

Regulated flexibility and the Labour Relations Amendment Bill of 2012

1 Introduction

Contrary to statements by Zwelinzima Vavi, general secretary of the Congress of South African Trade Unions (Cosatu), the South African government is not ignoring a decision adopted at the African National Congress' (ANC's) 2007 national congress in Polokwane to ban "labour brokers" (s 198 Labour Relations Act 66 of 1995 (LRA) refers to "labour brokers" as "temporary employment services" (TES); Anon "Labour Brokers" *Leadership* 19 March 2012 available at <http://bit.ly/13Wyg1v> (accessed 2013-5-25)). This is confirmed by the ANC's 2009 election manifesto which called for laws that would "ensure decent work . . . introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices" ("2009 ANC Election Manifesto" available at <http://bit.ly/gP5gKl> (accessed 2013-5-25); Benjamin "To regulate or to ban? Controversies over temporary employment services in South Africa and Namibia" in *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* (eds Malherbe & Sloth-Nielsen) (2012) 189 202). A lot of water has flowed into the sea since these political commitments were made, but all

indications are that the amendments are not far from their implementation.

A package of labour law amendment bills has been published during 2012 and the different pieces of legislation will be implemented in a staggered fashion. The Basic Conditions of Employment Amendment Bill [B15-2012] (BCEAB) is currently before the national assembly, the Labour Relations Amendment Bill [B16-2012] (LRAB) is presently being discussed before a parliamentary portfolio committee and the draft Employment Equity Amendment Bill and a draft Employment Services Bill are yet to be tabled in parliament. Indications are that the BCEAB will be signed into law before the end of 2013 and the LRAB will follow shortly thereafter (Botes & Sishi "Proposed amendments to labour legislation: Where are we?" *SA Labour Guide* available at <http://bit.ly/11upyrX> (accessed 2013-5-24).

Although a number of issues are covered in the amendments, the package is dominated by the suggested regulation of non-standard forms of work, which include TESs, fixed-term contracts and part-time employees. Three aspects are covered in this contribution: Firstly, what is South Africa's overarching labour policy framework and to what extent have these policies been influenced by the International Labour Organisation's (ILO's) "decent work" agenda and the European Union's (EU's) so-called "flexicurity" policies? Secondly, what are the content and salient characteristics of the suggested amendments pertaining to non-standard work? Thirdly, concluding remarks are made with the emphasis on the question whether an appropriate balance has been struck between the protection of workers' rights and the provision of flexibility in the labour market.

2 Decent Work, Flexicurity and Regulated Flexibility

South Africa was one of the founding members of the ILO in 1919. However, after being criticised for its racial policies during the 1950s and 1960s, South Africa resigned from the ILO in 1964 and was only readmitted shortly before the first democratic elections in 1994 (Van Niekerk *et al Law@work* (2012) 19–20). The ILO sets international norms in the labour environment and prevents unfair competition amongst member states. The implementation of protective measures, such as the principle of equal pay for men and women and social security benefits during the time of unemployment, increases labour costs. One of the purposes of the ILO is to prevent a "race to the bottom" whereby member states may contemplate a reduction of social protection with the view of becoming a more attractive investment proposition (Hepple *Global Laws and Global Trade* (2005) 13).

The ILO functioned optimally in the previous century during an era in which there was a joint commitment towards full employment and providing social security to workers (Hepple 33). This was an era during which the standard eight-hours-per-day, five-day-a-week, indefinite

contract of employment formed the basis of employment relationships. The conventions of the ILO were predominantly rights based providing protection to the weaker party in the employment relationship. Economic and business factors were not the main concern in policy formulation, but rather techniques to provide protection to workers. During the 1950s and the 1960s the eminent labour law scholar, Sir Otto Kahn-Freund, described the key function of labour law as being “a countervailing force” to counter the imbalance in the power relationship between employers and employees (Davies & Freedland *Kahn-Freund’s labour and the law* (1983) 18; Le Roux “The purpose of labour law: can it turn green?” in *Labour Law Into the Future: Essays in Honour of D’Arcy du Toit* (eds Malherbe & Sloth-Nielsen) (2012) 230-238).

A lot has changed in the past half a century and the ILO was compelled to reconsider its policy directions. During the post-World War II era the ILO was increasingly being challenged by uneven ratification of conventions, problems regarding the ILO’s supervisory mechanisms and globalisation, which saw the exponential growth of non-standard forms of work. As mentioned by Hepple (33), the ILO’s response was threefold. It adopted the ILO *Declaration of Fundamental Principles and Rights at Work*, revised and integrated its international labour standards (of which 71 of the 185 conventions were up to date and 54 were outdated) and most significantly for purpose of this discussion, adopted its labour strategy by embracing the “decent work” agenda. The objectives of this policy, which was accepted in 1999, are well known. In a four-pronged approach, it seeks to balance the realisation of fundamental rights at work; the promotion of job creation; the promotion of effective social protection for all; and the encouragement of “tripartism” and social dialogue (Rodgers, Lee, Swepston & Van Daele *The ILO and the Quest of Social Justice 1919-2009* (2009) 205-235). In sum, the decent work agenda has shifted the ILO’s attention from a rights-based agenda to one which includes policies that could potentially create jobs and reduce poverty. This sensitivity to labour market conditions is confirmed by the statement of the then Director General of the ILO, Juan Somavia, namely, that “the principle rout out of poverty is work, and to this end the economy must generate opportunities” (ILO *Organising Social Justice*, Report by the Director General (2004) 16).

In 2007 the EU followed suit and changed its labour market policies when it adopted the flexicurity approach (European Commission *Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security* (2007) 359). The term is a combination of the words “flexibility” and “security”. Following the Treaty of Lisbon in 2003, a task team headed by the former Dutch prime minister, Wim Kok, devised strategies to counter unemployment and to improve the EU’s competitiveness (Kok *Jobs, jobs, jobs – creating more employment in Europe* Employment Task Force Report (2003) 29–30). The underpinning of the strategy is to balance the protection of fundamental rights of workers, but at the same time, to establish flexibility in the labour market to enable employers to respond to changing market conditions. Although

not developed as a one-size-fits-all approach, four broad mutually supportive pathways were conceived which could ultimately provide guidance to member states. The strategy seeks to provide for flexible and reliable contractual arrangements to promote the upward transition of non-standard contractual arrangements to a situation of full protection; to promote investments in comprehensive lifelong learning; to enhance active labour market policies to strengthen the transition of workers between jobs; and to modernise social security systems to enhance the mobility of workers in the labour market (European Commission *Flexicurity Pathways: Turning Hurdles into Steppingstones* (European Expert Group on Flexicurity) (2007) 2-3; Bekker & Wilthagen "Flexicurity – a European approach to labour market policy" 2008 *Intereconomics* 68).

The change of policy direction after the adoption by the ILO of its decent work agenda and the implementation of the EU's flexicurity approach are reflected in the adoption of international standards relating to the regulation of triangular agency work relationships. Rather than prohibiting TESSs, the ILO adopted the Private Employment Agencies Convention 1997 (No 181) which seeks to balance flexibility and the protection to agency workers. One of the stated purposes of the Convention is "to allow the operation of private employment agencies as well as the protection of [such] workers" (art 2(3) of the Convention).

The EU has since followed the same policy direction and has implemented the Temporary Agency Work Directive 2008/104/EC, which, amongst others, is aimed at recognising "temporary work agencies", providing protection to agency workers and establishing a framework which could contribute to the creation of jobs (art 2 of the Directive). The Agency Directive is the third of a trilogy of directives which seek to balance the social rights of non-standard employees on the one hand, and on the other, to leave room for flexible working arrangements as part of labour market regulatory strategies. (The other two directives are the Framework Agreement on Part-Time Work Council Directive 97/81/EC and the Framework Agreement on Fixed-term Work 1999/70/EC.):

To what extent has South Africa adopted a policy framework that seeks to balance the protection of workers' rights without stifling economic growth? The Cheadle Task Team was briefed to prepare South Africa's first set of post-constitutional labour legislation and in its ensuing Explanatory Memorandum it mentioned that the draft Bills sought to "avoid the imposition of rigidities in the labour market" as it aimed to "balance the demands of international competitiveness and the protection of fundamental rights of workers" ("Explanatory Memorandum prepared by the Ministerial Task Team" 1995 *ILJ* 278 285–286).

At more or less the same time an ILO *Country Review Report* swayed influential South African labour law scholars to develop the notion of "regulated flexibility" (Standing, Sender & Weeks *Restructuring the Labour Market: The South African Challenge: An ILO Country Review* (1996)

1–10; Cheadle “Regulated flexibility: Revisiting the LRA and the BCEA” 2006 *ILJ* 663 668 mentions that the “concept of regulated flexibility was developed by Paul Benjamin” based on the *ILO Country Review’s* conception of flexibility.) Regulated flexibility amongst others represents a policy framework which provides for the selective application of legislative standards, depending on the remuneration earned by workers and the size of employers’ undertakings. Two principles underpin the South African brand of balancing flexibility and the protection of workers’ fundamental rights. Firstly, it is recognised that lower earning employees are generally in a more precarious position than higher earning employees, who, through education or experience may have earned a level of security in employability. Secondly, smaller undertakings should not be burdened with obligations that could potentially introduce rigidities and costs which would ultimately inhibit job creation.

The structure of the Basic Conditions of Employment Act 75 of 1997 (BCEA) has until now been the most notable example of the implementation of the regulated flexibility policy (Godfrey & Witten “The BCEA: Statutory, administrative and case law developments” 2008 *ILJ* 2406). Only employees earning below the current threshold amount of R183,006 are entitled to protection in terms of Chapter II of the BCEA which covers aspects like maximum hours of work (45 hours in any week; s 9(1)(a) BCEA) and maximum overtime (10 hours in any week; s 10(1)(b) BCEA). In similar vein, only employees earning below the threshold amount can rely on the rebuttable presumption regarding who is deemed to be an employee (s 83A BCEA; s 200A LRA). In respect of the size of undertakings, the Employment Equity Act 55 of 1998 (EEA) provides that only employers who employ fewer than 50 workers fall within the definition of “designated employer” (s 1 EEA).

It is argued that South African policy makers do take account of the fact that it is not the sole purpose of labour law to provide protection to workers. At least some thought goes into the notion that different categories of workers need different levels of protection and that start-up undertakings should not be burdened by regulations to the same extent as larger undertakings. However, as pointed out by Godfrey and Witten (*op cit* 2408-2409), attempts by policy makers to introduce the policy of regulated flexibility have been tempered by the strong position adopted by trade unions in South Africa. The authors point out that the final 2002 amendments resulted in “some balance being restored to the combination of flexibility and ‘core’ conditions” and turned out to be a “significant victory of labour”.

Added to this, it is clear that South Africa has developed its own brand of balancing flexibility and regulation. As part of an integrated labour law strategy the ILO and the EU also emphasises the improvement of social dialogue between social partners, investment in education and training and the modernisation of social security systems. Yes, in South Africa there has been a dramatic improvement of the level of social security

protection that is being extended to the needy, and yes, investments are being made towards skills development, but it seems that there is ample room for improvement regarding the integration and harmonisation of these strategies into a coherent labour policy framework (Benjamin “Labour law beyond employment” in *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (eds Le Roux & Rycroft) (2012) 21–35 confirms that expenditure on social grants have increased from approximately R30.1 billion in 2001/2002 to R101.4 billion in 2008/2009)).

3 LR Amendment Bill 2012: Protection of Non-standard Workers

3.1 Introduction

Although most of the media attention has focused on those amendments dealing with TESs, the thrust of the amendments is broader in so far as they cover three categories of non-standard employees (see eg Mawson “Labour broking to be regulated, not banned” (9-7-2012) available at <http://bit.ly/171UbaE> (accessed 2013525)). As will be discussed below, apart from employees placed by TESs, fixed-term and part-time employees are also provided with improved protection in terms of the suggested amendments. In the EU agency work was valued as potential “steppingstones” for job applicants to enter the workplace before the Temporary Agency Work Directive was adopted in 2008 (Kok *op cit* 29–30 mentions that temporary agency work was impaired by “legal obstacles” in the EU and they suggested that the “removing of obstacles . . . could significantly support job opportunities and job matching”). The discussion below considers the extent to which the suggested amendments seek to establish a balance between protection and regulation in South Africa and the extent to which the policy of regulated flexibility has influenced this round of proposed amendments.

3.2 TES

The current LRA provides that the TES is the employer in instances where (a) a TES procures the services of an employee; (b) the TES remunerates the employee; and (c) the employee renders services to a client (s 198(2) LRA). Furthermore, the LRA confirms that the TES and the client are jointly and severally liable in respect of obligations established by a collective agreement concluded in a bargaining council, binding arbitration awards that regulate conditions of employment and the provisions of the BCEA (s 198(4) LRA.) Despite the fact that the word “temporary” forms part of the term TES, the LRA in its current format is silent regarding the duration of these triangular relationships. The LRA also does not extend joint liability in respect of unfair dismissal and unfair labour practices between the TES and the client. There is also no obligation on TESs to provide agency workers with equal conditions of service (especially equal pay for similar work) compared to workers who are in the employ of clients doing essentially the same work. This has

resulted in a situation in terms of which agency workers are being exploited. In the *Regulatory Impact Assessment Report*, which preceded the set of amendments it is stated that:

There are also documented cases of large employers employing their entire workforces through TES. Reported case law includes instances of employers 'transferring' their employees to TES, and employees who are unaware that their employer is in fact a TES ... Section 198 can be used by employers to deprive employees of protection against unfair dismissals ... and to apply less favourable terms and conditions of employment

(Benjamin, Borat and Van der Westhuizen "Regulatory impact assessment of selected provisions of the: Labour Relations Amendment Bill, 2010, Employment Equity Amendment Bill, 2010, Employment Service Bill, 2010" available at <http://bit.ly/1au4fpO> (accessed 2013-5-27) 32).

The new section 198A of the LRAB suggests that there will be improved protection afforded to agency employees who earn below the earnings threshold in terms of the BCEA which currently stands at R183,008 per annum. In other words, the same level of protection (some would say lack of protection) applies to all employees earning above the threshold amount. Three categories of protection will be introduced:

- (1) Temporary in nature: The LRAB provides that employees not rendering "temporary services" will be "deemed to be the employee of the client and the client will be deemed to be the employer" (s 198A(3)(b)). Furthermore, "temporary service" is defined to mean work not exceeding a period of six months, work performed as a substitute for an employee of the client who is temporarily absent or work that has been categorised as such by a collective agreement or a sectoral determination (s 198A(1)(a)-(c)).
- (2) Termination to avoid consequences: The LRAB proposes that should a TES terminate the assignment of a worker to a client in order to avoid the operation of the section that deems the worker to be an employee of the client, the termination will be deemed to be a "dismissal" in terms of section 186(1) of the LRA.
- (3) Equal treatment: The LRAB suggests that unless there is a justifiable reason to do so, an employee deemed to be the employee of a client must on the whole be treated "not less favourably than an employee of the client" doing similar work (s 198A(5)).

When analysing the suggested protective measures the following aspects need to be highlighted. It is predicted that the words "deemed to be the employer" will cause uncertainty. Would this mean that the client does not become the actual employer and that the TES remains a party to the contract of employment after the initial six-month period? The provision only "deems" the client to be the employer, but does not stipulate that the client steps into the shoes of the TES in respect of the contract of employment. This is the statutory position in respect of transfers of businesses as going concerns (s 197 LRA). Even though it is clear that the client will bear the responsibilities of an employer, especially in respect of unfair dismissal and unfair labour practices, the suggested provision does not make it clear that the TES will be absolved of responsibilities in

terms of the initial contract of employment. It is suggested that rather than deeming the employee to be the worker of the client, the section should rather have maintained the position that the TES is the employer with the added protection of rendering the TES and the client jointly and severally liable for all employer-related obligations after the initial six-month period. This, with the equal treatment provision, would prevent the interpretational problems that will in all likelihood result from the suggested amendments.

In respect of the second protective measure, it can be foreseen that TESs will probably rely on the provisions of section 189 of the LRA and subject affected employees to dismissal on grounds of operational requirements to prevent the employee from becoming an employee of the client. If the drafters of the amendments had been serious about blocking such terminations it would have been more appropriate to classify them as “automatic unfair” dismissals, which attract the more stern sanction of a maximum of 24 months’ compensation (ss 187(g), 194(3) LRA). This is the way in which dismissals associated with the transfer of businesses as going concerns are currently dealt with (s 187(1)(g)).

Taking a leaf from the EU Temporary Agency Work Directive, it seems like an omission in the amendments in so far as no provision is being made for any guarantees for agency employees regarding the right to be informed of, and the right to apply for, vacant positions at the client. It could also have been useful had the amendments suggested that any agreement which has the effect of preventing agency employees from concluding contracts with a client after an assignment will be declared void (art 6 of the Temporary Agency Work Directive). This principle can be linked to the sentiment that agency work can serve as a potential spring board for job seekers into the labour market.

3 3 Fixed-term Contracts

The current provisions of the LRA provide limited protection to employees engaged in fixed-term contracts. So, for example, there is no protection in respect of the maximum duration of fixed-term contracts, or any obligation to apply the principle of equal pay for equal work performed. The only mentionable protection is in respect of the non-renewal of fixed-term contracts. The LRA presently provides that in instances where an employee “reasonably expected” the renewal, and where the employer does not offer to renew a fixed-term contract (or only offers to renew the contract on less favourable terms), it constitutes dismissal (s 186(1)(b) LRA). From this it follows that once it is determined that it is a dismissal, the employer bears the onus to prove that there was a sound reason for the dismissal and that a fair pre-dismissal procedure had been followed (s 188 LRA). The Labour Appeal Court has interpreted the current section to mean that it does not protect employees who reject reappointment on a fixed-term contract on grounds that they may have expected to be appointed on a permanent basis pursuant to consecutive

fixed-term contracts (*University of Pretoria v Commission for Conciliation, Mediation and Arbitration* 2012 ILJ 183 (LAC)). This, the amendments suggest, should be changed. A new section 186(1)(b)(ii) will read that “dismissal” means that:

- (b) an employee engaged in a fixed-term contract of employment reasonably expected the employer -
- (ii) to retain the employee on an indefinite contract of employment but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.

This is an improvement on the current situation. In practice, and if based on supporting evidence, it is possible that consecutive contracts can play a role in establishing an expectation in respect of the indefinite appointment of an employee rather than merely being offered another fixed-term contract. However, it can be argued that the wording of the suggested inclusion is vague and could be interpreted to have two meanings. The clause can be reduced for ease of reading to say that “an employee ... reasonably expected the employer ... to retain the employee on an indefinite contract of employment but otherwise on the same or similar terms as the fixed term contract, but ... did not offer to retain the employee”. The first interpretation is the one that the drafters are aiming at, namely, to cover a situation where the previously fixed-term employee is not offered an indefinite contract. However, the clause does not say as much. It only says “but ... did not offer to retain the employee”. This leaves room for a second interpretation, namely, that the employer did not offer a further fixed-term contract on the same or better terms. This problem could have been solved by adding towards the end the provision “but ... did not offer to retain the employee on an indefinite contract”.

Apart from the abovementioned protection offered to fixed-term employees, a new section 198B introduces significant additional protection for employees who earn below the current earnings threshold of R183,008. A “fixed term contract” of employment is defined to mean a contract that terminates on “the occurrence of a specified event”, “the completion of a specified task” or “a fixed date other than an employee’s normal or agreed retirement age” (s 198B(1)(a)-(c)). Fixed-term employees will be protected in a number of key ways:

- (1) Maximum duration: The LRAB suggests that, unless it can be justified, an employer may only engage an employee on a fixed-term contract (or successive fixed-term contracts) for a maximum duration of six months (s 198B(3)). An extensive list of justifications has been enumerated to which I shall return later. Should an employer without justification engage an employee on one or more fixed-term contracts for a longer duration than the mentioned six-month period, the contract of employment is “deemed to be of an indefinite duration” (s 198B(5)).
- (2) Written offer: The amendments propose that an offer to employ an employee on a fixed term, or an offer to extend a fixed term, must be

in writing and it must state the reason justifying the fixed-term appointment (s 198B(6)(a)-(b)).

- (3) Equal treatment: The LRAB puts forward that a fixed-term employee employed for longer than six months must be treated “on the whole not less favourably” than indefinitely employed workers performing similar work, unless there is justification for dissimilar treatment (s 198B(8)).
- (4) Application for vacancies: An employer must provide fixed-term employees with the same opportunities to apply for vacancies as it applies to employees employed on an indefinite basis (s 198B(9)).
- (5) Severance pay: Employees engaged for justifiable reasons for a longer duration than 24 months must be paid one week’s remuneration for each completed year in accordance with the provisions of the BCEA (s 198B(10)).

Of significance for purposes of this discussion are the exclusions to the mentioned protection and the justifications. It is clear that the drafters were mindful of the fact that start-up and smaller enterprises may find it difficult to comply with the amendments’ additional protection for part-time employees. In what can be classified as one of the most significant expressions of the policy of regulated flexibility, the amendments suggest that the protective measures do not apply to employers employing less than 10 employees, or employers whose business has been in operation for less than two years and that employ less than 50 workers. This exception does not apply in respect of employers with less than 50 workers who conduct more than one business or if the business was formed by the division of a business (s 198B(2)(a)-(b)).

Also of importance is the fact that the reasons which have been included in the amendments, which could justify the appointment of fixed-term employees beyond six months, are ample and cast in wide terms. The reasons include replacing an employee who is temporarily absent; being a recent graduate or student who is being employed for training; is engaged exclusively to work on a “genuine and specified project”; being engaged in seasonal work; employees who have reached the normal or agreed retirement age; and employees who have been engaged for a trial period of less than six months for the purpose of determining whether the employee is suitable for employment (s 198B(4)).

Two aspects need to be highlighted – the first is positive and the second raises a concern. The drafters have adopted a constructive approach by limiting the use of fixed-term contracts to six months in situations where there is no justification for not employing such workers in terms of an indefinite contract. Furthermore, rather than merely providing that it must be justified, specific reasons have been provided which could have the result of limiting the need to litigate in order to establish the boundaries of justifiable reasons. In addition, the list of reasons which could justify longer fixed-term contracts is not closed. The door is still open to “demonstrate any other justifiable reason” of fixing a longer term for a contract of employment (s 198B(3)(b)). An aspect that

is worrying though is that one of the reasons being mooted as being justifiable is to appoint an employee on a fixed-term contract rather than following the route of placing an employee on probation. Although this will provide employers with flexibility in the form of an escape clause in respect of newly appointed employees, it may have the consequence of undermining the established guidelines contained in the Code of Good Practice: Dismissal, which deal with probation and dismissal on grounds of poor work performance (Its 8, 9 Sch 8 LRA).

3 4 Part-time Workers

The LRA presently provides no specific protection to part-time employees. The amendments suggest a definition for both a “part-time” and “comparable full-time” employee. A part-time employee means an employee who is paid by reference “to the time that the employee works and who works less hours than a comparable full-time employee”. A “comparable full-time employee” is defined as an employee who is “remunerated wholly or partly by reference to time that the employee works” and who “in terms of custom and practice” of the employer is identifiable as a full-time employee (s 198C(1)(a)-(b)).

The limitations and protections in respect of part-time and fixed-term employees correspond in a number of respects but there are also a number of differences. The protective measures for part-time employees do not protect employees who earn in excess of the threshold amount and employers with less than 10 employees, and start-up employers with less than 50 workers are excluded (s 198C(2)(a)-(b)). Apart from these exclusions, the provisions also do not apply to employees who ordinarily work for an employer less than 24 hours a month and during an employee’s first six months of employment (s 198C(2)(c)-(d)).

The main protective measures are that part-time employees who earn below the threshold (a) are entitled to be treated on the whole not less favourably than comparable full-time employees doing similar work unless there is a justifiable reason for different treatment; (b) such workers should be provided access to skills development and training; and (c) they should receive the same access to opportunities to apply for vacancies as full-time employees (s 198C(3)-(4)).

The main concern lies within the definition of part-time and comparable full-time employee. The definition states that a “comparable full-time employee” is one who is “remunerated wholly or partly by reference to time that the employee works” and a “part-time employee” is a person who is paid by reference “to the time” that the employee works. Does this mean that it only applies to persons who are being paid on an hourly basis or does it also refer to persons who are being remunerated on a monthly basis? One could arguably have a half-day and full-day secretary at the same workplace who are being remunerated on a monthly basis and not necessarily for the “time the employee works”. Yes, such employees will generally agree to five or six working

days a week, and there will be agreement on whether they either work between 08:00 and 17:00, or between 08:00 and 13:00. However, such employees are paid their agreed upon salary at the end of each month irrespective of the fact that February and March generally do not have the same number of working days. Does this mean that they do not fall under the mentioned definitions as they are not remunerated specifically by reference “to the time” that they work? It is suggested that this problem could have been avoided by omitting the words “time the employee works” from both definitions.

4 Concluding Remarks

At more or less the same time when the flexicurity approach was adopted in the EU, the South African Government briefed Halton Cheadle in 2006 to consider the conceptual underpinnings of the local policy of regulated flexibility as it was applied to the post-constitutional labour laws introduced in the mid-1990s. In a sobering report, Cheadle points out that despite the adoption of the policy of regulated flexibility, the phased and urgent nature of the reforms after the first democratic elections resulted in piecemeal negotiations about specific statutes and it prevented the formation of a logical integrated set of labour laws (“Regulated flexibility” *op cit* 663). This sentiment is echoed by Benjamin, who in 2012 stated that the problems of unemployment and appropriate regulation “would best be dealt with in a broad framework covering the range of labour market regulation. Unless this can be achieved, the terms of the debate will remain too narrow” (“Labour law beyond employment” *op cit* 40).

It is clear that the drafters of the amendments under discussion were mindful of the overarching policy of regulated flexibility and that they did not merely introduce new obligations on employers without taking account of the fact that it may impact negatively on especially smaller employers and lower earning employees to implement additional obligations on employers. Furthermore, it is clear that some flexibility remains in place for employers, in so far as all of the added protective measures only become effective after six months after the employment of non-standard employees.

South Africa can gain direction from both the “decent work” and “flexicurity” policy approaches adopted by the ILO and the EU respectively. In both instances their policies seek to balance the protection of employees’ rights with aspects like investment in training and social security measures and the promotion of social dialogue. The purpose of labour law should be extended beyond the mere fortification of employees’ rights. This field of study should be alert to aspects that may discourage (and encourage) job creation and which integrates skills development and social security protection into a nuanced and harmonised labour market policy. As pointed out, although the suggested amendments are not perfect in all respects, they were definitely influenced by the principles of regulated flexibility which seek to strike a

balance between providing protection to employees and balancing this with some flexibility for employers. At the very least, it is a positive development that the TES industry was not prohibited and that the imposition of enhanced protection for fixed-term and part-time employees were not extended to small employers and start-up businesses.

B P S VAN ECK
University of Pretoria