LABOUR LAW AMENDMENTS

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THE LABOUR RELATIONS AMENDMENT ACT

On 1 January 2015, the Labour Relations Amendment Act, No 6 of 2014 (LRAA) took effect, with the exception of s37(c), and South African businesses have to comply with the new obligations created by the LRAA. The LRAA marks a move by government to streamline the country's labour environment and requires that South African businesses adjust the way they have traditionally employed and managed staff in their organisations.

Some key features of the LRAA

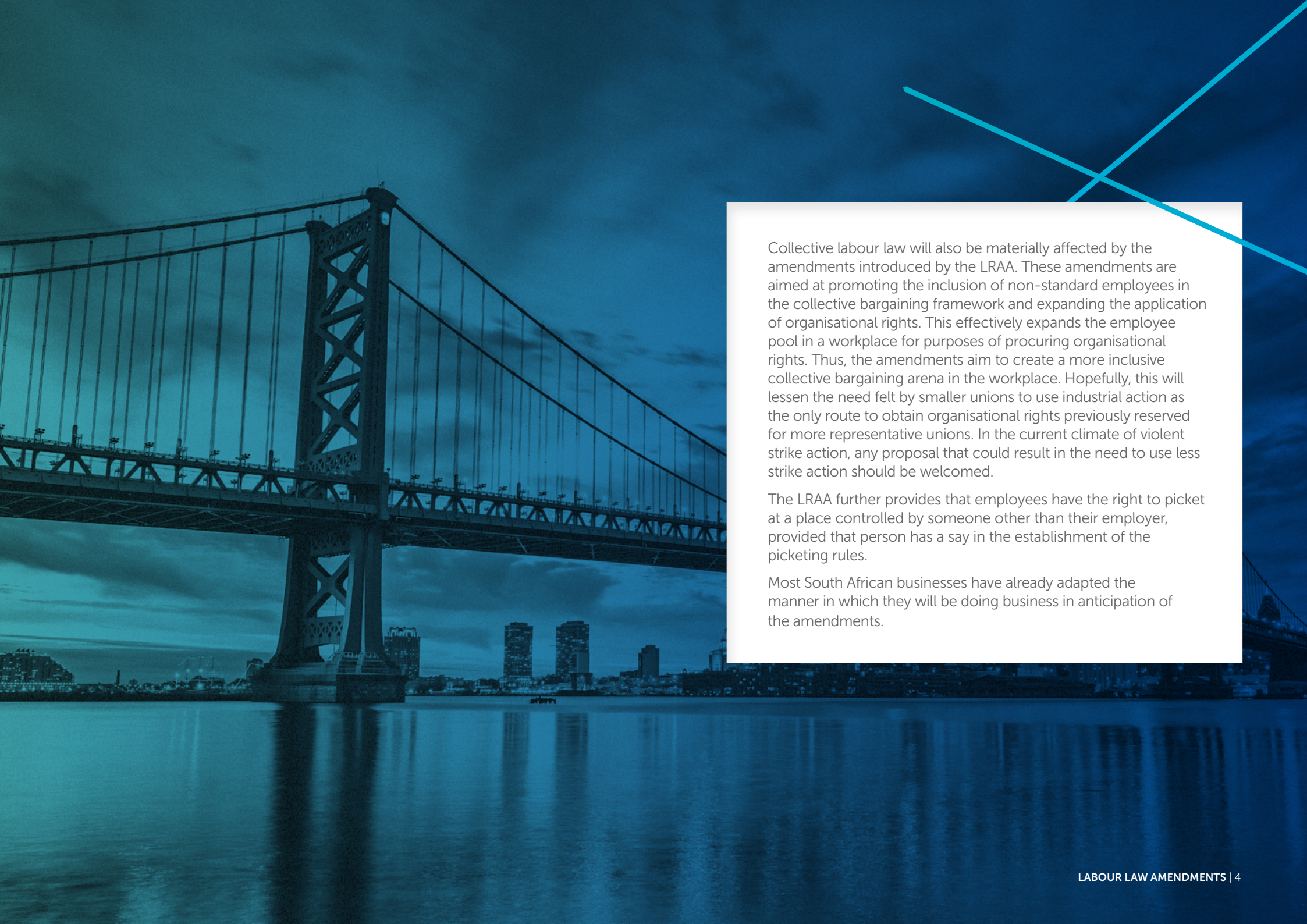
The LRAA responds to, among other things, the increased in-formalisation of labour and also seeks to ensure that vulnerable groups of employees receive adequate protection. Some of the most important amendments introduced relate to non-standard employees, which include Temporary Employment Service (TES) or Labour Broker employees, fixed term and part-time employees.

These categories of employees now enjoy far greater protection than what was previously available to them, with concomitant limitations placed on employers to utilise such employment structures. The new protections are limited in some respects, for instance, they only apply to persons earning below a statutory income threshold (currently R205,433.30 per annum), and in the case of fixed term employees, some smaller and start-up employers may be exempt. The amendments relating specifically to TES and fixed term contract employees are primarily intended to limit the use of these employees to circumstances which truly require short term contracts: three months or less; to replace another employee who is temporarily absent; or in categories of employment lawfully characterised as suitable for such employees.

Section 198A of the LRAA introduces additional protections for TES employees who earn below the statutory income threshold. This section does not ban labour broking but rather aim to regulate the industry more closely. The aim of this section is to ensure that temporary services are truly temporary and that lower-paid workers are protected from exploitation by labour brokers and their clients. Since the introduction of s198A, there has been uncertainty as to the correct interpretation of s198A(3)(b) – the so called "*deeming provision*". The Constitutional Court has ruled on the correct interpretation in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 (26 July 2018). The implications of this judgment are discussed in our Temporary Employment Services Guideline (which is available on the CDH website.

Section 198B regulates the use of fixed term contracts and the underlying principle in s198B is the concept of justifiability. Employers must be able to justify fixing the duration of an employment contract for more than three months. Failure to abide by the limitations results in the employees becoming permanent employees (fixed term employees), or being deemed to be employees of the client (TES employees).

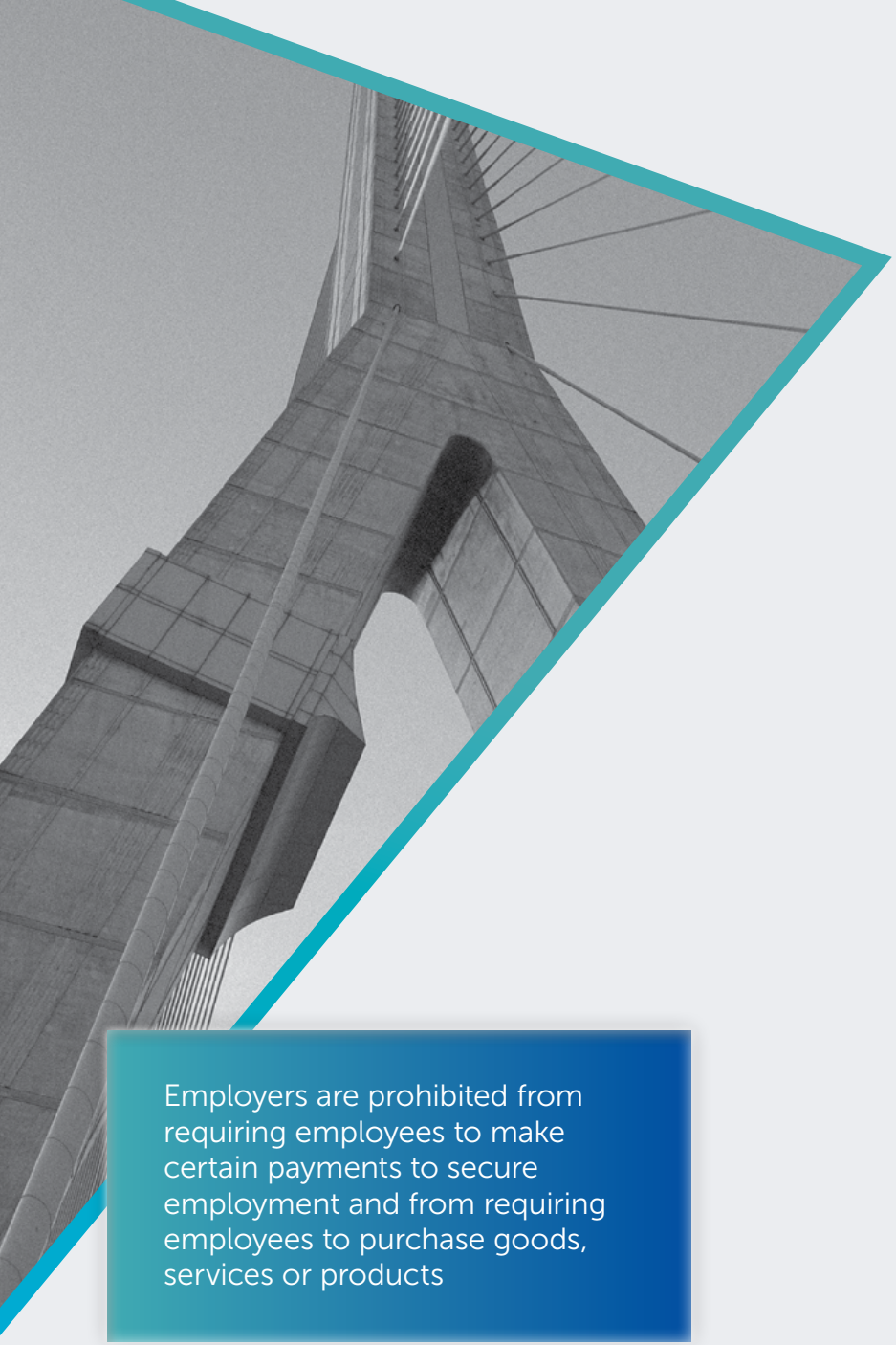
The LRAA also streamlines the procedure to be followed when reviewing CCMA arbitration awards. It further discourages litigants from instituting review applications as a tactical ploy to frustrate or delay compliance with arbitration awards. The amended s145(5) of the LRA, provides that a person who 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 s145(6), 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. In order for review applications to be finalised quickly, it is necessary for litigants to adhere to the timelines provided for filing of pleadings.



Collective labour law will also be materially affected by the amendments introduced by the LRAA. These amendments are aimed at promoting the inclusion of non-standard employees in the collective bargaining framework and expanding the application of organisational rights. This effectively expands the employee pool in a workplace for purposes of procuring organisational rights. Thus, the amendments aim to create a more inclusive collective bargaining arena in the workplace. Hopefully, this will lessen the need felt by smaller unions to use industrial action as the only route to obtain organisational rights previously reserved for more representative unions. In the current climate of violent strike action, any proposal that could result in the need to use less strike action should be welcomed.

The LRAA further provides that employees have the right to picket at a place controlled by someone other than their employer, provided that person has a say in the establishment of the picketing rules.

Most South African businesses have already adapted the manner in which they will be doing business in anticipation of the amendments.



Employers are prohibited from requiring employees to make certain payments to secure employment and from requiring employees to purchase goods, services or products

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT ACT, NO 20 OF 2013

In terms of Government Gazette dated 29 August 2014, the Basic Conditions of Employment Amendment Act, No 20 of 2013 (BCEAA) came into operation with effect from 1 September 2014:

The BCEAA introduces important amendments including:

- A prohibition on employers from requiring employees to make certain payments to secure employment and from requiring employees to purchase goods, services or products
- The prohibition of employing children under the age of 15 years
- Making it an offence for anyone to require or permit a child to perform any work or provide any services that places the child's well-being at risk
- Providing for the Minister of Labour to publish sectoral determinations in respect of employees and employers who are not covered by any other sectoral determination
- Providing for the Minister of Labour to publish sectoral determinations to regulate the adjustment of remuneration increases
- Providing for the Minister of Labour to publish sectoral determinations to regulate task-based work, piecework, home work, sub-contracting and contract work
- Providing for the Minister of Labour to publish sectoral determinations to regulate the threshold for automatic organisational rights of trade unions and to provide the Labour Court with exclusive jurisdiction in respect of certain matters
- The BCEAA forms part of an array of amendments to South Africa's labour laws including amendments to the Employment Equity Act, No 55 of 1998 (EEA) and in particular its provisions relating to the principle of equal pay for equal work, far-reaching amendments to the Labour Relations Act, No 66 of 1995 (LRA), including the regulation of the so-called vulnerable categories of employees such as, inter alia, fixed-term contractors, temporary employment services (labour brokers) and part-time employees, and the introduction of the Employment Services Act, No 4 of 2014 (ESA) dealing primarily with the employment of foreign nationals

An employer can safeguard itself by ensuring that its actions are justified in terms of s33a(2)

NEED A UNIFORM? CAN EMPLOYERS STILL ASK FOR PAYMENT?

The BCEAA have resulted in the insertion of s33A into the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) which aims to prevent employers from requiring employees to make payments to secure employment.

The controversial s33A prohibits certain conduct by employers. Section 33A(1)(a) states that an employer may not require or accept any payment from an employee or potential employee for employment or work allocation. Further, in terms of s33A(1)(b), an employer may not require an employee or potential employee to purchase any goods, products or services from the employer or from any business or person nominated by the employer.

This section may heavily impact on the airline, security, retail and food industries. Employers who require their employees to buy or contribute towards their uniforms, may now be precluded from such conduct, since an employer is prohibited from accepting money from their employees and from requiring them to buy goods from the company or any other party nominated by the employer.

That said, s33A(2) does not prohibit the conclusion of an employment contract or collective agreement in which an employee is required to participate in a scheme involving the purchase of specific goods, products or services if the purchase is not prohibited by any other statute and one of the following applies:

- The employee receives a financial benefit from participating in the scheme
- The price of any goods, products or services from participating in the scheme is fair and reasonable

Therefore, an employer can safeguard itself by ensuring that its actions are justified in terms of s33A(2).

Employers are encouraged to consider their policies and determine whether they fall foul of s33A of the BCEA.

SEVERANCE TAX BENEFITS – THRESHOLD INCREASE

Tax on severance is an important aspect of the law for employers and employees to understand. The BCEA provides that an employer who dismisses an employee for 'operational requirements' must pay severance of one week's remuneration for every completed year of service.

However, this does not prohibit an employer from providing more than the statutory minimum in terms of a contract of employment, company policy, collective agreement or an agreement reached in terms of s189 of the LRA.

The Minister of Finance has increased the tax-free threshold from R315,000 to R500,000, applicable from 1 March 2014. This amount remains a lifetime exemption.

Therefore, should an employee have the misfortune of being retrenched more than once in their working life, they may continue to claim the tax exemption on the severance component, but only up to a ceiling of R500,000, after which tax will be payable. According to the South African Revenue Service (SARS), it is the responsibility of the employer to apply for a tax directive should such severance be payable.

It must be noted that the benefit does not apply to a pro-rata bonus, severance notice and leave as these payments remain subject to tax. Therefore, the circumstances under which one will be entitled to this severance benefit must comply with the definition of a 'severance benefit' as defined in the Income Tax Act, No 58 of 1962 (Income Tax Act).

The Income Tax Act provides that a severance benefit means any lump sum amount received from an employer "*in respect of the relinquishment, termination, loss or repudiation of office or employment or of the person's appointment or a right or claim to be appointed to an office,*" provided one of the following requirements are met:

- The person is 55 years or older
- The person is incapable of holding employment due to sickness, injury or incapacity

The termination or loss is due to one of the following:

- the person's employer having ceased to carry on or intending to cease carrying on the trade in respect of which the person was appointed
- the person having become redundant in consequence of a general reduction in personnel or a reduction in personnel of a particular class by the person's employer (ie retrenchment or due to general operational requirements)

On a plain reading of the definition, the wording suggests that should a 55-year-old employee's employment be terminated for whatever reason, the severance benefit will apply. An argument may thus be made that, should a 55-year-old employee's employment be terminated (for a reason not related to operational requirements as required in the BCEA), severance benefits (ie the tax-free threshold) may find application.

In conclusion, this threshold affects a broad category of employees should their employment be terminated and it is therefore important for employers and employees to note that the severance benefit will be tax free up to the first R500,000 payable and thereafter the benefit will be taxable.

Tax on severance is an important aspect of the law for employers and employees to understand

EMPLOYMENT EQUITY AMENDMENT ACT, NO 47 OF 2013

On 14 January 2014, the President assented to the Employment Equity Amendment Act, No 47 of 2013 (EEAA), which was subsequently published in Notice R16 in Government Gazette No 37238 on 16 January 2014. While the Act had been assented to and published, it only came into operation on 1 August 2014. The EEAA marks the first amendments to the Employment Equity Act, No of 1998 (EEA) since it became law in 1998, amending various sections of the principal act. The following amendments are most noteworthy:

The amendment of the definition of designated groups

The definition of 'designated groups' is revised to ensure that beneficiaries of affirmative action in terms of Chapter III of the EEA are 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 their descendants. The result of this amendment is that the employment of persons who are foreign nationals or who have become citizens after April 1994 will not assist employers to meet their affirmative action targets. This change is consistent with amendments that are to be made to the Broad-based Black Economic Empowerment Act, No 53 of 2003.

Amendment of s6 – Expansion of discriminatory grounds

The amendment to s6(1) seeks to clarify that discrimination is not only prohibited on the listed grounds, but also on any other arbitrary ground. This change creates consistency with the terminology used in s187(1)(f) of the Labour Relations Act, No 66 of 1995, that prohibits discriminatory dismissals. (See below for a discussion of the effect of this amendment).

Insertion of new ss6(4) and 6(5) – Work of equal value

A new ss6(4) has been introduced to deal explicitly with unfair discrimination by an employer in respect of the terms and conditions of employment of employees doing the same or similar work or work of equal value. A differentiation based on a proscribed ground listed in ss6(1) or any other arbitrary ground will amount to unfair discrimination 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, responsibility and the like.

In terms of ss6(5), the Minister of Labour is empowered to publish a code of good practice dealing with criteria and methodologies for assessing work of equal value. A draft code was published for comment on 29 September 2014.

Amendment of s10 - Jurisdiction of the Commission for Conciliation, Mediation and Arbitration

Under the EEA, all unfair discrimination claims fall within the exclusive jurisdiction of the Labour Court. However, the EEAA amended ss10(6) to allow parties the option of referring the dispute for arbitration in the Commission for Conciliation, Mediation and Arbitration (CCMA) under the following circumstances:

- if the employee's cause of action arises from an allegation of unfair discrimination on the grounds of sexual harassment
- if the employee or employees earn less than the earnings threshold prescribed under ss6(3) of the BCEA
- if all the parties to the dispute consent thereto

The maximum award that the CCMA can make in respect of damages will be an amount equal to the earnings threshold referred to above. A person affected by an arbitrator's award in a discrimination case will be entitled to appeal to the Labour Court.

Amendment of s59 and s61 of the Schedule

The EEAA increases the maximum fines that can be imposed for criminal offences contemplated in s59 and s61 from R10,000 to R30,000. In addition, it empowers the Minister of Labour to adjust those fines in order to counter inflation, without the concurrence of the Minister of Justice and Constitutional Development.

An employer's turnover will further be taken into account in determining the maximum fine that may be imposed for substantive failures to comply with the EEA. In general, contraventions will attract significantly higher fines than prior to the amendments. This aspect forms the subject matter of a later article in this compilation.

Amendment of Schedule 4 – Total Annual Turnover Threshold

The EEAA increases the total annual turnover threshold that an employer must exceed in order to be classified as a designated employer.

This means that some employers that were obliged to comply by virtue of their turnover will no longer have to do so. Employers that employ 50 or more employees will still be regarded as 'designated employers' irrespective of their turnover. Employers are encouraged to familiarise themselves with the changes to the EEA. In addition, employers should ensure compliance with the amendments to avoid the hefty penalties in place. The Department of Labour has indicated that they are going to clamp down on enforcement of the provisions of the EEA, which should be incentive enough for employers to start getting their proverbial ducks in a row.

The EEAA increases the total annual turnover threshold that an employer must exceed in order to be classified as a designated employer

LABOUR COURT REQUIRED TO DECIDE ON RETROSPECTIVE APPLICATION OF EMPLOYMENT EQUITY ACT AMENDMENTS

In a decision handed down by the Labour Court, in Bandat v De Kock and Another (JS832/2013) [2014] ZALCJHB 342 (2 September 2014), the court was required to decide whether the EEAA applies retrospectively to matters instituted before its enactment.

In this case, Bandat instituted action against her employer, De Kock, for an automatically unfair dismissal and discrimination under the EEA in that De Kock had allegedly sexually harassed her.

After the close of Bandat's case, De Kock applied for absolution from the instance. The issue of the onus in Bandat's discrimination claim was complicated by the EEAA, which came into effect on 1 August 2014, and which was before the present matter was heard but after it was instituted.

Prior to the EEAA, where unfair discrimination was alleged, the duty was firstly on the complainant to establish the existence of discrimination, before the onus could shift to the employer to prove that the discrimination was fair.

Following the enactment of the EEAA, all the employee party has to do is to allege that discrimination exists on one of the grounds specified in s6(1) of the EEA, and the onus would squarely be on the employer party to prove that it does not exist. If this amended provision applied in the present case, then De Kock's absolution application could not succeed, as he would have the overall onus of proving that the allegation of discrimination did not exist or was justifiable.

The court held that there was nothing in the EEA or in the EEAA which indicated that it had to be applied retrospectively. As such, the presumption was that it was not retrospective and that the existing procedure prior to the enactment of the EEAA applied. There was no indication in the EEA of any intention that the amendment applied to existing and pending proceedings. There were equally no compelling reasons of equity and fairness necessitating a departure from the general principles.

The court accordingly held that the amended provisions of s11 of the EEA, dealing with the onus of proof in discrimination claims, did not apply in this instance and that the onus to prove that Bandat had been discriminated against, in the first place, rested on her.

In the context of the current matter, Bandat was required to establish sexually harassed by De Kock. The court found that she failed to provide sufficient evidence to even establish a prima facie case that she had been discriminated against by De Kock. Accordingly, De Kock's application for absolution was successful.

WHAT IS UNFAIR DISCRIMINATION ON AN ARBITRARY GROUND?

The EEAA has introduced an amendment to s6 of the EEA – the listed grounds of discrimination. The EEAA prohibits unfair discrimination of an employee on any one or more of the listed grounds (for example race, gender, sex, disability, pregnancy, religion and HIV status) or on any other arbitrary ground.

But what does this mean?

Prior to the amendment of the EEA, where employees sought to establish unfair discrimination on an unlisted ground, they were required to illustrate that the basis upon which they allege unfair discrimination was analogous to a listed ground. In *NUMSA & Others v Gabriels (Pty) Ltd* [2002] 12 BLLR 1210 (LC), the Labour Court interpreted this to mean that the ground relied on must be clearly identified and it must be shown that it is "*based on attributes or characteristics which have the potential to impair the fundamental human dignity of persons as human beings, or to affect them adversely in a comparable manner*".

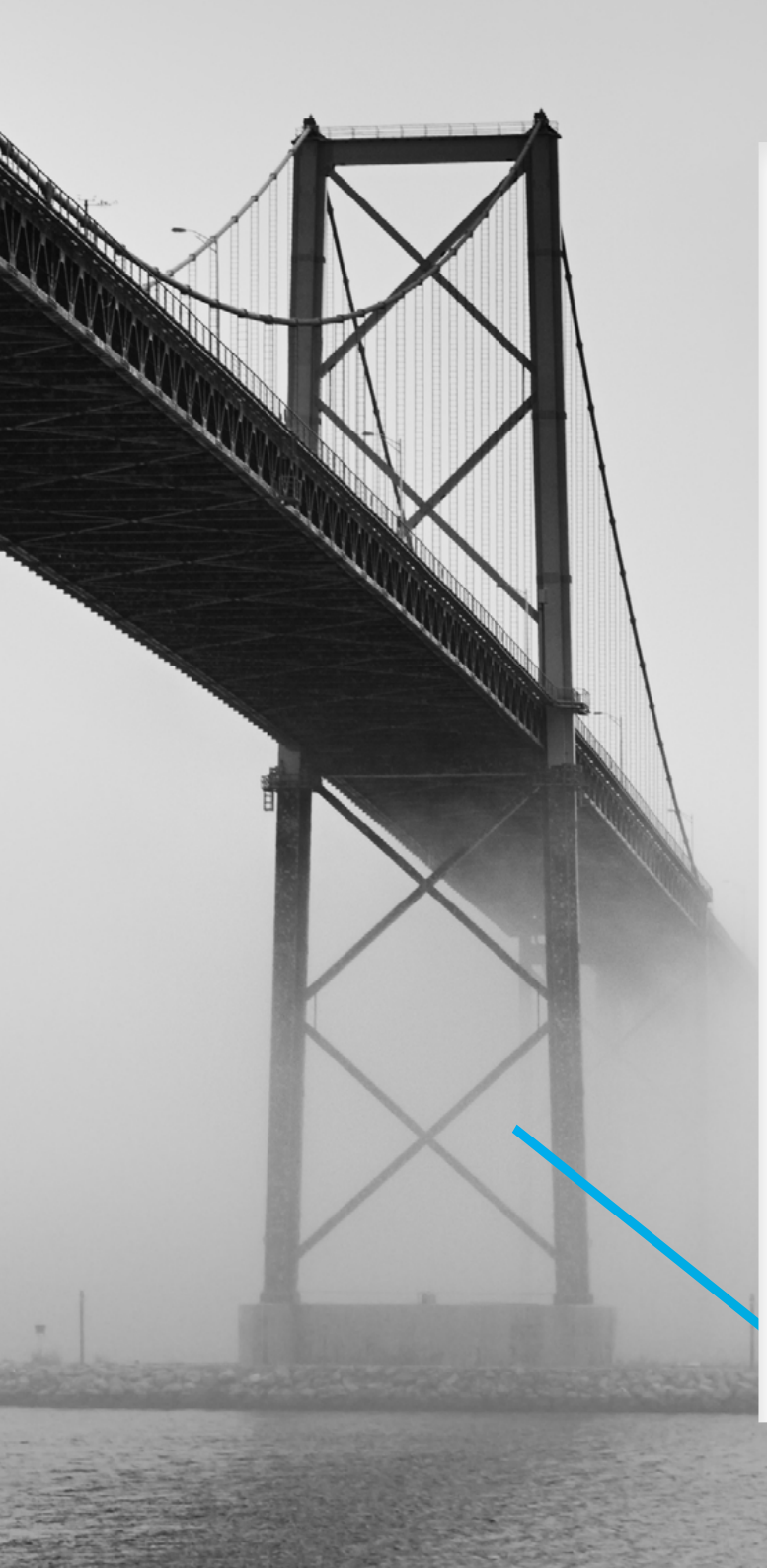
It has been said that the amendment was implemented to bring the EEA in line with the terminology used in s187(1)(f) of the LRA, which provides that discriminatory dismissals based on grounds similar to those listed in s6 of the EAA are automatically unfair. The section also refers to the term 'any arbitrary ground.' In light of this, it is important to consider the term 'arbitrary ground' in the context of s187(1)(f) of the LRA, so as to gain an understanding of how the courts may interpret this phrase in relation to s6(1) of the EEAA.

In *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* [2009] 12 BLLR 1181 (LAC), the respondent employee alleged that his dismissal was automatically unfair in that he was arbitrarily discriminated against due to his depression. The Labour Appeal Court held that the question when assessing whether discrimination has occurred on an 'arbitrary ground' is the following:

Did the conduct of the appellant impair the dignity of the respondent; that is did the conduct of the appellant objectively analysed on the ground of the characteristics of the respondent, in this case depression, have the potential to impair the fundamental human dignity of respondent?

The LAC found that the conduct of the employer constituted an egregious attack on the dignity of the employee and accordingly fell within the grounds in s187(1)(f) of the LRA.

Against this background, it seems that the inclusion of 'any other arbitrary ground' in s6(1) of the EEA does not widen the scope of the section's original application. The courts will, in all likelihood, apply the same test that was previously used in determining whether discrimination had occurred on a ground which is analogous to a listed ground, in order to determine whether discrimination has occurred on an arbitrary ground.



WHAT IS SAUCE FOR THE GOOSE IS SAUCE FOR THE GANDER: EQUAL PAY FOR EQUAL WORK

South Africa is a party to the International Labour Organisation (ILO) Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, or Equal Remuneration Convention. An 'equal work equal pay' clause is provided in the Code of Good Practice for the Integration of Employment Equity into Human Resource Policies and Procedures and the Public Service Act Regulations. But does it go far enough?

The legislature has made recent amendments and issued new regulations in respect of the EEA. Section 6(1) of the EEA now provides that discrimination may not take place on the following grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or any other arbitrary ground.

Section 6(4) now provides that 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) - constitutes unfair discrimination.

This new section provides focus to the issue of equal work and equal pay and affords employees the opportunity to link such an unfair practice directly to the EEA. An employee must prove that the employer has allowed a situation to occur where employees who do the same work receive different pay or benefits, in a discriminatory manner, without any justifiable ground or reason for such a difference.

In the amended regulations, the minister now also provides employees and employers with, *inter alia,* the following:

- A clear definition of the meaning of equal work for equal pay
- A methodology to determine when and how to apply the provisions of s6(4)
- How to assess whether work is equal by considering various factors such as responsibilities, qualifications needed to perform that function and the conditions under which that work is performed

Employers should audit their remuneration and reward practices carefully in order to identify potential claims. Where terms and conditions of employees differ, even though the employees concerned do the same or similar work, or work of equal value, the employer should determine whether such differentiation is on a listed or arbitrary ground and whether there is an acceptable justification for such differentiation.

WHAT DOES 'ON THE WHOLE NOT LESS FAVOURABLE' MEAN?

The wave of amendments to employment legislation has seen a codification of the case law relating to the principle of 'equal pay for equal work.' The principle has been codified by s198 of the amendments to the LRA and by the amendments to s6 of the EEA.

Section 198A(5) of the LRA provides that an employee of a temporary employment service (TES) placed at a client, must be treated on the whole not less favourably than an employee of the client performing the same or similar work unless a justifiable reason exists for the differentiation. In the context of s197 of the LRA the term 'on the whole less favourable' has been interpreted to mean that terms and conditions other than the fundamental terms and conditions of employment may differ from the old employer to the new employer. It therefore requires that the package offered to the employee by the new employer remains fundamentally similar but does not require the terms and conditions to be identical to those offered by the old employer.

Section 198B(8)(a) of the LRA states that a fixed term employee must be treated no less favourably than a permanent employee of the employer performing the same or similar work unless justifiable reason exists for the differentiation.

Section 6(4) of the EEA states that 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 the EEA amounts to unfair discrimination. This section appears to require the same terms and conditions for employees performing the same or similar work.

The EEA regulations further impose a duty on employer's to ensure that employees are not paid different remuneration for the same or similar or equal work.

The standards regarding equal pay for equal work appear to differ. The LRA seems to indicate that for TES employees the equal pay analysis must be conducted on the remuneration package as a whole, for example, it may be justifiable under the LRA to provide employees of the client benefits which the TES employees do not receive, so long as the TES employees are compensated monetarily. In relation to fixed term contracts the phrase 'on the whole' has been omitted and fixed term employees are required to be treated no less favourably than their permanent counterparts. This provision suggests that the terms and conditions must be equal. Furthermore, the EEA then requires an employer to ensure that there is no difference between the terms and conditions of two employees performing the same or similar work.

It appears that there are two approaches to equal pay claims; the one requires an equalisation of the complete package received by the employees while the other requires a line by line equalisation of the pay and benefits received by employees.

The equalisation provision relating to TES employees may be interpreted in light of the meaning given to the phrase 'on the whole not less favourably' in the context of s197. It is unclear how the courts will interpret the equalisation provision in terms of fixed term employees given the omission of the phrase 'on the whole.' In addition, no reasons have been provided for the differentiation between the equal pay provisions. Employers are therefore left with a fair amount of uncertainty as to how to conduct the equal pay analysis. Do employers conform to the standard of an equalisation of the package or the higher standard of a line by line equalisation? The answer remains unclear.

EQUAL PAY PROVISIONS AND THE IMPACT ON COLLECTIVE AGREEMENTS

What then is the effect of the equal pay clause on collective agreements?

Collective agreements are used as an instrument to frame and enforce terms and conditions of employment in respect of all the employees within a particular bargaining unit. Collective agreements are binding on the parties thereto. Thus a collective agreement, once validly entered into, may vary and amend the existing terms and conditions of employment of the employees to whom the collective agreement applies. The effect thereof may well be a difference in the remuneration of the employees who are covered by the agreement and those doing work of equal value but are not subject to the provisions of the agreement.

As a result of the above mentioned provisions introduced by the EEAA, employers may find themselves defending unfair discrimination and/or equal pay claims on the basis of the terms contained in collective agreements.

The impact of terms contained in collective agreements that differentiated between employees on prohibited grounds was addressed in the case of Gideon Jacobus Jansen Van Vuuren v South African Airways (Pty) Ltd and Airline Pilots Association of South Africa [2013] 34 ILJ 1749 (LC) (*Van Vuuren* case). In the *Van Vuuren* case, the court held that "*where the purpose and effect of an agreed provision is to discriminate against a minority, its origin in [the] negotiated agreement will not in itself provide grounds for justification*". This principle was approved on appeal.

Similarly, in the UK case of *Unison and another v Brennan and others* UKEAT/0580/07 the employment tribunal held that an employee who is affected by a collective agreement may seek a declaration that a term of the collective agreement breaches the UK equal pay and/or sex discrimination legislation and is therefore void. Employers must be able to establish that the difference in earnings between employees doing the same work is based on a genuine material factor that is not discriminatory.

Therefore, it is clear that the parties to a collective agreement may not rely on the terms of the collective agreement to justify their falling foul of the provisions of the EEAA.

In drafting terms of the collective agreements employers must ensure that they are able to demonstrate justifiable reasons for the different treatment of employees performing work of equal value. If employers are unable to do so, the different treatment of employees performing work of equal value may well be considered unfair discrimination and employers will not be able to hide behind the provisions of a collective agreement.

COMPENSATION AND DAMAGES: WHAT IS THE DIFFERENCE?

In the judgment of the Labour Appeal Court (LAC) in the case of South African Airways v Van Vuuren (Unreported) Case Number C 9/13 handed down on 12 June 2014 (Van Vuuren Judgment), the LAC considered the distinction between compensation and damages. The complainant in the matter claimed R100,000 in damages, the court *a quo* awarded an amount in excess of R1.4 million, with only R50,000 being awarded in damages. Section 50(1) of the EEA grants the court the power to make any appropriate order including one for compensation and damages in any circumstances contemplated in the EEA.

This discretion is repeated in s50(2) referring specifically to claims of unfair discrimination. The Van Vuuren Judgment considers the fact that often the words compensation and damages are used interchangeably due to there being ambiguity relating to the words. This would naturally affect the discretion of the court in awarding claims for damages and compensation.

The court considered that the term compensation as used in s193 of the LRA encompasses both patrimonial and non-patrimonial loss, thus failing to draw a distinction between damages and compensation. The EEA however, draws a distinct difference between the two concepts. While the Oxford dictionary defines the two concepts to mean compensation for loss or injury, the court states that this could not be what was intended by the drafters of the EEA as they specifically mention the two separate terms. The court therefore held that the only conclusion that may be drawn is that the term damages refers to patrimonial loss and the term compensation to non-patrimonial loss.

The court held that in an Aquilian action in order for damages to be awarded the claimant must prove the actual loss suffered. The purpose of this is to restore the claimant to the position he would have been in had he not suffered the damage. Compensation on the other hand, is *solatium* offered in order to make right injured feelings of the claimant.

The court concluded that the above distinction was how the EEA intended to separate the two concepts. Thus it would be possible in certain circumstances to award both damages and compensation. The court has a discretion in this regard. The award of both damages and compensation appropriate, just and equitable in the circumstances. Damages therefore are intended to restore the complainant to the position he or she would have been in but for the unfair discrimination and compensation is intended as *solatium* for the complainant's impaired dignity or injured feelings.

The court held that the determination of fairness and appropriate relief requires a balancing of the interests of the employer, the employee and the public in general. The court relied on the judgments of the courts in the cases of *Christian v Colliers Properties (2005) ILJ and Alexander v Home Office [1988] IRLR 190 (CA)* to conclude that while an award for discrimination must not be minimal, due to the fact that it is impossible to assess the monetary value of injured feelings, the award should be restrained. The awarding of excessive sums does as much harm to society as the awarding of minimal sums.

The court went on to hold that the court *a quo* had awarded an excessive sum. The court based its conclusion on two legs, firstly that the claimant had claimed far less than what was awarded by the court and secondly that the award of compensation bore no reasonable relationship to the injury and humiliation suffered by the claimant.

The court went on to examine previous cases of discrimination based on age. In the case of *Evans v Japanese School of Johannesburg [2006] 12 BLLR 1146 (LC)*, the court awarded R180,000 in damages for patrimonial loss and R20,000 compensation for injured feelings. In the case of *Bedderson v Sparrow Schools Education Trust [2010] 4 BLLR 363 (LC)*,the court awarded no damages as the complainant had not claimed damages and R42,000 in compensation being the amount of six months' salary. In the case of *Hospersa obo Venter v SA Nursing Council [2006] 6 BLLR 558 (LC)*, the court awarded R135,000 in damages for patrimonial loss and R40,000 - R45,000 compensation.

The court therefore awarded the complainant R50,000 in damages for patrimonial loss and R50,000 compensation for non-patrimonial loss. The court specifically stated that the non-patrimonial loss must be a stipulated amount and not monthly salaries so as to avoid awarding high earning individuals more compensation than those that earn less even though the injury suffered by the latter is often greater.

Therefore it is evident that a court granting an award of damages and compensation for unfair discrimination must distinguish between the two concepts. Furthermore, when determining the amount of compensation to be awarded the court must take into account the impact of such award on society. The court is also required to be consistent in its awards for compensation for non-patrimonial loss.

STRICTER ENFORCEMENT OF THE EEA UNDER THE AMENDMENTS *"ASSESSMENT OF COMPLIANCE"*

Enforcement of employer compliance with affirmative action measures will now be much faster, with significantly increased penalties for non-complying designated employers. Failures to prepare and/or implement employment equity plans, and file annual reports, will no longer be subject to a process of seeking compliance orders. Instead, the Director-General may immediately apply to the Labour Court to impose a fine.

The fines that may be imposed for failures to prepare and/or implement employment equity plans have been radically increased by approximately 300%. The new fines start from R1.5 million or 2% of turnover (whichever is the greater) for a first offence and up to R2.7 million or 10% of turnover for a fourth offence.

Other failures by designated employers to comply with Chapter III of the EEA (eg failures to consult with employees or conduct an analysis) may still result in a labour inspector seeking a written undertaking from the employer to correct the position, however, this process need not be followed. If a written undertaking is not complied with, the undertaking may be made by an order of the Labour Court. Compliance orders will only be used if no written undertaking was asked or provided, and in respect of s16 and 17 (consultation), s19 (conducting an analysis), s22 (informing employees of the provisions of the EEA, the most recent report submitted and so on) and s26 (keeping records).

Employers will no longer be able to delay enforcement of a compliance order by objecting to it or appealing against it.

The Director-General had the right to conduct a review of an employer's compliance with the EEA, and to request a host of information to facilitate the review process. The outcome of such process may be either approval of the employment equity plan, or a recommendation of steps to be taken by the employer. This review process is the manner in which the
Director-General may attempt to interfere in the targets for affirmative action set by an employer.

The process to enforce such requests and recommendations will no longer be a referral to the Labour Court, but will take the form of an application to the Labour Court for an order directing the employer to comply, failing which, a fine will be imposed. Such application must be brought if an employer gives the Director-General notice in writing that it does not accept the request or recommendation. If the Director-General does not bring an application in the allocated time after an employer's notice of disagreement, the recommendation will lapse.

Section 6 of the EEA contains a general prohibition of unfair discrimination, applicable to all employers. Discrimination on any of the listed grounds remains prohibited. The 'equal pay for equal work' principle will amount to unfair discrimination if an employer differentiates between terms and conditions of employment of employees doing the same or similar work or work of equal value, if such differentiation is directly or indirectly based on one of the prohibited grounds. An employer will only be able to escape liability if it can prove that the differentiation is in fact based on fair criteria such as experience, skill, responsibility, and so on.

The employee claiming equal pay discrimination will first have to establish a prima facie factual basis for the claim.

If a causal link is established, the employer will have to justify the discrimination. The Minister of Labour has prescribed the criteria and methodology for assessing work of equal value, which are set out in the regulations.

Enforcement of equal pay disputes will not be limited to individual employee claims, but may also take the form of state intervention (presumably through the review and recommendation process). A statement must be provided to the Employment Conditions Commission (established in terms of the BCEA), on the remuneration and benefits received in each occupational level. Employers will have to take steps to 'progressively reduce' any disproportionate income differentials.

If it is alleged that the claimant was discriminated against on an arbitrary ground, the claimant will have the burden to prove, on a balance of probabilities, that:

- The conduct complained of is not rational
- The conduct complained of amounts to discrimination
- The discrimination is unfair

It is evident by the new powers provided to the Minister as well as the increase in intervention by the Department of Labour that the drafters of the amended EEA envisaged a stricter enforcement of the provisions of the EEA.

Furthermore, the EEA clearly seeks to ensure that employers apply affirmative action more strenuously and that they take active steps to eliminate discrimination within the workplace.

THE EMPLOYER'S OBLIGATION TO CONDUCT AN ANALYSIS

Section 19 of the EEAA requires designated employers to conduct an analysis of its workforce profile in order to identify employment barriers that adversely affect people from designated groups. The purpose of the analysis is to identify the degree of under-representation of designated groups within the various occupational levels of the employer's workforce. The EEAA has slightly changed the original section by removing the reference to 'occupational categories.'

This section must be read with Regulation 8 which sets out the duties of a designated employer in relation to collecting information and conducting an analysis of its workforce. For the most part, the regulations dealing with conducting an analysis have remained the same.

However, a new template for reporting on the analysis has been introduced, the so-called EEA12.

Form EEA12

This form consists of nine pages and covers headings such as:

- Employer details
- Qualitative analysis

Quantitative analysis

This section requires employers to identify barriers that exist in terms of policies, procedures and/or practices. It then requires the employer to describe the affirmative action measures to be implemented to address the identified barriers.

Snapshot of workforce profile

This part of the form requires the employer to report on the total number of employees, including employees with disabilities, within each occupational level.

Analysis of workforce profile by occupational level

Under this sub-heading, the employer is required to conduct an analysis separately for each occupational level, race and gender intersection.

Regulation 8 also refers to the EEA1, EEA8 and EEA9 forms. The EEA1 form is used to obtain information from employees to assist employers in conducting their analysis. The EEA8 form provides information relating to the demographic profile of the national and regional economically active population. Form EEA9 provides information relating to the various occupational levels.

Employers would be well advised to ensure that their workforce analysis is conducted in terms of the new regulations to ensure compliance with their various duties.

BE SMART AND COMPLY – EMPLOYMENT EQUITY PLANS

One of the primary goals of the EEA is to redress the disparities in the workplace resulting from Apartheid policies by achieving equitable representation in all occupational levels in the workforce. The Commission for Employment Equity (CEE) has reported that despite the noble intent of the legislature to achieve progressive realisation of employment equity in the workplace, persons from designated groups (which is defined to include black people, women, persons with disabilities and any persons who were disadvantaged by Apartheid policies) remain largely under-represented in top management and senior management positions.

From the CEE's report for the year 2013/2014, it is apparent that the inception of the EEA over a decade ago has been to a large extent, ineffective. This is evident from the statistics, which reflect that white males hold the majority of senior management levels in all sectors of the economy. The CEE's report concluded that the under-representation was almost a constant feature among private employers.

Among the objectives of the EEAA, effective from 1 August 2014, is to remedy this failure and to emphasise the important roles employers have to play in achieving equality in the workplace and the dire consequences of failing to comply with their duties in terms of the EEA.

Section 20 of the EEA, as amended, must be read together with Regulation 9 of the EEA Regulations of 2014 (Regulations) which contain the minimum requirements of a designated employer's Employment Equity Plan (EEP).

Requirements in respect of an Employment Equity Plan

A designated employer's EEP must set out the following:

- The duration of the plan - this may not be less than one year and not more than five years
- Objectives - the EEP must set out the employer's objectives for each year of the plan, which must be:
  - specific
  - measurable
  - attainable
  - relevant
  - time bound
- Barriers and Affirmative Action (AA) - the barriers and AA measures identified in the audit analysis must include:
  - time frames for tracking and monitoring implementation of AA measures which have a specific start and end date (these dates must be within the duration of the EEP and cannot be stated as 'on-going')
  - designations of persons responsible for overseeing implementation
- Workforce profile, numerical goals and targets:
  - a workforce profile snapshot of entire current workforce including disabled persons and a snapshot of current disabled workforce profile. These snapshots will form the basis of numeric goals and targets
  - the numeric goals should be based on the current workforce profile and not the difference projected for the end of the EEP
  - the numeric targets should similarly be based on the current workforce profile and not the projected difference for the end of each reporting period
  - processes to monitor and ensure implementation of the plan should include details of stakeholders, responsibilities and frequency of monitoring (which may be monthly or quarterly as reporting is required annually)
  - internal dispute resolution processes for disputes around interpretation or implementation of the plan (which should include a step by step process including the designations and/or names of the persons and/or stakeholders involved in the process)
  names of the senior managers responsible for monitoring the implementation of the EEP

Employers will be required to prepare their subsequent EEP six months prior to the expiration of the current EEP and keep the EEP for a minimum of five years after its expiration. A template setting out how the above requirements should be recorded is contained in Form EEA13 of the Regulations.

When preparing the EEP, the Codes of Good Practice on Preparation, Implementation and Monitoring of Employment Equity Plans and The Integration of Employment Equity into Human Resources Policies and Procedures should be considered as guidelines along with the factors set out in s42(1)(a) EEA (Assessment of compliance) which require employers to consider the extent to which suitably qualified people from the different designated groups are equitably represented within each occupational level in the employer's workforce in relation to the demographic profile of the national and regional economically active population when determining numerical targets.

Where the designated employer fails to prepare and implement their EEP in accordance with the requirements set out above the Director General of the Department of Labour is granted a discretionary power to approach the Labour Court in order to impose a fine in accordance with the amounts set out in Schedule 1 of the EEA. It is worth noting that the smallest fine which may be imposed for a first contravention of s20 by an employer of is the greater of R1.5 million or 2% of the employer's annual turnover.

The legislature's intent stemming from these amendments is clear: comply or pay the price. In *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, the Constitutional Court recently reaffirmed the importance of affirmative action as a form of restorative justice and as a just strategy for achieving equality in South Africa's unique context.

Employers are therefore advised to ensure that their employment equity plans are thorough and in compliance with the requirements imposed by the EEAA.

AMENDMENTS TO THE EMPLOYMENT EQUITY ACT REQUIRE INCREASED REPORTING

Among the amendments to the EEA, are the amendments made to s21, which is concerned with the report detailing the employment equity plan and progress made in implementing the plan.

Prior to its amendment, s21 distinguished between employers who employed more, and employers who employed less, than 150 employees. This distinction no longer applies. All employers who employ more than 50 employees, or have an annual turnover higher than the amount identified in Schedule 4, are required to submit the report annually.

If an employer exceeds the threshold for the first time - rendering it a designated employer who must comply with the affirmative action requirements of Chapter III of the EEA - between the first working day of April and the first working day of October, then the employer would not be required to submit its first report in that year. Such an employer is required to submit its first report on the first working day of October of the following year.

The content of the first report is required to detail the initial development of, and consultation processes surrounding, the employer's employment equity plan.

Employers who previously met the threshold, and who have submitted their first report, are still required to submit a report to the Director-General of the Department of Labour (Director-General) annually on the first working day of October. As such, employers who previously employed more than 150 employees, are not affected by the amendments, and the frequency of submissions remains the same. In contrast, employers who employ less than 150 employees now need to submit reports annually, as opposed to once every 2 years, as the EEA previously required.

If an employer anticipates that they will not be able to submit the report in time, the amendment now requires that the employer notify the Director-General in writing of this anticipated failure. Such notification must be submitted before the last working day of August. The written submission, in addition, must clearly set out the reasons why the employer anticipates that they will not be able to comply with the time periods imposed by the EEA.

If an employer fails to follow the EEA in accordance with any of the requirements, the Director-General is empowered to approach the Labour Court for an order to have the employer fined. Failure in this regard is identified as the complete failure to submit a report, failure to notify the Director-General of late submissions, and/or providing false or invalid reasons for a late submission.

The fines which could be imposed are contained in Schedule 1 of the EEA and are dependent on whether the employer is a first time or repeat offender and are referred to above.

It is advised that employers identify whether they have reached the thresholds contained in the EEA to determine whether they are required to submit annual reports. If they now fall within this threshold and anticipate that they will not be able to submit a report in time, it is advisable that the employers notify the Director-General as a matter of urgency of their anticipated failure.

INCOME DIFFERENTIALS AND EQUAL PAY

An interesting amendment to s27 of the EEA, dealing with income differentials, is the addition of the words unfair discrimination.

Section 27 regulates the statement/report an employer has to submit when reporting in terms of s21(1) on the remuneration and benefits received in each occupational level of that employer's workforce.

This is done in accordance and as prescribed, by the Employment Conditions Commission (Commission) established in s59 of the BCEA.

The only amendments to s27 were in the heading, subsection 1 and 2.

The old s27 only placed focus on the issue of disproportionate income differentials and dictated that the designated employer had to take steps to rapidly reduce them, subject to guidance as may have been given by the Minister.

The amended s27 not only places the onus on the employer to rapidly reduce disproportionate income differentials but added the following words to the section, *"or unfair discrimination by virtue of difference in terms and conditions of employment as contemplated in s6(4)."*

The rest of the section from subsection 4 to 6 remains the same.

Subsection 4 sets out, but does not limit, the measures the employer can take to rapidly reduce any disproportionate income differentials or unfair discrimination on the terms and conditions of employment namely:

- Collective bargaining
- Compliance with sectoral determinations made by the Minister in terms of s51 of the BCEA
- Applying the norms and benchmarks set by the Commission
- Relevant measures contained in skills development legislation

Sections 5 to 6 set out that the Commission must research and investigate the norms and benchmarks for proportionate income differentials and accordingly advise the minister on appropriate measures for reducing disproportionate differentials. The Commission may not disclose any information pertaining to individual employees or employers. The only instance where information can be disclosed is when parties to a collective bargaining process request the information contained in the statement submitted by the employer. This request is however subject to s16(4) and (5) of the LRA that regulates the confidential information that an employer does not have to disclose to a trade union.

It would therefore be best to act proactively if the employer notices any form of disproportionate income differentials or potential unfair discrimination.

ASSESSMENT OF COMPLIANCE WITH EMPLOYER'S EMPLOYMENT EQUITY REQUIREMENTS

Section 42 of the EEA, as amended by the EEAA, deals with the assessment of compliance with employment equity by a designated employer.

The EEA places a positive duty on a designated employer to take steps to eliminate unfair discrimination in the workplace. In terms of s42, the Director-General of the Department of Labour is empowered to determine whether a designated employer is implementing employment equity in accordance with the EEA.

The Director-General may take the following factors into account:

- The extent to which suitably qualified people from and among the different designated groups, as defined in the EEA, are equitably represented within each occupational level in that designated employer's workforce in relation to the demographic profile of the national and regional economically active population
- The reasonable steps (no longer 'efforts') taken by a designated employer to train suitably qualified people from the designated groups
- The reasonable steps taken by the designated employer to implement its employment equity plan
- The extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups
- The reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups and any factor that may be prescribed

The Director-General may also take into account s15 of the EEA, which deals with the affirmative action measures to be implemented by a designated employer.

Significantly, as mentioned to above, the Director-General is now empowered to consider the steps taken by the designated employer to comply with the EEA and not merely the reasonable efforts to comply with the EEA. The significance of this amendment is that designated employers should show that they are taking positive steps to comply with the EEA.

The Director-General may, in terms of s20(7), apply to the court for a sanction to be imposed on a designated employer who does not comply with its employment equity plan. An employer may, in an assessment or in any court proceedings, raise any reasonable grounds to justify its failure to comply. These grounds may include any labour market related conditions, such as skills-shortage.

Employers are advised to monitor their compliance in order to avoid being heavily fined.

EMPLOYMENT SERVICES ACT, NO 4 OF 2014

The Employment Services Act, No 4 of 2004 (ESA) was passed by the National Assembly on Tuesday, 4 March 2014. ESA was also assented to by the President, but its commencement date is yet to be published.

Once in effect, ESA will repeal the Employment Services Provisions contained in the Skills Development Act, No 97 of 1998 (SDA). The stated purpose of ESA includes promoting employment and decreasing levels of unemployment in South Africa as well as providing training for unskilled workers.

While ESA has various mechanisms for improving unemployment levels in the country and training the workforce, only time will tell if these mechanisms will prove successful.

One of the more publicised provisions of ESA is that it provides for the registration of private employment agencies, which includes recruitment agencies and temporary employment services, more commonly known as labour brokers.

ESA further provides for 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. Employers in certain industries may be required to register vacancies and specific categories of work with public employment services. Employers may also be required to interview individuals recommended by a public employment agency and pay license fees to assist in funding public employment services.

Naturally, as with all other employers and employment agencies, the public employment services will have to comply with the Protection of Personal Information Act (POPI). One of the implications of POPI is that employers will be required to obtain consent from employees and prospective employees to process their personal information. The public employment services will also be required to obtain such consent from prospective employees when assisting them in applying for positions with prospective employers.

Where the public employment service has not obtained the consent or has obtained consent with insufficient scope, the employer would have to obtain the consent itself. This could be onerous on employers.

ESA empowers the Minister of Labour to introduce regulations relating to the employment of foreign nationals. The purpose of the provision is to protect the employment opportunities of South African citizens and permanent residents. Foreign nationals may not be employed without a valid work permit and if employed may only perform work authorised by their work permit.

ESA states that the Minister of Labour may create regulations setting out processes to be followed by employers prior to employing a foreign national.

Provision is also made for supported employment services for persons with disabilities. This would entail providing training to people with disabilities to promote their access to formal employment and ability to create self-employment opportunities.

ESA is thus a formal attempt by the legislature to address unemployment levels. Whether ESA will successfully carry out its purpose will be dependent on its implementation when it becomes law.

EMPLOYER'S DUTY TO REPORT ON VACANCIES

Section 10 of ESA mandates the Minister of Labour to create regulations requiring employers to notify the Department of Labour of any vacancy or new position within their establishments.

Many employers have raised an eyebrow at the onerous obligation this provision will introduce. However, the duty to report vacancies to the state is currently contained in s23(3) of the SDA and is thus nothing new. Section 23(3) of the SDA provides that the Minister of Labour may require each employer to notify a labour centre (which centres were to be established in terms of the SDA) of any vacancy that may exist within that employer's organisation.

The reason employers are not presently required to report vacancies to the state is because the Minister of Labour has not issued the requisite notice and/or regulations under the SDA requiring employers to do so and to facilitate the reporting process.

The ESA therefore simply moves the reporting obligation (if the Minister were to issue such a notice) from the SDA to the ESA. Consequently, the ESA has not introduced anything new in this regard.

MARKET RECOGNITION

Our Employment Law team is externally praised for its depth of resources, capabilities and experience.

Chambers Global 2014–2024 ranked our Employment Law practice in Band 2 for employment. *The Legal 500 EMEA 2020–2024* recommended the South African practice in Tier 1. *The Legal 500 EMEA 2023–2024* recommended the Kenyan practice in Tier 3 for employment.

The way we support and interact with our clients attracts significant external recognition.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. *Chambers Global 2024* ranked Aadil in Band 1 for employment. *Chambers Global 2015–2023* ranked him in Band 2 for employment. *The Legal 500 EMEA 2021–2024* recommended Aadil as a 'Leading Individual' for employment and recommended him from *2012–2020.*

The Legal 500 EMEA 2021–2024 recommended Anli Bezuidenhout for employment.

Chambers Global 2018–2024 ranked Fiona Leppan in Band 2 for employment. *The Legal 500 EMEA 2022–2024* recommend Fiona for mining. *The Legal 500 EMEA 2019–2024* recommended her as a 'Leading Individual' for employment, and recommended her from *2012–2018.*

Chambers Global 2021–2024 ranked Imraan Mahomed in Band 2 for employment and in Band 3 from *2014–2020. The Legal 500 EMEA 2020–2024* recommended him for employment.

The Legal 500 EMEA 2023–2024 recommended Phetheni Nkuna for employment.

The Legal 500 EMEA 2022–2024 recommended Desmond Odhiambo for dispute resolution.

The Legal 500 EMEA 2023 recommended Thabang Rapuleng for employment.

Chambers Global 2024 ranked Njeri Wagacha in Band 3 for FinTech. *The Legal 500 EMEA 2022–2024* recommended Njeri for employment. *The Legal 500 EMEA 2023–2024* recommends her for corporate, commercial/M&A.

BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE
This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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