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Why deeming provision can be daunting

IN 2018, the Constitutional Court made a ruling regarding the deeming provision referred to in section 198(A) of the Labour Relations Act (LRA).

This ruling stated that the client of a Temporary Employment Services (TES) provider is deemed to be the sole employer of assigned temporary employees earning R17 119 or less a month, after three months of employment. However, understanding what this ruling means for a business can be daunting.

Take for example a case where TES provider employees, who have been working at one of the TES provider's clients' businesses for many years, are seeking to be deemed permanent employees.

The LRA defines a temporary service as one where the employee works for the client for a period not exceeding three months, or fulfils work determined to be a temporary service. The employees, having been employed for many years, cannot be defined as temporary employees. The deeming provision is therefore applicable and the client is deemed to be the employer.

This does not mean that they must be employed directly by the client, or "put on the client's books". If temporary employees are employed for longer than three months, it does not result in a transfer to a new employment relationship, simply a change in



UNDERSTANDING the new ruling regarding temporary workers can be a daunting prospect for businesses, says the writer. If temporary employees are employed for longer than three months, it does not result in a new employment relationship

the statutory attribution of who the "employer" is according to the LRA.

It also does not mean that they are entitled to permanent employment, because section 198B makes provision for the use of fixed-term contracts of employment exceeding three months, provided the need for such contracts can be justified.

The same relationship between the TES provider, the client and the employee exists for the duration of the contract and the TES provider is responsible for remunerating the employee.

Depending on the circumstances of an individual case, employees may be deemed to be either indefinite or

fixed term and, for the purposes of liability under the LRA, deemed to be employed by the client. However, regardless of this they remain employees of the TES provider.

The TES provider may retain the practical roles, including remuneration, as well as a contractual relationship with the employee and the client.

The TES provider may also participate in litigation where the employee seeks to pursue a claim, seeing that the TES provider is jointly and severally liable. This makes it more important than ever to engage with a skilled and reputable TES provider.

Can a TES provider add value to a

client's business? Absolutely. Under the judgment, the TES provider is jointly liable for LRA transgressions along with the client as long as the commercial arrangement between them exists.

Liability is therefore shared, as opposed to the client being solely responsible for LRA compliance.

In assessing their staffing needs, it is therefore crucial for companies to consider potential TES partners' level of legislative compliance, industrial relations expertise and ability to provide commercial and operational solutions.

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