Beaumont's EXPRESS

A Monthly Guide to Labour Relations and the Law

VOL 24 NO 6 JUNE 2022

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ISSN 0 409 01183 5

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Printed by ***novus print***, a division of Novus Holdings

EDITORIAL NOTE

In the coming months articles in **Beaumont's Express** will focus on proposed amendments to the Employment Equity Act and practical notes relating to harassment in the workplace. This edition is no exception.

There are major changes to the EEA that will release small employers (less than 49 employees) from obligations under Chapter III and introduce additional requirements for large employers (50 and more employees).

All businesses wishing to contract with organs of state must have and maintain an EEA compliance certificate without which they will not qualify to tender for business or risk the cancellation of existing contracts.

The certificates can be obtained online with a declaration of compliance that can be assessed by DoEL inspectors.

One of the aims of these is to accelerate transformation at the top 3 levels in organisations through compliance towards sector targets determined by the Minister of DoEL. These targets must be incorporated into EE plans. Compliance certificates can still be obtained if there are justifiable reasons where annual targets are not achieved.

Employers can expect rigorous enquiry from inspectors in this regard. There is concern that these inspectors will adopt a narrow focus to recruitment and selection processes without due recognition to economic conditions and business imperatives.

There is continued case law on the topic of mandatory vaccinations and consequences for employees who decline or hesitate to be vaccinated. The article in this edition deals with the fairness of a subsequent retrenchment and forfeiture of severance pay.

Sexual harassment by a public official on a citizen during official duty was an abuse of power, a breach of the trust relationship regarding service delivery and a reputational risk to the employer. Dismissal was warranted.

The final article covers the inclusion of transformation as a selection criterion for retrenchment, the concomitant obligations of the consultation parties during consultations and options/remedies where consensus proves illusive.

Mike Beaumont
Editor

June 2022

Employment Equity Amendments 2022 – Forthcoming Attraction

Introduction

Amendments to the Employment Equity Act (“EEA”), that have been under discussion since 2018, will likely be **promulgated in Q3 of 2022**. This article explains and discusses these amendments. *Dates mentioned in this article are based on the presumption that the targeted promulgation/publication dates are achieved.*

The **purposes** behind these changes are to:

- reduce the regulatory regime for small employers under the EEA;
- include in the new definition of people with disabilities persons with intellectual or sensory impairments;
- enhance the administration of the EEA via compliance certificates under §53;
- empower the Minister to set sectoral numerical targets; and
- remove the obligation on HPCSA to determine the validity of psychological testing. It will in future be determined by the Labour Court.

The **consequences** of these changes include:

- small employers (49 or fewer employees) will no longer be required to implement affirmative action measures under Chapter III;
- designated employers for the purposes of Chapter III will employ 50 or more employees irrespective of turnover thresholds (large employers);
- designated employers must create new five-year EE plans that incorporate applicable sectoral numerical targets;
- all organisations that **do business with state organs** will in future be required to obtain and maintain a **compliance certificate** in terms of §53 of the EEA as a **pre-requisite to qualify to contract with such organs**;

- the criteria to be met to obtain a compliance certificate varies between small and large employers (see details below); and
- the validity of psychological testing can be disputed before the Labour Court.

This article expands below on this introduction. The date upon which the amendments will become law hinges on the promulgation of the EEAA (expected in Q3 of 2022) and the publication of actual sectoral targets (Q2 of 2023). Account must also be taken of **EE Regulations of 2018** that are to be read in combination with some of the changes.

The New Definition of Designated Employers

These amendments will effect employers differently depending on the number of employees (49 or less or 50 and more – hereinafter referred to as small and large employers respectively).

Employers with up to 49 employees will no longer be required to develop employment equity plans, etc **irrespective of annual revenues or turnover**. **Section 64A and Schedule 4 of the EEA is to be repealed.**

All employers must comply with Chapter 11 of the EEA – promote equal opportunities in the workplace by eliminating unfair discrimination.

Large employers (with 50 or more employees) will in future be the **designated employers** for the purposes of Chapter III of the EEA. Only these employers will be required to develop and implement affirmative action plans and report thereon annually.

Designated employers will be required to adhere to applicable sector targets and to create new 5-year EE plans on this basis. The sector targets will only be finalised in Q2 of 2023; in turn this timing suggests that the new 5-year plans will commence from 1 October 2023 ie, these plans must be finalised by this date.

The new definition of persons with disabilities is to be communicated to all employees and, where applicable, invite them to update declarations on form EEA1.

Compliance Certificates – §56(6)

Compliance certificates will be **compulsory** for organisations bidding for **contracts with an organ of state** meaning any department of state or other functionaries or institutions that exercise a power or perform a function in terms of the Constitution or a provincial constitution (see §239 of the Constitution). This requirement applies across the board and hence includes small employers.

An employment equity compliance certificate will be available **online** by interested employers. This will entail a **declaration of compliance** by the applying employer. The scope declaration will vary between small and large employers as indicated in Diagram 1 on the following page.

The **requirement to have a compliance certificate** applies **only to those employers** who seek to **provide supplies and services to an organ of state** – see §53.

EEA Compliance Criteria

Scope	**Small Employers**	**Large Employers**
Pay national minimum wage or current* exemption	√	√
No current* CCMA unfair discrimination award	√	√
Annual EE reports submitted (EEA2/4)	X	√
Compliance with own annual EE target towards 5-year sector targets	X	√

Diagram 1

* During previous 12 months

EE compliance certificates will also be used to determine compliance with the management control element of the BBBEE scorecard. The BBBEE regulations will be amended to align with the EE approach.

A public register will be established of employers issued with EE compliance certificates. This register will be used to inform on-site audits conducted by IES for verification of **justifiable reasons** (see the heading below for further information) for **failure to comply** with an individual employer's own annual EE targets.

An employer who is found wanting or non-compliant **can result** in the withdrawal of a certificate. In turn, this will be **sufficient ground** for rejection of any offer to conclude a contract with an organ of state or for the cancellation of an agreement.

Cancellation of a contract for **non-compliance** with the EEA is not automatic. Section 53(4) states that failure to comply with relevant provisions of the act is a **sufficient ground** for cancellation of the agreement.

Presumably, a contractor will be given an opportunity to rectify or challenge non-compliance before a contract is cancelled. An example will be an appeal to the Labour Court against a CCMA award on unfair discrimination.

Bidders for contracts with organs of State will be subject to number of pre-requisites such as possession of a tax clearance certificate. An EE compliance certificate is to be seen in the same vein. Failure to maintain the currency of the certificates can lead to the cancellation of a contract. This presumably will not amount to a breach of contract or result in a claim for damages.

The cancellation of a contract in the above context should be addressed in the contractual documentation. For example, what will happen where cancellation arises after partial performance or where there is work in progress? Cancellation will not affect rights and obligations for proper performance prior to cancellation; payment for goods or services that have been provided must still be met.

Remember that compliance certificates are automatically obtained against applicable declarations by employers. These declarations will form the basis of assessments of actual compliance by employers.

Inspectors have the power to obtain written undertakings or to serve compliance orders on an employer. The DG of the Department may conduct a review to determine if an employer is complying with the Act; this can ultimately result in approval of the employer's plan or a mandatory recommendation. These compliance steps can be accompanied by fines and enforced via the Labour Court.

Sector Targets

The reality is that white persons still occupy the majority of positions at top and senior levels and approximately one third at professional level. The Commission for Employment Equity and Government interpret this situation as a failure of the model of allowing employers to set voluntary numerical targets and the inadequate interrogation

of employment equity barriers without reference to economic circumstances and more particularly low job growth.

EEA 2 returns in recent years reveal a **decrease in the number of jobs** at the top 3 levels, even though the number of employers making annual reports may have increased during this period.

Accordingly, the opportunities to diversify the composition of employees at the top 3 levels will largely depend on attrition, recruitment and promotions.

Absent a significant increase in annual GDP, vacancies at top and senior levels across the entire economy are in the region of 6 000 and 17 000 per year respectively or 10% of the country wide number of incumbents at these levels.

The trend from 2018 is that the majority of vacancies and promotions at the top 3 levels have been filled by persons of colour. This trend in favour of designated persons is more pronounced when white women are added to these figures.

Males, however, still dominate recruitment and promotions at top and senior levels.

It is against this background that proposed sector EE targets are viewed as a key mechanism to assess EE compliance of designated employers.

For the purposes of sector targets, the economy is divided into 18 sectors, each of which will have its own sector targets over a five-year period. Organisations that span multiple sectors will adopt the sector target in which they have their dominant activity.

These sector targets will be set following consultations between the CEE together with the Department and specific sectors. The outcome is to ensure the equitable representation of suitable qualified people from designated groups especially in the top 4 levels.

It is understood that Government favours the 5-year end-targets to reflect the EAP statistics whereas sector employers are advocating a pragmatic approach considering gender dominance if applicable, the actual pool of suitably qualified persons alongside EAP, and estimates of potential vacancies.

The reality is that a workforce in, say, nursing, clothing manufacture and hospitality is dominated by woman and the converse applies in mining, construction and security. These realities need not however be embedded in perpetuity especially in the top 3 levels. The Department has acknowledged the proliferation of one gender over another in

many sectors; it is anticipated that sector targets will accommodate the reality that all genders are not equally represented in actual workforces across the economy or in all pools of graduates and importantly student enrolments at tertiary levels.

Consultations on the sector targets commenced in June 2019 and have since covered all 18 sectors. Agreement has been reached with the Financial and Business Services Sector. Written submissions on targets have been made by the remaining 17 sectors and these are currently under analysis by the Department.

The Department aims to complete consultations by February 2023 and then to invite public comment prior to final publication of sector targets during Q2 of 2023. The use of demographic numbers, in isolation as the formula could constitute a simplistic and serious flaw.

What risk exists that sector targets will be seen as quotas and open to legal challenge?

The difference between quotas and targets is explained in Diagram 2 below.

Targets v Quotas

Feature	Targets	Quotas
Outcomes	Aspirational	Mandatory
Process	Flexible – attempt to achieve goals where reasonably practicable	Rigid – must be obtained at all costs
Non-adherence	Excusable for justifiable reasons*	Automatic penalties - no exceptions

Diagram 2

* See heading below for details

It is important to reflect the characteristics of targets in practice and to ensure that a target is one of the criteria for selection alongside other justifiable job requirements.

It will be important that inspectors adhere to the distinction between targets and quotas when assessing any employer for compliance and, further, that they take full account of the actual job requirements and related business imperatives.

New 5-year EE Plans and Setting Organisational Targets

Designated employers are required to implement affirmative action measures in terms of §15 and to prepare and implement an employment equity plan (§20) considering the possible assessment factors under §42.

Employers are to **craft new 5-year EE plans in 2023** in line with the applicable sector targets through to 2028. Such plans are to contain the stepping stones in each of the years to reach the target destination in 2028.

As indicated earlier in this article, these stepping stones are to be set in the actual reality of vacancies and pools of suitably qualified persons. The release of sector targets is eagerly awaited as only then will be apparent if the set targets can be reached by 2028. Targets that can realistically be reached will be supported by employers; setting them up for failure through unachievable targets could have the opposite effect.

In terms of the proposed amendments to §16 **the primary consulting party is to be a representative union** rather than a representative committee. This is an extraordinary arrangement considering the low union density in the private sector especially in the top 3 levels! It does not make sense.

A representative union under the EEA means sufficiently representative of the employees employed by an employer in a workplace. Two or more unions may join together to obtain this level of representation. Recognition is typically afforded to unions according to representivity in a bargaining unit rather than the entire workforce. The consultation party must however reflect the interests of all employees across the different occupational levels.

The consultation agenda includes barriers. Considering that the focus of progress will be on the top 3 levels, is it incongruous to expect that all representative unions will have meaningful input towards identifying and resolving barriers for senior staff in organisations? Despite this amendment, employers will not be remiss to consult with representatives across all occupational levels.

Sector targets by their very nature presuppose that one size fits all. The reality is likely to be different. For example, not all organisations

will have 8 positions at top or senior level to accommodate all race groups and genders. There may also be few vacancy opportunities through which to build diversity.

Employment equity plans that fail to take into account these challenges will be a nonsense. The ultimate compliance test in these circumstances will be the steps taken by the employer to pipeline or attract appropriate diversity. This point is further discussed under the heading of justifiable reasons below.

Amendments relating to sector targets will be rolled out over the next **2 years** as follows:

- the new **definition of designated employers** will apply if the amendments are **promulgated before end of September 2022**;
- small employers will no longer be required to submit EE reports ie, for the period 2021/22;
- large employers will submit EE reports for 2021/2022 based on existing plans;
- The Department aims to promulgate the sector targets in Q2 of 2023;
- large employers will then have to create new 5-year EE plans based on applicable sector targets. The aim is to have a standard approach across all sectors to the five-year programme. Therefore, the first year of the new plan will run from 1 October 2023;
- assuming this is the case then the 2022/2023 annual reports by designated employers will be based on pre-sector- based targets.

Readers are reminded of the caveat to the start of this article that these timelines are the best estimates based on the Department's stated intentions.

Small employers will still be subject to Chapter II of the EEA (the prohibition of unfair discrimination). These employers are encouraged to have internal plans to diversify workforces on the basis of race, gender and persons with disabilities so as to make their workplaces more inclusive of the demographics of the country. Non-designated employers will no longer be able to volunteer their participation in statutory affirmative action plans and to submit annual returns. Section 14 of the EEA is to be repealed.

Justifiable Reasons

The aim of EEA (that is reinforced through the amendments) is to secure equitable representation of **suitably qualified persons** from

designated groups at all occupational levels in the workforce. See §§20(3/4/5) for details.

Provisions linking EE transformation and state procurement has historically existed in the EEA but were not previously activated in the absence of quality data analysis of transformation related progress made in the labour market. This data is now available via EE annual reports over the past 2 decades.

Employers will apply online for an EE compliance certificate. This will be an automated process based on applicable criteria mentioned in Diagram 1. This is a self-verification exercise that is open to later assessment by the Department.

A compliance certificate can be obtained even though an employer has failed to comply with annual EE targets towards 5-year sector EE targets. The employer must show **justifiable reasons** or grounds for non-compliance. Examples listed in the **EE Regulations of 2018** are:

- insufficient recruitment opportunities
- insufficient promotion opportunities
- insufficient target individuals from the designated groups with the relevant qualifications, skills and experience
- CCMA/order
- transfer of business
- merger and acquisitions
- impact of business economic circumstances such as Covid pandemic on business. See item 7.

Employers who rely on justifiable reasons can be expected to disclose these reasons in detail and that inspectors will interrogate the same as well as the recruitment and selection criteria and processes adopted. Record-keeping will be hugely valuable in this regard.

Processes adopted will go beyond a somewhat simple comparator of qualifications, skills and experience listed above. The following may also be relevant:

- equal employment opportunities illustrated in internal affirmative action measures;
- measures taken to identify and eliminate employment barriers;
- extent to which reasonable accommodation was considered and applied;
- retention strategies including training; and
- reasonable steps taken in support of the above – see §§20 and 42).

Note also that an employer may not unfairly discriminate against persons solely on the grounds of that person's lack of experience (§20(5). It is better to describe experience in terms of proven competencies/record rather than a measure of time.

The cornerstones of job performance lie in 3 distinct areas namely, organisational fit (attitude, ethics, etc), skills match (experience, abilities and certification, etc) and job fit (cognitive abilities, personality structure and interests).

Fit in relation to these 3 components may involve assessments, screening and references. Skills match extends beyond education and qualification and includes work history and demonstration of skills.

The selection process is not just about filling a vacancy but enhancing the productivity and profitability of the business; specific business imperatives are important factors when selecting candidates for vacancies. Accordingly, this elaboration on job match highlights the importance of having detailed, effective and fair selection processes.

Standardisation of the interview process and the training/capacity of the interviewers will be important to show objectivity and absence of bias.

The objective is to find the best fit between job applicants and the selection criteria (including numerical targets) that can stand up to the scrutiny of any assessment and, if applicable, validate justifiable reasons used in support of a compliance certificate.

The formula/factors adopted by an individual employer regarding recruitment and selection will respond to specific circumstances and requirements. The examples above are therefore illustrative and will need to be tailored to suit specific circumstances.

Conclusion

Diversity has both social and economic objectives which, if achieved, will help to grow the economy and create many new jobs. These objectives come with vibrant and expanding organisations that can grow their associated value chains.

Job growth typically occurs among small employers; the easing of some EEA regulations for these employers is welcomed. The regulatory burden of labour legislation on small employers adds to the cost of doing business and is a disincentive to job creation.

There is a caveat here, will the obligations of designated employers influence small employers to remain under the ceiling of 49 employees? This is not to say that these employers do not see the value of diversity

but rather that a very regimented formula to advance the concept is a barrier to growth of the business and may run contrary to the idea of an agile workforce.

Stretch targets are as vital as fair and objective assessments of compliance. DOEL has a major role to ensure that inspectors fully appreciate the distinction between targets and quotas.

It is tough enough in times of so much local and international uncertainty to propel organisations forward without having disputes over compliance experiences that are narrow in focus and attempt to second-guess genuine job requirements and appointments.

Disputes and litigation over EE plans and the implementation thereof are mostly distant memories. May this experience long last.

Organisations will be well served to ensure that recruitment and selection processes are best in class. This will not only support the aim of fair employment practices but also underpin compliance declarations in terms of §53.

Refusal to be Vaccinated – How fair to Retrench?

Introduction

The employer adopted a mandatory C-19 vaccination policy based on operational requirements that was informed by a risk assessment. Due process was followed in finalising and implementing the policy. The subsequent retrenchment of an employee who declined to be vaccinated was challenged on substantive grounds.

The arbitrator ruled as follows:

> "On the facts, I am satisfied that the employer has made out a case for the retrenchment process that it embarked upon. The rationale for the decision to impose mandatory vaccination policy is clear. The employer supplies medical products to a number of medical disciplines and it engages with hospitals, medical and related practitioners. To safeguard its own employees and ensure that the operations of the employer are not severely affected by absences (and even deaths) as a result of staff contracting the Covid-19 virus and that those entities and individuals that had contact with the staff members of the employer are adequately protected, it embarked on a risk assessment of its position and emanating from that it became apparent that a mandatory vaccination policy had to be imposed. The necessity to vaccinate, in my view, speaks for itself."
>
> ". . . I am satisfied that the employer has shown that the imposition of a mandatory vaccination policy is a justifiable operational requirement".

This requirement sufficed as a valid business rationale to retrench. Procedural fairness was not an issue.

The employee was further not entitled to severance pay based on §41(4) of the BCEA.

The case behind this article is **C Bessick and Baroque Medical (Pty) Ltd** [2022] unreported, case number WECT13083-21 of 9 May 2022 (CCMA). Further commentary on the case follows.

Legislative Guide

Recent arbitration cases on the topic of mandatory vaccinations have resulted in the development of detailed requirements for implementing a mandatory vaccination policy. These are:

- conduct a risk assessment of the workplace;
- develop (or amend) a plan . . . taking into account employees' constitutional right to bodily integrity and freedom of religion, belief and opinion;
- implement protective measures in the workplace;
- identify measures regarding vaccination of employees;
- consult with the union/health and safety committee/employees on the plan;
- notify all employees of the plan and the manner in which it intends to implement it;
- educate employees on the dangers of Covid-19 and measures to prevent spread, as well as vaccinations available, their benefits and possible side effects;
- give employees paid time off to be vaccinated;
- inform employees that they have the right to refuse on medical or constitutional grounds;
- if an employee refuses, ask for the reasons and counsel the employee;
- if the refusal is based on medical grounds, refer to a medical practitioner; and
- if necessary take steps to reasonably accommodate the employee as far as is reasonably practicable.

In the context of this article, the requirement to ask an employee, who declines to be vaccinated, for the reasons therefor is emphasised. These reasons are to be substantiated; bald statements are insufficient. Seek out objective grounds rather than unsubstantiated opinions or views.

Application

Attention now turns to further facts in the **Baroque Medical** matter.

The business case behind the decision to adopt a mandatory vaccination policy is summarised in the introduction section to this article. The employer consulted extensively with employees on a collective and individual basis on the design of the policy, the implications of non-vaccinating (retrenchment or other) and in response to concerns that a few individual employees raised about the policy.

The employee *in casu* put on record that she was not willing to be vaccinated because of medical, personal and religious reasons. In addition, she relied on the right to bodily integrity in terms of §12(2) of the Constitution.

The employee was asked but failed to substantiate the **specific medical condition or religious requirement** that prevented her from obtaining the vaccination and to **articulate the specifics of the belief** on which she relied.

The following is an example of her responses. She claimed that she had a blood disorder and that her medical practitioner suggested that she should not take the vaccination "at this stage". Notably this practitioner did not reject the vaccine. The nature of the blood disorder was not disclosed; in any event the advice of the medical practitioner was hearsay evidence. The employee feared that the vaccination may trigger "something" but could not challenge under cross-examination that the vaccine might not trigger anything! She did not give medical evidence of any possible adverse effects of the vaccine. And so on.

Conspiracy theories and the subjective views of others do not equate to a constitutional belief in terms of §15.

It is useful during such dialogue to highlight **duties** of employees, on a rational and scientific basis, to protect him or herself, colleagues, patients and clients against infection. Needs of clients are also to be considered and account taken of their requirements such as anyone entering their premises had to be vaccinated. The employer has the right to economic activity and a duty to provide a reasonably safe work environment.

The aim of these exchanges is to build understanding of the needs of both the employer and employee. The imperatives of one may prevail over the other. For every right there is a corresponding obligation and no right is absolute.

Provide for the possibility of reasonable accommodation and/or alternatives that are reasonably practicable to cater for employees who do not vaccinate. These topics are also agenda items in consultations for the possible retrenchment of non-vaccinated employees.

In the **Baroque Medical** case these topics were discussed (such as remote working) and declined by the employer because of the operational need for the employee to be available in person and the data risks inherent with remote working.

The employee was aware of the requirement to be vaccinated but elected not to comply therewith. The choice was hers and her employer

respected her election. She was not able to continue working for operational reasons. Accordingly, the retrenchment of the employee was substantively fair. There was no dispute over the procedure followed.

The final issue in dispute was whether the employee was entitled to severance pay. Section 41(4) allows for the forfeiture of severance pay for retrenchment where the **employee unreasonably** refuses an offer of alternative employment. Alternative employment can include a **different condition** which in this case was the vaccination requirement.

The employee had the election to vaccinate and retain her employment. On the facts, her refusal to vaccinate had no merit and her refusal was unreasonable. The arbitrator held that would be grossly unfair to expect the employer to pay any severance pay in the circumstances.

Recommendation

The 3 key learning points from this case are (a) mandatory vaccinations can be a valid operational requirement for the purposes of possible retrenchment, (b) the requirement for mandatory vaccinations can constitute a new condition of employment and as such amount to alternative employment in terms of §41(4) of the BCEA and (c) the caution and patience required to understand and possibly address concerns of employees about vaccinations.

This and similar cases reported in recent months show the single-mindedness of employees towards their rights not to be vaccinated and this without reference to the rights of other employees and the employer. Subject to the specific circumstances, the rights of others can trump those of the employees.

Employees who hesitate to comply with the mandatory vaccination policy are obliged to motivate their position on constitutional grounds (rather than a bald reliance thereon) and in some cases to provide evidence. Feeling fearful is real but the reasons therefor may be misplaced. The first response here of the employer is to listen, build understanding and offer expert advice (possibly through third parties). Avoid a spontaneous reaction that the fears are unfounded.

Endeavour to have the employee appreciate the rights of others and the need for these to be balanced with those of the employee. Check for common understanding especially of the consequences should the employee not be vaccinated.

Give due consideration to reasonable accommodation and/ or alternatives to being vaccinated. Where these options are not appropriate, put the employee on terms to comply and consider alternatives to dismissal such as unpaid exclusion from the premises. See Beaumont's Express Vol 24, March at page 56, April on pages 85 and 91 and May at 107 for various examples.

Sexual Harassment of a Customer by an Employee

Introduction

The various Codes of Good Practice dealing with sexual harassment apply not only to employees but also by employees on clients, suppliers, contractors and others dealing with a business whether in the public or private sector.

There were 2 incidents of sexual harassment in the public service by a public sector employee (the "official") on a member of the public (the "complainant"). The official had an obligation to treat the complainant with dignity and respect and to observe a professional client relationship at all times. The failure to do so irretrievably broke the trust relationship with the complainant and exposed the employer to reputational risk.

These acts of sexual harassment amounted to an abuse of a public position of authority and constituted serious misconduct. These principles apply equally in commercial settings in the private sector.

In workplaces, complainants of sexual harassment are called upon to report such incidents **immediately** to the employer – see §60 of the EEA. Complainants/members of the public can be excused on practical and emotional grounds should they delay in reporting such incidents. These complainants will understandably want to extricate themselves from the scene of harassment (which they may experience as hostile,

intimidating and offensive) and may be at a loss to whom to complain. The complainant may not have ready access to the support or advice that employees may have to obtain the attention of those in authority.

A cardinal error towards a complaint about sexual harassment is initially or upfront to second guess the veracity of the complaint. Gather and assess, in a balanced way, the full facts before making decisions. Second guessing can easily lead to poor judgment, potential bias and extenuate the harm to the complainant.

This article expands on this introduction with reference to constitutional principles, covers the all-too-common experience in sexual harassment cases of single witnesses and some of the factors to be considered in determining the appropriate sanction. Mention is also made of the extraordinary (and wrong) approach by the Labour Court regarding the evaluation of evidence in the case.

Legislative Guide

The Constitution equips us with the tools needed to protect the rights that are violated when sexual harassment occurs. **Dignity, integrity and personal privacy are core values** in the Constitution and are to be upheld in the provision of public services. Realising these goals calls for a fundamental change in **power relations** that exist in society generally and specifically within many workplaces. The following formula seeks to express this dynamic.

> Human Dignity + Equality (*f*) Re-imagining
> Power Relations = Substantive Equality

It is often a challenge in harassment cases to obtain clear evidence as the incident may have occurred in a secluded or private situation or be exhibited in subtle or less obvious ways. *In casu* the official was required to take the complainant's fingerprints – did he in the process caress her hand or simply handle it deliberately so as to capture the imprint?

The notion of **single witnesses** arises where the only evidence is provided by the complainant and the alleged perpetrator. The evidence must be analysed and assessed on the balance of probabilities. The credibility and reliability of the witnesses can be tested for discrepancies and inconsistencies as well as admissions and most importantly how the evidence of the respective witnesses was tested under **cross-examination**.

The value and process of cross-examination is captured in the following extract from a court decision:

> "The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct."

Explained slightly differently, both the complainant and the alleged perpetrator must put their respective opposing evidence to each other during cross-examination. Where this is not done it can be assumed that the evidence of the preceding witness is admitted. It is not sufficient for one of the two witnesses simply to give an opposite version of events during evidence-in-chief.

The **sanction** in the context of **sexual harassment** serves an **important purpose** in that it sends out an **unequivocal message** that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the **harshest penalty**. The sentiment frequently expressed in recent judgments is that sexual harassment must be rooted out of the workplace wherever it occurs.

Application

Material for this article comes from the case of **Ekurhuleni Metropolitan Municipality v SALGU and others** [2022] 4 BLLR 324 (LAC). The facts of the case are straightforward. The complainant applied for a learner's driving licence. On 2 visits to the public offices, she was attended to by the same official who sexually harassed her, first verbally (lewd comments) and then on the second visit both verbally and physically (repeat of the lewd remarks and the "fingerprint" caress). The official was dismissed but the sanction was reduced to a final warning at arbitration. On review, court found him not guilty for lack of evidence and reinstated him with a favourable award of costs. All these outcomes were reversed on appeal. The original sanction of dismissal was upheld, and costs were awarded against the official.

The challenge at all stages of the dispute was the **proper evaluation** of the evidence of **single witnesses**. The official admitted making the

remarks but denied any wrongdoing. He showed no remorse and failed to apologise (how could he if he did no wrong!). He also did not put his version to the complainant in cross-examination. The Labour Appeal Court questioned his credibility as a witness and the reliability of his account of events.

The arbitrator exceeded his remit by replacing the sanction rather than evaluating the fairness of the employer's decision.

The decision of the Labour Court was extraordinary and is summarised below to illustrate how incorrect this was. The focus was on what the complainant should have done! The complainant's evidence was rejected – it did not make sense to the judge who found that it barely constituted evidence establishing guilt based on the following:

- failure to report the first incident or to disclose it to her family or friends;
- if she was so shocked as she claimed she would not easily let it slide and do nothing about it;
- she failed to accurately account for what was said to her;
- she allowed herself to be served by the same official on the second visit and have fingerprints taken by him. It's improbable that she would have allowed this had he behaved in an inappropriate manner on the first visit;
- her conclusion that the act of rubbing her hand was of a sexual nature was subjective despite reference to the objective facts; and
- she failed to pull her hand away.

These findings ignored the subsequent steps taken by the complainant to report the matter, her reasons for failure to do so earlier (shock and her need urgently to leave the premises), fact that she was entitled to access public services without her rights being violated, there was no obligation on her to seek out a different official to serve her in order to safeguard her rights and there are no reasons why she would falsely accuse a person not known to her.

Sexual harassment committed by an official employed in the public sector, in the course of the provision of public services to members of the public, constitutes serious misconduct in so far as it amounts to an abuse of public position of authority. Repeated offences directed at the same member of the public makes it all the more serious. The abuse of power on 2 occasions violated the rights of the complainant. The absence of accountability, remorse and apology and the psychological harm done to the complainant were aggravating

factors that overshadowed length of service and a clean disciplinary record on the part of the official.

Both the arbitrator and the Labour Court failed to make findings of credibility, to balance all the factors instead of affording undue weight to some to the exclusion of others, to acknowledge the severity of the misconduct of the official and the harm inflicted on complainant.

Recommendation

The primary duty of the official was to render a professional service to a member of the public in a way that honoured her right to dignity, integrity and personal privacy. Instead, the official, an older man, sexually harassed a young professional woman in an exercise of power and authority to induce submission or obtain some control.

This is a blatant example of the abuse of power which is evident in all forms of harassment. This resulted in serious harm to the complainant and betrayed her expectation of trust in delivery of a public service.

The exhibition of abuse of power is an aggravating factor and a major determinant of an appropriate sanction.

The case reminds us to adopt a balanced and holistic approach to the evaluation of evidence especially where there are single witnesses. The task here is supported where there is proper attention to the role and exercise of cross examination.

Sexual harassment by an employee on a customer in the private sector can carry significant reputational risk for the employer.

It is extraordinary that the arbitrator and the Labour Court got it so wrong.

Can Selection Criteria for Retrenchment include Transformation Targets

Introduction

Employment Equity Plans ("EEP") cover a wide range of human capital interventions and it would not be surprising to find that aspects of these plans enter into §189 consultations.

This happened in **Solidarity obo Members and Barloworld Equipment South Africa and others** [2022] unreported, case number CCT102/21 – 6 May 2022 (CC). The employer wanted selection to be done in line with the employment equity plan ("EEP") as a component part of other selection criteria. Solidarity (the "union") objected to this addition, and instead proposed LIFO, skills and qualifications. The union excluded transformation in this mix and stated that this position was non-negotiable. The parties deadlocked on the point.

Members of the union were selected for retrenchment using a range of criteria including transformation and were subsequently dismissed. The union alleged that the company had failed to follow a fair procedure and approached the Labour Court per §189A(13) for relief. It sought the reinstatement of the retrenchees and an order directing the employer to engage further in consultations on selection criteria but excluding transformation.

The Labour Court held that the dispute was about **procedural unfairness** rather than failing to follow a **fair procedure**, fell outside of §189A(13), dismissed this application, held that it was an abuse of court process and awarded costs in favour of the employer. The matter recently came before the Constitutional Court which ruled:

- the agenda items for consultation in terms of §§189/189A include selection criteria;
- the employer may propose transformation as one of the elements of selection criteria;
- the employer is required to enter into meaningful joint consensus-seeking consultations regarding selection criteria;

- due process must be followed in this consultation exercise, but this does not require the parties to agree;
- if an employer does not comply with a fair procedure, the consultation party may approach the Labour Court for an order compelling the employer to comply with a fair procedure and/or other relief in terms of §189A(13);
- a fair procedure in this regard is distinct from procedural fairness;
- relief under §189A(13) is directed at the employer to comply with a fair procedure **simultaneously** with the overall retrenchment process; and
- the jurisdiction of the Labour Court under §189A(18) is restricted to the substantive fairness of retrenchments. The court is precluded from adjudicating on procedural fairness of a large-scale retrenchment.

A §189A(13) application can be brought within 30 days after actual dismissal and relief can include reinstatement whilst consultations continued. The application was made within this time limit. The LC erred in finding that the application was an abuse of the court process and the cost award was reversed.

The issues raised in this introduction are further explained below starting with a brief discussion on the architecture of §189A, the meaning of proper consultation, the aim of §189A(13) and the rationale for limiting the court's jurisdiction on disputed retrenchment to substantive issues.

Legislative Guide

The proposed selection criteria to be used for retrenchment are part of the compulsory details to be included in the initial notice of pending retrenchment and will form part of the subsequent consultations.

Selection criteria to be used will be as agreed, failing which criteria that are fair and objective. See §189(7).

It is not intended here to list all the features of meaningful joint consensus-seeking consultations save to highlight the importance of engaging in good faith, building understanding through information disclosure, having problem-solving dialogue, and keeping an open mind.

The essence of these consultations is about quality rather than quantity or duration but does not extend to an obligation to conclude an agreement.

The provisions in the LRA provide for procedures and processes that must then be complied with before any retrenchments can be effected. To buttress these provisions, §189A(13) contains a convenient and

expedient mechanism, including an interdict or order, to ensure compliance with a fair procedure.

The reference to a fair procedure covers all of the provisions in §§189/189A but does not extend to interrogating procedural unfairness in the traditional sense. The relief available under subsection 13 is aimed to ensure that the stepping stones to procedural fairness are met and timeously before retrenchments are finalised.

The consequence of this special remedy is that the Labour Court may not adjudicate a dispute about the procedural fairness of a large-scale retrenchment in any dispute referred to it in terms of §191(5).

One can be forgiven if this is confusing. A fair procedure and procedural unfairness are interrelated but distinct concepts. The use of §189A(13) is restricted to disputes over non-compliance with a fair procedure.

Application

The crux of the dispute was the employer's insistence on including transformation as one of the ingredients in the selection criteria and the union's rejection thereof. These positions by the parties were maintained throughout the consultation process.

The employer's position here was clear – transformation is a component of the company's EEP and that this plan would have to be complied with in the context of retrenchments. The union saw this as unfair discrimination on the grounds of race.

The employer's aim in tabling the matter of transformation was to seek consensus. The union did not however engage meaningfully about this aspect and avoided discussion how this might be adapted or applied in practice. The transformation proposal was not withdrawn by the employer and the union remained steadfast that its stance that it was non-negotiable. The parties had clearly deadlocked.

The transformation topic matter came to a head when the employer retrenched members of the union using a selection criteria matrix with weighted scores for the various criteria including transformation.

At this point the facts become somewhat unclear. This matrix appeared in writing but there is no record that it was considered during consultations.

The union in a §189A(13) application argued that inclusion of transformation in the selection criteria was discriminatory and wanted the consultation process to be resumed on the basis that transformation was excluded altogether as a selection criterion.

Curiously, the union didn't argue that failure to present the selection criteria matrix deprived it of the opportunity to considering this aspect further. This was unsurprising given its stance throughout the consultations that this aspect was non-negotiable.

The essence of the dispute at this stage was about the substantive fairness of the retrenchments of its members and here the union was unsuited by the limitations of §189A(13) which separates disputes about procedural fairness from disputes over substantive fairness. The proper avenue to dispute the latter is via strike action or a referral under §191(11) read with §189A(18).

The Labour Court was correct to refuse the union's application to order the employer to remove transformation from the selection criteria and resume consultations. The latter had run its course with CCMA facilitation and as a proper opportunity had existed to consult on the various issues, including transformation.

As mentioned above, the union did not raise the circumstances surrounding the late arrival of the selection matrix as the real procedural defect. The Court may well have reached a different conclusion had this been the claim.

Conclusion

The agenda items for consultations during a retrenchment are not restricted but must include the compulsory items listed in §189(3). Both consultation parties are free to add other items to the agenda. In so doing the aim of the initiating party is to reach consensus on the item.

The employer may include and implement an additional agenda item in the final retrenchment exercise once the consultation process has been complied with and exhausted.

In retrospect it would have been better for the union to have engaged on the specific details from the EEP that the employer sought to include in the selection criteria rather than to reject the proposal entirely. What adaptations of the plan are required to cater for a retrenchment as the plan was conceived for on-going operations? What can be done to ensure that the implementation of transformation in the selection criteria does not amount to a barrier? What if surviving a young graduate of colour will meaningfully contribute to a BBBEE score but result in the retrenchment of an older white person? What can be done to transition the older person in addition to the usual severance arrangements? And so on.

What impact will sector targets have on the way in which retrenchments are handled? A justifiable reason for not complying with sector targets is reorganisation/corporate action. Even so, this does not mean that transformation will not be raised as part of the selection process.

There is by the way an outstanding dispute by the union in the Labour Court concerning the substantive fairness of its members who were retrenched. It can be anticipated that the transformation details and weightings will be interrogated in this forum. The story is yet to end.

Preview

The following judgments appear in the June 2022 editions of the *Butterworths Labour Law Reports* and *Butterworths Arbitration Law Reports*. Keeping up to date with labour developments is important; therefore, a selection of these judgments will be discussed in forthcoming editions of *Beaumont's Express* as they bear relevance to the application of labour law in industrial relations.

FAIR EMPLOYMENT PRACTICE

***Austin-Day v Absa Bank Ltd and others* [2022] 6 BLLR 514 (LAC)**

Dismissal – Misconduct – Bank manager dismissed for depositing her own money in client's accounts, but no dishonesty proved – Dismissal unfair.

***Dreyden / Duncan Korabie Attorneys* [2022] 6 BALR 565 (CCMA)**

Dismissal – Procedural fairness – Employee informed by WhatsApp that he was dismissed for refusing to be vaccinated against Covid-19 – Dismissal procedurally unfair.

Dismissal – Substantive fairness – Incapacity – Employee dismissed for refusing to be vaccinated against Covid-19 without good reason – Dismissal fair.

***Gerber / Xone Control Room Management (Pty) Ltd* [2022] 6 BALR 584 (CCMA)**

Dismissal – Substantive fairness – Misconduct – Manager posting message on WhatsApp group encouraging employees not to be vaccinated against Covid-19 – Dismissal fair.

***MacKenzie / A.S.P Rope Access* [2022] 6 BALR 592 (CCMA)**

Dismissal – Substantive fairness – Misconduct – Breach of Covid-19 policy – Employee reporting for duty while feeling ill despite instruction to go home – Dismissal fair.

***Maphethle / Bombela Operations Company and another* [2022] 6 BALR 597 (CCMA)**

Unfair labour practice – Promotion – Employee relying only on claim that he was best candidate for promotion and failing to prove that employer had acted unfairly or irrationally by not promoting him – Unfair labour practice not proved.

Mkhwanazi v MEC for the Department of Education, KwaZulu-Natal **[2022] 6 BLLR 558 (LC)**

Dismissal – Proof of – Deemed dismissal – Teacher's services terminated after being instructed to leave school and to report to district office, which she had done – Requirements for deemed dismissal not satisfied – Teacher reinstated.

National Union of Mineworkers obo Mpunga / Harmony Gold Mining Company Ltd (Joel Mine) **[2022] 6 BALR 607 (CCMA)**

Dismissal – Substantive fairness – Misconduct – Absence without leave – Employee dismissed after absence due to arrest on serious charge for which he was convicted – Dismissal fair.

National Union of Public Service & Allied Workers / D and B Industrial Engineering **[2022] 6 BALR 613 (CCMA)**

Employer – Identification of – Former employees of temporary employment service become for all purposes employees of client after three months and entitled to payslips and letters indicating that client is sole employer.

Temporary employment services – Obligations post-deeming – TES ceasing to be employer after three months and employees entitled to letter indicating that former client is sole employer even if TES continues to pay employees.

Ntsunguzi / M2 Bio Food and Beverage (Pty) Ltd **[2022] 6 BALR 629 (CCMA)**

Dismissal – Procedural fairness – Employee informed that another person had been appointed to position which he had accepted – Dismissal procedurally unfair.

Dismissal – Proof of – Termination before commencement of service – Employer withdrawing from contract after employee accepted offer of post – Dismissal established.

Reeflords Property Development (Pty) Ltd v De Almeida **[2022] 6 BLLR 530 (LAC)**

Dismissal – Operational requirements – Employee retrenched after she accepted offer of alternative position with two reasonable conditions and employer failing to implement conditions – Dismissal unfair.

***South African Chemical Workers' Union / Mylan Pharmaceuticals* [2022] 6 BALR 635 (CCMA)**

Discrimination – Arbitrary ground – Members of union claiming unfair discrimination on basis of having to pay higher contributions for membership of union's provident fund than employees who were members of employer's pension fund – Claim not amounting to arbitrary ground – Discrimination not proved.

***South African Commercial, Catering and Allied Workers Union / Massmart Holdings Ltd* [2022] 6 BALR 642 (CCMA)**

Unfair labour practice – Benefits – Employer unilaterally requiring protected strikers to self-isolate in terms of Covid-19 policy and to be vaccinated or take unpaid leave – Unfair labour practice proved.

***Southern African Clothing and Textile Workers' Union / BSN Medical (Pty) Ltd* [2022] 6 BALR 653 (CCMA)**

Remuneration – Deductions from – Employer requiring employees to stay at home for two days during looting and rioting and treating days as unpaid leave – Employer obliged to pay employees for days in question.

***Thambu / Koen and Associates Architecture (Pty) Ltd* [2022] 6 BALR 658 (CCMA)**

Dismissal – Substantive fairness – Inappropriate conduct – Employee dismissed for sharing information about employer's finances with colleagues and tracking movements of MD – Dismissal too harsh as disciplinary code provided for final warning for offence of "disorderly conduct".

***Western Cape Education Department v Baatjes and others* [2022] 6 BLLR 537 (LAC)**

Dismissal – Misconduct – Appropriate penalty – Teacher assaulting learner and his grandmother in fit of anger and showing no remorse – Dismissal appropriate as evidence showed that teacher could not control anger.

Dismissal – Misconduct – Assault – Teacher assaulting learner and his grandmother in fit of anger and showing no remorse – Dismissal fair.

SETTLING DISPUTES

***Commercial Stevedoring Agricultural and Allied Workers' Union and others v Oak Valley Estates (Pty) Ltd and another* [2022] 6 BLLR 487 (CC)**

Evidence – Required for final interdict – Evidence must establish link between each person covered by interdict and unlawful conduct sought to be restrained.

Practice and procedure – Interdicts – Against strikers – Requirements – Final interdict against unlawful conduct during strike must link each individual striker to alleged misconduct – Employer failing to establish such link to mass of strikers, except two – Interdict unjustified.

Strikers – Interdicts against – Interdict against strikers must be based on evidence linking each individual striker to misconduct alleged by employer, even if by association – Employer failing to establish such link to mass of strikers – Interdict unjustified.

***Department of Correctional Services v Nxele and others* [2022] 6 BLLR 552 (LC)**

Practice and procedure – Urgent applications – Employer seeking order extending employee's precautionary suspension until conclusion of review of award which had declared suspension unfair labour practice – Order refused.

Unfair labour practices – Suspension – Employer held by arbitrator to have unfairly suspended employee and employer seeking order that suspension be extended until conclusion of review of award – Order refused.

***Ntsede / Kiewietsvlei Boerdery (Pty) Ltd* [2022] 6 BALR 619 (CCMA)**

Commission for Conciliation, Mediation and Arbitration – Arbitration proceedings – Representation – Representation by community organisation permissible in exceptional circumstances.

Dismissal – Substantive fairness – Misconduct – Employee returning to work while infected with Covid-19 – Dismissal fair.

***Real Time Investments 158 t/a Civil Works v Commission for Conciliation, Mediation and Arbitration and others* [2022] 6 BLLR 524 (LAC)**

Practice and procedure – Trial by ambush – Employee reinstated by Labour Court although he had not sought reinstatement in either arbitration proceedings or review – Order set aside and remitted to Labour Court for fresh hearing.

Remedies – Reinstatement – Employee reinstated by Labour Court although he had not sought reinstatement in either arbitration proceedings or review – Order amounting to trial by ambush and set aside.

***Solidarity obo Members and another v Ernest Lowe, a Division of Hudaco Trading (Pty) Ltd* [2022] 6 BLLR 566 (LC)**

Contract of employment – Employee claiming that employer's "no-entry" Covid-19 vaccination policy amounted to unilateral amendment of contract of employment – Claim not proved because nothing in contract precluding employer from adopting reasonable health and safety measures.

Health and safety – Vaccination policies – Employer giving employees who refused vaccination against Covid-19 choice between producing weekly negative tests at own expense and having vaccination – Policy not amounting to mandatory vaccination policy or breaching employment contract.

Practice and procedure – Exceptions – Employer excepting to employee's case as failing to sustain cause of action – Exception dismissed because employer had failed to file notice of objection as required by High Court rules.

Practice and procedure – Special pleas – Employer contending that employee's employment contract indemnified it from employee's claim of breach of contract – Clause providing that employer indemnified against claims arising from employment not constituting waiver of right to bring action for breach of contract.

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