FEDUSA SUBMISSION ON THE LABOUR LAW AMENDMENT BILLS 2012

to

LABOUR Portfolio Committee

25 July 2012

Cape Town

Jointly Presented by:

- • Dennis George : General Secretary
- • Gretchen Humphries : Deputy General Secretary
- (Operations)
- • Leon Grobler : Chief Operating Officer (UASA)

INTRODUCTION

- FEDUSA welcome the long awaited labour law amendments amending the LRA and the BCEA.
- The labour law amendments have been finalized following a period of consultations within NEDLAC. FEDUSA have been part of the NEDLAC process.
- FEDUSA is the largest politically non-aligned trade union federation in South Africa representing approximately 400 000 members from a diverse group of Affiliates organising in a wide variety of sectors in industry.

The NEDLAC process

- The process at NEDLAC entailed that social partner representatives attempted to reach consensus regarding the themes, after which three (3) legal drafters prepared with drafting legal text to reflect the consensus positions.
- The next step was the opportunity to comment again and positions of acceptance or proposed amendments were levelled.
- Finally the text with sufficient consensus between the parties was taken forward.
- There were high levels of divergence of opinion between the parties. One of these divergences was that Business Unity South Africa (BUSA) requested a Regulatory Impact Assessment (RIA) on the bills, but Government would not agree.

The NEDLAC process (cont)

- FEDUSA concur with the provisions of proposals around regulation of labour brokers and temporary work in general.
- The NEDLAC process was a robust process of compromises and consensus seeking between the social partners. The issues under debate, were mostly issues of “principle” and therefore the parties representing complete diverse interest, were sometimes unable to agree on proposed amendments.
-

The NEDLAC process (cont)

- Parties to NEDLAC, of which FEDUSA is one, are precluded from making submissions in respect of issues where there was agreement between the social partners.
- FEDUSA will therefore only focus on these issues, where we request further adjustment to be made, to the various Acts.
- This comments are restricted to the amendments to the Labour Relations Act and the Basic Conditions of Employment Act.

The Employment Services Bill and the Employment Equity Act

- Should the hearings be extended to also hear comments in respect of the Employment Services Bill and the Employment Equity Act, then FEDUSA will request an opportunity to supplement their comments on the additional bills.

FEDUSA comments to focus on:

1. Temporary Work / Fixed Term Contracts

- FEDUSA is in agreement with the proposed amendments and believe that it will go a long way to Regulate the Temporary Employment Industry.
- It will address the various unacceptable practices which lead to workers, being exploited.
- The equal treatment clause is totally supported as well as the limitations placed in respect of “fixed term” contracts.

Regulation of Temporary Employment Services

- The amendments to render protection to the most vulnerable workers, whilst also ensuring that temporary work is just that: “temporary work for a period and for a specific person”.
- The proposed provision to address the triangular relationship with the joint severable and liability clause grouped together with the other protected measures in the amendments, will ensure that workers are not exploited by the “Labour Brokers”.

Regulation vs banning of TES

- The heated debate around labour brokers has been escalating since the late 1990s, with most trade union federations internalising the debate.
- At its National Congress in 2008 as well as 2011, FEDUSA articulated the policy position of regulating all forms of atypical forms of work (casualisation, subcontracting, temporary work, outsourcing, and the like) to promote the principle of Decent Work.

Labour Brokers being regulated

- The tabling of the new Employment Services Bill is envisaged to have the necessary sophistication to address the real issue our members have with labour brokers, namely the exploitation of workers.
- Banning labour brokers and temporary employment services would have had detrimental and immediate effects on the most vulnerable sections of the South African labour market.
- FEDUSA researched and debated the policy with the ITUC (International Trade Union Confederation) and the International Labour Organisation (ILO)

Core principles in amendments

- The core principles included in the amendments:
- Equal pay for equal work;
- Equal benefits and conditions of service;
- Time limits;
- Set criteria for temporary contracts of employment as well as
- The clearer definition of employer in triangular employment relationships.

PROPOSED AMENDMENT : SECTION 188B TO THE LRA

- The purpose, application and interpretation of the LRA should be the yardstick in determining whether the insertion of the proposed Section 188B into the LRA is in contravention of the fundamental rights as conferred by section 27 of the Constitution.
- Neither can it be in contravention of the fundamental purpose of the LRA.

PROPOSED AMENDMENT : SECTION 188B TO THE LRA (cont)

- FEDUSA want to submit that the following issues in the proposed amendment are in conflict with the purpose, application and interpretation of the LRA:
- 1) Section 188B(1) introduces an earnings threshold in dismissal cases;
- 2) The introduction of a three (3) month written notice period or longer as specified in an employment contract which shall be deemed to be sufficient to "cure" a fair reason and fair procedure for dismissal for these higher-earning employees;
- 3) The application of the proposed amendment to contracts of employment concluded before the commencement date.

Concerns regarding the Rationale contained in the Memorandum of Objects ("MO")

It is our submission that the rationale as set out in the MO seeks to interfere with the objectives of the LRA rather than giving effect thereto. An unequal regime for so called "high-income" earners is created which leads to all sorts of inequities to that generic group of employees.

The following major concerns with S 188B are highlighted:

- 1) The termination of employment of high earners in circumstances where the reason for doing so may not fall clearly within a fair reason for dismissal as specified in the current section 188.
- All other employees can be dismissed for the following reasons namely conduct, capacity or operational requirements. Hence a new generic type of dismissal for high earners is created by this proposed amendment and in doing so erode their right to equal treatment as part of the objective of the LRA;

The following major concerns with S 188B are highlighted:

2) The cost for asserting discipline and performance standards at senior levels is notoriously difficult to manage on both public and private sector employees.

- Employment contracts / collective agreements currently in place will be affected by the proposed amendment and erode individual rights of high earning employees as well as their collective bargaining rights.
- The proposed amendment seeks to address difficulties in managing high earning employees

The following major concerns with S 188B are highlighted:

- 3) The amendment seeks to draw a fair balance between the rights and economic interests of employers enabling them to achieve efficiency and flexibility at senior levels and the rights and interests of high earners who remain protected against arbitrary or summary action.
- This is a contradiction in terms because the three months' notice is a form of arbitrariness and summary action.
- In short corporate slavery has just been born.

The following major concerns with S 188B are highlighted:

- 4) The amendment seeks to reduce the number of cases referred to the CCMA effectively to reduce the burden of dismissal hearings on the CCMA.
- The Reality as CCMA was requested to provide statistics to FEDUSA
- From 2009 to 2012 first quarter, a hundred and forty seven (147) cases was heard.
- The CCMA definition of high income earners is R600 000 per annum (R50 000 per month). It is clear that 147 over a 3 year period can hardly be described as “excessive” or as “burden”.

FEDUSA hereby address the proposed amendment on two main grounds:

- 1) The proposed amendment (if promulgated) will be in conflict with the Purpose and application of the LRA, including the constitutionality thereof;
- 2) The Retrospective effect of the proposed amendment in contravention to the Purpose of the Act

Purpose and application of the LRA

Section 1 of the LRA states the purpose of the Act is to advance economic development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the Act.

The primary objects of the Act which include:

- a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
- b) to give effect to obligations incurred by the Republic as a member state of the ILO;

Purpose and application of the LRA (cont)

- c) to provide a framework within which employees and their trade unions, employers and employers' organisations can –
- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
- (ii) formulate industrial policy; and d) to promote-
- (i) orderly collective bargaining;
- (ii) collective bargaining at sectoral level;
- (iii) employee participation in decision-making in the work-place; and
- (iv) the effective resolution of labour disputes.

Section 27 which is in the Chapter on Fundamental Rights in the Constitution entrenches the following rights:

- (i) Every person shall have the right to fair labour practices;
- (ii) Workers shall have the right to form and join trade unions and employers shall have the right to form and join employers' organisations;
- (iii) Workers and employers shall have the right to organise and bargain collectively; (iv) Workers shall have the right to strike for the purpose of collective bargaining;
- (v) Employers' recourse to the lockout for the purpose of collective bargaining shall not be impaired subject to subsection 33(1).

Submission on S188B

- It is submitted that the insertion of the proposed section 188B will deprive the employees who earn as at the date of their dismissal more than an amount determined by the Minister their right to fair labour practices.
- It is further submitted that the proposed section 188B will deprive the mentioned employees of their rights to effective resolution of labour disputes.

Interpretation of the LRA

- An accepted practice and norm is followed to the interpretation of the LRA as mandated by section 1 read with section 3(a).
- The various purposes of the LRA cannot be seen in isolation from one another.
- The Labour Appear Court in Equity Aviation Services (Pty) Ltd v SATAWU & others (2009) 10 BLLR 933 LAC at par 40 explained the meaning of purposive interpretation of the LRA.

Interpretation of the LRA

- The Labour Appeal Court also held that where there is conflict between contractual principles and the primary objects of the LRA, the latter should prevail.
- See North East Cape Forest v SAAPAWU(2) (1997) 6 BLLR 711 (LAC).
- In contrast to the traditional golden rule of construction the Constitutional Court applied the purposive approach in the interpretation of the LRA not only in the event of textual ambiguity but in the interpretative process throughout. See Chirwa v Transnet Ltd (2008) 2 BLLR 97(cc) at par 10:
- Similarly in Wyeth SA (Pty) Ltd v Manqele (2005) 6 BLLR 523(LAC) held by the Labour Appeal Court

Submission on S188B

It is submitted that the insertion of Section 188B will clearly be in contravention to the purpose of the LRA and more specifically the fundamental rights to fair labour practices and effective resolution of labour disputes.

Justice and equity or even the values set out in the Preamble of the Constitution to: "improve the quality of life of all citizens" would be effectively deleted.

Submission on S188B (cont)

- The proposed section 188B purports to apply the provisions to employees earning above a specified remuneration threshold rather than by reference to their status or role within the employer's enterprise.
- The amendments do not preclude the termination of employment of high earning employees summarily or on shorter notice where this is justified applying the provision of section 188.
- Where employers elect to give the minimum period of notice or any longer period provided in the contract of employment, this will be deemed to be fair for the purposes of section 188.
- It is submitted that the proposed section 188B will not withstand constitutional scrutiny.

Retrospective Effect

The proposed section 188B(5) states that it will apply to contracts of employment concluded before the commencement of this section with effect from two years after the commencement date of this section.

The amendment will apply to all contracts concluded prior to the date of promulgation and will effectively operate retrospectively.

Retrospective Effect

- The rule of prospective operation is in layman's terms intended for three reasons:
- 1) Does not prejudice those who contracted before the inception of the law.
- 2) Laws that are enacted with retrospective effect were done to give a just, equitable and fair treatment to those affected.
- 3) The purpose of retrospective application is in order to correct a past legal uncertainty.
- The effect of section 188B would declare various aspects of a relevant employment contract as *pro non scripto* (as if these terms had never been written) that in itself is prejudicial.

PROPOSED AMENDMENTS : SECTION 198 (B) (4) e

Proposed amendment

- "Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee has been engaged for a total period of not longer than 6 months for the purpose of determining the employee's suitability for employment."

Main concern SECTION 198 (B) (4) e

Employers will prefer to appoint new employees on this basis, as there is then no need to comply with the Code of Conduct as required by Schedule 8 (8)c of the Labour Relations Act dealing with employees on probation.

"Probation should not be used for purposes not contemplated by this Code to deprive employees of the status of permanent employment.

- Our concern is therefore if the proposed amendment of Section 198 (B)(4)(e) is accepted, in its current format some employers will be able to use this new amendment and not comply with the fair and reasonable process already in existence and is prescribed by Schedule 8(8) of the Labour Relations Act, Act 66 of 1995.

Submission on Section 198 (B) (4) e

- FEDUSA therefore suggest to remove subsection (e) of the new proposed Section 198 (B) 4 of the proposed amendments in its entirety.

SECTION 18

- The proposed amendments to Section 21 in respect of the Section 18 situation is welcomed and supported with due consideration to the effects thereof.
- The Section 18 provision is misused to “bully” previous well represented Trade Unions in a specific recognition unit, in a Section 18 agreement. In practice, this means, that a Trade Union, in existence since 1898 that previously had an 80 to 90% representivity, in a specific recognition unit, finds itself as a 20% representative Union, with no rights! That is not a fair labour practice! It would also not be considered freedom of Association!
-

FEDUSA proposes the addition of a Section 21B provision.

The provision will provide for a further test to be applied by the CCMA. It is a test that has been proposed by Advocate Brassey in his article "et al comments on the Labour Relations Act Vol 3 1 A3:119"

- It is a test, that has been accepted by the Labour Court in (2002) 11 LC 4.8.1 in the Fuel Retailers Association of SA v Motor Industry Bargaining Council and has been applied in other Labour Court cases.
- The PSA v Minister of Safety and Security and others (2007) 16 LC 4.8.1 is such an example.

The test to apply

- The alternative to this provision and ability to subject the Section 18 agreement to scrutiny by the CCMA, is to “strike”. FEDUSA and its affiliates believes that it is far better to have such a “test,” made available, than to be forced to resort to a strike, to resolve this.
- The proposed Section 21 provision will provide no guarantee, but only an opportunity to test a decision that affects a Trade Union that has for many years represented the interest of a substantial number of employees in the workforce.

GENERAL CORRECTION

- Section 1 of the LRA refers to the Constitution Section 27.
- The correct section in the constitution is in Section 23, which refers to fair labour practice.

Strikes

- **Section 69(1);**
- Removal of “supporters”;
- Supreme Court of Appeal SATAWU vs GARVIS and others;

- **Section 150 (2);**
- Definition of “Public Interest”;

Impact on the CCMA

Impact on CCMA

- Capacity
- Funding
- Various additional tasks :
  - Service of documents
  - Section 50 Strikes in Public Interest;
  - Equal treatment provisions;
    - Temporary Workers;
    - Part-time workers;

Impact on the CCMA

- Commissioners need to understand:
  - Remuneration principals;
  - Salary package structuring
  - Grading of jobs

Consequences of Act

Contracts of employment commenced on 1/1/1980

Date of enactment

2 years

Contract concluded before date of enactment

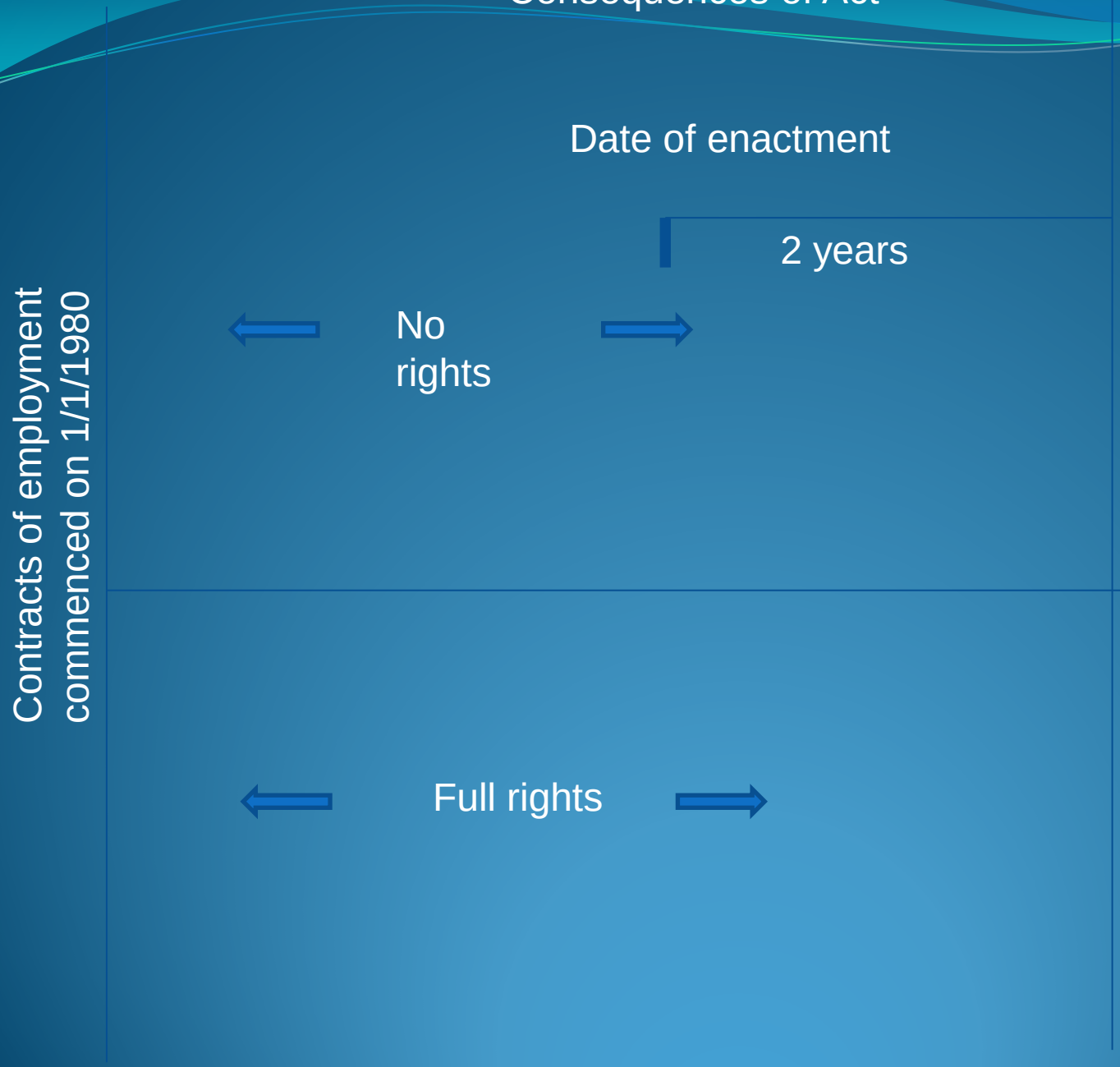
Date if dismissal 1 day before 2 years lapse

Full rights (Recourse to CCMA)

Date of dismissal 1 day after 2 years

No rights
No recourse, just three months payment

Consequences of Act



Employee 1
Date of dismissal one day after 2 years.
Employee earning R1 above threshold.
No recourse just three months

Employee 2
Date of dismissal one day after 2 years employee earning R1 below threshold
Full recourse to CCMA

CONCLUSION

- FEDUSA have already participated in the NEDLAC process in respect of the Employment Equity Act and the Employment Services Bill.
- We now await the Final drafted Bill to conclude the deliberations.

- We thank you for the opportunity to raise our concerns with the Portfolio committee.
  - The End