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Corporate Employment Law

Where results matter

THE EMPLOYMENT EQUITY ACT – KEY CHANGES

During the first quarter of 2014, we circulated an article regarding the proposed amendments to the Employment Equity Act (EEA). The long awaited amendments were finally assented to on 14 January 2014. The President has now determined the effective date as 1 August 2014 by Notice in the Government Gazette and on the same day, the Minister's Regulations to the EEA, which provides guidance on how equal pay for work of equal value should be evaluated and/or applied within an employer's specific circumstances, came into effect.

Following our first article which you may already have received, we decided to place further and specific emphasis on <u>the implications of the equal pay for work of equal value provisions</u>.

Equal pay for work of equal value

The courts have held in a number of decisions that the principles of 'equal pay for equal work' and 'equal pay for work of equal value' are implicit in the old section 6 of the EEA. Both the old and the new section 6 prohibits unfair discrimination and harassment on certain listed and unlisted grounds. One of the most important amendments has been made to the definition of discrimination. The listed grounds in section 6 have not only been extended to include "any arbitrary ground", but the new subsection (4) now 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 subsection (1), is unfair discrimination*,"

Employers should consider the following principles when conducting an audit on its terms and conditions of employment applicable to its employees, against the background of the requirements set out in section 6, as amended:

1. *<u>Determine whether the work concerned is of equal value</u>*

   This will be the case where the work performed by an employee of the employer is the same, sufficiently similar or has the same value as work done by another employee for the same employer, where:

1.1 'Same Work': work that is identical or interchangeable;
1.2 'Sufficiently similar work': the employees can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable; and
1.3 'Of the same value': the occupations of the two employees are different but they are accorded the same or equal value.

Equal value is determined by objectively assessing, in a manner that is free from bias on any of the listed grounds or any arbitrary ground, the relevant jobs and considering:

1.4 the responsibility required (including for people, finances and material);
1.5 the formal and/or informal skills and qualifications required (including prior learning and experience);
1.6 the physical, mental and emotional effort required;
1.7 where relevant, the conditions under which work is performed (including physical environment, psychological conditions, time when and geographic location); and
1.8 any other factor that you can show is relevant.

However, where there is a sectoral determination in your industry providing guidelines in this regard, you may use it to justify the value assigned to any employee's work.

2. *Assess whether there are differences in the terms and conditions of employment*

If the work is of equal value, then it must be established whether there is difference in the terms and conditions of employment, including remuneration, between the relevant employees.

3. *If there is a difference it must be justified*

If there is a difference, it must fair and rational, otherwise it will amount to unfair discrimination in terms of section 11 of the EEA. A fair and rational difference may be based on any one or a combination of the following:

3.1 seniority or length of service;
3.2 qualifications, ability, competence or potential above the minimum acceptable levels required of the job;
3.3 performance, quantity or quality of work (but only where both employees are equally subjected to your performance evaluation system, which system must be consistently applied);
3.4 if an employee was demoted for a legitimate reason without a reduction in pay and their salary is then fixed until other employees in the same job reach that level of pay;
3.5 where an individual is employed temporarily for the purposes of gaining experience or training;
3.6 where there is a shortage of relevant skill, or the market value in a particular job classification; and
3.7 any other relevant factor that is not unfairly discriminatory (i.e. not on a listed or arbitrary ground).

The EEA, as amended, does not prohibit differentiation; but it does require that employers have reasonable grounds for differentiating between employees.

Employers should therefore, in our opinion, conduct a thorough evaluation of its entire staff compliment, including a review of the employment contracts and policy documents which set out the various terms and conditions of employment, to ensure that it does not result in unfair discrimination.

Definition of designated group

The definition of a designated group has been amended. In terms of the EEA, as amended, beneficiaries of affirmative action measures will be limited to black people, women, and people with disabilities who are citizens of South Africa by birth or descent, or became naturalised citizens prior to 27 April 1994 or after 26 April 1994 and who, but for Apartheid policies, would have qualified for citizenship through naturalisation prior to this date.

Psychometric testing

In terms of the amendments to section 8 of the EEA, only psychometric tests or assessments that have been certified by the Health Professions Council can be used in assessments.

Dispute resolution

Section 10 of the EEA is radically changed by the insertion of subsection (6)(aA). Subsection (6) has been changed to allow employees to refer a dispute regarding alleged unfair discrimination on the grounds of sexual harassment to the CCMA for arbitration. In addition, employees earning below the threshold of section (6)(3) of the BCEA, namely R205 433.30 per year, will now have the right to refer any other dispute relating to unfair discrimination, as dealt with in terms of Chapter 2 of the EEA, to arbitration in the CCMA after conciliation instead of the Labour Court. A new subsection (8) provides that an unhappy respondent may appeal to the Labour Court against such an award within 14 days of the date of the award, but the Labour Court, *on good cause shown*, may extend the period within which that person may appeal.

Burden of proof

Section 11 of the EEA, dealing with the burden of proof, is substituted with a new clause. Under the previous clause, the employee carried the burden of showing discrimination and the employer then had to establish that it was fair. The amended clause is aligned with the burden of proof in terms of section 13 of the Promotion of Equality and Prevention of Unfair Discrimination Act.

In the amended section, the employee only has to allege that unfair discrimination occurred on a listed ground of section 6(1) (only a *prima facie* case of unfair discrimination is required). It is then up to the employer to prove that no discrimination took place or if discrimination did take place that it was not on one of the prohibited grounds of section 6(1) or, if it was, that it was justified. The clause continues by listing what needs to be proved on a balance of probabilities by a complainant who alleges unfair discrimination on an ‘arbitrary ground’, namely that the conduct complained of is not rational; the conduct complained of amounts to discrimination and the discrimination is unfair. The introduction of the term ‘arbitrary ground’ considerably widens the scope of the EEA’s application.

This amendment is consistent with the terminology used in section 187(1)(f) of the LRA dealing with automatically unfair dismissals.

Sanctions

Sanctions have been streamlined in the sense that it is easier for the Director-General to impose sanctions on the employer for not following the EEA. Section 20 dealing with the EE plan is amended by adding a clause allowing the Director-General to apply to the Labour Court to impose a fine in accordance with Schedule 1, if a designated employer fails to prepare or implement an employment equity plan.

Reporting, monitoring and enforcement

Section 21 of the EEA, which section deals with reporting, is amended by deleting the distinction between designated employers with 150 employees and less and substituted with a new clause. All designated employers are now required to submit its first report within 12 months after commencement of the EEA or, if later, within 12 months after the date on which that employer became a designated employer. Thereafter all designated employers must submit a report once every year, not once every two years, on the first working day of October or on such other date as may be prescribed. An employer that becomes a designated employer on or after the first working day of April, but before the first working day of October, must only submit its first report on the first working day of October in the following year or on such other date contemplated in the proposed subsection 21(1). Reports must contain the prescribed information and signed by the CEO. The new subsection (4A) requires employers who are not able to submit a report on the first working day of October to inform the Director-General in writing before the last working day of August in the same year giving reasons why the employer cannot submit a report in a particular year. The reasons must not be false or invalid. If he employer fails to submit or the Director General does not accept the reasons it can apply to the Labour Court to impose a fine on the employer. Interestingly, subsection 21(5) is deleted, which provided that employers may not unfairly discriminate against an employee purely on the basis of the employee's lack of experience when deciding whether or not an employee is suitably qualified.

Enforcement provisions

Enforcement provisions of the EEA are simplified by eliminating unnecessary mandatory steps as well as mandatory criteria that must be taken into account in assessing compliance with the EEA. The amendments promotes effective enforcement and may prevent the tactical use of reviews as a mechanism for delaying the enforcement process.

Section 36 dealing with the undertaking of the employer to comply with a labour inspector's request has been deleted. Labour inspectors can still enter, question and inspect the employment equity actions of employers and obtain a written undertaking to comply within a specified period, from the employer (due to the employer's failure or refusal to consult, conduct an analysis, publish a summary of its report, assign responsibility to a senior manager, inform its employees of the EEA or failure to maintain records). If the employer fails to comply with the written undertaking it has given within the

period stated therein, the Labour Court may, upon application of the Director-General, make the undertaking or any part thereof, an order of the Labour Court.

A new section 37(1) provides that if the employer fails to comply with sections 16,17,19, 22, 24, 25 or 26, the labour inspector may immediately issue a compliance order to the employer. In terms of a new section 37(5), the employer must comply. If the employer does not comply with the compliance order within the timeframe specified therein, the Director General, in terms of a new section 37(6), may apply to the Labour Court to make the compliance order an order of the court.

The employer does not have the right to object or appeal the order to the Director General any more as these processes in terms of sections 39 and 40 are repealed. The aim hereof is to simplify the procedure and not to allow delaying of the enforcement of the EEA via objections and appeals to the Director General. An employer's objections will in future be heard by the Labour Court only, should the Director General refer the non-compliance to the Labour Court.

An employer can prove compliance in the Labour Court in terms of the new sub section 42 (dA), which requires the employer to show as part of the assessment of its compliance, the reasonable steps it has taken to appoint and promote suitably qualified people from the designated groups.

Positive obligation i.r.o. income levels

Prior to these amendments to the EEA, a designated employer had a positive obligation to identify and eradicate unfair discrimination. In terms of the new sub section 27(2), another positive obligation has been added, i.e. to take measures to progressively reduce any disproportionate income differentials or unfair discrimination by virtue of a difference in terms and conditions of employment [as contemplated in s6(4)] subject to guidance by the Minister on reducing income differentials and differences in terms and conditions of employment.

Labour Brokers

Keeping in tune with the other legislative amendments, the section dealing with labour brokers has been repealed.

Schedules

Schedule 1 was amended by substantively increasing fines to almost three times that of the principal Act. The turnover threshold contained in Schedule 4 to the principal Act, in addition, has also been increased threefold. Moreover, an employer's annual turnover could be taken into account in determining the maximum fine that may be imposed for substantive failures to comply with the EEA.

Implications

The EEA as amended, will almost certainly lead to more prosecutions for non-compliance with the affirmative action provisions of the EEA and an increase in the number of cases involving equal pay claims, now that the matter is given prominence in the Act. While the closing of loopholes to prevent

recalcitrant employers from using technical points to avoid compliance is to be welcomed, we are concerned – based on experiences of our some of clients – about the willingness and capacity of the Department of Labour to administer the Act's provisions in an unbiased, correct and efficient manner. Further, we doubt whether the introduction of heavier fines for non-compliance will necessarily ensure better compliance: we believe that a hearts-and-minds campaign coupled with a more sympathetic approach towards employers who are committed to promote transformation but who are faced with many obstacles in doing so needs to form part of the package. If a carrot and stick approach is the best way of changing mind-sets regarding the need for transformation, the stick appears to get bigger with the new amendments while the carrots remain absent. Ultimately the cost of compliance will simply increase the cost of doing business and be passed through to the end users without any tangible benefits in terms of transformation.

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September 2014

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