

**CREATING A NEW ‘UNDERCLASS’:  
LABOUR FLEXIBILITY AND THE TEMPORARY  
EMPLOYMENT SERVICES INDUSTRY**

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# ABSTRACT

The core of the research focuses on the Temporary Employment Services (TES) Industry and its ability to provide labour flexibility for a number of client firms. The underlying notion that work is changing and becoming more flexible creates an exploratory realm for the concept of non-standard employment. The thesis draws on the conceptual model of the „flexible firm’ and argues that the rise in non-standard forms of employment, particularly temporary employment within the TES industry, is primarily a result of the demand for labour flexibility. The TES industry that offers „labour on demand’ is found to be an extremely secretive industry that is diverse in both its structure and services. The thesis reveals that the clients within the triangular employment relationship (TER) are reaping the most benefits especially with regard to escaping their obligations as the employer. The thesis explores human resource practices, unfair labour practices and the extensive loopholes exploited by the TES industry because of poor regulation. Consequently, the industry creates an „underclass’ that is unprotected, insecure and easily exploitable. Qualitative research techniques were used in the form of semi-structured interviews. The thesis provides insights into the demand and supply of temporary workers in Port Elizabeth and addresses the problems associated with a TER and the TES industry as a whole.

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# LIST OF ACRONYMS

ANC	African National Congress
APSO	Association of Personnel Services Organisations
ASGISA	Accelerated and Shared Growth Initiative - South Africa
BCEA	Basic Conditions of Employment Act 75 of 1997
BEE	Black Economic Empowerment
CAPES	Confederation of Associations in the Private Employment Sector
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Injuries and Diseases Act
COSATU	Congress of South African Trade Unions
EEA	Employment Equity Act 55 of 1998
GEAR	Growth Employment and Redistribution
HR	Human Resources
ILO	International Labour Organisation
LFS	Large Firms Survey
LRA	Labour Relations Act 66 of 1995
MIBC	Motor Industry Bargaining Council
NEDLAC	National Economic Development and Labour Council
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of the Petroleum Exporting Countries
PAYE	Pay As You Earn
PE	Port Elizabeth
RDP	Reconstruction and Development Programme
SAEFS	South African Enterprise Flexibility Survey
SARS	South African Revenue Service
SDA	Skills Development Act
SER	Standard Employment Relationship
SETA	Skills and Education Training Authority
SSETA	Services Skills and Education Training Authority
TER	Triangular Employment Relationship
TES	Temporary Employment Services
UIF	Unemployment Insurance Fund

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# 1

## INTRODUCTION

The notion that work is changing and progressively moving towards greater „flexibility’ is not new. The concept is pervasive in the literature and has become more pronounced in recent years. Firms’ use of flexible production techniques to improve efficiency and save costs has been in the forefront of managerial thinking. There are various forms of flexibility. However, the focus of this research is on labour flexibility. „Labour flexibility’ is now a commonly used term among business owners, academics, government and society at large. It refers to the ability of an organisation to adjust (by increasing or decreasing) its workforce according to the market demand for its specific product.

The rise in flexible employment practices is largely governed by market conditions, competitive pressures and the economic environment. Firms have actively pursued flexibility in order to remain competitive and to be as cost effective as possible. There has also been a related rise in non-standard employment, which sparks concerns about employment security as well as employment protection within the ambits of the law. This is a broad term that consists of a variety of forms of work that include temporary employment, part-time employment, and casual employment. These forms of work are largely insecure and are often unprotected. The concept of „labour flexibility’ and the rise in non-standard employment are interconnected and mutually dependent. The decision to focus on this specific form of flexibility stems from the fact, that it has produced the most challenging consequences for the temporary workforce. These consequences include job insecurity and a lack of benefits and trade union support.

A non-standard workforce is utilised in order for firms to implement labour flexibility. The implementation of labour flexibility has aided the growth in temporary employment and the Temporary Employment Services (TES) industry. The use of temporary employment is not new. However, the increase in the usage of TES agencies to provide a temporary workforce while circumventing the associated obligations of an employer is new. Firms have chosen to



use intermediaries not only to implement labour flexibility, but also to place the responsibilities of an „employer’ on a third party. The intermediaries have been termed labour brokers or TESs. Within this thesis, „TES agencies’ will be used to refer to temporary employment agencies. These agencies provide a service to employers by providing quick and easily accessible temporary labour on demand. The TES industry is a rather tarnished industry because of its reputation for exploiting the temporary workforce and its general lack of regulation. The TES industry is also a secretive industry since little is known of its workplace practices, particularly in South Africa.

The major concern of this research is that the TES industry creates a new „underclass’ of workers that are exploited and that lack trade union support and job security. These workers are not afforded the same protective measures as permanent employees, even though they often work under the same conditions as their permanent counterparts. The problem with the lack of protection for these workers originates from the labour legislation that does not effectively regulate the TES industry and the absence of a body to monitor its activities. A further inherent problem with regard to the TES industry and the very reason why firms utilise its services, is the lack of regulation. Firms turn to the TES industry because they do not want to deal with the obligations of being the employer. The law in fact deems the agency to be the employer, not the firm (or client) that uses the temporary labour. Therefore, if the TES industry was heavily regulated, there is possibility that firms utilising temporary labour purely on a cost basis would have a declining interest in its services. This raises the issues of self-regulation and the extent of regulation that should be placed on the TES industry.

The objective of the thesis is to demonstrate that due to the demand for labour flexibility and the poor regulation of the TES industry, a new „underclass’ of workers is present within the TES industry that are vulnerable to exploitation. The thesis addresses five underlining goals. Firstly, the demand for temporary labour is ever-present. The reasons for this demand are examined with a particular focus on labour flexibility. Secondly, the supply of temporary labour via the TES industry is examined in order to address the quality of services that the TES industry provides. The third goal is closely tied to the second: the research investigates the agencies’ employment practices in order to uncover any unfair labour practices or unethical treatment of their temporary workers. Fourth, the employment conditions and the issues that are pertinent to temporary workers, including job insecurity and discrimination, which contribute to the use of the term „underclass’, are examined. Lastly, labour legislation

and the regulation of the TES industry are analysed in order to prescribe a solution to the poor regulation of the industry.

Chapter 2 commences by providing an overview of the literature that relates to the increase in non-standard forms of employment. The chapter describes the historic trend of the changing nature of work and addresses specific inter-connected themes of flexibility, temporary employment, the TES industry, and the legislation that governs non-standard employment and the TES industry. Each theme is incorporated to understand the full impact of the prevalence of non-standard employment and the TES industry within South Africa.

Chapter 3 outlines the methodology and the research design that was used within the research. The chapter provides insight into the research site and the main objectives of the research. The qualitative research that was undertaken consisted of in-depth interviews providing immense detail and information regarding the practices of the agencies within the TES industry. The chapter examines the numerous issues that researchers face and describes the research experience of the researcher. This includes barriers to the research site and the ethics involved. The various respondents that participated are also listed.

Chapter 4 focuses on the demand for labour flexibility in Port Elizabeth, and it addresses why firms are utilising temporary employment via the TES industry. The „flexible firm’ is used as a theoretical underpinning for the discussion. The chapter examines the advantages and disadvantages of labour flexibility. It also discusses the relationship between firms and TES agencies and explores the reasons why firms are choosing to utilise the services of TES agencies.

Chapter 5 discusses the employment practices of agencies within the TES industry. It also evaluates the inherent problems with the TER and the dynamics associated with three parties that are involved. The three parties consist of the agency, the client firm and the worker. The chapter further discusses the human resource (HR) practices of TES agencies. The aim of this chapter is to present information on TES agencies in order to create a deeper understanding of their day-to-day functions and operations. The manners in which these agencies attract their clients and workers, and how the interaction with their workers creates an underclass are some of the issues that are discussed.

Chapter 6 discusses the employment conditions of temporary employees who work within the TES industry. A central focus is on the contracts that are offered to the temporary employees. Issues that were raised in Chapter 1, such as job insecurity, discrimination and the concept of „permanent temporary workers’ are addressed. The dynamics between permanent and temporary workers are also examined. The consequences of working within the TES industry are discussed in an attempt to highlight the reasons why an underclass of workers is being created.

Chapter 7 addresses the poor regulation of the TES industry. The chapter unpacks the legislation governing the industry and it examines the current institutions regulating the industry. This includes bargaining councils, the Department of Labour and the Association of Personnel Services Organisations (APSO). The impact of trade unions and their endeavour to ban the industry is also evaluated. The chapter further reveals the extensive loopholes and illegal activity within the TES industry, and examines the need for reform and more extensive regulation.

Chapter 8 concludes by reaffirming the main findings of the research and poses areas for further research.

# 2

## THE CHANGING NATURE OF WORK AND THE GROWTH OF NON-STANDARD EMPLOYMENT

### 2.1 INTRODUCTION

Employment and conditions of employment continually change. Employees in a “standard employment relationship” – i.e. an open-ended relationship of indefinite duration – are increasingly under threat. With the rise of mass production, employees were bound to the enterprise through the development of internal labour markets, which led to greater job security, favourable career prospects, and increasing rewards for seniority. The utility, efficiency and adaptability of this employment pattern are increasingly questioned. The regulatory functions of the institutions associated with permanent, full-time employment have come under considerable strain with the deepening of the crisis of Fordism and the proliferation of employment forms that depart from the standard employment relationship (SER). Szabó and Negyesi (2005:63) argue that the era of stable career paths is ending because there is a growing variability, changeability and uncertainty in employment. The labour market is increasingly shaped by rising competition in international markets as well as rapid technological growth that has changed the nature and organisation of work (Chirumbolo and Hellgren, 2003; Polanyi and Tompa, 2004). Globalisation and increased competition have stimulated changes in organisations such as increased privatisation, mergers, restructuring, the flexible organisation of work, outsourcing and downsizing in an attempt to reduce costs, improve efficiency and to remain competitive (Chirumbolo and Hellgren, 2003; Colclough and Tolbert, 1992). This led to organisations embracing a continuous restructuring in order to increase organisational flexibility (Chirumbolo and Hellgren, 2003:218).

Firms have to respond to the economic environment, and are forced to change their workforce accordingly. In fact, due to high unemployment, mass dismissals and the rise in temporary and part-time work, there is a view that long-term, full-time employment belongs in the past (Neumark, cited in Auer and Cazes, 2003:2). Even though there is a perception

that there is a growing changeability of employment, especially in developed countries, according to the International Labour Organisation (ILO), a large proportion of the workforce still remains in stable and secure employment. There is, nonetheless, a vast amount of workers in non-permanent jobs, which are referred to as non-standard forms of employment. It is the purpose of this research to focus on the segment of the South African labour market that is employed in non-standard jobs, which is largely insecure and unstable.

Since the 1980s, firms showed a strong tendency to incorporate a post-Fordist perspective by utilising flexible production techniques (Dex and McCulloch, 1997; Hyslop, 1994; Storey, 1997; Webster *et al*, 2003). There are several forms of flexibility. Yet, the area of focus of this research is on labour flexibility. This is because labour flexibility is a prominent and controversial method adopted by firms where their ability to alter their workforce directly affects the job security of employees. As Barker (2007:127) notes, labour flexibility refers to “the extent to which an enterprise can alter various aspects of its work and workforce to meet the demands of the business, for example the size of the workforce, the content of jobs, working time, etc.”

In order for firms to be both flexible and competitive, they integrated non-standard or atypical employment to meet the demands of their business (Belous, 1989; Bezuidenhout *et al*, 2004). To create a flexible workforce, firms have incorporated workers in a temporary capacity by (among others) utilising the services of labour brokers, which the law refers to as Temporary Employment Services (TES) (Benjamin and Theron, 2007:22). There are a number of reasons why firms choose to incorporate non-standard employment. In South Africa, it is argued, many firms choose to utilise non-standard employment and TES agencies in order to avoid labour regulations and the related obligations that are associated with the SER. In South Africa, it must be noted that not all firms are following a flexible approach to their labour and the standard employment relationship (SER) is well regulated and protected. There is both a strengthening of labour protection (particularly within the SER) as well as a growing trend of flexibilisation involving non-standard forms of employment. A flexible trend may be occurring in South Africa due to the need to compete in the global economy, which creates pressure to decrease costs and to deregulate (Makino, 2008:2).

The rising trend for firms to incorporate non-standard forms of employment (for example temporary labour) to avoid or dilute regulation is facilitated by the TES industry.<sup>1</sup> In South Africa, there is modest regulation of the TES industry, which poses many questions regarding the practices of the parties involved, the strategic intentions of firms, as well as limits in the protection of temporary workers. The focus of this chapter is on the demand for temporary labour (firms implementing labour flexibility), the supply of temporary labour (the role of the TES industry), the conditions of employment related to temporary employment, and the legislation and regulation that govern the TES industry.

Firstly, the chapter commences with a brief account of how and why work has changed. Definitions of non-standard employment and the TES industry are provided as well as estimates of its growth. Secondly, labour flexibility is discussed, specifically in terms of the „flexible firm’ model. South Africa, in particular, is contextualised in order to understand the historic roots of labour flexibility, the present state of the economy and its impact on the labour workforce as well as why managers choose to incorporate labour flexibility within their organisational strategies. Thirdly, the focus then turns to the various problems and benefits associated with temporary employment. The TES industry is discussed, specifically concerning the inherent problems within a TER. Labour regulation of non-standard workers and the regulation of the TES industry are examined to establish what measures are in place to protect temporary workers and to monitor the practices of TES agencies. These themes are explored in order to understand how the nature of work is changing in South Africa.

## **2.2 THE CHANGING NATURE OF WORK**

### **2.2.1 Historical Employment Patterns and Influences**

There is a growing consensus that from the 1980s onwards there was a qualitative change in the nature of work, which was largely a response to global economic changes (Theron, 2003:1247). This resulted in an increase in non-standard forms of employment with the specific trigger being the 1973 Organization of the Petroleum Exporting Countries (OPEC) oil crisis (Theron, 2005:293). Other influences that have contributed to the changing nature of

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<sup>1</sup> See: Bezuidenhout *et al* (2004); Kenny and Webster (1999); and Theron *et al* (2005).

work include legislation, ideology and social organisation (Theron, 2003:1247). It is important to note that the organisation of work over time is characterised by change *and* continuity (Hyman, 1991:260). Hyman (1991:261) argues that any turning point in production and work (specifically in reference to the 1980s) should be attributed to a number of influences – i.e. “a coincidence of elements” – since no element will operate in isolation. The transformation of work is the outcome of a variety of factors and transitions (Hyman, 1991:261).

In the past, forms of employment have varied between flexible and rigid (controlled and structured) forms of work. The term ‘flexibility’ refers to a number of processes. ‘Flexibility’ refers to “labour market and labour process restructuring, to increased versatility in design and the greater adaptability of new technology in production” (Smith, 1991:139). Flexible labour was a characteristic of industrial expansion that included migratory labour, labour circulation, putting-out systems, sub-contracting and other forms of casual work (Standing, 1999:50). Today, employers seek “flexibility in human resources they employ, including numerical control of staffing, the deployment of staff, their payment and utilisation” (Farnham and Horton, 2000:3). Essentially, if employers incorporate flexible forms of labour or techniques, the firm responds to demand more effectively, and they save on labour costs.

Employment that is highly regulated is regarded as ‘rigid’. This refers to employment that is structured and controlled by a set of rules or regulations and extensively protected by the law. Labour law and employment contracts differentiate between different forms of employment. In each country, there is a separate set of regulations, which often vary between rigid laws and flexible laws. Hyman (1991: 261) states that it is necessary to take into account the significance of both flux and stability and the interrelationship between the two. It is not a matter of whether forms of employment are flexible or rigid, as they never appear in isolation, yet it is necessary to address the degree of flexibility or rigidity. “The idea of absolute flexibility is an impossibility, an absurdity: explicitly or implicitly, the debate is rather about the level and distribution or regularity and variability” (Hyman, 1991:281). It is therefore important to take into consideration the factors that have contributed to the different levels of rigidity.

Flexibility is not a modern concept and its origins can be traced back in time. One of the oldest forms of labour was slavery, which was associated with a highly flexible system of

production where slave-owners could replace tired, old or injured slaves (Standing, 1999:49). The slave mode became increasingly rigid, especially when there was a shortage of slaves (Standing, 1999:49). Feudalism evolved through a flexible „free phase’ where peasants provided labour and worked the land in exchange for protection from landlords, but the system became rigid and economic surplus was increasingly extracted through rent and taxes (Standing, 1999:50). Rigidity usually comes to the fore through government institutions and regulations in order to control flexible systems of production.

One of the most significant influences on the nature of work, originating in the automobile industry, was the rise of „Fordism’. This refers to a system of mass production of standardised parts in large volumes and the utilisation of unskilled labour (Tolliday and Zeitlin, 1992:1). It was named after Henry Ford, who was a car manufacturer and who created the moving assembly line. Ford’s system was closely linked to Taylor’s scientific management by using “mass production tied to the cultivation of mass markets” (Giddens, 2001:383). Large profits were made. However, there was a need for the social protection of workers. During the nineteenth century, trade unions and political organisations created a greater demand for protective measures, safe working conditions, and limits of working time and minimum wages for workers (Standing, 1999:50). Polanyi adds that when the market expanded, the state responded by “ushering in a period of protective regulation to moderate the resultant tensions by offering social progress and security for the working class” (cited in Standing, 1999:50). Paternalistic employers were also interested in providing security and benefits for workers because they believed it would increase productivity and morale as well as enhance and intensify the skill content of labour (Standing, 1999:50). After the Second World War, “the rights of the labouring man [sic] was legitimised more than ever” (Standing, 1999:50).

Since 1945, developed countries have undergone a boom with 25 years of sustained economic growth and high levels of employment. However, momentum was lost in the 1970s. Instability increased due to „shocks’ such as the oil crises and the deregulation of financial markets (Hyman, cited in Tailby, 2003:491). A major influence in terms of transforming the nature of work has been the introduction of new technologies. A massive technological revolution spread around the world since the 1970s and primarily consisted of automation, information technology and robotics (Standing, 1999:76). Technology influenced management by allowing for alternative forms of work organisation, communication and



greater cost control (Standing, 1999:77). In Japan, there was rapid economic growth in the 1960s and 1970s and Japanese manufacturing plants drew Western interest in „lean production’ as well as „just-in-time’ inventory control systems (Tailby, 2003:492). The Japanese management techniques influenced the West with regard to the application of new production technologies (Tailby, 2003:492). This particular era is also referred to as the post-Fordist era, where work is organised according to the principles of flexible specialization. Jobs are more specialised and technology more advanced to make manufacturing more flexible. Today, many large manufacturers implement flexible production techniques to increase productivity. A key characteristic of post-Fordism is a growing polarization between skilled and unskilled workers. Instead of a large semi-skilled workforce, there is increased marginalization and insecurity of peripheral workers, flexible forms of industrial organization and product innovation (Jessop, cited in Klerck, 2001:426).

According to Valodia (2000:3), one of the most “important developments in the global economy since the 1970s has been the growth in atypical forms of employment ... in both the developed and developing worlds”. Other important changes that occurred in the 1970s and 1980s were the growing recognition of women as workers (Standing, 1999:81). The growth of non-standard forms of employment and their gender implications will be discussed shortly. Another prominent change in the global working environment has been the growth of multinational corporations. The globalisation of multinational corporations is associated with a trend to refine control mechanisms and to develop specific financial controls (Hyman, cited in Tailby, 2003:491). According to Hyman (1991:262), managers were empowered to experiment and “take new initiatives in industrial relations” in order to meet their financial targets. The tendency to cut costs through reshaping or minimising their workforce has become a common trend. Firms that are struggling cannot afford to pay their employees and often have to retrench their workers. This is clearly evident within the motor industry at the moment where thousands of employees around the world have lost their jobs.

The transformation of work is a result of new technologies that have been developed for new product market strategies, which require a more highly skilled, versatile workforce in order to succeed (Tailby, 2003:492). According to Klerck (2001:413), the emerging new age has been described as an information age as well as a post-industrial or post-modern age. This new age can be viewed either as a “refinement and modification of old trends” or as a drastic and radical break from the past (Klerck, 2001:413). Due to the constant upgrading of technology,

people are given more options in terms of employment choices as well as choosing where and when they prefer to work. Today, there are fewer employees that are employed by a firm for life (Szabó and Negyesi, 2005:72). The „dedicated worker’ who has a „psychological contract’ with the firm to stay for life is diminishing as workers are constantly seeking greater incentives and higher salaries to improve their standards of living. According to Forrier and Sels (2003:642), “the trend towards temporary employment is consistent with the emergence of boundaryless careers stemming from an increasingly diverse workforce that includes a growing demand for career flexibility”. Employees have gradually empowered themselves and employees have flexible working arrangements tailored to suit their needs. Many highly skilled employees are flexible in terms of when they want to work and who they want to work for because their skills are in high demand. Some workers choose this form of employment and are paid well for it (McKeown, 2005:276). Conversely, many workers without a permanent job are forced into non-standard employment arrangements, particularly in a country that experiences high unemployment. There are only an elite few who can „tailor their jobs to suit their needs’. This portion of the workforce will not be the focus of this research. These employees are also not a concern for unions because it is the lower skilled workers who are at a greater risk of being exploited.

It is interesting to note that in the past, “every period of economic reconstruction, associated with major technological change and the renewed pursuit of flexibility, has eventually induced a counter-movement to provide new systems of social protection compatible with the new structures and processes” (Standing, 1999:50). Trends in employment over time appear to shift and change from rigidity to flexibility and back again. It cannot be argued that one form of employment is ideal and that it can function on its own. For if one form supersedes the other, there is an inevitable progression for the latter to be incorporated. It is evident that the environment creates a necessity for both rigid practices and flexible practices, and that both patterns do in fact co-exist. There is both a need for workers to be protected and for firms to be flexible enough to compete in various markets. It is in the interests of workers, trade unions and political organisations for work to be more rigid, as there is greater protection of workers’ rights. Business and governments support flexibility where the driving force is to increase economic growth and profits. The susceptibility of certain forms of work to be more flexible or rigid is dictated by a particular environment. Once an environment changes, patterns of work will tend to alter to meet the needs of that environment.

Today, it is apparent that work is becoming more flexible. However, in South Africa in particular, there are both rigid and flexible forms of work within the labour market. Firms that are specifically implementing labour flexibility are not using the highly skilled worker who can choose when and where to work; they are utilising unskilled or semi-skilled workers. The more vulnerable, less-educated worker is exploited and used as a temporary employee.

### **2.2.2 The Growth of Non-standard Employment and the Globalisation of the Temporary Employment Services Industry**

Firms are incorporating non-standard forms of employment in order to be flexible and competitive within their market (Belous, 1989; Bezuidenhout *et al*, 2004). To understand the term „non-standard’ employment, it is necessary to identify the differences between standard and non-standard forms of employment. The SER is equivalent to what is considered a permanent job (Theron, 2005:296). There are three characteristics that differentiate the SER from non-standard forms of employment: firstly, employment is full-time where an employee has one employer; secondly, the employee works on the premises of the employer, and thirdly; employment is ongoing yet indeterminate which indicates that there is a contract of employment (Theron, 2005:296). Non-standard employment is regarded as significantly inferior to standard employment because of the lack of protection and security that is offered (Makino, 2008:2). „Non-standard employment’ is a broad concept that refers to employment that departs in one or more aspect from the SER (Bezuidenhout *et al*, 2004; Kalleberg, 2000; Klerck, 2004; Vosko *et al*, 2003).

Non-standard employment includes a variety of terms of work such as temporary, part-time, contingent work, self-employed independent contractors, casualisation, outsourcing, externalisation and subcontracting.<sup>2</sup> These concepts relate to a continuous trend in employment relations whereby workers provide their skills, expertise or labour to another firm or person on a contractual basis for a limited period of time. One of the main features of non-standard employment is the “absence of stability in the employment relationship” (Vosko, 1997:47). Non-standard forms of employment are therefore “more easily defined by

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<sup>2</sup> See: Bezuidenhout *et al* (2004); Felstead and Jewson (1999); Fischer *et al* (2005); Mangan (2000); Rogers (2000); and Tailby (2003).

what they are not than by what they are” (Vosko, 1997:47). Even though non-standard forms of employment are not regarded as „new’, there is a greater awareness of the growth of these forms of employment. A major concern of this research is that “many of the workers in these forms of employment have fallen outside, or have been covered only partially, by the formal regulations surrounding labour markets including statutory employment protection rights” (Tailby, 2003:506). As Theron (2005:299) argues, temporary work is not a new form of employment, yet, the large-scale utilisation of workers on short-term contracts to avoid a SER is comparatively new. One of the most noteworthy statements regarding non-standard employment is that it relates to employment that may be terminated with minimal costs to the employer, which includes employees who have fixed-term contracts or work for an agency (NUEWO Project, 2003:4).

Non-standard employment has increased significantly over the years and has become an integral part of the labour market (Laird and Williams, 1996; Mattusik and Hill, 1998). According to Rogers (2000:3), workers of all sorts have experienced “downsizing, right-sizing and re-engineering, which may have led them to non-traditional work arrangements”. There has also been a phenomenal and global growth of the TES industry, which relies on a non-standard workforce to stay afloat.<sup>3</sup> The TES industry refers to temporary employment agencies and their relationship with workers and clients, and how they function and operate within the labour market. Non-standard work as well as the TES industry is increasing over the world, especially in the United Kingdom, Japan, Canada, Mexico, the United States of America, Europe and is evident even in South Africa (Allen, 2002; Bentolila and Dolado, 1993; Peck *et al*, 2005). The TES industry, also referred to as the temporary staffing business is a “globalizing industry”, with firms in more than sixty countries (Peck *et al*, 2005:3).

The growth of the TES industry started to escalate from the 1970s and dramatically increased in the 1990s in order to “liberalize labour market regulation and to foster „flexible’ employment practices” (Peck *et al*, 2005:3). The TES industry is known for placing low-paid temporary employees in a client’s workplace for a fee (Peck *et al*, 2005:3-4). According to Peck *et al* (2005:4), the TES industry resembles a „Fordist’ pattern of international growth due to its mass-production that is based on “standardised products, top-line growth and scale economies”.

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<sup>3</sup> See: Morris and Vekker (2001); Peck *et al* (2005); Segal and Sullivan (1997); and Von Hippel *et al* (1997).

In the United States, for instance, 90 per cent of the country's firms use temporary staffing services where temporary workers earn considerably less money than permanent workers and are less likely to receive health or pension benefits (Allen, 2002; Boyce *et al*, 2007). Rogers (2000:3) argues that "the trend toward expanding [the] usage of temporary workers shows no sign of reversing or even slowing". The popularity of utilising the services of a TES agency has increased. In the mid-1980s, there were approximately 100 TES agencies in the United States. Today, however, there are more than 15 000 that 'hire' the services of more than 11 million individuals each year (Berchem, cited in Boyce *et al*, 2007:6). Temporary employment has also grown across the European Union as a whole since the mid-1980s (Tailby, 2003:519).

The extent to which the TES industry has increased can be seen from the growth since 1986 of conglomerates such as Adcorp, Logical Options and Capital Contracting (Theron *et al*, 2005b:32). The industry as a whole is growing due to increasing levels of economic uncertainty and risk as well as the increase in costs that are associated with the SER (Klerck, 2009:86-88). Peck and Theodore (1998:656) claim that the rapid increase of temporary employment plays a role in "reshaping norms of regulation in the labour market". The TES industry is part of a trend of deregulating the labour market and is "both a product of, and an active participant in, the restructuring process" (Klerck, 2009:88). It is essential to investigate the TES industry because it plays such a vital role in restructuring the labour market.

It is difficult to measure the extent of the growth of non-standard employment, especially within South Africa (Bezuidenhout *et al*, 2004:27). However, the fact that there is "increased attention from commentators and trade unions in recent years" suggests that it is on the rise (Fenwick *et al*, 2007:20). There is evidence to suggest that firms are employing more temporary employees. According to an ILO survey, temporary labour is widespread, and 82.5 per cent of enterprises in South Africa employed temporary labour by 1996 (cited in Barker, 2007:132). In South Africa, TES agencies were introduced "in response to an international trend" towards flexible labour markets and were established in the 1970s and 1980s (Theron *et al*, 2005a:4). By 2002, there were at least 1 646 temporary employment agencies recorded by Services Skills Education and Training Authority (SSETA) alone (Theron, 2003:1265).

The Large Firms Survey (LFS) <sup>4</sup> conducted in 1999 among 2 000 firms, indicated that the majority of the firms were subcontracting certain activities, with the most popular activities being transport, training and general services (Bhorat *et al*, 2002:31). The study found that subcontracting varies from 62 per cent in „small’ firms (50-99 employees) to almost 90 per cent in „large’ firms (200 employees and above). About 45 per cent of firms listed production as one of the activities outsourced and mostly explain their action by the fact that it “gives „flexibility to respond to surges in the workload’ and that it „responds to temporary need for specific skills”” (Bhorat *et al*, 2002:31).

Non-standard employment is on the increase in South Africa because of three interrelated processes: informalisation, casualisation and externalisation (Bezuidenhout *et al*, 2004; Fenwick *et al*, 2007). Informalisation refers to the process by which employment is “increasingly unregulated, in part or altogether” (Bezuidenhout *et al*, 2004:5). Many workers turn to informal employment to make a living but are not regarded as „employees’ in the eyes of the law. Casualisation is a closely associated term that refers to the process whereby “standard employment is being displaced by employment that is temporary or part-time” (Bezuidenhout *et al*, 2004:5). Employees who are regarded as casuals often work less than 24 hours a month and are the most vulnerable to exploitation. Externalisation is the focus of this research. It refers to employment where labour is provided through an intermediary such as a TES agency (Theron *et al*, 2005a:5). It also refers to “a process of economic restructuring, in terms of which employment regulated by a contract of employment is displaced by employment that is regulated by a commercial contract” (Barker, 2007:131). This specifically refers to the TER that consists of the TES agency, the client firm and the temporary worker.

The TES industry has clearly grown in popularity around the world. Many firms are turning to the TES industry to implement labour flexibility and to save on the associated costs of permanent employment. The TES industry provides a foundation for temporary employment to be cultivated. Many workers are forced into temporary employment as firms are either retrenching or there are not enough permanent positions available. While each country faces distinct circumstances and markets, the growth of multi-national corporations have ensured that certain employment trends are present throughout the world.

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<sup>4</sup> LFS survey (originating from the World Bank Survey Report, 2000) was conducted in Johannesburg covering eight manufacturing sub-sectors (Bhorat *et al*, 2002:31).

## 2.3 FLEXIBILITY

One of the foremost reasons for unemployment in developed countries, according to Barker (1999:30) is that the labour market does not adjust as quickly as it should to changing circumstances. In terms of flexibility theory, if markets could adjust to changing demand and supply conditions, unemployment would be reduced (Barker, 1999:30). This implies that flexibility is advantageous for any firm that needs to adjust quickly to demand and rapidly changing markets (Smith, 1995). Flexibility refers to firms' ability to cope with a changing environment with the use of a multi-skilled workforce (Klerck, 2001:415). It also involves employees becoming more flexible in terms of their tasks within a firm in order to increase profit margins and to make a firm run more effectively and productively. Flexibility is multifaceted and has a range of benefits and problems depending on the type of employment. The term „flexibility’ also relates to the “deregulation of the labour market” as well as a “reduction in the capacity of the state and labour to regulate employment and wages” (Klerck, 2004:2). Many firms have changed their approach to a more flexible approach. Internationally, flexibility in the workplace has grown and firms have adopted strategies to look for alternatives to permanent employment (Appiah-Mfodwa *et al*, 2000:95). A theoretical framework that underpins the concept of flexibility is the flexible firm model.

### 2.3.1 The ‘Flexible Firm’

The flexible firm model developed by Atkinson and Meager is one particular theoretical framework that describes flexibility within a firm (Hyman, 1991; Ransome, 1999; Tailby, 2003). The flexible firm model is best treated as an „ideal type’ because it emphasises the essential elements of changing employment practices in some firms (Burrows *et al*, 1992:4). The model describes three types of flexibility: functional, numerical and financial flexibility. Functional flexibility refers to “a firm’s ability to allocate and reallocate employees among a wide range of tasks” (Tailby, 2003:500). It is also known as internal flexibility in order to emphasize the fact that flexibility is derived from an existing workforce. Functional flexibility is a broad label that refers to the combination of a number of tasks through multi-skilling and team working (Tailby, 2003:500). This differs from external flexibility, also known as numerical flexibility, which conveys the idea of “bringing in additional workers and returning them to the external market when work levels fall” (Tailby, 2003:500). Numerical flexibility is also described as the “ability to adjust the level of labour inputs to

meet fluctuations in output” (Atkinson and Meager, cited in Storey, 1997:158). It “fosters quick adjustments in employment levels ... through hiring and firing workers [and] employment of temporary and contract workers” (Deyo, 1996: 5). The third type of flexibility is financial flexibility, which is concerned with whether a firm’s pay and reward structure can support both functional and numerical flexibility. “It is derived from keeping labour costs variable by hiring and firing peripheral workers strictly in accordance with current demand” (Klerck, 2001:425).

The focus of this research is on numerical flexibility (also known as labour flexibility), which is closely related to the internal labour market theory, which indicates that firms that are numerically flexible, will divide the workforce into „core’ and „periphery’ (Storey, 1997:158). The model is centred on the theory that a firm’s workforce is segmented when there is a “reorganisation of a firm’s internal labour market” and it is divided into two different groups (Tailby, 2003:498). The flexible firm model suggests that employers are segmenting their workforce in order to respond to technological conditions and industry competitiveness (Klerck, 2004; Tailby, 2003). The peripheral workforce consists of workers with skills that are available in the external labour market, and “whose terms and conditions could be constructed to emphasise the precariousness of their employment” (Tailby, 2003:498). Temporary employees are considered the „peripheral’ workers and are excluded from a firm’s employment terms and conditions in order to protect the employment security of the „core’ workforce (Tailby, 2003:507). These workers supply numerical flexibility that enables firms to adjust the level of labour inputs to meet fluctuations in demand for the firm’s goods and services, and to protect the employment security of the core (Tailby, 2003:498). Peripheral workers consist of non-standard workers who are often supplied by TES agencies or the services of subcontractors or self-employed specialists (Burrows *et al*, 1992:4). Core workers are workers with firm-specific skills that are not readily available in the external labour market (Tailby, 2003:498). Core workers are usually full-time, regular and are unionised (Standing, 2008:20). These full-time employees, who work on a permanent basis, are trained and rewarded to supply functional flexibility. They are expected to have a wide variety of skills, and when any changes occur in terms of the market or there are new developments in technology, they are required to acquire new competencies (Tailby, 2003:498). These workers are secure and highly regulated within the SER.



According to Lautsch (2003:567), there are two particular viewpoints concerning non-standard (peripheral) and standard (core) work systems. First, non-standard and standard work systems have different performance objectives for the firm, with non-standard work “merely filling a performance gap” where standard workers cannot accomplish their objectives (Lautsch, 2003:567). Second, both non-standard and standard work “may be designed to contribute jointly to a single strategic objective”, which will create tighter linkages between the groups (Lautsch, 2003:567). While both groups may serve the same purpose, whether permanent workers and temporary workers function well together within a firm is dependent on the employment security of both parties. Both segments are forced to work under the same conditions and working environment, yet one is inferior (as in the peripheral segment) due to a lack of entitlement and security, which may result in tensions between the two groups.

The main advantage of a flexible firm model is that the firm appears to profit from adjusting its workforce according to market demand, yet the problem with the model is that it puts workers at a great disadvantage. Workers are left vulnerable and insecure and are shifted in and out of firms as they are needed. The benefits of the model are essentially employer-based. Hyman (1991:281) agrees that flexibility “might be better described as a specific constellation of choices, advantageous to employers” (Hyman, 1991:281). Tailby (2003:498) argues that the productivity of the core workforce will increase and the firm will have lower wage costs when a peripheral workforce is incorporated. It also allows employers to reduce the need to manage labour (particularly if their peripheral workforce is outsourced via a TES agency), and they can concentrate on “areas of competitive advantage” (Fenwick *et al*, 2007:20). There will also be flexibility in wage costs, as the size of the peripheral workforce may be adjusted according to fluctuations in the demand for the firm’s goods and services (Tailby, 2003:498).

### **2.3.2 Firms Incorporating Labour Flexibility**

Since the 1980s, according to Hunter *et al* (1993:383), firms have increasingly adopted a labour management stance where there has been an emphasis on more flexible forms of employment. An objective of this research is to find out whether firms are adopting a core-periphery approach as indicated by the flexible firm model. This will require an investigation into a firm’s business strategy. Many firms have turned to TES agencies to help them

implement strategies of labour flexibility (Golden, 1996; Mehta and Theodore, 2003). As a whole, outsourcing can strategically change a firm. It assists the management of a firm to analyse the extent to which it is differentiated from its competitors and will therefore emerge with a “clear value proposition for the enterprise” (Kakabadse and Kakabadse, 2002:1). This means that firms have the opportunity to evaluate themselves, decide where they need improvement and have a clearer understanding of how they can change.

Atkinson (cited in Hunter *et al*, 1993:384) states that part of a firm’s labour strategy would be to follow all three forms of flexibility consistently. If firms do have a human resource (HR) strategy, how closely is the strategy linked to the flexible firm model? This would indicate whether the model is merely a prescriptive tool or whether the model is indeed applied. Hunter *et al* (1993:385) state that the main business strategy of a firm may be the only dominant consideration, and that any other strategy (such as HR strategies), will be “a second-order factor in managerial thinking”. It can also be argued that the decision to incorporate flexibility is usually a reactive decision. It is supported by McIlroy (cited in Hyman, 1991:259) who states that the flexible firm is not a strategy and is nothing more than a tactical survival plan relating to recession. Firms are not specifically focusing on strategies of flexibility, but it is a prerequisite to adapting to the market.

Strategies to incorporate labour flexibility may be inhibited by a number of factors. Firms, which would like to hire temporary workers, may be restricted due to closed-shop agreements, “where employers can only hire persons belonging to one or more specified unions” (Barker, 2007:130). The utilisation of temporary workers may be restricted if they are non-union members. Firms that are governed by a bargaining council will have specified restrictions and encounter union pressure that will inhibit the use of temporary workers as well as TES agencies. Essentially, the aim is to find out the reasons why firms are pursuing flexibility and why they are utilising the services of TES agencies.

### **2.3.3 The Flexibility Debate**

Flexibility is a controversial topic within labour relations. Supporters of flexibility believe that it increases the productivity of a firm. Those who oppose flexibility believe that it exploits workers because they do not receive the benefits that permanent workers receive. Standing (1999:49) argues that “[i]n many international reports and statements by public

figures, calls for flexibility have been little more than ill-designed masks for proposals to lower wages or worker protection”. According to Auer and Cazes (2003:1-2), there is a debate in Europe with two streams of views regarding the rise in flexible jobs. The one stream consists of economists and politicians who strongly support numerical flexibility and believe it is a remedy for unemployment, and that the demise of employment protection positively underpins employment growth. The second stream opposes deregulation and „flexibilization’ of the labour market because it will reduce working and living standards as well as add “uncertain effects on the sustainability of the economy” (Auer and Cazes, 2003:2).

In terms of the flexible firm model, there are various criticisms that have been levelled. Some believe that it focuses too much on the “neo-liberal preoccupation with labour market flexibility as the source of industry competitiveness” (Tailby, 2003:498-499). Hyman (1991:259) maintains that “the flexible-firm model has become a fashionable component of the management literature [and] there is little evidence of a strategic commitment to implement it”. It tends to lack conceptual clarity and neglects the tensions and new managerial problems that a core-periphery employment strategy could produce (Tailby, 2003:499). The model serves as an analytical tool, more than an accurate depiction of a firm. Nevertheless, it has been suggested that “this new division of labour would be a permanent feature of the labour market for years to come” (Tailby, 2003:499). Bezuidenhout and Kenny (2000:3), however, believe that the „flexible firm’ serves as a useful descriptive tool in achieving flexibility at the firm level.

A further criticism is that there are various problems with identifying „core’ and „peripheral’ workers. Core workers are said to have secure employment and therefore any evidence of security will automatically indicate membership of the „core’. If core workers are defined by employment status and tasks, there is a problem because some groups may have relatively secure employment, but are not treated as part of the core workforce. While other workers may be central to the functioning and profitability of a firm, they may be regarded as peripheral (Tailby, 2003:499). The notion that the core is mainly skilled and the periphery is unskilled is an over-simplification (Hyman, 1991:260). The different types of employment that fall within the category of „peripheral’ and that are „atypical’ (part-time, temporary, etc.) should not be viewed as one homogenous category (Hyman, 1991; Walsh, 1991). They are “by no means peripheral” as they all perform specific roles and functions (Walsh, 1991:114).

There are two distinct spectrums of flexibility. On the one side of the spectrum, there are desperate workers who have little or no skills and on the other side, there are workers with high skills who enjoy having flexible hours. This is a flaw in the flexible firm model, as some workers who are brought in are highly skilled and cannot be regarded as peripheral workers. Peripheral workers are unskilled or semi-skilled and are used as a buffer. It is understandable that, due to a high unemployment rate, the unemployed are „willing’ to work as peripheral workers. Flexible workers, who are able to receive employment in a country that has a high unemployment rate, are fortunate, even if they do experience instability and job insecurity (Sela, 2001:5). Nevertheless, despite the effects of labour market rigidities and unemployment, there is a view that a complete lack of flexibility might result in increased labour market duality between core and peripheral workers (Barker, 1999:39). This will mean that the core workers will remain the „privileged elite’ who enjoy basic labour rights, while the peripheral workers will be unprotected and non-unionised (Barker, 1999:40). Flexibility needs to be considered with regard to its social value and economic cost (Barker, 1999:40). What is needed is a “delicate balance” in order for worker rights to be protected as well as “ensuring adequate labour market flexibility” (Barker, 1999:40). However, there will always be a clash of interests, as both management and labour have different needs.

According to Pfeifer (2005:3), a core-periphery hypothesis implies that core workers experience job security due to the incorporation of a flexible workforce knowing that the temporary workforce acts as a buffer. It also implies that the core workforce have better working conditions and a higher income than the periphery. With the two different sets of non-standard workers in mind, it raises the question of whose interests are at stake (Tailby, 2003:490). For firms and highly skilled workers, flexibility appears to be advantageous. If a worker lacks skills and education, he or she is more likely to experience the negative effects of labour flexibility. Another issue that comes into play is the dynamics that are involved within a firm that adopts a flexible firm approach. Having both a core and peripheral workforce may cause tensions between the segmented workforce as well as raise issues of job insecurity, low trust and poor work performance. This conflict and tension within a workplace can be seen as a weakness of the flexible firm model. In order to implement labour flexibility, firms would have to incorporate a temporary workforce. This is done most prominently via the TES industry. Firms will use TES agencies to hire temporary workers who are reliable and efficient but they are taking a risk because both temporary workers and TES agencies can be unreliable.

It is debatable whether flexibility is advantageous and whether it should be pursued. Much of the research on flexibility is focused on management and the employers' agenda. Little is taken into account regarding the consequences of flexibility in terms of how temporary workers are directly affected. There are negative social consequences of labour flexibility such as "growing levels of risk, anxiety, marginalisation and powerlessness" (Klerck, 2004:3). According to Grimshaw and Ward (2000:4), flexibility policies tend to raise implications around the issues of social integration and exclusion of certain age and sex groups. This is because some unskilled and semi-skilled jobs are adapted to certain sexes and ages. While flexibility may be beneficial for a firm, in the long-term it is not beneficial for temporary workers who experience job insecurity. Standing (1999:81) argues that "[w]hen someone calls on workers or on employers to be flexible, it usually means he wants them to make concessions". Pollert (1991:11), one of the fiercest critics of flexibility, argues that the rise of a flexible workforce has been "asserted with little supporting evidence" and she firmly believes that the „flexible firm' is too simplistic (Pollert, 1988:48). The notion of flexibility, then, has become "something of an ideological fetish" (Hyman, 1991:281). Tailby (2003:499) argues that "the flexible firm model remains influential in the sense that its concepts of core and periphery, numerical and functional flexibility, have been absorbed into „everyday' practitioner and academic vocabularies". Theron (2003:1248) believes that flexibility is simply a management tool for firms to improve their competitiveness, and that the use of the concept as an analytical concept is limited.

Standing (1999:49) argues that flexibility may be too much of a good thing, stating that "a highly flexible system is also an unstable one, since it is sensitive to shocks that may be short-lived or random". Yet, one may argue, that in order for a country's economy to grow, flexibility is necessary. Flexibility is a sensitive issue because it does not only concern firms and worker rights, but also the survival and the well-being of the economy (Barker, 1999:40). "A key influence on the discourse of flexibility is *who gains or loses* from a particular set of institutional arrangements, and whose interests would benefit or suffer from their alteration" (Hyman, 1991:281). Adopting a „flexible firm' approach is primarily targeted and beneficial for employers in order to increase the firm's adaptability to economic and market conditions. Employers are the winners and employees are the losers. Flexibility further exemplifies the capitalistic mode of production, where employees are treated as commodities and are therefore dispensable. The significance of flexibility is on its "dynamic implications: changes to institutional, cultural and other social or economic regulations and practices which

permanently increase the capacity to respond to change” (Atkinson, cited in Hyman, 1991:282). In order to survive, firms are required to respond to change continuously, but it appears that there is always a cost incurred, “[a]n objective evaluation might show that the economic cost is unjustifiably high in relation to the social value, in which case there is a responsibility on government, employers and unions to achieve a better cost-benefit relationship” (Barker, 1999:40).

#### **2.3.4 Flexibility in the South African Labour Market**

South Africa has both a developed and developing economy (Theron, 2003:1247). After 1994, South Africa experienced a political transition and a progressive labour market regulatory framework was introduced (Bezuidenhout *et al*, 2004:26). South Africa has an unemployment rate that is much higher than in other industrialised countries with a limited social welfare system (Bezuidenhout *et al*, 2004:26). According to the Labour Force Survey, the official unemployment rate in South Africa is approximately 26.5 per cent, and if discouraged work seekers are included, the unemployment rate is a staggering 40 per cent (Statistics South Africa, 2005). The high unemployment rate can be attributed to “high population growth, low economic growth rate and declining labour intensity in the economy” (Barker, 1999:7). Two major problems caused by unemployment are poverty and inequality. There is still a large proportion of the population living in rural areas that experience poor sanitation and living conditions with no water and electricity (Barker, 2007:5). In terms of inequality, inter-racial inequality has decreased, however intra-racial inequality has increased due to the increased unemployment among the black population as well as the high upward mobility of Africans into senior positions (Barker, 2007:5).

One of the major influences of work in South Africa (specifically towards flexible labour) is the pressure to keep up with the global economy (Makino, 2008:2). In the 1980s, South Africa reduced its trade tariffs and it was a period where there were mass retrenchments and plant closures (Theron, 2003:1248). “[T]rade liberalization has undoubtedly generated increased competition” which has forced firms to become more efficient (Theron, 2003:1248). Trade liberalization has further stimulated “a drive to lower wages in sectors where there is increased competition” (Theron *et al*, 2007:9). In order to achieve trade liberalization, avoid risk and lower costs, firms have turned to externalising their labour. In other words, they have turned to the TES industry.

Globalisation of services and products create higher demand and firms then have to reduce their labour costs, usually by hiring temporary workers. The state, as well as business and labour, all play major roles regarding changes in employment practices. Political change has always been a major influence on the legislation that regulates labour. For example, in South Africa, labour law has incorporated affirmative action measures that have changed the recruitment procedures to favour previously disadvantaged groups.

The South African labour market can be divided into two segments.<sup>5</sup> The first segment consists of workers employed in the formal sector who are protected by labour legislation. The second segment consists of those workers who work in the informal sector, which are unprotected and are exempt from “fundamental labour standards” (Theron *et al*, 2005a:1). Barker (1999:8) refers to it as dualism, where one part of the labour force is secure, unionised and well paid; and the other part is employed in low-paid, insecure jobs or not employed at all.<sup>6</sup> The TES industry aids in maintaining the duality of the labour market (Theron *et al*., 2005a:1).

South Africa’s labour market is regarded as both rigid and flexible. The labour market is rigid because of a strong regulatory system, with trade union support and a centralised collective bargaining system. It is also flexible because of the high rate and increase in non-standard employment (Makino, 2008:5). The South African labour market is also quite flexible since South African employers have been increasingly able to use flexible forms of labour to adapt to rapid economic liberalization (Makino, 2008:19). Flexibility is strongly rooted in post-Fordist practices that depart from the ‘rigidity’ of Fordism, and that allegedly support firms in meeting the “rapid changes in product markets” by incorporating the different forms of flexibility (Klerck, 2001:424-5).

Conversely, Van Niekerk (2006:14-15) argues that the idea that the South African labour market is ‘too rigid’ is a misconception because South African labour law in respect to other countries’ laws is not out of alignment. In recent research of Organisation for Economic Co-

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<sup>5</sup> Also known as a two-tier labour market by the South African Foundation (Theron *et al*, 2005:1).

<sup>6</sup> The ‘flexible firm’ model is closely related to the dual labour market approach. However, the latter represents a macro perspective of the entire labour market whereas the former represents a micro perspective of the organisation.

operation and Development (OECD) countries conducted in 2004 for the OECD Employment Outlook edition, it was found that comparatively, South Africa is not as rigid as its counterparts (Van Niekerk, 2006:11-12). For example, in terms of temporary employment, South African law is similar to that of Australia, where no restrictions exist on the use of fixed term contracts either in respect of the number of renewals permitted or cumulated duration, but where the risk of continual renewal may lead to a court finding that the primary purpose of the renewal is to avoid unfair dismissal laws”. Among other countries, Australia has the “highest score on the flexibility rating, in relation to the use of temporary employment” (Van Niekerk, 2006:13).

Makino (2008:5) argues that the problems with the labour market differ depending on what aspects are focused on. One aspect is that because the labour market is so rigid, it creates unemployment and flexibilization is therefore necessary for job creation. However, the second aspect is the poor working conditions of non-standard employment and that it is necessary to strengthen worker protection. It appears that in order for a labour market to perform optimally, it requires both rigidity and flexibility. There should be a balance of the two, rigid enough to protect workers yet flexible enough for firms to compete effectively. According to the Department of Labour, “the core task of labour market reform has been to strike a delicate balance between flexibilization and workers’ protection, which can be summed up as ,regulated flexibility” (cited in Makino, 2008:13). Central to this concept of regulated flexibility is the recognition that “the labour market is both diverse and dynamic – one shoe does not fit all and that a shoe that fits now does not fit for all time”. It is accordingly necessary in any framework to “allow space within which employers and workers can adapt standards to suit the needs of any particular sector, sub-sector or workplace over time” (Cheadle, 2006:9). It is essential therefore, that the government matches the needs of the different forms of employment.

An important institution that affects the labour market in South Africa is the National Economic Development and Labour Council (NEDLAC), which has an “objective to build consensus on economic, development and labour policies” (Barker, 1999:10). The main economic policy that relates to flexibility that emerged in South Africa has been the controversial macro-economic policy called the Growth, Employment and Redistribution strategy (GEAR). While GEAR has been replaced by the Accelerated and Shared Growth Initiative (ASGISA), many of its key policy prescriptions remain intact. GEAR highlighted



“the necessity for greater labour market flexibility for transformation towards a competitive economy that could yield economic growth of 6 per cent per annum” (Makino, 2008:12). The GEAR policy is controversial because there is much debate about whether the strategy was consistent with the African National Congress (ANC) 1994 election manifesto that was outlined in the Reconstruction and Development Programme (RDP) or whether it embraces neo-liberal economic ideas (Valodia, 2000:7). The RDP supported the idea of an integrated and unified labour market whereas GEAR promoted a flexible labour market as well as the development of a dual labour market: “one with high minimum standards and relatively good wages, and the other with low standards and no minimum wage” (Valodia, 2000:7). GEAR supported a flexible labour market because it would reduce firms’ labour costs, increase investment as well as generate new employment opportunities. GEAR, however, is not supported by the trade union movement, specifically the Congress of South African Trade Unions (COSATU) (Nel *et al*, 2005:28). In 2000, COSATU decided to embark on a programme of mass action to protest against the consequences of GEAR, in particular the loss of jobs. Bezuidenhout and Kenny (2000:29) argue that

[t]he language of flexibility is not only about reforming legislation, but it is also an attack on the legitimacy of organised labour in the post-apartheid economy. Ironically, the language of „regulated flexibility’ was used to give flexibility a labour-friendly face.

A problem with the discussions of flexibility is that it did not “systematically specify forms of flexibility” where the concept shifted between numerical and wage flexibility (Bezuidenhout and Kenny, 2000: 29). The focus in South Africa is largely on the *quantity* of employment. However, there should also be a focus on the *quality* of employment (Makino, 2008:6). The issue of quality of employment is important because non-standard employment is on the increase in South Africa (Makino, 2008:6). The statistics available regarding non-standard employment are variable and limited. Nevertheless, “there is a consensus among the government, labor, and business sectors that the non-standardization of employment is progressing” (Makino, 2008:6).

According to Theron (2003:1266), the South African Labour Flexibility Survey, which was conducted in 1995 and 1996, indicated that South Africa has indeed a high and growing trend of employment flexibility. The information is however outdated and is open to various

criticisms (Theron, 2003:1266). Valodia (2000:7) argues that “we are seeing a re-segmentation of the labour market, away from the apartheid-based racial segregation, toward those in the primary labour market and those in atypical forms of work in the secondary labour market”. Valodia (2000:5) believes that there is a tendency to overstate the growth of informalisation and flexibilisation, and to see these “developments as very recent, and unconnected to historical trajectories in the labour market”. He further adds that there are new developments of informalisation, segmentation and flexibility that are emerging in South Africa, but it is important to note that South Africa’s labour market has “historically been characterized by high levels of flexibility and informality and that a key characteristic of the apartheid system, and the racial pattern of South Africa’s industrialization, was the highly flexible system of contract labour and migrant labour” (Valodia, 2000:5). Flexibility was prevalent in the South African mining industry at the end of the nineteenth century through the employment of migrant workers. Features of this temporary employment included an agency who recruited workers from the „homelands’ and the workers were required to enter into fixed-term contracts at the place they lived (Theron *et al*, 2005a:4).

Today, however, there are new forms of segmentation that are driven by flexibilisation (Valodia, 2000:6). Functional flexibility, which includes multi-skilling and multi-tasking, has become a significant part of the South African labour market, but what is more evident is the growth in numerical flexibility where there is an increase in non-standard employment (Valodia, 2000:6). Several studies show that there is an increasing trend towards flexibilisation in South Africa. Horwitz and Franklin conducted a survey of 626 South African organisations and found that there was a “marked growth in numerical flexibility as a means to reducing labour costs” (cited in Valodia, 2000:6). There was also evidence of functional flexibility. The ILO’s South African Enterprise Flexibility Survey (SAEFS) in 1995 found that 85 per cent of firms sampled employed temporary workers, 43 per cent employed contract workers, and 26 per cent used part-time workers (cited in Valodia, 2000:6). There are also a number of micro-level case studies that have recorded an increase in flexibilisation in a range of industries, including retailing, mining, petrochemicals, shipping, electronics and clothing (Valodia, 2000:6). Apart from the mining industry and petrochemicals, the majority of flexible workers tend to be women (Valodia, 2000:6). The gender implications of flexible employment will be addressed shortly. A major feature of flexibilisation has been the growth in labour broking and subcontracting (Valodia, 2000:6). It is evident that flexibilization and the TES industry are interconnected.

While the TES industry provides the labour flexibility, it does not necessarily provide protection for workers. There are inevitably different prescriptions to resolve the problems of the labour market (Makino, 2008:7). Some (especially in the business sector) claim that labour market regulations are the major cause of the high unemployment rate and that deregulating the market is the key to create employment, to lower the unemployment rate and to decrease poverty (Makino, 2008:7). NEDLAC asserts that retrenchment and trade liberalization are the causes of increased unemployment, and argues for increased “protection of workers’ rights, as well as job creation and redistribution through budgetary measures” (COSATU *et al*, cited in Makino, 2008:7). This particular argument “against deregulating the labor market by trade unions has been criticized as based on the self-interest of organized workers” (Makino, 2008:7). Deregulating the market appears to be a short-term answer to a long-term problem, reducing unemployment by increasing insecure non-standard forms of employment may help workers in the short-term, but in order to create stable, secure and long-term growth, there needs to be an increase in job creation, which will mean that firms will have to make sacrifices and reduce profit margins, which will slow the growth of the economy.

### **2.3.5 Trade Unions**

Non-standard employment provides a challenge for trade unions because of two major reasons (Heery *et al*, 2004:127-128). Firstly, non-standard workers in general have a serious need for representation because they are low-paid and are often excluded from training and benefits. Secondly, non-standard workers presence in the labour market, “threaten the interests of existing union members through the undercutting of negotiated terms of employment” (Heery and Abbott cited in Heery *et al*, 2004:127). Trade unions are subsequently opposed to labour flexibility. In the late 1990s, COSATU argued that the trend in flexible employment posed several and serious challenges for the labour movement (Bezuidenhout *et al*, 2004:26). Due to the very nature and circumstances of non-standard workers, it is difficult for unions to protect their interests and rights through dispute resolution procedures, employee representation and mechanisms for employee participation (Fenwick *et al*, 2007:20). Within the TES industry environment, unions play a limited role and the “agencies themselves may take on a representative role” (Druker and Stanworth, 2004:229).

Unions believe that casual labour “threatens the job security and conditions of standard employment”, and that the interests of casual labour and standard employees are in conflict (Fenwick *et al*, 2007:20). Unions exist “to serve the interests of their members” (Swanepoel *et al*, 2003:625). However, unions are reluctant to represent non-standard workers because their “main source of income and strength lies in full-time and permanent employees” (Fenwick *et al*, 2007:20). Unions tend to favour permanent employees because it creates a stable labour force and because once members are recruited, workers remain members (Hill, 1981:158). Unions are in a defensive and reactive mode due to the actions of firms that are restructuring because of competitive pressures (Bezuidenhout *et al*, 2004:26). Unions are in fact encountering problems with employers who want to outsource workers and functions as well as cut jobs (Bezuidenhout *et al*, 2004:26).

According to The Times (18/05/2009), COSATU wants to ban the labour broking industry, yet there is a fear that a million jobs would be lost. COSATU spokesperson, Patrick Craven, stated that the banning of the industry would not result in job losses; it will simply force firms to employ workers directly: “Our role as a trade unions federation is to change a reality in which workers are farmed out as commodities” (The Times, 18/05/2009). Trade unions are opposed to labour brokers because they restrict trade union activities in the workplace. In COSATU’s 2006 Annual Report, the federation referred to labour brokers as ‘ghost employers’. “The workers of these ghost employers are even more vulnerable than casual workers [because they] have to accept low wages and benefits and a high degree of job insecurity” (COSATU, 2006:12). COSATU places workers who work for a labour broker within a non-core zone, and does not consider them peripheral workers (COSATU, 2006:12-13). Workers within the non-core zone are regulated by atypical contracts and perform work for core employers in the formal economy (COSATU, 2006: 12). Essentially, workers who work within the TES industry are an underclass who is not afforded the fundamental rights of organisation and fair labour practice. The right of employees to belong to a trade union is a fundamental right that is entrenched in the Constitution and in the LRA. However, union opposition to non-standard employment needs to be more clearly formulated. Given the differentiation of non-standard employment, it is “not the form of work that should be resisted but the conditions often associated with it” (Klerck, 2002:4).

## 2.4 THE TEMPORARY EMPLOYMENT SERVICES INDUSTRY

There has been little attention focussed on the TES industry, which is strange considering that it plays an important role in terms of labour market flexibility (Klerck, 2009:85-86). A main objective of the industry is to “enable the user enterprise, or core business, to vary the numbers of workers deployed, so as to achieve numerical or employment flexibility” (Theron, 2003:1254). While the LRA of 1995 refers to the industry as ‘temporary employment service’ (TES), it is commonly referred to as labour broking (Theron *et al*, 2005b:2) as well as personnel supply services (Morris and Vekker, 2001:373). Theron *et al* (2005b:5) argue that labour broking is not a new phenomenon and it forms part of the process of ‘externalisation’. The TES industry has attracted much attention due to their “exploitative and unethical practices” (McNally cited in Druker and Stanworth, 2004:229).

Selling temporary labour has become ‘big business’, yet there is little knowledge on how the structure of the TES industry is changing and what role the temporary employment agencies play in contributing to the growth of temporary work (Peck and Theodore, 1998:656). Even in developed countries, the industry is not fully understood even though it is popular; and less is known about the consequences it may have on developing countries (Theron, 2003:1247). The motivation for focusing on the TES industry is due to the increase in non-standard forms of employment, and the fact that the TES industry provides temporary labour to firms to increase their labour flexibility. The TES industry plays a major role in promoting and providing a platform from which temporary work can escalate. This is because the TES industry relies on the temporary workforce to make money; therefore, it is in its interest to prolong the duration of the period that the worker is employed by a client (Theron *et al*, 2005:31).

One of the crucial questions posed by Marchington *et al* (2004:82) is whether all parties are benefiting from flexible arrangements and “whether workers bear the principal risk in these situations by suffering worsening terms and conditions in relation to pay, training, career development and promotion opportunities”. Theron *et al* (2005a:3) argue that the TES industry creates an underclass of workers that are “operating under an amended set of rules, that provide a far more truncated form of protection than is available to workers in permanent employment”. The term ‘underclass’ originates from the sociological view that social divisions exist within society (Mann, 1992:1-2). There is however “no single agreed

definition” of the term (Lister, 1996:3). The term refers to the “sub-stratum beneath the working class” and is most commonly associated with poverty and marginalised groups “at the base of the working class” (Mann, 1992:1-2). The notion of the „underclass’ was developed “as a way to explain long-term poverty” and that further “blamed the individuals concerned” because they were “unable to work in gainful employment” (Cruickshank, 2007:29). The TES industry creates an underclass of workers by placing informal workers that lack effective protection within the formal economy. According to Theron *et al* (2005a:38), workers within this underclass are “deprived of employment security and earn less than workers in standard employment for equivalent work”. This is clearly unfair and it puts temporary workers within the TES industry at a huge disadvantage. This underclass of workers is “the modern day equivalent of the contract workers under apartheid” (Theron *et al*, 2005a:38). The lack of protection and security for employees working within the TES industry is highly problematic, which is why more attention should be placed on regulating the industry.

The TES industry has grown enormously worldwide, yet little is known of its practices in South Africa. According to the Confederation of Associations in the Private Employment Sector (CAPES), the TES industry accounts for around four per cent of the economically active population in South Africa. “The industry is a R20 billion plus industry providing jobs for more than 400 000 assignees on any day” ([www.capes.org.za](http://www.capes.org.za)). The TES industry has been recognised within South Africa since 1983 (Bezuidenhout *et al*, 2004:21). The concept of providing a worker through an intermediary is not new. As mentioned earlier, the contracting of migrant labour within the mining industry in the nineteenth century via agencies was a common practice (Theron *et al*, 2005a:4). After World War II, agencies supplied women in temporary clerical and administrative positions where men were still occupying the majority of permanent placements (Theron *et al*, 2005a:4). South Africa responded to an international trend, and major international organisations such as Manpower opened its offices in the 1960s (Theron *et al*, 2005a:4-5). From the 1970s, coloured women were placed in temporary positions, until Africans were included (Theron *et al*, 2005a:4). Agencies provided temporary labour and placed employees in permanent positions and they started to place employees in an array of different occupations (Theron *et al*, 2005a:5). In 1983, the 1956 LRA was amended to make provision for labour brokers (Theron *et al*, 2005a:5). In 1983, there was a requirement for labour brokers to register with the Department of Labour, yet it was not enforced (Theron *et al*, 2005a:5). The 1983 amendments also

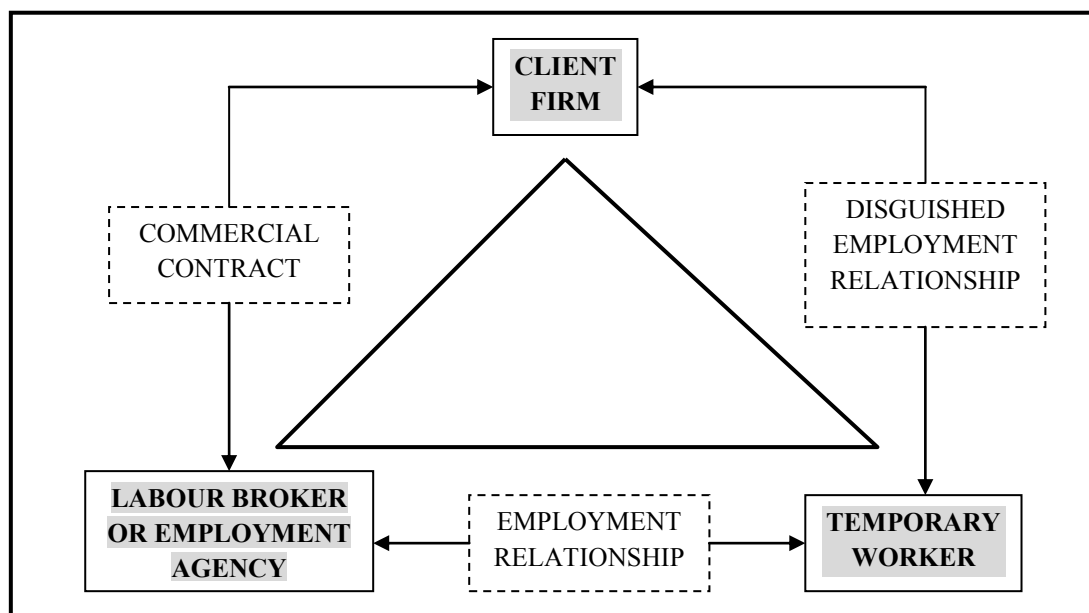
deemed the labour broker as the employer of the worker, not the client, which was to “legitimate a form of triangular employment relationship” (Theron *et al*, 2005a:5). The new LRA still asserts that the TES agency is the „employer’, yet the requirement for agencies to register with the Department of Labour was dropped. From 1983 to the 1990s, labour broking increased during a period of economic and political turmoil, where labour brokers provided „scab’ labour during strikes (Theron *et al*, 2005a:5). The rise in labour broking is paradoxical since it coincides with the empowerment and rise of a trade union movement which is opposed to it. According to Theron *et al* (2005a:5), during the establishment of the emerging trade unions, “the migrant labour system and influx control were dismantled”. It is the purpose of this research to uncover more information regarding the TES industry in order to develop a deeper understanding of its impact and its employment practices.

#### **2.4.1 The Triangular Employment Relationship**

Within a typical employment relationship, there is a contract of employment between an employer and an employee. The main characteristic within the TES industry is the use of a triangular employment relationship (TER) between the temporary employment agency, the client firm and the temporary worker. The client that utilises the services of the agency is known as the „user enterprise’ (Theron, 2003:1253). According to the ILO, a TER occurs when “employees of an enterprise („the provider’) perform work for a third party (the „user enterprise’) to whom their employer provides labour or services (cited in Theron *et al*, 2005b:3). The term „TER’ is often misinterpreted. For example, the TER is used to refer to workers who are only in a formal TER, which states that a TES agency will place them with a client. However, no distinction is made between, say, a security service and a TES in this regard (although security services are generally not regarded as TESs) (Theron, 2003:1255). The use of a TES agency or labour broker “is often used to evade employing workers directly and having to take on the responsibilities associated with a contract of employment” (Bezuidenhout *et al*, 2004:31). The TER essentially involves a contract of employment between the TES agency and the worker. Therefore, the TES agency is deemed the employer. As seen in Figure 1, there is no employment contract between the TES agency and the client (firm). Some TES agencies utilise contracts that do not allow a worker paid leave and prohibit strikes (Theron *et al*, cited in Makino, 2008:17). Non-standard workers without a written contract who are not registered for Unemployment Insurance are more vulnerable because they are outside the scope of labour regulation (Makino, 2008:17). In terms of the

relationship between a client and a TES agency, the relationship is regulated by a commercial contract instead of a contract of employment (Fenwick et al, 2007; Theron, 2003). One of the essential elements of the contract is concerned with the assumption of risk where the agency assumes all the risks that are associated with being an employer (Theron, 2003:1254). Even though the worker will work on the work premises of the client, the client is still not regarded as the „employer’. There is a partial employment relationship between the temporary worker and the client. The only provision made by the law to address the consequences of the TER is joint and several liability (Theron *et al*, 2005a:6). This is when the client is “jointly and severally liable for breaches of certain labour regulations by the broker” (Theron *et al*, 2005a:6).

Figure 1: The Triangular Employment Relationship



(Source: Klerck, 2009:94)

The contract between the client and the TES agency determines the terms and conditions of employment of the worker (Theron *et al*, 2005a:28). The worker has no insight into the commercial contract, yet the wages earned are determined by that contract (Theron *et al*, 2005a:28). The notion of collective bargaining to improve workers’ conditions is impractical in the sense that clients would not easily alter their commercial contract with the TES agency. When the contract between the TES agency and the client ends, it essentially means that the temporary worker’s employment has also ended (Theron *et al*, 2005a:29).



Within a TER, complications may arise in terms of the discipline and supervision of workers on site. Even though the agency is deemed the employer of the worker, problems can consequently develop when workers are under the control and direction of the client. Often the worker has to abide by two different sets of regulations: one from the TES agency and the other from the client. Both the agency and the client exert influence on temporary workers. This situation potentially creates confusion because there is conflicting needs or goals (Gossett, 2006: 377). Which set of rules the worker has to comply with is never clear, yet the most important procedures to adhere to would obviously be the client's (Theron *et al*, 2005:32). The fact that temporary workers are controlled by the client automatically signifies that the client is the „real employer' and that the majority of the responsibility of that particular worker should be placed on the client, not the TES agency. The discipline and management of workers occurs primarily in the workplace (Theron *et al*, 2005a:31). This therefore poses problems for TES agencies in terms of effectively managing their temporary workers. It is the responsibility of the TES agency to supervise and discipline the worker, and this is often rectified by providing a supervisor representing the TES agency on site (Theron *et al*, 2005a:32). The TER is inherently complex and many workers are confused as to who their employer is. The TER distorts and disintegrates the standard employer-employee relationship by involving three parties where the obligations of the real employer are removed. Major concerns in terms of the TER within this research is that a mutually beneficial relationship exists between the client and the TES, which further exacerbates the vulnerability of the temporary workforce who are already unprotected and insecure. There should be more responsibility placed on the client to ensure fair labour practice.

#### **2.4.2 The Divisions within the Temporary Employment Services Industry**

The TES industry as a whole appears to have segmented as there is both a growth of the larger multi-national agencies as well as the smaller locally owned agencies. The two segments cater for a different market: the larger agencies cater for higher skilled professionals and the smaller agencies offer job opportunities for lower skilled workers usually in the industrial sector (Peck and Theodore, 1998:657). Small backstreet agencies also recruit unskilled workers and offer “warm bodies delivered on time” (Peck and Theodore, 1998:656-8). The larger agencies seem to have „restructured upwards' by developing contractual relationships with clients (Peck and Theodore, 1998:658). Some well-

known agencies include Manpower, Adecco, Randstad, Labor Pool and Kelly Girl (Moore, 2001; Peck and Theodore, 1998; Purcell, Purcell and Tailby, 2004).

Peck and Theodore (1998:656) believe that the TES industry is both diversifying and polarising, with the major temporary employment industries developing long-term relationships with corporate clients while the smaller, backstreet agencies are developing aggressive cost-based strategies. Peck and Theodore (1998:656) argue that the TES industry has entered a new phase of restructuring, which is influenced by the growth of temporary work and the possible financial opportunities that lie ahead. Peck and Theodore's (1998:656) research focused on the emerging trends within firms and labour utilisation within the TES industry. They aimed to expose any processes within the industry that fall within the phenomenon of labour market „flexibilisation’.

### **2.4.3 The Advantages of the Temporary Employment Services Industry**

It is essential to address the actual or potential advantages of the TES industry in order to understand the industry better. It is inevitable that the reason why the TES industry has grown is because the firms that utilise their services are benefiting tremendously. It would appear that the attraction of temporary contracts for some employers has been the ability to save on pay and/or costs as well as to secure gains in numerical flexibility (Tailby, 2003:521). Employers have used agencies not only to save on costs, but also to “avoid statutory obligations such as the provision of sick pay, holiday pay and redundancy pay” (Tailby, 2003:521). Utilising a TES agency is advantageous for employers because it saves the employer the costs incurred from “screening, hiring and training temporary workers”, yet they still pay the TES agency's mark-up (Mangum *et al*, 1985:610).

Some firms will turn to the TES industry or outsource a function because they find it unprofitable to maintain a particular resource (Kakabadse and Kakabadse, 2002:1). Outsourcing non-essential functions have aided firms to concentrate on their core competencies, and therefore they are able to utilise their resources more efficiently (Kakabadse and Kakabadse, 2002; Olsen and Kalleberg, 2004). Unions however have different perceptions, they believe that “employers generally prefer to outsource to established enterprises, because they do not believe their own employees have the capacity or skills to do the work” (Bezuidenhout *et al*, 2004:61).

Firms tend to utilise TES agencies because of seasonal peaks or when there is a high demand for a product. According to Tailby (2003:521-522), some retail banks use temporary workers to help with the volume of customer enquiries “generated by the launch of a new product”. Workers are sometimes recruited by an agency and are retained as agency staff for a period of weeks before they are offered permanent positions (Tailby, 2003:521). In a majority of cases, employers will utilise the services of TES agencies because it is easier to find the ‘right’ worker for the job. The TES industry has a bad reputation of exploiting workers, but it is also important to look at the positive role they can play in training workers. Koh and Yer (2000:367) argue that they are not ‘exploitive’ but are in the business of finding work and upgrading the skills of workers. TES agencies are required to register with the SSETA who administers the skills development levies. TES agencies via the SSETA can provide training and increase the skills of temporary workers. TES agencies do offer employment to both highly skilled and lower skilled workers. The lower skilled workers are in high demand and are at a greater risk of being exploited.

#### **2.4.4 The Disadvantages of the Temporary Employment Services Industry**

There are numerous disadvantages associated with the TES industry, which have already been mentioned. The main issue pertinent to this study is that due to the lack of regulation, TES agencies are exploiting workers. The TES industry is essentially creating an underclass of workers that lacks the entitlement and associated security of a SER, even though they are working equivalent hours and work under the same conditions as their permanent counterparts. Temporary work is innately insecure because the contract of employment can be terminated at any stage and the TES industry thrives on maintaining the workforce on a temporary basis. Even though it is argued that firms will benefit, there are always disadvantages of hiring temporary workers through the TES industry. Temporary employees are less committed and less reliable than staff whose employment security is not so immediately in doubt. Firms experience adverse effects such as an increase in turnover and lower employee trust (Olsen and Kalleberg, 2004:322). One of the problems that firms may encounter when hiring temporary workers through a third party is that the delegation of labour management functions “may create its own difficulties, for example in terms of assuring the quality of labour supply” (Tailby, 2003:521). While TES agencies charge a fee for their services, they do not guarantee that their staff will “meet the quality or speed of customer service required” (Tailby, 2003:521).

The worker may also feel a sense of confusion about who the employer is, and may find it difficult to work within new working environments. When temporary workers enter a new workplace, there is always a risk of conflict between permanent and temporary workers. One of the most important problems of the TES industry is that many agencies do not comply with the law. TES agencies are paying sub-standard pay rates and are not following the correct procedures. Both employers and workers are at a risk of losing money, and employers are taking the risk of signing a contract with the agency, for if the TES agency does not comply with a particular law, the employer is jointly and severally liable.

It is vital to deal with both the advantages and disadvantages of the TES industry in order for the various viewpoints of the participants within the research to be accurately assessed. In other words, it is important to study the TES industry from different perspectives to attain a realistic representation of the industry as a whole.

#### **2.4.5 Employment Practices of Temporary Employment Services**

This research will attempt to find out how TES agencies manage temporary employees as well as how they source their workers and their clients. Like any other firm or service, TES agencies advertise their services through various mediums such as the internet and newspapers. Workers, who are searching for employment, are invited to submit their curriculum vitae to an agency. TES agencies will interview various candidates and match the demand of particular employment opportunities with the supply of the temporary workers who are available and who have the skills required. The temporary worker will sign an employment contract with the TES agency and the TES agency becomes the temporary worker's employer, even though the temporary worker will not physically work for the agency. The TES agency will (on occasion) train the employee and then deploy the temporary worker to the relevant client's premises.

The TES agency takes care of remuneration and administration of the temporary workers. In terms of the remuneration of the worker, payment is left to the TES agency to determine and it is often payment on a task basis. However, the amount that is available to remunerate workers is often determined by the margins of the core business (Theron, 2003:1254). This is because the relationship between the core business and agency is "inherently unequal" (Theron, 2003:1254). The relationship between the core business and the agency is "easily

terminable, with little likelihood of legal consequences” (Theron, 2003:1254). Businesses usually have policies and business strategies in terms of externalising any employment that maintains a dependency relationship between the business and agency (Theron, 2003:1254). The most significant characteristic of the relationship between the client and the agency that distinguishes it from other outsourcing services is that the agency is economically dependent on the client business for survival (Theron, 2003:1254).

Temporary workers interact with both the TES agency and the client firm. As a result, there may be numerous difficulties in the management and control of temporary workers. Various questions will be asked regarding the employment practices of the agencies. For example, in terms of disciplinary procedures, are there any hearings or procedures that are followed and which party is responsible? Additional information regarding the practices of agencies, in terms of perks or benefits as well as training opportunities to aid skills development will be investigated.

## **2.5 TEMPORARY EMPLOYMENT**

### **2.5.1 Definitions and Perceptions**

The major question surrounding the supply of temporary labour is the underlying factors within the South African labour market that have contributed to the availability of a temporary workforce. The most significant factor that makes non-standard workers available as a whole is the high unemployment rate. In the 1980s, according to Barker (1999:7), at least 350 000 people enter the labour market every year. However, only 50 000 jobs were created which meant that the economy could only absorb 14 per cent of new workers into the labour market. In the 1990s, job growth was very low and it is evident that there are far fewer job opportunities recently than there was in the past (Barker, 1999:8). Many low-skilled workers work in the informal sector in order to obtain money. The availability of employment within a country will greatly influence the choices that workers will make, which will make them turn to non-standard employment. “The state of the labour market (the overall availability of employment opportunities) may therefore be taken as an influence on workers’ preferences and opportunities” (Tailby, 2003:520). When analysing temporary employment, one must note that the trends in the growth of non-standard work have to be related to the practices of

employing firms, the growth of the TES industry and developments in labour law (Tailby, 2003:520).

Workers turn to non-standard employment and, more specifically, to the TES industry for assistance. If people are turning to temporary work because there are not enough job opportunities in the market, the government should ensure adequate protection. Because temporary workers are within a contractual relationship with an employer, in theory they should be protected by legislation and possess the basic rights that apply to all employees, but the problem is to exercise and extend these rights (Theron, 2003:1251). Moreover, with the proliferation of non-standard employment, “lines of authority in the workplace are redrawn, new sources of tension are generated, the segmentation of the labour market is intensified, and access to the training and other rewards necessary to secure a high-skill, high commitment workforce are increasingly restricted” (Klerck, 2004:5).

The demand for any form of labour is dependent on the demand for a product or service produced by that labour and it will also be influenced by the market value of that particular product or service (Barker, 1999:17). Therefore, temporary employment growth or decline is a result of firms’ demands for their product or service. A firm’s profitability and success directly affects the labour market. The main presumption is that temporary employment is on the increase due to firms wanting to implement labour flexibility (Burgess and Connell, 2006:130). Employers hire temporary workers to cope with fluctuations in the workload, to complete specialised projects, to minimise redundancies where changes to working practices are anticipated and to save on costs by minimising pay (Tailby, 2003:521).

As briefly mentioned, temporary work essentially occurs at two levels. The one level is that of highly skilled professionals that are well remunerated. For example, in the United States, Microsoft and Silicon Graphics, as well as AT&T have used non-standard workers to work as computer analysts, computer programmers, engineers and technical writers (Allen, 2002:104; Mattusik and Hill, 1998:680). These highly skilled consultants have obtained current and up-to-date knowledge from working in many firms (Allen, 2002:105). The other level relates to lower-skilled workers who are prone to exploitation and are offered a low wage for their manual services. The majority of lower skilled workers are forced into temporary employment. The number of temporary workers is not equivalent to how many temporary jobs exist, as some workers do not regard themselves as „temporary workers’ even though

they are in fact occupying temporary jobs (Casey *et al*, 1989:449). They may regard themselves as part-time workers. Many temporary workers are subjected to „hyper-commodification’, whereby they are traded on a price-orientated basis, as if they were mere commodities.

Temporary employment can also be defined as either voluntary or involuntary employment. Many people are forced into temporary jobs since there are no permanent jobs available. Some people prefer temporary employment because they are not seeking permanent positions, but merely want to gain experience in different areas. Rogers (2000:3) argues that temporary workers are involuntary temporaries, “supporting the idea that these trends are employer rather than employee-driven”. It must be noted that many people only engage in temporary employment on an involuntary basis because they have no other choice; they would prefer a full-time job (Rogers, 2000:3). Employers usually employ temporary workers to cover the absence of permanent employees. Yet, many employers utilise temporary workers to act as a buffer. Temporary workers have also been referred to as “disposable workers” since they are brought into the workplace on a temporary basis when a firm has unexpected increases in workload, or to cover employee absences, and to work on short-term projects (Allen, 2002:103).

A positive aspect concerning temporary employment is that it may assist workers in finding and gaining access to permanent employment positions (Cohen and Haberfeld, 2001:287). Although temporary employment is less attractive than permanent employment, many firms use temporary positions as an opportunity to screen applicants for permanent positions (Engellandt and Riphahn, 2005:284). It also releases employees from being confined or tied to one employer. Many temporary workers tend to hold more than one job (Hipple, 1998:26). This is because they have the extra available time for another job, but they will usually require another job because the first temporary position does not pay enough. While temporary workers may supplement the regular workforce, there are positions in firms that are staffed only with temporaries (Allen, 2002:103). There are many „permanent temporary’ workers that work for an extended period of time, with their contract being renewed continuously. One of the main advantages is that some temporary workers create and add valuable knowledge to a firm, which helps the firm establish a competitive advantage (Mattusik and Hill, 1998:680). This refers in particular to temporary workers that are skilled and have unique knowledge in a specific area.

## 2.5.2 The Implications of Temporary Employment

There are numerous negative aspects of temporary employment. A significant concern in terms of non-standard employment “is not the nature or length of services, but rather the broader issue of lack of entitlement” (Klerck, 2004:5). Many temporary workers are offered little job security, and their pay and fringe benefits are inferior to those of regular full-time employees (Forrier and Sels, 2003; Olsen and Kalleberg, 2004). Temporary workers particularly within the TES industry are more vulnerable due to the lack of trade union support. Roskam (2007:33) argues that labour broking arrangements are problematic for workers. This is because there is usually a decrease in wages, benefits and terms and conditions of employment, contracts are temporary and there is a reduction in the capacity for a worker to challenge an unfair dismissal. Roskam (2007:33) reiterates that “[i]t is safe to conclude that labour brokers have given birth to an underclass of employed workers”.

There is concern about the quality of temporary jobs and “the lack of opportunities for career advancement” that is associated with temporary work (Booth *et al*, 2002:189). One of the major characteristics of working in a temporary job is that “there will always be a certain degree of uncertainty regarding whether there will be continued employment as well as the job location, job requirements and what types of people one would be working with” (Boyce *et al*, 2007). Temporary workers who are incorporated within a firm will result in an increase in supervision. It is necessary to address the impact of the presence of temporary workers within a workplace “such as how workers are supervised and disciplined” (Theron *et al*, 2005a:3). Temporary workers tend to find themselves “stigmatised or isolated, uncertain of the duration of their assignment”, and they experience problems such as sexual harassment (Rogers, 2000:4). Most forms of non-standard work are insecure which can involve a temporary worker working alongside „permanent’ staff “whose terms and conditions are superior” (Tailby, 2003:520). A permanent employee is usually offered a pension, medical aid and extra perks of financial assistance (e.g. house and car subsidy). “Temporary workers as a group earn less money than traditional workers and are less likely to have a pension plan or health insurance from any source” (Rogers, 1993:4).

Due to the increased flexibility of the labour market and especially the increase in non-standard employment, many workers are beginning to feel insecure in their jobs. This fear, in turn, has consequences for both the individual and the firm (Chirumbolo and Hellgren,



2003:217). Purcell regards temporary employment as “unequivocally insecure” (cited in Tailby, 2003:517). This is “regardless of whether people choose or are relegated to it” (Tailby, 2003:517). Job insecurity has received increased attention because of “processes of globalization, de-regulation of labour markets, increases in unemployment and inequalities” (Charles and James, 2003:532). Increased competition as well as liquidations has left workers with a sense of insecurity (Bezuidenhout *et al*, 2004:64). Insecurity is a chief component within the underclass of workers within the TES industry. Many workers who experience job insecurity have an inability to plan for the future due to their short-term contracts (Conley, 2005:149).

Workers are left feeling vulnerable, not knowing when their next paycheck will come. Job insecurity may be referred to as “the personal inefficiency and incapacity to maintain continuity in a situation where the actual role and job position is threatened” (Greenhalgh and Rosenblatt, cited in Chirumbolo and Hellgren, 2003:218). It is further defined as the threat of involuntary job loss where there is uncertainty of whether employees will keep their job in the future (Nätti, 2005:12). Generally, job insecurity reflects “a discrepancy between the level of security a person experiences and the level she or he might prefer” (Hartley *et al*, 1991:7). It creates tensions between the workers and the firm that they work for and between the workers themselves. The use of non-standard workers can have “a negative impact on a variety of work attitudes, including loyalty, job satisfaction and manager/employee relations” (Banerjee and Tolbert, 2008:12).

Temporary workers are inherently vulnerable and insecure due to their contract status (Conley, 2005:145). Conley’s (2005:143-161) research indicated that temporary workers would prefer permanent contracts and that temporary employment had many disadvantages. This includes financial insecurity, under-utilised skills, damaged confidence, discrimination and lack of available transport - this is because temporary workers usually work early or late shifts. The lack of control over their contracts takes a great psychological toll on most temporary workers (Conley, 2005:152).

There are two variations to consider when addressing job insecurity. There is job insecurity for permanent employees who are concerned that they will not be secure within their current employment in the future and job insecurity for temporary workers who are already without permanent work and are constantly insecure. Permanent employees are however within a

better position than non-standard workers due to “higher remuneration and higher job security” (Hartley *et al*, 1991:182). When temporary workers feel insecure, it is usually because there is no guarantee that they will receive remuneration or employment for an extended period of time. It must be noted that job insecurity is a driving motive for workers to join a trade union (Nätti, 2005:11). This is because workers feel that they will receive greater protection and more security when their interests are guarded by a party greater than themselves. It is difficult to measure job insecurity since it may be characterized by feelings, although it may be measured by the number of non-standard workers within a country as well as a high unemployment rate. Forrier and Sels (2003:642) argue that the “evolution towards less employment security should be no reason for despair”. They further add that “lifetime employment within the same organization can no longer be guaranteed, employment security has to be safeguarded differently”. Forrier and Sels (2003:642) suggest that employees enhance their ‘employability’ as a new protection mechanism instead of striving for ‘lifetime employment’ in the labour market. “Employability, points to the permanent possibility of employees gaining employment in the internal and external labour market” (Forrier and Sels, 2003:642). However, it can also be argued that enhancing employability may not necessarily be productive within a country such as South Africa that has a high unemployment rate.

Heery and Salmon (2000:12) argue that insecurity should be defined broadly on three dimensions. Firstly, it can be understood in terms of “increased risk of involuntary job loss and unpredictability of earnings” which can be measured through indicators that include “job tenure, compulsory redundancy, the incidence of contingent contracts and the use of variable pay” (Heery and Salmon, 2000:12-3). Secondly, insecurity is viewed as a “property of the environment in which jobs exist” (Heery and Salmon, 2000:13). This dimension is viewed in terms of the penalties that are associated with job loss as well as the degree of labour regulation, trade unionism and unemployment support. The third dimension is that insecurity can be viewed as the subjective experience of employees in terms of attitudes and perceptions towards insecurity (Heery and Salmon, 2000:13).

While employees may feel insecure, they may never lose their jobs (Nätti, 2005:12). “There is also evidence that subjective experience of job insecurity is possible in contexts where no objective threat of unemployment exists” (Nätti, 2005:12). Overall, temporary workers have more reason to feel insecure than permanent workers. That is not to say that permanent workers do not feel threatened by temporary workers, but the most pressing issue that faces

permanent workers is the economic environment. Many permanent workers are at a risk of being retrenched. This is a grave reality as many firms around the world have retrenched workers due to the global economic recession.

What mechanisms are in place to provide protection? The Bill of Rights in South Africa's Constitution provides that everyone has the right of access to "social security, including, if they are unable to support themselves and their dependants, appropriate social assistance" (cited in Makino, 2008:15). According to Makino (2008:11), the social security system in South Africa is divided into two segments: private retirement provisions (pension, provident funds) and medical schemes that are highly developed, and the public system where there are social grants for the elderly, disabled and children. The medical system is also divided into private and public sectors, with the public sector catering for the poorest part of the population (Makino, 2008:11).

The government does provide unemployment insurance where employees have to register with the Unemployment Insurance Fund (UIF), except for workers who work less than 24 hours a month (Makino, 2008:11). The UIF cannot be considered as income security for people who have been unemployed over the long-term and those that have never been registered, as UIF only covers those people who have contributed to the fund, and they are paid only for a limited period of time (Makino, 2008:16). To address this problem, the government introduced a Public Works Programme in 2004. However, the scale and locations of programmes are determined by budget constraints (Makino, 2008:16).

Non-standard employees are at a disadvantage since many cannot afford medical schemes. According to Makino (2008:12), "[p]articipation levels for medical schemes is lower because some employees (especially if their wage is not high) choose not to be enrolled in medical schemes due to the high cost and considered low benefit". There are major differences in coverage of retirement and medical schemes between standard and non-standard employment within the formal sector (Makino, 2008:12). According to the ILO, "while 69.1 per cent of regular workers of 340 manufacturing firms are covered by pension funds, only 23.5 per cent of part-time workers and 8.9 per cent of temporary workers are covered" (cited in Makino, 2008:12). It is also reported that "temporary workers are often not registered for the UIF and the Compensation Fund, in spite of it being compulsory for employers to do so" (Department of Labour, cited in Makino, 2008:12). It is rare for employers to offer temporary workers any

benefits. Employers will sometimes offer premium rates to secure the services of temporary workers whose skills are in short supply and who have decided to supply their labour on a temporary basis only (Tailby, 2003:520). The lack of benefits awarded to temporary workers, creates even more inequality between permanent workers and non-standard workers.

Since South Africa's democratization, there has been a strengthening and extending of the protection for workers. However, "to have the rights on paper and to enjoy the rights in reality are two different things ... especially so for workers in non-standard employment" (Makino, 2008:16). There is progress regarding social grants and public works programmes for the unemployed, yet there is little progress regarding social security for non-standard employment (Makino, 2008:17). In early 2007, the government proposed "a social security reform plan that included a compulsory retirement provision and a wage subsidy for low-wage earners" (Mbeki, cited in Makino, 2008:17). This requires consultation with organised business and labour, but the extent to which non-standard workers will be covered is unclear (Makino, 2008:17). Lund (cited in Makino, 2008:17-18) points out that "the social security system in South Africa does not fit the needs of increasing numbers of workers in non-standard employment". Temporary employees working within the TES industry are at a greater disadvantage. TES agencies do not necessarily adhere to the law, and the industry's lack of regulation creates enormous problems for temporary workers. Rogers (2000:4) argues that the supposed „flexibility’ of temporary employment is largely mythical, as workers often work their schedules around the employer's needs. "Temps will come and go, but it has become increasingly clear that mediated work arrangements are here to stay, and not just for a few firms and industries, but across large swathes of the labour market" (Peck and Theodore, 2007: 173).

### **2.5.3 Industry and Occupational Divisions in Temporary Employment**

Temporary employment is rather diverse and is present in a wide variety of occupations. It has a multiplicity of forms and "encompasses a range of employment relationships" (Tailby, 2003:517). There is a general consensus that there are certain occupations in which non-standard employment occurs more often. According to Tailby (2003:517), many non-standard workers are "recruited to low-grade, low-paid jobs, but there has been growth in temporary employment in the past decade among professionals, managers and technically qualified

personnel”. While these workers are most likely to be hired on fixed-term contracts, within the public sector ,professionals’ are often hired through TES agencies (Tailby, 2003:517).

“Temporary workers are commonly employed in hazardous jobs or jobs of low complexity, but they can also be found in other professions, including law, teaching, and computing” (Tailby, 2003:519). Some are in clerical and secretarial positions, occupations in information technology, computing and telecommunications (Tailby, 2003:519). In Table 1 the various types of contracts within the different industries in South Africa are shown. Permanent employment remains the most widespread employment, yet temporary employment is particularly high. Industries that utilise a large amount of temporary labour include manufacturing, construction, wholesale and retail trade, private households and community, social and personal services.

*Table 1. Number of employees by type of employment contract and industry, 2005*

<b>Industry</b>	<b>Permanent</b>	<b>Fixed-Term</b>	<b>Temporary</b>	<b>Casual</b>	<b>Seasonal</b>	<b>Total</b>
Agriculture, Forestry and Fishing	455000	27000	99000	63000	69 000	715000
Mining and Quarrying	383000	25000	10000	---	---	423000
Manufacturing	1150000	64000	126000	81000	---	1434000
Electricity, Gas and Water Supply	86000	22000	12000	---	---	123000
Construction	270000	91000	182000	112000	---	662000
Wholesale and Retail Trade	1141000	55000	207000	176000	---	1585000
Transport, Storage and Communication	371000	22000	75000	29000	---	498000
Financial, Insurance, Real Estate and Business Services	790000	87000	60000	24000	---	965000
Private Households	535000	19000	317000	188000	---	1230000
Community, Social and Personal Services	1757000	89000	136000	67000	---	2055000

(Source: Statistics South Africa, 2005:35).

The prevalence of temporary labour in all industries reflects business' adaptability to economic conditions. The increase in temporary labour is possibly a result of retrenchments that have taken place. Nevertheless, employers hiring temporary workers, is part of a broader trend of saving costs. By using the TES industry, employers have the ability to remove their obligations as the employer, which is very appealing. According to Rees (1997:30), sectors such as construction and services in South Africa are experiencing a high amount of temporary labour because these sectors are more likely to expand and require the labour to grow. Employers in some industrial sectors, such as construction, have traditionally organised staffing to meet seasonal peaks (Tailby, 2003:521). Within the manufacturing sector, such as household appliances, production is cyclical by nature as demand for goods increases over the festive season. Employers will often employ more non-standard workers during the busy period (Bezuidenhout *et al*, 2004:64). Due to an increase in competition in local markets, manufacturers have strived to reduce costs (Bezuidenhout *et al*, 2004:64). Within the mining industry in South Africa, there are both core and non-core functions which has become more prevalent in recent years (Bezuidenhout *et al*, 2004:31). Special services such as construction and electrical services are subcontracted with an increase in the use of TES agencies (Bezuidenhout *et al*, 2004:61). There are various occupations that can be filled by a temporary worker who has the knowledge to „fill the gap' on a day-to-day basis. This research, however, is more concerned with large quantities of temporary workers that are brought into a workplace to enhance productivity and provide labour flexibility for employers. In South Africa, the majority of temporary workers are supplied by TES agencies and are working in unskilled and semi-skilled jobs, specifically factory workers who are easily replaced.

#### **2.5.4 The Gender Division in Temporary Employment**

Globally, there is a growing recognition of women as workers (Standing, 1999:81). However, according to Bodibe (2006:5), in South Africa many female workers are casuals, especially in the retail and cleaning industries. Since there are few employment opportunities, women are compelled to take these jobs. It is important to address gender issues within this research because “[w]omen are key figures in the struggles over flexibility” (Walby, 1998:81). It is “the increased availability of women as low-paid labour which makes this type of flexibility possible” (Walby, 1998:81). In terms of feminist's views, the state has been implicated in preventing women from working in certain areas within the labour market (Witz and Savage,

1992:6). Are women in South Africa currently placed in subordinated positions that exacerbate gender inequality? In recent years, attempts to restrict women's employment are illegal and there is a much greater awareness of women's rights (Walby, 1998:83). Unfair discrimination in terms of the Employment Equity Act (EEA) is an example of how gender issues are addressed in the ambit of the law. However, women do tend to occupy a major proportion of the peripheral segment, possibly because they prefer less hours of work to have more time for their families (Walby, 1998:84). It is important to note that a woman's position in the labour market is diverse, with divisions in class, ethnicity and age and it is therefore essential not to generalize (Walby, 1998:86). In South Africa's labour market, there is a reliance on existing gendered inequalities (Walby, 1998:87). Women are an integral part of the South African labour market, the question is to find out what the implications for women are who are working within the peripheral segment of the labour market, and how are they treated within the TES industry.

## **2.6 LABOUR LEGISLATION AND REGULATION OF NON-STANDARD EMPLOYMENT AND THE TEMPORARY EMPLOYMENT SERVICES INDUSTRY**

This section will aim to provide a review of the legislation and the forms of regulation that govern non-standard employment and the TES industry.

### **2.6.1 South African Labour Law Framework**

The mining and manufacturing industry have historically shaped the labour relations system of South Africa. These sectors are important to the economy and have made unionisation possible (Theron, 2005:307). The growth of non-standard forms of employment and the TES industry have both contributed to the decline of these sectors. The main premise on which the employment relationship is regulated is the SER. One of the main concerns about the TES industry is that temporary workers are unprotected (Klerck, 2009; Theron, 2003). There has been an increase in protection of all workers in South Africa, but there is also an increase in non-standard employment, "which means an increase in workers who do not substantially enjoy rights and protections under the new labor legislation and are excluded from social safety nets" (Makino, 2008:18).

Since the democratic elections in 1994, South Africa's labour dispensation has changed significantly with organised labour playing an important role in the transformation process (Cronjé *et al*, 2004:238). South Africa's key labour laws are the Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA). Two other crucial Acts are the Employment Equity Act (EEA) (provisions about affirmative action for previously disadvantaged groups), and the Skills Development Act (SDA), which aims to improve the skill levels of workers (Makino, 2008:15). In order to address legislation that applies to the TES industry, it is vital to discuss the legislation that affects non-standard employment.

Harris (2002) argues that legal intervention is an important aspect that plays a role in how human resources develop and change in the workplace. When addressing the issue of labour legislation and its impact on employment, one of the chief concerns is whether a certain set of rules should apply to all forms of employment or whether there should be a different set of rules for different forms of employment (Theron *et al*, 2005a:1). This argument was central in a debate between organised labour, business and government in South Africa shortly after the LRA was adopted in 1996 (Theron *et al*, 2005a:1). Makino (2008:10) claims that workers in non-standard employment and standard employment are treated equally. However, "the effectiveness of regulations differs, and the actual level of rights and protection which workers in non-standard employment enjoy is significantly inferior to that for workers in standard employment". Both groups of employees are included within the frameworks of the law; but there is less regulation within the informal economy. This automatically creates inequality and workers within non-standard forms of employment are more likely to experience employment insecurity and vulnerability. This, in turn, has social consequences because the unemployed experience poor living conditions and may turn to crime.

### **2.6.2 International Regulations**

Internationally, the concerns of regulating non-standard forms of work and the TES industry have been addressed. The view that the working world is transforming due to changes induced by globalisation is frequently asserted by the ILO (Bezuidenhout, 2004:19). In 1990, there were discussions on self-employment at an annual ILO conference, which questioned the assumption that the self-employed did not need protection. The Homework Convention, which was adopted in 1996, recognised that there were workers who do not work at the workplace of the employer and who were in need of protection. The convention "sought to



identify and hold accountable an employer on the basis of an identifiable economic relationship rather than on the basis of a contract of employment” (Bezuidenhout, 2004:20). In 1997, the Private Employment Agencies Convention was adopted. It gave international legitimacy for the first time to the operation of private employment agencies. The ILO failed to adopt a contract labour convention. Instead, a resolution was drafted to identify situations where workers required protection. Its purpose was to discuss the scope of the employment relationship and to adopt a new recommendation (Bezuidenhout, 2004:22).

In terms of the TER between the employer, the agency and the temporary employee, the ILO regards the agency as the employer. Bezuidenhout *et al* (2004:23) argue that the ILO ignores the economic reality that the firm that utilises the employee is the dominant party, and “it commonly determines the relationship between the provider and its workers”. Bezuidenhout *et al* (2004:23) argue that the ILO’s approach to non-standard employment is timid and imprecise, and in terms of the TER, the ILO’s characterisation is misleading. Bezuidenhout *et al* (2004:23) further believe that what one should learn from the ILO as it is a necessity to articulate a “theoretical understanding of the changing nature of work” and to implement changes at a national level rather than at an international level.

The ILO held a conference in 2003 to discuss a variety of issues that affect the employment relationship. However, with regard to the TER, it was stated that the issue was not resolved (Theron *et al*, 2005b:1). There tends to be uncertainty of what ‘the issue’ is. If there is an employment relationship, whether within a TER or not, all non-standard employees should have the same access to protection as employees in a SER. Possible reasons why the ILO finds it difficult to extend protection to non-standard workers is due to the fact that the ILO has a problem identifying the demarcations between independent workers and those within an employment relationship (Theron *et al*, 2005b:3). The ILO conference in 2003 proposed to focus on the concept of “disguised employment”, which is “when the employer treats a person who is an employee as other than an employee so as to hide his or her true legal status” (Theron *et al*, 2005b:4). There is also the concept of “ambiguous employment” where work is performed or services rendered “under conditions that give rise to an actual and genuine doubt about the existence of an employment relationship” (Theron *et al*, 2005b:4). The resolution of the ILO conference regarding the TER was that the major issue is to determine who the employer is, what rights the workers have and who is responsible for them

(Theron *et al*, 2005b:5). The rights of non-standard workers should be no different from the rights of any other employee (Theron *et al*, 2005b:5).

### **2.6.3 Labour Relations Act of 1995**

The LRA is concerned with “labour relations in general, including the rights of trade unions, collective bargaining, strikes and lockouts, unfair labor practices, and procedures for labor disputes, and regulates the collective bargaining institutions called bargaining councils” (Makino, 2008:10). A key goal of the Act is “to shift industrial relations away from its adversarial heritage and create a new system that would be able to meet the challenges posed by globalisation” (Du Toit *et al*, cited in Clarke *et al*, 2002:7). Although the Act covers organised workers’ rights, it excludes the majority of unorganised workers. These unorganised workers include most forms of non-standard employment and women in the informal economy (Valodia, 2000:10). South Africa’s current system of labour legislation “is premised on the existence of an employment relationship” (Theron, 2003:1257). Firstly, it is important to note that labour legislation applies to those persons who are ‘employed’, and not to independent contractors who provide labour and services on contract (Makino, 2008:16). As Klerck (2004:5) explains:

Workers falling outside the statutory definition of an ‘employee’ are deprived of the protections associated with standard employment and exposed to the rigours of common law. This provides employers with an incentive to construct employment contracts in a manner that excludes the legal indicators of a SER.

Many firms prefer utilising service contracts so that labour legislation would not apply, and as a response to this problem, LRA and BCEA were amended in 2002. The 2002 amendments to the LRA are of great importance because the Act is more specific in regards to the definition of an employment relationship. A problem with the current legislation is the various presumptions in terms of who is regarded as an ‘employee’. The LRA and BCEA try to establish this by creating presumptions “in terms of which a person will be regarded as an employee if any one of the seven criteria apply” (Theron, 2003:1272). According to the LRA and the BCEA, a person may be regarded as an employee if a person is subject to the control and direction of another person; their working hours are in control and direction of another person; a person has worked for another person for an average of 40 hours per month for

three months; a person will be considered part of an organisation if they work for an organisation; a person is economically dependent on the other person for whom he works; a person is provided with equipment by the other person; or the person renders services to only one person. The problem is that an employer can rebut the presumption, which means that not every worker will receive protection. In fact, workers in a TER are not assisted by the presumptions (Theron, 2003:1273).

The foremost concern with the TES industry is that it is creating a new underclass of workers who are not afforded the required protective measures as compared to workers within a SER. The non-standard workforce is vulnerable and a major problem is the absence of statutory and collective protection (Klerck, 2009:87). Any form of employment that is externalised is highly unstable because of the difficulties inherent in the TER such as holding the ‚real‘ employer (the client) accountable (Theron, 2003:1256). In terms of the LRA, the term ‚temporary employment service‘ means any person who, for reward, procures for or provides to a client other persons who render services to, or perform work for, the client; and who are remunerated by the temporary employment service. With regard to independent contractors, the temporary employment service is not the employer of that person. To escape the obligations of the law, TES agencies will try to ‚disguise‘ the employment relationship with a temporary worker, and claim that the temporary worker is an independent contractor. Theron *et al* (2005a:41) argue that the definition of a TES in the LRA is too vague. A TES can consist of a variety of functions, and therefore, the LRA should be more specific. As Theron *et al* (2005a:41) point out,

[t]he current definition of TES in labour legislation is not adequate. Its most glaring failing is that while it defines labour broking as a relationship between a temporary employment service, an employee and a client, it does not attempt to circumscribe what is temporary about this relationship. Indeed there is nothing to prevent the employee from being employed in perpetuity in this arrangement.

According to Theron *et al* (2005b:62), such a definition should state that a temporary employment period lasts for a certain amount of time, and any time worked after a specified amount of time would automatically result in a permanent state of employment. Due to the lack of a precise definition, TES agencies have the ability to withdraw temporary employees at any stage. Theron *et al* (2005b:62) state that the length of time that an employee should be

regarded as temporary is three months. Section 198 of the Labour Relations Act regulates the TES. The LRA provides that the temporary employment agency is the *de jure* employer. The LRA had already designated the TES as the employer prior to it becoming an international standard with the adoption of the Private Employment Agencies Convention (Theron *et al*, 2005b:5). The temporary worker essentially “has a ‘nominal’ employer (the person who assumes the risk of employment, legally) and a ‘real’ employer (who determines the terms on which they are employed)” (Theron, 2003:1255).

Since 1995, the LRA has included some rights for flexible workers involved in subcontracting arrangements. Before 1995, any employer that subcontracted labour through labour brokers was not liable for compliance with minimum standards. However, the Act now imposes joint and several liability on the parties. Breaches can include the TES breaching terms and conditions of employment provided for in a collective agreement, a binding arbitration award, provisions of the BCEA and a wage determination in terms of the Wage Act (Fenwick *et al*, 2007; Todd and Laubscher, 2008). This also means that an unfairly dismissed employee may sue the client and/or the labour broker for such breaches. “If the employee sues both, each is fully liable, but is absolved if the other pays” (Grogan, 2005:24). The client is responsible for accidents occurring in his or her workplace, In terms of abiding with the Occupational Health and Safety Act, “it is the client and not the labour broker who must ensure compliance” (Todd and Laubscher, 2008:11).

Within the TER, the client is not held liable for unfair dismissals. “This is a serious shortcoming, given the fact that it is usually the client’s decision whether or not to dismiss” (Fenwick *et al*, 2007:23). In terms of dismissal, according to Section 186 (1) (b) of the LRA, it can be regarded as a dismissal if an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it. It is easy for an employer to force an employee to accept a contract, which “would not allow the employee to reasonably expect the employer to renew the contract on the same or similar terms” (Makino, 2008:17). Clients should be held accountable and examples of unfair dismissal will be revealed within the analysis. According to Fenwick *et al* (2007:23), “[t]he provisions acknowledge the reality that the client is in control of the workplace and usually directly or indirectly determines the workers’ terms and conditions of employment ... [and] they make it less difficult for a client of a TES to turn a blind eye to the wages that the TES pays the employee”. Due to the

precariousness of temporary work, as well as minimal trade union activity, it is less likely that temporary workers will have recourse (Fenwick *et al*, 2007:23).

The TER is contentious as there is a sense of confusion concerning the responsibilities of each party. The main problem in terms of the exercise of these rights is due to the confusion regarding the identity of the employer (Theron *et al*, 2005b:5). In essence, the stipulation that the TES is the employer is artificial (Theron *et al*, 2005b:5). “Arguably it is primarily a device to absolve the client from accountability towards a section of its workforce” (Theron *et al*, 2005b:5). The client is the dominant party in the TER “because the client determines the services required” (Theron *et al*, 2005b:5). According to Theron (2003:1256-7), “externalization has the profoundest consequences for our system of labour regulation and skills development strategies, our current notions of social organization and our system of social protection”. Externalization is problematic as it dilutes the SER, but it is also a “shift away from the employment relationship altogether” (Theron, 2003:1257). Externalization is essentially overlooked, and there should be greater regulation of TERs.

#### **2.6.4 Basic Conditions of Employment Act of 1997**

The Act endorses and promotes a flexible labour market (Klerck, 2001:426). The main objective of the Act is to give effect to the constitutional right to fair labour practices and to make provision for basic conditions of employment. The BCEA sets minimum working conditions for all workers, including domestic and farm workers (Makino, 2008:15). While the BCEA applies to both standard and non-standard workers, there are certain provisions that do not apply to workers who work for an employer for less than 24 hours (Makino, 2008:15).

With regard to the TES industry, the 2002 amendments to the BCEA provide that the TES agency is the employer, and that the client as well as the agency is jointly and severally liable for breaches of labour rights. In terms of the regulation of working time, the BCEA 2 (6) states that the relevant provisions do not apply to employees who work less than 24 hours a month for an employer, which means that any employee who works in a temporary position for an employer for less than 24 hours a month will not be regulated by the BCEA in terms of hours of work, compensation, working intervals and overtime payment. The BCEA also does not cover employees who work less than 24 hours a month for an employer with regard to

leave. This means that they are not entitled to annual leave, sick leave, maternity leave or family responsibility leave. The BCEA does not regulate particulars of employment and remuneration for workers who work less than 24 hours a month for an employer. This means that the employer does not have to provide the temporary employee with written particulars of employment or inform employees of their rights, keep records, or give information on remuneration. Chapter 5 of the BCEA, which covers the termination of employment, also does not apply to employees who work less than 24 hours a month for an employer.

In essence, any casual worker who works less than 24 hours a month has no rights, no privileges and is the most vulnerable worker of all. It is therefore important to address this issue within the TES industry, and find out whether any workers work less than 24 hours a month. In their study of labour brokers, Theron *et al* (2005a:23) found that there were very few placements of less than 24 hours a month. This is because TES agencies make more money the longer the temporary worker is employed.

### **2.6.5 Skills Development Act of 1998**

The Skills Development Amended Act of 2003 states that the aim of the Act is “to provide an institutional framework to devise and implement national, sectoral and workplace strategies to develop and improve the skills of the South African workforce”. Skills development is implemented via the various Skills, Education and Training Authorities (SETAs). In terms of TES agencies, the Act states that private employment services must register with the Director-General, but the Director-General has a right to cancel the registration if certain criteria are not met. The Act requires “the employment service for gain’ to register”. However, the term is not defined and many TES “have taken a view that this provision does not apply to them” (Theron, 2003:1265).

### **2.6.6 Employment Equity Act of 1998**

The Employment Equity Act prohibits direct or indirect unfair discrimination by any employer on grounds such as race, gender, age and sexual orientation (Barker, 2007:245). In Section 57 (1) of the Act, a TES that provides a person’s services to a client either indefinitely or for more than three months is deemed to be the client’s employee and the client may therefore be held liable for unfair discrimination in terms of the Act. Why the

EEA and not any other legislation recognise the client as the employer is uncertain. The TES and the client can also be held jointly and severally liable if the TES commits an act of unfair discrimination based on the instructions of the client (Du Toit, cited in Fenwick *et al*, 2007:23).

### **2.6.7 Association of Personnel Service Organisations**

There are numerous large TES agencies in South Africa that are members of the Association of Personnel Service Organisations (APSO), which “advocates compliance with legislation in its literature” and states that they have developed a code of good practice for its members (Theron *et al*, 2005a:6). It is important to establish APSO’s role in guiding its members and promoting fair labour practices. It is also important to discover whether APSO promotes the protection of temporary workers, and whether TES agencies do in fact follow these recommendations. APSO’s role will be examined in Chapter 7.

### **2.6.8 Bargaining Councils and the Commission for Conciliation, Mediation and Arbitration**

Bargaining councils are important institutions because they are established to negotiate conditions of employment, wages and to resolve disputes in a specific sector or industry. The incorporation of bargaining councils within the research is fundamental as they aid in regulating the TES industry. In addition to the labour legislation that provides a foundation to regulate temporary employment, bargaining councils often supersede the law and agreements are altered and specified according to the needs of a particular sector. Minimum wages are determined by bargaining council agreements in each sector (Makino, 2008:10) or by means of a sectoral determination. Bargaining councils may agree to include the TER if they fall within their registered scope. However, in sectors where collective bargaining does not take place, the Employment Conditions Commission can investigate conditions in the sector and can make a recommendation of wages and conditions to the Minister of Labour where he or she will make a sectoral determination (Barker, 2007:111).

The Commission for Conciliation, Mediation and Arbitration (CCMA) is a dispute resolution body that attempts to resolve disputes through conciliation, mediation and arbitration. The body has a number of functions that include disciplinary procedures and establishing

workplace forums (Nel *et al*, 2005:115). The CCMA's primary role in terms of the TES industry is that it assists TES agencies and temporary workers to resolve disputes.

### **2.6.9 Future Considerations of Regulations and Amendments**

The regulation of the TES industry is a pressing concern. A system of regulation is required for both standard and non-standard forms of employment. According to Cheadle (2006:4),

the traditional model of employment (permanent full time employment with one employer until retirement) is steadily giving way to less stable (and often more vulnerable) forms of employment. This has two consequences for labour market regulation. The first is that much of the regulation based on the traditional model is not suited to these new forms of employment. The second is that the modern labour market is dynamic and labour market regulation is always a step behind.

Protection of non-standard workers is one of the most vital and pressing issues that remain for the Department of Labour (Makino, 2008:19). In 2006, the Minister of Labour stated: "I am of the view that the labour law should cushion and mitigate the adverse nature of atypical forms of employment and lack of protection for these workers" and "any proposed changes in the law in the next decade should ideally extend protection to vulnerable workers while balancing it with the needs of small employers" (Mdladlana, cited in Makino, 2008:19).

Remedying the situation of non-standard workers can be achieved by "extending minimum floor rights to these workers through legislation, or by strengthening their collective bargaining abilities" (Fourie, 2008:112). This could be problematic because temporary workers are inherently difficult to organise. While strengthening their collective bargaining abilities should aid the cause of temporary workers, it requires extensive intervention either in terms of labour law being amended or the formation of a new body that will regulate the TES industry. Theron *et al* (2005a:40) argue that the 2002 amendments to the LRA are not effective in regulating contracts within the TES industry. Even though the various presumptions are a step in the right direction, the presumptions need to be more precise. Many of the cases involving disputes are highly dependent on adjudication. However, it is "not appropriate that courts be expected to resolve difficulties as fundamental as these"



(Theron *et al*, 2005a:40). In addition, the law should impose compulsory registration with the Department of Labour in order to regulate the activities of TES agencies more closely.

Negotiations have taken place regarding the Code of Good Practice of who falls under the definition of an „employee’ as well as the regulation of the TES industry. “The Code of Good Practice was already agreed upon and published in December 2006, yet the future of regulation of labor brokering is uncertain” (Makino, 2008:20). According to Makino (2008:20), businesses are against labour law amendments and argue that what is necessary to protect temporary workers is “the improved effectiveness of, not amendments to, the current labor laws”. COSATU, by contrast, demands that regulations regarding the TES industry and fixed-term contracts are tightened (Makino, 2008:20). It is important to note that any amendments to labour law require a consensus between organized business and labour. Therefore, any amendments “are unlikely to take place in the near future, and if any further regulation is introduced, it is likely to be some form of self-regulation” (Makino, 2008:20). According to Theron *et al* (2005a:40-41), there has been a proposal “to create a statutory professional body along the lines of the Estate Agency Board” in order for the sector to regulate itself, as well as to make membership to one of the personnel associations compulsory. The option of the TES industry regulating itself poses a number of challenges. Due to the inclusion of a diverse range of activities, the industry is difficult to define. In order for an industry to be properly regulated, it requires the representation of each party involved, especially workers (Theron *et al*, 2005a:41).

## **2.7 CONCLUSION**

The objective of this chapter is to demonstrate that work is changing, that firms turn to flexibility in order to remain competitive in the global economy, and that the workforce is segmented into core and peripheral workers, where the former is highly regulated and the latter is less regulated. The main purpose was to address the peripheral segment, with a specific focus on temporary labour within the TES industry resulting in an underclass of workers. These workers are working in the same conditions as permanent employees yet are stripped of the entitlement, benefits and protection of a SER. This is a pressing issue and it is problematic as there is not enough information regarding the TES industry in South Africa.

There is a widespread consensus that non-standard work and the TES industry are expanding globally and in South Africa. The different forms of flexibility as well as flexibility in South Africa were examined. The focus of the discussion was specifically on labour flexibility because this is one of the major reasons why the TES industry is present within the labour market. In order for firms to implement labour flexibility, they require a temporary workforce provided by the TES industry. Temporary employment was then discussed in order to understand the TER and the various divisions of temporary work. The regulation (or the lack thereof) that affects both non-standard employment and the TES industry was examined. The rise in non-standard employment and the TES industry are interconnected since firms implement labour flexibility through the use of temporary agency employment.

It is necessary to consider additional reasons why TES agencies are used. The major argument is that besides the need for flexibility, firms are turning to the TES industry to avoid their obligations as employers. The LRA states that the TES agency is the employer, which is a major shortcoming since it allows the „real’ employer (i.e. the client) to avoid the responsibilities of an employer. Temporary workers within the TES industry constitute an underclass because TES agencies lack adequate regulation. The latter is the very reason for the growth of the TES industry. Since the pricing structures of the temporary employment industry closely follow the costs of employment in the more regulated sectors of the labour market, “the industry’s business interest is best served by the *growth* of regulatory costs in the mainstream employment relation, coupled with the ongoing under-regulation of its *own* sphere of operations” (Peck and Theodore, 2002:153). It is therefore necessary to ask whether more effective regulation or self-regulation of the TES industry will still maintain the industry’s appeal for employers.

# 3

## METHODOLOGY AND RESEARCH DESIGN

### 3.1 INTRODUCTION

Social research is a process where one is involved in learning and acquiring information about the social world (Neuman, 2003:2). Methodology within social sciences refers to how research is conducted; it is both the researcher's assumptions and purpose that shapes the methodology that is used (Taylor and Bogdan, 1998:3). Methodology is also considered as research design. Research design is "a strategic framework for action that serves as a bridge between research questions and the execution or implementation of the research" (Durrheim, 1999:29). Research involves organising, planning and selecting appropriate techniques and methods of addressing the research question (Neuman, 2003:2). This chapter is concerned with the philosophical approach and the methods that will be deployed to gather and interpret the information required.

### 3.2 RESEARCH OBJECTIVE

The central objective of this research is to demonstrate that, due to the demand for labour flexibility and the lack of effective regulation of the TES industry, a vulnerable underclass of workers has been created.

The thesis will address five objectives.

1. To examine the demand for temporary labour – i.e. why firms are incorporating labour flexibility.
2. To examine the supply of temporary labour – i.e. the nature and role of the TES industry.
3. To uncover information regarding the employment practices of agencies within the TES industry.

4. To examine the conditions of employment and the consequences of temporary employment in the TES industry.
5. To unpack the regulation and labour legislation of the TES industry.

### **3.3 THE METHODOLOGICAL APPROACH**

When research is conducted, researchers choose from different approaches to science, with each approach having its own “set of philosophical assumptions and principles [with] its own stance on how to do research” (Neuman, 2003:68). The approach that is adopted within this research is an interpretive approach. The aim of interpretive research is to “develop an understanding of social life” as well as learn about what is meaningful and relevant to the respondents that are studied (Neuman, 2003:76). Interpretive researchers use respondent observation and field research to find meaning; the techniques that are used include analysing transcripts of conversations and studying videotapes (Neuman, 2003:76).

The approach is also phenomenological in the sense that there is a commitment to understanding social phenomena from the respondent’s perspective in order to understand how the world is experienced (Taylor and Bogdan, 1998:3). This approach stems from Max Weber’s belief that social science needs to study “meaningful social action or social action with a purpose” (Neuman, 2003:75). Weber argued that there is a distinct difference between the natural and social sciences - namely, that people are conscious beings, aware of their social situations and capable of making choices, whereas natural phenomena have no social meaning attached to them (McNeill and Chapman, 2005:18). Neuman (2003:75) adds that internal motives of people is what drive’s their actions. It is these motives that the interpretive researcher needs to uncover. An interpretive approach will be undertaken because respondents will be asked questions that relate to their subjective viewpoint, and therefore, their views and opinions need to be interpreted within a specific context. “[W]hat the researcher observes is not the reality as such, but an interpreted reality” (Welman *et al*, 2005:191). An interpretive researcher uses qualitative data to acquire an in-depth understanding of his or her respondents because it is used to reveal people’s views and opinions.

Critical social scientists criticise interpretive approaches for being too subjective (Neuman, 2003:81). A further criticism is that interpretive researchers treat people’s ideas and

perceptions as more relevant and significant than actual conditions, and that there is a greater focus on short-term conditions rather than on the long-term context (Neuman, 2003:81). It is therefore necessary to adopt both an interpretive and critical approach to research. Conducting a critical and realistic approach to research, allows the researcher to go “beyond surface illusions to uncover the real structures in the material world in order to help people change conditions and build a better world for themselves” (Neuman, 2003:81). The results of this research will suggest improvements to the TES industry in order for temporary workers to be protected.

The research that has been undertaken is qualitative. Qualitative research has been criticised as being “soft” and not as accurate as quantitative research because it is both “fuzzy” and “elusive” (Neuman, 2003:1446). However, Neuman (2003:146) argues that qualitative data is empirical because it involves “documenting real events, recording what people say (with words, gestures, and tone), observing specific behaviours [and] studying written documents”. Within this research, transcriptions are analysed thereby allowing the researcher to make meaningful deductions from the words and ideas of the respondents. Neuman (2003:146) states that these are concrete aspects of the world and that this evidence is just as “hard” and “physical” as evidence used by quantitative researchers. Qualitative research (although not based on numerical precision) approaches social life in its authenticity. This ‘real’ approach enables the researcher to interview people based on the experience of their unique social reality. Qualitative data is “highly meaningful” and instead of trying to convert social life into variables, or test a hypothesis, “qualitative researchers borrow ideas from the people they study and place them within the context of a natural setting” (Neuman, 2003:146).

A qualitative approach is the most appropriate approach to research the TES industry, largely because more information is obtained in person with respondents, in respect to their decisions and perceptions, compared to a quantitative approach that relies on statistics. The information that is needed for this research requires in-depth discussion. Due to the secretive nature of the TES industry, face-to-face interviews are more effective when addressing issues such as exploitation and poor regulation. For example, a respondent discussing unfair labour practices would be more willing to open up to the researcher in person (where trust is gained) than answering a questionnaire about the same topic. It is more likely that a respondent will skip a question when answering a questionnaire. In person, the researcher has the ability to stimulate further discussion in sensitive areas.

### **3.4 RESEARCH SITE**

Port Elizabeth was chosen as the research site because of the abundance of TES agencies, industries and large manufacturing organisations as well as its close proximity to Rhodes University in Grahamstown. TES agencies and firms of varying sizes were selected. The motor industry was selected as a sector to study because of its prominence, availability and accessibility in the area. The automotive component manufacturers in particular are known for using TES agencies.

The TES industry also relies heavily on the motor industry for its contracts and the motor industry relies on TES agencies to provide a flexible workforce. The present situation within the motor industry is dismal as sales have plummeted, export demand has decreased, thousands of people have been retrenched and firms are closing down (Financial Mail, 2009). Research was conducted as the economic recession was starting to escalate. The turbulent economic environment in which the motor industry finds itself creates an additional factor to take into account when analysing their organisational practices. Any trends that may have been present in the last couple of years have been influenced by the external environment. This is important to mention, as one of the aims of the research is to identify any existing trends within the TES industry and how firms are operating. Now, firms are in a reactive mode, which means that they have to save costs and are forced to revert to measures that they would not ideally resort to.

### **3.5 SAMPLING**

Purposive sampling was used within the research, which refers to pre-selected sampling. Its main aim is to select typical or representative subjects of an area of study that will have an expected degree of accuracy (Abrahamson, 1983:238). It is used to select unique cases, a “difficult-to-reach, specialized population” and when the researcher wants to identify cases for an in-depth investigation (Neuman, 2003:213). The purpose of this research is to acquire information on the TES industry; from TES agencies as well as firms that hire temporary agency workers, and any related party with useful information. With a specific purpose in mind, parties with relevant information were sampled. Snowball sampling was also used, which refers to a method for identifying and sampling (or selecting) the cases in a network through a snowball effect (Neuman, 2003:214). Through the initial interviews with the TES

agencies, respondents were probed to find out further respondents that may be interviewed, thereby creating a snowball effect. The use of snowball sampling was extremely effective. One particular respondent referred me to another source that had an incredible amount of information on the TES industry. This source gave the most insight into the practices of TES agencies.

Purposive sampling and snowball sampling is a form of non-probability sampling which means that it is probable that any element of the population will be included in the population (Welman and Kruger, 2001:46-47). With non-probability sampling, the population is not selected at random; this is because qualitative researchers are concerned with the relevance of the research topic rather than their representativeness (Neuman, 2003:211). The advantage of non-probability sampling is that it is more economical, in terms of financial expenses and time (Welman and Kruger, 2001:62).

### **3.6 RESPONDENTS**

Gaining access to TES agencies and firms that hire TES agencies is difficult due to the secretive nature of the TES industry. The respondents consisted of employees who work within TES agencies, HR managers and managing directors of firms, an official from the Motor Industry Bargaining Council, temporary workers, an HR consultant, labour law consultant and an executive of APSO.

Overall, 27 respondents were willing to participate in the research. This unfortunately is not a true reflection of how many agencies and prospective people were approached, as many were uncooperative. This is not to say that the information is of any less value. A majority of the interviews that took place were in-depth and extremely informative. Some interviews lasted almost two hours, providing much insight into the practices of TES agencies. Contact was also established with firms in Port Elizabeth that hire temporary workers through TES agencies. Firms in one particular sector were selected, specifically the automotive components manufacturing sector. These firms were interviewed in order to find out how they manage the workers and whether they have changed strategies to become more flexible.

Respondents consisted of four large manufacturing firms. All the firms operated within the motor industry, which is why they were selected. An extensive selection of firms were

contacted, however only a few agreed to answer questions. This is probably due to the invasive nature of the research, as utilising TES agencies in particular has negative connotations and it has been criticised in the media by organisations such as COSATU. Many firms would prefer to keep their practices confidential and do not want to take the risk of revealing information to an outsider.

The choices that were made in terms of who was interviewed were taken from a specific managerial standpoint. Respondents who were in managerial positions were interviewed since they are in supervisory positions and they would have a greater knowledge and understanding in terms of the running of their business. They are also more likely to have authority in terms of their access to significant information. The majority of the respondents were directly involved in the decision-making processes of the firm and they gave instruction on how a firm or TES agency should be operated. Managers are likely to have more education in terms of the labour laws that they need to abide by. They will also have more experience in the various labour practices that they have to participate in.

The researcher was fortunate to interview two temporary workers outside a TES agency, and regret that it was not possible to interview more workers. Gaining access to temporary workers is difficult since most TES agencies do not want temporary workers to reveal how they are treated. When meeting with the various agencies, there were sometimes a few temporary workers filling in application forms. It is difficult to interview temporary workers on the premises, as it would automatically make the agency suspicious and distrustful. However, as stated, the focus of the research was on interviewing respondents who were in positions of authority.

Within the fieldwork, the researcher was extremely fortunate to interview people who had worked in an array of different agencies and they could reveal information from previous agencies that they had worked in. Many agencies were contacted via email and phone, and appointments were often made in person. The majority of the time the researcher was turned away, and many agencies would make false claims that they would phone her back. Gaining access proved to be difficult, but the researcher is grateful to those agencies that indeed opened their doors. Knowing that it is such a secretive industry, it is suspected that agencies did not want to talk to the researcher because they were fearful of how the information would be used.



Overall, fifteen agencies provided the researcher with access to information. These agencies included two well-known international agencies, ten well-established agencies of roughly ten employees who worked on the premises and three small „one-man’ offices. Anonymity was promised to the respondents. Hence, firms and people’s names may not be disclosed. The researcher was extremely privileged to have spoken to respondents who have worked in the industry for a number of years. An HR consultant was also approached in Port Elizabeth to find out any trends that she was aware of. An interview with a top-level official of the Motor Industry Bargaining Council and a labour law consultant was conducted who were very much in tune with labour law compliance. Lastly, APSO was contacted in order to gather more information regarding the firm’s practices and how effective it was in regulating the TES industry. There were numerous attempts to establish contact with union officials. Contact was also established with the president of COSATU. However, all attempts at setting up an interview were unsuccessful. Nevertheless, information was gathered regarding trade unions’ perceptions regarding the TES industry from the respondents who deal with unions. This will not result in bias, as information from union statements and reports are taken into consideration.

The following respondents were interviewed:

1. Agency A – Labour Broking Consultant. Two interviews on 26/09/2008 and 17/11/2008.
2. Agency B – Consultant. Interviewed on the 20/09/2008.
3. Agency C – Regional Manager of an International Agency. Interviewed on 08/12/2008.
4. Agency D – Team Leader for the Industrial Division of an International Agency. Interviewed on 24/11/2008.
5. Agency E – Secretary (and current manager). Interviewed on 09/09/2008.
6. Agency F – Consultant in Temporary Division. Interviewed on 05/08/2008.
7. Agency G – Manager. Interviewed on 25/08/2008.
8. Agency G – Recruitment Consultant. Interviewed on 25/08/2008.
9. Agency H – Contracts Manager. Interviewed on 24/11/2008.
10. Agency I – Manager and owner. Interviewed on 16/09/2008.
11. Agency J – Managing Director. Interviewed on 05/08/2008.
12. Agency K – Branch Manager. Interviewed on 28/11/2008.
13. Agency L – Regional Manager. Interviewed on 09/09/2008.
14. Agency M – Manager. Interviewed on 04/09/2008.

15. Agency N – Recruitment Consultant. Interviewed on 04/09/2008.
16. Agency O - Consultant. Interviewed on 28/11/2008.
17. Automotive Components Manufacturing Firm P – Managing Director. Interviewed on 17/12/2008.
18. Automotive Components Manufacturing Firm P – Human Resources Manager. Interviewed on 17/12/2008.
19. Automotive Components Manufacturing Firm Q – Human Resources Manager. Interviewed on 12/01/2009.
20. Automotive Components Manufacturing Firm R – Human Resources Manager. Interviewed on 12/10/2008.
21. Automotive Manufacturing Firm S – Human Resources Manager. Interviewed on 03/12/2008.
22. Labour Law Consultant. Interviewed on 13/08/2008.
23. Human Resources Consultant. Interviewed on 16/09/2008.
24. Motor Industry Bargaining Council Official. Interviewed on 09/09/2008.
25. Executive of National Operations of the Association of Personnel Services Organisation. Interviewed on 26/11/2008.
26. Temporary Worker 1. Interviewed on 17/11/2008.
27. Temporary Worker 2. Interviewed on 17/11/2008.

### **3.7 INTERVIEWS**

Sociologists tend to rely on verbal accounts in order to understand social life (Taylor and Bogdan, 1984:77). Interviews have become “the favoured digging tool of a large army of sociologists” (Benney and Hughes, 1977:233). Research was conducted in the form of in-depth, semi-structured interviews, which allowed for greater insight into the respondents’ views. An interview can be defined as “a conversation directed to a definite purpose other than satisfaction in the conversation itself” (Van Dyke Bingham *et al*, 1959:3). Conducting semi-structured, in-depth interviews created an opportunity to ask intense and uncomfortable questions and allowed the researcher to probe for answers. In essence, more information is gathered when difficult questions are answered, which ultimately results in a greater understanding of the subject matter. More information can be gathered with interviewing a respondent in person than asking them to fill out a questionnaire. A questionnaire may have

covered general details on the surface; however, the major concern was to find out more of the respondents' experiences and perceptions of the subject matter, which requires personal interaction. The interview schedules were divided into various themes. Themes are described as „umbrella' constructs and are very important within qualitative research (Welman *et al*, 2005:211). Themes were divided according to the themes within the research: flexibility, the TES industry, temporary labour and lastly, labour legislation and regulation.

Within any research techniques, there are a number of flaws. It is therefore necessary to choose the most appropriate method. The problem with relying on interviews as the major source of information is the question of whether statements are valid. This refers to the differences in corrigible and incorrigible knowledge. Gomm (2008:240) states that corrigible knowledge is verified as matters of fact; and incorrigible knowledge are unverifiable “because they are matters of self-knowledge”. The interviews that have been used will be based on incorrigible knowledge because it is based on ‘opinion’ (Gomm, 2008:240) which creates difficulty in terms of its validity. It is imperative therefore to not accept information at face value and to check the credibility of the incorrigible knowledge against official records (Gomm, 2008:243). It was therefore necessary to investigate matters further by researching reliable sources of information in addition to the interviews. This includes legislation and further references.

Another problem in terms of face-to-face interviews is that the interviewer can make subtle changes in the way a question is asked which could produce different answers (Bordens and Abbott, 2008:264). This is true, some questions may have been phrased differently in order for the respondent to understand the question, yet the central part of the question was not changed and therefore different answers were not produced. Within the interview process, it is essential that the researcher builds trust. Neuman (2003:391) argues that in order to do this it is necessary for the researcher to share background information and encourage the respondent to open up. There is a process of mutual discovery with a mutual sharing of experiences, but the focus is on the respondent's views (Neuman, 2003:391). This was indeed done, by first discussing the researcher's background and creating a medium of trust. Many of the interviews consisted of face-to-face interviews, which have the highest response rates and allows for the posing of complex questions (Neuman, 2003:290). “The field interview involves asking questions, listening, expressing interest, and recording what was said” (Neuman, 2003:390).

In order for any researcher to gain sufficient information that is pertinent to the research, it is important that the interviewer promptly recognises when a respondent's answer fails to meet the objective of the question (Kahn and Cannell, 1957:207). This proved to be slightly difficult at times, because sometimes the respondent did not answer the question correctly, and the researcher was forced to move to the next question, either due to time constraints or the respondent felt uncomfortable with the question. Overall, the most advantageous aspect of the research conducted was the research technique chosen. Interviewing the respondents allowed the researcher to obtain a vast amount of information that has contributed greatly to her understanding.

### **3.8 ETHICS**

Ethical decisions in research involves a multitude of responsibilities, moral alternatives and is concerned with the researcher's personal sense of what is right (Taylor and Bogdan, 1998:36). According to Taylor and Bogdan (1998:37), there are no hard-and-fast rules in terms of ethics, and that the researcher will have to experience a fair amount of soul-searching within the research process. If any research is undertaken that is deceptive, it may jeopardise the reputation of the discipline in the larger society, as well as restrict access for future researchers (Taylor and Bogdan, 1998:36). Research may have a powerful impact on the respondents' lives, which is why researchers need to take care of their behaviour and moral choices (McNeill and Chapman, 2005:12). The researcher believes that she was extremely ethical in terms of her interaction with the various respondents.

McNeill and Chapman (2005:12-14) state that researchers have obligations to their research subjects and should follow six broad ethical rules. Firstly, all research respondents have the right to know what the research is about and to refuse to answer certain questions. This is referred to as informed consent. Secondly, researchers should not be deceptive or lie about the purpose of their research. This is a controversial point, as some researchers may argue that "deceit can produce data that cannot be produced under more honest circumstances", which can lead to valuable information (McNeill and Chapman, 2005:13). Thirdly, the respondent's privacy should be safeguarded. Fourthly, the issues of confidentiality and anonymity are extremely important. Keeping a respondent's identity secret may be difficult. It is the responsibility of the researcher to make sure that the information provided by the respondent cannot be traced back to the respondent. The intentions and purpose of this

research was made clear to the respondents and they were given the option of anonymity. Fifthly, researchers should ensure that respondents are protected from any physical or emotional harm. Some respondents may be harmed by published material and may feel that they have been misrepresented. Lastly, researchers need to consider immorality and legality in terms of covert research. Researchers must avoid being drawn into situations that may involve crime or witness deviant acts. This, however, is not considered an issue within this research since it does not involve any potentially dangerous scenarios (McNeill and Chapman, 2005:12-14).

Overall, these ethical considerations are important within the research process, because if sociologists are not trusted, valid information cannot be gathered (McNeill and Chapman, 2005:14). “A researcher’s personal moral code is the best defence against unethical behaviour” (Neuman, 2003:118). Respondents were treated ethically within this research and they were fully aware of the researcher’s intentions.

### **3.9 DATA ANALYSIS**

Qualitative data consists of texts and phrases that represent people or events (Neuman, 2003:438). It is the most vital aspect of the research. Qualitative data is not just based on “vague impressions”, it is also “systematic and logically rigorous” (Neuman, 2003:438). It involves analysing the information and searching for explanations. In this research, the interviews were recorded and then transcribed, after which the transcripts were studied and interpreted. By analysing the transcripts, one is able to derive meaning in order to understand how the respondents interpret their social worlds. Neuman (2003:146) states that qualitative researchers analyse their material by identifying and examining themes, motifs, distinctions and ideas instead of variables. In this research, the key themes were outlined in chapter one, which were incorporated into the interview schedule. The same themes are then analysed and compared with existing literature. However because the interviews were semi-structured, there was a large amount of additional text to include. The additional information was both useful and important in creating a greater understanding of the research topic. “A qualitative researcher builds theory by making comparisons ... and he or she immediately ponders questions and looks for similarities and differences” (Neuman, 2003:146). Explanations and interpretations tend to be complex and may be in the form of an unfolding plot about particular people or events (Neuman, 2003:148).

### **3.10 CONCLUSION**

The various methodological steps that have taken place during the research have been described alongside any issues within the research process that a researcher should consider. Overall, there were a number of obstacles within the research process. The main problem was gaining access to respondents, which was expected, given the guarded nature of the industry. Many firms do not have time and/or are reluctant to discuss information with a researcher. Every research process has inherent limitations and boundaries. Ideally, research undertaken on a wider scale will reveal a greater amount of information. In terms of how the research could have been improved, it would have been ideal to have spoken to a union official as well as more temporary workers. Research was conducted ethically and professionally and the researcher was satisfied with the amount of information that was gathered. The rest of the thesis will involve an in-depth analysis of the themes within the findings.

# 4

## THE DEMAND FOR LABOUR FLEXIBILITY AND THE USE OF TEMPORARY EMPLOYMENT SERVICES

### 4.1 INTRODUCTION

This chapter focuses predominantly on the relationship between labour flexibility and the TES industry. The trend for firms in Port Elizabeth to incorporate temporary workers as a means of adapting to a changing market is aided by the use of TES agencies. The question that is pertinent to address is to find out why firms choose to follow a flexible approach to their labour: is it because of a demanding market or because labour laws are too demanding on employers? Furthermore, to what degree does the TES industry's role influence any shift in organisational practices of firms? Focusing on flexibility provides insight into one of the major reasons why firms utilise the services of TES agencies. Without firms utilising flexible labour, agencies would not survive. Flexibility is essentially the key survival strategy on which agencies operate and one of the major attractions for client firms. The TES industry opens the doors for firms to implement flexible labour policies. Labour flexibility and the TES industry are synonymous.

It has been noted that the prevalence of „flexibility’ is more pronounced within developed countries and regions such as Europe and the USA as compared to developing countries such as South Africa. While South Africa is often considered both a developed and a developing country, it still lacks highly evolved systems of production and practices compared to developed countries of the world. This chapter will investigate whether firms are incorporating labour flexibility, and what the associated advantages and disadvantages of utilising a flexible approach are. It will also uncover any relevant workplace business trends that are occurring or alternative business strategies that are apparent in the firms that were studied. This will reveal whether there is a changing managerial viewpoint on how to manage the labour force. It is the purpose of this chapter to argue that firms are utilising the TES

industry to implement labour flexibility to save on the costs of employing permanent workers. Due to the poor regulation of the TES industry, firms take advantage of their services and, as a result, are relieved of their obligations as an employer. The research reveals that firms utilise the TES industry because of the lack of responsibility within the TER.

Firms' decisions to incorporate labour flexibility further facilitate the organisational trend of outsourcing, and it has a knock-on effect in terms of how the labour market has changed. The growth of the TES industry has created an underclass of workers. As described in Chapter 1, these workers are deprived of the security of permanent employment based on the contractual arrangement of their employment relationship. The TES industry is poorly regulated and, as a result, these workers are exploited, and they also lack the safety net of trade unions. Firms who utilise the services of TES agencies are not only absolving themselves from the responsibilities pertaining to temporary workers, but they are perpetuating this underclass. Even though labour flexibility is a major drive for firms, particularly within the motor industry, one should not ignore the added advantages for firms of using TES agencies.

The analysis will proceed as follows. Firstly, flexibility in the workplace will be briefly addressed in order to ascertain whether the respondents were familiar with concepts of flexibility and what their perceptions of flexibility are. Secondly, a comparison will be drawn between the theory of the flexible firm and the research findings. The advantages and disadvantages of firms incorporating a flexibility approach will then be examined. Thirdly, the reasons (apart from flexibility) why firms incorporate TES agencies will also be explored. The reasons are examined in order to understand why firms are turning to the TES industry and to argue that besides providing labour flexibility, the TES industry and their client firms contribute to the creation of an underclass of workers. Lastly, any alternative business trends that firms are following will be highlighted.

## **4.2 IDENTIFYING FLEXIBILITY IN THE WORKPLACE**

As noted in Chapter 1, a problem with analysing the notion of flexibility is its multifaceted nature, as it refers to a variety of forms, especially concerning organisational practices. Labour flexibility allows a firm to adjust its workforce by incorporating a periphery (temporary workforce) in accordance with the demand for its product. This allows firms the leeway to increase or reduce the number of temporary workers via a TES agency/labour



broker at any time the market dictates. This, in turn, allows firms to save costs and to be more productive and reactive to the market.

However, when addressing the topic within the interview process, many of the respondents referred not only to labour flexibility, but also to several other forms of flexibility. For example, a high-ranking official of the Motor Industry Bargaining Council mentioned that even within a bargaining council, flexibility is present. He stated that multi-skilling was an excellent form of flexible work, where he is able to adjust the tasks of his employees since many of them have the ability to share and execute the same tasks. This improves the productivity of the firm. Moreover, as APSO's Executive of National Operations noted:

Flexibility can be seen in light of its adaptable nature in respect to working hours, contract periods, assignment categories ... Flexibility is desired both by clients, who wish to have greater control over workforce expenditure in relation to peaks and troughs in production/demand, and by employees, who are looking for greater access into a variety of assignments, increased control over number of hours worked, and increased family time in the strive for work-life balance (26/11/2008).

There are a variety of different forms of flexibility that are present within a firm. The Managing Director of a large automotive component manufacturer (Firm P) stated that the different dimensions of flexibility are strategic and essential in the running of the firm:

Flexibility comes in various dimensions. If you look at different types of flexibility, you've got, for example, your ability to develop new parts, new products ... Take another dimension of flexibility, which would be seasonality and our ability to increase and decrease volume, so that is a form of flexibility ... Technology flexibility where your ability to manufacture in different geographic locations so that you can optimize costs, distribution ... And then within your people itself. How do they contribute to flexibility in the sense that you not constrained by availability of a person? So then, your whole multi-skilling process comes into it as well ... You got to look at flexibility from a strategic viewpoint, and that's what we do with our drive, it's a key thrust (17/12/2008).

Firms, specifically within the manufacturing sector, tend to be extremely aware and knowledgeable of improving their productivity by incorporating various flexible production techniques. Many changes in South Africa are partly due to the outcome of global pressures to adopt flexibility. As one respondent noted:

Flexible staffing is huge overseas: it's monstrous, but we are way off the international numbers. However, I do think in the uncertain times that we have been in, I think that it is growing (Team leader for an Industrial division of Agency D, 28/11/2008).

Many firms within the motor industry have no choice in these matters since they are owned and controlled from abroad. Specifically within the motor industry, flexibility is ideal because it improves productivity. The Motor Industry Bargaining Council official firmly believes that "flexibility and the utilisation of your manpower [sic] is obviously something you would want to secure" (09/09/2008).

There was a noticeable increase in the usage of temporary employment via TES agencies. According to the Contracts Manager of Agency H, "the percentage of temporary staff is ever rising relative to permanent staff" (28/11/2008). A majority of the respondents agree that firms are following a flexible approach to their labour. The Managing Director of Agency J admits that firms are actively pursuing a flexible strategy to their workforce: "I think they have to be more flexible – it goes up and down and you can't have people there if they are not working" (05/08/2008). The Regional Manager of Agency C, who has 15 years of experience within the TES industry, indicated that firms are indeed dividing their workforce in Port Elizabeth:

[y]our large firms will have their core of multi-skilled people and over the last five years, the trend has been to keep their management people and their supervisory people. Everyone else will be outsourced. And you know what? It's working very well (08/12/2008).

Firms are able to pursue a flexible approach largely because of the existence of the TES industry. The argument concerning the importance and relevance of flexibility in this discussion is reinforced by a TES agency: "without flexibility there will really be no need for agencies" (Labour Broking Consultant of Agency A, 26/09/2008). If there were no agencies

to provide the peripheral workforce, the firms would have to recruit temporary workers themselves. Firms would have to deal with hiring and firing the peripheral workforce. By utilising the services of a TES agency, firms do not have to bear responsibility for the peripheral workforce and are able to focus on the productivity of permanent employees. The Manager of Agency G agreed that firms are more flexible: “[i]t also gives them that opportunity to get a contract for a week or two to get work done quickly and not sit with the responsibility of that person because the person knows that they are only employed for a certain contract” (25/08/2008). The actual adjustment of a temporary workforce is highly depended on levels of demand in the market and the state of the economy. By incorporating labour flexibility,

[i]f you have a market downturn, you are not forced to pay salaries which are not needed. And in times of upturns, if you maintain a constant workforce, you might find that you were understaffed because you now need to produce five times as many cars as you did in the downturn. So, I think, at the end of the day, it’s very efficient. The benefits far outweigh the disadvantages and I believe that in the long-term with a continued increase in competition in just every aspect of the world ... Every single firm, without exception, will have short-term staff (Contracts Manager of Agency H, 28/11/2008).

Due to the recent economic recession, some firms are forced to save costs wherever possible, which is why they attempt to reduce their labour force. As the Labour Broking Consultant of Agency A put it:

[i]n the economy that we have at the moment, I think, you will see labour broking doing a lot better than it used to before because now it makes far more sense to make your staff flexible than it does to have them permanent because the economy is so shaky. So, now if Europe dictates that they only need x amount of parts next month, you just drop 20 people and immediately your head count goes down, your costs go down. You can’t do that with permanent staff (17/11/2008).

According to the HR Manager of a large automotive manufacturing firm (Firm P), “I think largely we did get flexibility out of it, bring three guys in today, send them home tomorrow, and you could do with those peaks and valleys that we had” (17/12/2008). Due to the increase

in technological innovation and mechanisation, there are less people who are employed, but when workers are needed, utilising a TES agency provides the firm with that necessary workforce on a short-term basis. According to the Manager of Agency M,

[a] lot more is done by machines these days as well, so they employ less people, and sometimes it's easier to employ people from a broker or service provider and bring in those skills. Utilise them and then move on from there. I've seen that quite often (04/09/2008).

Many of the respondents spoke of labour flexibility, which is the most pronounced form of flexibility and the focus of this research. Labour flexibility is a key aspect of the 'flexible firm' model and will now be used to compare the findings.

#### **4.2.1 The Flexible Firm Model**

The flexible firm model was discussed in Chapter 1 as a conceptual model that suggests that employers divide the firm's workforce into two segments: a core and a periphery. The flexible firm model is viewed as an 'ideal type' that firms should attempt to follow. The notion that firms are following flexible trends is not a new concept, but it is essential to compare research findings to a particular theoretical framework. This allows one to obtain a greater understanding of specific firm's motives, and to highlight the consequences of these choices. It is apparent that firms, specifically within the automotive component-manufacturing sector, rely heavily on temporary employment to meet the demand for their parts. The core workforce, representing permanent workers, is placed in positions that are semi-skilled or highly skilled where their skills are of great use to the firm. These workers can easily delegate tasks to employees who are brought in on a temporary basis. The peripheral workforce (temporary workers), who are of less value to the firm, is employed through a TES agency. They are merely brought in to increase the productivity of a particular firm and are on short-term contracts. Once a task is completed, the temporary worker's contract is terminated, and they no longer work for that firm. Both temporary and permanent workers are sometimes at the same skill level but the client firm does not employ the temporary workers. The utilisation of a temporary workforce as a buffer automatically has detrimental consequences for the workers. As mentioned in Chapter 1, the advantages are

immense for employers. Employers save costs because permanent employees command higher wages and are eligible for numerous fringe benefits.

As noted, the flexible firm model is a highly contested concept because it lacks sound empirical foundations. The flexible firm model, however, does represent some of the trends unfolding within firms, but it does not provide detailed insights into the intentions of employers. Within this research, it was necessary to provide an account of the perceptions of the respondents, which could explain why labour flexibility is important, and why firms are utilising TES agencies to implement it. The term „flexibility’ appears to be used quite loosely by the respondents and often the intricacies and different forms of flexibility as well as the related advantages and disadvantages of each form are not taken into consideration.

The „flexible firm’ is a management-orientated model on how to improve the productivity of a business. The flexible firm model is simply a descriptive model of what takes place in firms, it is not necessarily a model that aims to guide or create the „ultimate’ model of a firm. One of the criticisms of the flexible firm model is that it is hard to identify the core and periphery. Yet in this research, it was explicit in terms of the nature of the work at a manufacturing level. Within the motor industry, the core workers were identified as the permanent workers, and the periphery were identified as the temporary workers. Perhaps, identifying core and periphery workers may be difficult in other sectors, such as information technology and financial services. This is because temporary workers that are brought in are regarded as consultants and have specialised skills, and cannot be labelled as peripheral workers. The latter are essentially temporary workers who are low skilled, brought in as a buffer and that are easily replaced. Hyman (1991) correctly argues that the idea that the core is mainly skilled and the periphery is mainly unskilled is an over-simplification. To a large extent, this is indeed the case within a manufacturing plant. However, what is evident is that some of the permanent workers, who are not in managerial positions, often have the same skill level and share the same tasks as the peripheral workers. Yet, they are paid higher salaries. This causes friction between the two groups. The flexible firm does bring to the fore the inherent inequality between these two groups. It encourages a division between the two groups of employees, and even though these employees may work under the same working conditions, they are treated differently. These groups are unequal because they have different employers and their contracts of employment are different. The temporary employees’ contracts are constructed in such a way that the workers are left extremely vulnerable.

Some firms incorporate labour flexibility for alternative reasons. For instance, in order for firms to be compliant with affirmative action measures, they specifically hire contract staff from previously disadvantaged groups. “They would then keep their core staff that would be your white managers who are very skilled, with many years of experience, but then they would bring in flexible staff or contract staffs who are affirmative action placements, and that way they make up the ratio that they need to have” (Consultant of Agency B, 20/09/2008). It is often thought that firms are implementing labour flexibility by using semi-skilled workers who are easily replaceable. However, according to the Managing owner of Agency I, regardless of the skills composition of a workforce, firms are definitely more flexible: “definitely, I mean we are not talking low level only here, even high level ... Firms are definitely going through that route of flexibility” (16/09/2008). It is argued that firms are not simply choosing to undertake a flexible approach to labour – they are forced to use it. In the words of the team leader for the Industrial Division of Agency D:

I think they have been forced to become more flexible. I think they have no choice because, you know, if you get a contract in for a year or two, do you want permanent staff in there? No. Maybe some key personnel, but you not going to take the majority permanently (28/11/2008).

### **4.3 ADVANTAGES OF ADOPTING A FLEXIBLE APPROACH**

In Chapter 1, the numerous advantages of adopting labour flexibility were outlined. This section will further delve into the findings of the research and the perceptions of the various advantages. Firstly, as already noted, flexibility allows firms to increase and decrease their workforce, thereby inevitably saving costs. If a firm had to use staff permanently when it was not necessary, they would end up paying more. “The amount that they actually pay for your services won’t really cover if they had to employ four or five people to do the work on their site (Manager of Agency G, 25/08/2008). The ability to adjust a workforce and to save costs is interconnected. A peripheral workforce usually costs less in the long-term. According to many of the respondents, a permanent employee would cost more in the long-term than employing a temporary employee in the short-term:

It’s a need, it just depends where the need is and what the need is within the firm, maybe the firm is trying to save money, or maybe they want to cut down on

overheads. Now, letting go of someone who is costing you R25, 000 a month when you can now have someone for R12, 000 a month (Consultant of Agency B, 20/09/2008).

Flexibility also allows TES agencies to move employees to another place of employment if a firm no longer needs them. The Regional Manager of Agency C argued that many firms will save costs on retrenchment packages if they decide to adopt a flexible approach:

General Motors, I believe, is retrenching quite a few people. If that was outsourced, there wouldn't be retrenchment packages. There would have been maybe brokers saying to all of those staff: „we going to reduce your hours to ensure we keep everyone on board' (08/12/2008).

This statement is mere speculation, and most often firms that retrench workers will terminate their contracts with temporary workers from TES agencies because the TES agencies can be expensive. The issue of expense will be addressed shortly. Respondents stated that when the workforce is continuously adjusted, the agency would secure new positions for their workers. As the Branch Manager of Agency K explained:

[w]e don't have to retrench them. When you have 20 people in your employ today signed by us, and you only want 10 tomorrow, we will withdraw that from that client. We will place them with another client. That's what makes it convenient and comfortable. So, the flexibility thing, I think, is important to big manufacturers (28/11/2008).

The problem with this statement is that the Branch Manager assumes that another employment position will be easily available and „waiting' for the employee. This is not necessarily the case. The idea that it is „convenient and comfortable', only applies to the client, not the temporary worker. Essentially, the TES agency's purpose is to serve the client's interests because they rely heavily on a long-term relationship for their financial security. The main automotive firms such as Ford and General Motors do not use TES agencies. The TES agencies were critical of their decisions:

They don't use brokers because of the unions ... Now that is short-sighted. Think about it: 50 per cent of their workforce might get retrenched over a period of time. If it was the broker, everyone would have kept their jobs but worked 50 per cent less time. They still providing food for their families. Now you are going to have 50 per cent people out of work. It's sad (Regional Manager of Agency C, 08/12/2008).

The primary advantage for firms to follow a flexible approach is that their productivity will increase. However, since these increases in productivity are achieved largely by cutting labour costs, flexible work benefits the employers far more than the temporary workers. Firms who utilise the services of TES agencies have the advantage of always maintaining peak production levels. "I guarantee the firm that I am going to supply them 20 staff every day. It's not their problem that the guy is sick, it's my problem to replace them" (Regional Manager of Agency C, 08/12/2008). Many firms experience absenteeism among their permanent staff. However, if a temporary workforce is hired through a TES agency, the impact of absenteeism may be drastically reduced. This is because the agency will always have temporary staff available. According to the Branch Manager of Agency K,

I think the daily absenteeism percentage in a production environment of a motor manufacturer could be anywhere from five to eight per cent. The productivity is so high because if any two or three weren't there we would substitute them anyway. What's the cost? I think you paying a premium to us but I actually don't think it's a premium. Just factor in having the cost of human resource people, with admin, payroll and the cost of absenteeism. If you factor all that in, I don't think its expensive (28/11/2008).

Predictably, all the agencies that were interviewed asserted that their industry had a positive impact because it provided employment for people who were struggling to find work. The positive aspect is that "we get to help people who don't have jobs. It's very rewarding to find somebody a job when they not working and they are very appreciative" (Consultant in a Temporary Division in Agency F, 05/08/2008). The firms argue that hiring temporary workers through TES agencies provides them with labour flexibility. Little mention is made of the disadvantages. Yet, there are numerous disadvantages of adopting a flexible approach. Disadvantages seem to be far greater for the temporary workers themselves.



#### **4.4 DISADVANTAGES OF ADOPTING A FLEXIBLE APPROACH**

The foremost problem with flexibility is the loss of employment security for temporary workers. As discussed in Chapter 1, job insecurity is rife among non-standard workers. Temporary workers who work for TES agencies move from job to job, many not knowing when their contract will be terminated and when the next job will commence. There are various consequences of firms adopting labour flexibility. Casualisation of the workforce and the continual use of peripheral workers threaten the stability and prosperity of a society. An underclass of workers is created when temporary workers continue to endure poor living conditions and have little power to change their situation. Once temporary workers have entered into short-term contracts, they invariably feel insecure and lack control over their lives. The risk of conflict occurring between core and peripheral workers is also always an issue. Permanent workers will feel threatened by temporary workers, and the temporary workers will often be discriminated against. The inherent conflict between these two sets of workers will be addressed in Chapter 6.

A disadvantage for firms that rely extensively on temporary workers is that it may inhibit the growth of innovative work practices and the introduction of new technology. In South Africa where there is a high unemployment rate, employers may be pressurised to use more labour-intensive techniques, which would reduce a firm's competitive edge. Firms also take on the risk of temporary workers performing poorly and reducing the quality of work. Moreover, temporary workers lack knowledge of a firm's procedures and practices; therefore they cannot be given complex tasks and are difficult to manage. Many temporary workers may need greater supervision, as there is an automatic distrust between temporary workers and the firm. The resultant low wages and the low trust that the temporary workers are experiencing decrease the high-quality production that firms are seeking. There is an inherent conflict between the search for quality and commitment on the one hand, and attaining flexibility on the other hand.

Firms also have to deal with union opposition. Unions are understandably opposed to the concept of „flexible labour’. As noted in Chapter 1, there are two conflicting viewpoints regarding flexibility. The one stream (usually economists) strongly supports flexibility because it acts as a remedy for unemployment. The other view largely supported by trade unions is against flexibility because it reduces working and living conditions. In the case of

the prevalent underclass in the TES industry, the demand for labour flexibility does indeed expose the temporary workforce to exploitation and unfair labour practice. This is only because the industry lacks effective regulation. Job creation is essential, and it would be ideal if there were more permanent jobs. However, it would be in the interest of both firms (that are seeking labour flexibility in particular) and workers if the industry was regulated.

Overall, flexibility has both advantages and disadvantages. The advantages for firms far outweigh the advantages for employees. The TES industry creates an environment for firms to implement labour flexibility. However, there are dire consequences for workers who are insecure and live from one paycheck to the next. As a result of job insecurity, broader social problems are created. Workers who are insecure may turn to other means such as crime, and the loss of employment creates social problems and puts pressure on family life.

#### **4.5 ALTERNATIVE REASONS TO UTILISE TEMPORARY EMPLOYMENT SERVICES AGENCIES**

The principal reason that firms choose to utilise the services of a TES agency is to implement a flexible strategy in order to react effectively to demand. However, there are other reasons that contribute to the use of TES agencies. There is a perception that firms utilise the services of TES agencies because labour comes cheaply. Even though this perception may be correct to some degree, it is highly dependent on the TES agency because hiring labour can be rather expensive. The issue of expense depends on the TES agency itself and the quality of their services as well as the skill level of the worker being hired. This research indicates that the higher the quality of the service, the higher the costs. Yet, even this statement can be a contradiction because the TES agencies that charge high fees and are well established tend to bend the rules.

Broadly speaking, the TES agencies who are not well established, such as the „fly-by-night’ operators offer labour at a low cost. However, this labour may be unreliable. That is why many firms opt to pay a higher fee in order to receive labour that has been screened and gone through an in-depth recruitment process. Those agencies that have a good name and have proven to have reliable and qualified labour are more likely to be granted contracts with large firms because they will screen the applicants properly. Many „fly-by-night’ agencies operate in small offices, sometimes as a „one-man-show’ looking for a „quick buck’, which offer

labour to firms at an extremely low rate usually because they do no screening or checks and because they may bypass labour laws. Some firms fall for this unknowingly, yet also at times knowingly. The expense of utilising a TES agency varies. Outsourcing a peripheral workforce from a TES agency may cost more depending on the agency that is chosen. The Regional Manager argued that it can cost more but it is highly beneficial because it is convenient:

It's costing them a lot more every month, but they never have strikes, they never have shutdowns. If there is a line that comes to an end, let's say it's in the dairy industry, and one of the machines breaks, then they can't produce more. Guess what? ... If it's permanent staff, the permanent staff sit around and get paid for it (Regional Manager of Agency C, 08/12/2008).

There is however a perception that most TES agencies' fees are low and that is why firms hire them. This is only partially true. A majority of the time, when it comes to TES agencies that are well-established and structured their fees are high because of the quality of their service. Yet, there are some exceptions to the rule. The issue of the mark-up will be discussed in Chapter 5. Agencies cannot guarantee the performance of their 'product'. As the Contracts Manager of Agency H put it:

[t]he problem is that human resources are unreliable resources, they not like a piece of steel or a glass of coke ... Sometimes you will send a guy to a site and he just won't go, or go there and fight with the site boss the first day and leave ... The most complicated product [sic] you can possibly sell is a person (28/11/2008).

It is necessary for TES agencies to inform their potential clients why they charge a certain rate. The Regional Manager of Agency C argued that it is essential to operate fairly and professionally:

“[l]ook after staff, explain to your client why you can't be cheaper, rather take a more expensive quote, then you will hear all the bells and whistles, rather than take a cheaper quote and be jointly and severally liable if that goes to council” (08/12/2008).

Yet, not all TES agencies operate in the same manner. Firms tend to seek out the route that reduces their costs and improves their profits. Roskam (2007:32) argues that one of the main reasons why firms choose to utilise the services of TES agencies is “that they can extract lower wages and reduce the employee’s terms and conditions of employment ... [W]orkers are offered alternative employment with the labour broker on reduced terms and conditions of employment. If they do not accept, they are retrenched”. This is clearly unfair for the employee who has to either be retrenched or work for a TES agency. They will inevitably work for the TES agency since they need the income to survive. The size of the client also dictates whether they utilise the services of a TES agency. According to the respondents, firms that hire TES agencies tend to save money in the long-term. If they kept a HR division running, it will probably cost more. Sometimes firms find it unnecessary to employ a HR practitioner for a small-to medium-sized firm: “[i]f you only have 20 or 30 people, it doesn’t warrant having a full-time person to do that, so you paying a little premium” (Branch Manager of Agency K, 28/11/2008).

Many firms are unsure of the quality of the labour they will receive. Labour is unreliable, yet some agencies can guarantee their labour better than others, depending on the recruitment and skills process involved. If a TES agency spends time on skills development, proper screening and checks, and abides by the law, they will charge more. This is inevitable. Problems arise when firms trust the quality of their product based on experience, connections, reputation and reliability. This is where firms may have a disadvantage because there is a belief that all procedures are correct, when in fact even the expensive, reputable agencies can exploit the situation by finding loopholes. Many loopholes were revealed within the interview process regarding the practices of some agencies. Even the well-established agencies find loopholes, and if there is money to be made out of a loophole, they will find it and exploit it. These loopholes will be addressed in Chapter 7.

As argued in Chapter 1, by using TES agencies, it allows the client to escape many of the obligations associated with being an employer. Roskam (2007:32) argues that “in practice, the labour broker seems more capable of escaping these obligations”. This includes unfair dismissals in particular. This was clearly evident from the interviews that were conducted with the respondents. Unfair dismissals will be addressed in Chapter 7. The Labour Law Consultant agrees by stating that firms utilise TES agencies, in order to “circumvent labour legislation, so that the responsibility is not mine” (13/08/2008). If firms are not considered

the „employer’ in terms of the law, they do not have the related labour law obligations that are associated with a SER. This automatically falls on the shoulders of the TES agency. There is a shift in responsibility from the firm to the TES agency. According to an official from the Motor Industry Bargaining Council, firms are removing themselves from the taxing provisions of labour legislation: “If you employed a person on a permanent basis, it is taxing and it creates a lot of tension within the workplace so firms move that onus and responsibility to someone else like the labour broker” (09/09/2008).

Another way that firms try to circumvent labour legislation is to hire a temporary workforce for long periods of time. The Branch Manager of Agency K provided the following example:

[w]e have a client who has used us over a period of three, four, five years. The staff that we have assigned there have been there for a reasonably long period of time. They are regarded as temporary staff. We administer, we pay them. That particular client’s productivity is, I think, exceedingly high. For a fact, their rate of absenteeism, on a daily basis is a small fraction of that which you will find of permanent employees (28/11/2008).

There are, however, a several other reasons for using TES agencies. Respondents stated that one of the reasons for using the services of these agencies is that the firms are finding labour issues to be a burden. The TES agencies stated that they removed the burdens associated with being „the employer’:

[w]e basically handle problems for people because they don’t want to handle them. So, they just pass all the problems to us. At the end of the day, all they have to do is pay a mark up. That's the concept. Anything that allows people to do less for a little bit will sell. That's why labour broking sells. Bottom line – it’s a hell of a lot of work (Contracts Manager of Agency H, 28/11/2008).

The Recruitment Consultant of Agency N (04/09/2008) agrees that, firms do not want the administrative burden of temporary workers, “[t]hey don’t want the staff members on their books, it’s too much administration for them and they might have a staff overload and they can’t afford pensions and medical aids”. The team leader of the Industrial Division for Agency D made the same point: “[i]t takes a lot of the HR work away, for payroll, for IR

issues, handling grievances and that, they actually save big time on that side ... It saves them a huge headache having to go through unions and retrenchment processes” (28/11/2008).

An important reason for the upsurge in labour broking and TES agencies is the fact that labour laws and associated practices are perceived to be rigid and time-consuming, and firms do not have the expertise to deal with them or they are trying to remove the obligation completely. As the Branch Manager of Agency K put it:

[t]he more onerous it is to dismiss people, the more onerous it is to administer people, the more reason there is for the existence of labour brokers. That's probably the cardinal key factor why there is this emergence of hundreds of labour brokers. It's becoming more onerous. The more onerous you make it, an employer is going to find some way where there is an easier route. Water flows where there is the least resistance. Labour brokers seem a good option to get around many of these issues (28/11/2008).

A further point is that firms do not have the time and resources to recruit the „right’ candidates. Some TES agencies specialise in headhunting, advertising and selecting the right candidates. Firms want to focus on their core business. As indicated in Chapter 1, firms prefer to focus on their core competencies. The Regional Manager of Agency C agreed and stated that, besides the firms’ need to be more flexible, they tend to utilise TES agencies because it is “not a core competency” within their business (08/12/2008). Many firms, whether small or large, “do not have the skill that is involved in labour and do not want to deal with UIF payments, the Department of Labour, unions, and the CCMA. Business men don’t want that” (Regional Manager of Agency L, 09/09/2008). The Executive of National Operations of APSO agrees that it is far simpler for the client to remove the administrative burden than hiring and managing temporary staff on their own (26/11/2008). An in-depth interview with a large automotive component manufacturer reveals that their decision to hire a TES agency is historical and since it was decided in the past, they have continued the trend. As the Managing Director of Firm P admitted:

[t]he main reason that stands out would be the administration burden for managing the whole recruitment and HR administration for temporary workers. That's why we

would use it. So, it would be from a resourcing and infrastructure perspective more than anything else (17/12/2008).

However, according to the HR manager of Firm P, TES agencies are hired for legal reasons. He suggested that if they had their own temporary pools of labour and continuously used those pools, the firm was afraid that those temporary workers might be deemed permanent in the eyes of the law. He further states that “a person with a labour broker is easy; you can turn him on or off, with two days or three days” (17/12/2008). The HR manager from another automotive components manufacturer states: “we cannot afford to employ full time because the sales are variable and therefore we have to flex employment in line with sales” (HR Manager, Firm Q, 12/01/2009). A further point of interest was raised by a respondent. She stated that firms do not want to take the risk of having any CCMA cases against them because it influences their tender and Black Economic Empowerment (BEE) processes (Consultant of Agency B, 20/09/2008). Apart from labour flexibility, there are numerous reasons for firms to hire TES agencies. TES agencies remove administrative burdens from firms. They provide a much-needed service that is time-consuming and highly beneficial for firms, yet there are many detrimental effects for the temporary workers that are often unethical. By using TES agencies, firms circumvent labour law associated with the SER as well as save costs. Temporary workers are treated like commodities: “[i]t’s a one-stop shop for human beings” (Contracts Manager of Agency H, 24/11/2008).

#### **4.6 ADDITIONAL ORGANISATIONAL TRENDS**

To explore the notion of the ‘changing nature of work’, respondents were asked whether they are aware of any additional organisational trends or perceptions of different work patterns or practices. One perception is that there is a growing trend for firms to outsource certain functions, particularly their HR and labour-related functions. According to a HR Consultant, outsourcing is increasing: “the possible downfall is you have an HR manager outsourcing everything; he doesn’t specifically do anything himself. Morale could be low ... and employees having a problem with it” (16/09/2008). She further stated that the workload is increasing, which is reason to believe that firms are using HR outsourcing firms more often. “Because it’s specialised, in a specific industry in a specific field, outsourcing seems to be a lot easier” (HR Consultant, 16/09/2008). As stated in Chapter 1, life-long employment is not as prominent as it used to be. As a labour law consultant explained:

[w]hat is coming to the fore is that there are more people working for more than one employer and that's a big move from the traditional. Yes, its becoming quite a trend in the last couple of years ... Twenty years ago you were shot if you worked for another employer (13/08/2008).

The Executive of National Operations from APSO (26/11/2008) agreed and stated that life-long employment is no longer a reality. One of the evident trends that is occurring is job-hopping. Employees are more demanding, and will often negotiate a higher salary with their future employers. However, they have to have the necessary skills and education to be in this position:

I think people's expectation of pay has changed a lot. People can become more demanding now, move around and get paid more. For us here, it's a big problem. People are jumping around. The older generation stuck with their employer for years. Now, they stay for two years, they hop around and it's acceptable (HR Consultant, 16/09/2008).

Compared to other cities in South Africa, firms in Port Elizabeth appear to be lacking in resourcefulness. The Eastern Cape is one of the poorest provinces in South Africa, which indicates that there is a lack of investment and productivity. As a whole, respondents believed that South African firms seem to be lagging in terms of ingenuity and advanced technology compared to international standards. The Labour law Consultant agreed:

I don't think that South African firms have caught onto the idea of the trends, say, in Europe and America and where people work from home ... There will be firms, if they make the mind shift, they can probably become more productive because of flexibility. But, it only relates to specific jobs and situations. You can't make it general (Labour Law Consultant, 13/08/2008).

The Regional Manager of an Agency C stated that he detected a transformation from a high amount of permanent employment to an increase in temporary employment in Port Elizabeth:

In 1975 or '76, it was static. In other words, permanent people and that's it. You went on a three-month probationary contract and then went to permanent. Two years ago



the economy was booming, today we almost going through a minor recession, you need flexibility. Why not employ a person on a flexible contract and ensure that businesses can sustain their production or be flexible where they use staff more or less at any stage? (08/12/2008).

One of the current trends specifically relating to the TES industry is the prevalence of small agencies that have a long-term association with one client. In these cases, what has happened is that firms who felt the need to downsize have reduced their HR department and have agreed to contract work out to one agency, usually the previous HR practitioner. As the Branch Manager of Agency K explained:

There are those brokers that, by some ‚fortunate association’ they have had with a particular organisation, have the opportunity to provide a service to that one client. And maybe he might have been an HR practitioner for that particular firm, and the firm would retire him or no longer require him ... So, there are those running around, many of those that have an association with only one particular client (24/11/2008).

Overall, in terms of developing trends, the concepts of job-hopping and reduced life-long employment are increasing in tandem with the growth in non-standard forms of employment. There appears to be a lack of commitment and loyalty to one firm. There is still a fundamental division between workers that voluntarily move from job to job, and workers that are forced to.

#### **4.7 CONCLUSION**

Each firm has its own organisational culture and structure and administers flexibility differently. The major form of flexibility that is the focus of this study is labour flexibility. This form of flexibility is rooted in the flexible firm and is seen as the most contentious form of flexibility due to its benefits for firms and costs for the temporary workforce. Firms are utilising the TES industry as means not only to implement flexibility, but also to avoid statutory obligations associated with the SER.

Flexibility is seen by the respondents as a necessary measure to remain competitive, save costs, improve productivity and remove the risk of employing a large permanent workforce.

The „risk’ pertains to retrenchment procedures and having to defend cases in the CCMA. The relationship between firms and TES agencies is mutually beneficial and there are numerous reasons why firms utilise the services of these agencies. TES agencies are utilised because of their flexible service of providing temporary workers when needed and removing administrative burdens, thereby allowing firms to focus on their core business. The greatest disadvantage relates to the workers who are placed in a precarious position, resulting in the creation of an underclass. These consequences and the exploitive measures will be revealed in the forthcoming chapters. The firms studied are pursuing labour flexibility. This was indicated not only by the respondents, but also by the prevalence of TES agencies in the area. The latter is based on the assumption that the growth in the TES industry is synonymous with the growth in labour flexibility.

# 5

## EMPLOYMENT PRACTICES WITHIN THE TEMPORARY EMPLOYMENT SERVICES INDUSTRY

### 5.1 INTRODUCTION

This chapter will focus on the TES industry. As mentioned in Chapter 1, the decision to focus on this industry is based on the belief that little is known about its practices, which is strange given that its services are widely used by firms. The TES industry, commonly referred to as labour brokering, is regarded as an unproductive and secretive industry. This perception is widespread throughout the media and literature, with the main conclusion that these agencies exploit their workforce. This viewpoint is further reinforced by the unions through their opposition to the TES industry. COSATU, in particular, is vehemently opposed to labour brokers. This research reveals the complex and differentiated structure of the TES industry. Defining features of the TES industry are that there are three parties involved and that employment is „externalised’. The aim of this chapter is to reveal detailed information on the practices of the TES industry and the interaction between the agencies, their clients and their workers. It was therefore imperative to explore the dynamics of the TER. The purpose of this chapter is to understand the different perceptions of the TES industry, the challenges confronting the industry and the positive aspects (if any) of the industry.

The industry essentially involves labour related issues and HR practices and therefore their practices should be carefully monitored and regulated. Is this the case? The findings of this research suggest that the industry is poorly regulated and workers are often exploited. There are, however, agencies that appear to uphold the law and there is a drive for regulation. The issue of regulation will be addressed in Chapter 7. This chapter discusses the information obtained regarding the practices of the TES agencies that were interviewed. First, the chapter outlines the divisions and the services within the TES industry, and then considers the various perceptions of the industry’s growth and expansion. It is important to note that the TES

industry is extremely diverse in terms of the services, size and structure of the agencies. Next, the discussion will turn to the TER and the dynamics between three parties within this relationship. It is argued that more responsibility should be placed on the „real’ employer – namely, the client – and that the TES agency should be regarded as its true status of an intermediary. Finally, the HR practices and remuneration strategies of TES agencies are described in order to shed light on their daily business practices.

## **5.2 DIVISIONS AND SERVICES WITHIN THE TEMPORARY EMPLOYMENT SERVICES INDUSTRY**

### **5.2.1 Divisions**

One of the interesting points that emerged within the research process was the divisions within the industry itself. There are divisions in terms of the size of the agency, often coinciding with their quality of service, as well the different services that the agencies offer to clients. The industry is comprised of an array of different agencies. There are a number of large, well-established agencies that are run by a group of people and smaller agencies that are generally run by one person. The so-called „bakkie brigades’ (or fly-by-night operators), who pick up labourers and take them to a site, have fallen loosely into the category of the TES industry. While they cannot technically be considered a TES agency because they operate from a motor vehicle, their activities have tarnished the reputation of the industry.

These findings are similar to Peck and Theodore’s (1998) view that the TES industry is divided into two segments: multi-national agencies and smaller locally owned agencies. However, further divisions were apparent within this research. Firstly, the large well-established agencies have been operating within the industry for a number of years. They are usually nationally and internationally known and recognised. “You get your higher level Kelly group. There is definitely more fair procedure there because you have more trained people. It’s a system that’s been practiced for a while” (Executive of National Operations for APSO, 26/11/2008). These TES agencies are structured, and are usually present in most major cities. TES agencies that are recognised and established promote the quality of their service, reliability and sustainability. These TES agencies usually charge a high fee to the client, typically because of their high-quality service. These agencies are capable of offering their services to a number of different clients because they have the structure to sustain it.

Usually, one will find that the larger well-established agencies have several people working in the agency who deal with specific sectors or areas. There is a well-placed system where one agency has the ability to work with a variety of different firms (large or small).

Secondly, the smaller TES agencies that are operated by a small number of staff, usually less than ten people, have to continuously improve their reputation by following the correct procedures, abiding by the law, and maintaining a high level of service to the client. Many of these agencies rely solely on one to three contracts with large clients.

Thirdly, there are those TES agencies that are operated by one or two people, who run an agency from a small office or room at the back of their own property, and who struggle to obtain contracts. Some survive on one contract and have a trusting relationship with one client, while others rely on a few temporary employees on a couple of different sites. These agencies struggle to make ends meet and to be recognised within the industry. The struggle for recognition within the industry is common among the smaller agencies. Because some agencies are new and do not have the resources to advertise, the well-known agencies take the bulk of orders. One of the questions asked was how agencies created relationships with clients, especially given that competition is ferocious. According to the secretary of Agency E (09/09/2008), “they don’t give you a chance”. She argued that many firms remain with the larger, well-established agencies, and it is difficult for smaller agencies to obtain contracts. For a majority of the time, agencies rely on referrals and are constantly phoning firms in order to gain access.

Lastly, the ‘bakkie brigades’ are mentioned, because they play a similar role to agencies in the sense that they are an intermediary who sells labour to another party. These bakkie brigades create an appalling reputation for the entire industry. They are known for picking up casuals off the streets, and bringing them to a firm’s site and paying them a minimum rate, usually in cash. Most of the agencies that were interviewed have a procedure whereby a worker’s salary is paid into their bank account, and there is a payroll system. The bakkie brigades, by contrast, pay the worker in cash, trying to make a ‘quick buck’. They do not follow any of the legal procedures and deductions. They appropriate a large portion of ‘their’ worker’s wage. As a result, the worker only gets a small fraction of his or her wage. This is exploitive and should be stopped. As the Regional Manager of Agency C noted, “[i]t’s sad because it gives the industry a bad name” (08/12/2008).

It is evident that due to the various divisions, there are different perceptions of the industry. An outsider may only be exposed to one particular segment and generalise that experience to the operations of the entire industry. All of the agencies have a common purpose. However, their practices vary depending on their status, their structure and degree of accountability. Larger, more reputable agencies will have a far greater expectation from a client to perform at a high standard compared to an agency that is run by one or two people. When unions argue against the industry, they should differentiate between the larger and smaller agencies, as there is a different level of service and structure to implement effective and ethical standards. Clearly, a labour broker operating from a vehicle cannot be considered an authentic business. TES agencies are expected to register with the Department of Labour, but the bakkie brigades are not registered and do not meet legal obligations towards their employees. TES agencies are more likely to be held accountable for their actions if they are registered. It is important that business, unions, workers and the government are aware that these divisions exist, and that the entire industry should not be judged based solely on a particular segment or experience.

In larger TES agencies, there is an accumulation of knowledge and experience of the TES industry. These agencies have the structure and resources to operate legally and effectively within the labour market. Smaller agencies are less likely to follow fair labour practices, and are at a higher risk without a knowledge base of labour laws and the industry. Many of these agencies open and close their doors over a short period of time, which makes it difficult to regulate them. It is also very difficult to monitor and regulate the bakkie brigades, which creates an immense problem.

### **5.2.2 Services**

Various services are offered by the TES agencies. Many of the agencies simply provide one specialised service such as recruitment. These agencies, however, are referred to as recruitment agencies who recruit people for a particular firm. Some recruit only permanent workers, while others recruit both permanent and temporary workers. This serves as a necessary function as recruitment is vital to acquiring the most qualified and productive worker for a client.

Some agencies offer a supply of temporary workers that are specifically involved with „temping’. This usually involves replacing a permanent worker for a specified period of time. For example, replacing a woman who has gone on maternity leave or filling in for a worker who is on sick leave. Some TES agencies are regarded as labour brokers, who deal specifically with contractual staff (i.e. temporary workers who work in less-skilled jobs). This particular point was informative, as it was originally believed that labour brokers were used as a general term that refers to those who supply labour to a third party. A TES agency can be considered a labour broker, yet a labour brokering division can be found within a TES agency. „Labour brokering’, according to many of the respondents, refers to a specific area of focus. Labour brokers deal with large firms, usually in the manufacturing sector, and provide firms with a bulk supply of unskilled or semi-skilled workers.<sup>7</sup>As the Labour Broking Consultant noted:

Labour broking is generally supplying entry-level staff, generally your machine operators, your forklift drivers, maybe your truck drivers, very low-class welders. That is what you’re supplying. You can take someone off the street who has never touched a machine, tomorrow they will be able to work on it (Labour Broking Consultant of Agency A, 17/11/2008).

These workers are usually poorly educated and are moved around to such an extent that they are difficult for a union to organise. According to the Consultant of Agency O (28/11/2008), “as soon as you talk about labour brokering, you’re talking about factory level and shift work”. Labour brokers, in particular, rely on their lower-skilled staff to make massive profits. Hence, they rely heavily on bulk contracts for a large number of workers who are used by a large firm such as a manufacturing plant. Some brokers hire out highly skilled workers who have a specialised skill and much money can be made, but the majority of the workers that are utilised are unskilled. Since labour brokers rely heavily on a semi- or unskilled workforce, they do not have much incentive to promote skills development. Money is made by placing a bulk group of unskilled to semi-skilled workers with a client for a short period of time. This is to ensure that the workers do not become permanent. Furthermore, training and skills development costs money and time, and there is a higher demand for workers who are easily

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<sup>7</sup> It must be noted that the TES agencies themselves made this distinction and it does not mean that it is accurate; however, most commentators will regard labour brokers and TES agencies as synonymous.

replaced. Yet, the longer a temporary worker is working, the more money a TES agency can make, TES agencies therefore have to be very aware of their employment contracts to ensure that their workers do not become permanent. This is because permanent workers cost a great deal more. The contracts of employment will be discussed in Chapter 6.

One can find TES agencies that are labour brokers and TES agencies that have a labour brokering division. Some agencies deal with all aspects of industrial relations and human resources such as pay roll, permanent recruitment, temporary recruitment and legal advice. Many of the TES agencies offer the various functions to an array of different clients. You will also find that some agencies specialise in particular areas. For example, some may focus solely on administrative staff and secretarial positions, while others may specialise in accounting, warehousing, and transportation or outsource a particular function such as a cleaning service. There is not one specific structure that is common to every agency, as many offer different services. They are unique in the way that they operate – for example, the agencies operate different payroll systems. However, the law has classified agencies under the broad category of TES. Given the divisions within the industry, it is clear why it is so difficult to regulate the industry effectively. TES agencies are considered employers, just like any other employer, yet the major difference compared to other employers is that their labour is supplied to a third party.

There are some TES agencies that will exploit a worker in any way possible, pay the worker the minimum in order to extract as much money as possible. However, there are also TES agencies in Port Elizabeth who try to operate with sound organisational practices and insist that they are simply providing a service. These TES agencies appear to be playing by the rules, and providing employment in a country that is rife with unemployment. Yet, it could be argued that many of the TES agencies are simply substituting permanent jobs with temporary jobs, not necessarily creating additional jobs. They are placing easily exploitable workers in temporary jobs. Employment is short-term and it does not provide any long-term safety net for workers who really need it. TES agencies are in essence a business whose aim is to make a profit. Their ‚product’ is the most complex of all and the most unpredictable, that being a person.



### 5.3 GROWTH OF THE TEMPORARY EMPLOYMENT SERVICES INDUSTRY

It is apparent that the TES industry has grown immensely. Internationally, agencies are a common feature in the labour market. To what extent is the TES industry growing in Port Elizabeth and what factors have contributed to its growth? Majority of the respondents was of the view that the industry was growing. For instance, one respondent believed that the industry is growing nationally:

[o]ne hundred percent yes, definitely. A lot of firms don't want to put permanent staff on their pay roll and it's easier. They don't want to deal with the day-to-day issues ... and dealing with labour issues falls on our shoulders. I think it is a national thing (Recruitment Consultant of Agency N, 04/09/2008).

The reason for the growth of the TES industry is due to firms creating a demand for temporary labour. It is apparent that the TES industry has grown in Port Elizabeth. However, during the period that the research was conducted, the country was experiencing an economic recession, and high oil prices had created a knock-on effect, especially with regard to the motor industry in Port Elizabeth. If the motor industry is struggling, this automatically affects the TES agencies that are providing temporary labour to automotive component manufacturers. As the Branch Manager of Agency K noted:

[w]e are sitting in a period at the moment where there is a slight economic downturn. So, I don't think employment numbers are increasing, but its times like these that we are going through that production is so unpredictable, especially if you take the automotive industry, or automotive component-related industry. Their production requirements have dropped significantly (28/11/2008).

According to a team leader of a well-established agency, the TES industry is growing in the Eastern Cape, but "at the moment, with the recession in the automotive industry, it is not a good time" (28/11/2008). Many agencies in the area open and close their doors depending on whether they are able to secure a contract or if they lose a contract. As the Managing Owner of Agency I stated,

I think every time you drive there is a new agency popping up, but I mean we know that some of them do come up and do close down ... for different reasons. Sometimes people get into the industry not knowing exactly what the industry is all about. They get someone to give you one contract, and I mean one contract is not going to sustain your agency (16/09/08).

There seems to be a perception that the growth in the TES industry is directly related to the notion that working within the industry is easy and it is a means to acquire large amounts of money: “It has grown because people think that they can make a quick buck” (Managing Director of Agency J, 05/08/2008). The specific growth figures of the industry are not available. As just indicated, many people attempt to open an agency, but close down just as quickly. It is therefore difficult to keep track of how many agencies are operating in the labour market. According to the Executive of National Operations for APSO,

There is very little research available ... so provision of exact figures is difficult. My understanding is that TES is on the increase as more and more firms are outsourcing certain sectors of their business. I cannot speak to PE specifically, but with the growing number of agencies in the region; I can only assume that there is increased business opportunity (26/11/2008).

According to the Regional Manager of Agency C (08/12/2008), there are 193 TES agencies in Port Elizabeth and only a few of these agencies are successful:

Every second person thinks they can be a labour broker. You have 193 brokers in PE, 60 per cent of them open and shut within six months. So, what happens, they employ staff, they milk them by paying them the lowest possible wage, they invoice them out with all the benefits, and at the end of the day they don't pay them the benefits out. That gives the industry a bad name. Problem is that you have 11 of the 193 controlling 80 per cent of the business. It's a big industry; 80 million industry just in PE.

However, one respondent did not believe the industry was growing because, although it is convenient for firms to hire labour brokers, she said that labour broking is also an “expensive road to travel” (Labour Broking Consultant of Agency A, 28/09/2008). The growth of the

TES industry is closely related to firms' need to be flexible, for if there was no demand, TES agencies would not have evolved. According to a respondent, the growth in the TES industry relates to the "legal implications of firms not wanting to take the risk of carrying staff" (Consultant of Agency B, 20/09/2008). The TES industry has grown in popularity because of firms' strategic requirements and due to the reduction of responsibility placed on firms. The growth of the TES industry is directly related to the structure of the TER, especially the fact that the „real' employer is not held accountable.

#### **5.4 THE TRIANGULAR EMPLOYMENT RELATIONSHIP**

The TER is complex. It can create misconceptions about the responsibilities of each party. In a typical SER, two parties are involved, one being the employer and the other the employee. The employee is heavily reliant on the employer to provide remuneration and work. However, within a TER, an intermediary (i.e. the labour broker or TES agency) is the party who provides and creates the employment relationship. The employee will work at the site of the client. However, the TES agency is considered the „employer' of the employee. The client assumes no responsibility and is not regarded as the employer.

This particular relationship can be confusing to employees because it seems as if they have two employers. TES agencies tend to argue that as long as an agency states clearly in the employment contract that the employee works for them, there should be no reason for the employee to be confused. Yet, it does become problematic when employees have grievances. At times, the temporary workers will complain to the client instead of the agency, which creates tension and disorder. The secretary of Agency E (09/09/2008) noted that some of the employees, who were unhappy with a situation, would complain to the client. They were still confused as to who their employer was. In such a case, the client would speak to the agency and the agency would sort the matter out. The assigned responsibility between the agency and the client is confusing. TES agencies claim that every contract with a client is unique in order to meet the specific needs of that client. However, the TES agencies were not willing to reveal any of their contracts with their clients.

In order to remedy the confusion, the agency needs to explain to the employee the nature of the employment relationship when the contract commences. The confusion is based on the

location of the work site, which is at the client's premises. According to the Team leader for the Industrial Division of Agency D (24/11/2008), the TER is murky:

I think it gets a bit cloudy sometimes because often these workers or employees want to be employed by your client, and they often see the client as the employer, but they're not. They don't have an employment contract with the client.

The LRA contains specific presumptions concerning an employment relationship. One of them being that an employee works at the 'site' of an employer. The law, however, states that the agency is the „employer' and an employment contract exists between the agency and the employee. It is clear that agencies state that they are the employer because the employee signs the contract with them, not the client. The TES agency is responsible for removing an employee on behalf of the client, which often leads to unfair dismissals. It would be desirable for clients to have greater accountability and responsibility within the TER. However, it may be argued that if clients indeed had more responsibility, they would not bother to use TES agencies in the first place. It is the lack of accountability that makes a TER so appealing to the client.

It is vital that TES agencies develop strong relationships with their clients in order to create a sustainable long-term relationship. They do this by being efficient and reliable. There is always a fear that clients will find another agency. Depending on the circumstances, the client may search for another TES agency in order to reduce costs and/or increase the quality of service. It is also important that TES agencies adhere to the law and ensure that the conditions of employment of their employees are fair and legal. In order to develop sound relationships, there should be open communication between TES agencies and their clients. As the Regional Manager of Agency C explained:

I don't do business to have a short-term relationship; I want to be with you for 20 to 40 years. All the things should be explained properly the first time and at the end of the day we will have a long-term relationship. I have contracts running 13 years, they were there before I was there, and the firm had almost lost them. We put the service level agreement together, and we visit that service level agreement every three months to ensure that the needs of the market are still the same. That's the way to do business; it has to be mutually beneficial in business (08/12/2008).

It is essential for agencies to strike a balance within the TER. The needs of all parties should be addressed. Running a TES agency is a huge responsibility because the TES agency must ensure that both the client and the workers' needs are equally satisfied. According to the Regional Manager of Agency C,

[I]labour outsourcing isn't dropping ten staff on site and leaving them. It's actually managing them on a daily basis, ensuring that they are wearing the right personal protective equipment, and that they are following the right procedures, listening to the firms' rules and regulations, and of course adheres to your own (08/12/2008).

One of the concerns with the TER is the management of workers on-site. It is necessary for the agency to have a hands-on approach to their workers. As the Regional Manager of Agency C explained:

The employer, being the outsourcing firm, will put a supervisor or manager on site to do that management function, and that's a feature that we try to sell. Why we sell it? Because then we have direct hands-on knowledge of what's happening at any stage (08/12/2008).

There are problems with the TER in terms of disciplining workers, and if agencies do not have a hands-on approach, there is often miscommunication and tension between the TES agency and the client. According to the Labour Broking Consultant of Agency A,

[o]ne of the big problems was because we, as the employer, had to discipline the staff, and we weren't on site, we had no idea what was really going on. So they wouldn't let me know that there was a problem with „Tommy' and all of a sudden, two months later I would get an order to take „Tommy' off site because he has been a problem for the last three months. And I turn around and say: „but I know nothing about this' (17/11/2008).

It is important for the TES agency not only to communicate with the client, but also to inform the employee about who to report to. “Initially, I think you need to make it very clear who they are reporting too, as long as you have your clear structure, I think it will be fine” (Recruitment Consultant for Agency N, 04/09/2008). The central flaw of a TER is how the

law conceptualises the role of the client within the TER. The client has the least responsibility and the most benefits. The law should place more responsibility on client, which would require a body to regulate the client's role within a TER.

Bezuidenhout *et al* (2004:23) are correct in arguing that the firm that utilises the employee is the dominant party, and that it “commonly determines the relationship between the provider and its workers”. The client is the party that is „pulling the strings’ and dictating how much the TES agency and the worker will be paid. Even though there is no employment relationship between the worker and the client, there is still a power struggle between clients and TES agencies:

[i]t's not like the client and the broker are on an even footing. The client very much controls what you do and how legally you can operate. It's only if they are told by their lawyer that you would be jointly and severally liable with us that will they actually pay attention. The rest of the time they will exercise a lot of grip on us, and literally it is the case that „if you don't like doing it we will get someone else’. Then there will always be someone in your shadow that is ready to step in, cheaper, faster and nastier (Labour Broking Consultant of Agency A, 17/11/2008).

The TES agencies have been taking the blame because they are exploiting the worker, but not much blame is placed on the client. The client is ignored or overlooked. One could say that the agency plays a role by deciding how much the worker is paid, but these decisions are dictated by how much the client is willing to pay. They know that a temporary worker will receive a particular wage and that the TES agency will put a mark-up over that. It is negotiated: both the agency and the client decide on the temporary worker's wage. Firms are aware of how much the temporary workers are being paid. It is their choice whether to pay more or less. Yet, at the end of the day, the TES agency takes full responsibility.

There needs to be greater emphasis on the decision making of both the client and the TES agency, not just the TES agency. More emphasis must be placed on the client's control and determination over wages. If the client was willing to pay a higher fee, temporary workers would earn a higher wage. It is debateable whether clients will still utilise temporary workers if their wages were high: it depends on the client, in terms of their expenses and their need for labour flexibility. There would probably be less interest because many firms strive to save

costs, but if a firm is seeking flexibility, it will continue to incorporate a temporary workforce even if there was a slight increase in costs. Obviously, if the temporary workforce costs as much as permanent workers, there may be a reluctance to hire them. Yet, firms who strive to make their workforce flexible will overlook many cost considerations. However, temporary workers will always cost less in the long-term – especially if one considers all the costs associated with permanency. The decision to incorporate temporary workers rests with the management of client firms. They definitely have the „upper hand’ within the TER.

The presumption is that within a TER there is an employment relationship between the TES agency and the worker, not between the client and the worker. In reality, this is not the case since most interaction is in fact between the temporary worker and the client because the temporary worker works on the premises of the client. The TES agency and the client structure their relationships to evade legal responsibilities. The ability to evade the law will be explored in more detail in Chapter 7. Because the temporary employee works at the site of the client, one may still argue that an employment relationship exists between the client and the temporary worker. Theron *et al* (2005b:66) correctly note that “it is a legal fiction to maintain that the TES is an employer”. Firms are the “beneficiaries of this fiction” as they have benefited from adopting a flexible approach to their labour, and they have weakened the bargaining position of unions. There is a “reduction in numbers achieved by externalising employment to TESs and other service providers, and by the introduction of an under-class of workers in the workplace” (Theron *et al*, 2005b:66). Theron *et al*’s argument is supported by a respondent who states that, when firms hire TES agencies, it reduces a great deal of apprehension on the part of an employer. “It saves them a huge headache having to go through unions and retrenchment processes” (Team Leader for the Industrial Division of Agency D, 28/11/2008).

There are advantages and disadvantages depending on the perspective of each party within the TER. From a temporary employee’s perspective, disadvantages include exploitation, employment insecurity, a lack of protection and low income. There are not many advantages except that through the TES agencies, worker’s skills may be developed, they may have flexible hours of work and are earning a living. In terms of TES agencies, they benefit and rely on the temporary workforce for their survival. Firms end up saving costs, increasing productivity and escaping the obligations of an employer by implementing labour flexibility.

## **5.5 HUMAN RESOURCE PRACTICES OF TEMPORARY EMPLOYMENT SERVICES AGENCIES**

### **5.5.1 Recruitment and Selection**

TES agencies in Port Elizabeth recruit from the same area. They are in constant competition with each other and often workers will change TES agencies and leave their curriculum vitae with as many TES agencies as possible. In the words of the Regional Manager of Agency C:

[t]here are only so many people in the town, even though you have such a high unemployment rate, you can't just rotate them. So, how do you maintain your labour force? Pay them better, look after them, and ensure that they feel that they are a valued asset to the firm. Most labour brokers treat their staff like absolute dirt, and that's why they have a high turnover ... I believe in looking after your employee, you maintain and retain that employee (08/12/2008).

Not all TES agencies seem to share the same sentiment. There is a greater focus on meeting the needs and providing a quality service to the client than the workers. This is because they rely on their relationship with their clients to stay afloat. At times, this service is not up to standard. However, there are TES agencies that strive for excellent service and quality. Any firm is capable of hiring a general worker. The Regional Manager argues that there is often poor recruitment and selection:

[t]hey don't do criminal checks, credit checks, so what they do is they get any riff raff coming in and working for clients. So firstly, you are putting the wrong calibre of people onto a site, then you not paying them correctly. A man's stomach is empty, he tends to look for other means of making money. He will either find a better job or help himself to something. It's unfortunately human nature. So you are either increasing the risk factor for your client or you increasing your turnover of staff ... Your client get's fed up (Regional Manager of Agency C, 08/12/2008).

TES agencies attempt to provide workers who are qualified and skilled in a specific functions as well as providing general workers. A positive aspect regarding the industry is that TES agencies specialise in finding the „right candidate for the right position”: “So what you have



to do, you have to recruit the right one. A high amount of strength goes into recruitment and selection” (Regional Manager of Agency C, 08/12/2008). An essential aspect that many TES agencies focus on is the screening process. As the Contracts Manager put it:

The most important part of the business is without a doubt the screening process ... You are not looking for rocket scientists; you are looking for people who are conducive to being part of a team. If you supply the clients with decent human beings in the first place, you will save yourself massive efforts as far as discipline goes. Everything will be better. Most labour brokers simply let people walk in the front door, take everybody and then send everybody (Contracts Manager of Agency H, 28/11/2008).

TES agencies are required to conduct interviews with potential candidates. According to a respondent, many firms do not have time to interview candidates and they often hire employees based on their curriculum vitae (Regional Manager of Agency C, 08/12/2008). The advantage is that TES agencies specialise in recruitment and selection and conduct the necessary checks: “you do a criminal check, credit check, reference check, educational check, and any degrees for licenses – it’s like a permanent position, you do the same process” (Regional Manager of Agency C, 08/12/2008). It is important to put staff through an induction process. The induction process consists of briefing the employee in terms of what is expected of him or her and what they need to wear. “You look after the safety of the employee by telling them the right way to do it” (Regional Manager of Agency C, 08/12/2008). Employees are also expected to write a test that is accredited by the SSETA and are trained. Once they have passed the induction process, they are ready to work. “If they don’t make the induction, we put them back through to training” (Regional Manager of Agency C, 08/12/2008).

In order for agencies to function efficiently for their clients, there is a need to familiarise themselves with the clients’ practices and workplace. “In order for you to discipline the person, you have to have knowledge of that industry, so you have to become an expert on that client’s needs” (Regional Manager of Agency C, 08/12/2008). In terms of the management of agency workers on site, an immediate supervisor works for the client that the agency workers will report to. Many of the agency employees have a team leader to oversee them and who will report back to the agency. “They can go to him and he can come to us and we sort out a

problem and go back. Of course we have a monthly meeting with all our sites” (Manager of Agency G, 25/08/2008). The manager of Agency G argued that it is necessary to have open communication with the workers and to know what the feeling is on the ground. “Once a month I go to all the different sites in their lunch hours and sit down and talk to the guys and find out if there are any problems” (25/08/2008). The TES agencies’ views on induction and training are questionable because they do not have the first hand knowledge base of the various clients’ premises, their regulations and procedures in order to train the workers as effectively as required.

### **5.5.2 Remuneration of workers and TES agencies**

There are TES agencies that do not follow the correct procedures and give the industry a bad name. One of the major concerns is that TES agencies are taking money from the worker in any way they can. From the interviews conducted, it became apparent that many TES agencies are guilty of such practices. However, the Regional Manager of Agency C (08/12/2008), who is an advocate for the TES industry, firmly believed in the ethics of the industry. He stated that the fee that they charge is for the client and that it is a mark-up operational fee. Furthermore, the relevant bargaining council and the BCEA set the pay rate for workers. Some TES agencies are not governed by a bargaining council and they pay their employees the bare minimum.

In order for a TES agency to make a living, they need to charge a fee. TES agencies earn a living by charging the client who is paying for a particular employee. TES agencies will charge an operational fee to the client, which includes the recruitment, selection, uniforms and transportation cost of the operations. However, “most big firms don’t want to pay the mark-up, so what the labour broker will do, they will try cut their services to make money out of the operational fee, which is not the way to go” (Regional Manager of Agency C, 08/12/2008). TES agencies place a mark-up above the employee’s wage in order to receive an income. This is how they make their money. Nevertheless, there are TES agencies who illegally take a proportion of the workers’ wage. The TES agencies in Port Elizabeth vary in terms of their mark-up, but it can be anywhere “between 15 per cent to 20 per cent, which is average, but it can go up to as much as 50 per cent” (Labour Broking Consultant of Agency A, 17/11/2008).

When establishing a relationship with clients, the TES agencies stated that it is essential to educate their clients, because many clients still have a perception that temporary labour is cheap, slave labour:

It's the broker's responsibility to educate the client ... „Sorry sir, this is not a way of cheap labour or slave labour'... It's education in the beginning; educate your client on what they can do with your employee, and that way you solve these problems (Regional Manager of Agency C, 08/12/2008).

However, the attraction of cheap labour is the very reason why firms choose to employ temporary agency workers. Throughout the research, some outspoken respondents revealed how easily exploitation occurs. A disturbing fact that surfaced during the interviews is how easy it is to take advantage of workers and to manipulate the system. “Everyone thinks that they are a labour broker, it's sad because they tend to exploit the staff,” (Regional Manager of Agency C, 08/12/2008). According to the Regional Manager of Agency C, workers are exploited by TES agencies by being paid sub-standard wages:

[w]hat they try and do is take quality people and they pay them sub-standard rates, let's say, the minimum rate is R8.57, I am just giving you a figure. They will come in and try pay that person R6, and quoted the client a charge rate of maybe R12. Right, now they will do their costing on R8.57, they charge the client R12. Now, it sounds like a 50 per cent mark-up but it's not. There are benefits that have to be added to that R8.57 of roughly 20-28 per cent, depending on the industry. So, let's say it's 28 per cent; you add on 28 per cent to the R8.57. That's a big chunk of change again. You add up to R11.50, then they realise that they are charging R12 and it's not enough in it. They pay the staff less and they make more money, a bad way to do it (08/12/2008).

These views have contributed to creating a greater perception of an underclass within the TES industry. There is still a pressing argument in terms of the issue of the „mark-up'. It may be argued that TES agencies are not ideal for any employee to work for because even though agencies claim that they simply put a mark-up on the employee's wage, the employee is potentially not receiving as much as he or she could. In Chapter 1, Theron (2003:1254) correctly noted that the amount available to remunerate workers is often determined by the

margins of the client's business. This is because the client has to reserve money for the TES agency, which in essence leaves the employee with less money at the end of the day. TES agencies claim that they are not taking anything away from the employee, but if an employee had to seek out employment for him or herself, he or she may potentially receive a higher wage without the TES agency. Employees are put in a tight spot because many firms will tell the employee to go to a specific TES agency if he or she wants employment:

[i]t's difficult to find work on your own. If you go to each and every firm, they don't take you by the gate. They tell you to go to a certain agency that belongs to this company. So, then you must go and consult with that agent (Worker 1, 17/11/2008).

There is a concern that workers have to pay a fee to the broker to secure a position. All the TES agencies denied these accusations. For instance:

[i]f the broker is charging the worker a fee, it's not right. At the end of the day, the client should pay for the broker's services not the employee. It's costly to get a person screened, interviewed and onto site. If you do it properly, it is very costly. But, if they are charging the employee a fee, its bad news (Regional Manager of Agency C, 08/12/2008).

One of the foremost concerns about the TES industry, that unions in particular are concerned with, are the differences in wages between temporary employees and permanent employees. There is a general belief that temporary workers are paid less and are exploited. In many cases, they are indeed paid less. However, in some cases, they are paid more because they are not receiving the extra benefits that the permanent employees are receiving. It was interesting to find out that the clients essentially determine the pay rate. Temporary workers who are employed by a TES agency will automatically be paid less and are at a disadvantage compared to workers who are not employed by a TES agency. This is because the client will take into account the fee they have to pay to the TES agency, and it is easier to save money by reducing the temporary employee's wage in order not to pay more for the TES agency's services. As the Regional Manager of Agency L put it,

[t]he firm we supply determines how much they want to pay per hour. But, it will be less than the permanent workers because we then load our money on. But, how much the person pays is not determined by the outsourcing firm (09/09/2008).

Temporary workers are paid differently depending on the TES agency and the sector. The bargaining council of a particular sector will determine the minimum wage of workers working in that sector. There will obviously be some variation in the wages of the different sectors. Those workers in sectors that are not governed by a bargaining council are the most vulnerable, unless a sectoral determination has been issued. TES agencies are not uniform in terms of how they pay their workers. Some workers are paid once a month, while others are paid once a week. There is also a different system of payments depending on the TES agency and the client. For example, the Labour broking consultant notes:

Monthly salaries are invoiced a week before the end of the month. The client pays before payment is made to the workers. If they don't, payment is still made, but it is ideal for the client to pay because the agency can end up carrying huge amounts. Weekly wages are paid one week in arrears because the client needs to be invoiced in advance so that payment can be received in time for wage payments (Labour Broking Consultant of Agency A, 26/09/2008).

One of the questions posed to the respondents was whether temporary workers are aware of the cost margins involved. The respondents, including the TES agencies and the workers, stated that the workers as a whole do not understand why the various deductions are being made. According to the Contracts Manager of Agency H,

I think that they generally have a good idea of what's actually going on. They don't know exactly what margins we have. We give to them a great deal. They don't give to us except for their work, time and commitment (28/11/2008).

As mentioned above, TES agencies rely on bulk contracts in order to make large sums of money. However, every agency needs to be financially viable and secure in order to make a profit:

There is money to be made. Otherwise, people wouldn't be in it. It's a volume-driven thing. To be in this particular business, you have to have substantial financial resources. I was talking about volume of staff that we are paying upfront and we are then recovering that from clients of ours. There is the risk in any business. Do your clients pay you? Do they pay you on time? So I think the brokers that are credible and have that substantial funding will stand the test of time (Branch Manager of Agency K, 24/11/2008).

Overall, temporary workers will receive less money if employed by a TES agency because of the associated costs incurred by placing a particular employee with a client. The advantage for temporary workers is the possibility of permanency – which is a major motivation – whereby the temporary worker may have an opportunity to become a permanent employee with the added security and steady salary. TES agencies automatically accumulate greater profits from utilising temporary employees, which is why they are reluctant to provide permanent placements. Workers will still have aspirations for permanency so they will continue to put themselves at risk by accepting an employment relationship with a TES agency. They do not have much of a choice.

## **5.6 CONCLUSION**

Overall, the TES industry appears to have grown and is very prevalent in Port Elizabeth. Within the research process, it was discovered that there are various divisions within the TES industry and a variety of services. The most prominent finding was in terms of the definition of „labour brokering’. The term is often used to define all TES agencies, whereas the respondents indicated that „labour brokering’ refers to contractual staff that is placed in lower skilled jobs, which are easily replaceable. On this view, labour brokering does not refer to every single TES agency that is in operation. The implication is that attention needs to be placed on the labour broking aspect of the TES industry, for this is where TES agencies make the most money and where employees are most often exploited. Employees are placed in positions of low skill, receive low wages and work mostly in shifts. The TES industry involves three parties: the agency, the client and the worker. The main problems of the TES industry is the inherent problems with a TER: three parties are involved within the relationship, rather than a typical SER. Responsibility is shifted from the „real’ employer (the client) to the „nominal’ employer (the agency). As a result, clients are able to shift their

statutory responsibilities to the TES agency in order to circumvent legislation. The TES agency controls the employment relationship with the worker, but is essentially in a business relationship with the client, signalled by a commercial contract instead of an employment contract. TES agencies run a business, that business is „labour hire’ and all the respectability of employment contracts is diminished within the industry as there is usually no loyalty, commitment and dedication involved. This clearly demonstrates a shift in work dynamics, a change in the nature of work. As the SER disintegrates, the demand for temporary labour continues to increase, and there is a lack of reciprocity and respect. Temporary workers are vulnerable and susceptible to exploitation and are not adequately protected by governmental institutions.

# 6

## A NEW ‘UNDERCLASS’: EMPLOYMENT WITHIN THE TEMPORARY EMPLOYMENT SERVICES INDUSTRY

### 6.1 INTRODUCTION

In order for firms to remain competitive within a changing market, temporary labour is seen as a necessity. The use of temporary labour is popular among firms because it is controlled by a TES agency. The TES agency is responsible for the employee and takes care of all administrative burdens. One of the questions that were asked in this research is whether the TES industry itself aided the growth in temporary labour. This is because temporary labour is the main form of work that is generated. The primary reason for the existence of temporary labour in the labour market is the demand for it. While the TES industry creates a platform for temporary labour to thrive, it does not create temporary positions. The demand for temporary labour is the product of firms following a flexible approach to their workforce. Yet, the manner in which firms select their temporary labour is through an easily exploitable means – that is, via the TES industry.

A main reason for focusing on temporary labour is the insecure nature of this particular form of employment. It is closely tied to the processes of casualisation and externalisation. The focus on temporary labour stems from the general understanding that any form of non-standard employment (whether it be casual, part-time or temporary) is by its very nature precarious, insecure and unprotected. When analysing temporary labour within the TES industry, one has to be careful of not generalising to all temporary workers. While qualitative research reveals that temporary employment is multifaceted and “beyond the reach of aggregated statistical data”, the aim is “not to generalise the research findings to *all* temporary workers” (Conley, 2005:145). This chapter aims to address the consequences of temporary employment within the TES industry. Temporary labour can be divided into various segments. As we noted above, ‘temps’ are usually regarded as those workers who



merely fill in a gap or are considered a replacement until a permanent person is appointed. One of the attractions of the industry is that if a permanent employee within a firm is off sick, temporary labour may be utilised as a replacement. “It’s the flexibility of having staff 24/7 and not being your problem” (Regional Manager of Agency C, 08/12/2008). However, the majority of the temporary workers that were studied in this research are contract workers. This form of labour is used purely for flexibility. „Easy in, easy out’. No strings attached. These workers are on short-term contracts, where they are merely meeting the demand for goods.

As mentioned in Chapter 1, the concept of an „underclass’ essentially refers to workers who are placed at the lowest end of the working class. These workers are at a greater disadvantage than other workers because they are easily exploited and they are in a vulnerable position. In order to create an appropriate understanding of the conditions of temporary employment, a variety of respondents were interviewed. This chapter outlines the various issues pertaining to temporary employment and the various perceptions of the respondents in terms of conditions of employment. Firstly, the different dimensions of temporary labour will be addressed. This includes the different occupations as well any racial, age or gender divisions that are present. Second, the various contracts of employment that are offered to temporary workers will be examined. Third, the term „permanent temporary employment’, which perpetuates an underclass of workers within the TES industry, will also be addressed. The debate surrounding the differences in treatment and employment conditions of permanent and temporary employment as well the discrimination experienced by temporary workers will be analysed whilst looking at the reasons behind the decision to use temporary as opposed to permanent workers. Fourth, the statutory deductions that are made from a temporary workers’ wage is explored. The chapter concludes with a closer look at job insecurity that is experienced by temporary agency workers.

## **6.2 DIMENSIONS OF TEMPORARY LABOUR**

### **6.2.1 Occupations**

This research focuses on automotive component manufacturing within the motor industry in Port Elizabeth. For the most part, the information concerning temporary positions reflects the occupations in the motor industry. The respondents from the TES agencies that were

interviewed place temporary employees in a wide range of sectors, therefore, additional information from other sectors has been included. In each sector, terms and conditions of employment will differ due to bargaining council agreements. Terms and conditions of employment are partly determined by the various bargaining council agreements, which employers must adhere to.

The majority of temporary workers that work within the motor industry are unskilled or semi-skilled (Branch Manager of Agency K, 24/11/2008). In terms of the workers used to create a „flexible’ labour force, the TES industry relies on semi-skilled workers who have little or no education and training. “In Port Elizabeth, finding good skills in a small area is difficult: there are not enough skills” (Consultant of Agency O, 28/11/2008). These workers are prepared to do almost anything for a wage and are the most exploitable workforce, especially because most of them are not unionised. The Labour Law Consultant argued that the availability of unskilled labour is beneficial:

As far as temporary employees are concerned, I think, we are fortunate in South Africa to have an abundance of unskilled labour that is unemployed. So, therefore, the source from where they come from is easy. It is easier to obtain someone quickly if you need someone unskilled. I think it is becoming more difficult where you move into the scarce fields (Labour law Consultant, 13/08/2008).

Within the automotive components manufacturing sector, many of the positions are lower skilled. Occupations include shop assistants, warehouse staff and warehouse distribution and transportation positions. Occupations in other sectors that are very common include vehicle deliveries and distribution of food products (Branch Manager of Agency K, 24/11/2008). With regard to other sectors, agencies deal with a large array of employment positions:

[w]e deal with loads of occupations. We’ve got a general handler, code 14 driver, store men, materials handler, receiving clerk, secretary, receptionist and machine operator (Managing Director of Agency J, 05/08/2008).

The Recruitment Consultant of Agency N noted that there are many temporary workers, especially women, in finance, many occupations in administration and manufacturing, and artisans are widely used (04/09/2008). Construction is widely known for utilising temporary

workers, and information technology and call-centre management are increasingly drawing on the services of TES agencies (Consultant from Agency B, 20/09/2008). The Branch Manager of Agency K stated that one of the most lucrative sources of income is when the agency is able to create a short-term contract for a highly skilled employee. This is because the TES agency will receive a greater mark-up. The HR manager of a large manufacturing firm stated that the temporary workers that are hired are “largely in the unskilled areas or semi-skilled areas” (Firm P, 17/12/2008). This is because there was an over-reliance on temporary agency workers who are skilled and could leave at any time. Once they left, there was a need to fill that skilled position again. “They could leave you and some of them did leave us. So, largely I think we try to put them in kind of unskilled jobs as a rule” (HR Manager, Firm P, 17/12/2008).

### **6.2.2 Racial, Gender and Age Dimensions**

When asked about whether there are any specific racial, gender or age differentiations within the occupations, the Managing Director of Agency J noted that:

There was, but not anymore. People are going back to your knowledge and experience ... It's got to be the right person for the right job. It doesn't matter what colour scheme you are, as long as you fit all those categories and everything (05/08/2008).

One of the questions the research addressed was the impact of affirmative action. Does it affect placement procedures within temporary placement selections? The respondents stated that it does play a role, but the most important concern is to find the right candidate for the right job. One of the prerequisites for employment is that workers must have the ability to speak English. The Labour Broking Consultant of Agency A (17/11/2008) stated: “I couldn't employ people who couldn't speak English and sign contracts”. Clients can be very fickle about the calibre of temporary workers that they are prepared to hire, particularly with certain firms. Firms are also reluctant to hire temporary workers from neighbouring countries. This is because of the apparent xenophobia that is evident in the workplace:

We never employed Zimbabweans. The union told me that if I bring them in the factory they would kill them. It wasn't an option. That was a year or two ago (Labour Broking Consultant of Agency A, 17/11/2008).

Some firms specify the exact qualifications to the TES agency that they would like the temporary worker to possess. In one particular incident, the respondent claimed that a client had rigorous demands:

They would only take people that had maths and science, grade 12, that's passed a polygraph and they wouldn't take women. They were paying R2, 900 a month, but they were expecting these qualifications. So, you know, I couldn't pay someone that worked at the one firm for R10 an hour and had Standard 8, and place them in that firm. So I was very limited as to where I could put them (Labour Broking Consultant of Agency A, 17/11/2008).

In terms of the gender divisions that were present, many temporary positions are filled with males. The gender division is highly dependent on occupation and sector. With regard to the motor industry, physical work is largely carried out by men. "We employ about 90 per cent males because the work is not thinking work always. It's very rarely thinking work and men are stronger than women so we usually employ men" (Contracts Manager of Agency H, 24/11/2008). Women tend to remain at a disadvantage and are often found in the domestic sector, and are not used as a „buffer' within factories as extensively as men. Women are usually found in administrative positions or warehousing, yet it is highly dependent on the industry and the specific firm. One cannot generalise. The Contracts Manager stated:

Women get placed into data capturing jobs, pickers, packers, scanners that kind of thing. Material handlers are almost always men. Every once and a while we will have a female forklift driver. (Contracts Manager of Agency H, 24/11/2008).

One of the concerns raised in Chapter 1, was how women in particular are treated within the TES industry. Women are considered to be the most vulnerable to exploitation and constitute a large portion of the secondary labour market in South Africa. However, in terms of the TES industry, both men and women are equally prone to exploitation. In terms of the age of the temporary workforce in Port Elizabeth, the respondents claimed that the age of the temporary workers they deal with varies. However, the age of temporary workers varied between 20 to 40 years of age because the work was intensely physical.

### 6.3 CONTRACTS

As Conley (2005:145) notes, the vulnerable contractual status of temporary work creates insecurity. There are different contracts that are offered to employees who work for a TES agency. One of the most popular and widely used contracts that are entered into with temporary employees is the fixed-term contract, also referred to as a limited duration contract. The contract is designed specifically for a „limited duration’, which can extend from a few days to several months. Employees enter into the contract with the knowledge that the contract will end and it will last for as long as the assignment takes to be completed. “You would always make it quite general so you could be moved around in the factory or you could have different responsibilities” (Labour Broking Consultant of Agency A, 17/11/2008). The contract directly relates to a specific project and is therefore determined by the duration of the project. There is an expectation that as soon as the project is finished the contract will expire. This particular contract can leave employees in a vulnerable position because there is often a clause stipulating that the contract may end within 24-hours, if proper notice is given. In other words, an employee can be told that his or her contract will end at any time or at any stage of the project, if the agency sees fit, even though it is unlawful in terms of the BCEA. This may be because of absenteeism or disciplinary problems, but the TES agency has the power to terminate the contract at any time. The employee has little power to prevent this from happening. Even though, in this particular contract, the employee is aware of the duration of the contract, he or she remains within a precarious employment position and this aspect is hardly advantageous.

While temporary employees may report any unfair dismissals to the CCMA, they are often not knowledgeable about their rights. The Labour Broking Consultant of Agency A (17/11/2008) reveals that workers have 30 days to report unfair dismissals. If they do not report within that period, the case will automatically be dismissed.<sup>8</sup> Many employees are oblivious to this fact, but agencies are fully aware and deliberately try to manipulate the situation by telling the employee that he or she will obtain another position soon. They try to sway the employee during the 30-day period, and once it has lapsed, they have no need to worry. This is particularly apparent with unfair dismissals. A respondent explained how a fixed-term contract is ended:

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<sup>8</sup> Employees can seek a pardon for late referrals.

[m]y boss was incredibly stingy and it was my job to keep the peace and that's what my job depended on. We would use the fixed-term contract, and the ways you would end it was either on the date that was stipulated on the contract, or there would be a clause in there that said if the job that you employed to do comes to an end your contract will automatically end. That's why I put a job description in. So, say you were employed to unpack containers, you do five containers in one day, but I employed you for a week, but after one day, your job is done. So, your contract automatically ends (Labour Broking Consultant of Agency A, 17/11/2008).

The next contract is an open-ended contract. This contract essentially has a start date and no finish date. "Now, theoretically, that is a permanent contract, but, the agency will use this lack of end date as an excuse to get rid of the contractor" (Labour Broking Consultant of Agency A, 26/09/2008). Open-ended contracts essentially provide an employment contract between the TES agency and the employee without giving the employee an indication when it will expire because there is no specific project to be completed. TES agencies provide employment to the employee for a period of time that is not pre-determined. The client usually determines the termination of the contract.

One of the problems that have arisen in the TES industry regarding contracts is that workers are sometimes asked to sign a 'restraint of trade' clause, which restricts them from working in the same trade or industry for a specified period. "This is ridiculous, at the level of machine operator, you can't tie someone into a contract that says they are not allowed to work in the same industry or area – it is madness" (Labour Broking Consultant of Agency A, 26/09/2008). Such clauses contribute to the generation of an underclass of workers within the TES industry who struggle to find employment within the trade that they specialise in.

TES agencies have to be aware of when contracts are terminated because of probationary periods and the expectation that the employee will acquire permanent status. Probation will be further addressed in Chapter 7. Many agencies do not want the employees to be permanent, so they often terminate the contract and create a new one shortly thereafter. This gives the TES industry a bad name. The deliberate and constant renewal of contracts to avoid permanency is not only unfair to the employees, it is also potentially unlawful. The constant

renewal of contracts essentially creates „permanent temporary employment’, which is evident in the following example:

We had contractors for five years at one firm, and I mean that's nonsense. The metal industry states that after a year, the people have to become permanent. If you think about it, if someone is there for five years, your excuse of flexibility falls away. So we definitely had a problem with on-going contracts and the expectation of renewal, which is something we would come up against a lot, with bargaining councils and the CCMA. How do you end somebody's contract if he has been renewed 15 times? He has a reasonable expectation that his contract is going to be renewed and that is what we would lose on (Labour Broking Consultant of Agency A, 17/11/2008).

As discussed in Chapter 1, „permanent temporary employment’ is a major concern. This is when temporary employees are placed in a position for a period of time that is essentially permanent, yet because of the contract that they have signed, they are still regarded as temporary employees. This is unfair to the temporary employees because they are stripped of the rights and privileges attached to permanency. It reinforces the concept of an underclass of workers. This was clearly evident within the research findings. The Contracts Manager (Agency H, 24/11/2008) stated that it was rare in his agency for temporary workers to receive permanent positions. However, given the nature of their contracts, the relationship was essentially permanent:

Temporary workers virtually always have their contracts extended so affectively it is permanent work. We had a guy retire the other day and had been working for 15 years as a temporary labourer. All that contract is, is the ability of the employer to end contracts in times of economic hardships. They just have problems securing loans from banks, because banks wont give you loans on temporary employment (Contracts Manager of Agency H, 24/11/2008).

Permanent temporary employment is a pressing problem associated with the TES industry. Workers are either constantly moving from one contract to the next, which is effectively „permanent temporariness’, or they are on one contract that is constantly renewed. This lack of security and effective recourse result in the creation of an underclass.

## 6.4 TEMPORARY VERSUS PERMANENT

In order to save costs, firms will reduce their permanent workforce and hire an increasing number of temporary workers. Temporary workers who work for a TES agency will usually not receive the benefits, such as a pension, medical aid and bonuses, which permanent employment provides. Temporary workers are also paid either by hour or by day (Recruitment Consultant of Agency N, 04/09/2008). This saves firms a great deal of money because temporary workers are only paid for the amount of time they worked. Permanent workers are paid a salary every month with additional perks, which constitute a significant cost to firms. Firms then do not have to pay as much money to the temporary worker even though he or she is working under the same conditions as permanent employees.

TES agencies will at times attempt to make their temporary workers permanent with a client. This is mainly due to union pressures. As a respondent explained:

A lot of our guys get taken on permanently, at my one client we had 150 taken permanently this year, and on average they would probably take 50 or 60 every single year... Also to keep the unions at bay ... So take some guys permanent, and it keeps them quiet. It just shuts them up for a bit. They are an absolute pain (Team leader for Industrial division in Agency D, 24/11/2008).

It must be emphasised that it is in the best interest of TES agencies to keep their workforce temporary. As noted by Theron *et al* (2005:31) in Chapter 1, it is in the interest of TES agencies to prolong the duration of the period that the temporary worker is employed by a client. This is because they rely heavily on their temporary workforce to make a profit. Therefore, it is unlikely that TES agencies will promote permanent placements. According to the Labour Broking Consultant of Agency A, (17/11/2008) many temporary workers would probably not cope with a permanent job:

[s]eventy per cent of the people that worked for me probably would not cope with a permanent job because temporary work suited their lifestyles. They could get blazingly drunk on a weekend, and they did. I had how many people through wellness campaigns and things to get them through drug addiction because it really is a problem (Labour Broking Consultant of Agency A, 17/11/2008).



One of the questions that this research set out to answer was whether employers prefer utilising temporary workers as compared to permanent workers. Depending on the type of business, the Regional Manager of Agency L (09/09/2008) stated that some firms will prefer temporary workers and others will rather have permanent employees. Firms usually try to maintain staff with specific skills and they offer them good salaries and packages. This is done in an attempt to gain the loyalty of employees. A preference for permanent or temporary workers is highly dependant on the firm:

So, certain firms want their workers permanent. On the other hand, outsourcing can also be costly to a firm, and some firms then prefer to have their own department that handles their stuff, but as they grow and they experience problems, they compromise. They say 50 per cent of our workforce, the part that we need the most we will keep them permanent, and the rest we make as temporary workers (Regional Manager of Agency L, 09/09/2008).

The prevalence of temporary employment is high, but do employers prefer temporary workers that are hired via a TES agency? For the most part they do because their obligations as the employer are removed. The expenses incurred, as discussed in Chapter 4, can be quite substantial. According to Labour Broking Consultant of Agency A (26/09/2008), employers like to implement flexibility by increasing and decreasing staff numbers as needed, so temporary workers are ideal. “They can get rid of workers that are not suitable or that they don’t like and temporary workers produce more output because they need to impress and they know their jobs are at risk” (Labour Broking Consultant of Agency A, 26/09/2008). As indicated in Chapter 1, some firms use temporary positions to screen applicants for permanent positions. Many clients will hire temporary workers over a probationary period and will test their performance, and select some who will then be employed permanently. As the Recruitment Consultant of Agency N stated:

[t]hey don’t want to employ and find it a bad move so rather take them on maybe three months or six months and then take them on permanently. There is always the possibility of it going permanent (Recruitment Consultant of Agency N, 04/09/2008).

According to the respondents, many temporary workers work very hard because they are hoping that they will obtain a permanent position. Temporary workers often perform their tasks very well, sometimes better than permanent employees do:

They would work so much harder than the permanent staff because they knew their jobs were on the line all the time and also they were told that if they didn't work hard they wouldn't be considered for a permanent positions, which isn't really how it worked but anyway. They are desperate to work, they desperate to be there (Labour Broking Consultant of Agency A, 17/11/2008).

The majority of temporary workers seek permanency. Many of them hope that after a certain period of time, when they have demonstrated their capabilities, that they will become permanent employees. According to the Regional Manager of Agency L, "they will put them on permanent, but after they have watched them, after they have seen their performance, after they see their attitude because it all counts in a work scenario, that they will make them permanent" (09/09/2008). However, if a temporary worker does in fact become permanent, performance tends to drop as there is no need to impress the client anymore. As the Labour Law Consultant pointed out:

[n]ormally, those people perform better than the permanent employees. Maybe because there is no security in employment. Maybe it's the unemployment situation. Whatever the case may be ... As soon as a person is appointed in a permanent position, his performance drops (13/08/2008).

One of the concerns with outsourcing in general, in terms of temporary workers being incorporated within a firm, is the dynamics between permanent workers and temporary workers. Within the working environment, some temporary workers will feel excluded and unfairly treated. According to the Regional Manager of Agency L (09/09/2008),

[a] firm like for instance „Firm X', which has 300 permanent workers and 300 temporary workers. The temporary workers will work and work ... But they know the permanent workers get more, and the permanent workers work less, they get away with murder and they feel unhappy. They feel they've been treated differently, but

they are more productive and they have been paid less, but they doing more, and so that can cause some friction in a firm.

Rogers (2000:4) noted in Chapter 1 that temporary workers find themselves isolated and stigmatised. An issue that was explored during the interviews was whether temporary workers are discriminated against in the workplace. One of the examples given of temporary workers being discriminated against by permanent workers was at an alcohol producing firm in Port Elizabeth. The permanent workers would threaten the temporary workers:

It doesn't work, right. Those workers immediately come to us. We then hold meetings with the management. We then serve their workers with a notice that if any of our people gets harmed, we will take action (Regional Manager of Agency C, 08/12/2008).

Another respondent agreed, stating that temporary workers are stigmatised, but insisting that it can be eliminated if there is open communication:

It needs to be handled correctly so if you have the tight dynamics between the firm and the project manager from the agency and there is open communication, you can call meetings and have discussions with both parties, then the dynamics will work better. But don't just leave it and let it happen, there is stigmatising, there is that problem (Consultant of Agency B, 20/09/2008).

Some of the respondents believed that the form of discrimination is not that serious. "I don't think they are threatened by them, I think that they think they are better than these temporary workers. But, at the end of the day, there are three temps for every one permanent worker. So it's not much the perms can do" (Contracts Manager of Agency H, 24/11/2008). The HR Manager from Firm S agreed: "permanent employees tend to take advantage of the temps due to the fluidity of their contracts and they also feel that they are superior to them because the temps are new to the organisation" (03/12/2008). It is important for firms, who decide to incorporate temporary workers, to communicate with their permanent workers and to reassure them that they still have employment security. As the HR Manager of Firm P explained:

we explained to them (our permanent workers), why we would be using them, where we would be using them, but there was definitely a concern or fear from the permanent employees that said: „you going to replace all of us one day with labour brokers’ ... The relationship has gone on three or four years later. Now, I think, it’s largely a belief that people are starting to see the value of labour brokers in terms of the flexibility that it can create.

Firms should always communicate with their permanent employees to give them a sense of security. Yet, it is quite possible that by threatening the security of permanent workers, firms may cause the permanent workers to work harder. According to an automotive manufacturer (Firm R, 12/10/2008), a division between permanent workers and temporary workers is clearly present within the workplace. Temporary workers try to out-perform the permanent workers, which causes conflict. Often the conflict or tension between permanent employees and temporary employees is over wages. Frequently, the problem is that one group of workers, whether it is permanent or temporary, is paid more than the other in the exactly the same working environment. The conflict between the different workers is demonstrated in the following example:

[w]e had a case the other day where the union wanted me to pursue the fact that the contract employees are being paid less than permanent employees and I said but in terms of our agreement as long as they are being paid more than the minimum rate, there is nothing I can do about it. If the minimum rate is R10 an hour, the permanent employees is paid R20 an hour, the contract employees get paid R15 an hour, its not in contravention of the agreement. Sometimes you find that contract employees, or people with the labour brokers will be paid more because they don’t have permanent employment so to entice them to come in, to work on a three month contract they paid more. So it’s not necessarily that they get less, it depends what the circumstances dictate. But, that causes problems because the one is getting less (Motor Industry Bargaining Council Official, 09/09/2008).

Ultimately, permanent employment is the preferred form of employment. It offers security, benefits and a stable income and it is highly organised. Temporary employees do not have the security of a guaranteed paycheck and are at a greater disadvantage than permanent workers. The endeavour for flexibility maintains an insecure workforce and it seems that employers

prefer temporary unskilled or semi-skilled labour for a portion of their workforce. Due to the enormous appeal of temporary labour, there should be greater attempts at protection.

## **6.5 STATUTORY DEDUCTIONS**

There are a few legislative provisions that benefit temporary workers. Temporary workers benefit from statutory deductions, which include the provisions set out in the BCEA, unemployment insurance in terms of the Unemployment Insurance Act, the Skills Development Act (SDA) and the Compensation for Occupational Injuries and Diseases Act (COIDA). With regard to the Motor Industry Bargaining Council (MIBC), a provident fund in terms of the Pension Funds Amended Act No. 65 of 2001 is deducted from worker's wages. There is, however, a problem with the deductions made from temporary workers' wages in terms of provident funds. The Motor Industry Bargaining Council official (09/09/2008) revealed that they are fully aware that temporary workers are at a disadvantage in terms of deductions. It appears that deductions remain at a fixed rate, regardless of how low the temporary worker's wage is. The official from the Motor Industry Bargaining Council stated that the main problem they have with TES agencies is that, due to the inherent business of labour broking, they cannot always guarantee the amount of hours they give to a worker:

[t]hey can only supply if there is a demand and people working for labour brokers understand that. That's part of the deal, however when you are contributing to a social benefit fund ... your contribution is based on a basic weekly wage, so your provident fund is a 7.5 per cent reduction and an 8 per cent contribution from the employer based on a normal 45 hour working week. So, for instance, if you are earning R450 per week, your contribution to that would be 15.5 per cent in total of VAT. The employer pays 8 per cent and you pay 7.5 per cent. Now when the labour broker could only let the guy work 35 hours because that is the only hours he could give the guy, the contribution to that fund must be based on that R450 and not a R300 income which takes a bigger percentage and leaves less expense. Obviously, he is earning less money but is still paying the same contribution to his provident fund (09/09/2008).

The official from the Motor Industry Bargaining Council admitted that this is problematic and should be addressed:

[y]ou've got to maintain your contribution level and that I find is the difficulty with your labour brokers. At some stage, one has to consider and sit down how we are going to deal with labour brokers and their contributions to a provident fund and to social benefit funds.

Temporary workers' deductions come to an average of six per cent (Contracts Manager of Agency H, 24/11/2008). The actual amount varies from agency to agency. Temporary workers also fall within the scope of the BCEA and therefore qualify for the same protections granted to permanent employees. Each TES agency will make several deductions from the workers' wage. This will differ depending on the ethics of each TES agency, whether they make the required statutory deductions and how much money they procure for themselves.

## **6.6 JOB INSECURITY**

Most temporary workers experience job insecurity. As mentioned in Chapter 1, temporary employment is regarded as unequivocally insecure. Job insecurity relates to the constant threat of job loss and the incapacity to maintain continuity of employment. According to the Regional Manager of Agency C, insecurity among workers depends on how they are treated by a TES agency:

[i]f you have a quality broker looking after their every need, guess what? They going to feel like the broker is going to supply them with work every day, which could actually happen, and they going to feel like they are not just a number ... It's a major problem, brokers want numbers (08/12/2008).

This statement is highly questionable – temporary workers will feel insecure regardless of how the TES agencies treat them. This is due to the inherent precarious nature of their jobs. Security is most often achieved through permanency. The Recruitment Consultant of Agency N believed that some temporary employees do not feel insecure:

[a] lot of them have been doing it for so many years, they are quite comfortable. They know they are going to get a job. They prefer change of industry, different environment, that type of thing (04/09/2008).

In general, semi-skilled or unskilled temporary workers are not „comfortable’ with their precarious lifestyles. It is necessary for them to earn a living wage in order to survive. Permanency is ideal; workers who prefer flexible working arrangements are usually those who have specialised skills. The statement that workers prefer the lifestyle is clearly misguided or is a petty justification for the actions of the agency. The Consultant of Agency B (20/09/2008) argued that job insecurity and mistrust go hand-in-hand:

I think there is a high level of feeling insecure, not having job security. Definitely, people on contract feel very insecure about their jobs ... I think there is a major insecurity by working through an agency and sometimes I think mistrust as well because ... the employee does find out that the agency is obviously taking a percentage (Consultant of Agency B, 20/09/2008).

Yet, even if there is a perception of a trusting relationship between the TES agency and the worker, temporary workers are incessantly insecure as a result of the nature of temporary employment. “I don’t feel secure. I need a permanent job, not a week or two months” (Worker 2, 17/11/2008). When workers feel insecure, there is often a lack of commitment, loyalty and dedication, and they are often regarded as unreliable. This is because, at times, they will not pitch up for work (Recruitment Consultant for Agency N, 044/09/2008). This can be attributed to their lack of commitment because they are not permanent employees:

If they get a call tomorrow that says: „OK I have got a permanent job for you’, they will leave without notice and actually there is not much you can do if they phone you. Although they are on a contract and they supposed to give you a week or a months notice, I mean they will just phone you up and say: „sorry, I’ve got a permanent job, I’m leaving, I am starting another job tomorrow’. There is nothing you can do about that (Consultant of Agency B, 20/09/2008).

A majority of the respondents agreed that temporary workers are definitely insecure given the nature of their employment contracts. These contracts can often be terminated with 24-hours notice. Depending on the TES agency, there will be variation in the way that workers are treated. Labour broking in particular is volume-driven, and temporary workers do not feel valued.

In the motor industry, there is always a need for a temporary labour force. However, due to the economic recession, temporary labour is often the first to be removed as firms try to maintain their production levels at the bare minimum, resulting in an ever-increasing reliance on their core workforce. In the current economic environment, many workers experience extremely high levels of insecurity because of mass retrenchments within the motor industry, not only in Port Elizabeth but also around the world. Temporary workers are left feeling helpless, which further perpetuates their underclass status. Firms were aware that temporary workers feel insecure:

At the moment, I am sure they do especially with the economy and the position it is at the moment because when you have to reduce your people you first reduce your temporary people. Obviously, in terms of their security of their contracts at the moment, they will most definitely be feeling quite insecure (HR Manager of Firm P, 17/12/2008).

According to Firm R (12/10/2008), permanent workers also feel insecure because they feel threatened by the temporary workers that are brought in. Temporary and permanent workers who are poorly educated and have few skills can easily be replaced, and are often the most prone to job insecurity. As a result of workers experiencing job insecurity, tensions between permanent and temporary workers are built up in the workplace.

As indicated in Chapter 1, Forrier and Sels (2003) argue that, in order to reduce job insecurity, workers should focus on improving their employability instead of striving for lifetime employment. Within the research process, questions were asked regarding the security of temporary employment and how temporary employees can improve their employability. The respondents stated that temporary workers are subjected to various training programmes and different employment positions, and are constantly enhancing their skills. “Temporary assignees, given the nature of the TES industry, are continually exposed to new technologies, different industries and various positions and this contributes towards their marketability” (Executive of National Operations, 26/11/2008). Temporary workers who have experience and skills will have a greater chance of attaining employment than those without any experience. The Manager of Agency G argued that temporary workers should not feel insecure because they are told from the beginning, when their employment commences, how long they are going to work:



It's a way to start earning money... I don't really think they feel insecure because you immediately tell them before they even go for that position what it's all about, how long they going to work, if its possible that its permanent (25/08/2008).

A concern was whether there are any mechanisms in place to make temporary employment more secure. The Labour Law Consultant argued that the legislation is in place to protect their rights:

I don't think one can do anything more, because they are fully protected in terms of the law. They have the same rights as any other employee, if they are dismissed or experience an unfair labour practice (13/08/2008).

In reality, temporary workers do not share the same rights as their permanent counterparts who are within a SER. As Klerck (2004:5) argues, this is because TES agencies will construct contracts in order to exclude the legal indicators of a SER. The effectiveness of regulations differ (Makino, 2008:10).

## **6.7 CONCLUSION**

The research suggests that unskilled and semi-skilled temporary workers, especially in the motor industry, are representative of previously disadvantaged demographics of the population. Within the motor industry, there are more men than women who work on the shop floor due to the nature of the occupations and the specifications of what most jobs entail – namely, highly physical work. This aspect also relates to the age of the workers, who are usually between 20-40 years of age. Due to the scale of the research, these results cannot be generalised, but it does provide insight into the dimensions of the temporary workforce. Temporary workers who are hired through a TES agency sign employment contracts that are limited in duration. Respondents provided information on the different contracts that are used. Conditions of employment are dependent on the employment contract and contracts may vary depending on the TES agency. There appears to be a rising interest from firms in utilising temporary labour. While permanent employment is still the dominant form of employment, the preference of firms employing temporary workers through TES agencies is becoming increasingly popular. It is not only the use of flexible labour that is the main attraction; it is the transferral of responsibility and obligation to another party that plays a

major role in influencing the decisions of firms. As a result, we have witnessed the creation of an underclass characterised by job insecurity and a lack of financial security. There is also a high incidence of permanent temporary employment. This means temporary workers are unable to secure loans and are deprived of perks such as pension and medical aid that many permanent employees take for granted.

Temporary workers supplied by the TES industry are easily exploitable. The BCEA regulates the conditions of employment for all employees and all TES agencies have to abide by these regulations. The main question posed when addressing temporary labour within this research was to find out how the TES industry, as the employer, treated its workforce. It was found that TES agencies are aware of loopholes within the system, which allow them to exploit temporary workers. While this does not necessarily imply that they all exploit their workers, most agencies clearly would not reveal such exploitive measures. Respondents gave insights into how to bypass fair labour practices. When analysing the conditions of temporary labour, it must be noted that although these workers are treated unfairly, they are in sense better off than those who are not employed at all. Compared to permanent workers, however, temporary workers are insecure and in an unfavourable position due to the mark-up that agencies charge. Money is fundamentally deducted from the workers' wages because an intermediary employs them. Regulatory interventions are necessary in order to provide protective measures for the underclass generated by the TES industry.

# 7

## **REGULATION AND LABOUR LEGISLATION GOVERNING THE TEMPORARY EMPLOYMENT SERVICES INDUSTRY**

### **7.1 INTRODUCTION**

This chapter will discuss the regulation of the TES industry. The central concern is the lack of adequate regulation of the industry as a whole, providing agencies with the opportunity to bypass certain regulations and statutory duties. It is for this reason that there is an interest from firms in the services of TES agencies. The poor regulation of the TES industry creates an underclass of workers who slip through the cracks and are easily exploitable. „Regulation’ refers not only to the manner in which the TES industry is regulated by labour legislation, but also to the ways in which it is regulated by labour market institutions. In particular, the analysis will examine how institutions such as bargaining councils, the Department of Labour, trade unions and APSO aid in regulating the TES industry. Addressing labour legislation and regulation is essential to this analysis, as it directly influences the practices of firms, the TES industry and workers. It is also important since the lack of regulation is seen as the most problematic aspect of the TES industry. Without effective regulation, TES agencies are free to exploit workers, to perpetrate unfair labour practices and to take advantage of the loopholes that exist. Firstly, the various forms of regulations will be addressed. An outline of the various loopholes and illegal activities that were discovered will give insight into the practices of TES agencies. Secondly, the impact of labour legislation will be examined. Lastly, the need for regulatory reform will be assessed.

### **7.2 FORMS OF REGULATION**

A number of institutions regulate the TES industry. The research discovered that although numerous institutions have a role to play, they do not satisfactorily regulate the TES industry. When asked about the regulation of the industry, the respondents indicated that the main form of regulation is the BCEA. The respondents insisted that they follow the law and stay within

the regulatory framework. In terms of other forms of regulation, many of the TES agencies simply stated that they are registered with the Department of Labour and indicated that the Department was at liberty to monitor their operations. However, there are no regular checks or form of monitoring. Bargaining councils constitute a form of monitoring, but only apply to sectors that are governed by a council. Those workers who work in sectors that are not covered by a bargaining council are at a greater disadvantage. There is no specific entity, apart from personnel bodies, which provides TES agencies with guidelines and direction. There is also no body that actively governs TES agencies and regulates their practices. Many of the respondents stated that the government should establish a body or organisation that actively monitors and assists TES agencies.

### **7.2.1 Bargaining Councils**

Bargaining councils are important institutions in the labour market with the capacity to regulate the relationship between employers, unions and workers. In terms of the LRA, TES agencies are deemed the „employer’ of the temporary workers that they hire. Technically, therefore, the TES agencies are regarded as employers and have a right to be represented in bargaining council negotiations:

Labour brokers have to comply with the legislation. If a labour broker provides labour for a firm that falls within the ambit of the motor industry, the labour broker has to register as an employer. So, the same that would apply to any other employer, would apply to them ... They have the same hours of work ... The same minimum rates they have to maintain and social benefits they have to provide. Everything that applies to any other firm applies to them (Motor Industry Bargaining Council Official, 09/09/08).

Many of the TES agencies are not active members within the bargaining process. In practice, TES agencies merely phone the bargaining council to find out the prescribed rates for workers. “As long as you are up to date with the procedures, and you know what’s happening and you know what minimum rates to charge, you will be fine” (Recruitment Consultant of Agency N, 04/09/2008). The Branch Manager of Agency K (24/11/2008) argued that they follow the requirements prescribed by the bargaining councils:

[w]e will register an employee and pay the benefits over to that council. We will also submit to them the necessary schedules and we will comply with all aspects of that particular agreement, but then you might have clients who fall within a different industry and we have to comply with those bargaining councils. We have multiple rules and pay rates and benefit regulations. I think some brokers might not necessarily be complying. I don't know how long they can get away with it but sooner or later they will get found out.

One respondent compared bargaining councils with the CCMA:

It's pretty much like a CCMA in a different format ... You always going to get one or two employees that feel that they not being looked after and that are going to go to the CCMA ... A guy gets terminated because there is no more work and he feels that he is unfairly treated (Regional Manager of Agency C, 08/12/2008).

The bargaining council's role *per se* is not the issue at hand. The important question to address is what role the bargaining councils play in regulating the TES industry. Bargaining councils play a role in regulating the activities of those TES agencies that fall within their registered scope. TES agencies have to forward the details of temporary workers who are working for firms in a particular sector, and the TES agencies have to pay the relevant levies to the bargaining council. Bargaining councils are therefore aware of what the temporary workers are being paid:

We were asked about two months ago to give a report to our general secretary on the compliance record of the labour brokers registered with us. I drew a report and I think we had 24 brokers registered with us of which we had problems with two. Those problems were resolved and the problems were mostly paper work because we are very reliant on them giving us information. There are so many regular changes, this person is here and that, the labour brokers just pay over the money and they don't send any paperwork, and we don't know how to allocate it, but generally I don't have problems (Motor Industry Bargaining Council Official, 09/09/08).

The problem is that not all TES agencies register with a bargaining council and many TES agencies do not comply with the agreements of the relevant bargaining council. Firms are not

supposed to hire TES agencies that are not registered with the relevant bargaining council. “You can’t supply staff in those sectors if you are not registered with the bargaining council” (Team leader for Industrial Division of Agency D, 28/11/2008). This respondent added that the TES agencies, which are not complying with the main agreement of a bargaining council, are the ones that give the industry a bad name (28/11/2008).

Workers who work in industries that are not governed by a bargaining council are the most vulnerable to exploitation. One of the concerns is that temporary workers who do not fall within the registered scope of a bargaining council are unprotected and more likely to be exploited by TES agencies. The TES agencies tend to argue that workers who are not governed by a bargaining council at least have legislation to protect them. As the Regional Manager of Agency C, (08/12/2008) put it, “those people fall under basic conditions and if the labour broker sticks to basic conditions, there shouldn’t be a problem”. It is indeed a pressing problem because not all TES agencies comply with the BCEA. How are TES agencies, which are not governed by a bargaining council, going to be monitored?

One respondent stated that registering with a bargaining council is a move in the right direction in terms of regulating the TES industry. “I think there have been significant strides made by joining bargaining councils and paying bargaining council minimum rates and paying provident fund” (Team leader for Industrial Division of Agency D, 24/11/2008). Because TES agencies work in different sectors, they have to be registered with each relevant bargaining council. This may not be practical. Moreover, each bargaining council has its own rules and regulations that the TES agencies must abide with, and each bargaining council must keep records of the TES agencies that it deals with:

Each and every labour broker is working on different bargaining councils and we have to comply with the bargaining councils rules. You have different bargaining councils, you’ve got three, four, five, depends on where the people work (Manager of Agency G, 25/08/2008).

TES agencies have to be up-to-date with the agreements of each bargaining council, and make sure they set their rates accordingly. This task can be onerous and requires considerable administration. This is where TES agencies that are not well established may falter. During the interview process, it was discovered that some TES agencies are not happy with the

performance of bargaining councils. One particular agency stated that the bargaining councils are not up to standard:

[w]e've really got problems with the bargaining councils, in that they don't perform. Really you battle to get things out of them, you battle to get through the different departments if you need to claim ... You fax it to two departments and when we follow up, they claim that they never got the paper work ... Although we've got proof when we faxed it through ... Bargaining councils are not how they supposed to be (Manager of Agency G, 25/08/2008).

According to the Contracts Manager of Agency H, the administrative process of dealing with bargaining councils is extremely tedious and frustrating: "I think they've got a hell of a lot of room for improvement" (28/11/2008). A problem inherent within the TES industry is the competition from smaller agencies who are not abiding by bargaining council agreements. There is constant competition between TES agencies who operate in terms of the law and those that operate outside the law. The latter do not charge standard rates, which creates an unfair advantage. As the Branch Manager of Agency K argued:

We can't compete with those brokers who are paying less than the required rate so they are able to provide to an employer staff at a rate which is far lower than ours. This is because they are not compliant with a particular agreed wage rate or benefits, and they might not make these contributions to workmen's compensation. Of course, if they get found out, both the client who is using their services as well as themselves is going to be in trouble (24/11/2008).

In terms of compliance and monitoring, both the Department of Labour and the relevant bargaining council have the right to inspect the records of TES agencies:

[w]e are monitored by representatives of the Department of Labour. They will not come around with a clipboard and tick off. But all of the bargaining councils formally monitor us and legally have the right to walk in here and insist on inspections being done and we have to comply. They perfectly entitled to demand to see our records, to see that we are compliant with their particular agreement.... We are registered as a temporary employment service provider, we registered with the receiver of revenue,

as a TES, we have to comply with tax contributions, and deductions from employees. But like anywhere in any business, you have people who don't comply, you get road traffic users who don't comply (Branch Manager of Agency K, 24/11/2008).

The problem is that TES agencies, that breach the regulations, are not reported and sanctioned. A concern is that there are a number of loopholes that go unnoticed. These loopholes are outlined shortly. According to the HR Manager of Firm P (17/12/2008), TES agencies were aware that they have to comply with bargaining council agreements:

[w]e have also tried to keep it in line with the bargaining council limits ... If your bargaining council says you must pay roughly R10, and you start paying R5, you going to pick up a bill. We've tried to and in fact we are sticking within those minimum requirements.

Joining a bargaining council is a positive move for the TES industry since it creates a form of collective regulation of the activities of the agencies. The Team leader of an Industrial Division of Agency D believed that bargaining councils do serve a purpose:

These fly-by-night guys have given the industry a bad name amongst the unions. They see us as exploiting people. So I am glad that agencies have to join ... because then it is actually cutting out those little guys (28/11/2008).

### **7.2.2 Trade Unions**

Trade unions represent the workforce at both industry and workplace level in order to ensure that workers are treated fairly and to negotiate favourable conditions of employment. Trade unions are vehemently opposed to the TES industry. This is evident in numerous news reports and statements. The trade unions' opposition to the TES industry is because they argue that labour brokers are exploiting temporary workers. COSATU is placing pressure on the government to have the industry banned (Sunday Times: 02/11/2008). It was widely publicised that the unions are opposed to labour broking because of "no job security" (Motor Industry Bargaining Council Official, 09/09/2008). There have been recent reports in the news regarding COSATU pushing government to ban labour brokers. According to SABC news, COSATU has warned government that if they do not ban the industry, organised



workers will take to the streets (21 September 2009). Respondents were asked about their experiences with trade unions and whether they were concerned about the industry being banned:

No. They won't get it right here. The fact is that with the „temp' side of things, there is 40 or 50 000 people, if I am not mistaken, employed through our industry and I don't think they will have the clout to be able to shut it down completely. I think regulate it a bit (Team leader for Industrial Division of Agency D, 28/11/2008).

TES agencies tended to argue that it is unlikely that the TES industry will be banned because of the number of jobs that it provides. An official from the Motor Industry Bargaining Council agreed:

I think the unions are pushing hard for it. I do believe labour brokers have a role to play ... I wouldn't see a purpose in banning them. There is need for them and I think they are fulfilling the needs and nobody is being the loser (09/09/2008).

This argument is easily refuted because the temporary worker is readily exploitable. One of the pressing concerns is that if COSATU succeeded in getting the TES industry banned, the unemployment rate would rise. Yet, it is also possible that temporary workers will be placed in permanent positions. This is obviously favourable for the workers, but not for TES agencies that depend on temporary employment to make a profit. The argument concerns the function of the TES industry within the labour market. The industry does provide some form of income to people who may not be able to find a permanent position due to a lack of skills, experience or education. Therefore, if the TES industry is banned, there may be a loss of jobs. According to the president of CAPES, if the TES industry was banned, it would threaten the livelihood of 500000 workers across South Africa (CAPES, 2009). Also, if the industry were to be banned, there is a possibility of it being driven „underground', which could spark even greater exploitative measures that would be harder to regulate. Even though firms may be forced to hire many workers permanently, it does not mean that all temporary workers will receive permanent employment. Those who are left stranded will struggle to find a temporary position. It is agreed that permanent positions are ideal, particularly for the less-skilled workers. Yet, what will become of those who lose their jobs? The TES industry responds to a

demand from firms for flexible labour. The TES agencies were highly defensive and argued that the industry is unavoidable:

There has been problems with the unions and labour brokers for a long time, they see labour brokers as the big evil and really, any labour broker that shrugs that off and says its not true is lying. As much as I am in favour of the unions, I do think they can be very stubborn and blind to finding people work. Sometimes a labour broker is a necessary evil (Labour Broking Consultant of Agency A, 17/11/2008).

A respondent argued that there is constant friction between trade unions and firms that hire TES agencies. “You have constant head-butting with shop stewards and firms, the trade unions in general hate labour brokers, and if they could, they would shut down all labour brokers” (Team leader of the Industrial Division for Agency D, 28/11/2008). This respondent further argued that one way to keep the unions at bay is to ensure that the client takes on some workers permanently. “So, take some guys permanently, and it will keep them quiet” (Team leader of industrial division for Agency D, 28/11/2008).

Organising workers within the TES industry seems to be the most pressing issue at hand. Every worker has the right to be represented by a union, but because of the temporary nature of their employment, organising temporary agency workers poses a significant problem. “It comes down to freedom of association; you can’t stop somebody for wanting to join” (Team leader of Industrial Division of Agency D, 24/11/2008). Many temporary workers do join trade unions and it is advantageous for them to remain within a particular sector so that they are protected. However, with workers who are constantly moving from one sector to the next, organisation becomes difficult. There is no union to represent temporary workers specifically, and many temporary workers would have to join a different trade union each time they are allocated a temporary job. As one respondent argued:

A guy might be here for two weeks and then he goes to another client, then he is back. It becomes a logistical and a payroll nightmare ... They wanted our guys to join a union. But what they don’t realise is that, say ... we have 100 staff members at firm X, and 100 of them want to join. Now suddenly they feel they like the majority trade union. They want to have organisational rights, but ... our workforce is the whole of the Eastern Cape, so it might be 100 of 1000. So, they’re not a majority trade union,

and these guys can't get it round their heads. We have actually won a case against them at the Labour Court, just based on that. I mean we prepared to give them union deductions, that's fine, but we not prepared to give them anything else. So, we had to enter into that agreement ... that it was just union fees (Team leader of Industrial division of Agency D, 28/11/2008).

Another respondent stated that, even if firms wanted to use agencies, they feel constrained and intimidated by the unions. "They are forced not to use agencies because of the pressure from unions" (Consultant of Temporary Division, Agency F, 05/08/2008). According to the Labour Broking Consultant of Agency A (17/11/2008), union officials and labour brokers often have a corrupt relationship. There were many favours passing between union officials and the TES agency:

Oh, absolutely corrupt, getting friends jobs ... I wanted us to have a good working relationship but it was very difficult and it was always a game. It was a case of I did this one a favour last week so he owes me a favour ... and I had this network of people that owed me favours. I would strategically employ people to then get that person to owe me something. Next time there was a hearing and I needed something, or if I needed a favourable verdict from shop steward. Also, very often the ladies that we have in the factories would have affairs with the supervisors. Sex is just rife at that level; it's unbelievable. A shop steward from a union, made a girl pregnant, made me employ her there because she was going to cause a fuss with his wife so he got her a job. The corruption is not just with the workers. The union guys can be even worse because they have power and they try make everybody jump (Labour Broking Consultant of Agency A, 17/11/2008).

According to the Contracts Manager of Agency H, the frustrations of dealing with unions are dependent on the decisions made by the management of a firm:

I think that trade unions are necessary if management is making trade unions necessary. I think trade unions are not necessary if management are decent people, if management don't take advantage of their staff. I have seen union-less situations for four years, a change of management, and all of a sudden there is union in because the

workers now find it necessary. They have their place like any protection system (24/11/2008).

TES agencies tend to adopt anti-union positions due to the threat to the profitability of their business. TES agencies do not provide security for their workers and they know that if a union were present, they would have an enormous conflict of interest. Unions would demand wage increases and benefits that TES agencies would not be willing to pay because of the income they would lose. It would also be difficult for TES agencies to dismiss workers so easily, which would cause further complications and conflict with their clients.

Many of the respondents claimed that some of the temporary workers are members of trade unions. "There is nothing to say that they can't, there are a lot of people who employed by labour brokers who are members of the trade unions. So it's certainly there" (Motor Industry Bargaining Council Official, 09/09/2008). While there are opportunities for temporary workers to join trade unions, the TES agencies do not encourage their workers to join. Nevertheless, one respondent stated that she would encourage her workers to join the union because she was afraid of her workers being threatened. "I also encouraged my staff to become union members because if they struck ... they wouldn't have been allowed to come to work, they would have been intimidated and they would have to stay home ... My guys would definitely get the brunt of it and you know in the factory as well. It would be a case of intimidation towards my temps because they were temps" (Labour Broking Consultant of Agency A, 17/11/2008).

Trade unions exist in order to protect the rights and interests of workers and to secure a living wage for their members. The Constitution and the LRA are in favour of trade unionism. Every worker has the right to join a trade union, yet if they are in a precarious position where they are unable to join, they are effectively stripped of those rights. This has contributed to the creation of an underclass of workers within the TES industry. What is required is increased protection for these workers, both legally and organisationally.

It is important to note that unions are concerned for the welfare of the lower skilled workforce and not the highly skilled workforce that is well remunerated. A distinction would have to be made between non-standard workers that are highly skilled and those that are not. If the industry was banned, there is a chance that firms will simply hire lower skilled

temporary workers outside their gates. One also has to assume that if the industry was banned, it will affect those workers who voluntarily prefer temporary employment. As discussed in Chapter 1, there is a clear distinction between voluntary and involuntary temporary employment. Nevertheless, it is vital to provide protection of the involuntary temporary workforce that constitutes an underclass.

### **7.2.3 The Association of Personnel Service Organisations**

This research set out to establish the role of APSO in regulating the TES industry. APSO is a member of the Confederation of Associations in the Private Employment Sector (CAPES), which is recognised as being the unified body for the labour recruitment sector. CAPES operates through its Business Unity South Africa membership at NEDLAC and is actively engaged in “political lobbying, including the fight for regulation and professionalization of the industry” (Executive of National Operations, APSO, 26/11/2008). According to the Executive of Operations of APSO, the purpose of APSO is to offer guidelines of “high ethical and professional standards of business” in order for both clients and workers to benefit from the services of TES agencies. It is claimed that a TES agency, which is a member of APSO, will provide a higher standard of service than a TES agency that is not a member:

The recruitment industry currently has no, or very low, barriers to entry, which means that clients and candidates can find themselves dealing with inexperienced or unprofessional operators. All APSO members are required to meet certain minimum criteria before membership is granted (Executive of National Operations, APSO, 26/11/2008).

There are membership fees to join APSO: “these are calculated based on the size of the member company; its national footprint (in terms of number of branches) and the type of recruitment services they offer. Subscriptions are renewed on an annual basis” (Executive of National Operations, 26/11/2008). Agencies that are granted membership have to adhere to professional standards of operation, adopt fair labour practices, follow APSO’s Code of Ethics and should be legally compliant. The Code of Ethics prescribes “the minimum levels of service required by APSO” and should be given to workers and clients and any other relevant party. In this Code of Ethics, APSO sets out “clear guidelines on issues such as search and selection, recruitment practices, reference checking, interviewing and fee

resolution” (Executive of National Operations, 26/11/2008). Membership does not only include agencies, large corporate firms and small to medium enterprises are also members. “APSO membership is growing rapidly, we are currently signing on an average of 15 new firms each month. As it stands, APSO has just under 900 individual member companies representing nearly 1000 offices nationally” (Executive of National Operations, 26/11/2008). APSO’s main focus is “improving the professionalism” and “the level of service” of the industry by training and developing its members and their employees (Executive of National Operations, 26/11/2008).

In terms of how APSO is structured, there is a National office in Johannesburg that employs five people in an administrative capacity. However, APSO relies on its members to volunteer their time and expertise on both regional and national committees. APSO is a voluntary organisation that relies on its members to create a forum for discussion to address any pertinent issues. The question is whether it is adequate. APSO is not enforcing its guidelines. There is no way to regulate its members effectively. Those agencies that are determined to find loopholes and to exploit workers are less likely to join APSO. In terms of enforcement,

APSO investigates complaints from clients, candidates and members against members and takes action to remedy the problem, resolve the conflict and in some cases issue sanction against offending parties. The difficulty comes in that membership is voluntary and so we are unable to intervene in cases where a complaint is lodged against a non-member. In these instances, the complainant is referred to the Department of Labour (Executive of National Operations, APSO, 26/11/2008).

During the interviews, APSO’s role in regulating the TES industry was addressed. According to the Consultant in Temporary Division for Agency F:

APSO is very good. I went to a conference and APSO at the end of the day rules the industry ... There is a lot of agencies that get called to APSO because they are unethical ... If I have another problem with another agency I can report it to APSO. We have to adhere to that code of ethics and it’s like a big body watching over you, seeing if you did right or wrong. They are only a phone call away. They have conferences and they have meetings, they very much showing their presence in the country (05/08/2008).

Many agencies, however, do not think that APSO plays a significant role. In the words of the team leader of the Industrial Division for Agency D:

I personally have not seen the value in APSO, not on the labour broking side, maybe on the permanent side. On the labour broking side there is no benefit whatsoever, I would love someone to tell me the benefit of belonging to APSO on the labour broking side. I don't think there is any ... There is no rules and regulations. I just don't see the value on the labour broking side and what APSO provides for us (28/11/2008).

The role of APSO is essentially to provide a „stamp of approval'. Therefore, when clients are looking for a TES agency to work with, a firm may believe that an agency will provide an excellent service if it belongs to APSO. This, unfortunately, is not a guarantee of quality service because TES agencies are not actively monitored. As the Branch Manager for Agency K explained:

[m]aybe there are some persons who think that it adds some credibility to your organisation, to say you are a member ... If you ask me personally, what does APSO do for us? ... I would say nothing. Look, that's an association, whether you belong to the round table or the lions or the tennis club, association of golfers or whatever (24/11/2008).

Newly established TES agencies can turn to APSO for guidance. “If you want to start out you can make use of them, they can help you because there is a lot of legislation and it's necessary to belong to them” (Regional Manager of Agency L, 09/09/2008). A TES agency stated that they are not a member of APSO due to the high costs of membership. “They are quite expensive to join. We are quite small ... I have had correspondence with them and I have looked at it. I think it's a good route to go. Their membership fee is a bit high though” (Manager of Agency M, 04/09/2008). One of the respondents was wary of APSO:

I am not a member of APSO. I have issues with the way it is run and also I have issues with the people who are managing it. I don't always agree with what they say ... It's not a professional body and I have issues with 5 people deciding what everyone else should be doing. I don't want to be part of it (Recruitment Consultant of Agency N, 04/09/2008).

APSO was praised for providing a Code of Ethics to guide the industry. However, given the loopholes within regulation of the TES industry, it does not seem adequate. As the Regional Manager of Agency C noted:

I think it's brilliant, but they not militant enough in the sense that, if you not a member, they don't chase you to become a member. It should be a prerequisite so that you can regulate the industry (08/12/2008).

It appears that APSO does serve a purpose in terms of providing guidelines to its members. It provides a Code of Ethics in order for its members to follow 'best practice'. Yet, following this 'ideal' is left to the TES agencies themselves. TES agencies can decide not to follow the Code since there is no enforcement of any kind. How will APSO know whether TES agencies are following the Code of Ethics or whether they disregard it? If there is an internal problem or loophole within a TES agency, employees working within that particular agency who benefit, will not report it. Moreover, there is no way to monitor the activities of TES agencies that have not joined APSO. APSO provides a support base and a forum for those who work within the TES industry, yet the Association does not appear to be aggressive enough in terms of monitoring its members, and it certainly does not provide the regulatory measures to implement effective labour law compliancy.

#### **7.2.4 The Department of Labour**

The respondents were of the view that the Department of Labour did not provide any base for support or regulation of the TES industry. There is little communication between TES agencies and the Department of Labour, with the Department doing little to monitor the activities of the TES agencies. TES agencies should register with the Department of Labour, but there is little evidence to suggest that there is any way of enforcing registration. Theron *et al* (2005b:11) argue that "the Department has done little thus far to enforce its system of registration. Given that in any event not all employment services for gain are TESs". Flaws in labour legislation include the ambiguous definition of a TES. Many may view the definition as inadequate and unrelated to their business because it does not include a reference to making profit. As a result, many TES agencies automatically assume that they are excluded. This gives TES agencies an excuse not to register. Theron *et al* (2005b:62) correctly suggest that the definition should be more precise and legislation should state that all TES agencies



must be registered with the Department of Labour, and that employers may only hire TES agencies that are registered. It appears that, on one hand, TES agencies feel that it is important to communicate and have a good relationship with the Department of Labour. However, on the other hand, many agencies feel that it is both pointless and a waste of time creating a relationship with the Department due to its lack of service delivery. The Managing Owner of Agency I (16/09/2008) stated that it is important to have a good relationship with the Department of Labour and unions, because they are the parties that give the TES industry a bad name. According to the Regional Manager of Agency C (08/12/2008), if an effort is made to have a good relationship with the Department of Labour, the relationship can become beneficial. He also noted:

I have a very good relationship with the Labour Department, partly because if you do it right, they never see you ... In Port Elizabeth, I dealt with a few of the high people within the Labour Department and I would say to them: „come and have a look if I am doing it correctly’. And they send a guy in, and he will say: „you know what, this is perfect’. You form a relationship like that ... Most companies, they will rather say ... „they waste my time’. They do have a job and they do have a function, the company should work hand-in-hand with them. But that's not enough to regulate a R80 million industry; you need an independent body to regulate it (08/12/2008).

The issue of regulation and the possibility of an independent body to regulate the TES industry will be addressed further in this chapter.

### **7.3 LOOPHOLES, ILLEGAL ACTIVITY AND UNFAIR LABOUR PRACTICES**

The underclass of workers created by the TES industry is subject to exploitative practices. Exploitation is rife within the TES industry and was widely substantiated by the respondents:

In PE, there are 11 big guys and out of them 50 per cent of them exploit the workers. Out of the small guys there is a handful who actually look after them and you will find that those handful will one of these days become one of the big boys because their staff are looking after them (Regional Manager of Agency C, 08/12/2008).

According to Labour Broking Consultant of Agency A (26/09/2008), it is no longer easy for labour brokers to get away with hiring and firing at will. Overall, government bodies are much stricter. Nevertheless, there are still too many loopholes in the regulatory network.

TES agencies take advantage of the numerous loopholes that they find. The prevalence of these loopholes as well as illegal activities highlights the urgency of regulation. During the interview process, the researcher was particularly fortunate to have spoken to respondents who were willing to reveal secretive and sensitive information. These sensitive issues include unfair labour practices and the theft of money. This section proved to be the most informative and revealing in terms of the research as it gave insight into how easy it is to exploit workers and revealed the many loopholes that may be exploited by the TES industry. Many of these issues have already been mentioned in previous chapters, but this section will reveal the unlawful practices by referring to specific examples.

### **7.3.1 Unfair dismissals**

The first and foremost problem is the prevalence of unfair dismissals. The Labour Broking Consultant of Agency A, (17/11/2008) admitted that her TES agency would often have to take workers off a site for no real reason. She admitted that there was no justifiable reason to remove the temporary worker from a site, but she would have to adhere to the client's demands. In her words:

[t]here were very many times that a client would say: ‚I don't like that person, get him off site', and you have to get rid of him. Taking people off site whenever you felt like it doesn't sound that bad, but when you influencing people's lives, it is (17/11/2008).

As stated in previous chapters, the client has the most power within the TER. The client dictates terms and determines the employment opportunities for the temporary workers. It is the responsibility of the TES agency to carry the burden of placing the temporary worker somewhere else. As the Labour Broking Consultant put it:

The client would argue that they will not have them back on site, and if they will not have them back on site, there is nothing we can do. Essentially we employ them, we just employ them on site of that firm, so it's not an argument of whether they work there, it's an argument of whether they still work for us. We will have to pay them out

or retrench them, keep them, or try and employ them somewhere else. It solely becomes our problem (Labour Broking Consultant of Agency A, 17/11/2008).

The respondent was probed to find out what exactly she would tell the worker:

You just say to them: „I am sorry, your contract has come to an end’. You have to be good. I was very good at it, making them feel I was doing them a favour by getting rid of them, because otherwise we would sit at the CCMA or the bargaining council all the time. So you say to them: „look you know I will keep you in mind’. Wherever I could, I would try place them again (Labour Broking Consultant of Agency A, 17/11/2008).

It is clear that agencies admit to manipulating the workers to stop them from reporting the matter. Many of the workers did not ask the TES agency why their contract suddenly ended. She further added that workers were ignorant of their rights:

[i]t’s the lack of knowledge. They just accept the fact that that’s what happens: you are on contract and your contract just ends. You definitely get the people who turn around and say: „I don’t understand, how come this has ended?’ Then you have to make that excuse even better; you got to try cover up somehow (Labour Broking Consultant of Agency A, 17/11/2008).

This particular loophole was mentioned in Chapter 6. The loophole that aids TES agencies in not being found guilty of an unfair dismissal by the CCMA or the relevant bargaining council is the 30-day clause. If there is any misconduct, workers have to report it within 30 days. Often 30 days will lapse and the TES agency is let off the hook. The Labour Broking Consultant of Agency A stated that she would manipulate the workers continuously within that 30-day window period:

[y]ou say to them that I am going to try find you work, and all you needed was for that month to pass, because that's the time they had to go to the CCMA or the bargaining council. Thirty days after their contract ended, if I could survive those 30 days I was free. I would either keep them hanging on for 30 days. I keep phoning

them and saying there might be a position next week ... and generally, if the first two weeks that they don't go the bargaining council or CCMA, you good (17/11/2008).

### **7.3.2 Deductions**

As already discussed in Chapter 6, numerous deductions are made from the wages of temporary agency employees. One of the more serious infringements by the TES agencies is the unlawful deductions made from workers' wage. At times, the deductions are either not paid to the bargaining council or they are kept by the TES agency. In some cases, the TES agency is not allowed to make the deductions in the first place. One example given was an instance where a TES agency took over a client from another TES agency and found that the previous TES agency was making deductions without paying it over to the bargaining council:

[w]e took over a client from somebody where the agency had been deducting provident fund, which is a large some of money, and never paid it over because they weren't part of the bargaining council. These are not tiny fly-by-night agencies we talking about; big international agencies are doing this, wherever they can slip and make a little bit of money, they will. There are many times with my old company as well, we would say „look lets just ride it out, let's see if they notice' (Labour Broking Consultant of Agency A, 17/11/2008).

During one interview, disturbing information was revealed concerning a well-known TES agency in Port Elizabeth. The TES agency was accused of making unnecessary Pay As You Earn (PAYE) deductions from workers' wages:

I am investigating a firm at the moment that's done R16 million worth of PAYE, where they subtract PAYE from employees ... They don't pay it up, employees that shouldn't be taxed. I am working with a couple people within the firms and I am busy trying to get all the information together. This is going to be big (Regional Manager of Agency C, 08/12/2008).

One of the problems that were indicated by temporary workers is the fact that they have to pay for transport, clothing and equipment (Worker 1, 17/11/2008). When addressing this

issue, it is clear that many TES agencies will deduct as much as possible from a worker's pay. This was supported by the Regional Manager of Agency C:

[t]here are so many things that agencies do wrong to the employees, like they outsource transport, they will get a taxi to do door-to-door service and charge them three times the price, bad news! And because it is out of sequence, in other words after six and before six they entitled to do it. There should be a regulated amount (08/12/2008).

The TES agencies usually purchase clothing and equipment for the temporary workers. This often involves considerable costs for the TES agencies. The problem, according to the respondents, is that temporary workers are unreliable and do not return the clothing or equipment. As the Regional Manager of Agency C explained:

[l]et's say I buy overalls, safety boots, gloves, etc. That costs me R400. I put a temp on site, he goes off after being inducted, he lasts one day and disappears and doesn't come back for his pay ... What should happen is that the broker should put a deposit in place. The deposit should be there to safeguard things like that. They return the equipment and they get paid back (08/12/2008).

The problem with deductions is that the temporary workers are usually unaware of what the deductions entail. It was necessary to establish what exactly is being deducted from a temporary worker's wage:

[y]ou have your hourly rate of your staff, you have all your benefits, in other words your leave pay, your annual leave, sick leave, family responsibility, your skills development, your UIF, whatever you need to make up a pay rate, needs to be added to that price. Then you put your operational costs on which is a percentage, then you put your mark up on it's so its quite an intense calculation to get down, because with a bargaining council there is a provident fund or there is a pension, there is a holiday bonus, there is a whole of other things added to it, so you know, personally your costing has to be right. If your costing is wrong your staff will be paid incorrectly, you going to have unhappy staff, and of course you could have a dispute at the council so

costing is a big problem, you have to do it properly (Regional Manager of Agency C, 08/12/2008).

In terms of the BCEA, an employer must supply an employee, when he or she commences employment, with various particulars in writing that include any deductions to be made from the employee's remuneration. An employer must also give an employee written information each time the he or she is paid, which should include the amount and purpose of any deductions made from the remuneration. The Act further provides that an employer may not make any deduction from an employee's remuneration unless (a) the employee agrees in writing to the deduction in respect of a debt specified in the agreement; or (b) the deduction is required or permitted in terms of a law, collective agreement, court order or arbitration award. A deduction may be made to reimburse an employer for loss or damage, only if: it occurred in the course of employment and was due to the fault of the employee; the employer has followed a fair procedure and has given the employee a reasonable opportunity to show why the deduction should not be made; the total amount of the debt does not exceed the actual amount of the loss or damage; or the total deductions from the employee's remuneration with respect to any damage or loss do not exceed one-quarter of the employee's remuneration in money. Obviously, many TES agencies do not adhere to the BCEA.

### **7.3.3 Public Holidays**

According to the BCEA, workers must be paid for any public holiday that falls on a working day. Work on public holidays is decided by agreement and workers must be paid double the normal rate if they do not normally work on public holidays. One of the unlawful practices of TES agencies is not paying employees for work on a public holiday. According to Labour Broking Consultant of Agency A (17/11/2008), they would try to follow the correct procedures, but there were many times that they did not and the TES agency would hope that the worker did not notice: "Oh damn, we didn't pay them for a public holiday. Let's see if they noticed". TES agencies will try to extract money wherever possible, even from the clients. The Labour Broking Consultant of Agency A admitted that:

[t]here were cases where they had worked over public holidays ... The client had paid us for that, or the client will pay us for the leave which will be included in the rate, so will sick leave, and it gets charged every hour, and the person might never take sick

leave, but we are getting paid. But we never pay that money back to the client. We keep that money ... and they will never get reimbursed for it. It's not always taking from the labourers (17/11/2008).

#### **7.3.4 Overtime**

The BCEA states that workers must agree to work overtime and that they may not work more than three hours overtime a day or ten hours overtime a week. TES agencies allow temporary workers to work more hours overtime than they are permitted to do. As the Labour Broking Consultant of Agency A put it:

[w]e have guys who work a lot of overtime that's illegal. You allowed to work, I think in the motor industry, 10 hours a week without exemption. We would have people who work 32 hours, which is dangerous (17/11/2008).

Workers who work overtime for extended periods of time run the risk of developing diseases and suffering from exhaustion. It may also lead to workers injuring themselves on duty (Labour Broking Consultant of Agency A, 17/11/2008).

#### **7.3.5 Leave**

Due to the precarious position in which a temporary worker finds him or herself, he or she will often work much harder than the permanent workers and will not take the required leave. As the Labour Broking Consultant noted:

The one massive international client that we had, I had guys who worked there three years straight without having any leave. Every Christmas would come and we asked them whether they wanted us to pay them out, or do you want to take leave, of course they want the money Christmas time. They take the money, and then work throughout Christmas and New Year and that's it. People were physically and mentally exhausted. This was completely against the Motor Industry Bargaining Council rules. According to the Motor Industry Bargaining Council, you supposed to take three weeks continuous leave every year. They not allowed to break it up into bits and these guys wouldn't, they would just sell it off and work through. So there are definitely

firms out there that every single day break the law with regards to that (Labour Broking Consultant of Agency A, 17/11/2008).

While permanent workers take leave, temporary workers often continue to work. Many temporary workers lose their leave if they do not take it:

If they don't take their leave, if they have been there for a year, six months after that one year date, their leave disappears. Temps would always have to work and they would end up losing it, which is horrible (Labour Broking Consultant of Agency A, 17/11/2008).

### **7.3.6 Taking Advantage of a Bargaining Council's Poor Resources**

One of the loopholes that were revealed benefits both firms and TES agencies. It relates to the regulation by bargaining councils. Due to the bargaining councils' limiting resources, they are seldom able to determine whether a firm has hired temporary workers that are registered with the bargaining council and whether they are even registered with a TES agency. As the Motor Industry Bargaining Council Official explained:

[i]t's going to be difficult to pick it up. You have to think that in the Eastern Cape alone there are probably about a 1500 employers employing about 26 000 employees. I've got five agents (two in East London, two in Port Elizabeth and one in George). We try and get to each firm at least once every 18 months to do an in-depth audit on their books. If those people are not on the firms books or even if they are there at the time ... It's impossible to take the listing of registered employees and verify each person. If they have seven guys off a bakkie you won't be able to pick it up (09/09/2008).

TES agencies are aware of how constrained bargaining councils are and will take advantage of this. This is clearly evident in the following example:

Since the CCMA has become much stronger, your bargaining councils are really crap. They are ... very aloof. Your arbitrators for the motor industry bargaining council will only take cases that are serious. We used to know that. We would very clearly know



that they wouldn't pay attention to the little cases that the CCMA would pick up. And if they worked within the Motor Industry Bargaining Council, they weren't allowed to go to the CCMA. So, if they went to the CCMA, we would nuke them on that (Labour Broking Consultant of Agency A, 17/11/2008).

### **7.3.7 Disciplinary Hearings**

One of the unfair labour practices that were revealed during the interviews is how disciplinary hearings are conducted. In most cases, the temporary worker does not receive a fair hearing. According to the Labour Broking Consultant of Agency A,

[i]f we did have a hearing, hearings were not fair, my boss would chair them. She would want to know all about it before she sat down. So, the day before, she would call me in and she would ask me to tell her about the hearing, and she would pretty much make her mind up there and then. So, regardless of what that person said in the hearing, the decision has been made which is not supposed to happen at all. Your chairperson is supposed to be completely impartial (17/11/2008).

### **7.3.8 Screening Applicants**

A further inappropriate practice that is committed by TES agencies involves the screening process. As the Regional Manager of Agency C (08/12/2008) explained:

[t]here's a lot of brokerages going through the backdoor to the South African Police Service and going to people with access to the criminal record file and getting criminal record information. It should be done properly, they should go to the police offices and pay their fee and get the criminal check done properly. It's time consuming and that's why they go backdoor because they just give identity numbers or names and it's not the right way to go.

### **7.3.9 Not conforming to a Bargaining Council's Agreement**

Many TES agencies do not comply with the agreements of a bargaining council. This is an example of how TES agencies do not comply with agreements:

[t]he agency was ... part of a bargaining council. The agency went in and quoted below standard rates. What happened ... the staff went to the bargaining council when the contract came to an end. There is now a R700,000 claim against that outsourcing agency. If you don't do it properly, if you don't cross your t's and dot your i's, you going to end up with problems (Regional Manager of Agency C, 08/12/2008).

The agency in question should have found out about the necessary requirements from the bargaining council. "Go and have a visit with the bargaining council, do it properly first, and this agency didn't do it" (Regional Manager of Agency C, 08/12/2008).

#### **7.4 SKILLS DEVELOPMENT**

Many TES agencies are involved in skills development by training temporary workers for the various positions offered. TES agencies can belong to different SETAs, depending on their clients. According to the Contracts Manager of Agency H (24/11/2008), the TES agency was constantly developing the skills of the workers:

[w]e give loans; we give advances in order for guys to get fork-lift code 10 drivers licenses. Everything is a constant training process ... It's one of the major advantages of using labour brokers. If a client had four different sites, and permanent staff, then those staff would never move around, but with labour brokers we can constantly change his position and you end up having skill transfer by accident. This guy will teach that guy. Then you get the more formal versions as well obviously.

TES agencies are required to register with the relevant SETA, but they tend to register with the SSETA. Skills development was explored during the interviews. One of the benefits of temporary workers being employed by a TES agency is that there is sometimes a training programme attached to the various positions that are available. TES agencies should draw up an induction programme for their workers, which should be registered with the SSETA and be up to the required standards. TES agencies should then train workers:

[y]ou don't just do half an hour and say they are trained, you put them through a proper training process and you grill them, if they don't pass, you don't claim that money back. I used to claim about 1.8 million a year in training, but I used to train

over 7000 people, that's the difference. Then you do refreshes. Training doesn't stop at just one module, you build on it. You want the most competent staff. You have to be progressive, and you look at other programmes that are registered with the services SETA, and you train them properly ... Bakkie brigades, outsourcing brokers don't do it. You do it properly from the start or you don't do it at all (Regional Manager of Agency C, 08/12/2008).

In order to be regarded as a „respectable’ TES agency, it is necessary to train and develop temporary workers. This is extremely beneficial for temporary workers since they are subjected to an array of different job positions during the various training programmes. There is potential in the TES industry to provide much-needed skills development necessary for workers who are unskilled or semi-skilled to utilise their skills to find permanent employment. According to the Regional Manager of an International Agency,

[t]he other players in the market don't see a need for this. I see a need; train your people, make sure they are competent. If there is something that they don't know, up-skill them (Agency C, 08/12/2008).

The idea that TES agencies develop the skills of temporary workers can be argued to be a fallacy. TES agencies thrive on lower skilled workers who are easily replaceable; this is how they make their money. Money is made by placing a „bulk amount’ of unskilled to semi-skilled workers on a site. A large amount of money is also extracted from a higher skilled worker who is specialised in a particular skill. Nevertheless, some respondents sought to improve the lives of temporary workers by addressing various problems. In the words of the Managing Director of Agency J, who is on the board of the Services SETA, “[w]hat we try and do is address what is lacking in the Eastern Cape and try and get a forum going; so we can try and put more workshops together” (Managing Director of Agency J, 05/08/2008).

The TES industry appears to be a large contributor to the skills development levy. “The TES industry also engages in learnerships, apprenticeships and is one of the largest contributors to the skills development levy in South Africa via the Services SETA” (Executive of National operations for APSO, 26/11/2008). A further set of unlawful activities that was revealed during the interviews involved claiming for skills training from the SSETA. TES agencies will claim that they have trained workers when in fact they have not. During an interview

with Labour Broking Consultant of Agency A, disturbing information was revealed regarding the agency she worked for and how easy it was to misappropriate funds from the SSETA:

[a] labour broker would fall under the Services SETA, and then they will say you can claim back for training you have done. It's utter rubbish. I am sure big companies actually do proper skills plans but we used to get back R80 or R90 000 a year for nothing. Because my boss would make me claim for giving someone a contract because that is an 'induction', a training session. So she would claim back for every contract that I signed with them every month. That definitely was very illegal and actually when I walked out of the agency at the end. I walked out with the skills plan in my computer, I didn't submit it because I couldn't do it, because it's my signature on there, and I wasn't going to do it, I kept holding off and she kept putting pressure on me for it and finally that day it was just too much and I packed my stuff and walked out. It is absolute daylight robbery (17/11/2008).

It is therefore easy to claim money back for training that did not actually occur. Furthermore, a TES agency can claim back money that they are not entitled to because the client had paid the skills development levy:

The client pays us the skills development levy. We pay it over, So it's right for the client to claim from the SETA because they paid it. We didn't take anything out of our pockets and pay. Yet, we were claiming back all this money. It's definitely illegal (Labour Broking Consultant of Agency A, 17/11/2008).

The SETAs provide an opportunity for employers to develop the skills of their workers. Yet, the body is clearly being taken advantage of by those who are either deliberately extracting money or by TES agencies that are not qualified to train workers. "It's a brilliant way for people to be up-skilled, if they do it correctly. I can't just slap together 10 sentences and say this is the course. It needs to be of the right standard" (Regional Manager of Agency C, 08/12/2008). The opportunity for TES agencies to claim funds so easily from the SETAs is a problematic area that should be addressed by the SETAs themselves. According to the Labour Broking Consultant of Agency A (17/11/2008),

[t]he SETA's are in such a mess. A couple years ago, you didn't even have to prove that you were doing the training. Now all you've got to do is provide them with a training plan, which is a piece of paper that says: „I did this and this'. Sign here. That's it. And you get your money.

The array of illegal activities within the TES industry is disturbing. These loopholes are reason enough to insist on more extensive and intensive regulation. Temporary workers are subject to exploitation and even the clients themselves are sometimes the victims of theft.

## **7.5 LABOUR LEGISLATION AND IMPROVING THE REGULATION OF THE TEMPORARY EMPLOYMENT SERVICES INDUSTRY**

One of the questions posed in Chapter 1 is whether the law should treat all forms of employment the same. As long as there is a presumption of employment, all categories of employment whether it is temporary or permanent are treated the same. This has been proven to be false because many of the employees working within the TES industry lack effective protection. South Africa's labour laws extensively regulate the SER. The problem lies with non-standard employment because this form of employment is largely insecure and, depending on the amount of time an employee works, it may result in an employee being excluded from the ambit of the law. Amendments should be made in order to protect all workers.

Many employers are overwhelmed by labour legislation and the obligations associated with the SER. "I think the average South African business man is so intimidated by the rigid labour legislation" (Labour Law Consultant, 13/08/2008). It is essential to address the ways in which present labour legislation shapes the decisions of employers because these directly affect their workforce. Firms have turned to the TES industry for relief. This discussion is based on the presumption that employers are turning to the TES industry not only to achieve labour flexibility, but also in an attempt to circumvent labour legislation. The problem with firms turning to the TES industry is that the industry is poorly regulated.

The resultant question is whether firms will still turn to the TES industry if the industry was effectively regulated. There is a definite possibility that their interest in the TES industry would decline in such a context. This is because the very reason why firms turn to the TES

industry is due to its lack of regulation. Therefore, if stringent regulations were in place, firms will lose the benefits that they currently derive from temporary agency employment. If the industry was regulated, and more responsibility was placed on the client, there is a possibility that firms would lose interest. But it is important to note that, firms who seek labour flexibility would not lose interest. It is the firms who utilise the services of the industry apart from labour flexibility that might lose interest. In the interest of workers, there is a great urgency to regulate the industry. However, both TES agencies and firms will probably be defensive since the lack of regulation serves their interests. One thing is certain: the TES industry can no longer operate in its current state. Far too many unfair labour practices have gone unnoticed and/or unpunished. This section will discuss the impact of labour legislation on the TES industry and future regulatory improvements.

### **7.5.1 The Impact of Labour Legislation**

The South African labour law framework is known to be fairly stringent. Because labour issues are tedious, many employers will prefer to evade their obligations as the employer. This is indeed evident within the findings of this research, as many respondents claimed that the growth of the TES industry is attributed to firms not wanting to deal with labour-related burdens. Yet, the problem is that the responsibility is placed on the wrong shoulders since TES agencies lack the necessary knowledge and do not adhere to labour legislation, which aims to promote fair labour practices. Many of the TES agencies who provide a poor service are not specialists in the field and are not educated in labour law. “The problem is you have a lot of small firms trying to become experts on an industry that don’t have that background or knowledge of actually doing it properly” (Regional Manager of Agency C, 08/12/2008). The TES industry is a cutthroat business and competition is fierce. In order to succeed, TES agencies require expertise in labour legislation and fair labour relations practices. “You need to be on the top of your game to survive” (Labour Broking Consultant of Agency A, 26/09/2008). According to the Labour Law Consultant (13/08/2008), considerable conflict is created within the labour market due to a lack of understanding and compliance with the various labour laws:

[y]ou deal with employers that do not have an understanding of the labour legislation... its that difficulty and issue of explaining and convincing them that this is the legislation and they must adhere to it ... That is the first problem, and second

problem obviously the nature of the workforce. Most of the businesses that are our clients are labour intensive clients. And I think the sophistication of the workforce is not very high and that leads to conflict. They don't understand why the owner of the business makes certain rules and why they have to comply with them (13/08/2008).

The Recruitment Consultant of Agency N, (04/09/2008) stated that labour regulations as a whole are arduous because the administration is time-consuming. The Branch Manager of Agency K (28/11/2008) agreed: "there is no question that labour law, negotiations and wage agreements are becoming very onerous". TES agencies are now taking on the risks and obligations normally associated with employers. Since a TES agency is regarded as the employer, it is removing the obligations from the 'real' employer. Firms that utilise the services of TES agencies are reluctant to take on the responsibility of a permanent employment relationship. The Contracts Manager of Agency H, (24/11/2008) suggested that "South Africa has got a general over-regulation problem". He argued that the regulation by labour laws in South Africa is extremely tedious:

[t]he difficulty involved in dismissing a human being once you hire them, even if they are obviously incompetent and completely ill disciplined, you still have to follow such long tedious processes. Then you have to deal with the CCMA, obviously we are totally procedural in our documentations so we will never fail to win a CCMA case, but you've got to go through the process which takes time (Contracts Manager of Agency H, 24/11/2008).

Even though labour legislation in South Africa does make provision for the TES industry, it fails to regulate the industry effectively. The relevant provisions in labour laws are not sufficient to ensure the protection of temporary workers employed by the TES industry. While the CCMA provides a forum to address workers' grievances, it is over-loaded with cases. According to the Labour Law Consultant (13/08/2008),

There is an undue pressure on employers, unions and the dispute resolution organisations because they accept all disputes. We believe that there should be a screening function so that cases that do not have merits do not even come on the rolls of the CCMA .... You see they are overloaded with cases, and they are running 2000, nearly 3000, cases in PE this year.

It appears that both the CCMA and bargaining councils do not have adequate resources to undertake effective and speedy dispute resolution. Government should address this problem as a matter of urgency. A vital factor to take into account is the importance of case law. The Labour Law Consultant (13/08/2008) explained that case law is extremely strong in terms of regulating the relationship between temporary employees and their employers. He further added that firms do not plan how long they will require the services of a temporary employee:

There is specific case law as far as how you deal with a temporary employee during the duration of his contract. What happens is that an employer employs a temporary worker on a one year contract, then after three or four months he comes to the realisation that he does not need this person anymore ... Case law specifically states that you go into that contract with open eyes and both parties must honour it. If you want the person to go, you have to honour your part of the contract by paying him out the balance of the contract ... I don't think employers give it enough thought and put enough into it when they enter into a contract (Labour Law Consultant, 13/08/2008).

The Executive of National Operations of APSO argued that “there is almost no legislation specific to our industry” (26/11/2008). The labour laws in South Africa do not deal with the complexities of the TES industry. Conversely, respondents argued that there is no need to introduce legislation that governs the TES industry because every aspect of labour law that applies to employers will apply to TES agencies. This is because the law regards the TES agency as an employer. “Every legislation that applies to a normal employer in the industry applies to the labour broker; so there is no less legislation in terms of our agreements that does not apply to them” (Motor Industry Bargaining Council Official, 09/09/2008). The only difference is that the TES agency is not the ‘real’ employer and it should be assigned its true role, that of an intermediary. Roskam (2007:33) believes that it would be far easier to regulate the activities of an intermediary. In certain situations, it would be unfair to deem the client the employer. This would apply, for example, in cases of ‘genuine temporariness’ such as a temporary secretary who is hired for a few days. There should be a time limit.

Roskam (2007:33) suggests that the law should place more responsibility on the client and deem the client the employer after a specified period of time. That is, if the client procures an employee from a labour broker for more than a month in any 12-month period, then the client should be regarded as the employer. “In order to prevent successive fixed-term contracts of



just below one month the stipulation of a 12-month period is necessary” (Roskam, 2007:33). One of the important legislative issues to deal with is how TES agencies prevent temporary workers from becoming permanent. TES agencies will intentionally move employees off a site in order to prevent permanency. It is unclear when, if ever, a temporary employee becomes permanent. It is dependent on the relevant bargaining council agreement, the contract between the employer and the employee, union pressures, and whether clients offer permanency. Many temporary employees expect permanency. There is a major difference between firms who seek a temporary employee for a few days and firms that outsource temporary employees „permanently’ (Roskam, 2007:33). According to the Labour Law Consultant, employers make a number of mistakes:

[s]ometimes they employ people on a limited duration contract and it should have been on a probation period, which they confuse with temporary employment. And sometimes they do it deliberately in order to circumvent labour law. With a limited duration contract, when the contract expires, there is no more relationship (Labour Law Consultant, 13/08/2008).

Employees are usually subject to a three-month probationary period after entering into a contract of employment. As the Contracts Manager noted:

If you haven’t found fault in the guy after three months, that’s when they choose to extend it with the first annexure. Once they do that, the only way to get rid of him is through disciplinary action (Contracts Manager of Agency H, 24/11/2008).

In terms of Section 8 of the Code of Good Practice: Dismissals, “[a]n employer may require a newly-hired employee to serve a period of probation before the appointment of the employee is confirmed”. This is done in order to evaluate an employee’s performance. The Code specifically indicates that probation should not be used to deprive employees of the status of permanent employment. An example is given: “a practice of dismissing employees who complete their probation periods and replacing them with newly-hired employees is not consistent with the purpose of probation and constitutes an unfair labour practice” (LRA Code of Good Practice: Dismissals, Section 8). This is directly relevant to the practices of TES agencies.

The period of probation depends on the nature of the job and how long it takes to determine suitability. During the probationary period, employees should be given advice and training, and employers must inform the employee of their decision and may either extend the probationary period or dismiss the employee. The employer is supposed to inform the employee whether the probationary period is extended or, if there is a dismissal, the employee has the right to refer a dispute to the Commission. According to Labour Broking Consultant of Agency A (17/11/2008),

[t]hey are regarded as our employee from the moment we pay them. Not after a period of time. The MEIBC for instance says that if someone has been on contract for a year they have to become permanent but that is not always enforced.

Much of the confusion stems from the statutory definition of an employee. According to the EEA, a person who is employed by a TES will be considered an employee of the client if that person's services are utilised for a period longer than three months. In terms of the legislation, one has to question the definition of an „employee’. If a worker that works for less than three months is not regarded as an „employee’, then what is his or her status? Surely every employee that signs a contract of employment is immediately an „employee’? The law fails to define a temporary employment relationship. TES agencies need to be distinguished from other service providers. Hence, the definition needs to be reworked. The alternative would be that TESs should be registered and that any provision would only apply to those who are registered (Theron *et al*, 2005b:68).

As noted above, TES agencies must register with the Department of Labour. However, this is not enforced. Theron *et al* (2005b:68) argue that compelling TES agencies to register will allow for greater protection of temporary workers. Theron *et al* (2005b:69) correctly insist that a more effective form of regulation would be to make it a legal requirement to provide the worker with a copy of the contract entered into with the agency. What is important here is that the terms on which both TESs and workers are remunerated should be disclosed. The question also arises whether the payment that the TESs is permitted to charge should be regulated (Theron *et al*, 2005b:69).

TES agencies also need to be registered with the South African Revenue Service (SARS). As indicated earlier, TES agencies were deducting PAYE from temporary employees, which

they should not be doing. Employers should not be deducting tax from employees who earn less than a particular threshold. If an employee earns more than R250000 per annum, his or her employer should be deducting tax. The problem is how to monitor the remuneration payments of TES agencies.

One of the major concerns in Chapter 1 was the provision in the BCEA that states if an employee works less than 24 hours a month, they are not entitled to any of the benefits that are associated with being an „employee’. Workers who work less than 24-hours a month are regarded as casuals. It was important to find out whether TES agencies employ staff for less than 24-hours. The TES agencies stated that they would never employ someone for such a short period of time. “There is no ways that ... in a factory environment that you will have someone like that” (Labour Broking Consultant of Agency A, 17/11/2008). According to the Regional Manager of Agency C,

There shouldn’t be that 24-hour clause. What should happen is that every hour worked, there should be some benefit accumulated. So, if I worked 2,000 hours a year, it could be for 30 different people. I should get a benefit accordingly; whether its family responsibility or whatever. If in a temporary position for an x amount of days, the rate of pay should be higher. They should pay out the sick leave, the leave pay, everything on that day. And they don’t do it. They retain it as a benefit (08/12/2008).

In terms of the 24-hour clause, the official from the Motor Industry Bargaining Council explained:

[a]s soon as you work more than 23 hours within a month, then the full term of the agreement applies ... A casual employee does not work for more than 23 hours within a month, as soon as you work more than that, then the full agreement applies, which is a 45 hour week and all the benefits along with that. But if you are talking about temporary employees who work on fixed-term contracts through labour brokers, yes our agreement does extent to them as well ... They’ve got to at least pay minimum wages for which the agreement would stipulate, but there will not be entitlement to a benefit fund, like a provident fund or anything like that (09/09/2008).

## 7.5.2 Joint and Several Liability

As mentioned in Chapter 1, an important principle governing the TER is joint and several liability. In terms of the relationship between the firms and the agencies, if there is a breach of contract or violation of statutory duties, the client and the TES agency are both liable:

If a firm is utilising a labour broker, and that labour broker is refusing to register with the bargaining council which they should ... that firm that is utilising the workers, together they are liable. So I can pursue that firm as well ... They can't utilise someone that is in contravention. It is unfair competition. That's the whole basis of bargaining councils; you must have equal playing fields. Now you get someone who can provide labour at half the price because they are not complying with the legislation ... They've got an unfair advantage above their competition ... and then we have to pursue the processes and legal steps available to us to ensure compliance (Motor Industry Bargaining Council Official, 09/09/2008).

The Labour Broking Consultant argued that joint and several liability is misleading in terms of any breach:

[t]his is a fallacy. This only applies if the breach is in contravention to the LRA. So, for example, if a client instructs us to not pay over UIF ... But for contracts ending unfairly or anything like that, the agency is solely responsible (Labour Broking Consultant of Agency A, 17/11/2008).

Roskam (2007:33) argues that the client should be held accountable and made “jointly and severally liable for the dismissal of workers and any unfair labour practices”. The conduct of the client must be regulated by regulating the contractual relationship between the client and the TES agency, “making it impermissible, for example, for the client to act in ways that would cause unfair labour practices or an unfair dismissal. In that sense the client’s liability would be extended” (Roskam, 2007: 34).

Many of the workers employed by TES agencies are factory workers, one of the questions asked was how an accident is handled by the client and the TES agency. According to the Executive of National Operations of APSO (26/11/2008), the TES, as the employer, is

responsible for handling performance, grievance and other employee-related matters. “In the instance of an accident, the TES would handle the administration, but it should be noted that 100 per cent liability in respect to the Occupational Health and Safety Act rests with the client” (Executive of National Operations of APSO, 26/11/2008). In terms of a client’s liability, as stated in Section 57 of the EEA, the client can be liable in the event that unfair discrimination against an employee is established. A TES agency that commits an act of unfair discrimination on the instruction of the client will be jointly and severally liable.

According to Section 198 of the LRA, the TES agency and the client are jointly and severally liable if the TES agency contravenes a collective agreement concluded in a bargaining council, and a binding arbitration award that deals with terms and conditions of employment, as well as the BCEA and the Wage Act. Bargaining council agreements bind TES agencies, temporary workers employed by TES agencies and the client if they fall within the registered scope of a bargaining council. Joint and several liability is a problem area within the TES industry. The law fails to take into account the full extent of the client’s responsibility within the TER. The client makes many of the decisions, yet has the ability to circumvent legislation. Much of the unlawful activity that is occurring is a result of instructions from the client. The TER is truly unequal, and the legislation should be more precise in this regard. Nevertheless, the legislation cannot be effective if it is not enforced.

### **7.5.3 Regulatory Reform**

According to Regional Manager of Agency C, the TES industry is sufficiently regulated by legislation. However, there needs to be a body to monitor implementation and to enforce regulations:

[t]he legislation isn’t followed up by anybody. So it’s no use having the legislation if you don’t have a body following it up. So my whole idea would be to have a body to regulate the legislation and then ensure that the employers, employees and clients know about the legislation (08/12/2008).

Due to the large number of loopholes and unlawful activities outlined above, it is clear that the TES industry requires more intense regulation. From the information gathered, the majority of the respondents believed that the TES is not adequately regulated and that the

industry needs intervention in order to monitor the activities of all TES agencies. According to the Managing owner of Agency I (16/09/2008), “we are wanting the industry to be self-regulated so that we can also be protected, so that not anyone can come in and out of the industry and actually spoil the industry”. She further argued that the industry needs protection, specifically from the TES agencies that do not follow the correct protocols:

[p]eople that do not belong to any association and that don't really know the rules of the game, they come in and mess up everything, and then they get out of the industry. That's exactly why we want to protect the industry (Managing owner of Agency I, 16/09/2008).

The respondents tended to agree that a body should monitor the TES industry: “I think labour broking needs to be more regulated. I think if it had a council or it had something that was overseeing it as a whole, it would be far better off” (Labour Broking Consultant of Agency A, 17/11/2008). Many of the respondents supported the idea of regulation. As the Regional Manager suggested:

This industry needs to be regulated by a body to do it properly, to make sure the staff are being treated correctly, to ensure that fair labour practice is happening. What you will find is less CCMA referrals, less dispute resolution through a bargaining council because it has been done properly. If I tell you I am going to pay you R5 an hour and at the end of the day I pay R4.50 a hour, that's a dispute. But if I tell you your pay rate is R5 an hour and I am going to be making these deductions for UIF or tax or whatever and that is what your take home pay is going to be, you have no dispute. Do it properly firstly (Regional Manager of Agency C, 08/12/2008).

There was much talk of a „council' that could possibly regulate the TES industry, but how would such a structure be set up? The Regional Manager of Agency C claimed that he has specific plans to establish a council:

I would like to get a council registered that can regulate labour brokering and stop labour brokers from exploitation. I would like to get a body of people, I have labour advocates that I have spoken to, all these guys who would like to come together with me to form a council, where people subscribe to it like APSO. I am so passionate

about people, staff need to be looked after, and everyone deserves to earn a decent wage. We could regulate that, where we do random audits and we go into firms with the power to do so and pull payrolls and randomly audit everything (08/12/2008).

The question is whether the industry should be self-regulated or whether there should be an independent body regulating the activities of TES agencies. Presently, APSO, the body that relies on its own members to regulate the activities of the industry, does not seem effective. A body that is independent from the TES agencies will monitor the activities more effectively than APSO by exposing the unlawful activities that have been uncovered by this research. The problem, however, lies with financial resources and backing from the TES industry as a whole. The Regional Manager of Agency C believed that it is necessary to attain support from all parties:

I need so much capital to do it ... People doing it right will be exonerated, and the people who are doing it wrong will end up closing doors ... We need funding to back us because it costs money to put up offices in each town, it costs money to do the marketing and get out there. I am going to be approaching various high powered people in positions not only in government and the labour department ... I am going to try get the buy-in from the government, but I am also going to target buy-in from industry, your big employers ... By having them as members, they are going to have an interest and hopefully they will sit on the board that regulates that industry (08/12/2008).

According to APSO, CAPES has proposed the establishment of a Private Employment Agencies Board (operating along similar lines to the Estate Agencies Board) and this has been tabled at NEDLAC for further exploration and discussion. In order for the TES industry to be properly regulated, aggressive intervention is necessary. The Regional Manager argued that the TES industry needs to be monitored:

It's like if the South African Police didn't have roadblocks; they wouldn't catch anyone speeding or driving without licenses. This council has to be the same. You need a person with a passion for the industry to regulate it (Regional Manager of Agency C, 08/12/2008).

This respondent further stated that he would prefer it if APSO was a part of the initiative as they have knowledge of the industry and the government does not have the expertise to monitor the TES industry effectively. The Regional Manager of Agency C (08/12/2008) argued that the government is merely interested in the growth in the economy and wants to reduce unemployment:

Members of the government don't want to get down to the nitty gritty and the dirty part of it ... They need to have more meetings with people in the right circles to find out how we can make labour broking better (08/12/2008).

Whether or not a council will be formed remains to be seen. A council is definitely required in an industry that is rife with unlawful activities and exploitative practices. There are a number of improvements necessary to redefine the TES industry. For a start, all loopholes should be eliminated. There should also be entry requirements in order for any TES agency to operate within the industry. The Managing Owner of Agency I (16/09/2008) agreed and stated that TES agencies need to be registered with the Department of Labour and SARS:

There are certain rules within SARS and the Department of Labour for instance that proves that you do pay over the taxes of the people, because some people don't, they make all these deductions but they not even registered with SARS or the Department of Labour. Regulation in the TES industry is minimal. An aspect of improving the regulation of the industry includes education. Clients are unaware of the rules and there is a need to educate them. I would like to see a regulated industry, professional services providers associated within the industry ... Clients that are treated with respect and confidentiality and to make sure that employees are paid the minimum wage and above (16/09/2008).

Some agencies are not that concerned with the future of the TES industry because they do not feel threatened. For instance, the Regional Manager of Agency C suggested that

[c]ompanies that are financially sound, the firms that do it right are going to stay. Your first agency started 30-odd years ago and are still here today ... I tell you what you have to be passionate about the industry. To make a success, you have to wear two caps: one, you have to fight for the employees because when you look after them,



they look after you; two, you have to fight for your clients, because it's the only industry that your product talks back to you (8/12/2008).

Roskam (2007:33) notes that the LRA does not sufficiently protect workers that are placed by TES agencies, and that reform is an urgent necessity. "I believe that it would be appropriate to recognise the true reality ... to state that the broker is the intermediary for placing employees in the service of the client and it is the client, not the labour broker, who is the employer" (Roskam, 2007:33). In the future, especially if the economic crisis persists, many TES agencies will go out of business:

There are those brokers that will exist with the tide and then they will disappear into thin air. Those brokers who can't fund huge wage bills, because they've got such a small number of staff will disappear anyway. You need volume. You have to have volume to really make money (Branch Manager of Agency K, 24/11/2008).

The TES industry does provide the flexibility that firms ostensibly require in order to remain competitive. "I think there is an absolute place for it as long as the rights of the employee and employer are not infringed" (Labour Law Consultant, 13/08/2008). The Regional Manager of Agency C concurred:

[i]t's a brilliant industry, there is space for everyone in the industry from unions to representative councils to outsourcing firms to employer's councils, and there is many ways of doing it. I think that it's not an industry that's going to go away (08/12/2008).

If the TES industry is not adequately regulated, it will continue to generate an underclass of precarious and vulnerable workers. However, one respondent believed that even if there was greater regulation, TES agencies would still find a way to exploit workers:

[t]here needs to be flexibility within the market and firms are not going to want to take that responsibility upon themselves. So, somehow someone is going to work out a way to cheat the system (Labour Broking Consultant of Agency A, 17/11/2008).

## 7.6 CONCLUSION

In this chapter, the various forms of existing regulation were addressed, and they were shown to be inadequate in terms of adequately governing the TES industry. The various loopholes and unlawful activities were highlighted, which create a number of reservations regarding the benefits of the TES industry. Far too many loopholes facilitate the super-exploitation of temporary workers. The government has not done enough to protect temporary workers within the TES industry. For example, by not enforcing the system of registration with the Department of Labour, the government has allowed a state of relative „lawlessness’ to prevail. Although bargaining councils and APSO aid in providing some form of supervision, they are not effective in regulating the TES industry. Workers falling outside of the scope of a bargaining council are unprotected and more likely to be exploited. Trade unions have every right to be concerned, yet the banning of the industry does not appear to be appropriate. Many workers rely on temporary employment to survive and although there is a clear underclass present within the TES industry, it is the responsibility of government to ensure adequate protection.

There needs to be an entire re-evaluation of the bodies that govern the TES industry. Specifically, the relevant laws should be amended to protect temporary workers more effectively. In order for legislation governing the TES industry to be successful, it requires all parties to adhere to the rules. This, in turn, requires an effective and efficient governing body to enforce compliance. The broader implications of a poorly regulated TES industry are far greater. The underclass that is created, which falls through the cracks in regulation, lacks the rights that are accorded to every other employee. Temporary employees’ standard of living and conditions of employment are not acceptable, and the lack of trade union support means that they are at the mercy and whim of employers.

# 8

## CONCLUSION

The central objective of this research was to demonstrate that, due to the demand for labour flexibility and the lack of effective regulation of the TES industry, a vulnerable underclass of workers has been created. The discussion commenced in Chapter 2 by addressing the changes in the nature of work. Within the formal labour market, there has been a notable shift in the change in attitudes of employees towards work, where employees are more likely to job hop and obtain higher salaries than remain loyal to one firm. Within the informal labour market, there is an alternative view, where workers within non-standard employment arrangements escape the protective measures of the SER and are more likely to be exploited. The thesis delves into the informal labour market – namely, temporary employment within the TES industry. Chapter 2 provides a background and a general introduction to the major themes within this research. It provides a summary of the relevant literature and research and creates a foundation for further exploration of the topic.

There were a number of ancillary objectives set out in Chapter 3, which provided a basis for the substantive discussions. Chapter 3 also outlined the methodological approach and the research design. Overall, gaining access to respondents who were willing to discuss sensitive issues was a significant obstacle. The motor industry has been a valuable research site due to the similarity in the organisation of work as well as the firms' reliance on the TES industry in Port Elizabeth to provide temporary workers. Due to the qualitative nature of this research and the reliance on respondents' perceptions and opinions, the information was largely subjective. Broader information was incorporated, and it was found that the information gathered from the research site contained many similarities with research conducted on a larger scale. Workers that are not within an SER are indeed in a vulnerable and precarious position. Temporary workers are often unable to access the protective measures that are available, such as bargaining councils and the CCMA, due to a lack of knowledge and organised support.

The research had five objectives. The first objective was to examine the demand for temporary labour – specifically, to address the incidence of labour flexibility and its associated benefits and problems. This is closely tied to the second objective, which was to uncover the mechanisms that govern the supply of temporary labour via the TES industry. Firms utilise the services of TES agencies to implement labour flexibility, to evade the statutory obligations of employers and to take advantage of the fact that TES agencies can easily exploit workers due to the lack of effective regulation. Given the lack of information regarding the practices of TES agencies, more information was acquired in the research process regarding their employment contracts and their HR practices. This was the third objective, which was discussed in Chapter 5. The fourth objective was discussed in Chapter 6 and focused on the conditions and consequences of temporary employment. This discussion was aimed at demonstrating why the temporary workers within the TES industry may be regarded as an underclass. Temporary workers experience extensive job insecurity and lack many of the benefits associated with permanent employment. Information was gathered regarding the discrimination against temporary workers within the TES industry and the resultant tensions between permanent and temporary groups. The fifth objective was examined in Chapter 7, which addressed the regulation of the TES industry. Numerous unlawful and unfair labour practices were exposed. This, in turn, led to an examination of the institutions that regulate the TES industry. The discussion concluded with an overview of the impact of labour legislation and possible reforms.

In general, there is a definite rise in non-standard employment in South Africa largely due to the high unemployment rate. This research addressed some of the problems associated with non-standard employment. Issues that are common to all forms of non-standard employment are insecurity (which includes job insecurity and financial insecurity), and lack of pension, medical aid and/or additional perks pertaining to permanency. However, particularly in terms of temporary employment within the TES industry, the creation of a new underclass is evident. This is revealed by the fact that these workers are more at risk than standard workers since they are subject to short-term contracts, job insecurity, vulnerability, discrimination, lack of trade union support and exploitative practices. It is clearly evident that workers found within the TES industry are highly susceptible to unfair labour practices. Both TES agencies and their clients have an added advantage in using temporary workers. These workers' contracts are easily terminable and workers are without doubt manipulated in order to circumvent any form of recourse. Firms are aware that by utilising a TES agency, they are

able to pursue labour flexibility; escape the obligations of an employer; save on costs; minimise administration and labour disputes; avoid trade union intervention and still retain overall control within the TER. Firms determine the conditions of employment and the pay rates of temporary workers and decide when their contracts will be terminated. The TES agency takes on a majority of the responsibilities and does all the „dirty work’. TES agencies and their clients’ ethics are highly questionable due to the fact that both parties contribute to unfair labour practices within the TER. Employers essentially reap the most benefits in terms of labour flexibility and the greatest disadvantage pertains to the treatment of the temporary workforce within the TES industry.

The major findings of the research may be summarised as follows. First, an aspect that stood out in the research was the difficulties associated with defining „labour brokering’. The term „TES’ was chosen because it corresponds with the legal terminology and includes a broad category of functions. Throughout literature, „labour brokering’ understandably has been used to define a TER where labour is outsourced, however, the research revealed that „labour brokering’ does not include all TESs and that the term only refers to one function of the TES industry. „Labour brokering’ refers to a division within an agency or an agency that deals solely with less-skilled temporary workers who are on short-term contracts and are provided to an employer in relatively large numbers. These workers are often production workers and are easily replaceable. The agencies within the TES industry offer a number of services and functions, and the term „labour brokering’ has been used loosely to define the whole industry. Moreover, the industry is extremely diverse in both its structures and the services that are offered.

Second, the respondents from various TES agencies insisted that they do not extract money from the workers’ wages. The respondents claimed that they do not charge the worker for their services and that the client carries the costs for their services. If this is in fact the case, the TES agencies’ mark-up entails a deduction of a portion of the wage that belongs to the worker. The client decides on the amounts to be paid to the worker and the TES agency, and inevitably, the mark-up subtracts money from the worker’s wage, whether it is removed directly or indirectly. It therefore creates an added disadvantage for temporary workers, particularly if they are already earning the bare minimum.

Third, labour flexibility is an important factor that accounts for the presence of the TES industry within the labour market. The demand for labour flexibility and the prevalence of the TES industry are inter-related. Firms are implementing flexible production techniques and are capitalising on the availability of a peripheral workforce. The TES industry would not exist if there was no demand for flexible labour. The existence of the TES industry is therefore dependent on the strategic intentions of firms.

Fourth, there is evidence to suggest that there is a high incidence of permanent temporary employment, with many respondents stating that temporary workers within the industry are often employed on short-term contracts over an extended period of time. This is due to a constant renewal of contracts. It is a clear indication of an underclass of workers that exist which are deprived of the security and the related benefits of permanent employment. The TES industry is highly dependent on employees remaining temporary. Many agency employees are regarded as „permanent temporaries’ in the sense that their contracts are permanently renewed and they are therefore excluded from the security of a SER. Alternatively, some TES agencies try to disguise their employment relationship with their workers by claiming that they are independent contractors

Fifth, the view that the TES industry is poorly regulated is reinforced by the number of loopholes and unlawful activities that were identified. These loopholes are deplorable and deeply problematic. There is a need for a dedicated statutory body to regulate the activities of TES agencies. A primary task of such a body should be to find a durable balance between the labour flexibility provided by the TES industry and the security of temporary agency employees.

Sixth, incorporating a peripheral and temporary workforce as proposed by the flexible firm model has exacerbated the segmentation of the South African labour market. This segmentation extends beyond the non-standard forms of employment already apparent within the labour market. There are workers in the TES industry who are deprived of basic fair labour practices and subjected to forms of exploitation that signal the formation of a new underclass. The latter is clearly evident from the findings of this research. The managerial strategies and practices associated with temporary employment have laid the basis for an underclass of highly precarious and disposable workers.

Seventh, TES agencies are able to exploit „their’ workers due to the poor regulation of the TES industry. The TER should be re-evaluated within the current legislative framework in order to place more responsibility on the „real’ employer – namely, the client. The latter bears equal responsibility for an underclass of workers that is condemned to short-term contracts that are easily terminated.

Eighth, it is imperative that an independent and well-resourced body is established to regulate the activities of the TES industry. One has to consider the broader consequences: an economy that thrives on a form of exploitation that relegates the most vulnerable, least skilled and lowest paid workers to an underclass. This stands in sharp contrast to the idea that South Africa’s labour legislation is intended to promote the protection and security of *all* workers.

Overall, the respondents contributed to a greater understanding of the TES industry and the utilisation of temporary workers to provide labour flexibility that the motor industry allegedly requires. Due to the recent economic recession, the entire motor industry has been overhauled. Nevertheless, firms’ desires for flexibility will continue well into the future. This, in turn, will result in a continuous demand for temporary labour. What is required is a supply of temporary labour that is regulated and afforded the same rights as their permanent counterparts. The establishment of a body to monitor and regulate the activities of TES agencies effectively and amended legislation to impose restrictions on the activities of the TES industry are urgently needed. Future research should concentrate on the experiences of the temporary workers themselves. Our knowledge of the ways in which their employment relationship affects their collective identities, working conditions and standards of living is still limited. There should also be a more intensive study of the strategies and practices of employers, unions and TES agencies. In particular, our understanding of the sectoral and occupational dynamics of temporary employment, the role of trade unions and the interaction between the supply of and demand for non-standard labour needs to be expanded.

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