

CALLING THE CAPE

# SOUTH AFRICAN EMPLOYMENT LAW

*A Review of Implications for the Off-Shore Business Process  
Outsourcing and Contact Centre Industries*

Prepared by Stephen Beukes

*Employment Relationship Coaching, Advice and Support*

## **1 EXECUTIVE SUMMARY**

Participants in the business process outsourcing and contact centre industries are heavily dependent on the demands of clients. Businesses must be in a position to meet a range of client driven specifications without facing the prospect of onerous and restrictive employment conditions. In addition such businesses must be in a position to adjust the size of their undertakings in line with client demand.

In this context the key question to be asked regarding South African Labour Law is whether sufficient flexibility is offered in a number of key aspects. These include the ability to:

- Set pre-conditions to employment in line with client demands;
- Arrange working conditions including hours of work to meet client demands;
- Set and implement performance standards; and
- Adjust the size of workforce arising from changes in demand.

It is our view that South African Labour Law offers the opportunity to employers to arrange working conditions to suit their operational requirements. This report addresses these key issues and illustrates the ease with which sufficient flexibility may be achieved.

In addition to these questions of flexibility the prospective employers in the South African Market will wish to have a clear understanding of the liabilities it can expect to be confronted with. None are onerous and this report provides a perspective on the responsibilities of a South African Employer.

## **2 MEETING CLIENT DEMAND**

For businesses driven by client demand and the need to meet defined specifications within restrictive cost constraints a number of key questions regarding employment conditions arise. Set out below is a review of those issues that we understand to be central to a prospective employer's consideration of the opportunities offered by the South African market.

### **2.1 Hiring**

Prospective employers will wish to know whether they are able to set preconditions to employment and to undertake the tests necessary to establish whether applicants meet the standards they require. This is a particular consideration for firms whose clients demand that certain minimum standards be met.

The employer's need to engage staff who meet the operational requirements of the undertaking is recognised in South African employment law. While protections against unfair discrimination against individuals for arbitrary reasons such as race and religion are legislated an employer may set pre-conditions to employment relevant to the inherent requirement of the position.

A prospective employer may for example set the ability to speak English as a requirement for employment where the client base is English speaking. Background checks such as to establish criminal record or credit history may be undertaken when these are demanded by a primary client (such information is easily accessible). Medical and other tests warranted by the requirements of the enterprise may also be undertaken.

*For a more detailed review of law on this issue refer to later sections of this report. In particular see section 4.1 and 4.2 relating to hiring and employment equity.*

### **2.2 Working Conditions**

An issue of particular concern to businesses servicing offshore clients is whether working hours can be arranged to meet the demand of client markets without being required to pay a premium for hours worked outside standard hours.

In South African employment law the setting of conditions of employment is, for the most part, left to employers and employees to set by way of contract. Although certain minimum conditions are legislated these are basic and are aimed at protecting employees vulnerable to exploitation. In our view these requirements are easy to meet and are sufficiently flexible to allow employers to arrange operations without significant premiums. Key questions are the following:

- **Can employees be required to work on South African public holidays without paying a premium?** Although certain public holidays are legislated these may all be exchanged for other days off. A business servicing the American market might require staff to work on the South African “Freedom Day” and grant time-off on Thanksgiving.
- **Can shifts be arranged to the hours of an offshore market even if these hours are at night?** An employer may arrange working hours to meet operational requirements. There is no prohibition on night work although an employer employing both night and day shifts is expected to pay a premium to night workers. This premium is not legislated and may be set by contract. The employer is required to ensure that staff have access to transport in cases where shift end during night hours but is not expected to carry the cost of this transport.
- **Is a premium to be paid for overtime work and when?** A maximum of 45 hours of work per week is legislated and a premium is payable for hours in excess of this. When these hours are worked can, however, be contracted by the parties and premiums are not payable simply because of when the hours are worked.

*For a more detailed review of law on this issue refer to later sections of this report. In particular see sections 4.3 and 4.4 relating to employment contracts and arranging working hours.*

### **2.3 Setting Performance Standards**

A particular concern for businesses working to contracts with primary clients setting out specific performance requirements is the ease with which performance standards required of employees can be enforced.

The right of an employer to set and implement performance standards relevant to the inherent requirements of the business is recognised in South African employment law. Termination of a contract of employment on grounds that an employee did not meet the required performance standard is legislated as fair.

An employer may, therefore, set performance standards as required by the primary client. These must be communicated to employees in advance, as should any failure to meet the standard. Where there is no improvement the contract may be terminated.

An associated question for businesses making substantial development and training investment is whether employees can be held liable for such costs. Employment contracts can provide for such liability and the manner in which an employee will be required to make good on such debt. Such contracts are enforceable.

*For a more detailed review of law on this issue refer to later sections of this report. In particular see section 4.7 relating to dismissal.*

### **2.4 Reducing the Workforce**

Businesses in the BPO and contact centre industries that are dependant on contracts to primary undertakings must be in a position to downscale their operations at relatively short notice and without the prospect of punitive costs.

The right of an employer to terminate contracts of employment for reasons of operational requirements is legislated as fair. An employer may dismiss employees for any reason related to the business requirements including cost constraints and the termination or reduction in demand from a primary client.

An employer wishing to effect terminations for operational requirements can follow a simple process, which includes advising employees of the reasons for the proposed

---

dismissals and allowing an opportunity for employees to submit proposals on issues such as alternatives to dismissal and the manner in which employees to be dismissed are to be selected. Decision making on all these issues rests with the employer and dismissals can be implemented within tight timeframes.

Employers dismissing employees for reasons of operational requirements are required to pay a severance package. A minimum of one week's pay for each year of service is legislated.

*For a more detailed review of law on this issue refer to later sections of this report. In particular see section 4.7 relating to dismissal.*

### 3 THE LEGISLATIVE FRAMEWORK

The South African Government has taken a relatively non-interventionist approach to the employment relationship, legislating only in certain key areas and leaving employers and employees to contract the relationship. The largest portion of the legislation is the product of engagement with organised business and labour. As a result the legislative framework enjoys broad based support contributing to a relatively stable labour market.

The policy objective of Government has been to establish a labour relations environment in which employer and employee are left to regulate their own relationship. It has therefore refrained from over legislating the details of the employment relationship. The result is a well-structured Industrial Relations system that includes provision for the timeous resolution of labour disputes. Where the state has chosen to legislate minimum conditions or place responsibilities on employers, these are reasonable and may be implemented within the operational constraints of the business.

The state has chosen to intervene in the following areas:

#### 3.1 The Broad Labour Relations Framework

The most significant piece of South African labour legislation, the *Labour Relations Act (Act 66 of 1995)* which aims to promote:

- Orderly collective bargaining,
- Collective bargaining at sectoral level
- Workers' participation and decision making at the workplace, and
- The effective resolution of disputes

Although parties are not compelled to bargain the Act establishes certain rights of employers and employees to organize collectively and establishes the framework within which this should take place.

The Act further establishes dispute resolution mechanisms

---

### **3.2 Basic Conditions of Employment**

are established by the *Basic Conditions of Employment Act (Act 75 of 1997)*. These minimum conditions include some core rights which cannot be varied by contract or collective agreement. These conditions are not particularly onerous and offer some flexibility in respect of such issues as the arrangement of working hours.

### **3.3 Unemployment Insurance**

is provided for by the *Unemployment Insurance Act (Act 30 of 1966)* which requires a 1% of salary contribution from employer and employee to a fund from which employees, who have lost their income, may claim some relief.

### **3.4 Workplace safety and Compensation for Injuries**

are regulated by a pair of statutes – the *Occupational Health and Safety Act (Act 85 of 1993)* and the *Compensation for Injuries & Diseases Act (Act 130 of 1993)*. Both pieces of legislation have significant implications for employers in industrial and related sectors.

In general the OHS Act defines the extent of the employer's obligation to provide safe working conditions. Of particular interest is that companies employing more than 20 staff establish safety committees which are to monitor compliance.

The COIDA Act provides for a fund contributed to by employer and employee against which any claims by employees for compensation for injuries or illnesses suffered in the course of employment. This defines the compensation an employee may be entitled to and protects the employer from such claims.

### **3.5 Employment equity and skills development**

receive special attention with the Employment Equity Act (Act 55 of 1998), the Skills Development Act (97 of 1998) and its sister the Skills Development Levies Act (Act 9 of 1999).

Motivated by South Africa's history of discrimination and the identification of skills development as a requirement for global competition this suite of legislation places obligations both operational and financial on the employer. Significant compliance incentives are however available to employers.

The full impact of this legislative framework on key employment processes and Issues is examined in more detail in the section following.

## 4 KEY EMPLOYMENT PRACTICES AND ISSUES

Businesses wishing to employ staff in South Africa can expect to be required to comply with a set of employment standards influenced by a constitution recognizing fundamental human rights and a government committed to meeting its obligations as a member state of the International Labour Organisation (ILO). This should not, however, be cause for concern for employers cautious at the prospect of having to meet onerous employment standards.

Compliance with South African employment standards would position an international business required to benchmark against international standards exceptionally well.

### 4.1 Hiring

The process of hiring staff in South Africa is constrained by prohibitions against unfair discrimination and the need to address imbalances arising from previous such discrimination. The legislation does, however, recognize the right of employers to employ to the inherent requirements of their business. Of particular note is the following:

- **Unfair discrimination** on any arbitrary grounds is prohibited. This includes discrimination on any of the grounds prohibited in the constitution including race, gender, religion, sexual orientation, culture, language and birth. Discrimination based on the inherent requirements of the job is, however, not considered unfair. *While arbitrary discrimination on the basis of language would be unfair, an employer whose clientele were entirely German could require applicants for employment to be able to speak German.*
- **Pre-employment testing** must be justified by the inherent requirements of the job. Psychometric and similar forms of assessment must be proven to be valid, reliable and not biased against persons or groups.
- **Medical testing** is prohibited unless it is permitted or required by legislation or is justifiable in the light of medical facts, employment conditions, social policy the fair distribution of employee benefits or the inherent requirements of the job. When an employer is in doubt it may apply to have an order made in this regard.

Testing for HIV/ AIDs is specifically prohibited unless ordered by the Labour Court.

- **Employment Equity** initiatives designed to address the consequences of previous discrimination are not regarded as unfair discrimination. As described below certain employers are required to have plans in place to ensure better representation of the economically active population.

#### **4.2 Employment Equity Plans**

The Employment Equity Act describes Employers' responsibility to address discrimination in the workplace and to take steps to address the consequences of previous discrimination.

In the first instance, discrimination for arbitrary reasons, including those described in the constitution, is prohibited. Employers must ensure that their employment practices and working conditions do not give rise to such unfair discrimination.

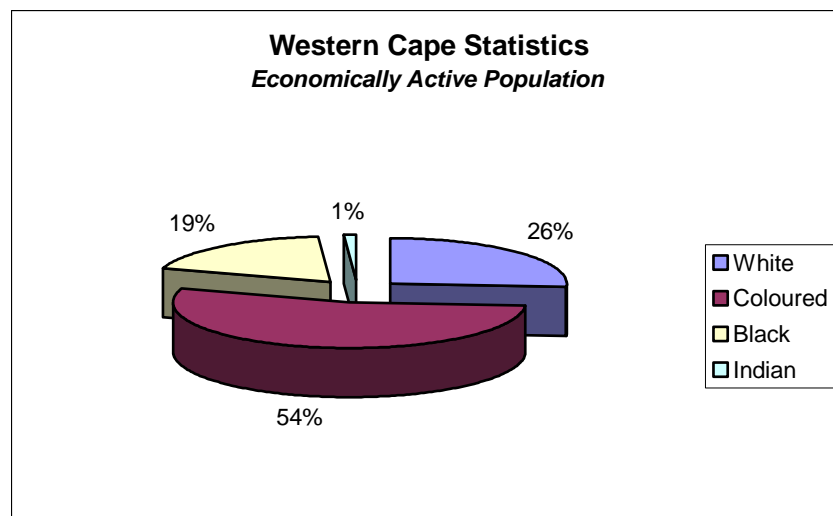
The Act places a second, more substantial, burden on employers who employ more than 50 staff or whose turnover exceeds that specified in the Act. These designated employers must undertake an analysis of their workplace, consult with their workforce and prepare a plan to identify and correct under representation of designated groups. These plans must be submitted to the Department of Labour and progress reported on an annual basis.

An employer's progress will be evaluated against the following criteria:

- The extent to which the workforce reflects the demographic profile of the national and regional economically active population;
- The pool of suitably qualified people from designated groups available for employment;
- Economic and financial factors relevant to the sector;
- The employer's present and anticipated financial circumstances;
- The employer's labour turnover;

- The number of present and planned vacancies that exist in the organization.

While employers are required to plan and take action to ensure that persons from designated groups enjoy equal opportunity and are equitably represented in all occupational categories and groups, the Act does not prescribe quotas. Employers are not required to take action that would establish an absolute barrier to the prospective or continued employment of people who are not from the designated groups.



### 4.3 Contracts and Conditions of Employment

An employer is required to provide each employee with a contract of employment setting out the particulars of employment in writing (*see the attached guide issued by the Department of Labour as an indication of the minimum requirement*).

South African Law recognizes the contract of employment as the primary source of the terms and conditions of employment. There are, however, certain core rights described in the Basic Conditions of Employment Act that cannot be varied by contract or collective agreement. Of particular note are the following:

- **The maximum hours of work** are limited to 45 per week. These hours must be arranged within the framework provided for in the Act. This framework does, however, allow for some flexibility to allow the employer to arrange hours to the

inherent requirements of the business. *(this is described in greater detail later in the document).*

It should be noted that the provisions relating to hours of work do not apply to employees earning in excess of ZAR 89 455 per annum.

- **Annual Leave** is set at 15 working days per annum on full pay, which is to be taken in accordance with an agreement between employer and employee.

In addition to these days of annual leave, an employee may take up to three days leave per annum for certain limited reasons related to family responsibility such as when an employee's child is sick or in event of the death of an immediate family member.

- **Sick Leave** is set at 36 days within a "sick leave cycle" of 36 months. The employer may insist on proof of incapacity (such as doctor's certificate) were an employee has taken more than two days leave or has been absent on more than two occasions in an 8 week cycle.
- **Maternity Leave** of up to 4 months may be taken by an employee. The employer is not, however, obliged to compensate the employee for this leave.
- **Administrative responsibilities** the employer is required to comply are described in the Basic Conditions of Employment Act which include the following:
  - The employer must provide the employee with written particulars of employment;
  - Basic employee records must be kept;
  - Employees must receive a payment advice with each payment.
- **Sectoral determinations** may be issued by the Minister of Labour, setting specific minimum conditions including minimum salaries in a particular industry or sector. The minister has limited his use of this opportunity to industries where employees are particularly vulnerable such as the agricultural and domestic sectors. *No determination is in place for the call centre industry.*

The remaining terms of the employment contract are to be determined by the contracting parties. The Act does not set minimum salaries nor are deductions in favor of pension or medical aid funds required.

#### **4.4 Arranging Working Hours**

Working hours must be arranged within the framework provided for in the Basic Conditions of Employment Act. Within this framework employers may arrange working hours to the inherent requirements of the business.

Particular constraints are the following:

- **Overtime** is limited to 10 hours per week or 3 hours on a day. Some flexibility is allowed with the possibility of compressing the working week or averaging hours over a period.
- **Meal Intervals** must be provided to employees who work for more than 5 continuous hours. Some flexibility is permitted in that employees may agree to have the meal interval reduced.
- **Daily and Weekly rest periods** are required between shifts – 12 hours between each shift and one weekly break of no less than 36 hours. These may be adjusted by agreement.
- **Night Work** is permitted but must be compensated for with an allowance, which may be monetary or a reduction in working hours. Transport to and from the employee's home must be available.

In addition the employer must make available medical assessments to staff regularly working night shifts.

- **Public Holidays** may be worked on by contractual agreement but the employee must receive a premium for this work. Public holidays may be exchanged for days off at another time.

#### **4.5 Trade Unions, Collective Bargaining, Strikes and Lockouts**

South African law recognizes the right of employees and employers to organize themselves into trade unions and employer organizations. Trade Unions which are able to organize a sufficiently representative portion of employees in a specific workplace are entitled to claim certain 'organizational rights". These rights include access to the workplace to canvass members, the right to elect trade union representatives and to have trade union membership fees deducted from salaries by the employer.

The law does not, however, compel employers bargain with trade union preferring a voluntary approach to collective bargaining. Nonetheless it is public policy to encourage employers and employees to engage in collective bargaining and to reach agreements, which will regulate the employment relationship. To this end employers and employees in particular industries may form Bargaining Councils, which may reach agreements replacing legislative provisions to suite the particular requirements of that industry. *No such bargaining council exists in the call centre industry but many other industries have chosen this route including the mining, motor, building and local government sectors.*

As a means to compel an employer to bargain or to motivate a particular collective bargaining demand, employees may strike. As a complementary right, employers may lock-out employees in support of a collective bargaining demand. Neither party may initiate such action, however, without having submitted their dispute to a statutory conciliation process. In addition employees may not strike in respect of a dispute of right (*for example employees may not strike in response to a dismissal they perceive to be unfair – this is a matter of right which is to be resolved by arbitration and not collective bargaining.*) Employees who participate in an unprocedural or prohibited strike may be dismissed for misconduct.

#### **4.6 Training and Development**

The state has intervened in the area of training and development with the following policy objectives:

- To develop the skills of the South African Workforce;

- To increase the return on such investment;
- To encourage employers to use the workplace as an active learning environment, so that employees can acquire new skills and new entrants can gain work experience;
- To encourage workers to participate in learnerships and other training programs.

As a source of funding for this initiative employers are required to contribute 0.5 percent of the total wage bill as a skills development levy. These funds are used to fund various statutory bodies including Sectoral Education and Training Authorities (SETA's). These SETA's are, amongst other responsibilities, to develop sector skills plans, monitor and assure quality of training provided in the sector, facilitate learnership and other training programmes, and to allocate funds for training.

Employers who develop and implement training plans within this framework may claim funding from the SETA's.

#### **4.7 Dismissal**

The Labour Relations Act addresses the matter of dismissal by, in the first instance, defining some dismissals as automatically unfair. This includes dismissal on arbitrary grounds, in response to an employee insisting legislated rights or for being a trade union member.

The Act goes on to recognize three fair reasons for dismissal, which are:

- **Misconduct** which covers circumstances where an employee has contravened some work place rule or standard.
- **Incapacity** in that the employee is unable to meet the inherent requirements of the job. This could be for any number of reasons but includes poor performance or ill health.
- **Operational Requirements** may warrant dismissal were an employee's services are no longer required as a result of a change in the employer's

operational requirements. This includes the conventional retrenchment scenario in the face of economic hardship.

An employer wishing to dismiss an employee is also required to follow a fair procedure. The Department of Labor have issued a guideline in respect of misconduct and incapacity dismissals (*attached*). These are not overly onerous requiring largely the basic recognition of principles of natural justice. It is interesting to note that lawyers are excluded from these processes unless agreed to by the parties.

The process required in respect of operational requirements dismissals is defined in the Act itself (*relevant sections attached*). An employer contemplating dismissals for operational requirements must consult with the affected employees and attempt to agree on steps to mitigate the impact of the dismissals before a decision to dismiss is finalized. In the event that no agreement is possible the employer may implement its intended retrenchment program provided the retrenchment criteria are not unfairly discriminatory.

It is worth noting that the law recognizes probation and the dismissal of an employee during the probationary period will be subjected to a much less stringent test if it is disputed.

#### **4.8 HIV Aids**

HIV/AIDS is a particular concern in the workplace and the department of Labour has issued a Code of Good Practice providing guidelines to employers as to how to address this issue (*attached*). It should be noted that this code has no legislative effect but is intended as a best practice guide to employers.

Employers should be aware, however, that arbitrary discrimination on the grounds of infection is specifically prohibited. In particular pre-employment testing may only be undertaken once the Labour Court has been persuaded that this is required in the light of medical facts, employment conditions, social policy the fair distribution of employee benefits or the inherent requirements of the job. in the light of medical facts, employment conditions, social policy the fair distribution of employee benefits or the inherent requirements of the job.

---

Performance and related issues arising from infection should be managed as a form of incapacity where dismissal may be warranted if the employee is no longer able to meet the inherent requirements of the job.

#### **4.9 Dispute Resolution**

The Labour Relations Act establishes comprehensive dispute resolution mechanisms for disputes that arise in the employment arena. Aside from the dedicated Labour Court a particular innovation is the creation of the Commission for Conciliation, Mediation and Arbitration (CCMA).

The CCMA is a statutory body of conciliators and arbitrators which has the task of resolving the bulk of labour disputes (*including unfair dismissal disputes*) in a non-legalistic environment with lawyers excluded from participating except by agreement. Disputing parties must refer disputes to the CCMA for resolution within set timeframes. As a first step an attempt is made to conciliate disputes. In the event that this fails parties may request a dispute to be arbitrated. For the most part arbitration decisions are final and binding.

## **ABOUT STEPHEN BEUKES**

Stephen Beukes is an industrial relations practitioner with extensive experience in providing employment relationship advice and support. Stephen provides a comprehensive Employment Relationship consultancy service including;

- **Coaching** in the form of formal training as well as ad hoc individual and small group development.
- **Advice** regarding policy compliance, process design, employment relationship strategy and specific incident advice.
- **Support** in the facilitation of workplace disputes and consultation processes as well as the chairing of formal incapacity, disciplinary and other investigations.

Stephen's contact details are as follows:

Tel: (021) 448 9394

Mobile: (084) 658 1423

e-mail: [beebeben@mweb.co.za](mailto:beebeben@mweb.co.za)