EMPLOYMENT

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IMMIGRATION: APPLICATION FOR A REPATRIATION DEPOSIT REFUND

The Department of Home Affairs, has designated 13 October 2014, as the effective date of dispensing with the statutory requirement for a repatriation deposit as a term or condition for the issuing of temporary residence visas in accordance with s11,13,14,15,17,18,20 and 22 of the Immigration Act, No 13 of 2002 (Immigration Act).

Repatriation deposits were refundable upon the final departure of a foreigner or after a permanent residence permit, in terms of s25 of the Immigration Act, had been issued to the foreigner. It can be argued that the reasoning behind the dispensing of this requirement may be found in numerous applications where the process has been frustrated due to the requirement of securing the said deposit. Thus the effect of such cancellation enviably means that the process of issuing temporary residence visas has become less strenuous in respect of cost.

Furthermore the Director-General has invited any person to apply for a repatriation deposit refund who prior to the coming into operation of the Immigration Amendment Act, No 13 of 2011, paid such deposit as a guarantee of the return of an applicant. All refund applications can now be made up until 28 February 2015, however such applications are limited to persons who have acquired permanent residence or have changed their status in the Republic prior to 26 May 2014.

All refund applications are to be accompanied by the following documents:

- Application for refund of repatriation deposit (available at South African Foreign Missions or Department of Home Affairs Local Offices);
- Original passport (for verification purposes);
- Proof of banking details/warrant vouchers (cheques);
- Proof of final departure from the Republic of South Africa on or before the expiry of the temporary Residence permit; and
- In the case where an application for refund is made in the Republic, proof of change of status prior to 26 May 2014 or proof of permanent residence permit.

However, such refund applications do not apply to persons who have overstayed their permit as such overstay is regarded as a violation of the terms and conditions their temporary residence permit, hence the exclusion.

In conclusion, all persons who qualify for a refund are called to apply within the prescribed period as failure to claim a refund by 28 February 2014 will result in the forfeiture of the refund to the State.

Michael Yeates and Thandeka Nhleko

DLA CLIFFE DEKKER HOFMEYR

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

In a decision handed down by the Labour Court on 2 September 2014, in *Bandat v De Kock and Another* (JS832/2013) [2014] ZALCJHB 342 (2 September 2014), the court was required to decide whether the Employment Equity Amendment Act, No 47 of 2013 (Amendment Act) 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 Employment Equity Act, No 55 of 1998 (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 Amendment Act, 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 Amendment Act, 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 Amendment Act, 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 does not exist or is justifiable.

The court held that there was nothing in the EEA or in the Amendment Act which indicated that it had to be applied retrospectively. As such, the presumption that had to apply was that it was not retrospective and that the existing procedure prior to the enactment of the Amendment Act had to apply. 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 show the existence of her being 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.

Kirsten Caddy

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 Labour Relations Act, No 66 of 1995 (LRA) and by the amendments to s6 of the Employment Equity Act, No 55 of 1998 (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 justifiable treatment 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 the same and 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 treatment 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 Act 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 for TES employees that 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.

Inez Moosa

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