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Highlights of the LRA Amendment Bill

Introduction

Finally we have clarity about the nature of the amendments to the LRA and BCEA. Although the Bills will be open for public comment, the fact that they represent consensus between the social partners at NEDLAC and that the department of Labour is already conducting information sessions across the country, suggest that only minor tweaks rather than large scale changes will be considered.

The amendments to the LRA are extensive, covering further limitations the right to strike; restriction of an employer's ability to enforce changes to terms and conditions of employment; changes to the CCMA's jurisdiction and Labour Court review procedures; and, probably most importantly, restrictions on the use of non-standard forms of employment.

Overview of the key changes

In future articles some of the most important changes touched on below will be discussed in greater detail. What follows is a broad overview only.

Organisational rights: while the BCEA Amendment Bill permits the Minister of Labour to determine thresholds for s 12 and 13 rights for unions in sectors covered by a Sectoral Determination, s 21 of the LRA will be amended to allow a commissioner to award full organisational rights to trade unions that do not enjoy majority representation in a workplace but is the 'most representative' union in the workplace. The ability of employers and majority trade unions to set thresholds for entry into the workplace by less representative unions is also restricted: an arbitrator may award organisational rights to unions that do not meet the agreed threshold, provided it would be fair to do so and the union/s concerned represent a 'significant interest' or a 'substantial numbers' of employees in the workplace. In deciding whether or not to grant any organisational rights, the arbitrator must consider 'the composition of the workforce', including the fact that there are non-standard employees (temporary employees, labour brokers, etc) in the workplace. Finally, trade unions representing employees of a labour broker will in future be able to exercise organisational rights at the premises of the broker and its clients.

Limiting the right to strike: several new limitations are laced on the right to strike. Key among these is the requirement – included in the 1956 Act but excluded from the 1995 Act – that a strike will be unprotected if a ballot of members had not been held or if a majority of members had not voted in favour of the strike. (While this provision also applies to lock outs by employer organisations, the primary aim is to limit strikes that do not enjoy majority member support, 'as violence or intimidation are more likely to occur under these circumstances', according to the explanatory memorandum to the Bill.)

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Another restriction relates to the types of dispute over which industrial action is permissible. The only so-called rights disputes that at present cannot be the subject-matter of a strike are rights disputes involving LRA rights, e.g. unfair dismissal, unfair labour practices, breaches of collective agreements, etc. An amendment to s 65(1)(c) now prohibits strikes now not only prohibits industrial action over rights disputes under the LRA, but also 'any other employment law'. Previously strikes were permissible over such rights disputes as health and safety, breach of contract, non-compliance with the BCEA and discrimination.

The right to picket is at once limited and extended: a 'material' breach of picketing rules (whether agreed or determined by the CCMA) will open those guilty of the breach (which may be individual union members or perhaps even the union itself) to civil action for damages. Picketing rules can now also in certain circumstances be extended to parties not directly involved in the employment relationship, e.g. owners of shopping malls and other landlords. Non-compliance with picketing rules can further lead to a suspension of the strike or picket by the Labour Court.

As far as essential service are concerned, a raft of new provisions aimed at making the Essential Services Committee (ESC) more effective in regulating industrial action in such services. Given the fact that relatively few employers and trade unions in essential services have established maintenance and minimum services agreements, the amendments provide that the ESC may determine such services. The right of 'public officials exercising authority in the name of the state', i.e. customs officials, judicial officers and those responsible for the administration of justice generally, will henceforth also be limited.

Finally, although it does not affect the right to strike or lock-out, the CCMA's powers to intervene to conciliate a dispute where it is in the public interest to do so have been strengthened.

Enforcement of awards: it will now be much easier for employees who have received a compensation award to enforce such an award. Instead for a writ having to be issued by the Labour Court before it can be enforced, an award may be presented directly to the deputy sheriff for execution if payment has not been made. Other awards that require the performance of an act other than the payment of money, e.g. an order of reinstatement, can be presented directly to the Labour Court for an order of contempt without the award first having to be made an order of court.

Review proceedings speeded up: at present a review application does not suspend the operation of an arbitration award. This means that employers often have to bring separate applications to the court to stay the execution of an award pending an application for review of the award. A new provision now provides that if the employer provides security the award is suspended. Where the order is one of reinstatement or re-employment, security equivalent to 24 months' remuneration must be provided; if it is for compensation, the amount awarded must be provided as security. The applicant must then apply for a date for the hearing of the review application within 6 weeks of bringing the application. The court must also issue its judgment within 6 weeks of the last date of the hearing. (Another section, also aimed at speeding up decision-making, provides that judgments of the court, other than those given on review, must be handed down within 6 months of the last day of a hearing).

Private dispute resolution arrangements: if an employee earns less than the to-be-prescribed threshold, or if the third party appointed to resolve the dispute is not independent of the employer, the CCMA may hear a dispute despite the fact that the parties have agreed to refer disputes between them to private mediation or arbitration instead of the CCMA.

Appearance by labour consultants: The CCMA's power to make rules regarding representation at conciliation and arbitration now includes the power to place regulate or limit rights of appearance. This is clearly aimed at restricting the ability of labour consultants who operate under the guise of trade unions or employer organisations to appear at the CCMA. Another potential blow to them lies in a new provision which states that a person representing a party in Labour Court proceedings as a director or employee of the party; or as an office-bearer or official of that party's registered trade union or registered employers' organisation, may not charge a fee for their appearance, or receive 'a financial benefit'.

Limiting the ability to retrench to implement workplace change: a subtle yet fundamental change is introduced by an amendment to s 187(1)(c). Currently, an employer wanting to implement changes to agreed terms and conditions of employment and who is unable to reach consensus with employees or their trade union may choose between locking them out until they agree, or embarking on a retrenchment exercise in terms of s 189. The courts have in the past made it clear that the purpose of the section was to prohibit so-called dismissal lock-outs and not to prevent the retrenchment of employees provided the requirements of s 189 have been complied with. The section now prohibits any dismissal because of 'a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer'. Employers will now be compelled to negotiate until there is agreement, or resort to a lock-out to obtain consensus. Retrenchments where there is a genuine operational reason for it not connected to the employees' refusal to accede to a demand are not affected.

High earning employees excluded from unfair dismissal protection: employees earning above a yet-to-be-determined threshold (the memorandum to the Bill proposes one of R1m) will be denied access to the CCMA to complain of unfair dismissal, provided the employer has given the employee at least 3 months' written notice or such longer notice period as might be provided for in a contract of employment. If such an employee is dismissed summarily, i.e. without notice, or on a shorter notice that prescribed or provided for, the right to approach the CCMA remains available. High-earning employees also retain the right to complain of an automatically unfair dismissal in terms of s 187. These provisions will take effect in respect of existing employees two years after the amendments have come into effect. The net effect of this is that employers will find it much easier to terminate the services of senior employees especially where the reason for termination is difficult to fit into the existing categories but involves issues of incompatibility, lack of initiative and leadership, or simply a desire to bring in 'fresh blood'. The thinking behind this provision is that higher earners are in a better bargaining position to protect themselves against unfair dismissal by negotiating appropriate protection.

Disciplinary enquiries by arbitrators: the so-called 'pre-dismissal arbitration' is now termed 'enquiry by arbitrator'. A number of changes have been introduced to encourage the use of this mechanism: it may now be provided for not only in a contract of employment but also a collective agreement; the arbitrator has all the powers of a commissioner; and the effect of the ruling by the arbitrator is the same as any arbitration award (which avoids duplication of proceedings).

Extension of CCMA jurisdiction in retrenchment disputes: the CCMA will be able to hear retrenchment disputes where the employer concerned employees less than 10 employees.

New protection for non-standard employees: undoubtedly the most anticipated changes concern so-called non-standard employees, i.e. temporary employees, part-timers and employees of temporary employment services. First, over-ruling a recent decision of the LAC in *University of Pretoria v CCMA*, s 186 is amended to provide that not only a reasonable expectation of renewal of a fixed-term contract but also an expectation of permanency. It is

not clear what type of relief can be claimed in the latter instance. Second, the provisions of s 198 dealing with temporary employment services (TES or 'labour brokers') have undergone major amendments. The net effect is to bring the mechanism of a TES back to its original purpose, which has always been to provide a means through which employers could satisfy genuine short-term employment needs. Unfortunately, many employers have used the mechanism to employ persons on something approaching a permanent basis without those persons enjoying the benefits of permanent employment or adequate protection against rights abuses. Changes include the following:

- where legislation provides for joint and several liability of client and TES, employees or inspectors from the DoL may institute proceedings against either party or both and also have any awards enforced against either of them;
- a TES must register to be able to conduct business – the fact that it is not registered offers no defence against claims against it or against its clients;
- the Labour Court may now rule on whether a provision in a contract between a client and TES is valid, e.g. a provision that provides for 'automatic termination' of employment if the client no longer requires the services of the TRS or an employee;
- where a client is subject to a sectoral determination or bargaining council agreement, a TES must adhere to those;

Third, a new s 198A brings about new protections for employees earning *below* a yet-to-be determined threshold, including the following:

- employees of a TES who work for a client for longer than 6 months are deemed to be the employees of the client after expiry of this period, except if the employee works as a substitute for an absent employee or if the employee performs work designated in a bargaining council agreement, sectoral determination or notice by the Minister as temporary work (note: the Minister is required to publish a notice inviting public comment on what should constitute 'temporary work');
- if a TES terminates an employee's assignment with the intention of avoiding this consequence, the termination is regarded as a dismissal (one can expect a flood of disputes challenging the termination of assignments);
- if employees are deemed to be employees of the client, or have been employed by an employer for longer than 6 months, must be given the same wages and benefits than employees of the client who perform the same or similar work, unless there is a justifiable reason for treating them differently (but see the next point);
- exceptions are provided for, however including the following: if work exceeding 6 months is of a genuinely temporary nature or the employer can demonstrate a justifiable reason for fixing the term of the contract, e.g. seasonal work, post-retirement work, people employed in terms of a temporary work permit, people employed on a 'genuine and specific project' and people engaged on a probationary period not exceeding 6 months. If employed for longer than 24 months, such employees must be given a severance package at the end of their contracts of a minimum of 1 week for every completed year of service;
- temporary and part-time employees must be given the same opportunities for access to apply for vacancies as permanent staff;
- renewal of fixed-term contracts (in writing) is permitted provided the position remains genuinely temporary or if the justification for employment beyond 6

months remains in existence. If challenged, the onus is on the employer to justify the reasons for employing someone on a temporary basis;

- part-time employees are given equivalent protection, i.e. they must receive the same wage and benefits as 'comparable' full-time staff members unless there is a justifiable reason for treating them differently. Such reasons include differences in seniority, experience or length of service, merit and the quality of the work performed;
- most of the above do not apply to businesses employing less than 10 people or certain new small businesses.

Comment

Overall, the amendments are aimed at promoting the achievement of the original objects of the LRA, i.e. ensuring orderly collective bargaining and peaceful industrial action and ensuring that the employment rights provided for in the Constitution are extended to all employees, particularly vulnerable ones. As far as the latter is concerned, while some of the provisions, especially those relating to non-standard employment, will impact significantly on companies' employment strategies, the amendments also provide opportunity for creative options as far as contracting with senior employees is concerned. As far as collective bargaining is concerned, the new provisions regarding industrial action are to be welcomed. However, the lowering of the requirements for obtaining organisational rights where there is no majority union also means that the amendments want to promote collective bargaining even further: in future employers will not be able to refuse to grant such rights on the basis of a lack of representation; nor will it make much sense in those circumstances to refuse to bargain if a union has obtained all organisational rights provided for in the Act. It also needs to be kept in mind that the determination of a union's representation will also no longer be limited to a company's own employees but will include non-standard employees as well, including those employed via a TES.

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