

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

Labour Law and the Recession

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Policy responses to the recession

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Two recent responses to impact of recession –

- Creation of fund to promote training for workers facing retrenchment (funded from UIF, NSF)
- Changes to tax laws to allow retrenched workers to withdraw up to R 300 000 of retirement benefits without penalty (Taxation Laws Amd Bill 2009)

These schemes are an immediate response to increased level of retrenchment flowing from recession; at the same time they point to the challenges of reconstructing SA's labour market regulation

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Employment, work, transition

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- The term “beyond employment” is used to describe the need for labour laws to respond to two shifts in the labour market that confront LMR –
 - An increasing proportion of work is performed by non-standard employees or by workers who are not employees and therefore are inadequately protected by labour law
 - Workers undergo several transitional phases in their working life (eg: work-school, unemployment, maternity child—rearing, change of work status) during which they have heightened insecurity

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Towards labour market regulation (LMR)

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- A “law of work” should provide appropriate protections –
 - To all categories of workers
 - Throughout their working life (including periods when not working)

Regulated flexibility has focussed on protecting employees in employment; *protected flexibility (flexicurity)* - the nexus between the capacity to adapt the workforce to changes in the economy and the capacity to maintain working and living conditions of the workforce. To what extent is this affordable?

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The challenge of decent work (ILO)

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- Decent work sums up the aspirations of people in their working lives – their aspirations for opportunity and income; rights, voice and recognition; family stability and personal development; and fairness and gender equality. Ultimately these various dimensions of decent work underpin peace in communities and society.

Decent work is captured in four strategic objectives:

- fundamental principles and rights at work and international labour standards;
- employment and income opportunities;
- social protection and social security;
- social dialogue and tripartism.

These objectives apply to all workers in formal and informal economies; in employment or working on their own account.

Decent work (SA govt.)

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- Employment should not be the residual outcome of other policies but the overarching goal of economic policies. Rising employment and living standards also have positive economic outcomes and is a vital source for growth in domestic demand. To achieve government's decent work outcomes, the labour-absorption rate, the composition of economic activities and the sustainability of the growth path are as important as the quantum of growth... we are talking about an employment-led and developmental growth-path. (Minister E Patel)

Labour market debates in SA

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Dominant themes in debates concerning the labour market in last decade -

- Deregulatory agendas: proposals to introduce a two –tier labour market (e.g ANC discussion document of 2005) or establishing EPZs with little labour law/OHS – response: are specific provisions/ practices appropriate?
- DOL research (2004) that restructuring of employment being driven by process of externalisation, in particular triangular employment (the rise of labour broking) resulting in income inequality and lack of protection
- Two economies: while SA’s informal economy is smaller than in comparable countries there is a high level of linkage between the formal and informal economy – role of policy is to create a “staircase” between two
- Taylor Committee (2002) recommends more comprehensive social protection to minimise the negative effects of unemployment on social cohesion. Recommendations include extending social insurance where administratively feasible, social grants and indirect social protection by facilitating favourable labour market transitions.
- Need for integration

The recession and regulation

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What are the implications of the recession for debates about regulation?

“The problem is that there is an organizational failure, a coordination failure, and a macroeconomic failure. We are failing to put to work these human and physical resources to produce output. ...The challenge ... is to try to create the aggregate demand that will put those resources back to work. The question is: what kinds of policies and reforms are likely to do that? If we start asking that question, we realize that *many of our policy frameworks in recent decades have been making things worse ... we have weakened our automatic stabilizers by weakening social protection, and we have destabilized the economy by making wages more flexible rather than providing job security. We have created greater anxiety, which, in times like this, increases savings rates and weakens consumption.* All of these so-called reforms have made our economic system less stable and less able to weather a storm.”

- *Joseph Stiglitz International Labour Review 2009*

Labour Law and employment

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- Studies in the OECD indicate that while employment protection laws do not effect the overall level of employment they effect the speed at which employment responds to economic shocks. How applicable to SA?
- In SA, evidence of slowing rate of dismissal in down-turn shown in number of jobs saved through CCMA facilitations (5000)

Labour law and hiring

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- South Africa labour law has been classified by OECD as “relatively flexible” but widespread perception that it is extremely rigid
 - World Bank Doing Business - 100 out of 182/
payroll costs – 9th lowest
 - OECD – 5 out of 40
 - World Economic Forum – 129 out of 134
- Primary focus of labour law practice/ debate is security of employment – (80% of CCMA referrals deal with dismissal) cf: UK

Hiring (cont'd)

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- Many of “rigidities” arise from practice (eg continuation of pre-1995 codes and agreements) and interpretation rather than content
- Enhanced institutional efficiency (CCMA) but Labour Court remains a challenge
- Would a shift from probation to qualifying period assist? (Cheadle 2006)

Training and entry to work

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- Declining level of apprenticeship training often attributed to SDA but emerges in 1980s as a result of cut-backs within state owned enterprises which continued after 1994
- Section 18(2) learnerships for employing unemployed persons
- Simplified conditions of employment, prescribed allowance and no right to employment after learnership
- Incentives - employers can receive discretionary SETA grants for learner allowance, training costs, tax rebates and BBBEE points
- Number of section 18(2) apprentices
 - 88410 (2000 -5)
 - 55305 (2006-7)
 - 57% obtained employment on completion of learnerships
 - less than 50% of employers have engaged a learner

Employers and decent work

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- Legal obligations largely confined to employees
- Employer policies of shifting workers out of employment to reduce obligations – e.g. – TEs, sub-contracting, owner-drivers (hours of work, health and safety)
- Supply and distribution chains may include many who are not employees/ who are not performing decent work – e.g. – waste pickers, vendors
- Obligations may be extended in response to other factors – consumer pressure/ export requirements
- Is there scope for legislative extension?

Social protection

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- Coverage limited to involuntary unemployment for limited period
- Considerable extension of social grants (13 ml)
- Employees who leave employment to undergo further training or establish own businesses forfeit value of contributions to Funds
- Shift from unemployment to employability fund? Implications for flexibility?

Debating points

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- Job quality vs job quantity
- Insiders vs outsiders
- Labour law: perception and reality
- Social contract
- Wage levels
- Inequality
- Job creation
- Procurement and decent work

Wage levels and unemployment

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- In its report on SA last year, the Organisation for Economic Co-operation and Development (OECD) asked why it was that real wages in SA didn't decline to the level that would create more jobs. It largely rejected the argument that this was because labour regulation was unusually inflexible, suggesting instead that the lack of competition in the economy meant dominant firms, earning high profits, could afford to accommodate the demands of a politically strong union movement — creating space for the kind of “labour aristocracy” some economists talk of to describe SA's formal sector unionised workers. (Hilary Joffe *Business Day* 3 August 2009)