EMPLOYMENT

IN THIS ISSUE

NEW CODE OF GOOD PRACTICE ISSUED ON EQUAL PAY FOR WORK OF EQUAL VALUE

On 1 June 2015, the Minister of Labour issued a Code of Good Practice on Equal Pay for Work of Equal Value (Code) in terms of the amended Employment Equity Act (EEA).

The objective of the Code is to provide practical guidance to employers and employees on how to apply the principle of equal pay for work of equal value, in order to promote the implementation of pay equity in the workplace by all employers including the state and trade unions.

The Code applies to all employees and employers covered by the EEA and is to be read in conjunction with the Employment Equity Regulations released in 2014, as well as the Code of Good Practice on the Integration of Employment Equity into Human Resources, Practices and Procedures.

The Code is framed by s9 of the Constitution, the International Labour Organisation (ILO) Equal Remuneration Convention 1951 (No. 100) and s6(1) and s6(4) of the EEA, which prohibit unfair discrimination.

The Code seeks to implement equal pay through human resources policies, practices and job evaluation processes, as well as the management of these policies and processes within a framework of sound governance in order to ensure that the principle of equal pay is applied fairly, consistently and free from unfair discrimination.

It is important to note that the Code seeks to equalise all remuneration which includes payment in money or in kind, or both, made or owing to any person in return for working for another person. Employers should therefore examine all aspects of their remuneration policies to ensure compliance.

The Code imposes a positive duty on every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Employers should also ensure that remuneration policies and practices are applied consistently without unfair discrimination on the basis of any one or combination of the listed grounds, or on any other arbitrary ground.

The Code provides three key issues which require scrutiny when examining whether the employer is complying with its obligation to apply equal pay in the workplace. The first is whether the jobs that are being compared are the same, substantially the same or of equal value in terms of an objective assessment. Secondly, whether there is a difference in the terms and conditions of employment of the employees whose jobs are the subject of comparison. Thirdly, if there is such a difference, whether such difference can be justified on fair and rational grounds in terms of Regulation 7 of the Employment Equity Regulations.

It is noteworthy that where there is a difference in the terms and conditions of comparable employees but such differentiation is not based on any of the listed grounds (eg gender, race, sex, age, disability, religion etc) in terms of s6(1) of the EEA, or any other arbitrary ground, then the differentiation will not amount to unfair discrimination.

The ILO Convention, which is echoed in the Code, focuses on gender based discrimination in terms of job evaluation. The Convention requires that measures should be taken in order to promote objective appraisal of jobs on the basis of the work to be performed. The Convention provides four criteria that should form part of every job evaluation in order to prevent discrimination. The first of these criteria is the responsibility demanded of the work, including responsibility for people, finances and material. The second criteria is the skills, qualifications (including prior learning) and experience required to perform the work, whether formal or informal. The third criteria is the physical, mental and emotional effort required to perform the work; and the fourth criteria is the assessment of working conditions, which may include an assessment of the physical environment, psychological conditions, time pressures and geographic location of the work performed.

Discrimination based on gender is a worldwide phenomenon, which the ILO suggests is due to gender stereotypes and the tradition of creating job evaluations on the basis of male-dominated jobs.

Employers are therefore cautioned when selecting a job evaluation method to ensure that it is equally tailored for all employees as the use of the above job evaluation tool does not in itself mean that there will be no unfair discrimination.

Where employers find that there is differentiation between employees and that such differentiation cannot be justified in terms of the reasons provided in Regulation 7, the employer should determine how to address the inequalities without reducing the remuneration of the other employees to bring about equal pay; and review and monitor the above process annually.

With the announcement of this Code, South African's stance on equal pay is now firmly in line with global best practice on equal pay for equal work.

Sihle Tshetlo

CONSTRUCTIVE DISMISSAL REFERRALS – HOW SOON IS *TOO* SOON?

In terms of the Labour Relations Act, No 66 of 1995 (LRA) 'dismissal' includes a scenario where "an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee." Such a resignation is known as a constructive dismissal and is specifically catered for in s186(1)(e) of the LRA. Due to the role reversal – with the employee resigning and it nevertheless being considered a dismissal – the following question arises: Is the effective date of the dismissal the date of the employee's resignation or the date that the employee's notice period comes to an end?

In *Helderberg International Importers (Pty) Ltd v McGahey NO and Others* [2015] 4 BLLR 430 (LC) (Helderberg), the Labour Court dealt with this exact question. An employee resigned (subject to one month's notice) on 31 August 2013 and referred a constructive dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 26 September 2013. In terms of his notice period, the employee continued to tender his services until 30 September 2013.

At arbitration, the employer argued that the referral had been served prematurely, prior to the effective date of dismissal. The commissioner found in favour of the employee, ruling that the date of resignation (31 August 2013) was the dismissal date. Thus, the commissioner treated the 'termination' as the date of resignation, rather than the date when the employee's services ceased.

On review, the Labour Court first assessed the applicability of s190(1) of the LRA to the case. This provision defines the date of dismissal as the earlier of 'the date on which the contract of employment terminated' or 'the date on which the employee left the service of the employer'. In terms of the Labour Relations Amendment Bill, 2000 Explanatory Memorandum, s190(1) was amended in order to clarify the date of dismissal as the date on which 'the final decision to dismiss an employee was made'. With this in mind, the Labour Court held that s190(1) cannot apply to a constructive dismissal as in a constructive dismissal as, in such a case, it is the employee who makes the final decision to terminate their employment.

The Labour Court held that the termination date in a constructive dismissal is the date on which the employee leaves the services of the employer. In this case, the employee tendered his services until the end of the notice period (30 September 2013), thus had been no dismissal by the referral date (26 September 2013). The Labour Court thus found that the employee's referral to the CCMA was premature.

It should be noted that the situation is different where the employer does not require the employee to work out their notice period. Here the date of dismissal will be considered the date on which the employee's services cease and a referral to the CCMA within the notice period will not be considered premature (*Chabeli v Commission for Conciliation, Mediation & Arbitration & Others* (2010) 31 ILJ 1343 (LC)).

What an employer should take from this case is that, firstly, s190 has no application to constructive dismissal disputes. Furthermore, if an employee works until the end of their notice period, the employment relationship will only terminate at the end of such a notice period. Prior to that date, no dismissal will have occurred yet. However, should an employee not be required to work out their notice period, the date of dismissal under s186(1)(e) will be the date on which the employee stops providing their services to the employer.

Lauren Salt and Julia Kaplan

ANTICIPATE THE EMPLOYMENT SERVICES ACT IN JULY

The Employment Services Act, No 4 of 2014 (Act) was assented to by the President on 3 April 2014. Since then, interested parties such as temporary employment services and recruitment agencies have been anticipating the promulgation of the Act, which is aimed at addressing the gross unemployment levels in South Africa.

The Act is by no means unique to South Africa. In 2011, the State of Namibia signed into law the Employment Services Act, 8 of 2011 (ESA), which came into effect on 1 September 2012. A comparison of the Act and the ESA reveals striking similarities. Both pieces of legislation are driven by a common purpose, which is to facilitate the exchange of information among labour market participants as well as regulate the operation of Private Employment Services (PES).

The recent spate of amendments to labour law have sought to bring parity between non-standard employees and permanent employees by enacting provisions that oblige employers to ensure that non-standard employees are treated no less favourably than permanent employees. The ESA has taken a similar approach and imposed a duty on private employment agencies to ensure that all placements are not to be treated on terms that are less favourable than the employer's incumbent employees.

During a roadshow to explain the recent slew of labour law amendments, the Department of Labour's Director of Public Services, Martin Ratshivhanda put an end to the uncertainty, announcing that the Act is expected to take effect in July.

The stated purpose of the Act includes promoting employment and decreasing levels of unemployment in South Africa as well as providing training for unskilled workers. Affirming this purpose, Ratshivhanda emphasised that the Act is intended "to reduce unemployment reliance on social security grants".

Ratshivhanda confirmed that the promulgation of the Act will be followed by the development of regulations that will control the operations of PES and that the processes established are intended to "re-route beneficiaries of social grants into full employment".

One of the key tools to achieve the Act's objectives is the creation of public employment services which will be established and managed by the State. The rationale behind these agencies is to provide state assistance to unemployed job seekers. The public employment services will register job seekers and placement opportunities with the aim of connecting the two parties. Provision will also be made for training of unskilled job seekers and access to career information.

In addition to establishing state-run employment entities, the Act encroaches on the independence of private employment agencies, calling for mandatory registration of recruitment agencies and temporary employment services, more commonly known as labour brokers.

While the formal attempt to address unemployment in the country should be welcomed, only time will tell if the Act, and its honourable intentions, will prove successful.

Inez Moosa and Katlego Letlonkane

THE XXI WORLD CONGRESS OF THE INTERNATIONAL SOCIETY FOR LABOUR AND SOCIAL SECURITY LAW IS TAKING PLACE IN CAPE TOWN FROM 15 TO 18 SEPTEMBER 2015, HOSTED BY THE SOUTH AFRICAN SOCIETY FOR LABOUR LAW (SASLAW) AND PROUDLY SPONSORED BY CLIFFE DEKKER HOFMEYR AND DLA PIPER AFRICA.

The 21st World Congress promises to provide a platform for a stimulating discussion on labour and social security law in a global environment where sustained economic and social uncertainty appears to have become the norm.

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