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THE EMPLOYMENT EQUITY BILL – KEY CHANGES

The long awaited proposed amendments to the Employment Equity Act were finally published for public comment on 19 October 2012. It should be noted that it is not law yet, and until the amendments have been enacted, the EEA applies as is. Most of the amendments are not a surprise as many of the issues have been widely discussed and commented on in the past and the legislature made good on the promise to tighten up the sanctions and enforcement of the EEA. The main purpose of the Bill is to amend the EEA to comply with ILO standards; further promote equity and equality; increase fines and align the EEA with the proposed amendments to the LRA and BCEA.

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 section 6 of the EEA. The Section 6 prohibits unfair discrimination and harassment on certain listed and unlisted grounds. The Bill now expressly introduces these principles of equal in section 6 of the EEA by adding a fourth sub clause which states that it is also unfair for an employer to differentiate between employees' remuneration on one or more of the grounds of discrimination where those employees provide work of the same or 'substantially the same' or 'equal value'. The burden of proof will be on the employer to show that any differentiation is in fact based on fair reasons such as experience, skill, responsibility and qualifications. The Bill does not prohibit differentiation outright: it must be based on an unfair discriminatory reason. In addition, the Minister may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated by the proposed amendment after consultation with the Employment Conditions Commission. The addition does not seem to change the law as it stands at present to any significant extent, if at all.

Psychometric testing

In terms of the proposed amendment 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 is 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 will now have the right to refer any other dispute 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 current clause the employee bears the burden the proof of showing discrimination and the employer must then establish that it is fair. The proposed 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 terms of the proposed section, the employee must 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 proposed amendment is consistent with the terminology used in section 187(1)(f) of the LRA dealing with automatically unfair dismissals.

Sanctions

The sanctions in the Bill 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 aan 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 requiring all designated employers to submit its first

report within 12 months after commencement ot 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 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. A new clause (4A) is added to require 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

The Bill seeks to simplify the enforcement provisions of the EEA by eliminating unnecessary mandatory steps as well as mandatory criteria that must be taken into account in assessing compliance with the EEA. The proposed amendments will promote effective enforcement and prevent the tactical use of reviews as a mechanism for delaying the enforcement process. However, it will not prevent employers aggrieved by decisions from challenging these decisions at an appropriate juncture.

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 but do no longer have to get an undertaking to comply and may immediately request and obtain a written undertaking from the designated employer. In addition, they can immediately approach the Labour Court in terms of the new section 36(2) to make the employer's written undertaking or any part thereof a compliance order if the employer failed or refused to consult, conduct an analysis, publish a summary of its report, assign responsibility to a senior manager, inform its employees of the EEA or failed to maintain records.

Where a written undertaking is requested a new section 37(1) provides that the labour inspector may immediately issue a compliance order to a designated employer if the employer refused to give a written undertaking when requested to do so. The same applies if the employer failed to comply with a written undertaking given regarding its 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

his failure to maintain records. If the employer does not comply the Director General may amend the order or 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.

One of the most important amendments concerns the assessment of compliance by the Director General, more specifically the various factors that need to be taken into consideration in determining whether sufficient progress has been made to promote representivity. (Section 42. Note that reference to *occupational categories* has been deleted). The net effect of the amendments is that employers will no longer be able to rely on factors such as its own or its industries economic woes, or the lack of progress on the part of other employers in the same industry to justify a failure to show 'reasonable progress' towards better representation of designated groups.

A new sub section 42 (dA) has been introduced in terms of which the employer needs to show as part of the assessment the reasonable steps it has taken to appoint and promote suitably qualified people from the designated groups. Finally, the sentence 'demographic profile of the economic active population' has been omitted.

Positive obligation i.r.o. income levels

In terms of the current EEA a designated employer has 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 subject to guidance by the Minister on reducing income differentials.

Labour Brokers

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

Schedules

Schedule 1 is 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 amendments 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 Bill's introduction of heavier fines for non-compliance will necessarily ensure better compliance: 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, we believe. If a carrot and stick approach is the best way of changing mind-sets regarding the need for transformation – which we believe to be the case – 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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Nov. 2012

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