DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT ALERT

17 September 2012

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THE LABOUR AMENDMENT BILLS AND THE JUDICIARY

Amendments to the Labour Relations Act, No 65 of 1995 (LRA) and the Basic Conditions of Employment Act, No 75 of 1997 (BCEA) are imminent. However, despite these amendments, it is apparent that the Labour Courts have commenced utilising the reasoning, which underpins these amendments, in their judgments.

The amendments to the LRA and the BCEA, by way of example, seek to regulate temporary employment employees. Our judiciary commenced this process some time ago. The first decision of its kind was the judgment by Acting Judge Boda in *Nape v INTCS Corporate Solutions (Pty) Ltd (2010) 31 ILJ 2120 (LC)*. Subsequent to this judgment, three other judgments were issued and finally endorsed by the Labour Appeal Court in the matter of *National Union of Metal Workers of South Africa and Others v Abancedisi Labour Services CC (JA62/10) [2012] ZALAC 21 (20 July 2012)*.

The purpose of these judgments was to ensure that temporary employment workers were not adversely prejudiced by practices of either the client or either the temporary employment service employer.

During December 2010, when the first set of proposed amendments was published, one of the issues of concern was the Employment Equity Act, No 55 of 1998 (EEA). Criticism related to how compliance with one's employment equity plan would be measured. Section 42(a) of the EEA stated as follows:

> "The extent to which suitably qualified people from …. (unclear) and different designated groups are equitably represented within each occupational category and level in that employee's workplace in relation to the –
>
> (i) demographic profile of the national and regional economically active population".

The proposed amendment was to amend this provision and provide that assessment of one's compliance with the Employment Equity Plan would be assessed in relation to national targets. In an unreported decision, in a dispute between *Solidarity and others v The Department of Correctional Services and others, unreported judgment handed down in the Labour Court on 24 August 2012 under case number 328/2012* the issue regarding the controversy between national and regional targets reared its head.

Solidarity sought to interdict the appointment of a person into a position, for which one of its members had competed and who was unsuccessful. In the trial between the parties, which is yet to be heard, Solidarity seeks, among others, the following:

> "2.1 a declaration that the employee equity plan of the Department of correctional services for the period 2010 to 2014 by requiring decisions on the appointment, transfer or promotion of personnel in the Department to be made by reference to quotas reflecting the national demographic pattern of men and women and different races,
>
> 2.1.1 does not meet the requirements of the Employment Equity Act 55 of 1998 (the EEA);"

In the unreported decision, Solidarity sought an urgent interdict preventing the department from filling the position until finalisation of the trial. They were successful in achieving their goal.

continued

In the course of its judgment, the Court held as follows:

"[22] On the evidence, it is apparent that the sole reason the applicant did not get the permanent appointment was that although he was the first choice of candidate recommended by the selection panel he was not the best candidate in terms of the employment equity plan which the department says forms part of its recruitment and selection processes. As the department put it in explaining why the National Commissioner did not deviate from the policy: '…, the coloured males were overrepresented in the category into which the post fell and therefore the appointment of the applicant would not have served to achieve equitable representation of the workforce and would therefore had been in conflict therewith.'

[23] On the other hand it is apparent that once the selected candidate was no longer available for appointment, the department declined not to make any appointment at all and decided to rather advertise the post, while utilising the third applicant in the position in an acting capacity. It is self-evident that the only reason it decided to re-advertise the post was to obtain another suitable candidate who would advance the achievement of its employment equity plan targets. This reinforces the impression that the employment equity plan was strictly construed and strongly suggests that the department views the target figures as setting absolute quotes that have to be achieved at any cost.

[24] In terms of s15(2)(d) of the EEA, measures to ensure equal opportunities for suitably qualified individuals from designated group and to achieve equitable representation in the workplace may include numerical targets and preferential treatment, but may not adopt quotas. What appears to have happened in this instance is that even when no suitably qualified person from a designated category was available, the third applicant could not be appointed. Thus even when the employment equity plan scheme could not achieve the object of appointing a suitably qualified person from a designated group, the third applicant's race was an insuperable obstacle to his appointment".

The issue regarding whether national or regional targets should be applied will be something that may be decided prior to the enactment of the Employment Equity bills. Whether an employer must employ a person from a designated group, who is suitably qualified, when it is unable to secure the appointment of another employee in terms of its employment equity plan, remains to be seen.

Aadil Patel and Johan Botes

We are hosting a seminar on Wednesday, 19 September 2012 in our Sandton office.

Adam Hartley, from DLA Piper UK, will be discussing second generation outsourcing from an international perspective and how other jurisdictions have applied it.

To attend the event, please send an email to jhbevents@dlacdh.com

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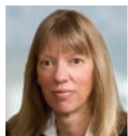

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