Clauses allowing for automatic termination of contracts of employment

Employers engage temporary employment services ('TES' or 'labour brokers') for various reasons, one being the relative ease with which under-performing or misbehaving placements can be replaced. Unless there is a contractual provision between the client and the TES which limits the client's ability to demand replacements, the client is king. As the law stands at present, the client does not acquire any liability for unfair dismissal if the TES decides to terminate the services of the unwanted employee. Its responsibility is to ensure that the TES complies with the provisions of the Basic Conditions of Employment Act (BCEA), sectoral determinations, bargaining council agreements or applicable arbitration awards dealing with terms and conditions of employment.

Compliance with the Labour Relations Act (LRA) - e.g. unfair dismissal, unfair labour practices, collective bargaining, etc. - is the sole responsibility of the TES. The only time the client may be drawn into a dismissal dispute between the TES and the latter's employee is where the client agrees, or is subpoenaed, to testify about an incident that happened at the client's premises and which led to the client chasing the employee away.

To relieve themselves of their own responsibility to comply with fair dismissal requirements, some labour brokers include a clause such as this one in the employment contract with their employees: 'This employment contract will commence on <date> and will automatically terminate on expiry of the contract between the broker and the client, alternatively in the event where the Client does not require the services of the employee for whatsoever reason.'

If the client subsequently advised the labour broker that the services of the employee are no longer needed, the labour broker would merely inform the employee in writing that the contract with the client had been cancelled and that, in the absence of alternative positions being found for the employee, the latter's services would no longer be required. There would then be no hearing or consultation with the employee and no severance benefits would be paid either: the labour broker's argument would simply be that the contract terminated automatically as agreed and, as this does not constitute a dismissal under the LRA, the employee has no right to a hearing or termination benefits other than, possibly, agreed notice pay.

Are such provisions valid, however? Viewed from one perspective the labour broker's argument is valid: in terms of s 186 of the LRA a dismissal usually involves a termination of the employment contract by the employer – in other words, it is a unilateral act. Therefore, termination by agreement or as a result of the fulfilment of an agreed provision in the contract (such as in the example above) cannot constitute a dismissal. On the other hand, the practical effect of this type of provision is to leave the employee totally unprotected in the event of dismissal: in terms of the LRA the client is not the employer whereas the labour broker's decision to release the employee does not constitute a 'dismissal'. What do the courts make of this?

In *Mahlamu v CCMA &*others the arbitrator in a case involving alleged unfair dismissal had upheld the labour broker's argument that the presence of a clause like the one under discussion in this article meant that termination of the employees' contracts did not constitute a 'dismissal' under the LRA. However, the Labour Court on review overturned the award and held that the commissioner had committed a 'reviewable irregularity' in the form of a material error of law.

The court held that the provisions of s 5 of the LRA, which protects employees against certain forms of discrimination as well as employer conduct that could undermine their employment rights, read with the constitutional right not to be unfairly dismissed, made this type of 'contracting out' impermissible. This meant that the termination of the employee's services in this instance constituted a 'dismissal' which therefore required both a substantively fair reason for dismissal and compliance with a fair procedure.

As the law stands at present, therefore, the client in a scenario such as the one above cannot be held liable for the consequences of an unfair dismissal of an employee by the client's labour broker. However, if the mooted changes to the LRA are implemented, both the client and the labour broker will in principle be liable. Clauses such as the one that was in issue in *Mahlamu's* case won't protect the client.

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