DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT

ALERT

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IN THIS ISSUE

THE **BASIC CONDITIONS OF EMPLOYMENT AMENDMENT ACT, NO 20 OF 2013,** COMES INTO OPERATION ON **1 SEPTEMBER 2014**

In terms of Government Gazette dated 29 August 2014, it has been determined that the Basic Conditions of the Employment Amendment Act shall come into operation with effect from 1 September 2014. The Amendment Act introduces important amendments to the BCEA including (a) a prohibition on employers from requiring employees to make certain payments to secure employment and from requiring employees to purchase goods, services or products; (b) the prohibition of employing children under the age of 15 years; (c) to make it an offence for anyone to require or permit a child to perform any work or provide any services that place at risk the child's well-being; (d) to provide for the Minister of Labour to publish sectoral determinations in respect of employees and employers who are not covered by any other sectoral determination; (e) to provide for the Minister to publish sectoral determinations to regulate the adjustment of remuneration increases; (f) to provide for the Minister to publish sectoral determinations to regulate task-based work, piecework, homework, sub-contracting and contract work; (g) to provide for the Minister 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 BCEA Amendment Act forms part of an array of amendments to South Africa's labour laws including amendments to the Employment Equity Act, and in particular its provisions relating to the principle of equal pay for equal work, far-reaching amendments to the Labour Relations Act, including the regulation of the so-called vulnerable categories of employees including fixed-term contractors, temporary employment services (labour brokers) and part-time employees, and the introduction of the Employment Services Act dealing primarily with the employment of foreign nationals. The Employment Equity Amendment Act came into operation with effect from 1 August 2014. The Labour Relations Amendment Act is awaiting a date of commencement as is the Employment Services Act.

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EQUAL PAY PROVISIONS AND THE IMPACT ON COLLECTIVE AGREEMENTS

The Employment Equity Amendment Act (together with its regulations) (EEAA) makes provision for equal pay for employees doing work of equal value. Any differences in the terms and conditions of employment for such employees, on any of the grounds listed in the EEAA (for example, age, gender, race, pregnancy, religion) or on arbitrary grounds, constitutes an act of unfair discrimination. Collective agreements are used as an instrument to frame and enforce terms and conditions of employment in respect of all the employees within a relevant 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.

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, it's 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 will be considered as unfair discrimination and employers will not be able to hide behind the provisions of a collective agreement in defence.

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