

The deeming provision ruling: what businesses need to know

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On 26 July 2018, after three years of debate, the Constitutional Court made a judgement regarding the roles and responsibilities of temporary employment service (TES) providers and their clients with regards to employees. This pertains to the deeming provision referred to in section 198A of the Labour Relations Act (LRA). The ruling states that the client of a TES provider is deemed to be the sole employer of assigned temporary employees earning R17,119 or less per month, following three months of employment.



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Until the ruling was made, following the insertion of the clause in 2015, interpretation was up in the air, and it was deemed that employees remained under the employment of both the TES provider and their client for the duration of the employment contract. This meant that both the TES and their client were dually responsible for an employee under contract for the purposes of the LRA, which deals primarily with unfair labour practices and dismissals.

What this means

It all sounds very complex, however it's relatively simple.

The new ruling does not mean that an employee automatically transfers from the TES provider's contractual responsibility to the client's, following three months of employment, but rather that – unless outlined in the TES/client contract - the client becomes responsible for any liability defined by the LRA in the event of a dispute, however, awards may still be executed against either the TES or the client.

In order for clients of TES providers to mitigate risk, it becomes important to, firstly, select a trusted TES provider who has a well-structured and solid in-house legal counsel and, secondly, to ensure that they are indemnified against risk in their commercial contract with their TES provider.

What has changed?

The triangular relationship between TES provider, client and employee still remains in place for every other labour act, regulation and council, apart from those set out in the LRA, which covers unfair labour practices. For the purposes of the LRA, the triangular relationship still remains in place for the duration of the commercial contract between the TES provider and client.

The TES provider is still responsible for remuneration of the employee, as well as for overseeing employee wellbeing, benefits and fair practice. After three months, for employees earning below the stated income bracket, the client assumes legal responsibility for maintaining remunerations and fair work practices.

However, a reputable TES provider will absolve the client of that responsibility through commercial contractual commitment, providing both legal assistance and recompense to their client for any claims of unfair practices, dismissals or other LRA-related matters. The TES provider still assumes full responsibility, handling such matters themselves and covering any claims made to the client by contracted employees.

What to do

As the judgement only dealt with a single question on the interpretation of the 2014 amendments to the LRA, further litigation and case law will determine how the CCMA and courts shall deal with the “deemed employee” relationship within the context of the various provisions of the LRA and other applicable legislation. It has therefore become more important than ever before to engage with skilled, reputable TES providers for temporary contract employee needs.

Businesses should be aware of the impact of the new ruling and avoid rash temporary employment decisions without consulting with an experienced and knowledgeable TES provider. Projects that are cut short, temporary workers suddenly no longer required, and dissatisfied temporary employees are but a few of the risky situations that businesses can find themselves in, coming under fire from LRA regulations unless they engage with a TES provider who can shoulder this for them.

Many organisations have frequent requirements for contracted employees for project-specific work, and often are for “unskilled” or blue-collar positions where the employee’s income averages at below the mentioned monthly wage. For these businesses, consulting with a TES provider who can alleviate risk and offer service such as employment requirement analyses becomes critical.

The commercial contract between the TES provider and the client needs to be specific on contract duration and the responsibilities for each party so that, if a dispute pertaining to the LRA arises, the client is protected, both legally and financially. The contract should underpin the entire relationship, and requires a collaborative employment initiative plan, strategic thinking and legal consideration.

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