POSITION PAPER

Contingent work forces and decent work

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SABPP
SA BOARD FOR PEOPLE PRACTICES
Setting HR standards

INTRODUCTION

The issue of labour broking and decent work has become extremely contentious during 2011 and the early part of 2012. COSATU called a Section 77 socio-economic rights strike in March 2012 over the lack of resolution of the debate around labour broking in the Nedlac negotiations on the various labour law amendments tabled by the Department of Labour during 2010. The Department shortly thereafter issued a Labour Relations Amendment Bill, which has drawn criticism from both organized business and organized labour.

The SABPP is the professional body for HR and has been provisionally recognized by the SA Qualifications Authority for the purpose of uploading HR professional designations to the National Learner Record Database. In this document, the Board provides some guidance to the profession on the question of the use of non-standard employment and also on the related issue of "decent work".

The principles that the SABPP has used to develop this position paper include that:

- Society and social institutions are complex, organic open systems. The implication of this is that simple solutions to problems or issues are not adequate responses.
- National development should be measured in more than economic terms – social indicators and individual well-being must also be considered.
- Substantially more transformation will be required in the South African economy and society to deliver progress for all South Africans.
- Society contains many competing interest groups. The history of modern South Africa has shown that the inclusive, consultative approach best informs decisions which yield the most sustainable outcomes.
- HR practitioners work at the interface of people, work and society and frequently face the challenge of reconciling competing interests. Professional leadership from the SABPP must deliver practical, down to earth approaches to assist HR practitioners in their work.
- Labour market policy should be influenced by sound research which balances the needs of different stakeholders.

The SABPP has issued a Guide for HR professionals on Ethics in HR Management (available from hrri@sabpp.co.za), which includes guidance on ethical issues in temporary employment.

REPLACEMENT OF PERMANENT WORKERS WITH ATYPICAL WORKERS

More flexible work practices are noted as a major trend in developed economies, but the practice remains controversial, especially where wages are low and the difference between "contingent employee" and "vulnerable employee" becomes minimal (Brewster, Sparrow & Vernon, 2008). The way that such flexible working has been implemented in South Africa appears to have, in many cases, substituted for permanent work opportunities, leading to a "casualization" of the labour market.

> *"The movement to non-permanent employment has been enormous. Between 2000 and 2010, the number of atypical employees in South Africa increased from 1.55 million to 3.89 million"*
>
> Business Day Editorial, 2010, 20 December

Statistics on the prevalence of "atypical workers" in South Africa are not definitive – different researchers use different methods and come up with different results. According to the Labour Force Survey of Statistics SA, in quarter 4 of 2011, around 65% of people employed in the formal sector were on permanent contracts, and therefore about 3m workers are on non-permanent contracts. The Development Policy Research Unit of the University of Cape Town showed, from 2011 research, that 20% of all jobs created in South Africa since 1994 were channeled through labour brokers. The National Association of Bargaining Councils has estimated that there were almost 1 million labour broker workers as at 2010 (which would be 10.7% of total employment in the formal sector). The CCMA has produced figures which estimated that labour brokers represented 7.6% of total employment.

> *"It is our view that labour brokers are nothing else but elements that suck the maximum of blood from the working people."*
>
> Zet Luzipho, COSATU KZN Regional Secretary, January 2012

The labour broking industry consists of companies which might be described as formal and a wide range of smaller, less formal companies. The formal companies are represented by the Confederation of Associations in the Private Employment Sector (CAPES) and between them estimate they employ 30% of the total labour broker workers, of whom a large majority are Black, female and unskilled. Only a few of these companies are large, but even the smaller members of this Confederation are legally compliant, paying a Skills Development Levy. Union membership is a very low 5% in these companies. Clearly, this leaves many hundreds of thousands of labour broker workers outside this formal environment, typified by the "men on a bakkie".

The 2007 Labour Force Survey of Statistics SA noted that around half a million workers on temporary or fixed term contracts had been working for the same employer for more than three years and around 300 000 for more than five years (Ensor, 2011, 18 January). CAPES figures show that, while 54% of temporary contracts are for 6 months or less, 21% are for 7 – 12 months,

another 21% for 1 – 2 years and 5% for 3 or more years. It is arguable that if someone has been working for the same employer for more than three years (or even one year), the job should be a permanent job with full benefits.

It would appear that there is insufficient evidence to draw any conclusions about relative pay between permanent and labour brokered employees. Only 15% of CAPES employees are covered by Bargaining Council arrangements. However, the CAPES survey showed that UIF, Workmens Compensation and BCOE Act leave provisions are available to all workers employed by CAPES members, but that only around 12% of labour broking companies provide medical cover or assistance with savings.

A perception of unjustifiable differences between the main work force and labour broker workers was highlighted in 2011 by aspirant Labour Court judges who felt that the latter need greater legal protection.

> *"Having arbitrated cases involving labour brokers, I firmly believe that the employees get treated very, very unfairly."*
>
> *"Labour brokers' relationships with employees are exploitative."*
>
> Interviewees for Labour Court judge vacancies

Because there is an oversupply of unskilled workers and relatively high wages for permanent workers, the use of contract and casual workers is attractive to South African employers. However, the substitution of non-permanent for permanent work when this is not strictly necessary contributes towards the high number of "vulnerable workers" and poverty which the Commissioners of the National Planning Commission have agreed is at a critical level (NPC, 2011).

The trend of large, and increasingly large, sections of the South African work force being employed through labour brokers and the situation where 70% of these people are employed through probably non-compliant brokers, has resulted in a trade union initiated, and Government sponsored, attempt to reduce if not eliminate the use of labour broking through the introduction of amendments to labour legislation. The amendments tabled in March 2012 have proposed more stringent registration requirements for labour brokers and also propose measures attempting to ensure equal treatment of permanent and temporary employees. For a summary of provisions of these Amendments, see Appendix 1.

POSITIONS TAKEN IN THE ARGUMENTS

Flexible labour market

Organized business institutions and allied labour market analysts argue strongly that the South African labour market is not flexible enough for a modern economy – that is, the requirements for taking on extra labour are too onerous in terms of minimum wage rates and processes regarding termination of employment as business fluctuates or changes. These are seen as particularly onerous for Small, Micro and Medium Enterprises (Bernstein, 2010). This means that an organisation would rather invest in automation or other means of finding "jobless growth". This labour market rigidity is argued as a major reason why the absorption of new entrants to the labour market (young people coming out of school and tertiary education) is so poor. The Index of Economic Freedom (IEF) rates South Africa as below the world average on labour freedom, citing difficulties in dismissing workers, even though it notes that the "non-salary cost" of employing labour is low (IEF, 2010).

However, the opposite is shown in the OECD Employment Legislation Index, where South Africa is the second least restrictive after the US (OECD, 2008). It would seem therefore, that there is no truly objective method to evaluate how rigid or flexible the South African labour legislation regime actually is. The argument put forward strongly by, amongst others, COSATU, is that the labour movement should not give up gains made since 1970 in South Africa in terms of worker protection against dismissal and in minimum wage setting mechanisms (COSATU, 2010).

There is evidence that, based on the fact that the country lost one million jobs (8%) in a short space of time in the 2009/10 recession (compared with a 1.8% contraction in GDP), it is indeed possible to reduce labour in times of need. A report by the International Monetary Fund (IMF) in 2010 also looked at the response of employment figures to both the 2000 – 2007 upswing and the 2008 – 2009 downswing and concluded that the job market is not inflexible (Davie, 2010, 1 October).

Decent work

The "decent work" concept is also used in argument around labour market flexibility. This argument holds that that South Africans should not just be employed in conditions which are unacceptable (as compared to first world standards) but that all South African workers have the right to decent working conditions, decent pay and the right to acquire skills and advance themselves. One of the International Labour Organisation's (ILO) working definitions of decent work is "productive work under conditions of freedom equity, security and dignity, in which rights are protected and adequate remuneration and social coverage are provided" (ILO, 2010, p.1).

> *"Some interested groups appear, incorrectly, to associate decent work with the optimal work standards to which workers may aspire, and to seek these through collective bargaining. The true meaning of the term is more closely associated with a minimum floor of legislated standards.*
>
> *The primary areas of decent work deficits are not in the formal sector, but in the informal sector [exacerbated by the failure to enforce current laws]."*
>
> John Brand, Employment Law Director at Bowman Gilfillan, Business Day, May 2011.

However, the concept of "decent work" is used by the ILO more as an umbrella concept for a process of defining national priorities for development in the world of work, thus each country defines for itself how it intends to proceed (ILO, 2011). It should be noted that the ILO concept does not set minimum standards for pay, but relates it more to poverty levels. The ILO's Decent Work programme for South Africa agreed at Nedlac in 2010 states four priorities: strengthening fundamental principles and rights at work; promoting employment creation; strengthening and broadening social protection coverage, and strengthening tripartism and social dialogue.

There is no research that shows the extent to which South African workers in both the formal and informal sector have "decent" employment conditions. Whilst formal sector employees are theoretically protected by the comprehensive set of South African labour laws, it is clear from recent press reports concerning non-compliant employers in the clothing industry, that clean, healthy and safe working conditions are not universally available. Employment conditions in sub-contracted and outsourced companies are also often not clear and could fall below the floor of legislated standards. If this is the situation in South Africa, the situation in the rest of Africa could be far worse, because other countries do not have the same standards of legislated labour protection. South African companies operating elsewhere in Africa rarely apply South African standards to those African operations, choosing rather to comply with local standards.

Certainly, one of the key challenges to accelerating economic growth in South Africa is how to reconcile the high standards already in place for formal sector workers with the more usual development route, described by Bernstein (2010) as being through so-called "sweat-shops" to higher paid and better protected work. It could be argued that a business in the start-up phase, where the owner is taking high financial risks, could justify paying low wages, but safe, healthy working conditions where employees can learn new skills should always be provided. Possibly the exemption systems of bargaining councils could be looked at in this regard.

HR PRACTITIONERS ARE OFTEN UNCOMFORTABLE WITH CURRENT PRACTICES

Research conducted during 2011 found that several examples (13) in the sample of 50 had significant numbers of temporary or labour brokered staff (Abbott, 2011). In some cases, the number of non-permanent workers equaled or exceeded the number of permanent workers.

The attitude of the HR practitioners interviewed from these companies varied. In a few cases, the nature of the company's business was very project based, and therefore the interviewees felt that the use of fixed-term contractors or labour-brokered staff was appropriate. In one case, the interviewee felt that the use of labour brokers saved her a lot of IR difficulties, even though the labour brokers' employees had a high labour turnover, high absenteeism, high propensity for theft, poor training and poor skills which adversely affected customer service.

> *"The nature of the business requires you to have flexible staffing, I think that's a key feature of any call centre business anywhere in the world. From a consumer perspective they don't know whether you're permanent or non-perm and the level of your skill."*
>
> HR Director of a large company

> *"Companies don't want to employ people permanently. And with these roll-over contracts, a person can't plan for his life because he doesn't know what's going to happen next. He can't even get hire-purchase contracts."*
>
> HR Manager of a rural manufacturing plant

In another case, the interviewee said that the decision to outsource or not was under frequent review, and management decisions tended to fluctuate as to which was best. In other cases, the interviewees were uncomfortable with the degree of non-permanent staff and were unhappy that the management of the company insisted on this policy, which might be for financial reasons (less benefits are offered); for labour management reasons (easier to terminate a fixed term contractor when there is a downturn); or to move costs from employment costs to other costs (and therefore look good in management reports).

> *"Our company benefit rules around permanent staff are not suitable to our shifts and hours."*
>
> HR Manager, medium sized company in the leisure industry

> *"We are currently moving some of our general workers into the company, because most of them are critical. We've had very limited involvement with them as the labour brokers staff, we're always on the guard, we have to babysit their staff members, there's no involvement, no element of taking care of your employees and we find that most of the general workers very much would prefer to be employed by us because they see how our own employees are treated. They're sort of like a step-child for want of a better word."*
>
> HR Manager, small construction company

> *"We put pressure on our businesses. We say to them we want you to give us 15% growth in revenue year on year for the next 5 years. But we want you to keep your costs down, particularly your employment costs. So what do they do, they get a labour broker who gives them another 100 employees and these guys are permanently employed for the next 5 years. But when you look at that income statement, that labour broker cost is not part of employment cost, no it's under services somewhere. So what are we doing, we're lying to ourselves, we're achieving nothing at all."*
>
> HR Director, large manufacturing company

From the above examples, it is clear that organisations' policies and practices around the use of labour tend to emphasise the short-term "bottom line" more than sustainable, people-based organization growth.

CASE STUDIES

It can be difficult for an HR practitioner to argue on humanistic grounds for decreasing the use of temporary or casual workers. However, much of the work on employee engagement has shown the "bottom-line" benefits of having high levels of employee engagement. To date, no research has been published to show the effects on employee engagement and hence on the prime influencers of the bottom line (quality and customer service) where a significant proportion of the workforce is non-permanent.

Case studies of the ethical and effective use of contingent labour will be collected by the HRRI of the SABPP for dissemination to all registered practitioners to assist them with strategizing on this matter.

SABPP POSITION

The SABPP supports the intention of the Department of Labour to extend better protection to vulnerable workers through the proposed amendments to section 198 of the Labour Relations Act. In general, we believe that the detailed proposals of this section are reasonable and fair, and accord with good HR practice.

Flexible work practices

The modern work place is characterized by the need to provide services during extended hours, sometimes 24 hours a day, 7 days a week. “Just in time” manufacturing processes also require flexible working hours.

From the employees’ point of view, flexible working can be a benefit or a problem, especially in South Africa where most workers do not enjoy cheap and reliable public transport systems. Some employees enjoy working different hours while for others, with transport requirements or child-care responsibilities, hours outside the norm can present a real problem. Full consultation with all employees is essential before introducing or changing work patterns. From the legal standpoint, changes to working patterns can be considered an operational requirement and management can take a final decision on this after proper consultation, but in the interests of employee engagement and productivity, it is better to seek a truly acceptable solution to employee concerns.

Peaks and troughs in service demand, such as are encountered in call centres, can be managed through scheduling of permanent staff on shift arrangements, through the employment of part-time permanent staff on stand-by arrangements, or through arrangements with a set of temporary staff who work on call. Many contingencies can in fact be planned for – annual and sick leave amongst groups of staff can be covered by the employment of “leave coverage” employees who are skilled to cover a range of situations.

Temporary staff should only be employed for truly temporary situations, which might include specific projects of a short-term nature, covering for staff away on unexpected leave, unexpected vacancies, or a sudden surge in demand over a short term period. Such contingencies are truly temporary. Seasonal work in the food industry also fits the concept of temporary work, although many employers of seasonal workers employ the same people year after year. If the need for staff persists beyond the expected short term, a permanent position should be created. While a hard and fast rule cannot be applied, a period of more than 6 months temporary work should be reviewed with a view to creating a permanent position. The practice of repeatedly renewing 6 month contracts is discouraged – it is not fair to employees. Labour force planning should never have the intention to replace large groups of permanent staff with temporary staff to save costs.

> *“The private labour placement and temporary employment services need to be effectively regulated to ensure that the opportunity for labour matching is available to vulnerable workers, while protecting basic labour rights.”*
>
> NPC National Development Plan, 2011, p.116

The provisions of the South African labour legislation were brought in during the early 1990s in response to serious abuses of the workforce which had occurred prior to that. HR practitioners should consider the spirit of the legislation, aimed at promoting mutual respect and trust in the workplace, rather than taking a legalistic approach.

Labour broking

Labour brokers do not create jobs, they provide one channel for employing people to do work that organisations need to be done.

Temporary employment services (TES) can provide a range of services, from referring people (having sourced and screened them) for their clients to employ as temporary workers to supplying a full service where the TES employs them and places them with clients (this latter full service is really the labour broking aspect of TES's).

Therefore the possibilities for employment include:

- permanent employees of the organisation which needs the work done, either full-time or part-time, working fixed or variable hours/shifts;
- employees on fixed term contracts, employed by the work giver;
- employees on specific project contract, employed by the work giver;
- casual employees, employed by the work giver;
- any of the above, employed by the TES
- any of the above, employed by an outsourced service provider.

Since labour brokers do not create jobs, it follows therefore that if labour brokers were to be banned, the work still remains to be done, so organisations would use another type of employment. Jobs would not be lost directly as a result, unless the organization is using the labour broker to pay lower wages to temporary employees than the organization would be able to, or there are other features of employment directly by the organization which add cost.

Obviously, an organisation will consider whether it is more cost-effective to achieve output of goods or services through using labour or other methods, and there will be a break-even point at which the cost of labour exceeds the cost of other methods. But often the full costs of alternatives are not taken into account in making such decisions. The problems around reducing the wages offered to the labour brokered employees in order to make it cost effective to employ them, are many, including that differentials between permanent and temporary employees are much resented (on both sides) and that productivity and engagement of employees (on both sides) are likely to be adversely affected. HR practitioners should ensure they bring good evidence to discussions on these alternatives.

HR practitioners should carry out a careful analysis of the costs and benefits of the various types of employment before recommending the model (or mix of models) to management. This analysis of costs and benefits should include considerations of employee engagement and employee relations, especially in service industries and the public sector. Workforce planning tools can be useful in analyzing the workforce needed over peak periods and deploying staff accordingly.

If the use of a labour broker is the most appropriate alternative, the following should be observed:

- Only labour brokers who can show compliance with labour legislation should be used. A easy way to achieve this is to use brokers who are members of CAPES, as they are all compliant. If the labour broker you want to use is not a member of CAPES, you will need to assure yourself that they are compliant.
- All labour broker employees on your premises or servicing your customers should be trained by your company to your normal standards.
- The labour broker(s) should show you evidence of how they induct and train their employees.
- Rates of pay received by the labour broker workers should be equivalent to those received by your own employees. It is acceptable to use labour brokers as a convenient source of labour, but not acceptable to use labour brokers to reduce costs of labour or to avoid responsibility for fair treatment. Pay differentials will cause problems on the shop floor and are a threat to industrial peace in your workplace.
- Facilities should be made available to labour broker workers in the same way as to your own employees. All people present on your premises should be treated fairly, to avoid people feeling like second-class workers.
- Do not use labour brokers to avoid unionization. It is in the interests of labour peace in your organization to permit recognized unions to represent labour broker workers.
- Do not use cheap labour through labour brokers to avoid wage rates set by collective bargaining, whether at organisation or sector/industry level. If the business cannot afford to pay rates agreed in centralised bargaining, the exemption procedure of the bargaining council should be used.
- Consider opening permanent vacancies to people who have been working in your organisation as labour broker employees.

Decent work

The SABPP Code of Conduct, to which all registered practitioners are required to conform, states that members of the profession are ethically obliged to, amongst other things, *"bring meaning and quality of work life to the people we service in our professional capacities."*

Following the spirit of the ILO pronouncements on decent work, HR practitioners should ensure that all employees can work in safe and clean conditions such that their health is not impaired and

their basic human rights are respected. This applies to every work place whether the employer is a micro, small, medium or large business.

If an employer cannot afford to pay wages which lift workers out of poverty, serious consideration should be given to the business model to see how business objectives can be reached while still paying decent wages.

Youth employment

It is critical for South Africa to expand work opportunities for young people in order to build a generation of productive, skilled workers for the future. HR practitioners should actively seek to provide first-time work opportunities to all levels of school-leavers and students. Local negotiations with unions can help to create suitable pay and benefits programmes for youth employees. The critical point about such work opportunities is that they give the young person a chance to learn good work habits and skills that are useful in the workplace. But such opportunities should never substitute for existing jobs.

CONCLUSION

Issues of flexible work practices, juxtaposed with the need to provide decent work, go to the heart of dilemmas facing South African employers and employees. HR practitioners bear the responsibility for finding answers to these dilemmas, through practical solutions appropriate to each workplace.

Some individual managers may seek to put in place practices which are contrary to the law, avoid or circumvent legal requirements and are not conducive to workers' rights. It is the responsibility of the HR practitioner to ensure legal compliance and respect for human dignity in the workplace.

The SABPP will, during 2012, launch a set of HR Standards, which can help to provide a basis from which to consider the issues dealt with in this position paper.

The SABPP also provides support and guidance to HR practitioners in the field and welcomes ideas and requests from practitioners and other stakeholders to guide the Board in its work. The SABPP Labour Market Committee, set up in 2012, will provide the forum to debate and formulate practical proposals on important current issues. The goal is to present a balanced perspective on the current polarized arguments on labour broking and decent work, based on sound research and practice, to the benefit of South African society as whole.

ABOUT THE SABPP

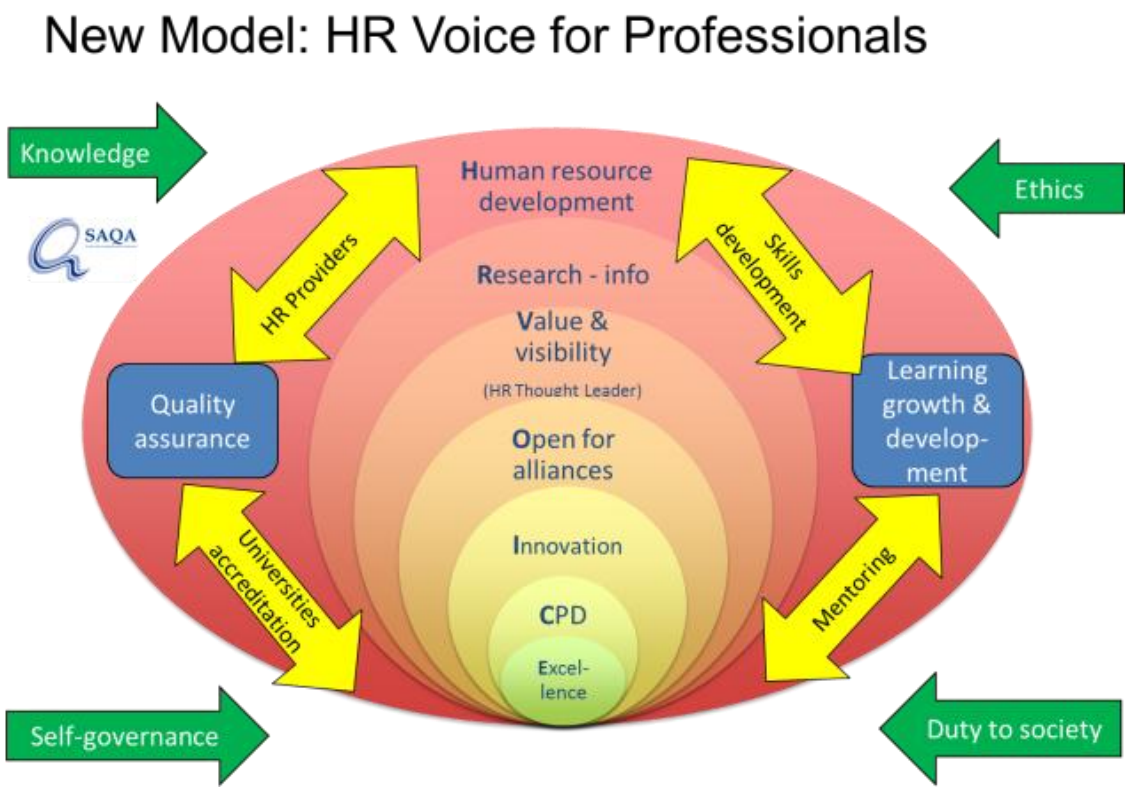
Mission: To establish, direct and sustain a high level of professionalism and ethical conduct in human resources and people practices.

The SABPP links the achievement of quality to equity and the fostering of innovation and diversity.

Our values:

OBJECTIVITY | FAIRNESS | CONSISTENCY | INTEGRITY

Our strategy – HR VOICE



CONTACT US

Enquiries about this position paper can be made to marius@sabpp.co.za or to penny@sabpp.co.za. Anyone interested to participate in the SABPP Labour Market Committee can contact either of these two people.

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APPENDIX 1

PROVISIONS OF THE LABOUR RELATIONS AMENDMENT BILL 2012 RELATING TO TEMPORARY EMPLOYMENT

There is no change to the existing general situation that, where a Temporary Employment Service (TES) supplies workers to a client, the TES is the employer and both the TES and the client are jointly and severally liable for certain contraventions of employment laws.

Proposed changes to section 198 include:

1. That claims by employees or enforcement orders by labour inspectors may be against the TES or the client, and awards or orders may be made against both.

2. All provisions of the LRA, a bargaining council agreement or a sectoral determination that apply to the client must also apply to the workers of the TES employed on the client's work.

3. For employees who earn below the threshold of the BCE Act only:

   3.1. If they are employed for more than 6 months, they will be deemed to be employees only of the client (except if they are standing in for a permanent employee who is on temporary absence) and thereby acquire all the rights accorded to employees under the LRA. Collective agreements at bargaining council level, sectoral determinations or a Ministerial notice may also regulate this point.

   3.2. Termination of employment at or before the 6 month point in order to avoid the above provision will constitute a dismissal, which can be challenged in the normal way.

   3.3. After the 6 months, an employee who is kept on must be paid the same wages and benefits as other employees performing the same or similar work, unless there is a justifiable reason for not doing so. These reasons could include that a system is in existence which takes into account factors such as seniority, experience or length of service; merit; quantity or quality of work performed; any other similar criteria not prohibited by the BCE Act.

4. For employees on fixed term contracts of any nature(who earn below the threshold as above):

   4.1. These contracts (or series of contracts) may not extend beyond 6 months except if the work can be shown to be of a limited or finite duration or for any other justifiable reason. These reasons may include:
   4.2. Replacing a worker who is temporarily absent
   4.3. A temporary increase in volume of work not expected to extend beyond 12 months

4.1. A student or recent graduate on work experience
4.2. A specific project of a defined nature
4.3. Seasonal work
4.4. Foreign workers on a work permit
4.5. Where the work is funded by an external funder for a specific period
4.6. For the expanded public works programme or similar public job creation programme.
4.7. The contract must be in writing and state terms in accordance with the above provisions.
4.8. The contractor must be treated on the whole not less favourably than other employees performing the same or similar work.
4.9. The contractor must be allowed to apply for internal vacancies at the employer on the same basis as permanent staff.
4.10. If the contract (or series of contracts) has been for 24 months or more, on final termination a payment equivalent to retrenchment pay must be made, unless an offer of alternative employment has been made and unreasonably refused.
4.11. There is an exemption from this section for small business of less than 10 employees, or less than 50 employees if the business is less than 2 years old, unless the employer conducts more than one business.

5. There are similar provisions as above relating to part-time employees earning below the BCE Act threshold. The new section does not apply to employees who normally work less than 24 hours a month (therefore "casual" workers), or during the first 6 months of employment. The same exemption for small and new businesses applies.

5.1. There is a definition of part-time employee as "an employee who is remunerated partly or wholly by reference to the time that the employee works and who works less hours than a comparable full time employee".

5.2. A "comparable full time employee" is defined as "an employee who is remunerated partly or wholly by reference to the time that the employee works and who is identifiable as a full-time employee in terms of the custom or practice of the employer".

5.3. A part time employee must be treated on the whole not less favourably than a full time employee doing the same or similar work, unless there is a justifiable reason for the difference (using the same list of justifiable differences as listed in our section 3.3 above).

5.4. Part time employees must be given access to the same training and skills development as comparable full time employees.

5.5. Part time employees must be given the same access to opportunities to apply for vacancies as full time employees.