

## **Amendment to the Labour Relations Act (Part 2)**

In a previous article, the amendments to the Labour Relations Act were discussed with specific reference to the implications in respect of restructuring, business take-overs and employee redundancy.

This penultimate article on the proposed amendments to the Labour Relations Act focuses on the remainder of the amendments addressing aspects concerning the operation of the Commission for Conciliation, Mediation and Arbitration (CCMA hereafter), unfair dismissal, unfair labour practices and dispute settlement.

### **Dispute settlement by the CCMA**

In practice it was found that the CCMA is being inundated with applications by employees, which often have little or no merit. This causes an enormous overload, generally causing disputes to last considerably longer than was originally envisaged when the CCMA was established.

A few amendments to the Labour Relations Amendment Act 2001 should address this matter and resolve the issue.

- Currently limited opportunity exists to recover costs for services rendered by the CCMA. The amendments enable the Minister of Labour to determine the circumstances by means of regulations in which fees may be recovered for conciliation and arbitration procedures.

It is expected that fees will be charged in accordance with the remuneration of the employee concerned and the turnover of the employer. The intention is to convince applicants in the higher income groups to make use of private arbitration, unless they are willing to pay the CCMA fee. It is however not yet clear what the fees and remuneration limits will be.

- The CCMA's power to grant orders of costs in arbitration cases is currently limited. Under the amendment, the CCMA may publish guidelines or a code of good practice that would expand their power to issue orders of costs. The grounds for orders of costs will consequently no longer be only vexatious or meddlesome litigation, but also other grounds, such as where the employer makes a reasonable settlement proposal before the commencement of the arbitration, which the applicant does not accept and the applicant then continues and loses the case.
- The orders of the CCMA are currently not enforceable in the absence of a labour court order that confirms the enforceability thereof. In future an order of the CCMA will be enforceable as if it is itself an order of the labour court.

## Representation at the CCMA

- The right of parties to be represented at CCMA proceedings is currently limited to trade union representatives, employer organisations, trade union officials and in some cases only legal representatives. These categories are now being replaced by regulations to be published and that would govern this issue in future. The expectation is that to some extent, the playing-field will be equalised for employers, in that employees will in all probability only be allowed to be represented by a trade union if the employee concerned was a member of that union at a date before the dispute arose. In such a case, current abuse by trade unions that are formed overnight and of which applicants become members even during the proceedings, would probably be neutralised. Included in the right to represent would probably be a director or employee of a subsidiary company.

## Definition of “dismissal”

- Under the definition of dismissal is to be added: an offer for substantially less favourable conditions of employment by a new employer after transfer in terms of section 197 of the Act (this aspect has been discussed in a previous article).

## Automatically unfair dismissal

- If the reason for an employee’s dismissal is the transfer of a business or a reason that is related to the transfer of a business as contemplated in sections 197 and 197A of the Act, it will in future constitute automatically unfair dismissal. Dismissal on operational grounds is still allowed in cases when a business is transferred, as long as the requirements prescribed in section 189 of the Act are met.
- Dismissal of an employee, who exercised his /her rights in terms of the Protected Disclosures Act by making a protected disclosure, is also regarded as automatically unfair.

## Trial period workers

- The Labour Relations Act henceforth makes specific provision for the use of probationary periods. During the probationary period (which must be reasonable) the employer only needs to prove that a fair procedure was followed if the reasons for dismissal are poor work performance and inability to adapt. Presumably there should still be some evidence of the poor work performance or lack of adaptability. A trial period can only be renewed for reasons that relate to the purpose and objectives of the probationary period agreement. The amendments thus imply that dismissal during the probationary period for less serious reasons would be accepted as long as a fair procedure was followed. In general, 3 to 6 months would in most cases be sufficient for a trial period and in exceptional cases longer than 6 months.

### Compensation for unfair dismissal

- Under the amendments, the labour court and the CCMA are granted wide discretion to award compensation in respect of unfair dismissal. The compensation awarded must be fair and justifiable and is limited to 12 months' remuneration at the remuneration rate on the date of dismissal. The current all-or-nothing-approach in respect of remuneration, particularly in the cases of dismissal that is procedurally irregular is thus being replaced with a more flexible approach.

### Dispute settlement

- By written agreement between employee and employer, external persons (CCMA Commissioners) who judge the matter once and finally may be used as chairpersons at disciplinary hearings. This possibility eliminates protracted procedures such as an internal hearing, the appeal hearing, conciliation at the CCMA and arbitration by the CCMA. In such a case, significant cost and time-saving is possible. It may however not necessarily constitute good management style to contract out all disciplinary actions. It could also be arranged by agreement that management deals with the hearing, but that the appeal hearing is dealt with by an outsider in the final instance.
- In cases where the dispute involves dismissal or an unfair labour practice in respect of a probationary period, provision is made for a joint conciliation/arbitration process and arbitration must follow on the same day after the conciliation has been completed. The same procedure may apply where the parties have so agreed, also as regards other dismissal disputes. This should have a dramatic impact on expediting the conciliation process and eliminating the long time lapse between conciliation and arbitration.

Next week, in the last installment on the amendments to the Labour Relations Act, the new definition of employee and its possible implications for employers and contracting with service providers are discussed. Thereafter the various employment relationships, forms of contract and contracting with employees and independent contractors are discussed in a series of three articles.