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FEDUSA SUBMISSION ON THE LABOUR LAW AMENDMENT BILLS 2012

The Portfolio Committee on Labour

Cape Town

Jointly Presented by:

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

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1) 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. The amendment bills deal with various aspects of labour legislation having a major impact on the lives of workers as well as the millions of unemployed. 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 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. After this representatives were given the opportunity to comment again and positions of acceptance or proposed amendments were leveled. Finally the text with sufficient consensus between the parties was taken forward. Failure to reach consensus would lead to a report by the NEDLAC Executive Director, adding that 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.

FEDUSA would concur with the provisions of proposals around regulation of labour brokers and temporary work in general. Hard work and tough deliberations over the past month paid off. The NEDLAC process was a robust one that were eventually one of the 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 eventual submissions “in general” is acceptable and would, to FEDUSA’s mind, enhance and promote the effectiveness of the Labour Relations environment.

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 make submission in respect of 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, as we are led to believe that the hearing will be restricted to this.

If the hearing is to 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.

2 SPECIFIC COMMENTS

2.1 Temporary Work / Fixed Term Contracts

FEDUSA are in agreement with the proposed amendments and believe that it will go a long way to regulate the temporary employment environment.

It will address the various unacceptable practices by individual firms and persons in this environment, that led to workers, being exploited.The equal treatment clause is totally supported as well as the limitations placed in respect of "fixed term" contracts.

FEDUSA has researched the issue worldwide and can therefore support the proposed step towards the regulation of the Temporary Employment Industry.

The amendments will serve 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", that their rights are properly protected and that these Labour Brokers that continue to exploit workers, or to continue with actions contrary to the stipulation of the amended Act, are properly taken to task. They will eventually be exposed and removed out of the regulated system.

2.2 Regulation rather than "Banning" is the preferred way!

The heated debate around labour brokers has been escalating since the late 1990s, with most trade union federations including the issue in internal discussions and their national congresses. At its national congresses in 2008 as well as 2011, FEDUSA also discussed the issue and Affiliates articulated the solution as regulating all forms of atypical forms of work (casualisation, subcontracting, temporary work, outsourcing, and the like) to promote the principle of Decent Work.

We are awaiting the tabling of the new Bill, in that it seems to have the necessary sophistication to address the real issue our members have with labour brokers, namely the exploitation of workers. The blunt approach of merely 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.

Internationally, FEDUSA researched the issue thoroughly and debated the matter with its mother body the ITUC (International Trade Union Confederation) and the International Labour Organisation (better known as the ILO). FEDUSA hope to find the best solution for our country and our members with global trends on atypical forms of employment.

The core principles included in the amendments are equal pay for equal work, equal benefits and conditions of service, time limits and set criteria for temporary contracts of employment as well as the clearer definition of employer in triangular employment relationships.

3 PROPOSED AMENDMENT : SECTION 188B TO THE LRA

3.1 The purpose, application and interpretation of 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 of the Republic of South

Africa Act No 106 of 1996 (as amended). Neither can it be in contravention of the fundamental purpose of the LRA with specific reference as stated in section 1 of the LRA.

At the outset 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, excluding automatically unfair dismissals (section 187) and unfair labour practices (section 186) to employees earning in excess of the threshold;

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.

3.2 Concerns regarding the rationale as 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 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;

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 drastically affected by the proposed amendment and therefore will trample on 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 however the purpose of the LRA is not intended to restrict a generically – specific group of employees such as high earners and thereby disregarding the prime object of the LRA i.e. to provide protection against unfair dismissals.

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 heinous form of arbitrariness and summary action. In effect high earners become mere chattel of their

employers and may be discarded in a manner synonymous with feudal practices more common in the Middle Ages. In short corporate slavery has just been born.

4) The amendment seeks to reduce the number of cases referred to the CCMA and to reduce the burden of dismissal hearings on the CCMA.

This is not the reality. The CCMA was requested to provide statistics to FEDUSA and it emerged that from 2009 to 2012 first quarter, a hundred and forty seven (147) cases was heard. (Statistics is attached as Annexure A).The statistics is in respect of what is the category of "high" income earners by the CCMA. 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".

3.3 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.

3.3.1 In Contravention to the Purpose of the Act

Section 1 of the LRA states that 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. It then continues to state 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 International Labour Organisation;
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).

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.

It is accepted practice and norm that a purposive approach 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 as follows:

"[U]nlike those cases in which the literal theory of interpretation applies, a person applying provisions of the LRA need not first find that the language of the statute is not clear or is ambiguous or that giving provisions of the LRA the ordinary or natural meaning will lead to an absurdity before he can interpret provisions of the LRA in such a way as to give effect to the primary objects of the LRA. In my view the effect of section 3 of the LRA is that whenever one seeks to interpret any provision(s) of the LRA, one is required to always give effect to the primary objects of the LRA and to always give an interpretation that will also be in compliance with the Constitution and with the public international law obligations of the Republic. This does not mean that one disregards the language chosen by the Legislature to formulate the statutory provision. However it does mean, in our view, that where adherence to the literal meaning of the statutory provision would not give effect to or promote the purpose or object of the provision and there is another meaning or interpretation that can be given to the provision which would promote, or give effect, to the purpose of the statutory provision, effect must be given to the interpretation that gives effect to the purpose of the provision even if this means departing from the ordinary or literal or grammatical meaning of the words or provision."

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:

"The objects of the LRA are not just textual aids to be employed where the language is ambiguous. This is apparent from the interpretive injunction in section 3 of the LRA which requires anyone applying the LRA to give effect to its primary objects and the Constitution".

Similarly in Wyeth SA (Pty) Ltd v Manqele (2005) 6 BLLR 523(LAC) the Labour Appeal Court while asserting the golden rule as a starting point in interpreting a statute, went on to note that the LRA contains an "interpretive instruction" in section 3 requiring the Act to be interpreted in compliance with the Constitution. It then interpreted the term "employee" on this basis and concluded as follows on page 45:

"Given the resultant gross hardship, ambiguity and absurdity in the adoption of the literal interpretation, FEDUSA is of the view that this Court is thus entitled to depart from such a literal and ordinary construction and extend the literal construction of the definition [of employee] as

including a person who has concluded a contract of employment which is to commence at a future date. Common sense, justice and the values of the Constitution would, in our view, best be served by extending the literal construction to include such a person".

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. The rights in regard to high earners will be disregarded on to whom the section applies. A mere notice of three months or longer period specified in the contract will be deemed a fair reason and in accordance with a fair procedure for dismissal. 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.

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. In that event the employees will be entitled to exercise the remedies provided by the LRA. 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 this "deemed to be for a fair reason and to have been effected in accordance with a fair procedure as contemplated in section 188" flies in the face of the purpose of the LRA which is to promote effective resolution of labour disputes. Section 188B rather than providing an effective resolution of a labour dispute in respect of high earners, will in fact delete and nullify the right that high earners would otherwise have in relation to the three months or more notice period.

In MacKay v Absa Group & Another (1999) 12 BLLR 1317(LC), Mlambo J stated at par 15:

"In keeping with the Act's main objects", it was held, "all disputes arising from the employer-employee relationship must be effectively resolved. Such disputes are resolved through conciliation, arbitration and adjudication, and those of a collective nature through collective bargaining. In the light of the aforegoing it is clear that it could never have been intended that some disputes arising out of the employer-employee relationship are incapable of resolution in terms of the Act".

It is submitted that the insertion of the proposed Section 188B must be in compliance with the Constitution. The Labour Court in FAWU & Others v Pets Products (Pty) Ltd 2000(7) BLLR 781 concluded at 788 that it can now be taken for granted that the conduct of employers and their organisations and employees and their trade unions will be judged according to the Constitution and according to the ILO Standards. The fact that the legislature has chosen to stipulate expressly the requirements in section 3 that any person applying the LRA must interpret its provisions in compliance with the Constitution, places the Constitution beyond question. It is submitted that the proposed section 188B will not withstand constitutional scrutiny.

3.3.2 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.

The rule of prospective operation is in layman's terms intended for three reasons:

1) It does not prejudice those who contracted before the inception of the law. In the present case the opposite is true. Parties to a contract prior to the commencement of the amendment will be affected albeit two years later. The contracting powers between employer and employee are severely restricted;

2) Laws that are enacted with retrospective effect were done to give a just, equitable and fair treatment to those affected. The proposed amendment will not have a just, equitable and fair effect if promulgated. The freedom to conclude contracts freely is unjustly and severely fettered.

3) The purpose of retrospective application is in order to correct a past legal uncertainty. No such uncertainties exist in the present LRA or other labour law jurisprudence. The current proposed retrospective application was not done to correct any legal uncertain rather it creates 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.

   The rule of retrospectivity has received wide recognition in case law in the Republic in respect of statutory interpretation and in constitutional interpretation in the previous Appellate Division as well as the Constitutional Court.

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

4.1 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."

4.2 Main Concern

Employers will, if this proposal becomes legislation, 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) of the Labour Relations Act, Schedule 8(8) c dealing with employees on probation, which for example submit that:

"Probation should not be used for purposes not contemplated by this Code to deprive employees of the status of permanent employment. For example, a practice of dismissing employees who complete their probation periods and replacing them with newly hired employees, is not consistent with the purpose of probation and constitutes an unfair labour practice"

Schedule 8 (8) (2) continues to prescribe the fair process to be followed in dealing with the termination of service of employees on probation, as follows.

"(2) After probation, an employee should not be dismissed for unsatisfactory performance unless the employer has-

(a) given the employee appropriate evaluation, instruction, training, guidance or counseling; and
(b) after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.

(3) The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.

(4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative of a fellow employee."

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

5 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 Constitution of South Africa guarantees "Freedom of Association", yet in practice this "Freedom" are undermined or denied through sheer financial pressure in the form of Agency shop fees being payable and the taking away of deduction facilitates in respect of trade union fees.

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!

What is even worse is that such a Union has for many years represented its members, bargained collectively and added value to the process. One of the primary objectives of the LRA is the promotion of orderly collective bargaining.

Collective bargaining envisages a measure of self-governing and if a Trade Union representing a substantial interest of the workforce, can merely be excluded from all rights, by a Section 18 agreement, one can challenge not only the fairness, but also the Constitutionality, of such an arrangement.

FEDUSA initially requested the repeal of Section 18, because we believe that such a Section has neither place, nor relevance in the new SA democracy. The other social partners however did not agree and we respect their views.

Instead, they have agreed to a watered down Section 18 provision and the ability to have the decision subjected to the scrutiny of the CCMA, in terms of Section 21 of the LRA. FEDUSA is grateful for this concession and are optimistic that the ability to "test" the decision will result in better "thought through," Section 18 agreements.
FEDUSA however wants the Section 21 process, to be further enhanced with a further addition to Section 21.

5.1 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 provides for the following:

- Whether the admission of the applicant would contribute to the promotion of orderly collective bargaining;
- The extent to which the applicant may disrupt the working of collective bargaining;
- The contribution which the applicant could make to the organizational diversity;
- The reason advanced by the parties for concluding an agreement that excludes the applicant;
- Stability in the industry;
- Whether the applicant is sufficiently represented to be an effective member of the collective agreement;
- Other advantage to the industry, sector, etc.

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.

6 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.

7 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