MASERUMULE
Corporate Employment Law

Where results matter

THE LRA AMENDMENTS HAVE BEEN IMPLEMENTED – FINALLY!

After much speculation and waiting, President Zuma has announced the date on which the Labour Relations Amendment Act 6 of 2014 ('the Act') becomes effective. In terms of section 45 of the Labour Relations Amendment Act 6 of 2014, the Act [excluding that portion of section 37(c) inserting subsection 198(4F) in the Labour Relations Act 66 of 1995] and a new set of regulations gazetted last year, **took effect on 1 January 2015**.

Section 37(c) of the Act is the portion of the new section 198 of the Labour Relations Act 66 of 1995, dealing with the registration of all temporary employment agencies, which new portion will only become operational once the necessary secondary legislation is in place. In the meantime, comment is once again being sought on categories of work to be deemed temporary services by ministerial declaration in terms of subsection 198A(1)(c) of the Labour Relations Act as amended by the Act.

We have previously canvassed the key LRA amendments and their likely impact on our clients and now that it is law, it is time to revisit this topic thoroughly to ensure that our clients are made aware of the most important aspects affecting their business:

1. Changes to the Definition of Automatically Unfair Dismissals

Section 187(1)(c), one of the categories of automatically unfair dismissal, has been amended from applying to situations where the reason for the dismissal of an employee is *"to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee"* to where the reason for the dismissal of an employee is *"a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer."*

As a result employers in a collective relationship context will no longer be able to force a change in terms and conditions (such as the implementation of a shift system) without the express agreement of all their employees or the union. The option of forcing such a change during substantive negotiations, when, among others such a change is part of the agenda, by framing the change as an operational requirement and following a restructuring process in terms of section 189 should substantive negotiations fail in this regard, has effectively been removed.

In our view the correct approach to effect such a change is to separate the issue from the substantive negotiations agenda and to treat it as a pure operational issue in a section 189 restructuring process on a separate timeline.

2. Temporary employees (fixed-term contracts)

A fixed-term contract is one entered into for a definite period, for completion of a specific project, or until a specified event occurs, e.g. where someone fills the position of another person who is temporarily absent.

The provisions below apply only to employees on a fixed-term contract earning less than the BCEA threshold. Certain (but not all) small or new employers are also exempt:

a. You cannot employ someone for longer than 3 months on a fixed-term contract unless there is a justifiable reason for it (s198B(3)(b), e.g. seasonal employment; employment on a specified project; where there is limited external funding; or appointment in place of someone who is absent for a temporary period, etc.) or 'the nature of the work for which the employee is employed is of a limited or definite duration' (s198B(3)(a));

b. If no justifiable reason is present, the employee is deemed to be permanent (indefinite) and must be treated as such (s198B(5)).

c. However, even if the fixed-term appointment is justifiable, after the first 3 months, the pay and benefits of a temporary employee must be adjusted to ensure that the fixed-term employee is "*not treated less favourably that an employee employed on a permanent basis performing the same or similar work"* unless there is a justifiable reason for this differentiation (s198B(8) as read with section 198D(2) e.g. experience, length of service, seniority (of the appointment), merit or performance. This will apply to all employees who are on fixed-term contracts on 1 January 2015 but only after a 3 month grace period (s198B(8)(b)) has lapsed i.e. from 1 April 2015.

d. It should be noted that, while it remains to be seen how this provision will be interpreted, the ambit of "not treated less favourably" appears to be wider than simply applying to "terms and conditions" or the notion of "on the whole no less favourably" and could extend the application to all aspects of employment.

e. A deemed permanent employee must be treated accordingly. You will be permitted to differentiate i.t.o. pay and benefits if this is based on e.g. experience, length of service, seniority of the appointment, merit or performance. This creates an opportunity for employers to creatively link pay to performance for all employees, the basic principle being 'performance before pay'.

f. All fixed-term and permanent employees must be given equal access to opportunities to apply for vacancies (s198B(9)), which means that preference can no longer be given to permanent employees during the appointment process.

g. Ending the contract at the end of the fixed term can now lead to two claims (s186(1)(b)), i.e. a claim for permanent appointment (i.e. where a reasonable expectation of permanent employment can be proved by the employee); alternatively, a reasonable expectation of renewal (as it has been in the past). It is likely that temporary employees will claim both, in the alternative. Note, however, that in both cases the level of compensation in the event of a successful claim, is likely to be based on the scale 'on the whole not less favourably' than that of a comparable permanent employee employed by the company.

h. The contract of a temporary employee must be in writing, must specify the reason why the appointment is only temporary and must contain the employee's agreement to the temporary appointment (s198B(6)). Clients would have to adapt their fixed-term contracts accordingly.

i. Temporary employees who have been employed for more than 24 months must, on expiry of the contract, receive severance pay equal to 1 weeks' pay per year of completed service unless alternative employment has been provided to them (s198B(10)(a) and (11)). Where such a contract was entered into before the amendments became effective, the severance will be calculated in respect of any period worked after the commencement of the amendments (s198B(10)(b)).

j. In any dispute about the employee's status, i.e. whether she is temporary or permanent, the employer who insists that the appointment is temporary must prove that a good justification exists for it and that the terms were agreed to by the employee (s(198B(7)).

All in all, the rule of thumb will be that employees earning less than the threshold will be regarded as permanent employees after 3 months unless the employer can prove a good (business-related) reason for the temporary nature of the appointment. After 3 months, whether they are truly temporary or have become permanent, their pay and benefits would need to be assessed and where required, adjusted.

3. Part-time employees

Part-time employees are now governed by section 198C. Part-time employees are defined as employees who are remunerated wholly or partly based on their hours of work and who are working fewer hours than a comparable full-time employee. A comparable full-time employee is one who is remunerated wholly or partly based on their hours of work and who is defined as full-time based on the custom or practice of the employer. The comparable full-time employee must be employed by her employer in the same type of employment relationship and must perform the same or similar work as the part-time employee. The comparable full-time employee can be in the same workplace or a different one. (s198C(1) and (6)).

Part-time employees earning less than the threshold and working for longer than 3 continuous months must, like temporary employees, be given terms and conditions that are on the whole no less favourable than a comparable full-time person doing the same or similar job and must be given no less favourable access to training and skills development as their full-time counterparts. This will apply to all part-time employees irrespective of when the agreement was entered into between the parties, however for employees employed prior to the commencement

of the Act, a 3 month grace period will apply. In addition, from the commencement of the Act, all part-time employees must be given the same access to opportunities to apply for vacancies as full-time employees. (s198(2) to (5)).

You will be permitted to differentiate i.t.o. pay and benefits if this is based on, e.g. experience, length of service, seniority (of the appointment), merit or performance. (s198D(2)).

Employees working less than 24 hours a month and certain small or new employers are exempt from the entire section. (s198C(2))

4. Temporary employment services ("TES")

The provision and use of TES are now governed by s198 and 198A. The provisions regarding other non-standard employees (i.e. fixed-term and part-time) apply equally to the TES, who is the 'real' employer of the employees who perform work for the client (s198(2)). For example, in terms of section 198B, if a fixed-term employee of a TES earns less than the threshold, he/she must be appointed on a permanent basis by the TES after 3 months, unless the broker has a justification for continued temporary appointment of the employee. After 3 months, the employee must not be treated less favourably than a comparable permanent employee, unless there is a justification for the difference in treatment (i.e. merit, length of service, etc.).

The TES must comply with any bargaining council agreement or Sectoral Determination applicable to the client, *irrespective* of the earnings level of the TES's employees.

A 'temporary service' is defined as meaning work for a client performed by an employee for a period less than 3 months, or where an employee of the client is temporarily absent, or where permitted by a collective agreement, Sectoral Determination or in a notice published by the Minister (s198A(1)). If an employee is not performing **such** work they will be deemed to be the employee of the client (s198A(2)) on an indefinite basis unless justified in terms of section 198B.

What 'deemed to be the employer' means is unclear but it is our view that the client will also be the employer for purposes of dismissal, unfair labour practices and organisational rights i.e. for purposes of the LRA (s198A(3)) – but not the BCEA, EEA and other labour legislation.

This would among others mean that the deemed employees will have organisational rights in the client's workplace, should be treated as employees for the purposes of all dispute resolution procedures and in all dispute resolution forums, and can participate in strikes (and can be locked out). Clients will therefore have to ensure that they protect themselves against unfair conduct by the broker by requiring certain guarantees of fair treatment; an indemnity; and also, e.g. that no disciplinary decisions can be taken without the client's oversight or in fact only by the client whilst TES employees are employed by the client. Similarly, it might be useful to require the broker to copy in the client on any grievances received, or to require of TES employees that any grievances must be dealt with i.t.o. the client's grievance procedure.

The amendments prohibit any scheme in terms of which employees are replaced or their services terminated in order to escape the provisions of the deeming provision. Such a termination is viewed as a dismissal.

If an employee of the TES working for a client is dismissed and replaced by a new employee before 3 months have expired, the employee may now have 3 claims: (1) on the basis that he/she reasonably expected permanent appointment (when he/she was appointed on a fixed-term basis by the TES); (2) non-renewal of the fixed-term contract (where there was a reasonable expectation of renewal); or (3) a claim that his/her replacement constitutes a dismissal because it was effected to circumvent the provisions of the Act.

5. Pre-dismissal arbitration

It was previously mooted in an earlier draft of the amendment Bill that high-income earners will be excluded from unfair dismissal protection. High-income earners will be glad to hear that this provision has bitten the dust, most probably because it would have been unconstitutional. However, the Act does provide for the pre-dismissal arbitration option, now called an "Inquiry by arbitrator" to be built into the contracts of employees earning above the threshold. This involves a once-off in-house hearing by an accredited arbitrator without the need for an internal hearing, appeal and conciliation followed by arbitration at the CCMA or Bargaining Council (s188A).

Clients might want to consider incorporating a provision to this effect in the contracts of senior employees: experience suggests that disputes involving these employees are often drawn out and are expensive affairs. Using this mechanism will save costs, time and create certainty sooner than would be the case otherwise.

6. Changes to organisational rights system

In determining whether a registered trade union is representative (s21(b)) the commissioner must now also consider the presence of non-standard employees in the workplace, including TES employees, fixed-term and part-time employees and other categories of non-standard employment.

The amendments also provide that:

a. if there is no majority union in a workplace;
b. but there is a union that is the 'most representative' and
c. that qualifies for rights of access and deductions (because it is 'sufficiently representative'),

it may apply for and be awarded full organisational rights, including the right to elect shop stewards (s21(8A)). Such union will however lose these rights where it is no longer most representative (s21(8B)). Note that there still is no statutory duty to bargain with that or any other union.

In certain circumstances certain organisational rights may be granted by an arbitrator to a union or unions acting jointly where they do not meet the representativeness requirement in a collective agreement but they in any event represent a sufficient interest or a substantial number of employees. (s21(8C)).

A trade union representing employees of a TES may exercise any organisational rights it is entitled to in the workplace of either the TES or the client. And the term "employer's premises" in chapter III should be read to include "client's premises" (s21(12)) and any arbitration award issued in terms of organisational rights as it relates to a TES that has employees covered by the award assigned to a client or relies on any other employer who controls access to the workplace to which the award applies (and which parties were also given an opportunity to participate in arbitration) may also be made binding on the client or the employer who controls access to the workplace (s22(5)).

7. Industrial action

Employees are now prohibited from participating in a strike or lockout if the issue in dispute is governed by any employment law legislation (and not just disputes in the LRA) (s65(1)(c)).

The mooted requirement that unions should conduct a ballot before striking has not materialised and therefore the status quo remains: unions are only required to follow the LRA procedures and adhere to their own constitutions when calling a strike.

A new provision (s69(6)) provides for the right to picket against an employer on the premises of someone that is not the employer, e.g. in a shopping mall. However, the owner of the property, the landlord, has a right to be heard before picketing rules are determined by the CCMA.

8. Reviews of Arbitration Awards

The enforcement of arbitration awards is being made more efficient (s143). Furthermore, a review will no longer stay the arbitration award unless the applicant for review furnishes security of 24 months' remuneration if the employee has been reinstated or re-employed in terms of the award or an amount equivalent to the amount of the compensation awarded (s145(7) and (8)). This will severely limit the financial viability for an employer in bringing a review application, especially small employers.

9. Section 200B

The new Section 200B seems to be largely overlooked in the commentary on the new Act, maybe because it is unclear as to whom it will apply. However, we believe it is significant. The result of the amendment is that a person or persons who carry on associated or related activity or business through or by an employer will be held <u>to be the employer</u> and will be jointly and severally liable with the 'true' employer if the intent or effect of their associated or related activity or business is or has been to directly or indirectly defeat the purposes of any employment law. Certain service level agreements, independent contractors, outsourcing agreements and subcontracting immediately spring to mind!

10. Other

Where an employee alleges in good faith that holding an inquiry contravenes the Protected Disclosure Act, either the employer or the employee can require that there is an inquiry by an arbitrator (s188A) into the allegations made by the employer regarding the employee's conduct or capacity. This is the only time when the employee can invoke such an inquiry. Further, in these circumstances, the inquiry by the arbitrator or the suspension of the employee on full pay pending the outcome thereof is specifically exempt from being classified as an occupational detriment in terms of the Protected Disclosure Act.

Section 198D has created a whole new dispute sphere that can be referred to the CCMA or Bargaining Council with jurisdiction for conciliation and arbitration, i.e. any dispute regarding the interpretation or application of sections 198A, B and C (i.e. non-standard employees). This type of dispute has different time limits for initial referral than a dispute involving a dismissal with a time period of 6 months after the act or omission for initial referral to conciliation and 90 days for referral to arbitration thereafter.

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