



CCMA

COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION

Labour Law Amendments RESOURCE GUIDE

March 2016

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LABOUR RELATIONS ACT



1. STATUTORY ORGANISATIONAL RIGHTS – POSITION BEFORE THE AMENDMENTS

Organisational rights are a set of legal rights given to trade unions to allow them to function better and to build up support in the workforce. Organisational rights are necessary to strengthen the organisational capacity of trade unions.

The LRA grants three statutory rights to sufficiently representative registered trade unions (section 11). These rights are the right of access to the employer's premises (section 12), the right to the deduction and payment of union fees (section 13) and the right to leave for trade union or trade union federation office-bearers (section 15). (Note that section 15 applies to office-bearers, not shop stewards.)

Registered trade unions representing the majority of employees in a workplace are also allowed to choose trade union representatives (shop stewards) (section 14) and to disclosure of information (section 16).

2. THE PURPOSE OF THE AMENDMENTS

The amendments to section 21 of the LRA:

- provide for the organisation of employees working for a TES, regardless of the workplace at which they are employed;
- broaden the discretion of Commissioners in respect of conditions under which organisational rights may be granted;
- grant rights, available to a majority union, also to the “most representative union” in a workplace;

- allow a Commissioner to grant organisational rights, despite a threshold agreement in certain circumstances.

The amendments to section 22 deal with non-standard employment and situations where a non-employer controls access to the workplace (e.g. a shopping mall).

3. SECTION 21: OBTAINING ORGANISATIONAL RIGHTS

Before the amendments, a “sufficiently representative” union (or two or more registered trade unions acting together) could claim the rights set out in sections 12, 13 and 15 of the LRA. “Sufficiently representative” caters for those union(s) that have membership of 50% or less of the total workforce, but still represent a major section of the workforce.



There is no set percentage, and a Commissioner faced with determining whether or not a trade union (or unions acting jointly) is sufficiently representative must take into account –

- the nature of the workplace
- the nature of the sector in which the employer operates; and
- the organisational history of the employer.

The Commissioner must also seek to minimise the possibility of too many trade unions in a single workplace, and to minimise the financial and administrative burden on the employer arising from the granting of organisational rights to more than one union (section 21(8)).

4. THE NATURE OF THE ORGANISATIONAL RIGHTS BEING SOUGHT

The amendment to section 21(8) adds a further consideration that must be taken into account: how the workplace is made up, including the extent to which there are TES employees, employees employed on fixed-term contracts, part-time employees and employees in other categories of non-standard employment. This amendment is in line with the focus in section 198 and 198A – D on strengthening the rights of vulnerable employees employed in non-standard forms of employment.

Registered trade unions that enjoy majority representation in the workplace (50% plus 1 of the total workforce) are also allowed (in addition to the rights available to

sufficiently representative unions) to choose trade union representatives (shop stewards) (section 14) and to the disclosure of relevant information (section 16).

The changes (section 21(8A)) extend these additional rights to sufficiently representative unions, as long as they are the **most representative** union in the workplace. The pre-condition for allowing the right to choose shop stewards is that the union must be entitled to the rights set out in sections 12, 13 and 15 (in other words it must have proven that it is a sufficiently representative union), and that no other union in the workplace has been allowed the right to elect shop stewards in terms of section 14.

Once the trade union has been allowed the right to elect shop stewards, it can also be allowed the right to disclosure of information. In this case the pre-condition is that the union must be entitled to the rights set out in sections 12, 13, 14 and 15 and that no other union in the workplace has been allowed the right to disclosure of information.

In terms of the new subsection 21(8B), the rights granted in terms of 21(8A) will come to an end if the trade union concerned is no longer the most representative union in the workplace.

Before the amendments, section 18 of the LRA allowed an employer and a registered majority union (or a bargaining council) to conclude a collective agreement which sets a threshold of representativeness which any new union would be required to meet in order to qualify for organisational rights.

The new subsection 21(8C) states that a CCMA arbitrator may (in an arbitration over an organisational rights dispute) ignore the terms of the threshold agreement by granting the organisational rights envisaged in sections 12, 13 and 15 to a union which represents a significant interest or a substantial number of employees, regardless of the fact that the union membership does not reach the required threshold. This can only be done if all the parties to the collective agreement are given an opportunity to participate in the arbitration proceedings.

Example 1: A mine employs 10 000 workers. Of these 5 500 have joined the Gold and Platinum Workers' Union (GAPWU), which has reached a Threshold Agreement with the employer, specifying that any other union must achieve 30% representivity before qualifying for organisational rights. The Mining Employees' Association of South Africa (MEASA) then signs up 2 800 members and applies for organisational rights. Although MEASA has not reached the threshold set in the Threshold Agreement, an arbitrator can grant the organisational rights on the basis that the union represents a substantial number of employees.

Example 2: In the same scenario as above MEASA signs up 800 members which constitutes 95% of the highly-trained Explosive Handlers employed by the mine. Although the number of employees only represents 8% of the workforce, the arbitrator can grant the organisational rights in sections 12, 13 and 15 on the grounds that the union represents a “significant interest” in the workplace, whose needs and interests may well be different to those of the other employees.



The new subsection (8C) is applicable as from 1 January 2015, provided the dispute is referred after that date, and no matter when the collective agreement setting the threshold was entered into.

In summary:

After the amendments, the rights that apply to sufficiently representative and majority unions remain the same.

There are 2 new ways to get organisational rights:

- The most representative union can get the rights to elect trade union representatives (section 14) and to the disclosure of information (section 16) if that trade union is entitled to section 12, 13 and 15 rights and no other trade union has been given section 14 or section 16 rights.
- Unions representing a significant number of employees or a significant interest can be granted section 12 (access), section 13 (stop orders) and section 15 (leave) rights despite not meeting the requirements of a Threshold Agreement.

5. SECTION 22: EXTENSION OF EFFECT OF ARBITRATION AWARD

In terms of the changes to this section, an arbitration award in an organisational rights dispute (in addition to being binding on the employer) may be made binding on the client of a Temporary Employment Service, where the award applies to employees of the TES, and also to any person who controls access to the workplace to which the award applies, provided that that person has been given an opportunity to participate in the arbitration proceedings.

The result of this change is that:

- Where the award is made binding on the client of a TES, the union will be allowed to exercise the organisational rights at the premises of the client and/or the TES. In practice, the section 12 rights (access to the workplace) will probably be exercised at the premises of the client, while the TES will have to deduct and pay over the union subscriptions in terms of section 13.
- Where it becomes clear, in a conciliation or arbitration hearing, that access to the workplace is controlled by a person or entity other than the employer (for example

where the employer is a retail store situated in a shopping mall, where the landlord has the right to control access to the premises), it will be necessary to join the third party as a party to the dispute (if the third party has not been cited by the applicant), before the arbitration award can be made binding on that party.

6. PICKETING

Section 69(6) of the LRA has been changed to provide that picketing rules established by the CCMA can allow picketing by employees in a place owned or controlled by a person other than the employer provided that that person has had an opportunity to state their case to the CCMA before the rules are made. This change is aimed at landlords such as shopping mall owners, who have previously been able to prevent picketing on their premises, effectively removing the pickets from the vicinity of the employer's premises.

Section 69(8) is amended to allow the third party referred to in subsection (6) to refer a dispute relating to an alleged contravention of section 69(1) or (2), or an alleged material breach of the picketing agreement or rules, to the CCMA for conciliation. If the dispute is not settled, it may be referred to the Labour Court for adjudication. A new subsection 69(12) is added which gives the Labour Court the power to give urgent interim relief, which may include an order to comply with a picketing agreement or rule, or an order changing the terms of a picketing agreement or rule.

The Bill sent to the NCOP also removed the right of "supporters" (as opposed to employees) to picket. Although the NCOP recommended that this be reinstated, section 69(6) only allows for "employees" to engage in pickets.

7. ESSENTIAL SERVICES

The amendments to the LRA introduces many changes to how the Essential Services Committee (the ESC) is made up and the way in which it works. This is aimed at improving the administration, governance and how well the ESC works. There are also changes about minimum services agreements and determinations.

8. NEW SECTIONS: 70A TO 70F

The new Section 70A provides that the chairperson of the ESC must not be a member of or associated with organised business, organised labour or government and **may** be a senior commissioner, and that the deputy chairperson **must** be a senior

commissioner. In addition there are to be six suitably qualified members of the committee, two each to be nominated by business, labour and government.

Section 70B sets out the powers and functions of the ESC. The committee will no longer conduct investigations itself; but must appoint panels to do so. Its main functions are to -

- monitor the determinations made by the panels and the implementation thereof, as well as associated matters such as minimum service agreements;
- promote effective dispute resolution in essential services;
- develop guidelines for the negotiation of minimum service agreements; and to
- decide whether to start investigations as to whether a service (or part thereof) is an essential service.

Section 70C provides for the appointment of panels consisting of three or five people. Each panel must be presided over by the chairperson or deputy chairperson of the ESC, or by a senior commissioner of the CCMA. The CCMA is required to prepare a list of suitably trained commissioners for this purpose. If the panel is made up of three members, the ESC must **either** appoint two of its members to serve as assessors, **or** invite the employer and trade union parties each to nominate an assessor. If the panel is made up of five members, the ESC must appoint two of its members to serve as assessors **and** invite the employer and trade union parties each to nominate an assessor. In either case, where the ESC appoints two assessors to the panel, one must have been nominated by organised labour, and one nominated by organised business or government, depending on whether the service concerned is a State-owned entity or private enterprise.

Section 70D sets out the powers and functions of the panels. These are essentially to conduct investigations and to make determinations as to whether or not a service (or part thereof) is an essential or a maintenance service, to ratify collective agreements providing for the maintenance of minimum services, and in some instances to determine the minimum services to be maintained at all times.

Section 70E deals with the authority (the Republic of South Africa) and administration of the ESC. The ESC will be based at the CCMA's head office and administered by the CCMA. Section 70F gives the Minister the power to make regulations concerning the functioning of the ESC and the panels.

9. AMENDMENT OF SECTIONS 71 - 74

Section 71 is amended simply to bring it into line with the changes set out above. Section 72 is amended to give a panel, when making a determination, the power to issue an order directing the parties to negotiate a minimum services agreement in a specified period, failing which the matter can be referred to a council or the CCMA for conciliation. If a collective agreement is still not concluded (or if a collective agreement is concluded, but is not approved by the panel) the panel may determine the minimum services to be maintained in the essential service.

Once a minimum services collective agreement has been ratified or minimum services determined by the panel, that agreement or determination may only be changed or cancelled by the ESC, and may not so be changed or cancelled for a period of 12 months. The only exception is in the case of a determination which is changed by a collective agreement between trade unions and employers representing / employing the majority of employees covered by the determination, which agreement is approved by a panel.

The provisions of the LRA providing for compulsory arbitration in essential services do not apply where minimum services have been agreed or determined. However, where minimum services have been determined by a panel, section 74 of the LRA (providing for compulsory arbitration) **will** apply if the majority of employees employed in the essential service have voted in a ballot (held prior to notice being given of a strike or lock-out) that it should apply. In such a case, the dispute must be referred to arbitration, and **all** of the employees in the enterprise will not be able to go on strike.

In terms of the new section 72(8), disputes arising from negotiations regarding a minimum services agreement may be referred to a council or the CCMA for conciliation, and if not settled, to the ESC for determination.

Section 73 deals with disputes about whether a service is an essential service and is amended to apply also to disputes about minimum services. The amended section 73(1) provides that disputes about (a) whether or not a service is an essential service; (b) whether an employer or employee is engaged in an essential service; (c) whether the parties should conclude a collective agreement on minimum services; and (d) the terms of such an agreement, are to be referred to the ESC for determination, and not to a council or the CCMA.

Section 74 is amended merely to exclude the disputes referred to in section 73(1) from the jurisdiction of a bargaining council or the CCMA. It continues to provide for compulsory arbitration in all other disputes arising in an essential service.

10. SECTION 75: MAINTENANCE SERVICES

There are no changes to the LRA in relation to maintenance services.

11. SECTION 103A: APPOINTMENT OF ADMINISTRATOR

This is a new section which provides that the Labour Court may order that a trade union or an employers' organisation be placed under administration, on application by the union or employers' organisation or the Registrar of Labour Relations.

The administrator to be appointed may be (but is not required to be) a commissioner. Commissioners will be identified to act as administrators in terms of section 103A.

12. SECTION 111: APPEAL FROM REGISTRAR'S DECISION

This section is amended to provide that an appeal against the Registrar's decision to cancel the registration of a trade union or employers' organisation does not suspend the Registrar's decision. This again confirms the earlier decisions of the Labour Courts. Deregistered unions and employers' organisations may therefore not represent at the CCMA or a bargaining council (or at the Labour Court) while the outcome of an appeal is still outstanding, unless a court orders otherwise.

13. SECTION 115: FUNCTIONS OF THE COMMISSION

This section has been amended to give more powers to the CCMA. It allows the CCMA to give assistance of an administrative nature to employees who earn less than the BCEA threshold (earning up to the BCEA threshold of R205 433.30) to serve any notice or document in terms of the LRA. This could include, for example, faxing a referral form to an employer on behalf of an applicant. The employee, however, remains responsible to ensure that the referral form is served on the employer.

The CCMA is also given powers to make rules to control the consequences of a party's failure to attend conciliation or arbitration proceedings, and to control the right of parties to be represented in proceedings before the CCMA.

14. SECTION 143: EFFECT OF ARBITRATION AWARDS

NB: the amendments to section 143 are subject to an appeal at the LAC – see directive from the Judge President of the LC below.

This section is amended in order to make the enforcement of arbitration awards more effective and accessible.

A certified award may be presented to the Sheriff for execution if payment is not made. (This removes the need to approach the Labour Court for a writ of execution; once certified the award may be enforced “as if it were an order of the Labour Court in respect of which a writ has been issued”.)

A certified award ordering the performance of an act (such as reinstatement or re-employment) does not need to be made an Order of Court before contempt proceedings can be instituted.

The change will reduce the costs of enforcement proceedings regarding an award for the payment of an amount of money. The award can be enforced as if it was an order of the Magistrates’ Court, and the fees applicable will be on the Magistrates’ Court scale.

The change to this section is only applicable to awards issued **after** 1 January 2015.



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10 February 2016

To: **The Acting Chief Registrar**
Johannesburg

Dear Neli,

**RE: EXECUTION OF COMMISSION FOR CONCILIATION MEDIATION AND
ARBITRATION AWARDS**

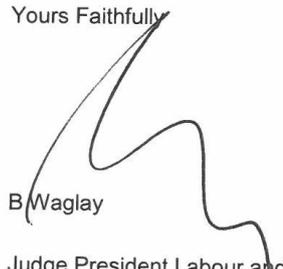
As you are aware, the Labour Court has found the process employed by the Commission for Conciliation Mediation and Arbitration (CCMA) in issuing warrants of execution invalid. The invalidity appears to attach to the amendments made to the Labour Relations Act.

The matter is now on appeal and will only be heard in the second or third term.

Consequent upon the finding, the position with regards to warrants of execution reverts to the position that had been in place previously that is, awards will be certified by the CCMA and the court must then issue the warrants as has been done in the past.

Please advise all the registrars accordingly.

Yours Faithfully


B Waglay

Judge President Labour and Labour Appeal Courts

15. SECTION 144: RESCISSIONS OF AWARDS AND RULINGS

The change to this section adds a fourth reason for cancellation of or variation of an award. This fourth ground relates to an award or ruling “made in the absence of any party, on good cause shown”. This confirms the decision of the courts that good cause is a requirement for rescission of an award on the reasons of absence from proceedings.

The test for good cause involves the consideration of at least two factors (as determined by the LAC in the *Shoprite Checkers* case) –

- the explanation for the default (non-attendance); and
- whether the applicant (for rescission) has a *prima facie* (on the face of it) case.

In addition, the applicant for rescission should show that there was no intention to not proceed with the case.

The new fourth ground differs from the first ground in section 144(a), which is that the award or ruling was erroneously sought made in the absence of a party, in that the applicant is required to provide an explanation for not attending the hearing (or responding if the application was made on the papers) and to show that a *prima facie* case exists in favour of rescission of an award or ruling.

16. SECTION 145: REVIEW OF AWARDS

Section 145 has been amended to speed up the resolution of review applications, to avoid unnecessary delays in the enforcement of awards, and to provide clarity on prescription¹ in reviews.

A party seeking the review of an award must apply for a court date within six months of applying for review. The court may condone a late application on good cause shown. Judgment must be delivered “as soon as reasonably possible”.

Review proceedings do not interrupt the operation of arbitration award, unless security (payment in the form of a deposit) is furnished. In the case of an award for reinstatement or re-employment, the security to be provided must be 24 months’

¹ In terms of the Prescription Act 68 of 1969, a debt (for example payment of money awarded to an employee) is extinguished after a certain amount of time has passed. In the case of arbitration awards, the prescription period is three years. However, it is possible for prescription to be delayed or interrupted under certain circumstances.

remuneration, and in the case of an award for compensation, must be the same as the amount of compensation awarded. The Act is silent on security to be furnished where the employee applies for review of an award in favour of the employer. However, since there is no action ordered in such cases it would seem that there is no need for security to be provided. An employer can make an application for security for costs in terms of the normal Rules of Court.

The changes of this section provides that the start of review proceedings interrupts the running of prescription in respect of the award.

The changes only apply to review proceedings instituted after the Amendment Act came into force, 1 January 2015, with the exception of the section dealing with prescription which applies only to awards issued after the commencement date.

17. SECTION 147: DISPUTE RESOLUTION FUNCTIONS IN EXCEPTIONAL CIRCUMSTANCES

Section 147(6) provides that if it becomes clear that a dispute should have been referred to private dispute resolution in terms of an agreement between the parties, the CCMA can either refer the dispute to the appropriate person or body for resolution, or can appoint a commissioner to resolve the dispute.

A new subsection 147(6A) is introduced to protect low income employees who have entered into private arbitration agreements. The CCMA must arbitrate if an employee who earns less than the threshold (R205 433.30 as from 1 July 2014) is required to pay any part of the costs of private arbitration; or if the person or body appointed to arbitrate is not independent of the employer. Examples of persons or bodies that are not independent could include a manager or director of the employer, or possibly a labour consultancy under contract to provide services to the employer or an employers' organisation of which the employer is a member.

18. SECTION 150: COMMISSION MAY OFFER TO RESOLVE A DISPUTE

This section is amended to give the Commission the powers to get involved in a dispute that has been continuing for a very long time (protracted dispute) in order to try to resolve the dispute, where it would be in the public interest to do so. The requirement for the permission of the parties is removed.

Where there is no permission for the CCMA to become involved, the Director may appoint a commissioner to conciliate if the resolution of the dispute is in the public interest.

Before appointing the commissioner, the Director is required to consult the parties and the Secretary of an applicable bargaining council, to hear the dispute.

The Director may also appoint two additional persons to assist the commissioner; one each from a list of five names submitted by organised labour and organised business representatives on the CCMA's Governing Body.

Unless the parties agree otherwise, the appointment of a commissioner to conciliate does not affect the right of the parties to strike or lock-out.

19. SECTION 186: MEANING OF DISMISSAL

Before the changes to section 186(1)(b), an employee whose fixed-term contract ended had to show (in order to prove that he or she was dismissed) that he or she reasonably expected to be given a new contract on the same or similar terms, and that the employer failed to renew the contract, or offered to renew it on less favourable terms.

The position has now been changed to provide, in addition, that a fixed-term contract employee is dismissed if he or she had a reasonable expectation of permanent employment and the employer failed to retain the employee, or offered to retain the employee on less favourable terms.

Section 186 is also amended to explain that the ending of employment by the employer (or the employee, in the case of constructive dismissal) is a dismissal, whether or not a formal contract exists.



20. SECTION 187: AUTOMATICALLY UNFAIR DISMISSALS

Before the amendments, the dismissal of employees to force them to accept a demand in a matter of a mutual interest dispute amounted to an automatically unfair dismissal (section 187(1)(c)).

This section has now been amended to state that a dismissal as a result of a refusal to accept a demand in a matter of mutual interest is automatically unfair. The dismissal does not have to be about forcing that the demand be accepted. The amendment removes the element of "compulsion" and gives effect to the promotion and protection of the right to effectively participate in collective bargaining.

Also, the change tries to remove a doubt (an anomaly) caused by *NUMSA vs. Fry's Metal* (2005) 26 ILJ 689 (SCA). The SCA accepted the reasoning of the LAC in that there is a difference between a final dismissal and a dismissal where employees have been locked out / a dismissal based on a condition.

21. SECTION 188A: INQUIRY BY ARBITRATOR

This was known as "pre-dismissal arbitration"; the name has now changed to "inquiry by arbitrator".

The changes allow for a collective agreement to provide for such an inquiry to take place, as opposed to obtaining the individual permission of the employee.

The arbitrator is now also empowered to allow the right of legal representation **on application** by either party.

The employee may no longer be represented by a fellow member of his trade union, unless that member is a co-employee (such as a shop steward), but can still be represented by an official or office-bearer of the union. Similarly, the employer cannot be represented by a fellow member of an employers' organisation, but may be represented by an official or office-bearer of the employers' organisation.

The holding of an inquiry in terms of section 188A and the suspension of the employee on full pay pending the outcome is not an "occupational detriment" in terms of the Protected Disclosures Act.

If an employee in good faith claims that the holding of a disciplinary inquiry by the employer is against the Protected Disclosures Act, either the employee or the employer may require that an inquiry by arbitrator be held in terms of section 188A. In this case the requirement for permission is not necessary.

(Note: The fee for an “inquiry by arbitrator” increased as from 1 April 2014 to R5131-00 per day or part of the day).

22. SECTION 189A: LARGE-SCALE OPERATIONAL REQUIREMENTS DISMISSALS

This section, dealing with mass retrenchments, has been changed to provide that a consulting party (employer, trade union, workplace forum, *etc.*) may not unreasonably refuse to extend the 60-day consulting period, if such an extension is required to ensure that meaningful consultation can take place. [See Disputes about dismissals on the grounds of operational requirements below].



Subsection 189A(19), which set out a prescribed test for substantive fairness, has been deleted. This will allow the Labour Courts greater freedom in determining substantive fairness in retrenchment cases.

23. SECTION 190(2)(D): DATE OF DISMISSAL

This is a new subsection to section 190(2) (an addition). In terms of this, where an employee is dismissed and must work until the end of the notice period, the date of dismissal is the earlier of the date on which the notice ends, or the date on which the employee is paid all outstanding salary. This replaces the current situation, where the date of dismissal would be the earlier of the date on which the contract of employment terminated, or the date on which the employee left service. That provision still applies in respect of summary dismissals.

Example: Joe is dismissed for repeated late-coming and unauthorised absenteeism. The disciplinary hearing takes place on 12 March, and the letter of dismissal is issued on 17 March. Since Joe has been employed for 11 months, the employer gives him two weeks’ notice, but advises Joe that he is not required to work out his notice. The employer pays Joe until the end of March, which payment is made in full on 28 March.

Under the previous law: The date of Joe's dismissal is 17 March, being the date on which he leaves the service of the employer. If Joe was required to work out his notice, the date of dismissal would be 31 March.

The current position is: The date of dismissal is 28 March, being the date on which Joe is paid in full. This is the earlier date, since the notice period expires on 31 March. If he was required to work out his notice, the date of dismissal would still be 28 March.

24. SECTION 191(12): DISPUTES ABOUT DISMISSALS ON THE GROUNDS OF OPERATIONAL REQUIREMENTS

Section 191(12) allows for arbitration by a bargaining council or the CCMA in respect of a broader category of employees dismissed for operational reasons. This partly gives effect to the decisions of the Labour Court and Labour Appeal Court in the cases of *Bracks N.O. & another v Rand Water & another* (2010) 31 ILJ 897 (LAC); [2010] 8 BLLR 795 (LAC) and *Scheme Data Services (Pty) Ltd v Myhill N.O. & others* (2009) 30 ILJ 399 (LC).

The following employees may request arbitration in terms of the amended section 191(12) -

- a single employee who is consulted and dismissed for operational reasons, whether or not the procedure followed is in compliance with section 189;
- a single employee who is dismissed for operational reasons (whether or not the consultation process involved more than one employee, or whether there was a consultation process at all); and
- any employee who is dismissed for operational reasons in a workplace with less than 10 employees, regardless of how many employees are dismissed.



Where an employer employs less than 10 employees, if more than one employee is dismissed based on operational requirements, any one employee or any number of employees dismissed for that reason, jointly or severally, can refer the dispute to arbitration. The option remains for any of the employees referred to above to refer their dispute to the Labour Court for adjudication instead of referring it to arbitration.



25. REGULATION OF NON-STANDARD EMPLOYMENT

The changes to section 198 of the LRA provide increased protection to those employed in non-standard work.

The amendments protect three categories of non-standard employees:

- employees placed by Temporary Employment Services (TES), commonly known as Labour Broker employees;
- employees engaged on fixed-term contracts; and
- part-time employees.

The new insertions to section 198 are entitled '**Regulation of Non-Standard Employment**'.

'Non-standard' employment in the Labour Relations Amendment Act of 2013 (LRAA) refers to:

- part-time work;
- fixed-term contract work;
- employment through labour brokers.

Sections 198A, B and C now give a lot of protection particularly to employees earning below the BCEA threshold of R205 433. 30.²

Most of these protections only apply to employees after they have been in employment for 3 months.

The amended legislation provides for employment through labour brokers, for limited duration employment and for part-time work, but introduces methods to make sure that non-standard employment is acceptable when certain neutral factors are considered.

² GN 531 of 1 July 2014

26. OVERVIEW OF THE NEW SECTION 198

- The old section 198 is largely unchanged, except for some additional protections in subsection 4.
- Sections 198 A, B, and C protect labour broker employees, fixed-term contract (FTC) employees and part-time employees (respectively), who earn below the threshold.
- Section 198D provides for Commissioners' authority (jurisdiction) to interpret and apply sections 198 A-C. This power is also applicable to BC panellists when hearing matters under the auspices of councils. This suggests a number of wide new powers including:
 - the power to enquire into contracts and conditions of employment;
 - the power to override certain contractual provisions by deeming FTC employees to in fact be indefinite employees in their workplaces;
 - the power to evaluate the reasons for fixing the term of temporary contracts; and
 - the power to identify comparable full-time or standard employees and ensure that non-standard employees receive the same treatment and benefits.

27. SECTION 198A: LABOUR BROKER EMPLOYEES

Section 198A:

- It defines a 'Temporary Service'.
- It requires employment via a labour broker (TES) to really be *genuinely* temporary.
- It requires that these workers must be treated no less favourably than the other workers (unless there are justifiable reasons for the difference).
- It deems the employee to have been dismissed if a contract was terminated to avoid the deeming provision.
- It provides for the protections to apply after 3 months in the case of an employee placed before 1 January 2015.
- Under certain conditions (discussed below), it deems the employee to be the employee of the client and the client is deemed to be the employer of the employee.

If the client has been deemed to be the employer, additional protections are applicable:

The employee is employed indefinitely (unless a valid fixed-term contract exists – see section 198B)

The employee must be treated like the client's other comparable workers (unless justifiable reasons for the different treatment exist (section 198D(2)) A Temporary Service (TS) must have one of these characteristics:

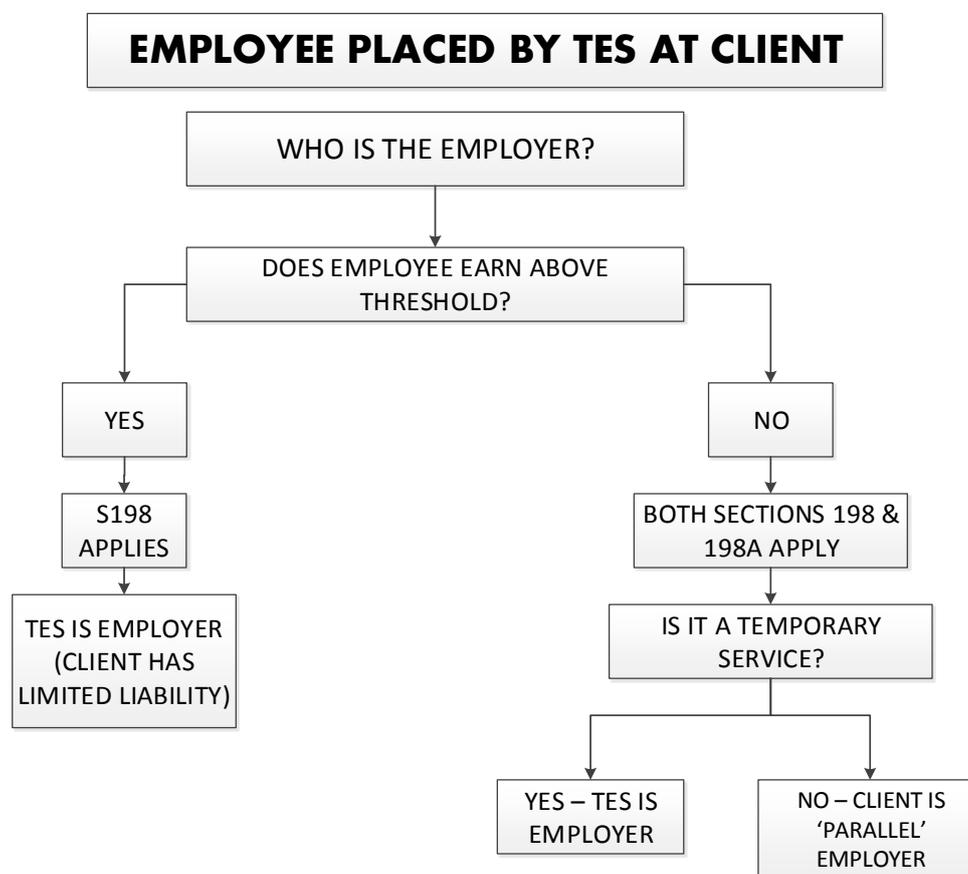
- It lasts less than 3 months OR
- It replaces a temporarily absent employee who is going to return (such as an employee on maternity or sabbatical leave even if the period of absence is longer than 3 months) OR
- It is a category of work which is defined as a TS:
 - in a Ministerial Notice, or
 - in a Sectoral Determination, or
 - in a Collective Agreement³

³ Note that does **not** include an employment contract

A **Temporary Service (TS)** is not the same thing as **Temporary Employment Service (TES)**:

- A Temporary Service is genuinely temporary work: it is a term describing **WORK**; while
- A Temporary Employment Service is an employer who hires out employees to client businesses: it is a term describing an **EMPLOYER**.

It will be important in dismissals involving labour broker employees to determine who the *real* employer is. The TES is the employer only if the worker is performing a genuinely temporary service, or if the worker earns above the threshold.



Section 198A (3) restricts employment through labour brokers to **genuinely temporary work**:

Section 198A (3) (a) and (b) provide:

“For the purposes of *this Act*, an *employee*

- (a) performing a temporary service for the client, is the *employee* of the TES in terms of section 198(2); or

(b) not performing such temporary service for the client is-

- (i) deemed to be the *employee* of that client and the client is deemed to be the employer; and subject to the *provisions* of section 198B, employed on an indefinite basis by the client.”

If the client has been deemed to be the employer, additional protections are applicable:

- The employee is employed indefinitely (unless a valid fixed-term contract exists – see section 198B)
- The employee must be treated like the client’s other comparable workers (unless **justifiable reasons** for the different treatment exist (section 198D(2)).

If the employee has become an employee of the client as a result of the deeming provision, alleged unfair dismissal proceedings must be brought against the client.

28. DEEMING THE CLIENT TO BE THE EMPLOYER

Employees are always considered to be employees of the client irrespective of the duration of the assignment for purposes of other legislation, such as the Occupational Health and Safety Amendment Act 181 of 1993, as well as the Mine Health and Safety Act 29 of 1986 (as amended).

First cases

1. *Assign Services v CCMA and others* (JR1230/15) [2015] ZALCJHB 283

In the first arbitration award handed down by the CCMA on the 29th June 2015, in the case of *Assign Services (Pty) Ltd v Krost Services and Rocking (Pty) Ltd*, the Commissioner found that the deeming provision contained in Section 198A(3)(b) is to be interpreted to mean the client becomes the Employer.

Assign Services subsequently took the matter on review at the Labour Court. In *Assign Services v CCMA and others* (as above) the Labour Court stated that “deeming” should be interpreted as an augmentation (extension) rather than a substitution of employers.

The court held that the deeming provision does not ‘invalidate’ the contract of employment between the TES and the worker, or change (‘derogate’) the terms of the contract. For example, should the TES have agreed to place the contracted worker on a particular training course, it must still do so. The court stated further [12] that the client acquires a parallel set of rights and obligations towards the worker rather than replacing the TES as the employer.

The Court further mentioned in passing that for the CCMA to have jurisdiction in terms of section 198D it is required that a live dispute be referred to the CCMA and not merely a request for legal advice.

The Court set aside the award referred above. The Court held that an error in law occurred in coming to the conclusion that the client was the sole employer.

In conclusion the Court restored the position to what it was before the arbitrator's award (status quo).

The Court emphasised that [despite the provisions of section 198A] the contract of employment between the TES and worker remains in place. The client is the Employer for the purposes of the LRA only and that there is joint and several liability for the matters referred to in Section 198(4) namely:

- a contravention of a collective agreement concluded in a bargaining Council;
- a binding arbitration award that regulates terms and conditions;
- the BCEA; or
- a sectoral determination.

1. *Mphirime v Value Logistics LTD / BDM Staffing (Pty) Ltd* [2015] 8 BALR 788 (NBCRFLI)

In the case of *Mphirime*, the arbitrator held that since the employee is deemed to be an employee of the client [in terms of the LRA], the client is bound to defend the unfair dismissal claim.

29. TERMINATION TO AVOID DEEMING

Section 198A (4) provides that if the employee's contract was terminated in order to avoid the deeming provision, such termination constitutes a dismissal:

- It could have been the reason for termination even if a termination date was decided on well in advance (for example when the contract was limited to 3 months without any proper reason other than to avoid deeming).
- A dismissal will be considered automatically unfair if the employee was exercising his/her rights in terms of the LRA and will be adjudicated by the Labour Court after conciliation failed to resolve the dispute at either the CCMA or the Council. However, in other dismissal matters the CCMA and Councils will have jurisdiction to arbitrate.

New Powers and duties for Commissioners arising from section 198A:

- Section 198A (3)(b): Treat the client as the parallel employer if the worker is not engaged in a Temporary Service (i.e. work of a temporary nature).
- Section 198A (4): Determine whether the purpose of a termination was to avoid deeming.
- Section 198A (5): Identify an employee in a similar position (comparable employee) of the client and award conditions that are on the whole not less favourable (unless there are justifiable reasons for different treatment under section 198D (2)).

In ***Assign Services v CCMA and others (JR1230/15) [2015] ZALCJHB 283*** the Court stated that “deeming” should be interpreted as an augmentation rather than a substitution, with the client acquiring a parallel set of rights and obligations towards the worker rather than replacing the TES as the employer.

The court held that the deeming provision does not ‘invalidate’ the contract of employment between the TES and the employee, or change (‘derogate’) the terms of the contract.

Thus, after the three month period referred to in section 198A(3)(b), the TES still retains the employment contract, with the client being viewed as a ‘parallel’ employer for purposes of the Labour Relations Act.

The 'new' section 198

It must be kept in mind that section 198 was also amended.

Section 198 still applies

- Section 198 protects **all** labour broker employees.
- Regardless of earnings, all employees placed with a client by a TES **also** have protections in section 198.
- Section 198 is largely unchanged. The key changes are:
 - Section (4A) unpacks the joint and several liability of the TES and client for specified contraventions (i.e. an election to institute proceedings against either or both).
 - Section (4F) provides that TESs must be registered with the DoL (but non-registration in terms of the Employment Services Act of 2014 does not constitute a defence to any claim instituted in terms of section 198A).
 - Section (4B) (a) provides that TESs must give employees written particulars of employment that comply with section 29 of the BCEA.
 - Section (4C) provides that TESs must comply with regulated employment conditions at the CLIENT.
 - Section (4D) provides that Commissioners have the power to determine and enforce those conditions.
 - Mistake at section (4E) (a): (4D) should rather read (4C).



What is new in section 198?

- Section (4E) requires Commissioners and bargaining council (BC) panellists to interpret provisions in -
 - TES contracts with clients, and
 - employment contracts
- Interpretation is required to decide whether the provisions comply with Bargaining Council Agreements or Sectoral Determinations.
- Commissioners and BC panellists are required to make 'appropriate awards'. An appropriate award would be, for example, to order the employer to comply with the applicable BC Agreement or SD, and to award back-pay where this has not been done.
- Where Commissioners are correcting under-payment, the limit on how far they can go back (retrospective application) to correct the under-payment would be three years (the period within which debts prescribe).



Transitional Arrangements

Section 198A is applicable from 1 January 2015. There is a general rule against the backward (retrospective) application of amendments, especially where it impacts on substantive rights.

If the employee was employed **BEFORE** the amended Act came into force, the employee will only benefit from the amended Act three months after 1 January 2015.

30. SECTION 198B: FIXED-TERM CONTRACTS

In terms of section 198B (2) (a) the protection provided for in section 198B only applies to employees employed on fixed-term contracts who earn below the BCEA-threshold.

The amendment to section 186, allows for a new category of dismissal where employees on a fixed-term contract may be able to prove a legitimate expectation to be indefinitely employed. This applies to ALL employees, regardless of how much they earn.

Definition of a fixed-term contract

A fixed-term contract is one which expires upon:

- the occurrence of a specified event;
- the completion of a specified task or project; and
- a fixed date other than an employee's normal or agreed retirement age. (The Social Security laws have set the retirement age, however policies of companies may provide otherwise).

Exclusions from section 198B

Section 198B does not apply to -

- a) employees earning *above* the BCEA – threshold (currently R205 433.30);
- b) employees who are employed in terms of a Statute, Sectoral Determination or Collective Agreement which allows for fixed-term appointments;
- c) an employer that employs less than 10 employees;
- d) an employer who employs less than 50 employees and whose business has been in operation for less than 2 years unless,
 - i. an employer has more than one business; or
 - ii. the business was formed by the division or end, (dissolution) for any reason, of an existing business.

The purpose of (c) and (d) above is to allow enough flexibility for small businesses and new enterprises.



Successive Fixed-term Contracts

Section 198B (3) provides for employers to employ employees on fixed-term contracts or successive fixed-term contracts for *longer than three months, but only if:*

- (a) the nature of the work is of a limited or definite duration (specific period);
- (b) the employer can show any other acceptable reason for limiting the term of the contract.

Section 198B (4) contains a non-exhaustive list of justifiable reasons.

Justifiable reasons in terms of section 198B (4)

Justifiable reasons for fixing the term of the contract are:

- (a) the replacement of an employee temporarily absent;
- (b) the temporary increase of work which is expected not to last longer than 12 months;
- (c) a student or graduate;
- (d) a project that has limited or defined duration;
- (e) a non-citizen who has been granted a work permit;
- (f) seasonal work;
- (g) public works or job creation scheme;
- (h) a project funded by an external source; and
- (i) the employee has reached the normal or agreed retirement age.

Effect of breach of section 198B

Where employment happens against section 198B (3) such employment is deemed to be of an indefinite period and the employees are accordingly considered permanent.

Legal formalities for fixed-term contracts

In terms of s 198B (6) a fixed-term contract must -

- (a) be in writing; and
- (b) state the reasons for fixing the term.

Fixed-term contracts for longer than 3 months

Employees employed in terms of fixed-term contracts for *longer than 3 months* should not be treated less favourably than those employees employed on a permanent basis performing same or similar work unless there are justifiable reasons for different treatment. The Employer must prove the existence of any justifiable reasons (see s 198D (2)).

Employers must provide an employee employed in terms of a fixed-term contract with equal access to opportunities to apply for vacancies.

Fixed-term contracts for periods longer than 24 months

Section 198B (10) provides that an employee employed on fixed-term contract on a specific project for a period longer than 24 months, depending on the terms of any applicable collective agreement, will be entitled to severance pay in an amount of 1 week's remuneration for each completed year of service at the end of the fixed-term contract⁴. However, employees will not be entitled to any severance pay should the employer offer or procure employment with a different employer, prior to the expiry date of the fixed-term contracts, which new employment commences at the expiry date of the contracts on the same or similar terms.

Should the Collective Agreement provide that employees employed on fixed-term contracts for more than 24 months will not be entitled to any severance pay, such clause will supersede (replace) the provisions of s 198B (10).

Analysing cases involving fixed-term contracts

It first needs to be determined whether there is indeed a valid fixed-term contract.

If there is not a valid fixed-term contract in place, then the employee is employed indefinitely.⁵

⁴ Section 41 of BCEA

⁵ A contract of employment is by nature indefinite in duration. It is only if the parties expressly agree to limit the term of the contract that it can legally be a fixed-term contract. This section clarifies the law on this point. Whilst it is not necessary to have a written contract in order to have rights as an employee, this section now provides that an agreement to limit the term of an employment contract **MUST** be in writing, and **MUST** cite the reason therefore, which **MUST** be objectively justifiable.

There are three basic requirements for a valid fixed-term contract:

- it must be in writing (subsection 6(a));⁶
- it must state the **term** when it expires (subsection 1), which must be
 - upon the occurrence of a **specified event**, or
 - upon the completion of a **specified task or project**; or
 - on a **fixed date**, other than retirement age ; and
- if longer than three months, it must state the reason (subsection 3 read with subsection 6).

If any of these requirements are **not** met -

- then it is **not** a fixed-term contract;
- employment is of indefinite duration;
- the employee must be treated as a 'permanent' employee; and
- section 189 applies to any dismissal for operational requirements.

If the fixed-term contract meets the three basic requirements above, then the employer must also prove (subsection 7 read with subsection 3):

- a) **For any fixed-term contract**, that the term was agreed upon (there was a meeting of the minds).

- b) For any **fixed-term contract longer than 3 months**, including the period of any previous contracts; that the reasons for limiting the term was acceptable to both.



Transitional arrangements

Section 198B applies to any fixed-term contract concluded after the start date of the Labour Relations Amendment Act of 2013 i.e. 1 January 2015.

Where employees have been employed on fixed-term contracts for periods *longer than 3 months* prior to 1 January 2015, the provisions of the amendments to the LRA of 2013 will only apply 3 months after 1 January 2015

⁶ Interestingly, this is a new 'statutory validity' requirement – whilst oral agreements are binding in SA law, some statutes require them to be in writing. Another example of an agreements which is not valid unless in writing is an agreement for the sale of land.

31. SECTION 198C: PART-TIME EMPLOYEES

Definition of part-time employees

A part-time employee is an employee: -

- who works fewer hours than comparable full-time employees; and
- who is paid according to their actual time worked.

A “comparable full-time employee” is an employee -

- who is paid for a full day, and
- who is identifiable as a full-time employee in terms of custom and practice.

Exclusions from section 198C

Section 198C does NOT apply where the **employee** -

- earns more than the BCEA threshold (R205 433.30);
- ordinarily works less than 24 hours;
- during the first three months of employment.

Section 198C does NOT apply where the **employer** -

- employs less than ten employees; or
- employs less than 50 employees and whose business has been in operation for less than two years.

Acceptable (justifiable) reasons for different treatment: Part-time employees may not be treated less favourably than comparable full-time employees doing the same/similar work, unless justified reasons exist. It refers to the application of a system that takes into account -

- seniority, experience, length of service;
- merit;
- quality or quantity of work; and
- any other similar criteria (that is not prohibited by the EEA).

Please note: Affordability is not a justifiable reason.

An employer may rely on any of the justifiable grounds, listed above, to treat a part-time employee doing the same/similar work differently.

Once again, this power of Commissioners and BC panellists to make appropriate awards should not be equated to “equal pay for work of equal value”, which forms part of the Employment Equity Act.

General protection provisions

Part-time employees (after three months of employment) should not be treated on the whole not less favourably than comparable full-time employees doing the same/similar work.

Employers should provide part-time employees with access to -

- opportunities to apply for vacancies as provided to full-time employees; and
- training and skills development on the whole not less favourable than the access applicable to comparable full-time employees. (This protection applies regardless of when they were employed).



Transitional arrangements

Section 198C applies to any part-time employee employed after 1 January 2015 and in the case of a part-time employee employed before that date, applies after three months.

32. SECTION 198D: DISPUTE RESOLUTION

General dispute resolution provisions in terms of section 198D

Section 198D provides that any disputes arising from the interpretation and application of sections 198A to 198C may be referred to CCMA or BC (with jurisdiction) by completing the LRA 7.11-form.

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An interpretation and application-dispute in terms of section 198D may be referred in writing within six months for conciliation. For purposes of calculation of the six months-period, the act or omission as referred to in section 198D (3) occurs on the date the contract was entered into. An application for condonation may accompany late referrals. Should conciliation fail to resolve the dispute, section 198D (5) provides that a request for arbitration may be served and filed within 90 days.

As to the alleged unfair dismissal disputes of labour broker employees, fixed-term employees and part-time employees, such disputes may be referred within 30 days of the date of dismissal to the CCMA or BC (with jurisdiction). The remedies for unfair dismissal as set out in section 193 of the LRA will apply.

In section 198D (2) the justifiable reasons for differentiation as previously referred to, is set out and refers to the application of a system which takes into account -

- seniority, experience or length of service;
- merit;
- the quality or quantity of work;
- any other criteria of a similar nature and such reason is not prohibited by the EAAA.

Disputes under the auspices of councils

It must be borne in mind that Bargaining Council Collective Agreements often contain provisions specifically applicable to labour broker employees, fixed-term employees and part-time employees. Such provisions may outdo those of the LRA in some instances. In most private sector Bargaining Councils, labour brokers are registered with the council as an employer and are required to comply with all Collective Agreements of the respective councils. Even if a labour broker is not registered with the council, the council will have jurisdiction should such labour broker fall within the registered scope of the council.

In *Confederation of Associations in the Private Employment Sector & Others vs. MIBCO & Others* (case number 46476/2011) the High Court upheld the system of sectoral bargaining and did not interfere with a restriction placed on the power of employers within the motor industry to utilise labour brokers. This judgment is however, currently on appeal.

The Main Collective Agreement of the Road Freight and Logistical Industry (NBCRFLI) specifically deals with the rights of part-time employees (section 61), relief employees (section 62), seasonal employees in the sugar transport sector (section 63) and labour broker employees (section 66).

Part 1 of the Conditions of Employment (section 20) of the Metal and Engineering Industries Bargaining Council (MEIBC) regulates labour brokers quite extensively. Although it allows for an exemption procedure, it has a provision for labour broker employees being employed permanently in scheduled occupations.

33. SECTION 200A: PRESUMPTION

The change makes the presumption as to who is an employee applicable to ALL employment laws (including the EEA and BCEA) as well as section 98A of the INSOLVENCY ACT OF 1936.

34. SECTION 200B: LIABILITY FOR EMPLOYER'S OBLIGATIONS

This is a new section which seeks to prevent those provisions which seek to provide an escape from responsibility in terms of labour laws. This is particularly important in the context of subcontracting or outsourcing arrangements if these are found to be a subterfuge (a form of deception) to hide the identity of the true employer.

Section 200B(1) provides that the term “employer” includes one or more persons (including juristic persons) who carry on associated or related activity by or through an employer, if the intent or the effect of doing so is to directly or indirectly defeat the purposes of any employment law. In terms of section 200B(2), if more than one person is held to be the employer in terms of subsection (1), those persons are all responsible for any failure to comply with the obligations of the employer in terms of the LRA or any other employment law.

35. SECTION 203: POWERS OF MINISTER

The change provides that the Minister may issue a code of good practice where the parties to NEDLAC have not been able to reach agreement on the code.

36. SECTION 213: DEFINITION OF “SERVICE”

The definition of “service” has been amended to include service by electronic mail and (in the case of the CCMA) by any other method of service specified by the Rules of the Commission. In the case of bargaining councils, it will include any other method of service stated in a collective agreement concluded in the council.

BCEA AMENDMENTS



37. SECTION 74: CONSOLIDATION OF PROCEEDINGS

Before the amendments, if an employee wished to claim outstanding statutory monies (such as notice pay, leave, overtime), the claim -

- must have been referred along with the dismissal dispute (i.e. it must have been noted on the LRA 7.11 referral form);
- should have been limited to amounts outstanding for a year or less;
- must not have been the subject of a compliance order, or other legal proceedings instituted for the recovery thereof.

The amendments remove all of these requirements. The only requirement is that the claim has not prescribed.

The expiry period is three years.

Once the CCMA has made a determination in respect of a claim for statutory monies in terms of section 74, no compliance order may be issued by the Department of Labour, and if a compliance order was issued before the determination by the CCMA, it may not be enforced.



Where the employee intends consolidating a claim for statutory monies with a severance pay dispute, the position before the amendments remains unchanged; that is, the claim for outstanding monies must still be referred together with the severance pay dispute. Since prescription applies, the claim cannot be older than 3 years.

EMPLOYMENT EQUITY ACT AMENDMENTS



38. EMPLOYMENT EQUITY CHANGES

All discrimination disputes, before the recent change to the Employment Equity Act, had to be referred to the CCMA for conciliation and, unless the parties agreed otherwise, to the Labour Court for adjudication.

This position has changed to the extent that the CCMA has extended jurisdiction to arbitrate unfair discrimination disputes in certain instances, particularly sexual harassment matters and where employees earn less than the BCEA threshold (R205 433.30).

Equal pay for work of equal value is also specified in the amendments as a form of unfair discrimination.

39. SECTION 6: AMENDMENTS

PROHIBITION OF UNFAIR DISCRIMINATION

Section 6(1) has been expanded to include “**or any other arbitrary (random) ground**” to the list of grounds upon which discrimination is prohibited.

Section 6(1) of the EEA now provides that:

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour,

sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth, **or any other arbitrary ground**.

ANY OTHER ARBITRARY GROUND

The list contained in section 6(1) is not a closed list, as is clear from the use of the words “on one or more grounds, including...” The amendment confirms that unfair discrimination on arbitrary grounds is not allowed, even if the arbitrary ground is not listed in section 6(1). Discrimination on the basis of citizenship status, for example, (a ground unlisted in section 6(1)) has previously been held to constitute unfair discrimination. Discrimination on a ground which is not held to be “arbitrary” in the circumstances of a matter may be justified. The amendments to section 11 of the EEA relate to the “burden of proof”. Whether the alleged unfair discrimination is on a “listed” or “arbitrary” ground affects the burden of proof.

EQUAL PAY FOR EQUAL WORK: UNFAIR DISCRIMINATION RELATED TO WORK OF EQUAL VALUE

One of the key amendment to the EEA relates to the express inclusion of a prohibition of unfair discrimination related to working conditions and wages.

In terms of the added section 6(4) –

“A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.”

The amendment therefore explains that unfair discrimination claims in respect of payment and other conditions of employment can be brought in terms of section 6 of the EEA and brings the EEA in line with core international standards binding on South Africa.

A differentiation based on a prescribed ground listed in section 6(1) or on any other arbitrary ground will amount to unfair discrimination unless the employer can demonstrate that differences in wages or other conditions of employment are in fact based on fair criteria such as experience, skill, responsibility and the like.

40. SECTION 8(D): PSYCHOLOGICAL TESTING

Section 8(d) has been added to the EEA and section 8 now reads as follows:

Psychological testing and similar assessments may only be conducted if:

- (a) They have been scientifically shown to be valid and reliable;
- (b) can be applied fairly to all employees; and
- (c) is/are not unfair (biased) against any employee or group; and
- (d) **the test or assessment has been certified by the Health Professions Council of South Africa, established by section 2 of the Health Professions Act, 1974 (Act No. 56 of 1974), or any other body which may be authorised by law to certify these tests or assessments.**

41. SECTION 11: BURDEN OF PROOF



Section 11 of the EEA now provides that –

“(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –

- a) did not take place as alleged; or
- b) is rational and not unfair, or is otherwise justifiable.

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that -

- a) the conduct complained of is not rational (sensible);
- b) the conduct complained of amounts to discrimination; and
- c) the discrimination is unfair.

If the discrimination is alleged on an arbitrary (unlisted) ground, it is unfair if it –

- causes / perpetuates systematic disadvantage in the workplace;
 - undermines human dignity; or
- adversely affects the equal enjoyment of a person's right and freedom in a manner that is comparable to discrimination on a ground listed in section 6(1).

There is accordingly a significant difference with respect to the burden of proof between a complainant's allegation of unfair discrimination on a ground specifically listed in section 6(1) and cases where the complaint is based on an arbitrary (non-listed) ground of unfair discrimination.

In terms of the amendments to the EEA, the definition of “designated groups” has been explained to mean “black people, women and people with disabilities who -

- a) are citizens of the Republic of South Africa by birth or descent; or
- b) became citizens of the Republic of South Africa by naturalisation -
 - i. before 27 April 1994; or
 - ii. after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies”.

The intention of this Amendment is to make sure that affirmative action measures continue to benefit only South African citizens (and not, for example, permanent residents) and that, generally, only people who qualified as citizens (and who are members of a “designated group”) before the first democratic elections in South Africa may benefit in this regard. The effect is, for example, that a disabled black woman who became a citizen of South Africa after 26 April 1994 would only qualify as a “designated” employee if she would have been allowed to acquire South African citizenship before this date, but was prohibited from doing so because of apartheid policies.

42. PROVINCIAL V NATIONAL DEMOGRAPHICS

In determining whether a designated employer is implementing employment equity in compliance with the Employment Equity Act 55 of 1998), the Director-General or any person or body applying the Act may, in addition to the factors stated in section 15, take the following into account -

- the extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer’s workforce in relation to the demographic profile of the national and regional economically active population;
- reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;
- reasonable steps taken by a designated employer to apply its employment equity plan;
- the extent to which the designated employer has made progress in getting rid of employment barriers that negatively affect people from designated groups;
- reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and
- any other prescribed factor.

43. DISPUTE RESOLUTION AND REMEDIES FOR UNFAIR DISCRIMINATION

A 'dispute' as defined in terms of the EEA ("an EEA dispute") does not include an unfair dismissal dispute.

For the CCMA to conciliate an EEA dispute -

- the dispute may be referred to the CCMA in terms of section 10(2) within six months after the act or omission that allegedly constitutes unfair discrimination (unless good cause has been shown for a longer period); and
- the party that refers a dispute must satisfy the CCMA that-
 - (a) a copy of the referral has been served on every other party to the dispute; and
 - (b) the referring party has made a reasonable attempt to resolve the dispute.

The definition of 'serve' or 'submit' has been slightly expanded, in terms of the amendments to the EEA, to include sending or transmission "in any other prescribed manner". This means, in essence, that the Minister of Labour may make a regulation, in terms of section 55 of the EEA, and in the usual fashion, which allows for additional ways to serve or submit any communication.

Reasonable attempt to resolve the dispute

The requirement that there must have been a reasonable attempt by the referring party to resolve the dispute (section 10(4)(b)) is an attempt on the part of the drafters to avoid claims being referred to conciliation without an attempt having been made by the applicant to make the employer aware of the claim and attempt to resolve the matter.

44. SECTION 10: ARBITRATION OF UNFAIR DISCRIMINATION DISPUTES

Before the EEA amendments the legal position in respect of disputes concerning chapter 2 of the EEA (include disputes relating to the prohibition of unfair discrimination) was the following:

- An employee, or applicant for employment, could refer a dispute concerning alleged unfair discrimination (or medical or psychological testing) to the CCMA for conciliation (within six months).
- If a dispute was not resolved at conciliation, a party could refer it to the Labour Court for adjudication.

- The parties to a dispute could also agree to refer the dispute to arbitration.

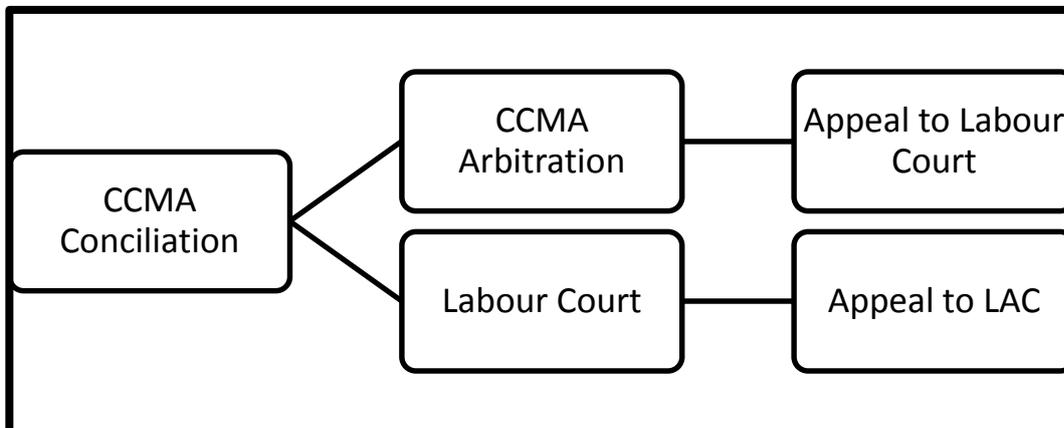
The preamble to the Employment Equity Amendment Act confirms that the intention is to provide for the referral of certain disputes for arbitration to the CCMA.



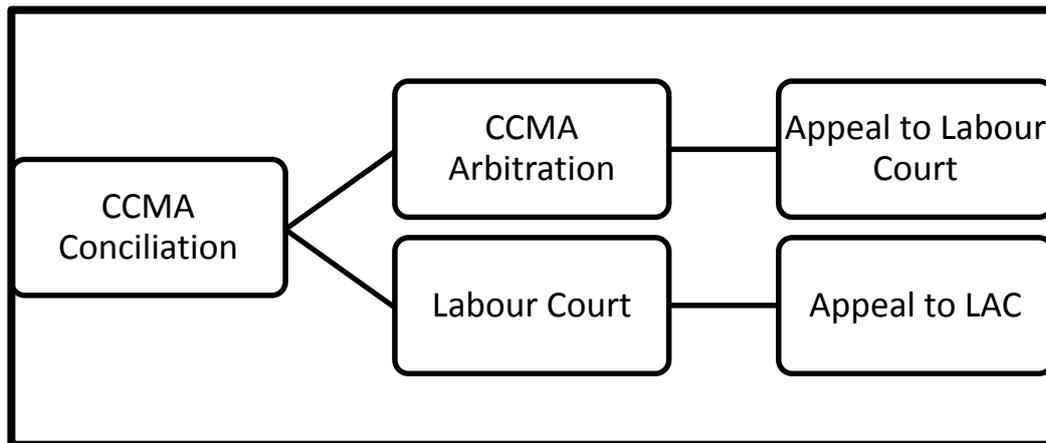
In terms of the amended section 10 of the EEA unfair discrimination disputes may now be arbitrated by CCMA commissioners in the following instances -

- in all cases involving sexual harassment the employee has the option to refer the dispute to the CCMA, instead of to the Labour Court (which remains an option if the employee chooses this route);
- for lower-earning employees (i.e. employees earning less than the threshold specified by the Minister in terms of the BCEA), other unfair discrimination disputes may also be referred to the CCMA for arbitration as an option instead of approaching the Labour Court route; and finally
- if all the parties consent to the arbitration of the dispute (for example, in a case involving a high income earner alleging unfair discrimination on the basis of disability), *any party* to the dispute may refer it to the CCMA for arbitration.

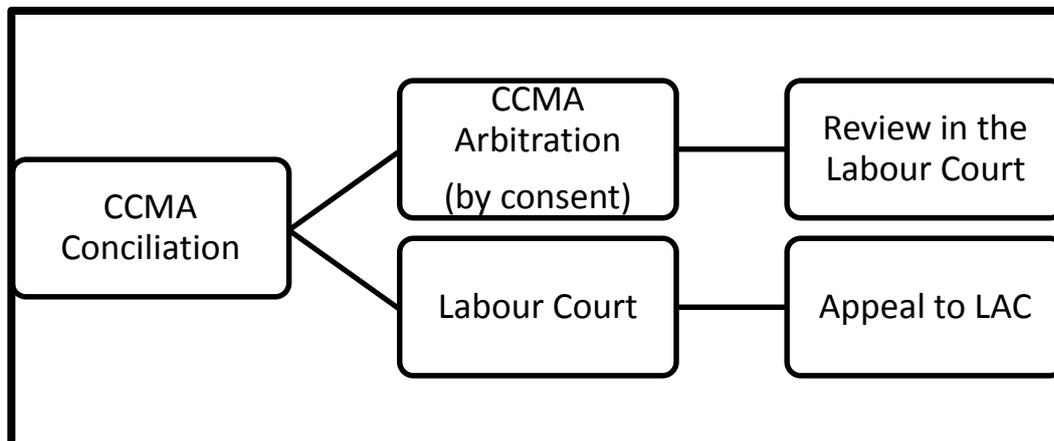
Sexual harassment cases (irrespective of earning threshold):



Discrimination cases under the threshold



Discrimination cases (besides sexual harassment) above the threshold



45. SECTION 48: REMEDIES FOR UNFAIR DISCRIMINATION DISPUTES

In terms of section 48 of the EEA, a commissioner of the CCMA may, in any arbitration proceedings under the EEA, make “any appropriate arbitration award that gives effect to a provision” of the EEA.

An award made by a commissioner of the CCMA may include -

- a) payment of compensation by the employer to that employee;
- b) payment of damages by the employer to that employee;
- c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees (section 48, read with section 50(2)(a)-(c)).

Damages (or loss suffered) must be proved and it must reflect actual loss. An award of damages need not be calculated in terms of months' salary as long as the amount does not exceed the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act (the threshold).

It must be remembered that, in terms of section 48(1) of the EEA, a commissioner of the CCMA may, in any arbitration proceedings in terms of this Act, make any appropriate arbitration award that gives effect to a provision of the EEA.

Awards for different causes of action arising out of the same set of facts cannot be made separately from each other and the commissioner has choice to consider to what extent amounts awarded in respect of another cause of action should be considered.

Compensation for unfair dismissal is capped at 12 months' remuneration for ordinary unfair dismissal. Compensation for an ordinary unfair dismissal case may be appropriate if the matter is brought as a constructive dismissal due to sexual or racial harassment.⁷

Compensation for automatically unfair dismissal (section 187 of the LRA) is limited to 24 months' remuneration. Compensation of up to 24 months' remuneration may be appropriate if the parties have agreed to arbitration in terms of section 141 of the LRA.

Compensation for unfair discrimination in terms of the EEA is not limited.

Compensation is intended to remedy the breach of a statutory right - in the case of the EEA, the right to equality. It is similar to a "payment for comfort" (*solatium*) for payment of a non-patrimonial loss, injury to dignity, and to compensate for unfair treatment.⁸

In addition, it is notable that the Labour Court may make any appropriate order (in terms of section 50 of the EEA), including reviewing an administrative action in terms of this Act on any grounds that are permissible in law. Bearing in mind that CCMA

⁷ *Dial Tech CC v Hudson & another* (2007) 28 ILJ 1237 (LC).

⁸ *South Africa Airways (Pty) Ltd v V and Another* (CA9/13, C420/2006) [2014] ZALAC 27; [2014] 8 BLLR 748 (LAC) (12 June 2014)

arbitrations have been held to be administrative action, this confirms the Labour Court's powers of review in respect of commissioners' conduct in terms of the EEA, as well as in relation to other administrative action which occurs in terms of the EEA (for example, in respect of conduct on the part of labour inspectors, the Director-General of the Department of Labour or the Minister of Labour).

As indicated above, in terms of section 48 of the EEA, a commissioner of the CCMA may, in any arbitration proceedings make "any appropriate arbitration award that gives effect to a provision" of the EEA. Commissioners may also exercise a choice in an unfair discrimination case in terms of awarding compensation or damages (to a limited extent) or may make an order directing the employer to take steps to prevent the same unfair discrimination in future.

Section 50 provides that the Labour Court may make "any appropriate order" that is just and equitable including –

- awarding compensation in any circumstances contemplated in the EEA;
- awarding damages in any circumstances contemplated in the EEA;
- imposing a fine in accordance with Schedule 1 for a contravention of certain provisions of the EEA;
- an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees; and
- the publication of the Court's order.

In terms of section 50 (3) of the EEA, the Labour Court may take into account any delay on the part of the party who tries to find assistance in handling a dispute. This subsection was not amended.

46.3.9 SECTION 10 (8): THE APPEAL

In terms of the new section 10(8), a person affected by an award made by a CCMA commissioner following an arbitration held as a result of an employee referral in terms of section 10(6)(aA)) (i.e. where the employee alleges unfair discrimination on the grounds of sexual harassment or, in any other case involving unfair discrimination the employee earns less than the specified threshold), may *appeal* to the Labour Court against that award within 14 days of the date of the award. This time period may be extended by the Labour Court on good cause shown.



KEY LEARNINGS

- Section 198A-D - Non-standard employees are afforded the same protections as permanent/full-time employees, except where they are performing a real Temporary Service, or are employed on a fixed-term contract for an acceptable reason. TES employees can be deemed to be employees of the client if the service does not qualify as a Temporary Service. Fixed-term employees can be deemed to be permanent employees.
- Section 21 - Organisational rights: There are 2 new categories by which trade unions can obtain organisational rights – as the “most representative” union, and where the union represents a “major number” of employees or a “significant interest”.
- Section 69 - Picketing may take place on property controlled by a third party.
- Section 111 - Deregistered unions and employers’ organisations may not represent at the CCMA/BC while an appeal is still outstanding, unless a court orders otherwise.
- Section 103A - A union or employer’s organisation may be placed under administration with a commissioner (or another) appointed as administrator.
- Section 115 - The CCMA may provide assistance of an administrative nature to employees who earn less than the BCEA threshold to serve any notice or document in terms of the LRA.
- Section 143 - A certified award does not need to be made an Order of Court before contempt proceedings can be introduced.
- Section 150 - The CCMA may get involved in disputes that are taking very long to resolve in order to try to resolve the dispute, where in the public interest, without the consent of the parties.
- Section 189A - Consulting parties may not unreasonably refuse to extend the 60-day consulting period in section 189A facilitations.
- Single employees and small business employees (where the business employs less than 10 employees) may choose to have retrenchment disputes arbitrated.
- Section 213 - The definition of “service” is amended to include service by electronic mail and any other method of service specified by the Rules of the Commission.
- Section 74 of BCEA - The only restriction in claiming outstanding monies along with a dismissal dispute is prescription.

- Section 6 of EEA – Failure to provide equal pay for work of equal value is now specified as a form of unfair discrimination. Discrimination can be on any arbitrary ground, not only the listed grounds.
- Section 10 of EEA – Employees earning less than the threshold may choose arbitration by the CCMA of discrimination disputes. All employees can refer to arbitration if discrimination on grounds of sexual harassment is alleged.
- Section 11 of EEA – Duty to prove is on the employer if employee alleges discrimination on a listed ground. Onus is on the employee if discrimination on an unlisted ground is alleged.

The ultimate purpose of the change is to make sure that our labour laws give effect to Constitutional rights, including the right -

- to fair labour practices
- to engage in collective bargaining
- to equality and protection from unfair discrimination.

