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Effects of the proposed amendments to the BCEA & LRA

Proposed amendments to the BCEA;

- Very few amendments to BCEA
  - Amendment to Sec 55(4)(b), the Minister of Labour may determine a minimum remuneration increase in a sector
    - Example: Domestic or Cleaning Industry
    - Can make any decision w.r.t. % of increase
    - Enforceable
    - Could impact collective bargaining with unions
  - Possible effect: Blanket approach & huge increases

- Minister can also determine thresholds of representivity for organisational rights i.t.o. Chapter 111 of the LRA
  - Increase in union activities
  - More recognised unions
  - Currently: 30% sufficient,
    : 50% majority
- Possible effect as mentioned above, but the good part will be certainty as currently "rule of thumb"

- Currently Sec 68 – labour inspector must first try to secure a written undertaking from an employer to comply with the BCEA before proceeding to formal enforcement.

- Should a labour inspector detect an indiscretion or non-compliance of the act, the employer is advised thereof and the labour inspector will allow the employer reasonable time to rectify the indiscretion or non-compliance

- This obligation has been removed and whether or not a written undertaking is first sought is in the discretion of the inspector.

- In addition to this, together with the addition of Sec 68(3), if a written undertaking is given by an employer and not complied with, the inspector does not have to first issue a compliance order, but can directly approach the Labour Court for the enforcement of the written undertaking.

- Sec 71 & 72 gave employers the right to object or appeal against a compliance order
- These two sections have been deleted
- As amended Sec 73 stipulates that the Labour Court may order compliance and/or payment of an amount and/or a fine
- It may be stated that fines have been increased – doubled or trebled depending on the offence.

- Possible effect: More power to labour inspectors
- If he/she is in a good mood, they will accept a written undertaking, if not, they can immediately issue a compliance order. No justification required.
- Problematic – no objection or appeal against a compliance order and huge penalties
- Again, a blanket approach

- I.t.o. Sec 77, the Labour Court now has exclusive jurisdiction for all BCEA claims and can even grant civil relief for contraventions relating to, e.g. a breach of the child labour provisions

Proposed Amendments to the LRA;

- Majority of the proposed amendments are very technical and doesn't have a direct impact on payroll

Dispute Resolution

- The CCMA will be given an extensive list of rights and powers under the new amendments. Firstly they will be allowed to provide administrative assistance to employees earning less than the BCEA earning threshold – R 193,805.00 which include assistance in filling out referral forms and serving document on the employer

- The CCMA can now also determine the issue of representation of any party to proceedings by any person. This is an attempt to regulate representation b persons claiming to be trade union or employer's organisation officials who are not bona fide organisations

- The CCMA may now also make a ruling as to the consequences of the non-attendance of a party to the conciliation or arbitration proceedings. Previously the failure of a party to conciliate would invariably result in the issue of a certificate of non-resolution. With this amendment in place, the commissioner could now determine that the matter be dismissed, even at conciliation stage, should the employees not avail themselves for the proceedings.

- More problematic amendments include that an arbitration award certified by the CCMA, can be enforced without even having to issue a Labour Court writ of execution. Certified arbitration awards for monetary amounts can also be executed through Magistrates Court process as if it is a Magistrates Court order

- The problem with these amendments is that employers challenging arbitration awards must apply to the court for stay applications to stay the execution of the award until the challenge has been finalised.

- Undue burden on time and resources of the Labour Court and unnecessarily costly for employers who have legitimate challenges in this regard

Labour Court

- Where a dispute, which should have been referred to arbitration, comes before the Labour Court, the judge will now have the discretion to deal with the matter as a judge, but is limited to make an order and arbitrator could have made under the circumstances

- Judges are also now bound by a 6 month time limit in which judgement in matters heard before the Labour Court must be given. There are however no consequences set out for failure to meet this deadline

Unfair dismissal

- Sec 186(1)(b)(ii), which provides that where an employee has a reasonable expectation of being offered permanent employment at the end of the fixed term contract, but was not offered such permanent employment, it is also considered to be a dismissal.

- The problem create by this, of course, is where a fixed term contract employee is replaced by a permanent employee, this could give rise to a claim for unfair dismissal.

- The determination of "date of dismissal" i.t.o. Sec 190 has also been supplemented by the introduction of a new subsection 2(c), to include the situation where and employee is actually given notice, the date of dismissal would be the date when the notice period expires or the date upon which the employee actually receives final payment of all outstanding salary, whichever is the earlier.

Limitations:

- The proposed amendments have introduced an especially problematic proposed limitations to the application to the LRA, which in the view of LabourNet should not pass constitutional challenge.

- In a proposed Sec 188B of the LRA, it is proposed that employees earning an excess of a certain threshold, to be determined by the Minister, will be excluded from the normal unfair dismissal provisions and protection of the LRA.

- Possible effect
  - An employer can simply give an employee 3 months written notice of termination of employment, and such dismissal would be deemed to be fair
  - The employer may still dismiss the employee in the normal course without such notice and in such event the normal unfair dismissal provisions of the LRA will apply
  - This will also lead to the dismissal of senior personnel at will – directly against Sec 23(1) of the Bill of Rights, every person has a right to fair labour practices and not just every poor person.

- What stops and employer from simply increasing the salary of an employee to just above the threshold and even before paying this salary, just giving the employee 3 months notice. This would be an effective, and in the end, cheap way in getting rid of all middle level and senior employees.

- I.t.o the explanatory memorandum, the reasons for the above proposed amendments are:
  - CCMA has difficulty in coming to grips with some of the complex that may arise in the case of such dismissals
  - The fact that such dismissals may not comfortably fit into the reason for dismissal categories as determined by Sec 188(1)
  - Such dismissals take up too much of the CCMA's limited resources and time.

- As a basis of justification for this kind of provision, this reasoning is untenable. Simply put, the suggestion is that such employees must be deprived of protection i.t.o. the LRA because the CCMA cannot do its job.

THANK YOU

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