

LABOUR RELATIONS
AMENDMENT WORKSHOP

INTRODUCTION

- The Labour Relations Amendment Act of 2014 amended the Labour Relations Act 1995 and was assented to by the President on 15th August 2014.
- The President has not yet published the effect date on which the amendments will become effective although it is suggested that the effective date will be 1st November 2014.

INTRODUCTION

- The purpose of the amendments are set out in the –preamble of the Act but for the this workshop I will deal with the purpose of the amendments in far as it is relevant to the University.
- The amendments have gone through a process of consultation, public hearings and some compromises.

PURPOSE OF THE AMENDMENTS AS RELEVANT AT THE UNIVERSITY

- To facilitate the granting of organisational rights to trade unions that are sufficiently representative;
- To strengthen the status of picketing rules and agreements;
- To provide greater protection for workers placed in temporary employment services;

PUPOSE OF AMENDMENT

- To regulate the employment of fixed term contracts and part-time employees earning below the earning threshold determined by the Minister
- To specify the liability for employer's obligation.

MEANING OF DISMISSAL

- The amendment has extended the definition of dismissal (Section 186).
- The amendment now includes as a dismissal the reasonable expectation of an employee engaged on a fixed term contract of employment on an indefinite basis;

MEANING OF DISMISSAL

- The consequence is that such employees may seek as relief, employment on a permanent basis at any time during the currency of the agreement, or on termination, when in the past the only relief which could be awarded was engagement on a further fixed term contract on the same or similar terms which prevail prior to the termination.
- The amendments also clarify that a termination of employment is a dismissal whether or not there is a contract of employment.

MEANING OF DISMISSAL

- It has also revised Section 187(1)(c) which now states : that a dismissal is automatically unfair if its reason is a ‘refusal by the employees to accept a demand in respect of any matter of mutual interest”
- It closes the door for employers who consult in respect of retrenchment and try to get employees to amend terms and conditions of employment. The result is that a dismissal for operational reasons will be unfair where employees are given an alternative to dismissal but refuse to accept it.
- It would be difficult to change terms and conditions pursuant to a restructuring.

NON STANDARD EMPLOYMENT

- The title of Chapter IX of the LRA was amended and now reads “Regulation of Non Standard Employment and General Provisions”.
- Section 198A deals with employees of temporary employment services (TES)
- Section 198B deals with employees on fixed term contracts;
- Section 198C deals with part time employees
- Section 198D deals with general provisions that deal with the above sections

NON STANDARD EMPLOYMENT

- Section 198 continues to apply to all employees irrespective of their level of earnings and aims to ensure that the TES and the client are both responsible for ensuring compliance with minimum employment standards
- Section 198 A –D only applies to employees earning below the BCEA earning threshold . The current threshold is R205 433 per annum.

TEMPORARY EMPLOYMENT SERVICES (TES)

- TES are commonly known as labour brokers
- The amendments excludes persons who ‘render services ‘ to the client;
- This highlights the distinction between genuine service providers who provide cleaning, security, food or maintenance services and TES employees.

- *Temporary services are described as work for a client-*
- *Not exceeding 3 months;*
- *As a substitute for a temporary absent employee ;or*
- *As determined by a bargaining council collective agreement, sectoral determination or a notice – published by the Minister*

TES

- TES employees falling outside these categories will be deemed to be employed by the client indefinitely and will have to be employed on conditions similar to the client's other employees unless a 'justifiable reason exists. The employer bears the onus of proving a justifiable reason.
- Much of Section 198 stays the same but Section n198(4A) an employee may institute proceedings against the TES and/or the client, once joint and several liability arises or if the client is deemed to be the employer under Section 198A.
- Similarly a labour inspector acting in terms of the BCEA may enforce compliance against the TES and/or the client

TEMPORARY EMPLOYMENT SERVICES (TES)

- In terms of new Section 198(4f) a TES must be registered in terms of applicable legislation in order to provide the services of a TES.
- What constitutes ‘justifiable reason’ –
 - a. seniority, experience or length of service;
 - b. Merit;
 - c. The quality or quantity of work performed;
 - d. Other criteria of a similar nature prohibited by the Employment Equity Act.

TES

- Transitional arrangement in Section 198A(9) provides that for TES employees currently employed at the time the amendments commence, their new rights under this section commences 3 months after the commencement date of the Amended Act. Any TES engaged at any time after the commencement date would have to be employed in terms of the new provisions.

EMPLOYEES ON FIXED TERM CONTRACTS

SECTION 198B

- The new section increases the protection for employees on fixed term contracts. A fixed term contract is defined in the amendments to mean a contract of employment that terminates on-
 - the occurrence of a specific event;
 - the completion of a specific task or project; or
 - A fixed date other than an employees's normal or agreed retirement age.

FIXED TERM CONTRACT

- This section only protects employees earning under the BCEA earning threshold (R205 433 per annum)
- An employee can only be engaged on a fixed term contract or successive fixed term contracts for longer than 3 months if-
 - the nature of the work 'is of limited or definite duration' or
 - The employer can demonstrate 'any other justifiable reason' for doing so.

EMPLOYEES ON FIXED TERM CONTRACTS

SECTION 198B

- What may constitute a justifiable reason for having a contract over 3 months :-
 - a. is replacing another temporarily absent employee;
 - b. is employed due to a temporary increase in work of up to 12 months
 - c. is a student or recent graduate employed for the purpose of being trained or to gain work experience or to gain work experience to enter a job or profession;
 - d. is employed to work exclusively on a specific project of limited or defined duration ;
 - e. is a non –citizen granted a work permit for a defined period;
 - f. Is employed to perform seasonal work;
 - g. Is employed on an official public works scheme or similar job creation scheme;
 - h. Is employed in a position funded by an external source for a limited period;
 - i. Has reached the normal or agreed retirement age in that business.

EMPLOYEES ON FIXED TERM CONTRACTS

SECTION 198B

- The amendments specify that the fixed term contracts must be in writing and must state the justifiable reason if they are for more than 3 months.
- An employer bears the onus of proving justifiable reason;
- If a fixed term contract does not comply with the provisions it will result in the employment being deemed to be on an indefinite basis (Section 198B(5))

FIXED TERM CONTRACT

- If a fixed term contract is longer than 24 months the employer must on expiry of the contract and subject to any collective agreement pay the employee one week's remuneration for each completed year of the contract. This obligation falls away if the employer offers the employee employment or finds employment for the employee with a different employer, commencing at the expiry of the contract and on similar terms.

EMPLOYEES ON FIXED TERM CONTRACTS

SECTION 198B

- If the fixed term contract is for more than 3 months the employee must in terms of Section 198B not be treated 'less favourably' than an employee employed on a permanent basis performing similar work, unless there is a justifiable reason' for the different treatment.
- Any employee on a fixed term contract (of whatever) length must also be provided with the same opportunities to apply for vacancies as employees employed on an indefinite basis.

EMPLOYEES ON FIXED TERM CONTRACTS

- Transitional arrangement: the obligation to treat employees not less favourable commences after 3 months after the implementation of the Act for those contracts in existence. For contracts entered into after the implementation the provisions will apply immediately.
- The amendments has introduced an expectation of permanent employment.
- Fixed term contracts can only be for 3 months.
- The CCMA or relevant bargaining Council has the jurisdiction to adjudicate all disputes regarding the interpretation an/or application of Section 198A,B and C.

PART TIME EMPLOYEES

Who does it not apply to:

- part-time employees earning above the BCEA earning threshold.
 - who ordinarily work less than 24 hours a month or
 - during an employee's first three months of continuous employment.
 - Small business
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- Employers must treat part-time employees 'on the whole not less favourable than comparable full time employees doing the same or similar work, unless there is a justifiable reason for different treatment.

PART TIME EMPLOYEES

- Similar to fixed term contact and TES employees a 'justifiable reason' for different treatment between part time and full time would include:-
- Seniority, experience or length of service, merit, the quality or quantity of work performed, or other similar criteria not prohibited by the EEA.
- The employer is required to provide part-time employees with similar access to training and skills development as provided for comparable full-time employees and provide them with the same opportunities to apply for vacancies

DATE OF DISMISSAL

- The amendment now clarifies the date of dismissal which is :-
- If an employer terminates an employee's employment on notice, the date of dismissal is the date on which an employee's notice expires or the date on which the employee is paid all outstanding salary, if that is an earlier date.
- It is thus important to notify an employee of termination by way of notice and notice period.
- Section 191 allows for the extension of the 30 day period of conciliation . The parties must agree to the extension.

EMPLOYMENT SERVICES ACT

- This act has implication in respect of the selection and recruitment of foreign nationals

- Who is a foreign national?

An individual who is not a SA citizen or does not have a permanent residence permit in terms of the Immigration Act.

It is mandatory that employers satisfy themselves that there are no South African citizen or permanent resident within SA with suitable skills to fill a vacancy before recruiting a foreign national.

EMPLOYMENT SERVICES ACT

- The employer needs to prepare a skills transfer plan in relation to any position in which a foreign national is employed.
- If an employer employs without a valid work permit the employee will be entitled to enforce any claim that the employee may have in terms of any statute or employment relationship against his or her employer or any person in terms of the law.