

THE PLIGHT OF WORKERS IN THE HOSPITALITY INDUSTRY IN SOUTH AFRICA

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Abstract: *Most workers in the hospitality industry are not standard employees. They are generally referred to atypical employees. Most of the employees are unskilled and female. Generally these employees do not enjoy decent working conditions. This is despite progressive labour legislation. The minimum protection they do enjoy is insufficient to provide a decent lifestyle. The purpose of this article is to demonstrate why many workers and employees in the hospitality industry are excluded from the legislative protection regarding individual rights as well as from the benefits derived from union representation.*

Introduction

The plight of workers in the hospitality industry or sector is characterised by the employment of unskilled mainly female non-standard employees. Generally these employees do not enjoy decent working conditions. This is despite progressive labour legislation. The minimum protection they do enjoy is discussed and the reasons that these workers are limited only to bare minimum standards is explored. The purpose of this article is to demonstrate why many workers and employees in the hospitality industry are excluded from the legislative protection regarding individual rights as well as from the benefits derived from union representation. Secondly, the provisions of the 2015 amendments to the Labour Relations Act 66 of 1995 (LRA) that were enacted to address and remedy these anomalies are investigated. Given the fact that a majority of workers and especially vulnerable workers in the hospitality industry are women, the 2014 amendments to the Employment Equity Act which was enacted to promote affirmative action and prevent discrimination, are discussed.

The Labour Relations Act (LRA) is the centrepiece of the South African legislation and is the main source of legislative individual rights for employees. The LRA unashamedly encourages collective bargaining as a means for trade unions to achieve better working terms and conditions for employees. Since many workers in the hospitality industry do not qualify as employees in terms of labour legislation, including the LRA, they remain unprotected regarding individual employee rights. Secondly, many workers in

the hospitality industry, whether they qualify as employees or not, are not represented by trade unions and are therefore denied the advantage of collective bargaining between trade unions and employers as a means to improve their working terms and conditions of work.

Hospitality sector profile

According to research undertaken by Labour Research Service “The hospitality sector has grown increasingly quickly over the last decade and is now one of the fastest growing sectors in the economy.”¹ Hospitality forms part of the tourist industry and includes accommodation - hotels, bed & breakfasts, caravan parks, camping sites, inns, game lodges and time sharing of apartments at resorts and the food and beverage sector - restaurants, coffee shops, tearooms, fast food outlets as well as other catering services. Tourism is the fourth largest generator of Gross Domestic Product in South Africa.² The hospitality industry makes up 67% of all tourism in South Africa, followed by travel which constitutes 16% of the tourism sector.³ “Hospitality is by far the largest subsector in the industry with a total of 16 444 registered employers at 40430 enterprises in 2009. The vast majority of these are very small, micro and medium sized enterprises making up 90% of the sector, with very few large enterprises. The majority of hotels and restaurants are small enterprises employing less than 10 employees. Large establishments employ only 1.4% of the employees in the industry.”⁴

The hospitality industry is characterised by informalisation of the workforce. This entails the use of *inter alia* workers who are employed on a part-time basis, or for a fixed term, or on a temporary basis, or scheduled and seasonal work which is tenuous and insecure. Shift work, seasonal work and part-time work is particularly prevalent in the hospitality industry given the nature of the services offered. Often core, permanent employees work in the same jobs as permanent core staff.⁵ Furthermore the number of core, permanent workers has declined over the last twenty years or so as a

¹ Michelle Taal “Organising in the Hospitality Sector in South Africa” *Labour Research Service South Africa*, November 2012, 3.

² Webster, E. et al, 2012, “Working in the Hospitality Industry in Gauteng”, Society, Work and Development (*SWOP*) Institute, South Africa: University of the Witwatersrand, 5.

³ “A Review of the Economic Profile and Structure of the Hospitality Industry in South Africa: Investigations into Wages and Conditions of Employment in the Hospitality Sector.” Human Sciences research Council (HSRC), 2005, 5-4, 16.

⁴ Michelle Taal “Organising in the Hospitality Sector in South Africa” *Labour Research Service South Africa*, November 2012, 4.

⁵ “A Review of the Economic Profile and Structure of the Hospitality Industry in South Africa: Investigations into Wages and Conditions of Employment in the Hospitality Sector.” Human Sciences Research Council (HSRC), 2005, 5-4, 6.

consequence of outsourcing and restructuring. More than half of hotel staff is not employed by hotels but by different service providers.⁶

The hospitality industry is a labour-intensive industry and working conditions are pressurized with long and irregular hours, low wages and a lack of job security.⁷ Furthermore, the prevalence of outsourcing and the use of labour brokers has resulted in a drop in wage levels, has impacted negatively on job security and workers in the industry are often not provided with benefits such as medical aids or pensions.⁸

The result of this is twofold: Firstly, many of these employees do not qualify as employees qua the legislation and therefore are not protected regarding individual rights. Secondly, even if they do qualify as employees in terms of the legislation, they are often not represented by trade unions as a result of inter alia, logistical difficulties in recruiting and gathering workers together who work shift work, seasonal and part-time work.

What follows is a discussion on how the 2015 amendments to the LRA have attempted to extend the net of legislative protection to certain atypical employees who up till now fell beyond the net of legislative protection. Given the prevalence of female workers in the hospitality industry, the 2014 amendments to the Employment Equity Act are explored. Following this, how the 2015 amendments to the LRA have attempted to encourage union representation of part-time, casual and fixed term employees and employees employed by TES's is discussed.

The extension of the net of protection in terms of the 2015 LRA amendments

The latest amendments to the LRA seek to protect three categories of non-permanent employees, namely employees employed by a TES, employees on fixed term contracts, and part-time employees.

⁶ Webster, E. et al, 2012, "Working in the Hospitality Industry in Gauteng", Society, Work and Development (SWOP) Institute, South Africa: University of the Witwatersrand, 5.

⁷ Ibid.

⁸ Michelle Taal "Organising in the Hospitality Sector in South Africa" *Labour Research Service South Africa*, November 2012, 13.

Regarding employees of TES, the new section 198(A) of the LRA provides that employees who earn below a certain threshold who work for more than three months for the client are considered to be employees of the client, unless the employee works as a substitute for somebody who is temporarily absent. Furthermore, the section provides that termination of the employee's services by the TES, whether at the insistence of TES or the clients in order to avoid "deemed employment," is considered to be a form of unfair dismissal. The section also provides that "deemed employees" must on the whole be treated not less favourably than comparable employees unless justifiable reasons exist for differentiation in treatment. In terms of section 198(D)(2) justifiable reasons include seniority, experience, length of service, merit, quality or quantity of work and any other similar criteria. The provision specifically provides that affordability on the part of the employer is not a justifiable reason.

Section 198(B) provides protection for employees on fixed term contracts. In terms of the section an employee may only be employed on a fixed term contract for more than three months in circumstances where the nature of the work is of a limited or definite duration or there is a justifiable reason for fixing the term. A justifiable reason includes: replacing an employee who is temporarily absent; where there is a temporary increase in work that is longer than 12 months; so that a student can gain experience; where a person is engaged for a specific and limited duration project; work for a non-citizen with a work permit; seasonal work; a public works scheme; where there is external funding; or the person has reached retirement age. An employee who is on a fixed term contract the duration of which is longer than three months may on the whole not be treated less favourably than permanent employees performing the same or similar work, unless there are justifiable reasons. Justifiable reasons are the same as those mentioned above. Employees on fixed term contracts must be provided with equal access to opportunities for vacancies from the first day of their employment with the employer. Employees on fixed term contracts the duration of which is longer than 24 months are entitled to severance pay unless alternative employment on similar terms and conditions is provided or offered prior to the expiry of the fixed term contract. These protective provisions are not applicable to employees who earn above the threshold, or where there is a collective agreement, statute, or sectoral determination which allows for a fixed period. These provisions are also not applicable if the employer employs less than 10 employees or the employer employs less than 50 employees and whose business has been in operation for less than two years.

In terms of section 198(C), a “part-time employee” is defined as an employee who works shorter hours than a comparable full-time employee and is paid according to the time worked. A “comparable full-time employee” is an employee who is paid for a full day and is identifiable as a full-time employee in terms of custom and practice. This section is not applicable during the first three months of employment. It is also not applicable if the employee earns more than the threshold, or works less than 24 hours per month, if the employer employs less than 10 employees or if the employer employs less than 50 employees and the business has been in operation for less than two years.

Part-time employees may not be treated less favourably than equivalent full-time employees unless it is justified. The justifiable reasons are the same as those mentioned above. After three months, part-time employees must be provided with the same access to opportunities for vacancies as well as access to training and skills development.

As progressive as this legislation might be, it is no guarantee that the vulnerable seasonal employees will be protected.

Furthermore, even if these legislative protections are implemented, seasonal workers will often be excluded from such protection because the protection only comes into force when an employment contract lasts for longer than three months. The duration of seasonal workers’ contracts is often less than three months thus excluding seasonal workers from the protection provided in terms of the amendments to the LRA.

As stated above, very small, micro and medium sized enterprises make up 90% of the hospitality and the majority of hotels and restaurants are small enterprises employing less than 10 employees. Large establishments employ only 1.4% of the employees in the industry.”⁹ Since the provisions in the 2015 LRA amendments that are designed to provide protection for part-time employees (section 198(C)) and fixed term employees (section 198(B)) are not applicable if the employer employs less than 10 employees or the employer employs less than 50 employees and whose business has been in operation for less than two years, they are not applicable to most workers and employees in the hospitality sector. Consequently their plight will remain the same.

⁹ Michelle Taal “Organising in the Hospitality Sector in South Africa” *Labour Research Service South Africa*, November 2012, 4.

2014 Amendments to the Employment Equity Act¹⁰

Section 6 (1) of the Employment Equity (EEA) prohibits direct and indirect unfair discrimination on grounds of gender, sex, pregnancy, marital status, and family responsibility in both access (recruitment) and treatment (job classification, remuneration, employment benefits, employment terms and conditions, promotion and dismissal). Where discrimination is alleged on one of the listed grounds, the employer bears the burden of proving that the discrimination is fair or justified. Discrimination can be justified or fair if it is necessary as an inherent requirement of the job or the reason for the discrimination is affirmative action.

The 2014 amendments to the EEA added the words in section 6(1) “or on any other arbitrary ground” after the list of prohibited grounds for discrimination. This addition leaves no doubt that claims for equal pay based on discrimination can now be brought in terms of section 6(1) of the EEA. The following sections have also been added to section 6 of the EEA:

(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) is unfair discrimination.

Unfortunately this addition seems to address only one aspect of gender pay discrimination, namely the situation in which men and women do the same or similar work, or work of similar value. Therefore the law does not address the concentration of women in sex-typed jobs, which are concentrated in lower paying occupations such as unskilled workers in the hospitality industry, or the disproportionate share of low-ranking positions held by women and the lower earnings relative to those of men with similar training and experience.

The 2014 amendments to the EEA, section 10(6) of the EEA provide that if an employee earns less than the threshold determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, that employee may refer a dispute about discrimination, which includes sexual harassment, to the Commission for Conciliation Mediation and Arbitration (CCMA). This provision renders access to justice accessible to the poorer members of community since access to the procedures provided by the CCMA free of charge.

¹⁰ 55 of 1998.

Minimum conditions of employment set by the sectoral determination

As mentioned above, the LRA provides machinery for collective bargaining at sectoral level, on an industry by industry basis, for the attainment of collectively bargained working conditions and wages. More than 70% of workers in the hospitality sector are not covered by collective agreements.¹¹ This is a consequence of the logistical and other impediments facing unions in the recruitment and organisation of members in the hospitality industry that are discussed below. Therefore, most workers in the hospitality industry are only protected by the sectoral determination that covers the sector. The sectoral determination provides minimum wages and working conditions for the protection of workers in industries that typically employ workers who are vulnerable and easily exploited.

The sectoral determination is a safety net in cases where union representation is low and wages and conditions of employment have not been set by means of collective bargaining between employers and trade unions at a bargaining council for that particular industry. The hospitality industry determination sets wages in accordance with the size of the enterprise.¹² There are therefore wages set for enterprises in the hospitality industry that employ more than ten employees and wages set for enterprises in the hospitality industry that employ less than ten employees. The wages as set by the 2015 sectoral determination are extremely low. They are as follows:¹³

HOSPITALITY SECTOR MINIMUM WAGES AS FROM 1 JULY 2015

TABLE 1:

Table 1: Minimum wages for employers with 10 or less employees

Minimum rate for the period			Minimum rate for the period		
1 July 2014 to 30 June 2015			1 July 2015 to 30 June 2016		
Monthly	Weekly	Hourly	Monthly	Weekly	Hourly
R2 601.88	R600.48	R13.34	R 2 760.59	R 637.10	R 14.15

TABLE 2:

Table 1: Minimum wages for employers with more than 10 employees

¹¹ Webster, E. et al, 2012, "Working in the Hospitality Industry in Gauteng", Society, Work and Development (SWOP) Institute, South Africa: University of the Witwatersrand 6.

¹² <http://www.mywage.co.za/main/salary/minimum-wages/hospitality>

¹³ <http://www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-14-hospitality/>

Minimum rate for the period			Minimum rate for the period		
1 July 2014 to 30 June 2015			1 July 2015 to 30 June 2016		
Monthly	Weekly	Hourly	Monthly	Weekly	Hourly
R2 900.08	R 669.30	R14.87	R 3 076.98	R 710.12	R 15.77

The sectoral determination also provides for minimum benefits that a worker in the hospitality industry is entitled to: These minimum conditions provide as follows:

Hours per day: An employee may not work more than 45 hours in a week (nine hours a day for an employee who works five days or less in a week and eight hours a day if the employee works more than five days in a week).

Remuneration: An employer must pay an employee in respect of each hour or part thereof (excluding overtime) worked by an employee on any day other than a paid holiday or a Sunday, not less than the hourly minimum rate.

Sick Leave: During every 36 month cycle an employee is entitled to paid sick leave equal to the number of days the employee would normally work during a period of 6 weeks.

Maternity leave: An employee is entitled to a minimum of four consecutive months unpaid maternity leave.

Family responsibility leave: Full time employees are entitled to three days paid responsibility leave.

Annual leave: Employees are entitled to three weeks leave per annum. This amounts to 15 days or one day for every seventeen days worked or one hour for every 17 hours worked.

Unemployment insurance: The Unemployment Insurance Act has been amended to include the hospitality sector.

Bonus: Employees in the hospitality sector are entitled to an annual bonus at the end of each year equivalent to one month's salary.

From the above it is clear that the sectoral determination provides for a bare minimum of working conditions and the minimum wage levels are deplorably low.

The failure of trade unions to organise this sector constitutes a major obstacle to the attainment of protection and improved wages and working conditions for the workers in this sector. In order to improve the lot of these hospitality workers it is necessary for unions to organise and recruit members

so that better wages and working conditions can be negotiated at sectoral level at the bargaining councils. However, there are many obstacles facing unions in the hospitality industry.

Reasons for the lack of union representation in the hospitality industry

Research undertaken by the Labour Research Service identified the following obstacles and challenges for union organisation and recruitment in the hospitality sector:¹⁴ The nature of the sector poses challenges: The wide diversity of the hospitality sector with “covering everything from five-star hotels to camping sites bring challenges to unions for organising workers who find themselves in very different circumstances and conditions despite being in the same sector. Not just in terms of diversity of establishment but also size of establishment, where 90 per cent of workers are in very small locations with two or three other workers, presents challenges.”¹⁵

The nature of work in the hospitality industry with the widespread use of part-timers,¹⁶ shift work,¹⁷ fixed term contract workers¹⁸ casual workers,¹⁹ employees provided by TES's, and the prevalence of outsourcing²⁰ all pose problems for unions wishing to recruit and organise workers within the industry.²¹ Furthermore, these informal forms of employment make it difficult for trade unions to ensure regular payment of union dues.²²

¹⁴ Michelle Taal “Organising in the Hospitality Sector in South Africa” *Labour Research Service South Africa*, November 2012, 19-22.

¹⁵ *Ibid*, 19

¹⁶ Part-time employees are those employed on a continuous basis but not on a full-time basis.

¹⁷ Shift work results in workers working at night and weekends. This is prevalent in the hospitality industry because hotels, lodges, bed and breakfasts must operate and attend to clients 24 hours a day, seven days a week. It is obvious that these irregular working hours make it difficult for trade unions to gather workers together at the same time and to recruit members.

¹⁸ A fixed term contract terminates on the expiry of its duration. Its termination does not constitute a dismissal unless there is a reasonable expectation of renewal on the part of the employee. Seasonal workers are usually employed on fixed term contracts.

¹⁹ Casual workers are usually employed for a day at a time on an ad hoc basis if and when the provider of work requires their services.

²⁰ When certain services such as cleaning or catering are outsourced to other enterprises, this often results in workers losing their jobs or being employed by those enterprises at with inferior wages, benefits and working conditions.

²¹ Michelle Taal “Organising in the Hospitality Sector in South Africa” *Labour Research Service South Africa*, November 2012 22.

²² Sahra Ryklief “A Confusion of Categories” A case study of the organisation of casual and contract workers in the South African Commercial, Catering and Allied Workers Union (SACCAWU) 2/1/2013, 12.

It is difficult for trade unions to recruit these types of employees: It is difficult to arrange meetings with workers who work at night in order to introduce the trade union to them and to recruit them. Precariously employed workers such as those employed by TES's or those who are employed part-time or on a fixed term basis are often do not join trade unions for fear of losing their jobs. Such workers who are desperate for work are the most vulnerable and it is easy for employers to intimidate them and prevent them from joining trade unions.²³

Another challenge facing trade unions wishing to recruit members and organise in the hospitality industry is the difficulty in gaining access to the employers' premises. Hotels, bed and breakfasts, lodges and the like need to provide an atmosphere conducive to leisure and luxury. This renders managers averse to allowing trade unions on the premises as these meetings may have a disruptive effect on the atmosphere in a hotel or restaurant.²⁴

The fact that the majority of workers in the industry are women also creates challenges for unions. Women are more vulnerable and more susceptible to bullying from managers thus preventing them from joining trade unions. Another problem is that union structures are still dominated by men which often results in the trade unions being insensitive to specific needs of women such as maternity and sexual harassment issues.²⁵

The informalisation of the sector and the employment of large numbers of immigrants has resulted in management strategies of dividing employees and workers based on immigrants and locals and core full time employees and informal workers. Workers are in competition with each other. Vulnerable informal employees and immigrants who are ignorant of their rights and often in South Africa illegally accept abusive and exploitative conditions because they are desperate, they are ignorant of their rights and are often in South Africa illegally. This "sews divisions among workers who see immigrants as destroying the hard won gains for conditions that South Africans have fought for as well as making it more difficult for locals to get jobs."²⁶ This management strategy of dividing workers and discouraging solidarity amongst workers serves to minimise trade union membership.

²³ Michelle Taal "Organising in the Hospitality Sector in South Africa" *Labour Research Service South Africa*, November 2012, 22.

²⁴ Sahra Ryklief "A Confusion of Categories" A case study of the organisation of casual and contract workers in by the South African Commercial, Catering and Allied Workers Union (SACCAWU) 2/1/2013, 12.

²⁵ Michelle Taal "Organising in the Hospitality Sector in South Africa" *Labour Research Service South Africa*, November 2012, 20.

²⁶ Ibid 21.

The 2015 LRA amendments regarding union representation

These amendments attempt to provide for the organisation of employees engaged by a TES. Section 21 now provides that in determining whether a trade union is sufficiently representative and therefore has the right to certain organisational rights, commissioners must consider the composition of the workforce including non-standard employment. Secondly the amendments now provide that if there are TES employees, the trade union may organise at either the TES or the client's premises.

Since non-standard informal employees will be taken into account in determining trade union representivity and consequently access to organisational rights these provisions may go some way in ameliorating trade union representation in sectors such as the hospitality sector that have been informalised and employs a large percentage of non-standard employees. However it is doubtful that these provisions will have a major effect on union organisation in the hospitality sector given the obstacles and challenges facing trade unions in the recruitment and organisation employees in this sector.

Conclusion

Despite the fact that the centrepiece of South African labour legislation, namely the LRA is considered to be a very progressive and has been commended internationally it has failed to provide adequate protection for the majority of employees and workers in the hospitality industry. The two means of achieving employee protection, namely the provision of individual rights by means of legislative protection and the achievement of rights by means of collective bargaining by trade unions, have not been applied to the majority of workers in the hospitality industry. Despite innovative amendments to the LRA to extend the net of protection to non-standard employees, the provisions regarding part-time and fixed term employees exclude employers who employ less than ten employees. Since the majority of employers in the hospitality industry employ less than ten employees, the effect of these amendments to ameliorate the lot of employees in the hospitality sector will be minimal. Therefore workers in the hospitality sector have the barest minimum protection in terms of the industry sectoral determination.

Regarding the attainment of better wages and working conditions by means of sectoral level collective bargaining, this has not been possible given the challenges faced by trade unions in the hospitality sector in recruiting employees in the industry, especially non-standard employees. The amendments to section 21 of the LRA may go some way to extend trade union representivity as non-standard employees must be considered in the

determination of whether a trade union is sufficiently representative and thus entitled to organisation rights.

The 2014 amendments to the Employment Equity Act address only one aspect of gender pay discrimination, namely the situation in which men and women do the same or similar work, or work of similar value. The amendments to the EEA are commendable however, for rendering access to justice regarding disputes about discrimination and sexual harassment accessible to the poorer members of community. This is particularly relevant for the tourist industry given the high proportion of unskilled, female workers.