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**LABOUR RELATIONS AMENDMENT BILL,  
B16-2012**

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**COMMENTS BY ESKOM HOLDINGS SOC  
LTD (ESKOM)**

**DATE: 27 JUNE 2012**

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# **COMMENTS BY ESKOM ON THE BILL**

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## **AS INTRODUCED IN THE NATIONAL ASSEMBLY (PROPOSED SECTION 75); EXPLANATORY SUMMARY OF BILL PUBLISHED IN GOVERNMENT GAZETTE – NOTICE 35212 OF 5 APRIL 2012 (“BILL”)**

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### **1 INTRODUCTION**

On 20 March 2012 Cabinet approved the submission of the Labour Relations Act Amendment Bill [B16-2012] to Parliament, where it is to be considered by the Portfolio Committee on Labour. Once considered by the Portfolio Committee, the Bill will be submitted to the National Assembly and the National Council of Provinces for adoption.

These submissions are made in response to an invitation from the Portfolio Committee on Labour for written comments by interested parties and stakeholders.

### **2 GENERAL COMMENTS**

Although Bill 16-2012 has retained certain amendments which appeared in the draft bill released in December 2010, many of the current amendments are being presented to the public for the first time. Eskom Holdings SOC Ltd's specific comments to these amendments are set forth below.

### **3 SPECIFIC COMMENTS**

#### **Amendment to Section 21 - Clause 1**

It is submitted that it is not feasible to include employees assigned to temporary employment services, employees engaged on fixed-term contracts, part-time employees and other non-standard workers in the consideration of a dispute about organisational rights as the nature of such work is not permanent, and the number of the workforce would be constantly changing. This will lead to practical and administrative problems for an employer insofar as implementation and compliance are concerned.

It is not clear what trade unions representing “*a significant interest, or a substantial number of employees...*” means. This should be defined so that it is measurable or capable of measurement.

#### **Amendment to Section 22 – Clause 2**

To grant organisational rights at the site of a TES client, where employees assigned by the TES work, will lead to difficulties in implementation and compliance due to changes in the workforce numbers, arising from the non-permanent nature of TES work.

#### **Amendment to Section 69 – Clause 9**

The amendment is silent on whether a new / fresh notice will be required if a suspended strike is resumed, and this issue must be addressed to avoid confusion.

#### **Amendment to Section 72 – Clause 14**

Empowering the ESC to determine minimum services if the parties are unable to reach a minimum services agreement defies the meaning / definition of an “agreement”. The ESC should only be empowered to determine a dispute about minimum services, and not what those minimum services are as this usurps the bargaining power of the parties. In the event of a dispute about the nature/categories of the minimum services, then the essential services designation by the ESC ought to prevail, subject to an application for variation of such designation.

#### **Amendment to Section 72 – Clause 15**

It is submitted that the issues of whether or not a collective agreement should be concluded to provide for the maintenance of minimum services, and the terms of such a collective agreement are matters for collective bargaining and not for determination by the ESC. To allow the ESC to determine such matters usurps the collective bargaining power of the parties.

#### **Amendment to Section 150 – Clause 26**

It is submitted that the Director’s power to *mero motu* intervene in a dispute undermines collectively negotiated agreement processes and also undermines the ability of the parties to themselves appoint conciliators. Further, there is no definition of “*public interest*” and in the absence of securing the parties’ consent, the Director’s ability to intervene in what he/she believes is in the public interest is unfettered.

#### **Amendment to Section 186 – Clause 35**

This amendment seeks to extend the meaning of dismissal to include an employee on a fixed term contract who had a reasonable expectation of being retained by the employer

on an indefinite contract of employment, but who is not retained or who is retained on less favourable terms. The issue of an expectation of retention for an indefinite period has been the subject of much debate, and was finally resolved in the LAC case of *University of Pretoria v CCMA and others* (2012) 23 ILJ 183 (LAC) where the court held that a reasonable expectation of permanent employment does not fall within the definition of dismissal. This amendment now undoes the decision of the LAC.

### **Insertion of Section 188B – Clause 38**

There are fundamental concerns regarding this amendment, the effect of which is to preclude higher earning employees from having access to the CCMA if they have been given 3 months (or longer) written notice of termination of employment. It is submitted that this amendment is potentially unconstitutional as it deprives such employees of the right to fair labour practices. Further, the reasons given for the amendment, namely that this group of employees has sufficient bargaining power to protect against unfair dismissal, and that the costs and process involved in disciplining them are difficult to manage, are debatable as this is not always the case. Also, senior managers who are employed at smaller businesses who may earn less than the amount that will be prescribed will fall outside the ambit of this amendment, even though the same reasons would apply in respect of them. If this amendment is to be retained, then it is submitted that the threshold to be prescribed should be much higher than the amount of R1 million that is currently being bandied around.

### **Amendment to Section 189A – Clause 39**

It is not clear whether “*consulting party*” refers only to the union/s and employees, or whether consulting party could be the employer party as well. It is submitted that this should be clarified to include only the former and not the latter.

#### **Insertion of Section 198A – Clause 44**

Temporary services are restricted to a period of 6 months, after which the worker becomes the employee of the client unless the worker is a substitute for an employee who is temporarily absent, or the category of work is permitted by a collective agreement concluded in a bargaining council, a sectoral determination or a notice by the Minister. It is submitted that the limitation of 6 months is far too restrictive and impractical, and will negatively interrupt the flow of business operations. Further, the words “*by a collective agreement concluded in a bargaining council,*” in s198A(1)(c) seems to limit the agreement to a bargaining council agreement only and excludes the possibility of a collective agreement being negotiated and concluded by a trade union and employer. If this is not the intention, then this discrepancy must be clarified.

#### **Insertion of Section 198B – Clause 44**

A distinction is made between fixed term contracts entered into for 6 months or less and fixed term contracts entered into for longer periods, ie. more than 6 months. In the latter case, the employer must have a justifiable reason for fixing the term of the contract. While the list of what would constitute justifiable reasons is not exhaustive, an employer runs the risk of his reason being determined to be unjustifiable, in which event the contract will not be invalid, but will be deemed to be for an indefinite period. This will increase the cost of doing business drastically, in particular the employment costs. Further, it is submitted that the limitation of 6 months is far too restrictive and impractical, and will negatively affect the flow of business operations

Interestingly though, s198B(2)(c) provides that the section will not apply to fixed term contracts permitted by statute, sectoral determination or “*collective agreement*”. Unlike in s198A(1)(c) “collective agreement” is not restricted to an agreement concluded in a bargaining council, and seems to include the possibility of a collective agreement being

negotiated and concluded by a trade union and employer. If this is not the intention, then this discrepancy must be clarified.

In addition, the amendment provides for severance pay to be paid to an employee who is engaged for a period exceeding 24 months for the purposes of a specific project of limited duration, upon expiry of the fixed term. The amendment goes further to provide that the employee is not entitled to severance pay where the employer offers the employee employment, or procures employment for the employee with a different employer on the same or similar terms, which commences *“at the expiry of the contract”*. The explanatory memorandum provides that the new employment contract must commence *“no later than 30 days after expiry of the contract....”*. It is submitted that the latter provision must be specifically inserted into the body of section 198B(11) of the Act, and must not just be contained in the explanatory memorandum.

#### **Insertion of Section 198C – Clause 44**

The definitions of *“part-time employee”* and *“comparable full-time employee”* both contain a reference to time worked in a certain period. Does this mean that the provision will only apply to employees whose remuneration is calculated every week or month based on the time worked? It is submitted that this should be clarified.

Unlike sections 198A and 198B, this section does not contain any reference to a collective agreement, whether concluded in a bargaining council or not. Is this an omission or is it the intention that part-time work cannot be regulated by collective agreement? This should be clarified.

#### **CONCLUSION**

Eskom would like to extend its appreciation to the Portfolio Committee for the opportunity to influence the provisions of the Bill. We trust that our comments have been

constructive and that they are of assistance in finalising the Bill. In the event that further clarification or information is required, Eskom would be more than happy to provide same.