

Employment & Labour - South Africa

Employees Transfer Automatically in Second-Generation Outsourcing Transaction

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The Labour Appeal Court has decided that the transfer of undertaking provisions in Section 197 of the Labour Relations Act apply where a service that was previously outsourced is either taken back by the original employer or passed to a new service provider. The court supported a purposive interpretation of Section 197 in its decision in *Aviation Union of SA v South African Airways*, which was handed down on October 9 2009. This decision overturns previous rulings by the court that the transfer of undertaking provisions do not apply to second-generation outsourcing because this is not a meaning that can be inferred from the plain wording of Section 197.

The court stated in this latest decision that both purposes of Section 197, as previously articulated by the Constitutional Court, have as their common denominator the continuation of employment of employees involved in the business (or service) that is transferred as a going concern. Neither purpose is served by an interpretation of Section 197 that entails job losses or prevents continuation of employment for those employees who moved with the work when the outsourcing first occurred.

Therefore, where South African Airways had previously outsourced its infrastructure and support services departments to LGM and then terminated its contract with LGM, those employees would either transfer back to South African Airways or transfer to such other party as South African Airways might contract with to provide the services in future.

This decision has far-reaching implications for employers that engage in outsourcing and will require a reassessment of strategy where an employer wishes to cancel its contract with one service provider in favour of another.

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