LABOUR LAW UPDATE

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Labour Newsflash

Welcome to the next edition of the Labour Newsflash

We live in the time of change and innovation. This too has found its way in our labour law with significant questions being posed through the new generation of employee, flexible working hours, introduction of technology and the ubiquity of social media.

No doubt this will lead to challenges such as online picketing and consistency queries around flexibility.

In the midst of all this change we are also faced with a number of imminent strikes, some of which will have a significant impact on your day to day lives.

Below are two cases, which have hit the headlines. No doubt, some interesting reading for the cold nights we face across the country.

Case 1: Affirmative Action in the Spotlight

On Friday, 15 July 2016 the Constitutional Court handed down judgment in an application for leave to appeal against a decision of the Labour Appeal Court. The outcome will impact how employment equity is applied across the country.

The case

The decision of the Labour Appeal Court related to a dispute between Solidarity and the Department of Correctional Services (the Department) about the validity of the 2010-2014 Employment Equity Plan (2010 Employment Plan) of the Department as well as the Department's refusal to promote or employ certain employees.

The Employment Equity Plan, (specifically coloured employees) contained targets based on the demographic profile of the national population issued by Statistics South Africa in 2005.The Department advertised certain vacant posts. Among those who applied were the 10 individual applicants in this case, who are all members of Solidarity. When most of them were recommended for appointment, the Department refused to appoint them. This refusal was based on what they deemed to be an overrepresentation due to their utilisation of the national demographics.

The issue of utilising only national demographics has been a contentious issue for some time. Many have the view that this is akin to seeking absolute quotas and is therefore in contravention of both the Constitution and the Employment Equity Act.

Solidarity referred an unfair labour practice and discrimination case due to, amongst other reasons, the targets contained in the 2010 Employment Plan being quotas rather than numerical targets.

The Court rejected Solidarity's contention that the targets contained in the 2010 Employment Plan were quotas. It found them to be numerical targets which were applied with some flexibility. The Court concluded that candidates from designated groups were also subject to the principle that an employer may refuse to appoint a candidate who falls within a category of persons who are already adequately represented at a particular occupational level.

Application of the Act

Section 42 of the Employment Equity Act is of particular significance in this outcome.
This section holds that when assessing compliance the following factors, in addition to other sections, may be taken into account:

(a) **the extent to which the suitably qualifies people from designated groups are equitably represented within each occupational level in relation to the demographic profile of the national and regional economically active population**; (Own emphasis)

(b) reasonable steps by a designated employer to train suitably qualified people from designated groups;

c) reasonable steps taken by a designated employer to implement an employment equity plan;

d) the extent to which the designated employer has made progress in eliminating employment equity barriers that adversely affect people from designated groups;

e) reasonable steps taken by designated employers to appoint and improve suitably qualified people from designated groups; and

f) any other prescribed factor.

Of significance, the Court held that the Department had acted in breach of its obligations under section 42 of the Employment Equity Act in not taking into account the demographic profile of the regional and national economically active population but simply using the demographic profile of the national population in assessing the level of representation of the various groups and in setting the numerical targets for its 2010 Employment Plan.

It held that the Department used the incorrect benchmark, contrary to the Employment Equity Act. This meant that the Department had no justification for using race and gender to refuse to appoint the individual applicants and that, therefore, the decisions not to appoint most of the individual applicants constituted acts of unfair discrimination.

The Court Orders

The Court made an order that the individual applicants who were denied appointment even though they had been recommended must be appointed to the relevant posts if those posts have not been filled or were filled but are presently vacant and the appointment should be with retrospective effect to the dates when the individual applicants should have been appointed.

With regard to those individual applicants who had applied for the posts that remain filled to-date, the Court ordered that their remuneration should be placed at the level at which it would have been if they had been appointed to the posts and this should be with retrospective effect to the dates when they would have been appointed had they not been denied appointment. Three of the individual applicants were unsuccessful in their appeal.

Conclusion

This outcome is a clear indication of the balancing act required to be performed by organisations when setting affirmative action targets. In all organisations, these targets must take into account not only the national demographics, but also the regional ones, which may prove a difficult balance, particularly where there is a significant difference between the two.

The decision could also have a huge impact on Broad Based Black Economic Empowerment

The new codes of good practice were issued in October 2013, and amended in May 2015. They require the application of demographics when determining BEE scores for Senior, Middle and Junior Management under the management control element and when determining points scored for a number of sub-elements under Skills Development.

There has been much discussion on which demographics to use. Must the National or Provincial demographics be applied when determining black representation in the Management categories, or in Skills Development?

The draft Verification Manual states at Paragraph 5.1.10.9 to Appendix 4 that a company can use provincial demographics if the "*biggest portion of its employees are based in that province*." Otherwise we default to National demographics.

The elements where demographics impact scoring make up 24 points out of the 109 points available on a company's BEE scorecard or 22% of the points. This is a significant portion of the scorecard. Does this judgement by the Constitutional Court mean that national demographics cannot be applied for BEE purposes and that the Department of Trade and Industry must revisit the formulas used for Management Control and Skills Development?

Many companies have already had verifications performed under the amended codes of good practice and their BEE levels have all dropped substantially. What impact will this judgement have on such certificates as the basis for a significant portion of the scoring has been questioned?

** Case 1: As appeared in the Cape Argus.*

Case 2: The SABC Judgement

On the 26th of July an urgent judgment was issued in the Labour Court under case no. J1343/2016.

This matter involved an urgent application by a number of employees of the SABC. Initially the employees had sought interim relief to uplift their suspensions from work, suspend disciplinary proceedings against them and various other related relief. This interim relief was subject to a number of other applications.

The applicants were provided with ammunition in their application by the recent Constitutional Court outcome, which declared the ban on broadcasting protest action as illegal.

The amended papers then filed had included the setting aside of the dismissal of the employees which had taken place and ordering their reinstatement.

It is unnecessary for us to summarise the facts of the matter as these have been within the public realm.

The charges against the employees involved amongst others, non-compliance of their contractual obligations with alternatives of insubordination and insolence. This was due to, amongst other things, the distancing of the employees from the instruction provided. Despite a number of these background applications occurring, the SABC acted recklessly and terminated the services of the individuals with immediate effect. This necessitated the amended papers.

The employees' application was based on two grounds; firstly, that it was unlawful to terminate their services without complying with the contractual rights to a disciplinary hearing before they were dismissed; and they secondly contended that their dismissal would mean breaching their constitutional right to freedom of expression and therefore cannot be a lawful basis either.

There were a number of arguments that would be too lengthy to summarise herein, with regards to the jurisdiction of the Labour Court to hear the matter. The Court found that whilst certain claims under the Labour Relations Act could not be heard by it, the Labour Court is entitled to entertain the claims based on the alleged invalid termination of their contracts of employment and to make orders that are competent to remedy the breach of contract.

It is impossible to capture all the arguments and rational in a summary of this nature, however once it assumed jurisdiction, the court reached the following conclusion:

The court found that the dismissals should be nullified and as a result there was an order granted declaring the employees' dismissal invalid, as if they had never taken place. Added to this the SABC would allow these people to return to their workplaces to resume their duties. The SABC was also interdicted from proceeding with their proceedings initiated against the employees.

Lesson to be learned:

No matter the situation, if your policy provides for a particular process to be followed contractually, and these processes are in line with the terms of the LRA, then they need to be followed to ensure fairness.

There is no rationale for exerting excessive power and ignoring procedures in exercising this function, particularly if there is a questionable motive for the dismissals.

Our 2017 Employment Conference

In closing we are proud to announce that our Employment Conference will occur in Johannesburg again next year, with a star-studded line-up in the offing. Pencil in the date provisionally for 20 April. Do not miss this opportunity to engage with the best and brightest minds in the field.

We look forward to engaging with you on these topics and you are more than welcome to engage with us on our contact details hereunder or on social media.

'Till next time
Johnny and Grant
Global Business Solutions

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