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EDUCATION LABOUR RELATIONS COUNCIL

LABOUR BULLETIN

Education Labour Relations Council
in association with the
Labour and Social Security Law Unit of the
Nelson Mandela Metropolitan University

Nelson Mandela Metropolitan University
for tomorrow

In this Issue:

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1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its September 2014 *Labour Bulletin*. It contains notes on recent case law of relevance to the education sector.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone. We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Ms NO Foca
ELRC, General Secretary

2. Critical assessment of the potential benefits and problems of Conciliation/Arbitration as forms of alternative dispute resolution mechanisms

Alternative Dispute Resolution ('ADR'), a phenomena recognised worldwide, can be succinctly and aptly described as "*dispute resolution processes and techniques that act as a means for disagreeing parties to come to an agreement* ***short of litigation****. It is a collective term for the ways that parties can settle disputes, with (or without) the help of a third party.*"[1] (emphasis added)

[1] Lynch, J. "ADR and Beyond: A Systems Approach to Conflict Management", Negotiation Journal, Volume 17, Number 3, July 2001.

Post 1994, ADR has been introduced in many facets of law in South Africa such as civil litigation, labour law and family law[2]. This is evidenced by the creation of the small claims court, rent tribunal, CCMA and **Bargaining Councils**. In recent years ADR has been introduced in divorce matters in which the courts now prescribe 'court annexed mediation' in divorce proceedings, before the parties resort to litigation. The format of court annexed mediation is similar to the "court annexed arbitration" which is a prevalent feature in the American judicial system.[3]

The focus of this topic will be limited to assessing the use of conciliation and arbitration, the primary forms of ADR provided for in the Labour Relations Act[4].

ADR has been used in other 'first world' jurisdictions (Europe, Australia and the United States of America) over a lengthy period of time and as an alternative to litigation in many facets of law thereby offering commentators an opportunity to objectively assess its advantages and limitations, specifically within these jurisdictions but also from a more generalised perspective.

These jurisdictions have always had well-developed socio-economic, political and legal order thereby justifying the use of ADR from a purely commercial sense in introducing a cheaper and expeditious means to dispute resolution as opposed to litigation. Admittedly, this reason would make ADR a viable option anywhere in the world, including South Africa as has been **one** of the reason for its use.

Post democracy, and given the unavoidable inheritance of past inequalities that prevail in the workplace, the quest for transformation and the need to provide equal access to justice to all employees, it is argued that the choice of statutory ADR became a necessary transformation 'tool', which makes it more beneficial as an alternative to litigation in South Africa than elsewhere in the world. It is therefore necessary to briefly trace the origins of the South African labour dispute resolution system to present day.[5]

1. The Dispute Resolution system pre-1994

Pre-1994, the South African Industrial relations system had been a product of the apartheid Government. Employment laws and practices were designed to exclude Black workers from the mainstream South African economy so much so that at some early point in our history, black workers were even excluded from the definition of "employees". This denied basic worker rights to the majority of employees, let alone affording them access to a speedy and cost effective dispute resolution mechanism. In 1956, the Labour Relations Act of 1956 ('the old Act") was passed into law and operated up until the birth of our democracy.

The old Act made provision for the Industrial Councils, Conciliation Boards, the Industrial Courts and the Labour Appeal Court, all of which fell under State control by the then Department of Labour.

Labour disputes were channeled through the use of Industrial Councils in industries where they existed and where not, the trade unions / employees could apply to the Director General of the Department of Labour to set up Conciliation Boards.

Failure to resolve disputes through structures of the Industrial Councils or Conciliation Boards would result in the dispute being referred to the Industrial Court/ Labour Appeal Court. Given the adversarial nature of employer/employee relations during this time, it was obvious that the Industrial Councils and Conciliation Boards were ineffective and resulted in a large number of disputes being referred to the Industrial Court/Labour Appeal Court. In turn these courts prescribed rules which were

[2] It is acknowledged that The Arbitration Act 43 of 1965, has been in use in South Africa over many years, and provided for the use of arbitration as a form of ADR.

[3] In a court-annexed arbitration, an arbitrator's decision addresses only the disputed legal issues and applies legal standards. Those unhappy with the court-annexed arbitration can reject the non-binding ruling and proceed to trial. It is a hybrid of mediation and arbitration that involves the diversion of state trial court cases into arbitration. Source : (http:/courtforms.uslegal.com)

[4] Act 66 of 1995

[5] The topic at hand specifically requires a critique on the potential advantages and problems of ADR. However, it is necessary to reflect briefly on the Industrial relations system before and after 1994 so that an objective assessment can be made, given that ADR has become statutorily entrenched in resolution of labour disputes in South Africa.

highly legalistic, time consuming and above all, costly.

In summary, the old dispute resolution system failed because of two reasons:

(i) By design, the route of industrial councils, and/or conciliation boards, followed by the courts of law, proved time consuming and costly to the impoverished worker who had no financial means to access the courts of law which in any event, prescribed highly formalistic rules of engagement. To add to this, these forums lacked independence and were seen as nothing more than bastions of the apartheid system.

(ii) Viewed as apartheid entities, labour laws and its supporting institutions lacked legitimacy. It was difficult for the system to succeed when the general worker population saw themselves as being forced to use these forums whilst in principle, vehemently opposing their existence.

2. The Dispute Resolution system post - 1994: The advent of the new Labour Relations Act[6] (LRA) and the use of ADR in labour dispute resolution

The period post April 1994, South Africa had, as mentioned inherited a failed industrial relations system. A new industrial relations system had to be devised that took cogniscance of the following:

(i) By 1994 and in line with worldwide trends, there was a significant shift from litigation to the use of ADR modalities. As already elaborated in the introduction, the choice of ADR over litigation assured that disputes were resolved more expeditiously and cost effectively. It was imperative that South Africa also explored this model.

(ii) Our new democratic order had inherited the backlog-of cases as a result of a failed industrial court system. The new system had to ensure that the backlog was cleared as expeditiously as possible.

(iii) At the dawn of democracy, the glaring disparities and inequalities that prevailed in many a South African workplace would not have vanished overnight. With the advent of progressive labour laws, it was expected for a large number of workers to exercise their new found rights and challenge cases of unfair dismissals and unfair labour practice. As much as workers would have earned their right to challenge the indiscretion of their employers, they still lacked the financial means to exercise that right.

In the circumstances, there was a dire need to overhaul the previous dispute resolution system in ensuring:

(a) Workers themselves could lodge disputes and seek relief, free of any charge;

(b) A dispute resolution forum which was *quasi-judicial* in its offering but at the same time, statutorily entrenched so that justice would not be placed beyond the reach of an impoverished employee;

(c) The dispute resolution system provided must have little or no interference from the state in order to earn the respect of its users. This in turn would ensure its legitimacy.

3.1 The new Labour Relations Act

In 1995, the new Labour Relations Act [7] was promulgated which by and large, factored all of above considerations. The following are important provisions of the new Act:

[6] Act 66 of 1995

[7] ibid

Section 112, Chapter 7 – Dispute Resolution[8] states: "The *Commission for Conciliation, Mediation and Arbitration ('CCMA') is hereby established as a juristic person"* This section clearly provides for the statutory establishment of the CCMA as a juristic entity in providing a dispute resolution service.

Section 113[9] states: *"The commission is independent of the State, any political party, trade union, employer, employers' organization, federation of trade unions or federation of employers' organizations".*

This section expressly specifies the independence of the CCMA thereby marking a significant shift from dispute resolution provisions in terms of the old Act which ensured that they remained under state supervision and control. **Section 115** states: "(1) The Commission must (emphasis added)

(a) attempt to resolve through conciliation, any dispute referred to it in terms of this Act;

(b) if a dispute that has been referred to it remains unresolved after conciliation, arbitrate the dispute if

(i) if this Act requires arbitration and any party to the dispute has requested that the dispute be resolved through arbitration; or

(ii) all parties to the dispute in respect of which the Labor Court has jurisdiction, consent to arbitration under the auspices of the Commission" [10]

Section 115 expressly provides for the statutory role of the CCMA in dispute resolution. In terms of this provision, Parties are also given the opportunity to opt for the use of arbitration by consent in disputes otherwise founding jurisdiction in the Labour Court.[11]

3.2 Types of disputes dealt with under the auspices of the CCMA: Disputes of Rights:

The CCMA provides for individual disputes that relate to an unfair labour practice[12] and unfair dismissal disputes[13]. Although unfair discrimination cases are referred to the Labour Court if conciliation fails the parties are at liberty to consent to arbitration under the CCMA[14].

Disputes of interest: Disputes of interest are generally decided by the use force through strike action. However section 64 of the LRA[15] makes it peremptory to attempt conciliation before resorting to strike action.

3.3 ADR processes under the LRA

Applicants are expected to lodge cases of unfair dismissal and unfair labour practices at the CCMA[16]. All disputes must be referred to conciliation. Should conciliation fail to resolve the dispute, then the dispute would be referred to arbitration save in instances the Act clearly specifies the dispute must be referred to the Labor Court. Given the quasi-judicial nature of Conciliation and arbitration processes, they are considered to be forms of ADR and can be described as follows:

3.3.1 Conciliation: Conciliation is a peremptory process in which a 3rd Party adjudicator (commissioner) would assist the Parties in resolving their dispute. Given the exploratory nature of

[8] Chapter 7 – Dispute Resolution – Act 66 of 1995.
[9] ibid
[10] ibid

[11] Disputes relating to unfair discrimination must be referred to the Labour court if Conciliation fails unless the parties consent to arbitration

[12] Unfair Labor Practice disputes must be lodged with 90 days the commission of the alleged offence.
[13] Unfair dismissals must be lodged within 30 days of being made known to the dismissal.
[14] Act 66 of 1995
[15] Chapter 4 – Strikes and Lockouts – Act 66 of 1995
[16] Every reference to CCMA must also include the dispute resolution provisions of Bargaining Councils.

proceedings, no legal representation is allowed. Like mediation[17], a conciliating commissioner does not have any decision-making powers. The commissioner would assist parties to resolve the dispute. Other than each party being given an equal opportunity to present their version of events, there is no real formalistic structure to conciliation. It is the attitude of parties that essentially decide the form and substance of proceedings. It may sometime occur that the commissioner would hold side meetings with parties in an effort to broker settlement. Conciliation proceedings are held on a without-prejudice basis which means that Parties are encouraged to raise issues freely in attempting to find an amicable resolution to the dispute further enhancing its status as a forum in which a win-win situation could be achieved. Parties are given sufficient time to reflect on their respective positions/mandates. Parties are made to feel at ease as there is no form of studious formalities associated to conciliation, other than all possible attempts being explored in a user-friendly manner in which all parties made to feel comfortable and can easily relate to.

3.3.2 Arbitration: In the event the parties fail to settle the dispute through conciliation, the dispute is referred to arbitration. Arbitration is a process that requires 3rd party intervention with decision making authority. Parties are expected to present their cases and the arbitrator makes a final and binding determination on a balance of probabilities. The arbitrator draws authority from sections 138 and 143 of the LRA[18]. From these sections, it is clear that an arbitrator unlike a judge is expected to approach proceedings in a less formalistic manner. Arbitration proceedings are premised on the equity principle and for the need to achieve social justice as advocated in the preamble of the LRA[19].

An arbitrator is expected to use the minimum of legal formalities, determine the true nature of the dispute and rule. As such, an arbitrator is empowered to conduct proceedings however s/he deems necessary even to the point of assisting an unrepresented party on how s/he ought to lead their case so as to avoid any potential prejudice. All of above denotes the highly flexible nature of arbitration proceedings. In addition, an arbitrator must issue an award within 14 days after hearing the dispute which further entrenches the expeditious nature of proceedings. Built in to arbitration process is the provision for condonation of late dispute referrals. So too are provisions made for rescission and variation of awards if grounds for same are met.

1. Benefits of ADR

In taking a holistic approach to the value of using ADR in labour dispute resolution in the South African context as elaborated above, the following advantages of conciliation and arbitration as forms of ADR processes must be considered:

(a) Flexibility of procedure - the process is determined and controlled by the parties to the dispute

(b) Lower costs and an expeditious resolution to the dispute.

(c) Less complexity in deciding the dispute

(d) Parties sometime have an opportunity to request for the use of a senior commissioner if they are of the opinion that the dispute involves complex issues and questions of law.

(e) In general, and in cases where Private arbitration is sought[20], Parties have a right to choose the arbitrator. (could be useful to choose arbitrator who has expertise in area of disputed issue)

(f) During conciliation, parties are afforded an opportunity to assess

[17] The processes of mediation as well as facilitation have similar feature to conciliation. Even though the LRA makes provision for Mediation and Facilitation through the CCMA, in practice, it is rarely used. Over years the practice has developed at the CCMA that it uses primarily Conciliation and Arbitration as forms of ADR.
[18] Act 66 of 1995
[19] ibid

[20] Private arbitration under the auspices of a Private dispute resolution agency such as Tokiso or if Parties decide themselves for arbitration in terms of the Arbitration Act, No 43 of 1965.

and reflect on their respective positions and have sufficient time to amicable settle the dispute thus saving time, money.

(g) Practical solutions tailored to parties' interests and needs (not rights and wants, as they may perceive them)

(h) Durability of agreements

(i) The proceedings remain confidential and is not disclosed to the public domain unless it is taken on review and is finally determined in the form of a court judgment. When proceedings remain confidential, it sometimes helps in preserving the of relationship between the parties as well as protect the reputation of the parties which is sometime important from a business perspective, especially for an employer.

2. Disadvantages / problems of ADR

Over time, the following disadvantages have been associated with the use of ADR :

(a) Judicial intervention is limited to the review function of the Labour court. As such a party unhappy with the outcome of an award, may have limited grounds thereafter, to challenge the arbitrators finding and decision as would be the case in an appeal hearing.

(b) The process of conciliation can be rendered a futile exercise especially in cases where there is no prospects of settlement. For example an employee charged with serious assault, theft involving large sums of money etc.

(c) Should a 'losing party wish to exercise their right and take the award on review, the finalization of the award could be significantly delayed. (moreso if the dispute does end up in the Labour Appeal Court or event the Supreme Court of Appeal or the Constitutional Court). In this instance, it could be said that the processes of Conciliation / arbitration, would have constituted a greater delay in finalizing the dispute as opposed to referring it in the first instant to a court of law.

(d)Lack of enforcement– Should the losing party default in implementation (Employer) It would require additional adherence to due processes to enforce the award as an order of the court thus further delay in the implementation of the award.

(e) Delaying tactics of an employer that could lead to the prescription of an award. – Sometimes an employer would elect to review an award as a delaying tactic. Should the Employee not proceed to make the award an order of the Labour Court, within reasonable time, then there is a possibility that the award may prescribe leaving the employee party with no relief at all even thought the ward would have been in his/her favour.

(f) Settlement sometimes lead parties to compromise their principle in pursuit of an expeditious settlement which may give rise to precedent setting thus prejudicing the Employer in future cases of similar nature.

(g) Lack of technical skills / adequate legal skills by commissioner – Given the informal nature of proceedings, it is not a requirement arbitrators to be legally trained. Nor are they expected to poses expertise in any subject matter in dispute. This may limit the ability and competence of a presiding commissioner, especially in respect of possessing sufficient knowledge of the law, which is sometimes necessary especially when lawyers are used to represent parties in arbitration. This could give rise to many challenges by way of review applications thus delaying the finalization of the dispute.

(h) The erosion of the judicial system[21].

3. The future of ADR in labour dispute resolution in South Africa

It has been more than fifteen years on, since the CCMA/ Bargaining Councils had come into existence. The significant and steady increase in the number of users of the CCMA, and its exponential growth in recent years bear testimony to the confidence and support for the use of ADR processes in the resolution of labour disputes.

Taking cogniscance of the disadvantages enumerated above, it is argued that any decision to return to the use of an outright formal litigation process or to effect material amendment to existing models of ADR to make them

[21] A more detailed explanation on this identified disadvantage of ADR is covered under item 4 : Future of ADR

more legalistic, ought not to be considered.

Broadly speaking the disadvantages enumerated above can be classified into two categories:

4.1 Concerns that relate to the principle structure and model of conciliation and arbitration as forms of ADR which are:

4.1.1 The extent to which the existing provisions of review of arbitration award as opposed to appeal, constitute any prejudice as pronounced by the Labour Appeal Court in Herholdt when it held " *I would therefore tentatively venture that the time has come for the social partners and the legislature to think again. Justice for all concerned might be better served were the relief against awards to take the form of an* ***appeal*** *rather than a review. The protection granted by a narrower basis for intervention is, in all likelihood, fanciful -a chimera.(bold emphasis added)"*[22]

To replace review provisions with one of appeal would constitute a material change to the system of labour dispute resolution and at the very least, strip the current ADR process of its *quasi-judicial* character. Entrenching an Appeal process would in a sense constitute a return to a highly formalistic process (a benefit to rich employers) that might lead to protracted delays as experienced in the past Industrial court set-up.

4.1.2 The erosion of the judicial system and its associated value to a society at the expense of reliance on statutory ADR systems

Carr and Jencks[23] argue amongst other disadvantages that ADR (when referring of forms of private ADR) are that there is a danger posed by an erosion of the judiciary which may be reduced as an "after thought" by the Government thereby robbing it of its competence as well as the erosion on the ongoing collation judicial precedent. They further argue that opting for ADR there is a possibility that there is a loss of and reduction of information of the public welfare when stating *" As previously noted, one of the attractive features of private ADR is that certain things can remain private and confidential. However, this results in a significant amount of information that is difficult to track and lost to the public. Further, to the extent that public disclosures are made during the privatized process, they are often not tracked, memorialized and stored.142 There is already a scarcity of data….."*

… information available to scholars who study private ADR and the court system.143 The privatization of business disputes only adds an additional layer of fog that makes the meaningful study and analysis of such issues all the more difficult.

Moreover, if we are serious and sincere about protecting the public welfare, much of the information that is normally hidden by private ADR should be made available to the public…" [24]

The argument of ADR eroding formal law and the threat to rob society of judicial precedent with respect might be exaggerated to some extent. In practice, there will always be sufficient disputes in any facet of law that is decided by the courts of law, thus sufficient opportunity for a growing body of judicial precedent.

At the expense of repeating the point, our system has opted for *statutory* ADR, which is now fused into our dispute resolution system incorporating the use of formal law. In recent years the body of jurisprudential law in labour disputes has exponentially grown as a result of an increase in Labor Court, Labor Appeal Court, Supreme Court of Appeal and Constitutional Court jurisprudence in labour disputes. If anything this should perhaps point to some sort need to amend existing legislation so as to curb the extent of judicial intervention which was hoped for in the first place.

[22] Heroldt v Nedbank Ltd (case number DA 20/2010) 23 August 2010.

[23] The Privitisation of Business and Commercial Dispute Resolution : A misguided Policy decision – Chris .A Carr and Michael R Jencks, 88 Kentucky L.J (1999-2000)

[24] Ibid

4.2 Associated concerns related to the functioning of ADR processes

It is argued that the problems / challenges which have been identified by and large relate more problems which are associated to the provision of ADR such as the attitude of Parties to these processes and /or competence levels of commissioners. As such they do not point to the need to overhaul the existing models of conciliation /arbitration processes more than offer sufficient education and training to its users who in turn will ensure the success of ADR in labour dispute resolution.

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Summary of the Labour Relations Amendment Act 6 of 2014

INTRODUCTION

1. The Labour Relations Amendment Act 6 of 2014 ("Act") was assented to by the President and published in the Government Gazette No. 37921 on 18 August 2014. The date on which the amendments will come into operation is still to be determined but it is expected to be before the end of the year.

2. We provide below a summary of the salient changes to the Labour Relations Act, 1995 ("LRA"). This is a fairly long summary. We have, for example, not dealt with the changes to the LRA relating to: the requirements for a collective agreement concluded in a bargaining council to be extended to non-members; the issue of essential services; and various administrative issues relating to trade unions and employers' organizations. However, should you have any queries in this regard please do not hesitate to contact us.

CCMA

3. Several amendments have been introduced that either remove anomalies or seek to improve the CCMA's ability to function more effectively, including its ability to provide administrative assistance to lower earning employees in relation to the service of pleadings relating to proceedings in the CCMA. The CCMA is also empowered to make rules regulating the consequences of a party's failure to attend conciliation or arbitration proceedings.

ENFORCEMENT OF ARBITRATION AWARDS (SECTION 143 OF THE LRA)

4. Amendments to section 143 of the LRA are intended to streamline the mechanisms for enforcing arbitration awards of the CCMA/bargaining councils and are aimed at making these mechanisms more cost effective and easily accessible to lower earning litigants.

5. An award for the payment of money, which has been certified by the CCMA, can be presented to the sheriff for execution if payment is not made. This amendment does away with the current practice in terms of which parties had to have a writ issued by the Labour Court.

6. The enforcement of awards to pay money will now occur in terms of the Rules and Tariffs applicable to the Magistrates Court, thus simplifying and reducing the costs of execution of awards for the payment of money.

7. In the case of awards such as reinstatement, which are enforced by contempt proceedings in the Labour Court, the need to have the arbitration award made an order of the Labour Court before contempt proceedings can commence is removed.

RESCISSION OF AWARDS OR RULINGS (SECTION 144 OF THE LRA)

8. Section 144 of the LRA has been amended to confirm previous decisions of the Labour Court in terms of which it was held that arbitration awards or rulings can be rescinded if good cause is shown.

REVIEW APPLICATIONS IN THE LABOUR COURT (SECTION 145 OF THE LRA)

9. The amendments to section 145 of the LRA are aimed at reducing the number of review applications that are merely brought to frustrate or delay compliance with arbitration awards, and also to expedite the finalization of review applications brought to the Labour Court.

10. Prior to the amendments, a review application did not suspend the operation of an arbitration award. This often resulted in urgent

separate or interlocutory applications to stay the enforcement of awards pending review proceedings. In terms of the amendments the operation of an arbitration award would be suspended if security is provided by the applicant (namely the amount of compensation payable or in cases where reinstatement ordered, 24 months' remuneration), or any lesser amount permitted by the Labour Court.

11. To speed up the finalization of review applications, the amended provisions require that an applicant must apply for a date for the hearing of a review application within six months of the delivery of the notice of motion. A failure to comply with this requirement can be condoned. Judgment in review matters must be handed down within a reasonable time. The amendment also seeks to provide that a review application interrupts the running of prescription in respect of an arbitration award.

12. The amendments exclude the jurisdiction of the Labour Court to adjudicate disputes that are required, not only by the LRA, but by any other employment law, to be determined by arbitration.

13. When the amendments come into effect it will only be in exceptional circumstances (i.e. where the Labour Court is of the opinion it is just and equitable) that the Labour Court will deal with review applications against decisions or rulings of the CCMA/bargaining council before a matter has been finalized by the CCMA/bargaining council. For example, the ability of a party to challenge a CCMA "jurisdictional ruling" dealing with condonation for the late referral of the dispute, prior to dealing with the merits of the dispute, may be limited. This seeks to limit the use of piece-meal review applications during arbitration proceedings as a mechanism to delay a matter.

THE CCMA AND PRIVATE ARBITRATIONS

14. The CCMA will be required to resolve disputes even where the parties have agreed to private dispute resolution if, in the case of lower paid employees (i.e. employees who earn below the earnings threshold determined by the Minister of Labour from time to time, currently R205, 433.30 per annum), the employee is required to pay any part of the cost of private dispute resolution, or, in the case of all employees, the person appointed to resolve the dispute is not independent of the employer.

CONVENING CONCILIATIONS IN THE PUBLIC INTEREST

15. In a change that would affect collective bargaining disputes, the CCMA is given the power to intervene in disputes where it is in the public interest to do so, by appointing a commissioner to attempt conciliation even if a previous attempt at conciliation has already failed. The CCMA's intervention does not however affect the parties' right to strike or lock-out.

AUTOMATICALLY UNFAIR DISMISSALS AND MATTERS OF MUTUAL INTEREST (SECTION 187(1)(C) OF THE LRA)

16. The amendment broadens the scope of section 187(1)(c) of the LRA. Previously, section 187(1)(c) of the LRA provided that a dismissal is automatically unfair if the reason for the dismissal is to compel an employee to accept a demand in respect of any matter of mutual interest between the employer and employee.

17. This provision has been considered in the situation where an employer wishes to introduce new terms and conditions of employment and an employee or employees refuse to agree to these new terms and conditions. It has been argued that this provision prevents employers from dismissing employees in these circumstances. This section has, however, been interpreted in such a way as not to prevent an employer from dismissing employees who refuse to accept changes to conditions of employment – at least in certain circumstances. This has been the case where the employer has been able to persuade a court that the reason for the dismissal is not to force employees to accept a change, but rather that its operational requirements justify dismissal.

In effect the employer argues that it concedes that the employees do not want to accept the change to their conditions of employment and it is not attempting to force them to do so by dismissing them; it is dismissing them in order to replace them with employees who are willing to work in accordance with the new terms and conditions of employment and that these dismissals can be justified on the basis of its operational requirements. See the decision in National Union of Metalworkers v Fry's Metals (Pty) Ltd (2005) 26 ILJ 689 (SCA).

18. The proposed new section 187(1)(c) states that a dismissal will be automatically unfair if the reason for the dismissal is the refusal of

employees to accept a demand in relation to a matter mutual interest. The explanatory memorandum states that the purpose of the amendment is to remove the anomaly arising from the Supreme Court of Appeal's decision in the Fry's Metals decision and that the amendment seeks to give effect to the intention of the legislature when this section was originally enacted – i.e. to protect employees who refuse to accept a demand by an employer relating to a matter of mutual interest. It is seen as an amendment designed to protect the integrity of the collective bargaining process.

19. An employer could still argue that the reason for the dismissal is not the refusal of employees to accept a demand relating to a matter of mutual interest, but rather that dismissal is needed to replace the employees with persons who are prepared to work in accordance with the new terms and conditions of employment. Whether the courts will accept this argument remains to be seen. If it is not accepted, the ability of employers to introduce more flexible working practices in the absence of employee consent will be further restricted. It will also possibly lead to a greater use of the lock-out. It may also give rise to a reconsideration of employers' contractual rights to change working conditions.

AGREEMENT FOR PRE-DISMISSAL ARBITRATION (SECTION 188A OF THE LRA)

20. Agreed pre-dismissal arbitrations in terms of section 188A of the LRA will in future be referred to as an "inquiry by an arbitrator". In addition to by agreement between the employer and employee, they may be provided for in a collective agreement. The amendments to section 188A also aim to prevent the collateral litigation that frequently follows when an employee who is charged with misconduct for making disclosure claims that it was a protected disclosure. The amendment allows either party in these circumstances to trigger a pre-dismissal arbitration (now referred to as an inquiry by an arbitrator). An inquiry of this kind (by an independent arbitrator) will not constitute an occupational detriment as contemplated in the Protected Disclosures Act, 2000.

THE DATE OF DISMISSAL (SECTION 190 OF THE LRA)

21. Section 190 contains provisions relating to when a dismissal is deemed to take place – the importance of this date being that it determines when the 30-day time period for the referral of an unfair dismissal dispute to the CCMA/bargaining council begins to run. In terms of the amendments, if a contract of employment is terminated on notice, then the date of dismissal will be the date on which the notice expires or, if it is earlier, the date on which the employee is paid all outstanding salary.

OPERATIONAL REQUIREMENT DISMISSALS (SECTIONS 189 AND 189A OF THE LRA)

22. Section 189A of the LRA is amended to preclude a party from unreasonably refusing to agree to extend the period for consultation over a proposed retrenchment.

23. Section 189A(19), which attempts to define when a dismissal on the grounds of operational requirements will be fair, is repealed. It appears that the reason for this is that it will remove the uncertainty as to whether this test also applies to retrenchments not covered by section 189A and also to ensure that the Courts retain their discretion to develop jurisprudence in this area in light of the circumstances of each case.

24. Unfair retrenchment claims may now be adjudicated by the CCMA if:

24.1 the consultation process applied to one employee only, or

24.2 if only the employee in question is dismissed; or

24.3 if the employer employs less than 10 employees, irrespective of the number of employees who are dismissed.

NON-STANDARD EMPLOYEES

25. The amendments to section 198 of the LRA are designed to introduce additional protections to non-standard employees.

26. The main highlights in relation to the amendments pertaining to temporary employment service employees (labour broker employees), employees employed on fixed term employment contracts and part time employees are as follows:

26.1 protection is provided only for employees earning an amount equal to or less than R205,433.30 per annum;

26.2 flexibility for employers is retained during the first three months of employment i.e. the

deeming provisions do not apply during this period; and

26.3 employees who fall within the protected category have a right to be treated "on the whole not less favourably" than "standard" employees after three months.

FIXED TERM EMPLOYEES AND A REASONABLE EXPECTATION OF RENEWAL (SECTION 186 OF THE LRA)

27. The definition of "dismissal" in section 186 of the LRA has been extended to include a situation where an employee employed in terms of a fixed term contract of employment reasonably expects to be retained on an indefinite or permanent contract of employment but the employer fails to offer such employment. Prior to the amendment the best an employee could expect was for a renewal of the fixed term contract on the same or similar terms. The amendment introduces an expectation of permanent or indefinite employment. Where the employee is able to prove a reasonable expectation of renewal on a permanent or indefinite basis the employee may now be appointed permanently.

28. The provisions of the new section 198B of the LRA only apply to fixed term employees earning below the current earnings threshold (R205, 433.30 per annum). These provisions are subject to certain exceptions. For example, they do not apply in respect of small employers (i.e. an employer who employs less than 10 employees) or start-ups (i.e. an employer who employs less than 50 employees where the business has been in operation for less than two years (unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business). They also do not apply in respect of fixed term contracts that are permitted by any statute, sectoral determination or collective agreement.

29. Where the amendments do apply:

29.1 An employer may only employ an employee on a fixed term contract or successive fixed term contracts for a period of up to three months.
(The period of three months may be varied by a sectoral determination or a collective agreement concluded at a bargaining council.) Where an employee is employed on a fixed term contract for longer than three months the employee is deemed to be employed for an indefinite or permanent period unless the nature of the work is of a limited or definite duration or if the employer can demonstrate any other justifiable reason for engaging the employee on a fixed term contract.

29.2 The non-exhaustive grounds of possible justifiable grounds for engaging an employee on a fixed term contract for longer than three months include where the employee:

- Is engaged on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
- Is replacing another employee who is temporarily absent from work;
- Is a student or recent graduate who is employed for the purpose of being trained;
- Gaining work experience in order to enter a job or profession;
- Is engaged to work exclusively on a specific project that has a limited or defined duration;
- Is a non-citizen who has been granted a work permit for a defined period;
- Is engaged to perform seasonal work;
- Is engaged in an official public works scheme or similar public job creation scheme;
- Is engaged on a position which is funded by an external source for a limited period; or
- Has reached the normal or agreed retirement age applicable in the employer's business.

29.3 An employer who employs an employee to whom the section applies on a fixed term contract or who renews or extends a fixed term contract, must do so in writing and must state the reason that justifies the fixed term nature of the employment contract.

29.4 The employer bears the onus of proving at any proceedings that there exists a justifiable reason for fixing the term of the contract and that the term was agreed. In the absence of a justifiable reason this does not mean that the contract is invalid it simply means that the employee is deemed to be a permanent employee.

29.5 An employee employed on a fixed term contract for more than three months must not be treated less favourably than an employee who is employed on a permanent basis performing the

same or similar work, unless there is a justifiable reason for different treatment.

29.6 An employer must also provide an employee employed on a fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.

29.7 This provision will apply three months after the commencement of the amendments to fixed term contracts of employment entered into before the commencement of the amendments.

29.8 A justifiable reason for different treatment includes where different treatment is a result of the application of a system that takes into account: seniority, experience, or length of service; merit; the quality or quantity of work performed; or any other criteria of a similar nature and such reason is not prohibited by section 6(1) of the Employment Equity Act.

29.9 In the event that it is justifiable to employ an employee on a fixed term contract for longer than 24 months, then upon the expiry of the contract the employer would be required to pay the employee one week's remuneration for each completed year of the contract (severance pay).

However, a different arrangement can be made in an applicable collective agreement and/or the employer may procure employment for the employee, which commences at the expiry of the contract and is on the same or similar terms. In the event that the employee unreasonably refuses such offer of employment, the employee will not be entitled to such severance pay.

TEMPORARY EMPLOYMENT SERVICES (OR LABOUR BROKERS)

30. For the most part, section 198 of the LRA has largely remained unchanged and, for example, the position still remains that the temporary employment service (labour broker) and not the client is the employer. Furthermore, in terms of section 198 the joint and several liability on the part of the client for non-compliance by the temporary employment service does not extend to dismissals.

31. The additions can be summarised as follows:

31.1 Where there is joint and several liability between the temporary employment service and the client (e.g. in relation to the provisions of the BCEA) or where the client is deemed to be the employer in terms of the new deeming provisions introduced by section 198A (discussed below), the employee may institute proceedings against either the temporary employment service or the client or both and may enforce an award, order, ruling etc against either party.

31.2 A labour inspector of the Department of Labour acting in terms of the BCEA may secure and enforce a compliance order against the temporary employment services or the client, as if it were the employer, or both.

31.3 A temporary employment service may not employ an employee on terms and conditions of employment not permitted by the LRA, a sectoral determination or a collective agreement concluded at a bargaining council that is applicable to a client for whom the employee works.

31.4 A temporary employment service must be registered to conduct business, but the fact that it is not registered is no defence to any claim instituted in terms of the section 198A.

31.5 In any proceedings brought by an employee, the Labour Court or the CCMA may determine whether any provision in an employment contract or a contract between a temporary employment service and a client complies with the law and make an appropriate order or award.

31.6 When determining whether a sectoral determination applies, the courts will look at the sector in which the client is engaged. This means that temporary employment services will no longer be able to pay their employees at a lower rate than that which applies to the other workers within the sector in which they render services.

32. The most controversial amendments to temporary employment services arrangements are those contained in the new section 198A to the LRA. However, as with the case of fixed term contracts this section only applies to employees earning below the prescribed BCEA threshold (currently R205, 433.30 per annum).

33. In terms of the new section 198A, temporary employment services employees who fall below the threshold will only be regarded as being employed by the temporary employment services if they are performing temporary services. If not they will be deemed to be the

employee of the client. In this regard, temporary services means:

33.1 for a period not exceeding three months of employment;

33.2 as a substitute for an employee of a client temporarily absent (e.g. on maternity leave); or

33.3 in a category or work or for a period determined by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister of Labour.

34. If the employee of the temporary employment services is not performing "temporary services" for the client, then:

34.1 the employees are deemed to be permanent employees of the client, with the consequence that the client takes on all dismissal obligations and liabilities;

34.2 they are entitled to be treated on the whole not less favourably than the (actual) employees of the client performing same or similar work unless a justifiable reason for different treatment exists (as discussed above);

34.3 termination of their assignment, whether at the instance of the temporary employment service or the client, to avoid the deeming provision or because the employee exercised a right in terms of the LRA, will be regarded as a dismissal.

35. Employees covered by section 198A who provide services to a client before the commencement of the amendments acquire the rights in terms of section 198A with effect from three months after the commencement of the amendments.

36. It is important to note that the new section 198A does not provide a claim for equal treatment by all temporary employment services employees, but only those who earn below the threshold and who are doing temporary work, as defined (i.e. more than three months and not filling in for someone temporarily absent.) In addition, it is provided that the employees of the temporary employment service must be treated equally vis-a-vis the client's employees - the converse is not provided for, namely that the client's employees must be treated equally vis-a-vis the employees of the temporary employment service. Therefore, if the TES offers better conditions of employment, the employees of the client will not have a claim by virtue of the amendments. They will have to bargain for additional rights in the normal course.

PART-TIME EMPLOYEES

37. Section 198C of the LRA introduces certain protections to part-time employees earning below the threshold.

38. A part-time employee is "an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee". A comparable full-time employee is defined as "an employee who is remunerated wholly or partly by reference to the time that the employee works and who is identifiable as a full-time employee in terms of the custom and practice of the employer of that employee". It does not however include a full-time employee whose hours of work are temporarily reduced for operational requirements as a result of an agreement.

39. This new section only applies to employees earning below the prescribed BCEA threshold (currently R205, 433.30 per annum). These provisions are subject to certain exceptions. For example, they do not apply in respect of an employer who employs less than 10 employees or an employer who employs less than 50 employees where the business has been in operation for less than two years (unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business). They also do not apply in respect of an employee who ordinarily works less than 24 hours a month for an employer and during an employee's first three months of continuous employment with an employer.

40. Where the section does apply, taking into account the working hours of a part-time employee, an employer must:

40.1 treat a part-time employee on the whole not less favourably than a comparable full-time employee doing the same or similar work, unless there is a justifiable reason for different treatment (as discussed above);

40.2 provide a part-time employee with access to training and skills development on the whole not less favourable than the access applicable to a comparable full-time employee; and

40.3 provide a part-time employee with the same access to opportunities to apply for vacancies as it provides to full-time employees.

41. For the purposes of identifying a comparable full-time employee, regard must be had to a full-time employee employed by the employer on the same type of employment relationship who performs the same or similar work in the same workplace as the part-time employee; or if there is no comparable full-time employee who works in the same workplace, a comparable full-time employee employed by the employer in any other workplace.

JURISDICTION TO DEAL WITH DISPUTES ARISING FROM THE AMENDMENTS TO SECTION 198 OF THE LRA

42. Disputes arising from the interpretation and/or application of the new sections 198A, 198B and 198C can be referred to the CCMA or relevant bargaining council (within six months of the act or omission concerned) for conciliation and thereafter arbitration.

43. It is important to note that the LRA seek to prevent simulated arrangements or corporate structures that are intended to defeat the purposes of the LRA or any employment law. It also seeks to impose joint and several liability on the persons found to be employers under this section for any failures to comply with an employer's obligations under the LRA or any employment law. The explanatory memorandum to the amendments explains that this is particularly important in the context of subcontracting and outsourcing arrangements if such arrangements are subterfuge to disguise the identity of the true employer.

COLLECTIVE BARGAINING: CHANGES RELATING TO ORGANIZATIONAL RIGHTS

44. In a dispute about a trade union's level of representativeness, in addition to the factors already provided for in section 21(8) of the LRA, a commissioner must also now consider the general make up of the workplace including the extent to which there are temporary employment services (labour broker) employees assigned to work in the workplace, employees employed on fixed term contracts, part time employees, or employees in other categories of non-standard employment. The rationale for this appears to be the view that these types of employees are difficult for the union to recruit as members.

45. In an arbitration about the granting of organizational rights a commissioner has a discretion to grant shop steward representation rights (section 14) and disclosure of information rights (section 16) to a minority trade union provided that:

45.1 the union is sufficiently representative and already enjoys access to the workplace rights (section 12), deduction of union dues (section 13) and leave for trade union activities rights (section 15); and

45.2 no other union has the relevant rights; and

45.3 the union satisfies the other requirements contained in section 21(8) of the LRA.

46. Accordingly, although a commissioner may award organizational rights to minority trade unions, such unions should have substantial membership and effectively be the most representative union in the workplace.

47. However, any such organizational rights granted to a minority union will lapse if the trade union concerned is no longer the most representative trade union in the workplace.

48. If a majority union and an employer have agreed on thresholds of representativeness in respect of one or more of the organizational rights referred to in sections 12, 13 and 15 in terms of section 18 of the LRA ('Rights to establish thresholds of representativeness') a commissioner has a discretion to overrule the threshold if all parties to the collective agreement have been given an opportunity to participate in the arbitration and the applicant union/s represent a significant interest or a substantial number of employees.

49. A union may seek to exercise organizational rights in respect of the employees of a temporary employment service or one or more of its clients, in the workplace of either the temporary employment service or one or more of the clients of the temporary employment service. If the union exercises rights in the workplace of a client of a temporary employment service it will include the premises of the client.

50. An award about the interpretation and application of organizational rights may be made binding not only on the employer but to the extent that it applies to the employees of a temporary employment service, also a client of the temporary employment service for whom an employee covered by the award is assigned to

work. In addition, the award may be made binding on any person other than the employer who controls access to a workplace to which an award applies provided that person is given a chance to participate in the arbitration.

STRIKES, LOCK-OUTS AND PICKETING

51. Section 65 of the LRA has been amended to make it clear that the right to strike or lock-out is limited if the issue in dispute is one that a party has the right to refer to arbitration or the Labour Court in terms of the LRA or in terms of any other employment law i.e. the Employment Equity Act, 1998.

52. Section 67(9) of the LRA has been deleted. This section provided that any act in contemplation or furtherance of a protected strike or a protected lockout that is a contravention of the BCEA does not constitute an offence. The aim of this deletion appears to be that it seeks to clarify that conduct in breach of a picketing agreement or picketing rule does not enjoy protection against civil legal proceedings under section 67.

53. Prior to the amendment, employees were only allowed to picket in a place to which the public had access or on their employers' premises with its permission, which permission cannot be unreasonably withheld. The CCMA may now authorize a picket in a place owned or controlled by a third party (for example, a mall owner) other than the employer but that third party must be given an opportunity to make representations to the CCMA. The third party in question may refer picketing disputes to the CCMA.

54. Provided proper notice has been given to the affected party, in relation to picketing the Labour Court "may grant relief, including urgent interim relief, which is just and equitable in the circumstances", which may include:

54.1 an order directing a party to comply with the picketing agreement or rule;

54.2 an order varying a picketing agreement or rule.

55. The amendment granting the Labour Court the power to suspend a picket or a strike was removed from the final version of the Act.

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3. Questions & Answers

Dear General Secretary

Question:

I am in dire straits regarding a very sensitive issue. I was dismissed in 2012 for the case of abscondment and would like to know what procedure I must follow to get the sanction lifted in order for me to return to my field of qualification.

Anonymous

Dear Anonymous

Section 14 (2) of The Employment of Educators Act, 76 of 1998 as amended states that “if an educator who is deemed to have been discharged under paragraph (a) or (b) of subsection (1) at any time reports for duty, the employer may, on good cause shown and not withstanding anything to the contrary contained in this Act, approve the re-instatement of the educator in the educator’s former post or in any post on such conditions relating to the period of the educator’s absence from duty or otherwise as the employer may determine”. This simply means that the ex-educator should make representation to the Head of Department who

will consider reasons submitted by the educator and make a decision if s/he (HOD) on whether or not to re-instate him/her.

Ms NO Foca, ELRC General Secretary

Dear Readers

We would like to hear your views on education related queries or disputes. We will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Research & Media Manager, Ms Bernice Loxton. Contact details are on the last page of this publication.

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