissal)

Since the power to dismiss as a disciplinary measure is already protected, there is no need to subject disciplinary measures short of dismissal to judicial scrutiny. A code of practice and model of disciplinary procedures as a guide to employers and trade unions should be issued instead.

Suspension

There are two different kinds of suspension; a suspension pending a disciplinary enquiry and suspension without pay as an alternative penalty to dismissal.

Suspension as a penalty does not require judicial review because it can only be effected with consent and the refusal to consent as an alternative to dismiss will be the subject of review in an enquiry into the fairness of the dismissal.

There is, however, a strong need for the regulation of suspension pending a disciplinary hearing, particularly in the public service. There are two abuses, namely arbitrary decisions and inordinate periods of suspension. The first abuse could be curtailed by judicial review of the decision supplemented by a code of good practice. The second abuse requires, firstly, the creation of a statutory obligation to conduct disciplinary hearings in a reasonable time and the power to strike down tardy disciplinary proceedings, and secondly, institutional reform in the public service.

Dismissal

The Labour Relations Act describes what is required of employers in regard to dismissals. It provides reasons for which an employer could never dismiss (automatically unfair grounds)⁷ and reasons for which an employer could dismiss (misconduct, incapacity and operational requirements).⁸ In this latter category, the LRA requires substantive and procedural fairness, the details of which are included in codes of good practice.

The code originally embraced the idea of regulated flexibility. The first line of the code states that the code is “intentionally general” and “departures from the norms established by this code may be justified in proper circumstances.”

There are a number of problems with the current situation with regard to dismissal which requires change.

- There is a need for the code of practice to be regularly updated to keep up with changing jurisprudence, as was the original intention of the legislators.

7 Section 187

8 Section 188

- The codes of good practice are frequently ignored by parties when dealing with dismissals. To remedy this, the CCMA should issue guidelines requiring reference to the codes and justification for departing from them. Additionally, the failure to take the code into account should be a ground for review.
- As far as dismissals for misconduct and incapacity are concerned, there is an over-emphasis on complex and expensive pre-dismissal proceedings by arbitrators and commissioners. The code of good practice calls for a much less burdensome and a more flexible approach, with no requirement of a formal hearing. There is a need to strengthen the code and make its objectives clearer and to train commissioners to apply the code correctly.
- With regard to dismissals for operational requirements, at present the LRA and the code of good practice set out a complicated process (s189) with little room for variation. It is suggested these proceedings place too heavy a burden on small businesses. The paper proposes that small businesses should be excluded from the detailed requirements of section 189 of the LRA but subject to the general obligation to dismiss fairly and a code of good practice which should provide a simpler procedure.

Collective Bargaining

The promotion of a voluntary system of collective bargaining is the principle manner in which the 1995 LRA gave effect to regulated flexibility. Sectoral level collective bargaining was strengthened and the coverage broadened. It was decided, however, that the regulation of collective bargaining at the level of the workplace would be left to the bargaining council.

There are a number of problems with the current system that require attention.

- The fragmentary coverage of bargaining councils ensures that many workplaces are not covered by sectoral bargaining. At the same time, there is a lack of a broad demarcation of sectors. There is, therefore, a need to demarcate sectors, to consolidate existing bargaining councils, and establish bargaining councils in sectors where there are none.
- A number of reforms were made to the law during the 1990s and early 2000s to allow bargaining councils to perform more functions.⁹ However, the councils struggle to perform the roles given to them due to lack of support from the department.
- Bargaining councils were given the regulatory function of setting terms and conditions of employment (in particular wages) for their respective sectors in light of their particular needs. This function is however weakened since the BCEA set minimum standards from which sectoral level agreements may not depart. In this regard, the BCEA should be amended to permit greater variation of employment standards by sector level agreements and determinations.

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Including the power to regulate collective relations in the sector and to develop sectoral policy for submission to NEDLAC or another appropriate forum.

- The regulatory function of sectoral level bargaining requires that sectoral agreements set minimum wages and working conditions, whilst actual levels are set at the level of the workplace, which may of course vary among different workplaces, depending on size and needs. However, in reality, parties have set sectoral agreements that set actual terms and conditions, with no room for variation. To remedy this situation, the department of labour should develop a draft policy on the nature of sectoral agreements, which should be submitted to NEDLAC for consideration and agreement.

It is also proposed that a carefully considered discretionary extension mechanism should be introduced (with the minister of labour holding such discretion) along with guidelines and a code of good practice. The discretion of the minister should also only be employed based on a published labour market policy and after being negotiated at NEDLAC.

New Role for Sector Level Bargaining

At present, many of the atypically employed and those people working in the informal labour market are not covered by collective bargaining at the level of the workplace. However, sectoral collective bargaining may provide these workers with a forum.

Collective agreements should apply to all forms of dependent work. This may require amendments to the LRA and the BCEA. Labour market policy should be formulated to guide bargaining councils and the Employment Standards Commission in regulating these kinds of employment.

Conclusion

It is important to note that any changes to labour market policy have to withstand constitutional scrutiny. A blanket exclusion from the provisions of labour legislation is not a possibility – any limitation of rights or difference in treatment must not only be justified but carefully targeted.