

CHAPTER 6

THE INDIVIDUALISATION OF EMPLOYMENT CONTRACTS

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A Introduction

It is inevitable that loss of union power and decentralisation of collective bargaining¹ coupled with the increasing number of small enterprises² could all contribute to a move towards the individualisation of the contract of employment. South Africa is no exception to the general trend towards an increase in the use of temporary and casual labour, externalisation or outsourcing³, and an increase in the use of atypical employees generally.⁴ “The ILO-sponsored South African Labour Flexibility Survey (SALFS) in 1996 was the first prominent survey that showed that firms in the manufacturing sector were increasing their use of temporary or casual labour. More recently, other surveys and studies have also shown that these are trends affecting thousands of workers not only in manufacturing but also in retail, agriculture, mining, construction and other sectors of the economy. Most analysts generally agree that increases in atypical forms of

¹ See Horwitz and Franklin “Labour Market Flexibility in South Africa: Researching Recent Developments” 1996 *SAJLR* 3-31; Horwitz and Erskine “Labour Market Flexibility in South Africa: A Preliminary Investigation” 1996 *SAJLR* 24-47.

² According to Ntsika Enterprise Promotion Agency (a government agency set up in 1995 to promote the development of the small business sector), the small business sector which comprises survivalist, micro, small and medium enterprises, accounted for 99.3% of all private sector enterprises in the country. Only 0.7% is made up of large enterprises. In 1998 the Department of Trade and Industry estimated that the small business sector absorbed some 455 of people who left the formal sector, and contributed some 30% to the gross domestic product (Institute for South African Race Relations *2000 South Africa Survey Millennium Edition* (1999) 492.)

³ A survey conducted by Andrew Levy and Associates in September 1998, found that 68.3% of companies had outsourced in the previous five years and that more than three quarters of them had done so on more than one occasion. They concluded that the outsourcing would continue in the foreseeable future, Institute for South African Race Relations *op cit* 28. See also in this regard Theron “Employment is not what it Used to Be” 2003 *ILJ* 1252-1256, 1268-1271; Kenny and Bezuidenhout “Fighting Sub-Contracting in the South African Mining Industry” 1999 *Journal of the South African Institute of Mining and Metallurgy*; Kelly “Outsourcing Statistics” 1999 *SALB* 16; Bernstein “The Sub-Contracting of Cleaning Work: A Case Study of the Casualization of Labour” 1986 *Sociological Review* 396-442.

⁴ See Research Project on “The Changing Nature of Work and Atypical Forms of Employment” *SOCPOL Circular* No 73A/04. The findings of this report are discussed below under the heading “South Africa”.

employment are a global phenomenon. They are often attributed to different factors such as those linked to “globalization, technological change and transformation in the organization and functioning of enterprises, often combined with restructuring in a highly competitive environment”.⁵

Deery and Mitchell attribute this “widespread growth of individual employment arrangements across much of the industrialised world”⁶ to the following interrelated factors:

- (i) An aggressive assertion of managerial rights in industrialised states in response to the global economic restructuring that occurred in the 1980’s and the 1990’s;
- (ii) A global political climate which facilitated a deregulation of labour relations. The authors state: “There has been a clear political objective in many Western countries to introduce greater flexibility into their systems of labour market regulation and to remove alleged rigidities which have been seen as inhibiting efficiency and productivity. This has invariably involved greater decentralised bargaining and extended opportunities for individualised employment arrangements.”
- (iii) A culture of individual responsibility as a result of human resource management ideologies. These ideologies have been referred to as “unitarist fantasies”.⁷ According to the unitarist approach trade unions are perceived as restricting the individual’s freedom to pursue his or her self interest as well as eroding the relationship of trust between employer and employee. This in turn will hamper employee loyalty and work commitment. Trade unions undermine the promotion of a sense of common purpose

⁵ Cheadle *et al Current Labour Law* (2004) 135; see also in this regard International Labour Office *The Scope of the Employment Relationship* Report V for International Labour Conference (2003); Jordaan “Non Standard Forms of Employment” 1995 *Labour Law News and Court Reports* 1; Olivier “Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed” 1998 *ILJ* 669; Thompson “The Changing Nature of Employment” 2003 *ILJ* 1793; Theron *op cit* 1247.

⁶ *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 1.

⁷ Ronfeldt and McCallum “Our Changing Labour Law” in *Enterprise Bargaining, Trade Unions and the Law* (1995) 2.

between employer and employee.⁸ A stable and productive workforce is perceived as a major factor in ensuring global competitiveness. The change in work processes has resulted in the demand for a multi-skilled core workplace that is able to respond to changing demands and circumstances in the market.⁹

Various strategies may be utilised by management in order to elicit loyalty and high levels of productivity from the workforce. These include:

- (i) Various forms of employee participation such as profit sharing schemes or ownership of shares;
- (ii) investment in training and career development;
- (iii) systems of communication and information sharing;
- (iv) non-union grievance procedures;
- (v) in-house bulletins;
- (vi) social functions; and
- (vii) the development of a core workforce consisting of permanent employees with considerable benefits coupled with a peripheral group of non-skilled, part-time, casual and other forms of atypical employees.¹⁰

⁸ Bendix *Industrial Relations in the New South Africa* 3rd edition (1998) 20-21; Deery and Mitchell *op cit* 7 state: "Policies built around open communication systems, extensive training, incentive compensation, team work and the dissolution of status barriers have been seen as easier to introduce in the absence of trade unions".

⁹ Deery and Mitchell *op cit* 2 state: "more competitive product markets combined with less buoyant labour conditions have provided both the incentive and the opportunity for employers to press for wide discretion to manage and direct the performance of work. The pursuit of labour flexibility has invariably provided a rationale for greater unilateralism. Management has often cited collective procedures and standards as constraints on their organisational efficiency. This has served as an argument to strengthen claims for greater managerial prerogatives in relation to structure and performance of work.

¹⁰ Deery and Walsh "The Character of Individualised Employment Arrangements in Australia: A Model of 'Hard' HRM" in Deery and Mitchell *Employment Relations Individualisation and Union Exclusion – An International Study* (1999)117-118.

Various studies have demonstrated that effort levels were increased where individual pay schemes based on performance and upward communication channels existed between labour and management.¹¹

What follows is a comparative overview of laws and human resource management policies adopted in Australia, New Zealand, England and Japan that have facilitated the move toward individualisation of employment agreements in those countries. Finally, the available statistics regarding the use of “atypical” employment in South Africa and the effect of these on the efficacy of the current legislative system are discussed. The reason for not discussing the South African statistics in terms of “individualisation” is that the only statistics available deal with the use of “atypical” employment. The difference between “individualisation” and “atypical” employment is that with “individualisation” the basis of the relationship is usually a contract of employment, whereas with “atypical” employment the basis of the relationship is often a commercial contract. However, as is discussed below, the result is similar: The employer or provider of work can dictate the terms and conditions of the contract.

B Australia

1 Law and Individualisation of Employment Contracts¹²

In 1996 the Liberal National Party Coalition Government replaced the Federal Labour Government. The new government enacted the Workplace Relations Act 1996 (hereafter “the WRA”). Prior to the passing of this legislation, the employers’ generally supreme power was curbed by collective power embodied in trade unions as well as by the administrative supervision of industrial tribunals. Since the turn of the 20th century individually negotiated wages and conditions of employment were rare in Australia. A system that established compulsory arbitration, the entrenchment of trade union power and a wage board system

¹¹ *Ibid.*

¹² This contribution limits itself to Australian Federal Law. For details concerning Australian State law, see Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) ch 1 – 6.

dominated for almost a century. For the majority of Australian employees the source of their rights and entitlements was not the individual contract of employment but rather industrial awards, collective agreements and federal or state legislation.

The main object of the WRA is to place the responsibility of determining employment conditions in the hands of employers and employees at workplace level.¹³ The WRA also enables “employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act.”¹⁴ Clearly then, the WRA encourages individual contracts of employment between employer and employee. Even in the absence of a facilitative legal framework at federal level by the mid 1990’s there already was a trend in Australia to implement individual contracts of employment.¹⁵

The WRA severely limits the scope of industrial awards. Australian federal awards may now deal with only twenty matters which have been listed in the Act together with any incidental matters which may be considered necessary for the operation of the award.¹⁶ The WRA requires the Australian Industrial Relations Commission to review awards, not only to see to it that they do not cover non-allowable matters, but also to ensure that the awards do not preserve inefficient work practices, hinder productivity, or deal with matters more appropriately left to workplace level agreements. Clearly this opens the door for de-centralised collective bargaining as well as individual agreements. The WRA encourages individually negotiated agreements which can change the standards set down in awards or certified collective agreements. These variations can now operate to diminish as well as to increase employee entitlements. This can now be done without official scrutiny and on an individual basis as opposed to by collective agreement only.

¹³ S 3(b) of WRA.

¹⁴ S 3(c) of WRA.

¹⁵ Forsyth “Deregulatory Tendencies in Australian and New Zealand Labour Law” Centre for Employment and Labour Relations Law Working Paper No. 21 (1999) University of Melbourne, at 4.

¹⁶ S 89A (6).

A system of individual agreement making outside of the award system is provided for. These agreements are called Australian Workplace Agreements¹⁷ and they operate to the exclusion of any federal or state award. An AWA is defined as a written agreement between an employer and an employee, made either before or after employment has commenced that “deals with matters pertaining to the relationship between an employer and employee”.¹⁸ AWA’s can deal with any matter the parties wish to include in the agreements. However certain core provisions must be included.¹⁹ These include anti-discrimination provisions. A model dispute resolution procedure is automatically applicable unless the parties formulate their own. Not every employer can enter into AWA’s. Partnerships and sole traders which are not registered corporations are excluded from the eligibility criteria. Thus many small businesses cannot enter into AWA’s.²⁰

In practice, AWA’s are usually drawn up by management and presented to the employees for approval. This has been criticised on the basis that this cannot constitute bargaining but usually amounts to the imposition of terms and conditions by the employer.²¹ Each party may appoint a person or persons to act as bargaining agent on their behalf whom the other party must not refuse to recognise.²² However, in 1997 only in 6.5% of the cases did employees use agents and mostly these agents were neither unions nor lawyers.²³

AWA’s must be approved by the employment advocate²⁴ who must be satisfied that they pass the “no disadvantage test”.²⁵ This means that workers entering into

¹⁷ Hereafter referred to as AWA’s.

¹⁸ S 170VF of the WRA 1996.

¹⁸ S 170VF of the WRA 1996.

¹⁹ S1700G.

²⁰ S170VC.

²¹ Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 33.

²² S170VK.

²³ Deery and Mitchell *op cit* 34.

²⁴ The “employment advocate” is a body with various functions. In relation to AWA’s the employment advocate must advise both employers and employees,

AWA's must on balance be no worse off than they would have been under applicable awards.

It should be noted however, that AWA's that leave employees worse-off can at times still be approved. Since rights or entitlements arising from sources other than an award, such as an enterprise collective agreement will not be considered in the application of the no disadvantage test, the employee would be worse off if that enterprise collective agreement provided him/her with more extensive rights and entitlements. Another situation where an AWA that leaves an employee worse off would be approved is where approval would in the opinion of the employment advocate, not be contrary to the public interest. In these circumstances, even where the AWA did not meet the no-disadvantage test, approval is required. An example of such a circumstance is where the AWA is "part of a reasonable strategy to deal with a short-term crisis in and to assist in the revival of, a business or part of business".²⁶

Since employees must *on balance* be no worse off, losses can be balanced against gains. Therefore the only requirement is that the employee should not be worse off on the whole with reference to the applicable award. It follows then, that certain rights or entitlements can be compromised and the AWA still approved on the basis that the employee is on the whole not worse off. The fact that the employment advocate has the conflicting duties of advising both employers and employees is perceived by some as an obstacle to genuine protection for employees from entering into AWA's which render them worse off.²⁷

scrutinising proposed agreements for approval, investigating alleged breaches of AWA's and offences concerning AWA's, and where appropriate providing free legal representation to a party relating to an AWA.

²⁵ This test is also applicable to enterprise agreements brought to the Commission for certification, WRA section 170 LT (2) – (4) of WRA.

²⁶ S 170VPG (4).

²⁷ Stewart "The Legal Framework for Individual Employment Agreements in Australia" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 29.

Furthermore, there is a lack of transparency with reference to the decisions of the employment advocate. The confidentiality provisions in the Act see to it that such decisions are shrouded in secrecy. Therefore there is no real measure of accountability. The WRA provides no mechanism to challenge the merits of a decision of the employment advocate. It has been argued that this too, results in a weakening of protection offered by the no-disadvantage test.²⁸

Lastly, an AWA can only be approved if the employee genuinely consented to making it.²⁹ The employer has a duty to provide certain information and explanations to the employee in order that the employee may be in a position to ascertain the effect of the AWA. How far the employer is expected to go in this regard is unclear. It has been suggested that there should be a comparison of the employee's position under the applicable AWA with his/her existing rights in terms of the award.³⁰ With reference to non-union collective agreements the commission has taken the view that employees must "understand the impact of the agreement" in order for there to be genuine consent.³¹

The employer is also required not to act unfairly and unreasonably in failing to offer AWA's with similar terms to comparable employees, that is, employees who do the same kind of work.³² An acceptable reason for differential treatment offered by the employment advocate was differences in levels of skill and performance. Nevertheless, it is largely unclear what would constitute reasonableness and fairness in this regard.

The up-take of AWA's has been somewhat slow. By January 2001, 150,079 AWA's had been approved, covering 2 798 employers. Most of these employers

²⁸ Forsyth "Deregulatory Tendencies in Australian and New Zealand Labour Law" Centre for Employment and Labour Relations Law Working Paper No 21 (2001) University of Melbourne, at 5.

²⁹ Section 170VPA (i) (d).

³⁰ Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 34.

³¹ *Ibid* 35.

³² Sections 170VPA (1) (e) and 170VA.

were small businesses. It seems that the up-take rate has been increasing over time. By mid 2000 only 1.4% of all Australian employees were protected by AWA's. However 2.6% of the Australian workplace was protected by formal individual agreements if state systems were also taken into account.³³

Nevertheless it seems that there is a much stronger trend toward individualisation than these figures indicate – according to Wooden up to 15% of the workforce may be covered by individual contracts of employment.³⁴ In June 1998 alone 4 574 AWA's were approved, compared with only 4 493 in the first nine months of the system and in 2000 there were 41% more AWA's approved than in 1999.³⁵ Perhaps the reason for the initial slow up-take is a lack of awareness of the AWA system. Nevertheless, there are other valid reasons that might encourage employers to make use of the other means of formalising their relationship with employees such as a certified agreement. A certified agreement is a registered enterprise agreement. The following reasons also contributed to this situation:³⁶

- (i) Separate documentation concerning every individual employee and all new employees must be lodged with the employment advocate. Certified agreements are automatically binding on new employees. The financial and administrative burden on the employer as well as the time consuming delays while applications are processed all act as disincentives for employers.
- (ii) The no-disadvantage test must be applied separately for each individual covered by the AWA, taking each individual's unique circumstances into account. With a certified agreement, on the other hand, the no-disadvantage test can be applied to the group as a whole.

If an award is altered to confer superior entitlements to employees, existing AWA's which were tested with reference to the previous entitlements might

³³ Wooden Inaugural lecture, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 14 August 2000 3-4.

³⁴ Wooden, *The Transformation of Australian Industrial Relations* (2000) 75-76.

³⁵ Information available at website www.oea.gov.au 16 September 2001.

³⁶ Wooden *The Transformation of Australian Industrial Relations* (2000) 78-79.

have to be altered in order to satisfy the no-disadvantage test with reference to the new entitlements.

- (iii) In a situation where not all employees accept the terms of the AWA, the employer will be faced with the administration of different conditions for different workers. This might also be the cause of conflict at the workplace.
- (iv) Since certified agreements only override awards to the extent of any inconsistency, it is not necessary to include all the provisions of an award in a certified agreement. With an AWA, on the other hand, all applicable award provisions must be included so as not to render the employees worse off.
- (v) An employer who breaches an AWA can be sued for damages. This remedy is not available to employees when a certified agreement is breached.

Where there is no union presence or a weak union presence certified agreements seem to be a viable option for employers. The employer can enter into such agreement directly with a group of employees, and still exclude the applicable award coverage.

2 Human Resource Management and Individualisation

2.1 Introduction

Deery and Walsh³⁷ undertook a study which identified the characteristics of firms in Australia which employ staff on individual contracts rather than collective arrangements. The study used official Australian data to identify workplaces with 60% or more of their non-managerial staff on individual contracts of employment. Their study compares these “individualised workplaces” with what they term “collectivised workplaces” which had no non-managerial employees on individual contracts. What follows is a brief summary of their findings.

2.2 Organisational characteristics

It was found that 90% of individualised workplaces were in the private sector. Many of these firms were foreign owned (23%) as opposed to 10% in the

³⁷ “The Character of Individualised Employment Arrangements in Australia: A Model of ‘Hard’ HRM” in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) chapter 6.

collectivised workplaces. A great number of them faced foreign competition 41% as opposed to only 29% in the collectivised workplaces and were more likely to have made a profit in the previous financial year (65%) as opposed to 44% in the collectivised workplaces. 80% of the individualised workplaces used contractors as opposed to 64% in collectivised workplaces.³⁸ It is interesting to note that the average number of employees in collectivised and individualised workplaces was very similar: 94 in individualised workplaces and 93 in collectivised workplaces. Surprisingly collectivised workplaces made more use of casuals (18%) than did the individualised workplaces (only 10%). Also surprising was the fact that 85% of the employees of individualised workplaces were full time,³⁹ and full time employees comprised only 70% of the workforce of collectivised workplaces.⁴⁰

2.3 *Human Resource Management characteristics*

66% of individualised workplaces had no union presence with only 21% of collectivised workplaces having no union presence. The majority of both managements of collectivised workplaces (87%) and individualised workplaces (97%) preferred to deal directly with the employees. Individualised workplaces were more likely to have an in house human resource manager, 25% as opposed to 17% at collectivised workplaces. Individualised workplaces also made significantly more use of outside advice of law firms and management consultants on industrial relations issues: 48% of individualised workplaces made use of law firms for advice, only 25% of collectivised workplaces did so.⁴¹ As for management consultants the ratio was 36% at individualised workplaces to 19% at collective workplaces. Negotiations of industrial relations matters such as staffing levels, wages, occupational health and safety, technology and charges in work practices were very rare at individualised workplaces. However, these negotiations also took place at a minority of collectivised workplaces.⁴²

³⁸ Deery and Walsh *op cit* 121.

³⁹ *Ibid* 122.

⁴⁰ *Idem*.

⁴¹ Deery and Walsh *op cit* 120-123.

⁴² *Idem*.

2.4 Performance Related Pay

The use of individualised pay schemes based on performance share ownership, bonus schemes and staff appraisal schemes were far more prevalent in individualised workplaces. The figures are as follows:⁴³

Human Resource Management Characteristics (% workplaces)

	Individualised Workplaces	Collectivised Workplaces
Employees receive Performance Related Pay	65	27
Share ownership	29	14
Bonus scheme	66	31
Staff appraisal scheme	77	59

The contrast with reference to the provision of training for employees, team building, improvement methods and so on are not so stark:

⁴³ Deery and Walsh *op cit* 122.

Human Resource Management Characteristics (% workplaces)

	Individualised Workplaces	Collectivised Workplaces
Training scheme	62	60
Team building	51	48
Semi autonomous groups	31	28
Quality circles	16	12
Continuous improvement methods	20	17

2.4 Communication and Information Sharing

The forms of communication were similar in all workplaces. The difference in the use of these systems between individualised and collectivised workplaces was negligible as seen from the figures:⁴⁴

Forms of Communication Used (% of workplaces)

	Individualised Workplaces	Collectivised Workplaces
Daily-walk-around by senior managers	86	87
Suggestion schemes	30	30
Staff newsletters/bulletins	51	56
Surveys of employees views	20	23
Regular meetings between managers and employees	79	82
Regular social functions	60	43
Joint consultative committees	22	34

⁴⁴ Deery and Walsh *op cit* 123.

Notable differences however with reference to the use of regular social functions and joint consultative committees were observed. It seems that individualised workplaces made use of social functions in order to create an atmosphere of solidarity and loyalty amongst its workforce.⁴⁵ With regard to the use of consultative work committees it comes as no surprise that collectivised workplaces made significantly more use thereof since as seen above, 97% of individualised workplaces preferred to deal with employees on an individual basis.

Individualised workplaces were more likely to share information concerning customer/client satisfaction and workplace performance. Collectivised workplaces were more likely to provide information to employees concerning affirmative action policies and occupational health and safety policies.⁴⁶ Only 62% of individualised workplaces had written grievance procedures in place compared with 72% of collectivised workplaces.⁴⁷

2.6 Human Resource Management Outcomes

The difference in the rate of absenteeism between individualised and collectivised workplaces was negligible. Individualised workplaces experienced very little industrial action compared to collectivised workplaces. Employee turnover however was quite a bit more substantial at individualised workplaces. The figures are as follows:⁴⁸

	Individualised Workplaces	Collectivised Workplaces
Employee turnover (%)	20	12
Absenteeism (%)	2.7	2.6
Strikes in last year	1	10
Stopwork meetings in last year	2	17

⁴⁵ *Ibid.*

⁴⁶ Deery and Walsh *op cit* 124.

⁴⁷ *Idem.*

⁴⁸ *Ibid* 124.

C New Zealand

1 Law and Individualisation

Between 1894 and 1991 unions enjoyed legislative support and were able to operate in a system that embraced collectivism. Trade unions were encouraged and protected by legislation to the extent that they enjoyed monopoly bargaining power and union membership was compulsory in the private sector.⁴⁹ By the early 1970's many began to criticize the New Zealand labour relations system for failing to take into account its effect on the economy and the individual circumstances of employers. Some trade unions also attacked the system on the basis that they could extract more concessions from employers by bargaining at enterprise level.⁵⁰

In 1990 the Labour party was voted out of office and replaced by the Conservative National Party. This new government, in contrast to the gradual approach to deregulation taken in Australia, took a 'big bang' approach. The result was the Employment Contracts Act of 1991 (hereafter referred to as the ECA). New Zealand deregulated its labour law system as part of a broader program of economic reform.

The ECA abolished the centralised system of wage fixing which had been in place for almost a century. The ECA forced a shift from collective to individual bargaining, with the common law and legislation being the primary sources of regulation. The ECA provides for a contractual regime to govern the employment relationship. An employer can enter into a contract of employment with each individual employee, or alternatively a collective contract binding on "one or more employers and two or more employees".⁵¹ The "collective" agreements need not involve the participation or input of a trade union. The word 'collective' therefore

⁴⁹ Oxenbridge "The Individualisation of Employment Relations in New Zealand" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion: - An International Study* (1999) 227.

⁵⁰ Wood "Deregulating Industrial Relations: The New Zealand Experience" 1996 SAJLR 40.

⁵¹ S 2.

means nothing more than the involvement of more than one employee as a party to the contract.

The only significant difference between the collective and individual forms of contract is that the 'collective' contracts must be in writing and for a fixed term. Since strikes and lock-outs are unlawful while a collective contract is in force⁵², the expiry date in collective agreements is necessary for determining the lawfulness of a strike or lock-out. When a collective agreement expires, the employment relationship does not cease, but the parties become bound by individual contracts of employment "based on the expired collective employment contract".⁵³ Since these contracts of employment bind only the individual employees and not trade unions or collective bodies, any enforcement action would have to be brought by the individual employee.

There are very few restrictions as to content of the contract of employment. The content of collective contracts are "a matter of negotiation"⁵⁴, while the parties to individual contracts can determine the content "as they think fit".⁵⁵ Thus, the only limitations are the common law and minimum standards legislation. The only substantive control to be found in the ECA is a provision which allows the court to intervene where a contract was procured by harsh and oppressive means, or its contents are harsh and oppressive.⁵⁶ It is difficult to prove that terms and conditions are harsh and oppressive. The courts are inclined to test the contents of the contract against statutory minimums. If they fall within these minimums the courts will find it difficult to establish harshness or oppressiveness. Where the terms however regulate a matter for which there are no statutory minimums this provision will be applicable. In considering the harshness or oppressiveness of terms and conditions the courts are sympathetic to the operational requirements of

52 S 64(1).

53 S 19 (4).

54 S 9(b).

55 S 19(1).

56 S 57.

the employer.⁵⁷ With regards to the means which were employed to procure the contract, the manner of negotiation is put to the test. Where employees have succeeded in claims based on the provision employers have used unlawful means to procure the contract, such as unlawful lock-outs or misrepresentation.⁵⁸

The main purpose of the ECA was to reduce the employment relationship to a purely economic one and to achieve labour market flexibility in this manner. It seems that the New Zealand Court of Appeal also approached the employment relationship from a conservative viewpoint in line with the objectives of the ECA.⁵⁹ Anderson has described the court's approach as 'pro-employer' and 'anti-collectivist'.⁶⁰ There have been a number of cases where it is evident that the New Zealand Court of Appeal perceives the employment relationship as purely contractual and has adopted traditional general principles of contract with an emphasis on the preservation of the subordinate role of the employee in the relationship as well as an emphasis on individualism and freedom to contract.⁶¹ For example, in *TNT Worldwide Express (NZ) Ltd v Cunningham*,⁶² the court held that irrespective of the common law indicia of a contract of employment, the express words of the contract were held to be the determinative of whether the contract qualified as a contract of employment or not. In *Principal Auckland College of Education v Hagg*⁶³ the court held that termination of a fixed term contract did not amount to dismissal unless it entailed a variation to the contract. In *Aoraki Corporation Ltd v McGavin*⁶⁴ The court was of the view that the ECA left very little room for court intervention in the employment relationship.

⁵⁷ See *March v Transportation Auckland Corporation Ltd* 1996 2 ERNZ 266.

⁵⁸ Anderson "Individualising the Employment Relationship in New Zealand: An Analysis of Legal Developments" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 210.

⁵⁹ Anderson *op cit* 210-213

⁶⁰ *Ibid*

⁶¹ For a more complete discussion of the cases illustrating this point, see Anderson *op cit* 210-213.

⁶² [1993] 3 NZLR 681

⁶³ [1997] 2 NZLR 537.

⁶⁴ [1998] 1 ERNZ 601.

In late 1999 the Labour/Alliance Coalition Government took over. The new government enacted the Employment Relations Act 2000 (the ERA), which came into effect on 02 October 2000. The purpose of the ERA was to achieve a more balanced approach to economic and social policy, and to create a climate of co-operation between employers and employees.⁶⁵ The ERA also has a strong corporatist flavour in its attempt to create ‘partnerships’ between government, business and unions.⁶⁶ In order to achieve this, the ER Act promotes collective bargaining. It does so by promoting the principles of ‘good faith’ and the freedom of association. Collective bargaining has now taken centre stage with unions once again being given recognition which had been withdrawn by the 1991 Act.

The ERA does not preclude or prevent parties from entering into individual agreements, despite its emphasis on collective agreement making. Despite the ERA, a return to the era of a centralised arbitration system with compulsory union membership in certain industries has been ruled out.⁶⁷ However the real significance and effects of the ERA in practice still remains to be seen.

2 Human Resource Management and Individualisation

An extensive study of the process of individualisation in New Zealand in the period following the enactment of the Employment Contracts Act 1991⁶⁸ has rendered some interesting results. One conclusion is that the legislature’s focus on individual and enterprise bargaining arrangements as opposed to centralised collective bargaining has resulted in a significant decline of trade unions. The following table illustrates the point.⁶⁹

⁶⁵ Wilson (Attorney General and Minister of Labour) “New Zealand’s Path Forward: A Plan for Working Together for Productivity and Fairness” Whitlam Lecture, Melbourne, 8 December 2000, 5-6 as referred to by Forsyth “ Re-Regulatory Tendencies in Australian and New Zealand Labour” Centre for Employment and Labour Relations Law (2001) Working Paper No. 21, University of Melbourne, 21.

⁶⁶ *Idem.*

⁶⁷ Forsyth *op cit* 22

⁶⁸ Oxenbridge “The Individualisation of Employment Relations in New Zealand “in Deery & Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 228.

⁶⁹ *Ibid.*

New Zealand Unions and Union Density, 1985-1996

<i>Year Density</i>	<i>Unions</i>	<i>Membership</i>
December 1985 43.5%	259	683,006
September 1989 44.7%	112	648,825
May 1991 41.5%	80	603,118
December 1991 35.4%	66	514,325
December 1992 28.8%	58	428,160
December 1993 26.8%	67	409,112
December 1994 23.4%	82	375,906
December 1995 21.7%	82	362,200
December 1996 19.9%	83	338,967

Source: Crawford, A, Harbridge, R and Hince, K 1997

Consequently, since 1991, union representation of employees in the negotiation of individual employment contracts has become very rare.⁷⁰

⁷⁰ *Idem.*

Oxenbridge categorises the different kinds of individual employment contracts as follows:

- (i) traditional iec's negotiated individually between employers and employees, covering single employees;
- (ii) iec's that are not formally negotiated, or written, but exist in law all the same (informal or verbal contracts);
- (iii) In accordance with ECA provisions, iec's based on expired cec's, or awards and agreements ("rollover" iec's);
- (iv) "standard form" iec's (or, "de facto cec's", whereby conditions of employment are the same for all employees. A variation involves organisations implementing collective-style contracts, with changes in remuneration and job descriptions made to customise the contract to the individual;
- (v) "two-tier" contract structures, whereby an employee is party to a cec which sets out basic conditions, and an iec or letter of appointment which sets out salary details and other individualised conditions.⁷¹

The extent and trends towards these different forms of individualisation gleaned from different research findings (albeit disparate samples of surveys) are summarised thus.⁷²

⁷¹ *Op cit* 232.

⁷² *Ibid* 233.

Structure of Contracts under the ECA

	IEC	Multi-Employer(and awards)	Single Enterprise CEC	Combined IEC/CEC	Total CEC
Department of Labour May 1991 % employees	28%	59%	13%	-	72%
NZ Employers Federation 1992 % employers	71%	-	-	-	-
McAndrew 1992 % contracts	25%	25%	36%	24%	41%
Department of Labour Aug 1992 % employees	52%	8%	35%	5%	48%
Statistics New Zealand Feb 1992 % employees	46%	40%			54%
Statistics New Zealand Feb 1993 % employees	57%	9%			43%
Department of Labour Aug 1993 % employees	40%	9%	37%	8%	54%
NZIER 1995*	45%	10%	29%	15%	54%
Department of Labour Aug 1996 % employees	49%	11%	34%	4%	49%
Harbridge et al 1998 % contracts	3%	22%	75%	-	97%
Department of Labour 1998 % employees	-	7%	93%	-	100%

(Percentage of employees/employers/contracts in all enterprises surveyed)

In February 1992, 61% of enterprises had the majority of their employees covered by individual employment contracts and by 1993 the figure had already risen to 77%.⁷³ Furthermore there was a huge decline in the number of employees covered by multi-employer collective agreements (from 59% at the time of the promulgation of the ECA to less than 10% in 1998).⁷⁴

In summarising and collating with the research findings Oxenbridge comes to the following conclusions:⁷⁵

- (i) around two-thirds of workers represent themselves in the process of developing ice's; Unions represent most workers covered by cec's; and union representation is higher in the public sector than in the private sector. Trends towards groups of employees representing their fellow employees in negotiations were identified;
- (ii) small-scale surveys (<2000 responses) indicated that between 40% and 60% of employees were covered by iec's, and an equivalent proportion by cec's. However, the two large collective bargaining databases hold contracts covering between 20% and 30% of the labour force, and it is assumed that the remainder of the population are covered by iec's;
- (iii) there has been a massive decline in the number of workers covered by multi-employer agreements, and around one-third of the population currently work under enterprise cec's;
- (iv) ice's (particularly rollover contracts) predominate in all industry sectors outside of the public sector, metals manufacturing, communications and meat processing sectors, where the prevalence of cec's is greater. The incidence of cec's is higher on large sites with high levels of pre-Act membership;

⁷³ *Ibid* 234.

⁷⁴ *Idem.*

⁷⁵ *Ibid* 247-248.

- (v) large proportions of workers (around one-fifth to one-third) are covered by rollover and standard form iec's, denoting little worker input into the contract formation process;
- (vi) the small firm sector in New Zealand is characterised by a high level of iec's (particularly informal, standard form and rollover iec's), non-negotiation modes of contract formation, and minimal union presence or representation;
- (vii) young workers in low-paid occupations, and workers in the hospitality and retail sectors, are more likely to have: informal contracts; no knowledge of their contract type or legal minimum employment conditions; no input into the contract formation process; and no choice over the type of contract covering them;
- (viii) several studies suggest that iec's have facilitated the use of soft HRM strategies, particularly the implementation of performance-based pay structures. However, iec's are primarily used by employers as a strategy for cost-cutting, concession-bargaining and de-unionisation of the workforce;
- (ix) unions have responded to de-collectivising forces by focusing resources on organising larger sites and those which offer the greatest recruitment potential. They have largely withdrawn from the small firm sector.

In short only about 20% of the employed labour force is covered by collective agreements demonstrating the dramatic decrease of support for the collective bargaining system in New Zealand.⁷⁶

D England

1 Law and Individualisation

Until recently, the most important source of regulation of the employer and employee relationship for non-managerial employees in England has been collective bargaining.⁷⁷ However, a trend towards 'individualising' employment

⁷⁶ *Op cit* 234.

⁷⁷ Deakin "Organisational Change Labour Flexibility and the Contract of Employment" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 136.

relations has since occurred. The motivation for this trend was the belief that it would result in more flexible labour markets which are essential for international competitiveness and economic efficiency.⁷⁸

Brown has identified a number of factors that created pressures which forced government and employers to change their strategies.⁷⁹ Conservative governments in England, especially the Thatcher Government encouraged a policy in terms of which trade unions would play a much less prominent role in employment relations. The privatisation of certain industries such as telecommunications, gas, water and electricity has resulted in loss of union power and influence. Changes in product markets, capital markets, national and global competition have also exerted pressure on employers to individualise the employment contract. The rate of unemployment which has risen from below 4% for the 15 years preceding 1980 to over 9% for the subsequent 15 years⁸⁰ has also diminished the bargaining power of employees and trade unions even further.

In terms of British labour law which has traditionally taken a voluntaristic approach, collective agreements are not enforceable as between the parties to them.⁸¹ This means that where there has been a breach of a collective agreement neither the trade union nor the employer may enforce the rights embodied in the contract. However, the terms of such collective agreements are enforceable as between individual employee and employer. Collective agreements become incorporated into the individual contract of employment in terms of the doctrine of incorporation in workplaces where the relevant union or unions have been recognised by the employer for the purposes of collective bargaining, by the employer.⁸²

⁷⁸ Brown "Individualisation and Union Recognition in Britain" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 153.

⁷⁹ *Op cit* 153 – 155.

⁸⁰ *Idem.*

⁸¹ Deakin *op cit* 139.

⁸² *Ibid* 136.

Due to the traditionally voluntaristic nature of British labour law, unlike New Zealand and Australia, it was not necessary to change labour laws to any great degree in order to achieve the individualisation of the contract of employment. The major impetus for such change was the lack of government support for trade unions coupled with labour market pressures.

2 Human Resource Management and Individualisation

The research conducted by Deakin⁸³ suggests that the major reason for management to pursue a trend toward the individualisation of the contract of employment was the attainment of flexibility with reference to job and grading structures. This trend however is not particularly new. Brown quotes the following figures: “The proportion of employees covered by either bargained or statutory collective arrangements fell from 83% in 1980 to 36% in 1997”.⁸⁴

Brown also makes the important distinction between substantive and procedural individualisation.⁸⁵ Substantive individualisation refers to the content of terms and conditions imposed by the individual contracts of employment. Procedural individualisation refers to the manner of determining these terms and conditions, i.e. without collective mechanisms or parties representing the individual employee. He concludes that in practice individualising firms tended not to differentiate non-pay terms and conditions between employees but that these terms and conditions were in fact standardised.⁸⁶ One reason for this might be an attempt to reduce administrative costs in designing and implementing agreements that reflect differences in non-pay terms for each individual. Secondly, the implementation of different terms and conditions can result in such differentiation leading to animosity between the employees and between management and employees.⁸⁷ Where this

⁸³ *Ibid* 130.

⁸⁴ Brown *op cit* 154.

⁸⁵ *Ibid* 156.

⁸⁶ *Idem*.

⁸⁷ Oxenbridge *op cit* 242 found that with reference to New Zealand “in a small number of cases, some very small firms referred to an increase in the amount of conflict and animosity between employees resulting from individual contracts of employment”.

is perceived as discrimination it could be a demotivating factor resulting in a reduction of loyalty and co-operation from employees.

Deakin's findings also indicate a tendency to standardise certain terms and conditions since "the individualised agreements closely followed the model of the statutory written statement required by legislation".⁸⁸ This fact as well as empirical evidence suggests that the employees are presented with the agreement as a *fait accompli* on a take it or leave it basis without any individual bargaining having taken place.⁸⁹

Brown's research indicates that the individualisation has been procedural as opposed to substantive with the only substantive differentiation in individual contracts being differences in pay. The procedural differentiation comes in the form of employers retreating from collective bargaining.⁹⁰ Brown's research shows that management's main objective in individualising the contract of employment is to reassert management prerogative in the implementation of pay structures.⁹¹ Detailed job descriptions and numerous job grades forced upon management by trade unions in collective agreements were perceived by management as restrictive and inflexible. Management did not want to be bound by a pay structure determined by an inflexible job grading system. Such system necessitated very precise job descriptions which ran contrary to the achievement of flexibility through a multi-skilled workforce. Furthermore this system did not allow for the rewarding of high productivity and loyalty. Management therefore sought to reduce the precision of job descriptions. This allows for the exercise of management prerogative with reference to the employees' duties on an *ad hoc* basis as the need arises due to changing labour market trends.

⁸⁸ Deakin *op cit* 143.

⁸⁹ *Idem.*

⁹⁰ *Ibid* 156.

⁹¹ *Idem.*

Despite the practical difficulties that can be encountered in the implementation of pay determined with reference to individual performance the majority of firms in Brown's research saw such pay structures as an essential part of their strategy.⁹²

Deakin's findings were similar: the principal objective cited by management for individualisation was flexibility in pay and grading structures.⁹³ He also found that individual performance related pay was most prevalent in firms that had de-unionised completely.⁹⁴

Brown also identified the objectives of increasing rewards at higher levels whilst decreasing payment rates at lower levels and reducing the number of less skilled workers.⁹⁵ One of the reasons for this is that the overhead costs of less skilled employees are proportionately high due to the standardised non-pay terms. Another way of reducing overhead costs is to outsource the tasks requiring fewer skills. In comparing firms that had individualised their contracts of employment with firms in similar product market circumstances that had retained collective bargaining Brown came to the following conclusions concerning substantive terms and conditions:⁹⁶

- (i) Both firms that recognised trade unions and those that did not, implemented standardised non-pay terms and conditions for non-managerial staff.
- (ii) Not only firms that individualised their contracts of employment but also unionised firms wanted to exercise more control over the content of job descriptions, performance related pay and pay structures. All the firms, including unionised firms had decreased the number of job grades in order to achieve greater flexibility of job description. Deakin's research yielded

⁹² *Idem.*

⁹³ Deakin *op cit* 145.

⁹⁴ *Idem.*

⁹⁵ *Idem.*

⁹⁶ *Ibid* 160 – 162.

similar results in that he found most flexibility clauses relating to hours of work, contractual performance or job description and pay structures.⁹⁷

- (iii) The linking of pay to performance for middle and senior managerial staff was common to all the firms surveyed (unionised and those that had retreated from collective bargaining). For a non-managerial grade however, there was a greater tendency amongst firms that had derecognised their unions to link pay with individual performance.
- (iv) Strong unions had in the past negotiated wages for less skilled workers which were above competitive levels. Employers had to pay these rates irrespective of market conditions. Brown's research suggests that all firms surveyed, even those that had not derecognised the trade unions were able to readjust these wages so that they were in touch with market rates.
- (v) As far as the size of pay increases was concerned, once again unionised and de-collectivised firms showed very similar results. i.e. unions did not negotiate higher pay rises for their members.
- (vi) Both unionised and de-collectivised firms had achieved similar flexibility with reference to functional as well as temporal flexibility.
- (vii) Since the matched firms enjoyed similar commercial success it seems that unit labour costs were also comparable.

In summary therefore, the only difference seems to be in payment systems with firms that had derecognised unions making more extensive use of performance linked pay. Deakin's research also confirmed Brown's findings that firms that had retained collective bargaining also made use of flexible working arrangements. He states "Many of the firms retaining collective bargaining made use of contractual devices aimed at formalising flexible working arrangements. Agreements included clauses reserving to the employer the right to change working hours to fulfil operational needs, and to vary job duties. Hence the preservation of the collective bargaining did not prevent the achievement of a high degree of working time flexibility".⁹⁸

⁹⁷ Deakin *op cit* 146.

⁹⁸ Deakin *op cit* 148.

In conclusion these studies indicate that collective bargaining need not necessarily act as a bar to flexibility. Collective agreements can contain clauses which are sufficiently flexible to adapt to changing needs and circumstances as they arise. Most firms whether they had retreated from collective bargaining or not had attempted to achieve flexibility. Nevertheless it is doubtful that such flexibility is achievable where the collective bargaining is at industry level as opposed to plant level as is the case in England.⁹⁹

E Japan

1 Law and Individualisation

Like England flexibility and individualisation has easily been achieved without the necessity of altering legislation or introducing new legislation. Since the relationship between employers and trade unions in Japan has traditionally been co-operative and collective bargaining is mainly enterprise based, trade unions and collective agreements have not been a bar to flexibility required by the employers.

2 The Traditional System of Japanese Industrial Relations

2.1 Introduction

In terms of the traditional system of Japanese industrial relations job security is of paramount importance. In exchange for job security employees forfeit individual treatment. Everyone is treated alike and follow similar careers. Wages are not determined by reference to productivity or ability but rather by age and length of service. In other words employees are rewarded for length of service and loyalty as opposed to the type or quality of work they produce. The notion of job security is deeply entrenched in the system and the dismissal of employees is heavily

⁹⁹ Summers "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *Comparative Labour Law Journal* 481.

restricted.¹⁰⁰ It therefore seems to have been accepted that control over employment conditions by the employer is a necessarily quid pro quo for life-long employment.¹⁰¹

There are three sources of the terms and conditions of employment:¹⁰²

- (i) *The individual contract of employment:* The individual contract of employment forms the basis of the relationship between employer and employee. It need not be in writing and very often is not reduced to writing. Employment contracts however are subject to minimum standards established in terms of the Labour Standards Law and other protective pieces of legislation, collective agreements and work rules.
- (ii) *Collective Agreements:* Article 16 of the Trade Union Law¹⁰³ gives precedence to the provisions of collective agreements over the provisions of an individual contract of employment. Unlike South African law, where the so called 'principle of advantage'¹⁰⁴ is applicable, in Japan even where the individual contract provides more advantageous provisions for the employee, such provisions are null and void and the provisions of the collective agreement are applicable. Where the individual contract is silent on certain issues the collective agreement is applicable.

Most collective agreements cover only one specific employer. Unlike South Africa employers are not bound by standards set by collective agreements at industry level. Since collective agreements in Japan are enterprise level

¹⁰⁰ Nakakubo "Individualisation of Employment Relations in Japan" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 179.

¹⁰¹ *Idem.*

¹⁰² *Ibid* 172-179.

¹⁰³ *Ibid* 173.

¹⁰⁴ In terms of this principle if the individual contract of employment provides for terms and conditions that are more advantageous to the employee and the terms of the collective agreement, then those terms in the individual contract are applicable. Likewise, the terms in the collective agreements that offer more advantage to the employee are also applicable.

collective agreements they are very specific and do not set only minimum standards, although theoretically this would be possible. This possibility would allow individuals to negotiate better conditions. The general practice however is for the collective agreements to provide for the actual terms and conditions within that enterprise. Furthermore it has been generally accepted by the Japanese courts¹⁰⁵ that collective agreements which provide employees with less advantageous conditions nevertheless override the individual contract of employment and they are binding on the employees. The employee's consent is not necessary to render such collective agreements binding. However, in principle these collective agreements are only binding on union members. In practice however, the terms and conditions contained in collective agreements are normally incorporated in the work rules¹⁰⁶, which are binding on all employees. The result is that normally the terms contained in collective agreements become applicable to all employees within an enterprise irrespective of whether they are union members or not.

- (iii) *Work rules of the organisation:* With the decline of unions in Japan¹⁰⁷ work rules have gained in significance. Work rules are applicable to all employees. They are a set of written documents setting out the working conditions and other general rules of the establishment. Every employer who employs more than 10 employees is obliged in terms of the Labour Standards Law to compile such rules and to make them known to the employees. The work rules deal with matters such as working hours, rest periods, leave, health and safety, wages, bonuses and other conditions of employment. Work rules may not breach laws and ordinances and are inferior to collective agreements. Generally, in practice where there is a

¹⁰⁵ See Nakakubo *op cit* 174 for discussion.

¹⁰⁶ Discussed hereunder.

¹⁰⁷ Nakakubo in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999)176 cites the following figures: More than 80% of private sector employees are not union members and the overall unionisation rate has declined to below 23%.

collective agreement in place the work rules will be altered so as to reflect the collective agreement. The practical implication of this custom is that the terms of collective agreements become applicable to all employees irrespective of whether they are union members or not.

In establishing or altering work rules the employer is obliged to seek the opinion of the majority representative union. If there is no such trade union then the employer must seek the opinion of the person representing the majority of the employees. Prerogative however rests with the employer and it is not bound by such opinion. The courts have held that as long as these new rules are 'reasonable' they are binding on employees without their consent.¹⁰⁸ Work rules take precedence over the terms of individual contracts of employment. In terms of the Labour Standards Law work rules provide minimum standards that are applicable to a particular enterprise. Each individual employee is free to negotiate more advantageous conditions with the employer. Without such explicit agreement the work rules form the contract of employment.

In summary it appears that in terms of traditional Japanese labour relations the individual contract of employment plays a truly minimal role. Even where there is no collective agreement in place the work rules will overshadow the individual contract of employment. Despite this fact, Japanese employers do enjoy considerable flexibility in determining the terms and conditions of employment contracts. This is possible for a number of reasons:

¹⁰⁸ See *Shihoku Bus Co v Nihon*, Supreme Court 25 December 1968, Minshu Vol 22 No. 13: p 3459. In ascertaining the reasonableness of the change of rules the courts will balance the necessity for change against the disadvantage inflicted on the employees. Where the majority of employees are in favour of the change the likelihood of the courts finding the changes to be reasonable are more likely. See also Yamakawa "The Role of the Employment Contract in Japan" in Betten *The Employment Contract in Transforming Labour Relations* (1995) 114-115 for a discussion on this concept.

- (i) 95% of Japanese unions are enterprise based.¹⁰⁹ Unlike South Africa and Germany, Japanese employers are not bound by minimum conditions set at industry level through collective bargaining.
- (ii) The relationship between employers and trade unions is characterised by co-operation with an emphasis on the pursuit of the common interest being the welfare of the organisation.¹¹⁰
- (iii) It is understood the employer has the right to various discretions, such as the right to transfer employees. It is accepted that employees accept this right of control by the employer in exchange for job security. Hence the employers' prerogative to alter work rules remains intact.¹¹¹

2.2 *Human Resource Management and Individualisation*

A movement away from the tradition of the seniority wage system towards an individualised system has been identified in Japan.¹¹² This is a natural result of the pressure of global competition moving the emphasis to efficiency and productivity rather than long term stability of the employees. Other factors resulting in a more individualised treatment of the employer employee relationship are:

- (i) The long term decline in the rate of unionisation in Japan;¹¹³
- (ii) decline in the coverage of Japanese collective agreements both quantitatively and qualitatively;¹¹⁴
- (iii) the rise in the number of atypical employees who are not legally protected to the extent of typical employees. Atypical employment is largely free from

¹⁰⁹ Nakakubo *op cit* 178.

¹¹⁰ Nakakubo *op cit* 179 states: "While 90% of Japanese Unions have collective agreements with the employer, they are more concerned about the relationship between the employer and the union than about actual working conditions for the employees. They indeed do not have to conclude comprehensive collective agreements because the standard working conditions are already prescribed in work rules".

¹¹¹ See Yamakawa *op cit* 109-110.

¹¹² See Nakakubo *op cit* 105; Nakata "Trends and Developments in Employment Relations in the 1980's and 1990's" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study (1999)* 189, and Yamakawa *op cit* 116.

¹¹³ Nakata *op cit* 189-191.

¹¹⁴ *Ibid* 191 –194.

regulation.¹¹⁵ A large degree of flexibility is therefore available to employers in the use of atypical workers;

- (iv) even where there is a collective agreement covering working conditions in force, such agreement may contain a provision to the allowing individual treatment of employees depending on employee's circumstances. The view has been put forward that as the changing world of work develops, the inclusion of this kind of provision is likely to increase;¹¹⁶
- (v) the Japanese economy declined in the 1990's and it was no longer able to carry the huge amount of 'baby boomers' that were hired in the 1960's and 1970's;¹¹⁷
- (vi) the younger generation is becoming increasingly critical of the seniority wage system.¹¹⁸ Consequently, different Human Resource Management tools and practices have become more popular in Japan. What follows is a brief description of some of the more prevalent means of achieving flexibility in the contract of employment.

2.3 *Individual Appraisal Systems*

The movement away from the traditional seniority wage system has resulted in the use of other criteria for the determination of wages:

2.3.1 *Satei*

Satei refers to individual worker appraisals. Such appraisals are normally undertaken by management either annually or bi-annually.¹¹⁹ Employees are appraised on work performances and attitudes. Promotions, level of wages and the assignment of tasks are influenced by these appraisals. Already in 1988 more than 80% of firms surveyed by the Ministry of Labour made use of Satei.¹²⁰ These systems are also common even in unionised organisations, and studies show that

¹¹⁵ See Yamakawa *op cit* 115 and Nakata *op cit* 194 who point out that the number of regular employees dropped by 6.8% from 1989 to 1996 while all other types of non-irregular employees increased in the same period with the sales and service sectors experiencing the largest increase in non-regular employment.

¹¹⁶ Yamakawa *op cit* 123.

¹¹⁷ Nakakubo *op cit* 180.

¹¹⁸ *Idem.*

¹¹⁹ Nakata *op cit* 194.

¹²⁰ *Ibid* 195.

the share of unionised firms with ability pay is not smaller than non-unionised firms.¹²¹

The ‘annual salary’ system is an example of pay - related performance and it allows for the employer and individual employee to negotiate the employee’s annual salary for the next year. The employer or its representative, and the individual employee, together review the employee’s achievements during the preceding year against the targets met. New targets are set for the following year and a salary consistent with the target performance is set.

Wage differentials based on ability and achievement as opposed to age had already been adopted in Japan by some companies as early as the 1960’s, and by the 1970’s such practices were quite common.¹²² However, most Japanese companies still employ large numbers of school leavers every year. They all acquire skills gradually through on the job training. Since they have the same amount of time on the job many of them develop at very similar rates. The result is very similar wages for people of the same age.¹²³ However, individual personnel appraisal systems that result in more dramatic wage differentials are on the increase. The trend is to place emphasis on results as opposed to potential ability of the employee.¹²⁴

2.3.2 *Flexibility in Working Hours*

A trend to individualising working hours through agreement between employer and individual employee has been identified in Japan. This “variable working time” system allows individuals to choose when to start and when to finish working. The percentage of firms using this system has increased from 7% in 1988 to over 40% by 1996.¹²⁵

¹²¹ *Ibid* 197.

¹²¹ *Ibid* 195.

¹²² Nakakubo *op cit* 181.

¹²³ *Ibid* 182.

¹²⁴ *Idem*.

¹²⁵ *Ibid* 199.

Another system which allows flexibility in working hours is called a 'Sairyo Rodo' arrangement. In terms of such agreements efficient workers work less hours and less efficient workers work more hours. This system is applicable to workers with special kinds of skills. Since it deviates from the eight hour day and 40 hours per week standard contained in legislation (Labour Standard Law), application of such system is dependent on agreement between management and the majority of workers in the organisation. The Ministry of Labour has recorded an increase across industries of this system from 1988 to 1996.¹²⁶

The increase in the type and number of atypical employees in Japan¹²⁷, the dwindling coverage of collective agreements¹²⁸ and the need to compete globally have all contributed to the individualisation of the contract of employment in Japan. Changes in legislation were not necessary to allow for this new trend because the Japanese labour law system already had the following characteristics:

- (i) a culture of cooperation between employer and trade union;
- (ii) no centralised system of collective bargaining where wages and other conditions of work are set at industry level; and
- (iii) a great degree of employer prerogative with regard to the content of contracts of employment.

F South Africa

1 Introduction

South Africa began lifting trade tariffs in the late 1980s.¹²⁹ In fact the ANC government "appears to be going further than its predecessors in stimulating competition, as proved by the intention to reduce import tariffs as far as

¹²⁶ Nakata *op cit* 200.

¹²⁷ Yamakawa *op cit* 115 and Nakata *op cit* 200.

¹²⁸ Nakata *op cit* 194 after having conducted various surveys concludes: "In summary, the evidence in this section indicates that the coverage of Japanese collective agreements is declining both quantitatively and qualitatively. Consequently, individual contracting is becoming more relevant to the Japanese workforce."

¹²⁹ Theron "Employment is not what it Used to be" 2003 *ILJ* 1248.

possible.”¹³⁰ In 1994 South Africa signed the Marrakech Agreement of GATT and in 1995 South Africa applied for membership to the World Trade Organisation.¹³¹ Around the same time the Labour Relations Act¹³² (hereafter the LRA), with its emphasis on industrial level collective bargaining,¹³³ was being drafted. This system, as espoused in the Labour Relations Act,¹³⁴ was a result of the “struggles in mining and manufacture.”¹³⁵ As Theron points out:¹³⁶ “The growth of casualization and externalisation has coincided with the decline of these sectors, both in terms of their relative importance to the economy, and in terms of the numbers employed. Accordingly the model on which our labour relations system is premised no longer prevails, or has changes substantially.” As will be demonstrated hereunder, the consequences of this are twofold: firstly, many are no longer protected by the legislation because they cannot be categorised as “employees” in terms of the legislation; and secondly, unions are unable to represent a significant number of workers and consequently cannot exercise the amount of power that they were capable of wielding in the past.

2 Changing Nature of Work in South Africa¹³⁷

2.1 Terminology

Before any attempt can be made at discussing the extent of this phenomenon it is necessary to give meaning to and define the terminology that is used to describe

¹³⁰ Bendix *Industrial Relations in the New South Africa* (1998) 101.

¹³¹ Theron *op cit* 1248 at footnote 2.

¹³² Act 66 of 1995.

¹³³ See ch 3 *infra*.

¹³⁴ Act 66 of 1995.

¹³⁵ Theron *op cit* 1271.

¹³⁶ *Idem*.

¹³⁷ See in general Welch “Collectivism v Individualism in Employee Relations: For Human Rights at the Workplace” 1996 *ILJ* 1041; Baskin “South Africa’s Quest for Jobs, Growth and Equity in a Global Context” 1998 *ILJ* 986, Mhone “Atypical Forms of Work and their Policy Implications” 1998 *ILJ* 197, Olivier “Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed” 1998 *ILJ* 1329; Theron “Employment is Not What it Used to be” 2003 *ILJ* 1247; Thompson “The Changing Nature of Employment” 2003 *ILJ* 1793; Mills “The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility” 2004 *ILJ* 1203.

what is generally termed “atypical” or “non-standard” employment.¹³⁸ The meanings that are ascribed to the different forms are the same as those given by Theron.¹³⁹ As a starting point, it makes sense to define what the “standard employment relationship” (SER) entails because this is what “atypical” employment is not. The SER refers to employment that is indefinite (or permanent) and full-time, and the work is usually done at a workplace controlled by the employer.”¹⁴⁰ “Casualisation” refers to the use of part-time and temporary workers.¹⁴¹ “Part-time work refers to work that is not full-time. However many part-time workers “have only one employer, and work on the premises of the employer in terms of an employment contract.”¹⁴² A temporary worker, on the other hand, also works in terms of a contract of employment, but that contract is not for an indefinite period; it is for a fixed term.¹⁴³ Once that time period has elapsed the contract automatically comes to an end unless there is a legitimate expectation of renewal.¹⁴⁴ “Outsourcing” refers to a situation where an employer reverts to making use of an outside contractor to provide certain services that were until then provided by employees of the organisation.¹⁴⁵ The employer then “outsources” services that are peripheral to the “core” business of the employer to the “sub-contractor”. Such non-core functions include services such as catering, cleaning, security, maintenance and transport.¹⁴⁶ “Homework” is a form of sub-contracting.¹⁴⁷ With homework the work is done in someone’s home and it is usually women who do the work.¹⁴⁸ In short, with sub-contracting the contract of employment is replaced by a commercial contract.¹⁴⁹ In this way the employer or “core-enterprise” is relieved of its duties imposed by labour legislation with regard

¹³⁸ Theron *op cit* 1247.

¹³⁹ “Employment is Not What it Used to be” 2003 *ILJ* 1247.

¹⁴⁰ *Ibid* 1249.

¹⁴¹ *Ibid* 1250.

¹⁴² *Idem*.

¹⁴³ *Idem*.

¹⁴⁴ See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) pars 1100-1102; Basson *et al Essential Labour Law* 3rd ed (2002)127-132.

¹⁴⁵ Theron *op cit* 1252.

¹⁴⁶ Cheadle *et al Current Labour Law* (2004) 145.

¹⁴⁷ Theron *op cit* 1253.

¹⁴⁸ *Idem*.

¹⁴⁹ *Ibid* 1254.

to the workers that perform the non-core functions because they do not qualify as “employees” of that enterprise. Another means of achieving this result is by making use of a “temporary employment service” (hereinafter TES). In other words, workers are employed by an intermediary, and not by the core-enterprise.¹⁵⁰ In this situation the core-enterprise is referred to as the “client” or “user” and a “triangular employment relationship is created.¹⁵¹ Outsourcing, sub-contracting, homework and the use of TES’s are all forms of “externalisation”.¹⁵² Externalisation results in a situation where the employment relationship is not regulated. This is termed “informalisation”.¹⁵³

2.2 *Surveys and Statistics*

The Labour Market Policy Chief Directorate commissioned a research project on “the changing nature of work and atypical forms of employment”.¹⁵⁴ The research report comprises four research papers. The findings of these papers are summarised below.

Paper 1: The Prevalence of Casualisation and Externalisation in South Africa

This research was conducted by the National Institute for Economic Policy. The research used the Labour Force Surveys of September 2000, 2001 and 2002. Unfortunately there was confusion in those surveys as to what exactly was meant by “casual worker”. The researchers stated: “when analysing casualisation and externalisation in the labour market using the large cross-sectional data sets there was a clear reliability issue. This issue can only be resolved by face to face interviews and extensive training of field interviewers. The reliability problem with available large data sets could well be why the report’s findings are often inconsistent with extensive case-studies findings. Since the study is quantitative in nature it is acknowledged that some of the findings are not consistent with other studies that use different methodologies. In particular there is an extensive case

¹⁵⁰ *Ibid* 1255.

¹⁵¹ *Ibid* 1254.

¹⁵² *Idem*.

¹⁵³ Cheadle *et al op cit* 139.

¹⁵⁴ Socpol Circular No. 73A/04.

study literature that finds increasing evidence of casualisation in the workplace and an increasing use of contracting out by employers to independent contractors in order to bypass the Labour Relations Act. Labour brokers and employment agencies too have increased in number.”

The general conclusion was that in some categories casualisation had increased and in other categories it had declined during the period 1999-2003. The research also indicated that there was an increase in self-employment in both the formal and the informal economies. The number of home workers increased from 460 000 to 520 000 between 2000 and 2002.

Paper 2: Atypical Forms of Employment and their Policy Implications

The object of this research paper was “to evaluate the impact of ‘atypical’ forms of employment on our labour legislation”, and “to address the impact of atypical form of employment on the following policy areas: social security and social protection; skills development; and collective bargaining.” The research was conducted by the Sociology of Work Unit of the University of the Witwatersrand and the Labour and Enterprise Project of the University of Cape Town.¹⁵⁵

The researchers conducted four sectoral studies: mining, construction, manufacturing (particularly household appliances) and retail. The following was concluded: Since the 1990s the mining sector had shed almost 50% of its jobs and a number of activities had been externalised. The outsourcing of non-core functions such as catering, cleaning, security and maintenance of hostels had occurred. Even outsourcing of core-functions, such as the mining of certain shafts or sections of shafts had also occurred. Subcontracting also took the form of the use of labour brokers or TES's to recruit and supply labour.

¹⁵⁵ Although the study included an evaluation of international literature and case studies, only the findings with regard to South Africa are summarised herein. The impact of the use of “atypical” forms of employment on certain policy areas is discussed hereunder under the heading “Legislation”.

As far as the construction industry is concerned the researchers found that in the last 15 years the most prevalent form of atypical or non-standard employment is the “labour only sub-contracting” (LOSC). This is where firms or individuals supply unskilled and semi-skilled workers on construction sites to perform a specific task. These workers are regarded as part of the informal economy and according to Labour Force Survey data 40% of the construction industry is in informal employment. However, since the Labour Force Survey data used registration with the Receiver of Revenue to reach this figure, the researches found that according to insiders’ estimates the figure is about 60% of total employment.

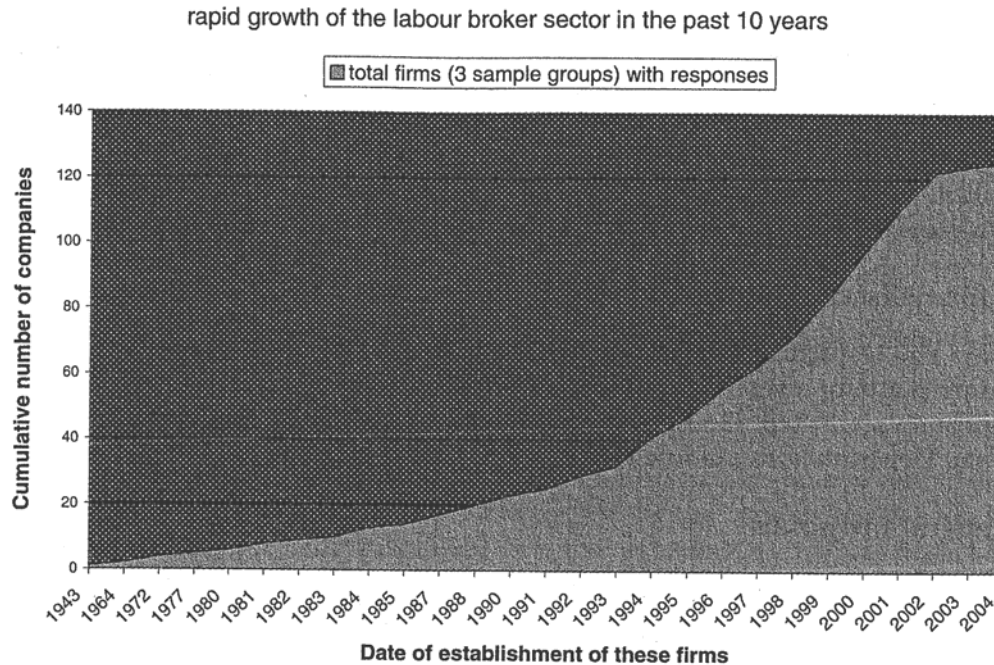
The researches found that employment in the manufacturing sector had also declined since the 1990s. According to figures supplied by the Metal and Engineering Industry Bargaining Council, the industry had 425 000 employees in 1986, and only 235 544 in 2003. Since the mid 1990s fixed term contracts in the household appliance industry have increased. The researches found that about one third of employees in that sector are on short term contracts.

As far as the retail industry is concerned, the researches found that the majority of workers were non-standard or atypical. This is the result of the increased use of “casual” employees who work on a part-time basis, the outsourcing of non-core functions and the sub-contracting of shelf packers. According to the Labour Force Survey 38% of the retail sector is informal.

Paper 3: Temporary Employment Services

The research for this paper was conducted by the Labour and Enterprise Project of the University of Cape Town. Aside from collecting and analysing existing data, the researches also conducted interviews with key TES's and representatives of the industry, officials of the Department of Labour, as well as with union officials. Access to data compiled by the Metal and Engineering Industry Bargaining Council concerning TES's was obtained. Based on this information the researches estimate that the number of TES's in the formal economy is over 3000. If the informal economy were included the number would be significantly higher.

According to one estimate for every one TES in the formal economy, there are three in the informal economy. The researches compiled the following graph which shows the growth of TES's in the past 10 years.



Paper 4; The Economic Determinants of Casualisation and Externalisation

The research was conducted by the Development Policy Research Unit of the University of Cape Town. The methodology was to conduct interviews with senior managers at a sample of firms. The sample of firms was drawn from manufacturing firms that employed more than 150 people in the Cape Town metropolitan area between 2000 and 2003. The sectors represented are: food and beverages, clothing, leather and textiles, paper products and publishing, chemical and petroleum products, rubber, glass and other non-metallic products, metals, machinery, electronics, wood and furniture.

It was found that 89% of the firms made use of casual / temporary employment in 2003 and 79% of the firms made use of outsourcing and sub-contracting. Only 26% of the firms made use of part-time workers. The ratio of sub-contracted labour to permanent employees increased from an average of 11% in 2000 to 18% in 2003. More than 90% of the firms were engaged in multi-skilling their employees. 66% of the firms experienced an increase in production volumes from 2000 to

2003. 75% experienced increased levels of productivity over the same period. 60 % reported increased profits over the period.

Other Surveys

In 1999 the World Bank conducted a survey of firms in the greater Johannesburg area that employed more than fifty people. The survey reported that the proportion of firms sub-contracting varied from 62% in the smaller firms (employing less than a hundred people), to almost 90% in the large firms (employing more than two hundred people).¹⁵⁶ Using a postal questionnaire Andrew Levy and Associates conducted a survey on outsourcing in 1999. They found that of the 101 firms that responded 68% had outsourced over the past five years and nearly 79% of these firms had outsourced more than once.¹⁵⁷

3 *Legislation*

In this section the absence of legislative protection for certain workers as a result of the use of non-standard or atypical forms of employment is discussed. Secondly, the various legislative provisions that render employer escape from certain legislative duties towards employees possible are highlighted and discussed.

The South African system of labour law is premised on the contract of employment in the sense that such contract creates standard or typical employment.¹⁵⁸ Where the relationship between employer and independent worker is not based on the contract of employment, the worker generally cannot enjoy certain privileges and protections that are available to typical employees whose relationship with the employer is premised on a contract of employment in the traditional sense.¹⁵⁹

¹⁵⁶ Bhorat, Lundall & Rospabe *The South African Labour Market in a Globalising World: Economic and Legislative Considerations* (2002) ILO Report.

¹⁵⁷ Kelly "Outsourcing Statistics" 1999 *SALB* vol 23 no 3.

¹⁵⁸ Theron "Employment is not What It Used to be" 2003 *ILJ* 1257.

¹⁵⁹ See in general Olivier "Extending Labour Law and social Security Protection: The Predicament of the Atypically Employed" 1998 *ILJ* 669; *Ongevalle Kommissaris v Onderlinge Versekerings-Genootskap AVBOB* 1976(4) SA 446 (A); *Smit v Workmen's Compensation Commissioner* 1979(1) SA 51 (A); *Niselow v Liberty Life*

Since only employees can be trade union members,¹⁶⁰ a contract of employment also seems to be a prerequisite for the protection afforded by trade unions. Secondly, organisational rights can only be exercised in the workplace.¹⁶¹ A workplace is defined in terms of the LRA as “the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where the employees work in connection with each independent operation, constitutes the workplace for that operation.”¹⁶² The outcome of this is that certain atypical employees, such as home workers¹⁶³ are excluded from exercising organisational rights for two reasons: Firstly they cannot be trade union members; and secondly, they do not work at the workplace of the employer. In short therefore, the emphasis on the use of collective bargaining by trade unions and employers as a means, *inter alia* of advancing and protecting employee interests prevalent in the LRA,¹⁶⁴ cannot come to the rescue of unprotected atypical employees. The increase in the use of atypical employees has also affected bargaining councils negatively.¹⁶⁵ Theron explains: “The erosion of standard employment has far-reaching implications for our current system of collective bargaining, which is premised on the definition of workplace discussed above, and which encourage bargaining at sectoral level, in bargaining councils. Indeed the vision which appears to inform the scheme on which our collective bargaining system is premised is that bargaining councils would be established at

Association of Africa Ltd 1998 ILJ 585 (LAC); *SA Broadcasting Corporation v Mc Kenzie* 1999 ILJ 585 (LAC).

¹⁶⁰ S 213 of the LRA defines a trade union as “an association of **employees** (my emphasis) whose principal purpose is to regulate relations between employees and employers, including any employers’ organisations”.

¹⁶¹ Ss 11-16 of LRA.

¹⁶² S 213; see also *Specialty Stores v CCAWU* 1997 ILJ 992 (LC); *SACCAWU v Specialty Stores Ltd* 1998 ILJ 557 (LAC).

This refers to workers who work from their own homes for their own account (not domestic workers).

¹⁶⁴ This is discussed in detail in ch 3 *infra*.

¹⁶⁵ The growth of “labour only sub-contractors” has resulted in the demise of bargaining councils. (which, as demonstrated in ch 3 *infra*, are the preferred forum for collective bargaining in terms of the LRA), in certain areas. See Cheadle and Clarke *ILO National Studies on Worker Protection* International Labour Office Report (2000) 67.

a sectoral level in all major sectors of the economy. In sectors where there was not sufficient organisation to do so, statutory councils would be established. In fact the scope of the sectors covered by bargaining councils today is limited...Moreover, the prospects of extending the current scope of bargaining council coverage appear extremely limited.

There is no simple explanation as to why bargaining councils have not grown, but casualization and externalisation is certainly part of it. A crucial element of the bargaining council system is that agreements concluded at bargaining councils may be extended to non-parties in certain circumstances. But both because of policies to promote small enterprises and a proliferation of satellite enterprises as a consequence of restructuring, the extension of agreements have long been a vexed issue. At the same time where agreements have been extended to non-parties, it has not enabled bargaining councils effectively to regulate such enterprises.

Although unions and others frequently call for stricter enforcement of collective agreements, it is no simple matter to do so. As a general proposition bargaining council inspectorates are complaints driven, and do not have the resources to investigate clandestine operations or the like. No enforcement strategy is likely to be effective unless it is underpinned by organization. Still less will inspectors be able to uncover the economic relationships that may connect a clandestine operation to an employer in the formal sector. Even if they were to do so, such formal sector employer might well be outside the jurisdiction of the council. This would be the case with a retailer putting out work to a home-based clothing manufacturer, for example. The tendency for externalization to erode the relevance of conventional notions of a sector thus has far-reaching implications.”¹⁶⁶

¹⁶⁶ *Op cit* 1276-1277.

The Department of Labour is aware of these problems and certain attempts have been made to remedy the situation: The 2002 amendments¹⁶⁷ to the Basic Conditions of Employment Act (BCEA)¹⁶⁸ and the Labour Relations Act (LRA)¹⁶⁹ create a presumption that a person will be considered an employee in the traditional sense if one of any seven criteria applies.¹⁷⁰ Theron is concerned that these provisions will have limited success in extending protection to atypical employees and states: “But the limited scope of the new presumption must be emphasized. An employer may rebut the presumption. Even on the most optimistic interpretation it is not likely to extend effective legislative protection to all categories of workers that may be in need of protection. The person producing goods or providing services from her/his home, for example, may be economically beholden to another.”¹⁷¹

Another legislative provision that attempts to protect the atypical employee is section 83 of the BCEA which gives the Minister of Labour the power to deem certain categories of persons to be employees. However the Minister has to date not made use of this provision.¹⁷² Section 51 of the BCEA also gives the Minister of Labour the power to deem certain persons to be employees. This is in regard to sectoral determinations. However, this provision is to date yet to be invoked. Theron is of the view that the reason for this is that the same difficulties that prevail in enforcing bargaining council agreements are applicable to sectoral determinations in terms of the BCEA.¹⁷³

¹⁶⁷ S 200A of the Labour Relations Amendment Act 12 of 2002 and s 83A of the Basic Conditions of Employment Amendment Act 11 of 2002; Clarke “The Basic Conditions of Employment Act Amendments-More Questions Than Answers” (2002) 6(1) *LDD* 1; Ernest “Employee and Independent Contractor: The Distinction Stands (2002) *SAMLJ* 107; Bosch A survey of the 2002 Labour Legislation Amendments: Is There Really ‘Something for Everyone?’” 2003 *ILJ* 1; 5.

¹⁶⁸ 75 of 1997.

¹⁶⁹ 66 of 1995.

¹⁷⁰ These provisions are discussed in detail in ch 5 *infra* under the heading “Employees’ Rights Extended to Atypical Employees”.

¹⁷¹ Theron *op cit* 1273; see also Theron “The Erosion of Workers’ Rights and the Presumption as to Who is an Employee” 2002 *LDD* 27; Christianson Defining Who is an Employee” 2001 11(3) *Contemp LL* 21.

¹⁷² Cheadle *et al Current Labour Law* (2004) 149.

¹⁷³ Theron *op cit* 1277.

Legislation has allowed for a system where TES's can be considered the employer in a triangular relationship.¹⁷⁴ This creates an opportunity for organisations to avoid the provisions of labour legislation with regard to the workers provided by the TES's. The study in Paper 3¹⁷⁵ examined forty eight CCMA and Labour Court cases that dealt with TES's. The major problem was determining who the employer was.¹⁷⁶ As a result the applications were normally dismissed. Another problem was determining whether or not there was a dismissal. This is because, if the TES is the employer, only the TES can effect a dismissal. Once again the decisions on this issue were found to be contradictory. These uncertainties give rise to a number of questions: For example, must the TES remunerate the worker when the client no longer requires that person's services?

Finally, a contract of employment is not only a prerequisite to qualify for the protection afforded by labour legislation and collective bargaining, but is often a prerequisite for social security protection.¹⁷⁷ Atypical employees are excluded from social security protection that requires employers and/or employees to make contributions. Examples are the Compensation for Occupational Injuries and Diseases Act,¹⁷⁸ Unemployment Insurance Act,¹⁷⁹ the Pension Funds Act.¹⁸⁰

¹⁷⁴ S 198(2) of the LRA deems a TES to be the employer.

¹⁷⁵ Discussed *supra* under the heading "Surveys and Statistics" in sub-heading 2.2.

¹⁷⁶ See for example *Lad Brokers (Pty) Ltd v Mandla* 2001 ILJ 1813; *Bargaining Council for the Contract Cleaning Industry and Gadeza Cleaning Services and Another* 2003 ILJ 2019; *National Union of Metalworkers of SA on behalf of Fortuin and Others and Laborie Arbeidsburo* 2003 ILJ 1438.

¹⁷⁷ See Olivier "Extending Law and Social Security Protection: The Predicament of the Atypically Employed" 1998 ILJ 669.

¹⁷⁸ Act 130 of 1993.

¹⁷⁹ Act 63 of 2001.

¹⁸⁰ Act 24 of 1956.

4 Conclusion

South African atypical employees generally do not enjoy the protection offered in terms of legislation or in terms of collective organisation.¹⁸¹ Consequently, as a result of their financial dependence on the provider of work, they are at the mercy of the provider of work with reference to wages and other conditions of work.¹⁸² These employees are not protected from unfair dismissal, exploitation in the form of the payment of very low wages, they sometimes work in conditions that are hazardous to their health and safety, are excluded from certain social security protection and, do not enjoy the benefit of skills development levies.¹⁸³ All this is because they do not qualify as standard employees.

¹⁸¹ Mills “The Situation of the Elusive Independent Contractor and Other forms of Atypical Employment in South Africa: Balancing Equity and Flexibility” 2004 *ILJ* 1203, 1234-1235.

¹⁸² Theron “Employment is not what it used to be” (2003) *ILJ* 1255.

¹⁸³ Cheadle *et al Current Labour Law* (2004) 162.