DLA CLIFFE DEKKER HOFMEYR

May 2013

EMPLOYMENT MATTERS

THE LATEST LABOUR LAW AMENDMENTS

Parliament's Portfolio Committee on Labour continues to scrutinise and consider the following proposed legislation:

- the Labour Relations Amendment Bill, 2012;
- the Basic Conditions of Employment Amendment Bill, 2012;
- the Employment Equity Amendment Bill, 2012; and
- the Employment Services Bill, 2012.

The above bills will seek to make amendments to the Labour Relations Act, No 66 of 1995, the Basic Conditions of Employment Act, No 75 of 1997 and the Employment Equity Act, No 55 of 1998. The Employment Services Bill will also introduce new legislation (below).

When these bills eventually come into force they will have a significant impact on labour relations in South Africa and employers should prepare themselves for the changes proposed therein. These bills have been under discussion for several years now and it is likely that they will be promulgated in substantially the same form as they are currently drafted. In this issue of Matters we will consider several of the more pertinent changes to the current legislative framework.

IN THIS ISSUE

THE EMPLOYMENT EQUITY AMENDMENT BILL AND THE NEW EMPLOYMENT SERVICES BILL

The Employment Equity Amendment Bill, 2012 (EEAB) proposes several changes to the current Employment Equity Act, No 55 of 1998 (EEA). One of the ways that it does so is by introducing a new form of unfair discrimination.

This form of unfair discrimination will regulate situations where different employment conditions are applied to different employees who do the same or similar work (or work of equal value). Unless the employer can show that differences in wages or other conditions of employment are, in fact, based on fair criteria such as experience, skill and responsibility, such conduct will constitute unfair discrimination.

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With regard to affirmative action, the Labour Department will have increased powers to fine companies who do not comply with their employment equity obligations. The quantum of fines will be increased and may now also be determined by making reference to the employer's annual turnover.

Furthermore, the group of people who benefit from affirmative action will be limited to persons who were citizens of South Africa before the democratic era (or would have been entitled to citizenship, but for the policies of apartheid), and to their descendants. This means that the employment of persons who are foreign nationals, or who have become citizens after April 1994, cannot assist employers to meet their affirmative action targets.

The amendments will also affect a company's use of contract workers. In line with proposed amendments to the Labour Relations Act, No 66 of 1995, employees who are placed with a client by a labour broker for longer than six months will be deemed to be employees of the company for the purposes of affirmative action.

The Employment Services Bill, 2012 (ESB) is a new government initiative which will set up a public 'employment services agency', and will also provide for the regulation and registration of private employment services agencies. These agencies are not labour brokers but institutions that will provide job seekers with certain services - such as matching job seekers with available work opportunities, registering job seekers, job vacancies and facilitating other employment opportunities. The Bill will also set up a nationwide database to monitor employment and assist with government's goal of creating more jobs, decent work and sustainable livelihoods.

Johan Botes and Mark Meyerowitz

GREATER PROTECTION FOR FIXED TERM EMPLOYEES

The use of fixed term contracts of employment is a necessary cost for some employers, particularly those involved in seasonal businesses.

However, there has always been concern that these contracts allow employers to exploit employees engaged on a fixed term basis by denying them the benefit of statutory and/or contractual entitlements that other, permanent employees enjoy. As a reaction to this concern the current Labour Relations Act, No 66 of 1995 (LRA) included in its definition of a 'dismissal' the failure by an employer to renew a fixed term employment contract where the employee reasonably expected that the contract would be renewed. In such circumstances the contract is effectively renewed because a failure to do so entitles the employee to claim for unfair dismissal.

The Department of Labour has now proposed amendments to the LRA that provide even more protection to fixed-term employees. The proposed amendment to s186(b) provides that a failure by an employer to permanently retain an employee, who was engaged under a fixed term contract of employment and who reasonably expected to be permanently retained on the same or similar terms, constitutes a dismissal.

The above amendment now removes all doubt as to whether an employee who reasonably expects his fixed term contract to be renewed becomes a permanent employee, or merely has his fixed term contract renewed. If the employee reasonably expected his fixed-term contract to be renewed then it will effectively be renewed. If the employee reasonably expected his contract to be renewed on a permanent basis then that is what will happen.

It is further proposed in terms of a new s198B that an employee employed on a fixed term contract for a period in excess of six months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for the differential treatment. Contravention of the new s198B will have the effect that the employee shall be deemed to have been employed indefinitely.

Section 198B effectively means that employers cannot make use of fixed term contracts that last for more than six months. However, s198B will not apply to:

- employees earning in excess of the threshold prescribed by the Minister in terms of the Basic Conditions of Employment Act, No 75 of 1997 (currently R183,008.00 per annum),
- employees who are employed interms of a statute, sectoral determination or collective agreement that permits the inclusion of a fixed term contract,

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- employers that employ less than ten employees, or an employer that employs less than 50 employees and whose business has been in operation for less than two years, unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

Furthermore, the proposed new s198B provides that an employer may engage an employee on a fixed term contract of employment for a period in excess of six months only if the nature of the work for which the employee is engaged is of a limited or definite duration, or if the employer is able to demonstrate any other justifiable reason for fixing the term of the contract. The employer bears the onus of proving at any proceedings that there exists a justifiable reason for fixing the term of the contract and that such term was agreed.

The proposed new s198B provides a list of reasons which will be considered sufficient to establish the justifiability of fixing the term of a contract of employment. Accordingly, the fixing of the term of the contract will be justified under circumstances including the following:

- the employee is replacing another employee who is temporarily absent from work;
- the employee is engaged on account of a temporary increase in the volume of work which is not expected to endure beyond twelve months; or
- the employee is engaged to perform seasonal work.

The above amendments seek to achieve a balance that considers the commercial sustainability of businesses while protecting the interests of workers who earn less than R183,008.00 per annum. The underlying principle in the proposed s198B is justifiability. Employers must be able to justify fixing the duration of an employment contract.

Gavin Stansfield and Mandlakazi Ngumbela

AMENDMENTS TO THE PROVISIONS DEALING WITH LABOUR BROKERS

Temporary Employment Services (TES), or as they are more commonly referred to, labour brokers, have been accused, particularly by trade unions, of increasing the casualisation of labour and exploiting employees.

On the other hand, members of the TES industry defend their existence by arguing that they create employment in a country where unemployment is rife and where employers cannot always commit to full-time employees. The Labour Relations Amendment Bill, 2012 (LRAB) aims to protect vulnerable individuals who are employees of TESs and who often lack the protection normally afforded to full-time employees by virtue of the Labour Relations Act, No 66 of 1995 (LRA). The LRAB seeks to regulate TESs by providing for their regulation, registration and licensing. The Department of Labour (DOL) will now also be able to access information about the number of individuals employed by TESs and where these individuals are being placed among the TESs client base.

The LRAB introduces a new definition of 'temporary services' in the proposed new s189A of the LRA. Temporary services will now mean work done by an employee of a TES for a client:

- for a period not exceeding six months,
- as a substitute for an employee of the client who is temporarily absent,
- and/or in the category of work for any period of time which is determined to be a temporary service by a Collective Agreement concluded in a Bargaining Council, or a sectoral determination.

The proposed new s198A(3)(b) of the LRA will provide that an employee who does not meet the definition of performing temporary work for a client will be deemed to be an employee of the client. The proposed s198A(4) provides further that the termination by a labour broker of an employees' assignment with a client for the purposes of avoiding s198(3)(b) will constitute a dismissal.

Temporary employment is therefore limited to genuine temporary work that does not exceed six months, unless there is a justifiable reason for the differentiation. The employee should further be employed on terms which are no less favourable

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than the terms applicable to the client's other employees performing the same or similar work. The LRAB has not defined "justifiable reason" and this will be the subject of extensive litigation in the Labour Court.

The LRAB proposes that at least three months before the amendments come into effect, the Minister of Labour (Minister) is required to issue a notice inviting persons to consult on what is deemed to be temporary services. The Minister will be required to issue a sectoral notice in this respect and the recognised categories of work will be deemed to be temporary work.

The sectoral notice issued by the Minister does not take precedence over any collective agreement that is concluded in a bargaining council, the notice does however take precedence over any sectoral determinations. The increased power the Minister acquires in this respect appears to be a move to regulating the industry more strictly.

Zinhle Ngwenya

REVIEWING CCMA ARBITRATION AWARDS: THE PROPOSED PROCEDURAL AMENDMENTS

Among other aims, the Labour Relations Amendment Bill, 2012 (LRAB) proposes streamlining the procedure to be followed when reviewing CCMA arbitration awards. It further discourages litigants from instituting review applications as a tactical ploy to frustrate or delay compliance with the award.

The amended s145(5) of the Labour Relations Act, No 66 of 1995 (LRA) will provide that a person who institutes a review application must arrange for the matter to be heard by the Labour Court within six months of commencing proceedings. However, the Court has been given the power to condone a failure to comply with this provision on good cause shown.

In terms of a new s145(6) of the LRA, judges will be required to hand down judgment in review applications "as soon as reasonably possible". This provision reiterates the need for the speedy resolution of review applications. One of the original aims of the current LRA has been the speedy resolution of labour disputes. Sixteen years after its promulgation this aim has sadly not been realised. While there are numerous reasons for the delays in finalising labour disputes, any positive steps to reduce litigation time should be welcomed.

If review applications are to be finalised speedily, litigants will have to adhere to the timelines provided for pleadings. We expect that, given the renewed imperative to quickly dispose of matters, the court will be less inclined to grant condonation for failure to comply with these timelines. This should especially assist employers who find themselves at the mercy of slow ex-employees who fail to timeously review arbitration awards handed down against them.

Employers should, however, similarly take care in managing their own review applications. They should take all necessary steps to progress the matter to avoid censure for delays in the proceedings. Employers who institute review proceedings, and then unnecessarily delay the matter, will face an increased risk of having the review application dismissed.

Johan Botes and Mark Meyerowitz

AMENDMENTS TO THE LABOUR RELATIONS ACT: GIVING UNIONS GREATER ACCESS TO ORGANISATIONAL RIGHTS

To represent their members and operate effectively, trade unions require certain privileges.

These privileges include access to the employer's premises, access to certain information, the ability to collect union dues and appoint shop stewards.

However, given the importance of collective bargaining in the national labour relations framework, the Labour Relations Act, No 66 of 1995 (LRA) has in certain instances elevated the above mentioned privileges to the status of legal rights. Specifically, a trade union is entitled to such 'organisational rights' if it is sufficiently representative of the employees employed at a particular workplace.

If a trade union's request for organisational rights is declined by the employer, the union may refer a dispute to the CMMA to determine whether the union is entitled to these rights.

Section 21of the LRA sets out considerations which a CCMA commissioner must take into account when resolving a dispute about organisational rights. Specifically, the commissioner must decide on the extent of the union's representation at the workplace with different rights applicable where a trade union is sufficiently representative, on the one hand, or enjoys majority membership in a workplace, on the other. Majority trade unions are entitled to elect shopstewards and have access to information in terms of s14 and s16 of the Acts respectively.

The Department of Labour has proposed certain amendments to s21.

In terms of the proposed amendments a commissioner determining a dispute about organisational rights will also have to consider the general composition of the workforce. This will include considering the extent to which employees are employed in non-standard forms of employment, such as through a temporary service provider or on a fixed-term contract.

It is further proposed that a commissioner be given a discretion to award the organisational rights referred to in s14 and s16 in certain circumstances where a trade union is not, in fact, the majority trade union. However, this will be subject to the proviso that:

- the trade union must already be entitled to rights in terms of s12 (access to the workplace), s13 (the deduction of union dues) and s15 (leave for trade union activities); and
- there must be no other trade union in the workplace that already has s14 or s16 rights.

Effectively, these amendments allow the CCMA to award organisational rights that traditionally require majority membership to minority unions who nevertheless have substantial membership. However, these rights will be contingent on the trade union effectively being the most representative union in the workplace.

In terms of the current Act, s18 states that an employer and a majority union may conclude a collective agreement that establishes a threshold of representativeness required for any trade union seeking to obtain organisational rights under s12, s13 and s15 (the right to access, the right to collect union dues, and the right to take leave for union activities, respectively).

Another proposed amendment to s21 will give arbitrators discretion to award organisational rights under s12, s13 and/or s15 in instances where a union does not meet the threshold established by a collective agreement in terms of s18. The threshold in the agreement may be disregarded if applying it would unfairly affect a trade union that represents a 'significant interest' or 'substantial number' of employees. The commissioner will be required to draw a balance between the majority trade union and the trade union seeking to enforce the rights.

The above amendments are aimed at promoting the inclusion of non-standard employees in the collective bargaining framework and expanding the application of organisational rights. This will effectively expand the employee pool in a workplace for purposes of procuring organisational rights. The amendments will have the effect of creating a more inclusive collective bargaining arena in the workplace. The proposed amendments may assist smaller or less representative trade unions to gain greater access into the workplace than what is currently permitted under the CCMA process stipulated in s21. Hopefully, this will lessen the need felt by smaller unions to use industrial action as the only route to obtain organisational rights previously ordained for more representative unions only. In the current climate of violent strike action, any proposal that could result in the need to use less strike action should probably be welcomed.

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