DLA CLIFFE DEKKER HOFMEYR

EMPLOYMENT

ALERT

15 SEPTEMBER 2014

IN THIS ISSUE

COMPENSATION AND DAMAGES: WHAT IS THE DIFFERENCE?

STRICTER ENFORCEMENT OF THE EEA UNDER THE AMENDMENTS

STRICTER ENFORCEMENT OF THE EEA UNDER THE AMENDMENTS

The Employment Equity Act, No 55 of 1998 (EEA or Act) has been extensively amended. The amended act came into force and effect on 1 August 2014. This article examines the more stringent enforcement mechanisms introduced by the amendment act.

Employment Equity disputes

Enforcement of employer compliance with affirmative action measures will in future be much faster, with significantly increased penalties for non-complying designated employers. Failures to prepare and/or implement employment equity plans, and failures to 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, 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 on 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), 19 (conducting an analysis), 22 (informing employees of the provisions of the EEA, the most recent report submitted and so on) and 26 (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. Such application must be brought if an employer gives the Director-General notice in writing that it does not accept the request or

FOLLOW US ON TWITTER: **@CDH_LabourLaw**

recommendation. If the Department does not bring an application in the allocated time after an employer's notice of disagreement, the recommendation will lapse.

Equal pay disputes

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; and
- the discrimination is unfair.

Conclusion

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 envisage a stricter enforcement of the provisions of the Act.

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

Aadil Patel and Kirsten Caddy

COMPENSATION AND DAMAGES: WHAT IS THE DIFFERENCE?

In the recent 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, the LAC considered the distinction between compensation and damages. The complainant in the matter claimed R100 000 in damages, the court awarded an amount in excess of R1.4 million, with only R50 000 being awarded in damages.

Section 50(1) of the Employment Equity Act, No 55 of 1998 (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 is repeated in s50(2) referring specifically to claims of unfair discrimination. The judgment considers the fact that often the words compensation and damages are used interchangeably due to there being ambiguity relating to the meanings of 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 Labour Relations Act, No 66 of 1995 (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 2 concepts. While the Oxford dictionary definitions of the two concepts define both 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 holds that the only conclusion that may be drawn is that the term damages refers to

patrimonial loss and the term compensation refers 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 concludes that this is the manner in which the EEA seeks to distinguish damages from compensation. 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 must be appropriate and 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 further 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 6 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 was 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 effect of such award on society. The court is also required to be consistent in its awards for compensation for non-patrimonial loss so as to ensure that the compensation granted to high earning employees is not greater than that awarded to low earning employees merely by virtue of the fact that the former earns a higher salary.

Inez Moosa

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@dlacdh.com

Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@dlacdh.com

Johan Botes
Director
T +27 (0)11 562 1124
E johan.botes@dlacdh.com

Mohsina Chenia
Director
T +27 (0)11 562 1299
E mohsina.chenia@dlacdh.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@dlacdh.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@dlacdh.com

Gavin Stansfield
Director
T +27 (0)21 481 6314
E gavin.stansfield@dlacdh.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@dlacdh.com

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@dlacdh.com

Kirsten Caddy
Senior Associate
T +27 (0)11 562 1412
E kirsten.caddy@dlacdh.com

Nicholas Preston
Senior Associate
T +27 (0)11 562 1788
E nicholas.preston@dlacdh.com

Andrea Taylor
Senior Associate
T +27 (0)11 562 1687
E andrea.taylor@dlacdh.com

Ndumiso Zwane
Senior Associate
T +27 (0)11 562 1231
E ndumiso.zwane@dlacdh.com

Anli Bezuidenhout
Associate
T +27 (0) 21 481 6351
E anli.bezuidenhout@dlacdh.com

Shungu Mariti
Associate
T +27 (0)11 562 1475
E shungu.mariti@dlacdh.com

Inez Moosa
Associate
T +27 (0)11 562 1420
E inez.moosa@dlacdh.com

Zinhle Ngwenya
Associate
T +27 (0)11 562 1119
E zinhle.ngwenya@dlacdh.com

Lauren Salt
Associate
T +27 (0)11 562 1378
E lauren.salt@dlacdh.com

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.

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa Dx 154 Randburg and Dx 42 Johannesburg

T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa Dx 5 Cape Town

T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com

©2014 0125/SEPT14

Cliffe Dekker Hofmeyr is a member of DLA Piper Group, an alliance of legal practices