

financial consequences for non-compliance with the Employment Equity Act

by itayi gwaunza

Section 50 of the Employment Equity Act 55 of 1998 (EEA) provides that the Labour Court may make any appropriate order including imposing a fine in accordance with Schedule 1 for a contravention of certain provisions of the EEA. Schedule 1 of the EEA sets out the maximum fines that may be imposed in terms of the EEA for the contravention of any provision in sections 16, 19, 20, 21, 22 and 23 of the EEA which are as follows:

Contravention	Maximum Fine
No previous contravention	R500 000.00
A previous contravention in respect of the same provision	R600 000.00
A previous contravention within the previous 12 months or 2 previous contraventions in respect of the same provision within 3 years	R700 000.00
3 previous contraventions in respect of the same provisions within 3 years	R800 000.00
4 previous contraventions in respect of the same provision within 3 years	R900 000.00

The maximum fines that may be imposed in terms of the EEA for the contravention of sections 16, 19, 20, 21, 22 and 23 of the EEA are material. The Department of Labour has on two recent occasions successfully requested the Labour Court to impose material fines on employers that had contravened certain provisions of the EEA. It is accordingly important for employers to know their duties in terms of the EEA and the consequences for contravening any of those duties.

Employer's obligations under the EEA

Sections 16, 19, 20, 21, 22 and 23 are in chapter three of the EEA which contains the affirmative action provisions. In terms of the EEA, every designated employer must, in order to achieve employment equity, implement affirmative action measures for people from *designated groups* in terms of the EEA. In this regard, the EEA provides in sections 16, 19, 20, 21, 22 and 23 that a *designated employer* is obliged to:

- Take reasonable steps to consult and attempt to reach consensus with employees and/or employee representatives on the conduct of the analysis (referred to below), the preparation and implementation of the employment equity plan (EE Plan) and the employment equity report (EE Report).
- Collect information and conduct an analysis of its employment policies, practices and procedures and the working environment in order to identify employment barriers which adversely affect people from designated groups.
- Prepare and implement an EE Plan.
- Report to the Director General of the Department of Labour on progress made in implementing its EE Plan.
- Publish a summary of its EE Report in its annual financial statements if the designated employer is a public company.
- Prepare another EE Plan before the end of its current EE Plan.

Enforcement by the Department of Labour

The EEA contains mechanisms that enable the Department of Labour to monitor and enforce compliance with the EEA. For example:

- A labour inspector from the

Department of Labour who has reasonable grounds to believe that an employer has failed to comply with its duties to consult with employees, or conduct an analysis, or prepare an EE Plan, or implement an EE Plan, or submit an EE Report to the Department of Labour etc may request and obtain a written undertaking from a designated employer to comply with any of its duties within a specified period.

- A labour inspector may issue a compliance order to a designated employer if that designated employer has refused to give the above-mentioned written undertaking when requested to do so or has failed to comply with the written undertaking.
- A designated employer may object to a compliance order issued by a labour inspector by making written representations to the Director General. The Director General may confirm, vary or cancel all or any part of the compliance order and specify the time period within which that employer must comply with any part of the compliance order that is confirmed or varied. A designated employer who receives a compliance order from the Director General must comply with the compliance order or appeal against it to the Labour Court. The Director General may apply to have the compliance order made an order of the court if the designated employer does not

a labour inspector had requested and obtained an undertaking from Win-Cool Enterprise that it would comply with certain provisions of the EEA within a period of time specified in the undertaking

comply with the compliance order or does not appeal against the compliance order.

- The Director General may conduct a review to determine whether an employer is complying with the EEA. Subsequent to the review, the Director General may approve a designated employer's EE Plan or make recommendations to an employer in writing stating steps which the employer must take in connection with its EE Plan or the implementation of that EE Plan or in relation to its compliance with any other provision of the EEA and the period within which those steps must be taken.
- If a designated employer fails to comply with the Director General's recommendations, the Director General may refer the employer's non-compliance to the Labour Court.

Recent case law

Two recent cases show the consequences that may be visited upon designated employers who contravene sections 16, 19, 20, 21, 22 or 23 of the EEA.

In the recent matter of *Director General, Department of Labour v Win-Cool Enterprise (Pty) Ltd [2007] 9 BLLR (LC)*, the Director General applied to have a compliance order that had been issued to Win-Cool Enterprise made an order of court and to have a fine of R500 000.00 imposed on Win-Cool Enterprise for contravening sections 16, 19, 20, 21, 22 and 23 of the EEA. A labour inspector had requested and obtained an undertaking from Win-Cool Enterprise that it would comply with certain provisions of the EEA within a period of time specified in the undertaking. After Win-Cool failed to comply, the labour inspector issued a compliance order to Win-Cool Enterprise directing it to comply with certain provisions of the EEA, including consultation with employees, the conduct of an analysis, the preparation of an EE Plan, the implementation of an EE Plan, the submission of an EE Report etc. Win-Cool did not object to the compliance order but it nevertheless failed to comply. It was only after the Director General launched an application in the Labour Court to have the compliance order made an order of court and to have a fine imposed on Win-Cool Enterprise for contravening the EEA that Win-Cool Enterprise submitted an EE Plan. This was long after the expiry of the compliance order. Win-Cool Enterprise also consulted with its employees only after it had submitted the EE Plan to the Department of Labour. Win-Cool Enterprise opposed the Director General's application to the Labour Court.

The Labour Court made several important pronouncements:

- Contraventions of statutes may give rise either to criminal or to civil enforcement proceedings. The distinction is vital because in criminal proceedings, such safeguards as proof of the offence beyond reasonable doubt, the right to silence, the presumption of innocence and protection against

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there are several important lessons to be learnt from these cases

self incrimination apply. None of these safeguards apply in civil proceedings in which the elements of a contravention must be proved on a balance of probabilities.

- The EEA does not create a criminal offence giving rise to criminal enforcement proceedings for contravening sections 16, 19, 20, 21, 22 and/or 23 of the EEA but creates a regulatory contravention giving rise to civil proceedings for which a penalty is payable.
- Accordingly, the Department of Labour bears the onus of proving non-compliance with sections 16, 19, 20, 21, 22 and/or 23 of the EEA and the amount of the penalty to be imposed on the civil standard of a balance of probabilities.
- In considering whether there has been non-compliance with sections 16, 19, 20, 21, 22 and 23 of the EEA the Labour Court noted that mechanical compliance with the process prescribed in the EEA by an employer is not genuine compliance with the letter and spirit of the EEA. Compliance is not an end in itself. The employer must systematically develop the workforce out of a life of disadvantage. Disadvantage of all kinds is targeted by the EEA. For example, the mere fact that an employer employs black people only – as Win-Cool Enterprise did – cannot, in itself, prove that it has redressed all forms of discrimination. Contrary to what Win-Cool Enterprise argued in the Labour Court, employing exclusively black people and mainly women in low skilled jobs at low rates of pay cannot, without

more, redress race, gender, sex or economic discrimination. Non-racialism is a façade if economic and other forms of exploitation exist. Equity is about creating jobs of quality that inspire the spiritual and material development of the workforce and, thereby, economic growth.

- Proving non-compliance with sections 16, 19, 20, 21, 22 and 23 of the EEA may be facilitated by the pre-litigation procedures referred to in the EEA: for example, obtaining undertakings and issuing compliance orders.
- The enforcement procedures referred to in the EEA, namely obtaining an undertaking and issuing a compliance order, are not pre-requisites for the Labour Court to issue a fine against the employer. They nevertheless facilitate proof that the employer was aware of its statutory obligations and had an opportunity to comply. The undertaking is tantamount to an admission of non-compliance with sections 16, 19, 20, 21, 22 and/or 23 of the EEA at least at the time the undertaking is given.
- The employer's failure to appeal against a compliance order is prima facie acceptance of the truth of its contents: i.e. non-compliance by the employer with sections 16, 19, 20, 21, 22 and 23 of the EEA.
- Despite bearing merely an evidential burden, an employer who has failed to comply with an undertaking and compliance order will be hard pressed to find a credible defence.
- Negligence and absence of intent have better prospects of succeeding as defences in the absence of an undertaking and compliance order as a plea in mitigation. A substantive defence to alleged non-compliance with

sections 16, 19, 20, 21, 22 and 23 of the EEA could relate to labour market conditions and whether they enable employers to comply with their EE Plans.

The Labour Court came to the conclusion that the Department of Labour had proved on a balance of probabilities that Win-Cool Enterprise had contravened sections 16, 19, 20 and 21 of the EEA: i.e. Win-Cool Enterprise had not (a) consulted with its employees and/or their representatives about the conduct of an analysis, the preparation and implementation of the EE Plan and the EE Report; (b) conducted the analysis; (c) prepared and implemented an EE Plan; and (d) reported to the Director General on progress made in implementing its EE Plan. The Labour Court held that Win-Cool Enterprise's defence that it intended to comply with the EEA but that the consultant it had instructed to ensure that it complied with the

the labour court, however, could not make the compliance order that had been issued by the labour inspector an order of court because the time period stipulated in the order for compliance had passed

EEA did not do so was not good. The Labour Court held that there is a limit to which employers can outsource their affirmative action responsibilities.

Employers are not relieved of any duty imposed by the EEA even when they assign managers to take responsibility for monitoring and implementing the EE Plan which they must do.

Having found that Win-Cool Enterprise contravened sections 16, 19, 20 and 21 of the EEA, the Labour Court held that, when considering the appropriate penalty, the following criteria must be considered:

- The extent of the contravention.
- The period for which the contravention endured.
- The reason for non-compliance;
- The maximum fine prescribed;
- The employer's willingness to comply;
- The loss suffered by the workforce as a result of the contravention and the profit derived from it.
- The employer's compliance or otherwise with other labour laws.
- The employer's investment in the development of its workforce.
- The possible effect of the penalty on employment.
- The area or industry in which the employer operates.
- The deterrent effect of the penalty.

The Labour Court imposed a penalty of R300 000.00 of which R200 000.00 was suspended on condition that Win-Cool Enterprise complied fully with sections 16, 19, 20 and 21 of the EEA by 1 October 2007. The Labour Court, however, could not make the compliance order that had been issued by the labour inspector an order of court because the time period stipulated in the order for compliance had passed.

In the earlier matter of *Director General, Department of Labour v Ginghua Garments (Pty) Ltd (2007) 28 ILJ 880 (LC)* the Labour Court was faced with

similar circumstances as in the Win-Cool Enterprise case. In this matter, Ginghua Garments had also failed to comply with an undertaking and subsequent compliance order and the Department of Labour sought to make the compliance order an order of court and for a fine of R500 000.00 to be imposed on Ginghua Garments. Ginghua Garments admitted that it had contravened sections 16, 19, 20, 21 and 23 of the EEA. After considering the matter the Labour Court imposed a penalty of R200 000.00 of which R100 000.00 was suspended for a period of 3 years on condition that Ginghua Garments does not contravene any of the provisions of sections 16, 19, 20 and 21 during the 3 year period.

Lessons for employers

There are several important lessons to be learnt from the above cases. For example:

- The maximum fines that may be imposed in terms of the EEA for the contravention of sections 16, 19, 20, 21, 22 and/or 23 of the EEA are material. It is accordingly important for designated employers to know their duties in terms of the EEA and the consequences for contravening any of the duties referred to in the EEA.
- Do not take undertakings requested and obtained by labour inspectors or compliance orders issued by labour inspectors or the Director General to comply with the EEA lightly. If anything, undertakings and compliance orders should prompt employers into quick action where there is non-compliance with the EEA.
- Avoid mechanical compliance with the process prescribed in the EEA. This is not genuine compliance with the letter and spirit of the EEA. Remember that compliance with the EEA is not an end in itself and you must systematically

develop the workforce out of a life of disadvantage.

- The mere fact that an employer employs black people only cannot, in itself, prove that it has redressed all forms of discrimination.
- It is an employer's duty to comply with the EEA. An employer cannot pass the blame for non-compliance with the EEA to its labour consultant. There is a limit to which employers can outsource their affirmative action responsibilities.
- Take your affirmative action responsibilities seriously and timeously.

Lastly, it is important to note the warning sounded by the Labour Court in the Win-Cool Enterprise judgment about the possible impact of not complying with the EEA. The Labour Court had the following to say in this regard:

"Affirmative action is politically sensitive. The adverse publicity that accompanies the mere complaint that an employer is not complying with the affirmative action provisions can tag the employer as racist, sexist, antidemocratic or counter-revolutionary. The court imposes only monetary sanctions. Non-monetary sanctions, such as adverse publicity in the form of 'name and shame' advertisements and disqualification from government contracts may also accompany contraventions. Employers who are issued with penalties are also exposed to social stigma, ostracism from the community and social, psychological and economic harm as an accused. They risk losing their liberty if they are cited for contempt of court for not complying with a compliance order and are as vulnerable to having their human dignity impaired as any accused. A sanction under the EEA can therefore be as odious as a conviction and a fine."

private arbitration clauses in the spotlight

by penny bosman

More and more employers are opting to include a private arbitration clause in their contracts of employment so that they can retain a greater measure of control over the resolution of employee disputes rather than relying on the statutory dispute resolution mechanisms contained in the Labour Relations Act 66 of 1995 (“the LRA”) which are often slow and inconsistent.

The recent case of *SACTWU obo Stinise v Dakbor Clothing (Pty) Ltd and others [2007] 7 BLLR 659 (LC)* has raised doubt about whether such private arbitration clauses are valid where there is a bargaining council with jurisdiction over the matter.

In *Stinise’s* case, the union referred a dispute on behalf of an employee to the relevant bargaining council. The employer raised various preliminary points including the fact that the bargaining council no longer had jurisdiction to determine the dispute because of a clause in the employee’s contract of employment which provided that disputes between the parties would be referred to private arbitration.

The union took the matter on review alleging that the private arbitration clause contained in the contract of employment was in conflict with the bargaining council’s main agreement and the provisions of the LRA.

The union’s argument was based on section 199 of the LRA which provides that a contract of employment may not permit an employee to be treated

the commissioner agreed with the employer’s view and ruled that the bargaining council did not have jurisdiction to determine the dispute which should have been referred by the union to private arbitration

in a manner, or to be granted any benefit, that is less favourable than that prescribed by a collective agreement or arbitration award. In addition, a contract of employment may not waive the application of any provision of a collective agreement or arbitration award.

The union argued that the private arbitration clause contained in the employee’s contract of employment deprived the employee of the right to the free dispute resolution procedure provided by the bargaining council in its main agreement and therefore that it was contrary to public policy.

On review, the Labour Court held that because the commissioner had failed to apply his mind to whether or not the private arbitration clause had the effect of permitting an employee to be treated in a manner less favourable than that prescribed in the main agreement and whether the parties were effectively trying to waive the provisions of the main agreement, the commissioner’s ruling was reviewable. The Labour Court consequently set the ruling aside and referred the matter back to the bargaining council for determination. However, the Labour

Court did not comment on whether the provisions of the private arbitration clause in question were in fact less favourable than those set out in the bargaining council agreement.

From the decision of the Labour Court in the *Stinise* case it is clear that while there is nothing to prevent an employer and employee from agreeing that disputes between them will be referred to private arbitration, employers must be careful not to fall foul of the provisions of section 199 if they are governed by a bargaining council main agreement. A private arbitration agreement entered into between an employer and an employee in these circumstances may not be enforceable where it allows an employee to be treated in a manner which is less favourable than that prescribed by an applicable collective agreement or if the private arbitration agreement amounts to a waiver of the provisions of a collective agreement.

If, for instance, an employee’s contract of employment provides that the employee will be required to pay half the costs of a private arbitration process when the employee would otherwise be entitled to a free dispute resolution process at the bargaining council, this may well constitute “less favourable” treatment and lead to a private arbitration clause being unenforceable.

Employers who are governed by bargaining councils will therefore have to be very careful if they want to put in place private arbitration agreements with their employees to make sure that these do not contain provisions that provide for less favourable treatment of employees or amount to a waiver of the provisions of the bargaining council main agreement. Employers who already have these sorts of agreements in place should review them carefully to make sure that they comply with the provisions of section 199 of the LRA.

private arbitration clauses could be invalid if they contain less favourable provisions

dismissal for a reason relating to pregnancy - employers should watch out!

by susan stelzner

In *De Beer v SA Export Connection CC t/a Global Paws* (unreported decision of the Labour Court dated 31 August 2006) the court had the following to say about dismissals for reasons related to pregnancy:

'A dismissal will not in my view escape being automatically unfair by the argument that the woman is being dismissed not because of her pregnancy, but because of her unavailability for work that results from her pregnancy. No more can the employer argue that the reason is economic, citing the extra expenses that it must incur to provide temporary cover for an absent employee.'

a dismissal is also unfair if the reason for dismissal is connected with the woman's exercise of her maternity leave rights

The protection contained in section 187(1)(e) of the LRA is also granted to an employee against dismissal for any reason related to her pregnancy. It cannot be argued, for example, that a dismissal escapes these provisions because the reason is not pregnancy but the absence from work that her pregnancy occasions. The dismissal is also unfair not only when pregnancy or any reason connected with the pregnancy is the reason for the dismissal, but also when the woman is dismissed for reasons connected with the exercise of her rights in respect of maternity leave.'

These were the facts that led to the decision. Ms De Beer was employed as a travel consultant. She fell pregnant and agreed to return to work a month after she had given birth. She subsequently gave birth to twins who suffered from colic. Two to three days before she was required to return to work, Ms De Beer requested that she be given a further one month off to stay with her twins at home. The

specific protection for women who have children

company was prepared to give her an extra two weeks, which she refused to accept. Her services were then terminated for alleged misconduct. She referred a dispute to the Labour Court and contended that her dismissal was automatically unfair in terms of s 187(1)(e) of the LRA.

The court explained the purpose of section 187(1)(e) as follows:

'Section 187(1)(e) of the LRA must be seen as part of social legislation passed for the specific protection of women and to put them on an equal footing with men. I have no doubt that it is often a considerable burden to an employer to have to make the necessary arrangements to keep a woman's job open for her while she is absent from work to have a baby, but this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the workplace. If an employer dismisses a woman because she is pregnant and is not prepared to make the arrangements to cover her temporary absence from work the dismissal would be automatically be unfair.'

As far as the meaning of the phrase 'any reason related to her pregnancy' as used in s 187(1)(e) was concerned, the court decided that it covered the facts of this case, where a mother had twins who suffered from colic which required her to stay at home with them for a longer period. The phrase 'any reason' not only covers pregnancy related health problems but should also include babies who are ill and need nurturing from their mothers. The court found that Ms De Beer in fact was punished for having fallen pregnant in that she was only given a month's maternity leave. Even though this had been agreed with her, the agreement was in conflict with the maternity leave provisions of the BCEA. Had Ms De Beer been allowed to use her full four months maternity leave, she would not have been dismissed and she could have spent time with her colic twins. Her dismissal was clearly a reason related to her pregnancy.

a price has to be paid to recognise the equal status of women in the workplace

The court found that Ms De Beer's treatment by the company was degrading and deeply offensive. It ordered the company to pay compensation equal to 20 months' salary, as well as her costs.

unemployment insurance

The Minister of Labour in concurrence with the Minister of Finance has approved an increase in the maximum earnings with effect from 1 October 2007. This means that contributions will from this date be payable in respect of employees earning up to:

R 149 736.00 per annum or

R 12 478.00 per month or

R 2 879.53 per week

Employees who earn more than the annual, monthly or weekly maximum are also liable to contribute to the Fund, but contributions payable are only calculated on R149 736.00 of their annual earnings, or on R12 478.00 of their monthly earnings, or on R2 879.53 of their weekly earnings.

when can a single retrenched employee go to the CCMA?

by susan stelzner

Clients will recall that the 2002 amendments to the LRA introduced section 191(12) which provides that the CCMA may arbitrate about a dismissal for operational requirements if the individual was dismissed following a consultation procedure in terms of section 189 of the LRA that applied to a single employee only.

In *Rand Water v Bracks NO* (unreported decision of the Labour Court of 18 June 2007) the court considered in the context of a review whether or not the CCMA had jurisdiction to arbitrate a dispute where the single employee retrenched was complaining about the procedural fairness of her

retrenchment. The court considered the wording of section 191(12) and said that the section only applies where an employee is complaining about substantive fairness. This is because the wording of the section, said the court, implies that the process must have been 'in terms of section 189' i.e. procedurally correct and fair. Therefore, where the complaint is about procedure even a single employee can't elect arbitration by the CCMA but must go to the Labour Court.

Our view is that this decision is wrong and subverts the intention of the legislation in introducing section 191(12) as a way for single retrenched

to make use of the simpler and often cheaper CCMA proceedings instead of having to go to the Labour Court. However, for the time being at least it is Labour Court authority on the point.

this decision subverts the intention of the legislature in our view but is Labour Court authority

STOP PRESS: We have just been advised that the CCMA has intervened to appeal this judgement.



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