AN ANALYSIS OF THE PROPOSED AMENDMENTS TO THE LABOUR RELATIONS ACT AND OTHER EMPLOYMENT LEGISLATION

"SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF *MAGISTER LEGUM* IN THE FACULTY OF LAW AT THE NELSON MANDELA METROPOLITAN UNIVERSITY"

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DECLARATION

I, *Antonio Moodaley (204008972)*, hereby declare that the *treatise* for Magister Legum (Masters in Labour Law) to be awarded is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University or for another qualification.

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Summary

South Africa's Labour Laws should undergo drastic changes in 2014 when new amendments take effect. The bills amend the Labour Relations Act 66 of 1995 (LRA), Basic Conditions of Employment Act 75 of 1997 (BCEA) and the Employment Equity Act 55 of 1998 (EEA).

These amendments originate from the increasing "casualisation" of work prevalent in the South African Labour market and aim to address the phenomenon of labour broking, the continuous renewal of fixed-term contracts and unfair discrimination regarding wages amongst others. The legislature effected additional amendments to these Acts to align them with new developments, to improve the functioning of the Commission for Conciliation, Mediation and Arbitration (CCMA) and to fulfil South Africa's obligation as a member of the International Labour Organisation (ILO).[1] In addition, the amendments attempt to clarify the wording of the Labour Relations Act (LRA) to elucidate numerous significant judicial interpretations of various provisions of the current Act as well as to close what some believe to be loopholes in current legislation.[2]

There are differing views on the possible effects the amendments could have on the country; some believe that it will damage business while others believe it will affect job creation.[3] According to Bosch, the amendments allow employers flexibility without depriving employees of rights properly due to them.[4]

The researcher emphasises topical issues such as the need for temporary employment services, entitlement to organisational rights and the abuse of fixed-term contracts and further discusses, to a lesser extent and focusing on discrimination, the Basic Conditions of Employment Act[5] (BCEA) and the Employment Equity Act[6] (EEA).

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[1] Anonymous "The South African Labour Guide: New amendments to the labour Relations Act and Basic Conditions of Employment Act" July 2012 http://www.labourguide.co.za/most-recent-publications/amendments-to-the-lra-and-bcea (accessed 2012-11-29).
[2] Grogan "The New Labour Bills*"* 2011 27 part 1 *Employment Law* 12.
[3] Anonymous " Labour laws set new course" http://www.SAnew.gov.za (2012-10-29)
[4] Bosch "The proposed 2012 amendments relating to non-standard employment: What will the new regime be?" 2013 34 *ILJ* 1631.
[5]The Basic Conditions of Employment Act 75 of 1997.
[6] The Employment Equity Act 55 of 1998.

Chapter 1 examines the Labour Relations Act, Chapter 2 the Basic Conditions of Employment Act, and Chapter 3 the Employment Equity Act. In Chapter 4, the researcher presents his conclusions.

Chapter 1: Labour Relations Act amendments

1 1 Sections 21 and 22: Organisational rights

Organisational rights form the cornerstone of a constructive collective bargaining system. Without these rights, trade unions could not meaningfully participate in the collective bargaining process. They provide methods by which the trade unions make their influence felt in the workplace.[1]

Currently, unions may seek to acquire five organisational rights depending on their representation in the workforce. The amendments introduce additional ways in which unions can be entitled to these rights.

Presently, for trade unions to acquire organisational rights, their representation within an organisation should be sufficient or they should represent the majority of the workers. The LRA does not specify what constitutes sufficient representation, but the general rule is that a sufficiently representative union has approximately 30% representation[2] in a workplace while a majority union has more than 50% representation[3].

Prior to the enactment of the amendments, trade unions that enjoy sufficient representation have 'entry level' organisational rights, which include access to the workplace (section 12 of the LRA), deduction of union fees or levies (section 13 of the LRA), and leave to engage in trade union activities (section 15 of the LRA). In addition, trade unions with majority representation exercise rights that entitle them to elect trade union officials (section 14 of the LRA) and to have employers disclose information (section 16 of the LRA).

[1] Basson *Essential Labour Law* (2005) 239.
[2] *SACCAWU v The Hub* (1998) 12 *BALR* 1590 (CCMA).
[3] Basson *Essential Labour Law* 241.

The current system has been criticized for infringing on the constitutional rights of minority unions with respect to organisational rights. The following extract provides a clear and brief explanation of the issues surrounding the system.[4]

> "The principle of majoritarianism remains one of the main pillars of the construct of our labour market. The stakeholders in the labour market have lived with this principle for many years. While it has served the system of our industrial relations very well, some have raised concerns of its unintended consequences including but [not] (not *sic*) limited to the possibility that it may infringe on the constitutional rights of other organisations and individuals' freedom of association. These concerns warrant a need for evaluation".

This system has caused a lack of major unionised workforces in numerous workplaces, as the unions present do not have majority representation. Although some of these unions may enjoy 'entry level' organisational rights, these rights do not include those conferred by sections 14 and 16 of the LRA. The right to elect trade union officials, or 'shop stewards', and the right to disclosure of information by the employers are crucial to ensuring that a trade union bargains effectively with employers. The right to have a shop steward elected is of particular importance to the trade union as its function is to assist members, monitor the employer's compliance with the LRA and collective agreements, and to report any alleged contravention of labour laws.[5] Without exercising these rights, unions cannot guarantee that employers comply with their obligations to their employees. Furthermore, without shop stewards, members do not have competent representation in hearings, consequently leading to possible unfair outcomes.

The right to disclosure of information, on the other hand, allows the trade union access to information pertinent to the collective bargaining process, such as financial statements and information regarding existing and new contracts with third parties.[6] This allows trade unions to bargain effectively with employers, and being deprived of this right leaves a trade union at an unfair disadvantage during the collective bargaining process, weakening its position. Therefore, confining these rights to majority trade unions only implies that trade

[4] Framework agreement for a Sustainable Mining Industry entered into by Organised Labour, Organised Business and Government*,* 03 July 2013, para 5.3.
[5] Section 14 of the Labour Relations Act 66 of 1995.
[6] Basson *Essential Labour Law* 245.

unions that are merely sufficiently representative may be unable to adequately participate in the collective bargaining processes.[7]

Furthermore, for a union to achieve any organisational rights, it must inform the employer of the rights it seeks to acquire. Within 30 days, the employer must meet with the union with the aim of concluding a collective agreement regarding those rights. If unsuccessful, the parties may refer the matter to the CCMA for resolution.[8] Minority unions are entitled to only limited organisational rights as mentioned above. However, with the aid of a Constitutional Court judgment[9], minority unions can obtain rights that were previously out of their reach.

In *National Union of Mineworkers v Bader Bop,*[10] the Labour Appeal Court had to decide whether a minority union could engage in strike action to obtain rights afforded to majority unions only. The majority held that such unions may not engage in strike action, but must instead refer disputes for arbitration in terms of the LRA. The Constitutional Court[11] disagreed with the finding in that the Labour Appeal Court did not fully consider the International Labour Organization (ILO) conventions on Freedom of Association and the Protection of the Right to Organize[12] and Collective Bargaining[13].

One may extract two rights from the interpretation of these conventions, namely the right to associate for purposes of collective bargaining and the right to strike.[14] Furthermore, the court held that interpreting the LRA to allow minority unions the right to strike over the issue of shop steward recognition corresponds to the principles of freedom of association entrenched in the ILO conventions. This interpretation also avoids a limitation of the right

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[7] Walasan, R "Amendments to the Labour Relations Act" 27 August 2012 http://www.masconsulting.co.za (accessed 2012-11-20).
[8] Section 21 of the Labour Relations Act 66 of 1995.
[9] *Numsa v Bader Bop (Pty) Ltd v National Union of Mineworkers of SA* (2003) 24 *ILJ* 305 (CC).
[10] *Numsa v Bader Bop (Pty) Ltd v National Union of Mineworkers of SA* (2002) 23 *ILJ* 104 (LAC).
[11] *Numsa v Bader Bop (Pty) Ltd v National Union of Mineworkers of SA* (2003) 305 (CC).
[12] Convention 87 of 1948.
[13] Convention 98 of 1949.
[14] Grogan *Collective Labour Law* (2010) 17.

to freedom of association as entrenched in the Constitution.[15] Therefore, the *Bader Bop* case created loopholes for unions without majority representation to gain recognition as bargaining powers. However, it also increased the risk of union proliferation and competition for union membership in the workplace.[16]

There was therefore a need to reinvigorate enterprise-level collective bargaining and engagement and to improve industrial democracy through the radical reform of organisational rights.[17] The legislature addressed this situation by amending section 21 of the LRA to allow the commissioner liberty in determining representation in the workplace and to consider not only the employer's own permanent, temporary and part-time employees but also employees of a temporary employment service (TES). Therefore, the amendments move away from majoritarianism towards a more holistic approach by broadening the scope of the Act to grant organisational rights to unions without majority representation. In addition, they effect the principles of freedom of association and provide protection for workers in atypical employment.

Furthermore, a commissioner must not only consider the employees of a certain employer but all the employees within that workplace. Section 21(8)(v)(b) effectively forces employers to afford unions these organisational rights irrespective of who the 'main employer' is, provided they meet the minimum requirements.

As mentioned above, the amendments provide for two additional opportunities for unions to obtain organisational rights, if referred to arbitration, as discussed below.

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[15] *NUMSA v Bader Bop* 2003 para 36.
[16] Docrat "Collective Bargaining: Section 21 Organisational Rights, Freedom of Association and Majoritarianism" Paper presented at the 2013 CCMA Commissioner Indaba.
[17] Brand,J "South Africa's Labour Relations Act needs radical reform" no date http://www.miningweekly.com/article/south-africas-labour-relations-act-needs-radical-reform-john-brand (accessed 2012-11-20).

Most representative trade unions

In terms of the amendments, a trade union (or two or more trade unions acting jointly) that does not represent the majority of employees but is sufficiently representative to have the rights referred to in sections 12, 13 and 15 of the LRA and is the 'most representative' trade union in the workplace may exercise the rights referred to in sections 14 and 16 of the Act. However, if there is a majority trade union that is already exercising these rights, the commissioner cannot exercise the discretion of granting minority unions these rights. Furthermore, these trade unions would have to retain their majority status in order to retain the organisational rights afforded to them in terms of sections 14 and 16.[18]

It may well be argued that the amendments do not go far enough in extending organisational rights to minority trade unions. For instance, in a workplace where a minority union wants to exercise the section 14 right but a majority union already exercises that right, the minority union will not be entitled to this right. The option that the union would have is to resort to industrial action. As the judgment in the *Bader Bop* case[19] states that nothing precludes such a union from embarking on a strike, industrial action would be logical because arbitration would not produce the desired outcome.

Significant interest groups

Majority trade unions, in terms of section 18 of the LRA, may enter into collective agreements with employers to set thresholds for representativeness in respect of entry-level rights. A threshold agreement effectively prevents any union that does not meet the threshold from gaining entry-level rights even if it represents a substantial number of workers in the workplace and, consequently, prevents competition. Therefore, a union which would have been a recognised union had it not been for the threshold agreement would not be entitled to attain those organisational rights.

[18] Walasan, R "Amendments to the Labour Relations Act" 27 August 2012 http://www.masconsulting.co.za (accessed 2012-11-20).
[19] *NUMSA v Bader Bop* 2003 para 36.

The amendments make it possible for minority unions who do not meet the requirements of the threshold agreements to enjoy entry-level organisational rights. There are only two requirements according to the amendments. Firstly, all parties to the collective agreement must have the opportunity to participate in the proceedings and the union must represent a significant interest group, such as pilots or rock drill operators.[20] These provisions (section 8C) are sensible, as they allow unions to organise in the more prevalent atypical employment environments.[21]

However, noble as this purpose is, it would be challenging to determine a significant interest group in a diverse workplace. For instance, in a university where various categories of employees, such as lecturers, IT technicians, and examination staff, perform work central to the operation of the university, it would be difficult for one to determine whether they form part of a significant interest group if all of them decide to form separate unions. The employer would have to deal with a proliferation of trade unions and an increase in administrative burdens, which the LRA seeks to reduce in section 21[22].
Although legislators intended that the right to establish threshold agreements should prevent situations where trade unions compete for organisational rights in a disruptive manner, this is likely to be the result.[23]

One of the primary objectives of the LRA is to promote orderly collective bargaining. Where there is a proliferation of trade unions, collective bargaining is seldom as effective as it should be. The purpose of the Act is not to have many weak unions that cannot bargain effectively. If left unchecked, this amendment may result in a proliferation of trade unions, which would negatively affect the collective bargaining process.

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[20] Docrat 2013 CCMA Commissioner Indaba.
[21] Lexis Nexis *Labour Relations Act, No 66 of 1995* 2013 19.
[22] Section 21 of Labour Relations Act 66 of 1995.
[23] Walasan, R "Amendments to the Labour Relations Act" 27 August 2012 http://www.masconsulting.co.za (accessed 2012-11-20).

Furthermore, if numerous trade unions are evenly matched but only one is entitled to shop stewards and access to information, it is likely to cause conflict between the unions. In addition, the employer would not only have to keep track of all the unions but would also have to attend to all their levy deductions, which could create an administrative burden.

Another serious concern is that the commissioner may exercise the power bestowed upon him or her through these amendments in situations where parties had concluded collective agreements prior to the commencement date of the amendments.[24]

This amendment therefore raises serious questions regarding the integrity of collective agreements.

Collective bargaining and collective agreements are among the pillars upon which the LRA, itself the result of a successful collective bargaining process, stands. This amendment weakens the integrity of the collective agreement and, in turn, the collective bargaining process. The commissioner should therefore exercise the discretion bestowed upon him or her with great caution.

Challenges of the concept "workplace"

In terms of amendments to section 22 of the LRA, arbitration awards become binding on employees of a TES, clients of a TES and the owner of the property to which the award applies.[25] This affects property owners who lease their properties to businesses; they have no option but to participate in arbitration proceedings to protect their rights and interests. Therefore, employers as well as lessors would have to deal with the effects of granting organisational rights to unions.[26]

To some degree, this addresses the problem regarding the granting of organisational rights in respect of employees of a TES. Previously, unions could not to obtain these rights in respect of TES employees because the LRA envisaged that a union could enforce those

[24] Lexis Nexis *Labour Relations Act, No 66 of 1995* 2013 19.
[25] Section 22 (5) of the Labour Relations Act 66 of 1995.
[26] Snyman "Comments by Labournet as to the Proposed Amendments to Labour Legislation on March 2012" 2012 *Labournet* 2.

rights against only the employer of the employees and not the client, as the client and not the TES controls the workplace.[27]

The amended section 21(8) of the LRA provides that commissioners must consider the composition of the workforce in the workplace, which would include the prevalence of TES employees and fixed-term contract employees. The purpose of this amendment is to encourage commissioners to grant organisational rights in circumstances where atypical employment abounds to boost the strength of a trade union in that particular workplace and thus offer some protection to vulnerable employees.[28] Furthermore, section 21(12) affords unions the opportunity to exercise organisational rights in the workplace of either the TES or the client.[29] This further assists in offsetting the inherent vulnerabilities of those types of employees.

These unions often have difficulties regarding representation in either workplace, as the client does not employ the workers and they do not work at the workplace of the TES. TES employees will now form part of the workplace of either the TES or the client. This apparently remedies the situation where the workplace of the TES is a considerable distance from the client's workplace.[30]

However, the wording of section 21(12) is cryptic and does not correlate to what is mentioned in the Memorandum[31]. The definition of 'workplace' remains the same in that it's the place where the employees of the employer work[32] and therefore still means that only employees of the employer that controls the workplace are counted for purposes of attaining organisational rights. This would result in TES employees not being counted if they are stationed at a client's premises as they are still employed by the TES and not the client. This is substantiated by other sections in the LRA, such as sections 11, 14 and 16,

[27] Bosch 2013 *ILJ* 1633.
[28] Clause 2 of the Labour Relations Amendment Bill, 2012.
[29] Bosch 2013 *ILJ* 1633.
[30] Bosch 2013 *ILJ* 1635.
[31] Clause 2 of the Labour Relations Amendment Bill, 2012.
[32] Section 213 of the Labour Relations Act 66 of 1995.

which indicate that representativeness is determined with reference to "employees employed in a workplace", that is, the employer's workplace.[33]
Section 21(12) merely indicates that a union "may seek" to exercise organisational rights. This wording does not clarify how a union will qualify for the rights it seeks to attain (in other words, who will count towards representativeness). A clearer explanation of the term 'workplace' in particular, which would have included TES employees in determining representativeness, would have resolved this issue.

Section 21(12) creates further confusion, if interpreted broadly, in that it allows a union who exercises organisational rights against a TES to have that same privilege against the client of the TES. If the broader meaning is adopted, section 21(12) should be redrafted as its meaning is not apparent from the wording of the section.[34]

Furthermore, once an arbitrator has determined that a union is entitled to organisational rights, the award will bind not only the TES, but also the client of the TES or persons who control access to the workplace. However, even though the award may be applicable to both TES and clients, not all organisational rights are relevant to clients, such as the right to union levies. Therefore, arbitrators may be required to make awards partly applicable to the parties. Whether the amendments allow this is a matter of much debate.[35]

The section 21 amendments are likely to have serious consequences, as competition should intensify, organisational rights disputes should increase, the definition of 'workplace' should be redefined and there should be challenges to existing collective agreements.[36]

[33] Bosch 2013 *ILJ* 1635.
[34] Bosch 2013 *ILJ* 1636.
[35] Bosch 2013 *ILJ* 1637.
[36] Docrat 2013 CCMA Commissioner Indaba.

1 2 Section 32: Bargaining councils

Bargaining councils are statutory successors to the industrial councils that operated under the 1956 LRA. One of the primary functions of a Bargaining council is to conclude and enforce collective agreements. Collective agreements concluded under the auspices of a bargaining council, known as bargaining council agreements, are binding on all member parties involved in the bargaining council and collective agreement as well as their members.[37] Parties may extend these agreements with the consent of the Minister of Labour. Where parties extend these agreements, they bind not only those mentioned above but also those who are not members of the bargaining council, provided they fall within the registered scope of the bargaining council and are identified.[38]

Parties can apply for exemption from agreements, provided the collective agreements contain a provision that requires an independent body to decide appeals for exemptions.[39] This extension provision seems intended to create conformity in the industry. However, legislators failed to consider smaller enterprises unfamiliar with the extension process or that found it too burdensome, which resulted in significant compliance issues and wasted time.

In addition, fairness in the exemption application process was a concern. The extension of collective agreements did not address the needs of small and medium enterprises or situations where the Minister of Labour erred when deciding whether to extend agreements.[40] Some viewed this as a barrier to economic development and job creation.

To correct this situation, legislators amended section 32 of the LRA to provide for an independent body to hear and decide exemption applications no later than 30 days from the date the appeal was lodged. No trade unions or employers' organisations may

[37] Grogan *Collective Labour Law* (2010) 88.
[38] Van der Walt, A, Le Roux, R and Govindjee, A (eds) *Labour Law in Context* (2012) 191.
[39] Grogan *Collective Labour Law* (2010) 88.
[40] *Valuline CC and Others v Minister of Labour and Others* (2013) 6 *BLLR* 614 (KZP).

participate, as it must be independent. This may improve and hasten the process of applying for exemptions and resolving disputes. The Minister of Labour can reject an application to extend an agreement to non-parties if he or she is not completely satisfied that there is an effective dispute process for non-parties' applications of exemption.[41] Therefore, the amendment improves the efficiency of exemption procedures and ensures the independence of an exemption appeal body.[42]

1 3 Section 69: Pickets

Picketing is a means of attempting to persuade fellow workers to join a strike or of opposing a lockout.

Section 69(1) of the current Act allows unions to authorise a picket in support of a protected strike or against a lockout, while section 6(6) permits picketing on an employer's premises with consent. Trade unions use the section 69(1) right to their advantage by using pickets as a form of strike and although the provision permits only peaceful pickets, they tend to be the opposite.

Furthermore, section 69(6)(a) limits the freedom to picket by restricting the picket to the employer's premises. However, an employer's premises could be situated within the premises of another property. This could mean that picketers may picket only on the street outside the property, which could be sizeable. In addition, the effect of the picket may decline the further the picketers have to stand away from the employer's premises.
According to international labour law

> "restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful."

[41] Walasan, R "Amendments to the Labour Relations Act" 27 August 2012 http://www.masconsulting.co.za (accessed 2012-11-20).
[42]Clause 4 of the Memorandum of the Objects of the Labour Relations Act Amendment Bill 16B of 2012.

The LRA complies with international labour law in relation to limiting restrictions on picketing. However, international law provides for generalisations, while South African law is more specific. Thus, the LRA regulates picketing on employers' premises and international law does not provide for such picketing.[43] Conduct such as carrying placards, chanting slogans, singing and dancing fall within the definition of peaceful and lawful conduct in the South African context.[44] In *Shoprite Checkers v CCMA,*[45] the Labour Court held that in mature and enduring industrial relations settings with a high degree of mutual inter-dependence and trust, picketing on the employer's premises is permitted. Therefore, the Court permits picketing on an employer's premises provided it is not disruptive in any way.

However, the general rule still disallows picketing on an employer's premises by employees or a union except with the permission of the employer, as the employer has the right to its property. If a union is unsuccessful in its attempts to obtain an employer's consent, the commission may intervene.[46]

The amendments effectively allow picketers to picket on premises that do not belong to the employer (for example in a shopping mall)[47] on condition that the party controlling or owning the premises (the landlord) has the opportunity to make representations before the CCMA when the picketing rules are drafted[48]. The amendments bolster the enforcement of picketing rules in terms of section 69 and the owners of premises can no longer unjustly deny picketers the right to picket on their property.

However, one must consider the effects of pickets allowed by property owners, under the pretences that they will be peaceful but are violent or disruptive. One should consider the immediate remedies at their disposal, if any. In addition, one should question whether relief is available if picketing or picketers deter customers of neighbouring businesses from

[43] *Shoprite Checkers (Pty) Ltd v CCMA* (2006) 27 *ILJ* 927 (LAC).
[44] *Picard Hotels Ltd v Food and Allied Workers Union* (1999) 20 *ILJ* 1915 (LC).
[45] *Shoprite Checkers (Pty) Ltd v CCMA* par 27.
[46] *Shoprite Checkers (Pty) Ltd v CCMA* par 33.
[47] *Shoprite Checkers (Pty) Ltd v CCMA* par 27.
[48] Section 69(6) (a) of Labour Relations Amendment Bill, 2012.

entering the premises. For instance, in a large shopping centre with numerous shops in close proximity to each other, picketing may disrupt business for not only the employer concerned but also for stores nearby. Therefore, these other business should be entitled to relief or to the opportunity to participate during the drafting of the picketing rules.

The amendments address this situation, albeit to a limited extent. According to the amendments, failure to adhere to these provisions[49] may result in the employees being liable for damages resulting from a breach of picketing rules or agreements, which the Labour Court can enforce or amend. Therefore, the Labour Court will have the power to grant urgent relief that is just and equitable.[50] The court will determine what this includes beyond that contained in subsection 12 of the LRA amendments.

Furthermore, the addition of section 69(12) no longer restricts resolution to the Labour Court,[51] but allows for arbitration, not only conciliation, by the CCMA. The amendment extends parties' access to the Labour Court in respect of disputes over compliance with picketing agreements or rules.[52] This may prove to be an economical solution.

In addition, the court may order any party to comply with a picketing agreement or rule and it may vary the terms of the picketing agreement or rule. The court may even suspend the picket or strike, suspend the right to engage replacement labour, or suspend a lockout where there is a breach of picketing rules. This suspension is not a long-term solution, as it does not address the underlying issues, such as the reason for the breach. Strikes will recur with the same problems as before. The court attaching stringent conditions to

[49] Section 69 of the Labour Relations Act 66 of 1995.
[50] Snyman,S "Comments on proposed amendments to labour legislation" no date http://www.bbrief.co.za/resources/articles/comments/comments-on-proposed-amendments-to-labour-legislation (accessed 2012-11-19).
[51] Section 69(11) of Labour Relations Amendment Bill.
[52] Brookshaw, L" Strikes, pre and post the LRA Amendments Bill" 2012 http://www.polity.org.za/article/strikes-pre--and-post--the-lra-amendments-bill-2012-2012-08-13 (accessed 2012-08-13).

uplifting suspensions[53] could curb the likelihood of parties not adhering to the picketing rules.

Although these amendments have increased the likelihood of parties adhering to picketing rules, they have still failed to clarify the relief available to those affected by the picket but not a party to the picketing rules. The legislature should have allowed these parties the opportunity to participate in proceedings in the interest of fairness.

1 4 Section 70 -74: Essential Services and Minimum Services

The legislature has amended this section to regulate dispute resolution in essential services and to enhance the administration, governance and efficiency of the Essential Service Committee. In addition, it provides the CCMA with the function to negotiate and conciliate disputes regarding minimum service agreements and to promote interest arbitrations[54].

1 5 Section 115: Expanding function of CCMA

Following the amendment of section 115 of the LRA,[55] the CCMA may determine the consequences of non-attendance of conciliation or arbitration proceedings. The conciliation process[56] is an intricate part of our labour dispute resolution system. It provides parties with the opportunity to resolve their dispute without the formalities and costs normally associated with arbitration. Parties are able to disclose information that they would not normally disclose in order to assist the commissioner to resolve the dispute expediently and therefore reduce unnecessary legal costs. However, parties do not always feel the need to attend these processes due to various reasons including the fact that there are no real consequences for non-attendance if the matter is only set down for

[53] Snyman "Comments by Labournet as to the Proposed Amendments to Labour Legislation on March 2012" 2012 *Labournet* 4.
[54] Bono " Essential services: Implications of proposed amendments to the LRA" Paper presented at the 2013 CCMA Commissioners Indaba.
[55] Clause 18 of the Labour Relations Amendment Bill, 2012.
[56] Section 135 of the Labour Relations Act 66 of 1995.

conciliation. The commissioner is left with no other alternative but to issue a certificate stating that the matter remains unresolved. This prolongs the matter, as it must then be set down for arbitration, which will be held on separate date. This does not give effect to the aim of the LRA, which envisages expedient resolution to disputes.

In *Premier Gauteng and Another v Ramabulana No and Others*[57] the Labour Appeal Court held that a matter must proceed to arbitration before the CCMA dismisses it. This is confirmation that parties will suffer no serious consequences for failing to attend the conciliation process.

The amendment now seeks to change this position by allowing commissioners to dismiss matters at the conciliation stage and not only at the arbitration stage as was mentioned above. This amendment may encourage parties to have more respect for CCMA rules and attend the hearings, which will result in an increase in parties resolving their disputes within 30 days from the date it was referred. This will be more in line with the purposes of the LRA.

1 6 Section 143: Effect of arbitration awards

The amendment makes certified arbitration awards enforceable without Labour Court writs of execution. It further allows a party to enforce monetary awards through a Magistrates Court as if it were a Magistrates Court order. This should reduce the costs, as the Magistrates Courts' free structure applies. However, these amendments apply to only awards issued after the implementation of the amendment.[58]

Presently, the Labour Court is flooded with stay applications because of the certification of awards in the absence of any legal challenge.[59] The amendment making an award enforceable if it is merely certified and the execution being effected through the Magistrates Court could be problematic.

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[57] *Premier Gauteng and Another v Ramabulana No and Others* (2008) 29 *ILJ* 1099 (LAC).
[58] Clause 20 of the Labour Relations Amendment Bill, 2012.
[59] Snyman 2012 *Labournet* 8.

To resolve this, legislation should prohibit the CCMA from certifying awards where legal action is pending, and where the opposing party believes the legal action is frivolous or vexatious it should apply to the court to have the process removed.[60]

1 7 Section 144: Variation and rescission of arbitration awards and rulings

Legislators have amended this section to introduce 'good cause' as a ground for rescission as decided by the court in *Shoprite Checkers v CCMA*.[61] According to the Labour Appeal Court, 'good cause' entails that the applicant must:

(a) Give a reasonable explanation for his or her default;
(b) Prove that he or she at no time denounced his or her defence;
(c) The party had a serious intention to proceed with the case; and
(d) The explanation must be *bona fide*

The amended LRA contains principles of case law that clarify what parties need to prove in rescission applications.

1 8 Section 145: Review of arbitration awards

The amendments to these sections seek to expedite the court process by forcing Labour Court judges to submit their judgments within a reasonable period. A review will also not suspend an arbitration award unless the applicant can furnish security for the amount awarded. This could amount to 24 months' remuneration for the employee if the award contains an order of reinstatement or re-employment. This provision expands the time constraints imposed on CCMA commissioners to include Labour Court judges.[62]

This 'security' amount seems prejudicial to certain employers. Many employers would be unable to furnish two years' salary or large amounts of compensation, particularly if more than one employee is involved. The legislature should instead have entrusted the discretion to determine what amount is fair as an amount for security to the courts. The

[60] Snyman 2012 *Labournet* 8.
[61] *Shoprite Checkers (Pty) Ltd v CCMA* (2006) 27 *ILJ* 927 (LAC).
[62] Snyman 2012 *Labournet* 8.

legislature wants to discourage review applications, a right afforded in terms of the LRA, through this amendment.

Although the amendment seeks to impose time constraints on the Labour Court Judges as it has on the CCM commissioners, it does not specify the period within which to issue the judgment. The amendments merely enjoin the Labour Court judge has to issue judgments within a "reasonable time". This could potentially create more issues. For instance, if a Labour Court judge were to issue a judgment six months after the matter was heard, how would it be determined that this was within a reasonable period. On the one hand, it would require the consideration of various factors such as the workload of the judge and the complexity of the case itself. On the other hand, these are issues that CCMA commissioners are also burdened with, yet they are required to issue awards within 14 days[63].

Therefore, the legislature should have opted to rather include a reasonable time frame within which to issue a judgment. This would surely have expedited the process and bring the amendments more in line with the purpose of the LRA.

1 9 Section 147(6A) and section 150: Expanding the jurisdiction of the CCMA

This amendment gives the CCMA jurisdiction to hear matters that parties would otherwise have resolves through private arbitration. Previously, an employee and an employer would agree through either a contract of employment or collective agreement to refer any dispute to private arbitration, splitting the cost between the two parties. The amendment allows the CCMA to intervene if the employee party is required to pay for private arbitration. This defeats the inviolability of collective agreements.[64]

[63] Clause 19 of the Labour Relations Amendment Bill, 2012.
[64] Snyman 2012 *Labournet* 8.

Section 150 further expands the functions of the CCMA by allowing it to intervene in disputes where there is a public interest.[65]

1 10 Section 186(1) (b): Fixed-term contracts

Fixed term contracts, as the name suggests, are contracts where the termination date of the employment relationship is predetermined. On the termination date, operation of law extinguishes the parties' obligations, including their claims against each other.[66] One of the realities of fixed term contracts is that employers take advantage of the conditions of this employment relationship and endlessly renew employees' contracts despite requiring their services permanently. In so doing, the employer escapes costs by not being compelled to provide any benefits, such as medical aid, pension or housing subsidies, to these employees. [67] In these circumstances however, employees may have reasonable expectations of contract renewal or permanent employment.[68]

Expectation of renewal

Currently, in terms of section 186(1) (b) of the LRA, a dismissal is deemed to have occurred if the employee

> "(r)easonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it"

For a dismissal to occur under this section, an employee must prove that[69]

(a) There was a fixed term contract;
(b) Said contract was terminated or about to be terminated;
(c) The employee believed the contract would be renewed;

[65] Lexis Nexis *Labour Relations Act 66 of 1995 (*2013) 121.
[66] Grogan "Dashed expectations" 2012 28 *Employment Law* 3.
[67] Bosch 2013 *ILJ* 1634.
[68] Section 186 (1) (b) of the Labour Relations Act 66 of 1995.
[69] Grogan 2012 *Employment Law* 3.

(d) This belief is objectively reasonable; and
(e) The employer failed to renew the contract or renewed it on substantially less favourable terms.

Non-renewal of a contract does not constitute a dismissal unless the employee had a reasonable expectation that the employer would renew the contract. If the employee has such an expectation, section 186(1) (b) will be triggered.

Whether this amounts to a dismissal depends on a number of factors, including the number of previous renewals.[70]

Furthermore, where a contract clearly shows it is of a temporary nature[71] or if the employer gave the employee adequate notice of the termination[72] it should not lead to a dismissal as there would not have been any expectation.

Some employees on fixed-term contracts have even had their contracts terminated on the occurrence of uncertain events. These contracts are prevalent in many sectors and the courts have subsequently condemned them in cases such as *Sindane v Prestige Cleaning Services*[73] *and Mahlamu v CCMA*[74]. The employers in these cases included a clause in their employment contracts that stated that an employee's contract could cease if the client terminated the contract. However, the courts and legislature have limited the circumstances upon which an employer may take refuge in this 'automatic termination clause' in a dismissal claim.[75] The meaning of dismissal in terms of section 186(1) (b) provides for circumstances such as these.

Expectation of permanent employment

Another question that arises in relation to fixed-term contracts is whether employees employed in terms of such contracts can have a reasonable expectation of securing

[70] Grogan *Employment Rights* (2010) 63.
[71] *Malandoh v SABC* (1997) 18 *ILJ* 544 (LC).
[72] *Smith v American International School of Johannesburg* (1994) 15 *ILJ* 817 (IC).
[73] *Sindane v Prestige Cleaning Services* (2009) 12 *BLLR* 1249 (LC).
[74] *Mahlamu v CCMA* (2011) 4 *BLLR* 381 (LC).
[75] Grogan 2012 *Employment Law* 3.

permanent employment. In *Biggs v Rand Water,*[76] the Labour Court held that section 186(1)(b) was included in the LRA to prevent the unfair labour practice of keeping an employee on a temporary basis without employment security until it suits the employer to dismiss such an employee. The employer would then be without the unpleasant obligations imposed on it by the LRA in respect of permanent employees.

An economic rationale may justify the need for a fixed-term contract instead of a permanent contract. In the *University of Pretoria v CCMA,*[77] the Labour Appeal Court held that an employer usually sets aside a limited amount of funds for fixed-term contracts and that these funds can be exhausted. The creation of a permanent post, conversely, would require a more permanent funding source.

A further issue exists where employers continue to renew contracts indefinitely. This may also create an expectation of permanency for the employee concerned.
In *South African Rugby Players Association & Others v South African Rugby (Pty) Ltd,*[78] the Labour Appeal Court applied a test to determine whether there was a reasonable expectation of permanent employment. According to the test, the employee must prove that, under the circumstances prevailing at the time, he or she expected the employer to renew the contract on the same or similar terms. In this case, the court disagreed with the employees, who claimed that they were entitled to a twelve-month contract although their original contract was valid for only three months. Thus, if there was a reasonable expectation, it should be confined to an expectation of another three-month contract. Therefore, the Court did not consider permanent employment a reasonable expectation.

Although one may regard the use of fixed-term contracts as an unscrupulous method to avoid the rights enshrined in the LRA, employers are not obliged in terms of the Act to

[76] *Biggs v Rand Water* (2003) 24 *ILJ* 1957 (LC).
[77] *University of Pretoria v CCMA* (2012) 2 *BLLR* 164(LAC).
[78] *South African Rugby Players Association & Others v South African Rugby (Pty) Ltd* (2008) 29 *ILJ* 2218 (LAC)44.

engage employees on indefinite or so-called permanent contracts. However, it is possible that the relationship between employer and employee could be construed as intending the contract to be of permanent duration, despite an official description to the contrary.[79]

The amendments attempt to address this issue by allowing an employee to claim dismissal in circumstances where he or she reasonably expected the employer to offer permanent employment on the same or similar terms and the employer failed to do so.[80]

Grogan thoroughly summarises the legal position:

> "The notion of reasonable expectation clearly suggests an objective test: the employee must prove the existence of facts that ... would lead a reasonable person to anticipate renewal. The facts that found a reasonable expectation will clearly differ from case to case but will most commonly take the form of some prior promise or past practice – e.g., where the employer habitually renewed the contract. That a fixed long term contract has been renewed a number of times is not in itself indicative of the existence of a reasonable expectation of renewal; whether there was a reasonable expectation of renewal must be determined from the perspective of both the employer and the employee. The conduct of the employer in dealing with the relationship, what the employer said to the employee at the time the contract was concluded or thereafter, and the motive for terminating the relationship has been cited as factors to be considered."[81]

Grogan further states that there is no reasonable explanation why an expectation of permanent employment should not consequently lead to a claim for dismissal in terms of section 186(1) (b).[82]

This issue has been debated for numerous years and the courts have drawn mixed conclusions in this regard. In *McInnes v Technikon Natal,*[83] the Labour Court held that section 186(1)(b) is broad enough to include the expectation of permanent employment,

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[79] *SACTWU v Mediterranean Woollen Mills (Pty) Ltd* (1995) 4 *ILJ* 889 at 291 (LAC).
[80] Grogan "New Labour Bills" 2011 27 *Employment Law* 16.
[81] Grogan *Workplace Law* (2009).
[82] Grogan *Workplace Law* (2009).
[83] *McInnes v Technikon Natal* (2000) 6 *BLLR* 701 (LC).

but in *Dierks v University of South Africa*[84] *and Auf de Heyde v University of Cape Town*[85] the Labour Appeal and Labour Court respectively held opposite findings. The Labour Appeal Court, in *Dierks*, held that an employee may expect a contract to be renewed only on the same or similar conditions, which therefore precludes the employee from relying on section 186(1) (b) if he or she expected to be permanently employed.

The Labour Appeal Court clarified this in *University of Pretoria v CCMA*[86] where the court explained the economic justification for fixed-termed contracts instead of permanent employment, as discussed previously. Therefore, the interpretation of section 186(1) (b) cannot be construed in a way that allows for the expectation of permanent employment. The amendment correlates with this; it allows employees to claim dismissal if they can show reasonable expectations of renewal, but not if they can show that they reasonably expected indefinite employment.[87]

Conversely, employers treat fixed-term employees considerably differently to permanent employees in relation to benefits and salaries. They have no job security, which is detrimental in a country like South Africa where jobs are scarce. Therefore, not allowing an expectation of permanent employment to lead to a claim of dismissal may cause concerns regarding discrimination.

According to Department of Labour Director-General (DG) Nkosinathi Nhleko, the South African government intends to create a situation where employers treat all employees in an equal manner. According to the DG, a person employed by a company who enjoys a particular set of rights should have the same rights as an employee in a permanent position. Therefore, the issue revolves around equality.[88]

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[84] *Dierks v University of South Africa* (1999) 4 *BLLR* 304 (LAC).
[85] *Auf de Heyde v University of Cape Town* (2000) 8 *BLLR* 877 (LC).
[86] *University of Pretoria v CCMA* (2012) 2 *BLLR* 164(LAC).
[87] Clause 30 of The Memorandum of the Objects of the Labour Relations Amendment Bill, 2012.
[88] Anonymous http://www.sanews.gov.za no date (Date accessed 2012-11-18).

This is likely to cause extensive debate regarding the identification of similar job roles and descriptions as well as whether an employer provides employment terms to fixed-term employees that are on par with those offered to permanent employees. The researcher further discusses these topics under the chapter, Unfair Discrimination.

1 11 Section 187(1) (c): Automatically unfair dismissals

According to section 187(1) (c), a dismissal is automatically unfair if the reason for dismissal is

> "to compel an employee to accept a demand in respect of any matter of mutual interest between employer and employee".

The main purpose of the provision was to prevent the employer from resorting to dismissal in the process of collective bargaining

Authors and the courts have been somewhat confused about the purpose of this section and the type of action it intended to prevent.[89] The general view is that legislators intended the section to prohibit harmless lockout dismissals, whilst allowing the final dismissals of employees who refuse to accept demands regarding matters of mutual interest.[90]

Furthermore, the main aim of this provision was to preclude the employer from resorting to dismissing employees in the context of collective bargaining as was permissible under the 1956 LRA. In *NUMSA v Frys Metals*[91] at para 38 the Labour Court had this to say:

"Dismissal is not a legitimate instrument of coercion in the collective bargaining process…. Section 187(1) (c) renders any dismissal to compel acceptance of an employment demand automatically unfair ,…"

A plain reading of this decision would imply that an employer is precluded from dismissing an employee within the context of collective bargaining. This would be consistent with the

[89] Coetzee "Can the employer still raise the retrenchment flag in interest negotiations? The Fry's Metal case under the Labour Relations Amendment Bill, 2012" 2012 *De Jure* 351.
[90] Grogan 2003 *Employment Law* 411.
[91] *National Union of Metalworkers of SA v Frys Metals* (2001) 22 *ILJ* 701 (LC).

purpose of the section, which outlaws any form of dismissal as a way of compelling an employee to accept a demand. However, the Labour Appeal Court[92] came to a different conclusion by establishing a test to determine whether a dismissal falls within section 187 (1) (c). This test unfortunately resulted in an anomaly when determining whether a dismissal falls within the ambit of section 187(1)(c).This anomaly is evident when the Labour Appeal Court' decision is compared with the decision in the *Algorax* case[93].

The Labour Appeal Court[94] held that the purpose of section 187(1) (c) is to avoid the so-called 'lockout dismissal', which is the provisional dismissal of an employee until a demand is accepted, which featured in pre-1995 labour relations practice. Furthermore, the court held that this provision does not apply where the dismissal is final and irrevocable. The Supreme Court of Appeal (SCA) confirmed this. Therefore, according to the test developed in the *Fry's Metal case*, a dismissal only falls within section 187(1) (c) if it is conditional; otherwise, it is regarded as a dismissal for operational requirements. Employees would then have another remedy at their disposal should section 187 not apply.

Furthermore, if the operational requirement dismissal could not muster the requirements of fairness under the Labour Court, those employees will be entitled to compensation. The compensation would be limited to 12 months, unlike the 24 months in an automatically unfair dismissal (section 193(1)).

The employees in the *Fry's Metal* cases did not question the fairness of the operational requirements dismissal but the automatic unfairness of their dismissal. The test therefore relies on whether the employer intended that the dismissal is final or conditional on the employees accepting certain demands.

Furthermore, this decision read with the decision in *Chemical Workers Industrial Union v Algorax*[95] discourages employers from re-employing employees retrenched for refusing to

[92] *National Union of Metalworkers of SA v Fry's Metals* (2003) 24 *ILJ* 133 (LAC).
[93] *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC).
[94] *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* (2003) 24 *ILJ* 133 (LAC).
[95] *Chemical Workers Industrial Union and Others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC).

accept changes in working conditions. In this case, the employers dismissed those employees who would not accept a change in the terms and conditions of their contract of employment for operational requirements. However, the employer offered the employees reinstatement until the matter was heard in the Labour Court, which meant that section 187(1) (c) applied because the dismissal became non-final.

The *Fry's Metal* dismissal did not invoke section 187(1) (c) because it was clear that the employer intended to dismiss the employees if they refused to accept the change in contractual terms. Therefore, according to the *Fry's Metal* and *Algorax* cases, if the employees had refused to accept the demands but later decided to accept due to desperate circumstances, the employer could not entertain reinstatement even if it wanted to, as this would result in an automatically unfair dismissal. This goes against the objectives of the LRA.

Thompson[96] had previously raised the possibility of an amendment to section 187(1) (c) to outlaw all dismissals in the context of economic disputes (in other words, both temporary lockout and final dismissals). He considers this prospect with some dread:

> "It is suggested that such 'remedial' steps would not serve industrial society well. On reflection, if the intention was that s[ection] 187(1)(c) should outlaw all dismissals in the context of economic disputes, it was being asked to do too much heavy lifting. In any event, to locate that kind of control measure in the 'automatically unfair' basket was simply too drastic. The contest between claims for business flexibility on the one hand and protection against labour exploitation on the other is too complex and too important to be addressed by blunt-nosed legislative injunctions. A wide interpretation of s[ection] 187(1)(c) had the potential to hamstring the adaptive capacity of business mightily, and so inflict a great harm on the economy. The court could have tempered this again by a generous and

[96] Thompson "Bargaining over Business Imperatives: the Music of the Spheres after Fry's Metals" 2006 27 *ILJ* 729-730.

overriding interpretation of the sweep of the operational dismissal provision (the 'employer's leeway'), s[ection] 188(1)(a)(ii), but the exercise would have been a tricky and uneasy one".

The amendments seek to curb the adaptive capacities of business profoundly. The amendment reads:

Section 187 (1) (c):

> "a refusal by employees to accept a demand in respect of any matter of mutual interest between them and their employer".

It is challenging to see how a business can be said to have acted unfairly for taking measures to survive, even if it offered amended contractual terms as an alternative to dismissal. The amended section 187 may lay numerous questions to rest[97], including:

(a) Will it be possible to retrench employees who refuse to agree to proposed changes to terms and conditions of employment fairly, where the employer can show that their refusal will have dire consequences for the business, or is the employer limited to trying to compel agreement through a lockout after failed collective bargaining?

(b) Will the employer be able to justify the retrenchment if the only reason for the amended terms and conditions relates to profit or optimum efficiency?

(c) If the employer initially follows a collective bargaining approach and only later, when agreement proves illusive, embarks upon a retrenchment exercise where a materially similar alternative is offered, will that result in the drawing of an adverse inference against the employer, rendering dismissals automatically unfair under the proposed section 187(1)(c)?

The amended section 187(1) (c) is open to two interpretations. The first is that a lockout and not retrenchment is the employer's only option. Therefore, an employer who amends

[97] Thompson "Bargaining, Business Restructuring and the Operational Requirements Dismissal" 1999 20 *ILJ* 755-756.

terms and conditions of employment in an attempt to restructure would be unable to rely on dismissals based on operational requirements should the collective bargaining process fail.[98]

Another interpretation is that the operational requirement option is limited in the sense that employers would be unable to rely on it if the reason for the restructure related to increase in profitability in an already profitable business. Therefore, such interpretation would require a limitation to the term 'mutual interest' to limit the effects of section 187 on retrenchments based on profitability rather than survival.[99]

However, in Zondo's view in the *Fry's Metal*[100] case, an employer is not restricted from retrenching employees in order to increase profitability. The Labour Appeal Court has confirmed this view in other matters before it.[101]

It is therefore irrational to interpret the amended section 187 in a way that restricts an employer's use of alternatives to retrenchment when sections 189 and 189A are structured with the aim that employees remain employed if there are viable alternatives. This includes a change in the terms and conditions of employment.

Section 189 and section 187 should be read together and not one being subservient to the other. Furthermore, the interpretation of section 187 should be factual and carried out by adopting the test to determine the primary reason for the employer's action.[102] Therefore, there is no justification for redrafting the interpretation currently given to what constitutes a substantively fair operational requirement dismissal simply because of the proposed amendment to section 187(1) (c). If a company seeks to amend terms and conditions of

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[98] Coetzee "Can the employer still raise the retrenchment flag in interest negotiations? The Fry's Metal case under the Labour Relations Amendment Bill, 2012" 2012 *De Jure* 356.

[99] Thompson "Bargaining, Business Restructuring and the Operational Requirements Dismissal" 1999 20 *ILJ* 755-756.

[100] *National Union of Metalworkers v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA).

[101] *General Food Industries Ltd v FAWU (*2004) *ILJ* 1260 (LAC)*; Mazista Tiles (Pty) Ltd v NUM* (2004) *ILJ* 2156 (LAC); *Van Rooyen v Blue Financial Services (SA) (Pty) Ltd* (2010) *ILJ* 2735 (LC).

[102] *Chemical Workers Union v Afrox* (1999) *ILJ* 1718 (LAC) 1729F-1730A.

employment to increase profitability, it should be allowed to invoke section 189 in the absence of a settlement agreement.[103]

The amendment complies with the 1995 legislation intended to preclude the dismissal of employees in circumstances where there was a refusal to accept a demand by the employer over a matter of mutual interest. This protects the integrity of the process of collective bargaining under the LRA.[104] Furthermore, if the amendment was in effect at the time the *Fry's Metal* case was heard, the dismissal of the applicants may well have been automatically unfair.

The amendment is likely to result in employers being extremely cautious when engaging in collective bargaining over changes in terms and conditions of employment. If the employees are unwilling to settle and the employer opts to dismiss them, this may be perceived as automatically unfair in that it leads others to believe that the real reason for the dismissal was the non-acceptance of a matter of mutual interest.
Employers should thus consider adopting a retrenchment process from the beginning instead of first engaging in collective bargaining and then using retrenchment because of non-adherence. If they decide to engage in collective bargaining from the outset, they should opt for a lockout rather than a retrenchment in the event of non-adherence. These cautionary steps may offer employers some protection.

1 12 Section 188A: Pre-dismissal arbitration

People have always criticised the name "pre-dismissal arbitration" for not accurately reflecting the process conducted. The name presupposes that there was a dismissal, which is not the case as the presiding officer is still to determine whether a dismissal is the necessary sanction.

[103] Coetzee "Can the employer still raise the retrenchment flag in interest negotiations? The Fry's Metal case under the Labour Relations Amendment Bill, 2012" 2012 *De Jure* 358.
[104] *GG* 35799 of 2012-10-19.

The current section 188A(1) states an:

> ‘’[e]mployer may, with the consent of the employee, request a council, an accredited agency or the commission to conduct an arbitration into allegations about the conduct or capacity of that employee”.

The amendment effectively substitutes the name ‘pre-dismissal arbitration’ with ‘inquiry by arbitrator’ although it has the same status as an arbitration.

In addition, the amendments allow parties to consent to an enquiry by means of a collective agreement that facilitates the use of the process previously available to only high-income employees. The amendment promotes that arbitrators conduct enquiries to avoid having two processes, an enquiry and arbitration.[105]

Furthermore, if an employee assumes that the enquiry is in contravention of the Protected Disclosures Act (PDA), either party may request an enquiry conducted under this section.[106]

According to the explanatory memorandum:

> “… the section is amended to avoid disputes where an employee claims that the holding of the enquiry into allegations of misconduct, and suspension pending such an enquiry, breaches the provisions of the PDA. By permitting either party to insist on an enquiry under this section the amended provision reduces the risk of collateral litigation, including High Court litigation, which has been common in these circumstances.”

Therefore, the holding of this enquiry in terms of this section and suspension of an employee pending the outcome thereof do not constitute an occupational detriment in terms of the PDA.

This amendment mainly seeks to resolve the confusion regarding the term ‘pre-dismissal’, which appears in the heading. The essence of the section remains the same.

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[105]Grogan “New Labour Bills” 2011 29 *Employment Law* 18.

[106] 24th Annual Current Labour Law Seminar 2013 hosted by Lexis Nexis.

1 13 Section 189A: Large-scale retrenchments

Currently, an employer must comply with the substantive and procedural requirements as laid out in the LRA in order for there to be a fair retrenchment process in a large scale dismissal.

According to the LRA, even if there are excellent substantive reasons for a dismissal, an employer must follow a fair procedure before dismissing an employee or employees. Therefore, an employer may dismiss employees for operational reasons, but only if the employer has attempted to avoid such an event by consulting with the affected parties (trade unions and employees).

The 2002 amendment[107] distinguished between the retrenchment of one employee, small-scale retrenchments (less than 50 employees) and large-scale retrenchments (more than 50 employees). The 2002 amendments further provided for facilitation of large-scale retrenchments, which the CCMA should conduct. This is the procedural aspect of the retrenchment process.

Furthermore, employees involved in a large-scale retrenchment can either strike or refer a dispute over the substantive fairness of the retrenchments to the Labour Court.[108] Employees may not do both – they may not refer a dispute to the Labour Court and strike.[109]

Subsection 19 of Section 189A sets out the test one must apply when determining the fairness of a large-scale retrenchment. However, there has been great uncertainty regarding the requirements of substantive and procedural fairness as they overlap to some extent.

The substantive test involves determining whether:[110]

(a) The dismissal was to give effect to an operational requirement;

[107] Labour Relations Amendment Act, 2002.
[108] Basson *Essential Labour Law* 171.
[109] Grogan *Employment Law* 63.
[110] Section 189 of the Labour Relations Act 66 of 1995.

(b) The dismissal was justifiable on rational grounds;
(c) There was a proper consideration of alternatives; and
(d) The selection criterion was fair and objective.

The law approaches disputes regarding procedural and substantive fairness differently. An employee's choice to either strike or refer a dispute on the substantive fairness of a dismissal does not restrict his or her right to approach the Labour Court if an employer fails to comply with the appropriate procedure. Furthermore, in the event that the employer fails to comply with a fair procedure, the Labour Court has the power to compel the employer to do so or even to prevent the employer from dismissing the employee until it has complied with such procedure.[111]

One of the challenges relating to dismissal for operational requirements as mentioned above is that substantive and procedural fairness are often interlinked in the sense that it is impossible to determine the reason for dismissal without conducting fair procedures. Therefore, employers are uncertain about what constitutes substantive fairness for dismissals for operational requirements. Furthermore, trade unions have also been concerned that employers were not taking the consultation process seriously by refusing to extend the consultation periods in situations where extensions may possibly lead to resolutions.

The amendment, however, deletes sub-section 19 dealing with substantive fairness, which results in an employer only having to satisfy the procedural requirements when retrenching employees on a large scale. Furthermore, the amendment prevents a consulting party from unreasonably refusing to extend the period for consultation[112], if such an extension is paramount to ensuring meaningful consultation and conclusion. This gives effect to the concept of meaningful collective bargaining as envisaged in the LRA.

[111] Grogan *Employment Rights* 67.
[112] Clause 33 of the Labour Relations Amendment Bill, 2012.

According to the explanatory memorandum:[113]

> "Specifying the test to be applied in section 189A retrenchments has led to uncertainty about whether and to what extent this should apply to cases of retrenchment where section 189 applies. The courts should retain their discretion to develop the jurisprudence in this area in the light of the circumstances and facts of each case and to articulate general principles applicable to all retrenchment cases."

Thus, the amendment also removes the confusion regarding whether the requirements apply to the ordinary section 189. The legislature seems to want to leave it to the courts to determine substantive fairness, but the courts in any event have already been interrogating these operational requirements dismissal.

For instance in *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union*,[114] the Labour Appeal Court emphasised the need to scrutinise dismissal for operational requirements as well as the need to interrogate retrenchments.

Therefore, the deletion of subsection 19 would more than likely have a nominal effect.

1 14 Section 190: Date of dismissal

The correct date of a dismissal may not always be easy to establish in circumstances where an employee appeals against his or her dismissal for instance. The date of dismissal is relevant when referring a dispute to the CCMA or the relevant bargaining council. In unfair dismissal cases, the referral period is 30 days from the date of dismissal. Referral outside the stipulated period requires the lodging of a condonation application. If the application fails, the employee has no recourse against his or her previous employer. In addition, the date of dismissal is relevant to the calculation of compensation. If the

[113] Clause 39 of the Labour Relations Amendment Bill, 2012.
[114] *BMD Knitting Mills (Pty) Ltd v SA Clothing and Textile Workers Union* (2001) 22 *ILJ* 2264 (LAC).

dismissal was found to be unfair, the employee can receive an award of compensation *equivalent* to his or her remuneration at the date of dismissal.[115]

The Labour Appeal Court in *Edgars Stores Ltd v SACCAWU* found that the date of dismissal was the date when the dispute regarding the fairness of the dismissal arose and the lodging of an appeal by the employee did not extend this date.[116] However, the court in *SACCAWU v Shakoane* felt that the date of dismissal could be different from the date the dispute arises. According to Zondo J, a dispute arises when the employee challenges the fairness of the dismissal, which occurs when the employee lodges the internal appeal. The dissenting judgment held that in light of the rules of administrative law, a dispute only arises when a final decision is taken, which would usually be the day the appeal is dismissed.[117] In *Fidelity Guards Holdings (Pty) Ltd v Epstein*, the court applied the same finding.[118]

Moreover, there has been uncertainty about the date of dismissal in situations where an employee is dismissed on notice but he or she receives remuneration for outstanding salary prior to the expiry of the notice period.[119] There are two potential dates of dismissal in these cases: the date of expiration of the notice period or the day the employee left service.

As evidenced by the above, the date of dismissal requires clarification as it serves a very important purpose.

The amendment deals with the situation regarding termination on notice as follows[120]:

> "[I]f an employer terminates an employee's employment on notice, the date of dismissal is the date on which the notice expires or, if it is an earlier date, the date on which the employee is paid all outstanding salary."

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[115]Bower L http://www.retrenchmentassist.co.za/index.php/ccma (date accessed 2012-11-20).
[116]*Edgars Stores Ltd v SACCAWU* (1998) 5 *BLLR* 447 (LAC).
[117] *SACCAWU & Another v Shakoane* (2000) 21 *ILJ* 1963 (LAC).
[118]*Fidelity Guards Holdings (Pty) Ltd v Epstein* (2000) 21 *ILJ* 2382 (LAC).
[119] The Memorandum of the Objects of the Labour Relations Bill, 2012.
[120] Clause 35 of the Labour Relations Amendment Bill, 2012.

This amendment is therefore for clarification purposes and the "outstanding salary" contained in the amendment would include the payment in lieu of the notice period.

1 15 Section 191: Disputes about unfair dismissals and Unfair Labour Practices

Disputes under the current section 189 resulted in the CCMA assuming jurisdiction over retrenchments that affected only a single employee. The question that commonly arose was whether there was justification for limiting the number to only one employee and whether the process would be similar in nature if numerous employees were dismissed.

The current section 191(12) provides:[121]

> "If an employee is dismissed by reason of the employers operational requirements following a consultation procedure in terms of section 189 that applied to that employee only. The employee may elect to refer the dispute either to arbitration or to the Labour court"

Therefore, should an employer dismiss only one employee, the employee can refer the matter to either arbitration or the Labour Court. If an employer dismisses more than one employee, the employee has no choice but to refer the matter to the Labour Court for adjudication. This is costly for employees in comparison to self-representation in an arbitration hearing, as they usually require the services of attorneys or advocates. Furthermore, employees have to find alternative avenues of economic support, as legal counsel and the other delays inherent in the judicial system may unnecessarily prolong the matter, which can be costly. This seems inconsistent with the purpose of the LRA,[122] which is to ensure the expeditious and cost effective resolution of disputes.

[121] Labour Relations Act 66 of 1995.
[122] Section 1 of the Labour Relations Act 66 of 1995.

The amendment allows the CCMA to intervene not only where an employer retrenches one person, but also in the retrenchment of up to ten employees, provided the employees give their consent and the employer employees less than ten employees.[123] Therefore, employees in situations where employers retrenched more than one employee but less than ten can also choose the resolution path previously available to lone retrenched employees only. Most employees are likely to opt for arbitration because it is expedient, cheaper and a less formal means of dispute resolution. Parties do not require legal counsel, as the process is generally informal; the CCMA issues awards within fourteen days of the hearing; and employees incur minimal expenses unless their cases are vexatious and frivolous, as this may amount to a cost order against them[124]. This amendment more closely aligns this section with the purpose of the LRA.

Another important amendment to section 191 (5) is that the CCMA or Bargaining council now has the power to extend the conciliation period if the 30 days have expired. This will greatly assist commissioners in settling disputes in circumstances where parties require further internal consultations and investigations prior to considering a settlement. For instance, in a dispute regarding wage disparity, and the reason for such disparity is the incorrect application of a system used to determine the amount of remuneration an employee is entitled too. To resolve this dispute would merely require an investigation as to the proper application of the system. Under the current LRA however, the CCMA, if the 30 days have expired, would have to proceed to arbitration, which will probably reduce the chances of the employer having to investigate the application of the system in order to settle the dispute. The amendment, which allows for extension of the 30 day time-frame, will therefore increase the chances of employers making an effort to settle where the dispute is based on a technical aspect.

Therefore, by increasing the jurisdiction of the CCMA, the legislature is giving effect to the purpose of the LRA which entails an expedient, cost effective dispute resolution process.

[123] Clause 35 of the Labour Relations Amendment Bill, 2012.
[124] Section 138 of the Labour Relations Act 66 of 1995.

1 16 Section 198: Temporary employment services (Labour brokers/TES)

In the political context

> "[l]abour brokers are the main drivers of the casualisation of labour. Their practices are the absolute contradiction to the principle of decent work. They have driven down workers' wages and conditions of employment. They do not create any jobs but sponge off the labour of others and replace secure jobs with temporary and casual forms of employment."[125]
>
> "We demand a total ban of the labour brokers, a system we have described as human trafficking and modern day slavery".[126]

Persons who hire out the services of others in terms of agreements between themselves, the people hired out and third parties, known as clients, are labour brokers (TES).[127] Section 198 of the LRA and section 83 of the BCEA regulated the procurement of and provision of employment to companies. In terms of section 198, the definition of temporary employment service is:

> "any person who, for reward, procures for or provides to a client other persons –
> (a) Who render services to, or perform work for, the client; and
> (b) Who are remunerated by the temporary employment service."

Both of these elements must be present to qualify as a temporary employment service. Section 198 applies if the contractual relationship between the employer and the company is a genuine arrangement and not one of deceit for avoiding any aspect of labour legislation.

The question that normally arises is whether the person procured is the employee of the TES or the client where the TES places him or her. Section 198(2) and the Code of Good Practice: Who is an employee? issued in terms of the Labour Relations Act, clarifies this.

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[125]Zwelinzima Vavi, National Press Club, 6 March 2012.
[126]COSATU Memorandum, 7 March 2012.
[127] Grogan *Employment Law* 29.

In terms of section 198(2), if a TES places a person at a company, he or she is regarded as the employee of the TES and the TES as the employer.[128] However, in terms of the Code of Good Practice, if it is found that the individual has an employment relationship with the client, the individual would be an employee of the client and the client is the individual's employer for the purposes of the LRA and the BCEA.

Furthermore, if a client pays an agency fee to an agent who remunerates the worker and remains responsible for his or her discipline, performance management and so on, but the worker works under the supervision of the client, it creates confusion for an employee, as he or she often assumes that the client is his or her employer.
The major issue is that TES have allowed clients to employ workers for indefinite periods and when they no longer require workers' services, clients would merely inform the TES. If the employee is fortunate, the TES may be able to place him or her at another site. If not, the TES would retrench the employee.[129] In addition, the commercial contract between the client and the TES also indirectly regulates the salaries paid to employees, further exacerbating the problem as previously mentioned.[130] The client thus pays the employee for his or her services through the commercial contract with the TES yet escapes the associated obligations of an employer.

TES have also attracted negative attention lately. The Congress of South African Trade Unions (COSATU) is calling for the banning of TES, but the government maintains that TES should be regulated, not banned. One of the reasons behind COSATU's call for the outright ban of TES is that they reduce the prospects of permanent employment for the employees they place. The prospect of permanent employment falls within the core values enshrined in section 23(1) of the Constitution.[131] Therefore, the working relationship TES facilitate is unorthodox and counter-intuitive.[132]

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[128] Grogan *Employment Law* 30.
[129] Bosch 2013 *ILJ* 1632.
[130] Bosch 2013 *ILJ* 1632.
[131]Zwelinzima Vavi, National Press Club, 6 March 2012.
[132] Bosch 2013 *ILJ* 1632.

The views of the International Labour Organization (ILO) are aligned with the values of the South African Constitution. According to Recommendation 198 of the ILO, to which South Africa is party, countries must take steps to ensure that they reduce the number of situations where individuals are deprived of the protection to which they are entitled. This, in turn, gives effect to the right to security of employment contained within the Constitution.

Furthermore, the LRA renders TES and their clients jointly and severally liable if the temporary employment service contravenes a collective agreement, an arbitration award regulating terms and conditions of employment, the BCEA or a determination under the Wages Act. Accordingly, an employee may sue the client and/or the TES for such breaches. Where the employee decides to take action against both parties, each party is fully liable but absolved if the other pays. If a client reinstates a 'hired' employee, the order operates only against the TES. Whether the client reinstates an employee is entirely dependent on the contract with the TES.[133]
In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*, the Supreme Court of Appeal held that there are even circumstances in which a client may be held vicariously liable to 'hired' employees for delicts committed by its own employees.[134]

One of the cornerstones of the right to fair labour practices is the right not to be unfairly dismissed. However, the current LRA does not provide for joint and several liability for unfair dismissal, which is one of the primary reasons employers opt for TES services. This enables the client to make use of the services of the TES employee without the concomitant responsibilities like ensuring that a dismissal is fair as required by the LRA. Therefore, clients may regulate the working commitments of employees with a minimum of the responsibilities usually associated with that type of employment relationship. Most employees who have been dismissed find it onerous to determine the real employer in proving their dismissal. This at times lead to a situation where in referring a dispute to the

[133] Grogan *Employment Law* 31.
[134] *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* (2007) 28 *ILJ* 307 (SCA).

CCMA the employees cite a wrong employer. In any event, should they be successful, they would rarely be awarded reinstatement because of the nature of their employment relationship.[135] This raises concerns particularly when one takes into account that according to the LRA the primary remedy for an unfair dismissal is reinstatement unless certain circumstances exist. Due to the nature of their employment, the TES employees they are at times denied this remedy.

The amendments relate to the Labour Relations Act, the Basic Conditions of Employment Act and the Employment Equity Act. In addition, the Employment Services Bill[136] has been introduced which, should it be enacted, will extensively regulate the TES industry in that these companies will have to register to operate legally.[137] However, non-registration will not disqualify them from being regarded as TES for the purposes of section 198.[138] Therefore, they cannot escape liability if they operate a TES but claim to be another type of entity. The amendments to section 198 of the LRA result in TES being regulated, not extinguished.

Furthermore, any company that provides work to another person and has direct supervision over that person is essentially considered the employer. Therefore, the client is considered the employer and not the TES or a third party. Section 198 of the LRA, which may be repealed, will have the effect that the Act no longer recognises TES. Consequently, section 198(2) of the Act, which provides that "a person whose services have been procured for or provided to a client by a TES is the employee of that TES, and the TES is that person's employer",[139] will not protect clients of a TES.

In *Mandla v LAD Brokers (Pty) Ltd*, the Labour Court confirmed that the contract between a TES and an employee creates a unique and *sui generis* tripartite relationship where the

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[135] Bosch 2013 *ILJ* 1633.
[136] Grogan 2011 *Employment Law*.
[137] Section 198 (4F) of Labour Relations Amendment Bill, 2012.
[138] Bosch 2013 *ILJ* 1637.
[139] Du Toit J "The South African Labour Guide: Amendments to labour legislation: Temporary employees" http://jand@labourguide.co.za (date accessed 2012-08-29).

employee renders personal services not to the employer but to the employers[140]. The use of this plural form of the word employer suggests that the court was referring to both the TES and the client.

Furthermore, Section 198(4A) of the amendments not only clarifies joint and several liability but also indicates what the client being deemed the employer of the TES employees means. When clients are deemed employers, employees can institute action against either the TES or the client. Therefore, an employee dismissed for poor work performance or misconduct may bring an unfair dismissal claim against either of the employers, provided both were joined as parties to the proceedings.[141]

According to Benjamin, the employees of a TES were the employees of the TES under the current section 198(2), as they were more closely linked with the TES than with the client. However, the amendments deem the client the employer, as it is closer than the TES in that the connection between the employee and the client is no longer temporary.[142] Given that the employee performs his duties at the client's place, the manner in which he performs his or her duties is for all intents and purposes controlled by the client it can be argued that by also regarding the client as the employer, the amendments actually give effect to the reality of the situation. The amendments will also eliminate the tendency by the clients to just decide to get rid of the employees procured by the TES without any valid reason and not even following a fair procedure since they will be liable for an unfair dismissal claim.

Moreover, whether there will ever be clarity regarding the enforcement of awards on a client is debateable. Although an applicant may cite a client as a party, it may not

[140] *Mandla v LAD Brokers* (2002) 6 *SA* 43 (LAC).
[141] Bosch 2013 *ILJ* 1639.
[142] P Benjamin "To Regulate or Ban? Controversies over Temporary Employment Agencies in South Africa and Namibia" in Labour Law into the Future: Essays in Honour of Darcy du Doit 2012 *Juta* 189 - 197.

necessarily be in the position to effect remedies, such as promotion in Unfair Labour Practice (ULP) cases, where the employee is not formally within its hierarchy.[143]

Additionally, the amendments also fail to clarify the consequences of a client terminating a contract with the TES that results in TES employees losing their jobs because of operational requirements. One consequence could be that the client is no longer the employer as it had terminated the contract. Another could be that the TES decides not to retrench the employees, but to transfer them to another site where they would be employed on similar terms as those applicable to the first client.[144] Furthermore, if the client is deemed the employer of the TES employees, the employee must not be treated less favourably than an employee of the client performing the same or similar work, unless there is justification to do so.[145] This provision endeavours to resolve the situation where TES employees perform the same or similar work for substantially less benefits or remuneration than their counterparts.

However, this does not mean that TES employees must join the client's pension funds, bargaining councils and so on. All that is required is for employers to provide them with something of a similar nature that is not overall less favourable.[146]

Furthermore, even where a subcontractor commits an unfair labour practice, both the subcontractor and the client could be accountable. A client should be wary of committing unfair labour practices not only against its employees, but also against those who provide services to it. If not, the client could be liable. Therefore, employers should consider obtaining appropriate assurances or indemnities from the service providers with which they enter into contracts.[147]

Lastly, section 198A also caters for the situation where a TES terminates an assignment with a client to avoid the client being deemed the employer by default. According to the

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[143] Bosch 2013 *ILJ* 1639.
[144] Bosch 2013 *ILJ* 1639.
[145] Section 198A (5) of the Labour Relations Amendment Bill, 2012.
[146] Bosch 2013 *ILJ* 1640.
[147] Truter J "Amendments to labour legislation: What should employers be doing right now?" no date http://www.labourwise.co.za (date accessed 2012-08-29).

amendments, this constitutes dismissal. One can test the fairness of the termination of an assignment in terms of the LRA.[148] This provision gives rise to several questions. Firstly, why is this incorporated in section 198(4F)[149] instead of section 189(1) of the LRA? Secondly, why is it not incorporated in section 187, as it is aimed at enforcing the employer's obligation under the LRA? According to Bosch, this should be regarded as an automatically unfair dismissal for the reasons mentioned above; if this is not the case, it leads one to assume that there is a fair reason for the dismissal, which seems impossible if the purpose was to avoid the obligations inferred by the LRA.[150]

Further protections introduced by the amendments in this regard are:[151]

(a) A TES may not employ an employee on terms and conditions of employment not permitted by the LRA, a sectoral determination or a collective agreement concluded at a bargaining council that is applicable to a client for whom the employee works.
(b) The Labour Court or an arbitrator may now rule on whether a contract between a TES and a client complies with the LRA, a sectoral determination or applicable bargaining council agreement and make an appropriate award. There have been rulings that these agreements lie beyond their jurisdiction.
(c) A TES must provide an employee assigned to a client with written particulars of employment that comply with section 29 of the BCEA.

The TES industry plays a vital role in the creation and retention of employment, thereby sustaining the economy. These employees are however vulnerable under the current LRA as they lacked protection such as when claiming unfair dismissal, which is a fundamental right under the LRA. The amendments however, have attempted to rectify this in that clients of a TES can now be held liable for such claims whilst previously, only the TES could be held liable.

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[148] Anonymous "Brief on proposed section 198 of the LRA" 9 June 2012 http://www.focusedoutcomes.co.za accessed 2012-11-20).
[149] Labour Relations Amendment Bill, 2012.
[150] Bosch 2013 *ILJ* 1641.
[151] Grogan 2011 *Employment Law*.

Furthermore, Labour Broking is an industry issue that the government and labour stakeholders cannot ignore. Proper regulation, rather than banning, would be acceptable for the employees, the client and the TES. Government should further concentrate on the issue of regulation rather than targeting the industry.[152] Imposing an indirect ban on the TES by making the industry unattractive may prove to be an effective way of dealing with the situation.

1 17 SECTION 198B: Fixed term contracts with employees earning below the threshold

Section 198B of the Act offers vulnerable employees additional protection provided those employees earn below the threshold set by section 6(3) of the BCEA. This provision is not applicable to employees employed in terms of statute, sectoral determination or collective agreements that permit the conclusion of fixed-term contracts. It does not apply to employers who employ fewer than ten employees or those who employ fewer than fifty and whose business has not been in operation for less than two years. Thus, the amendments also cater for vulnerable businesses.[153]

According to this section, employees who fall under the above threshold may work for only a period of up to three months on a fixed-term contract or successive fixed-term contracts of up to three months. Beyond this period, the contract will be deemed permanent. However, there are exclusions such as:[154]

(a) If the nature of the work for which the employee is engaged is of limited duration, such as seasonal workers who are employed in the farming sector;
(b) If the employer can justify the need for a longer period and that there was an agreement on the same;
(c) If a sectoral determination provides for a longer period; and

[152] Snyman,S "Comments on proposed amendments to labour legislation" 2012 http://www.bbrief.co.za/resources/articles/comments/comments-on-proposed-amendments-to-labour-legislation (accessed 2012-11-19).
[153] Section 198B (2) of the Labour Relations Amendment Bill, 2012.
[154] Section 198B (3) of the Labour Relations Amendment Bill, 2012.

(d) If a collective agreement concluded at a bargaining council provides for a longer period.

This section of the Act also affords the following protections to these employees:[155]

A. In the event that the contract is extended to a period longer than 3 months then those employees should be treated on the whole not less favourably than an employee on an indefinite contract. There may, however, be a justifiable reason for treating employees differently which, according to section 198D, is determined by taking into account the following factors: Seniority, experience or length of service, merit, the quality or quantity of work performed and any other criteria of a similar nature not prohibited by section 6(1) of the Employment Equity Act. Amongst the reasons that are regarded as justifiable are the following:[156]

(a) Replacing another employee who is temporarily absent from work;
(b) Engaged on account of a temporary increase in the volume of work that is not expected to endure beyond twelve months;
(c) Student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
(d) Engaged to work exclusively on a genuine and specific project that has a limited or defined duration;
(e) Has been engaged for a trial period of not longer than 3 months for the purpose of determining the employee's suitability for employment;
(f) A non-citizen who has been granted a work permit for a defined period;
(g) Engaged to perform seasonal work;
(h) Engaged on an official public works scheme or similar public job creation scheme;
(i) Engaged on a position which is funded by an external source for a limited period;
(j) Has reached the normal or agreed retirement age applicable in the employer's business.

B. Employees on fixed term contracts and those on indefinite contracts must be provided with the same access to opportunities.

C. Employees on fixed termed contracts extending beyond 24 months and which have been justified, must receive an amount equivalent to one's week remuneration for each completed year of the contract. This of course, is subject to any collective agreement which is in effect. If the employer offers the employee alternative employment which commences no later than 30 days after the expiry of the contract and on the same or similar terms then the employer will not be obligated to pay this 'severance pay'.

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[155] Section 198B (4) of the Labour Relations Amendment Bill, 2012.
[156] Anonymous "Brief on proposed section 198 of the LRA" 9 June 2012. http://www.focusedoutcomes.co.za (accessed 2012-11-20).

To add to the employers obligations to the employee, the EEA amendment requires employers to elevate the status of fixed-term employees to the extent that they receive the same benefit as their permanent counter parts. If their contracts are for extremely short periods, the employer is obliged to compensate them the amount that the benefits, such as medical aid and housing subsidies, would have totalled.[157]
This conforms to numerous ILO conventions and recommendations, which require the government to adopt measures that reduce the abuse of fixed-term contracts.

These amendments are likely to have serious repercussions for institutions such as universities, which have numerous employees employed on fixed-term contracts. It would be a costly mistake for an employer to employ persons engaged under fixed-term employment in permanent positions on less favourable terms than those they were entitled to as fixed-term employees.[158] Furthermore, employers must pay fixed-term employees employed for longer than two years severance packages when their contracts end unless there are unreasonable refusals of alternative employment.[159] Therefore, employers should be particular about the operational reasons for fixed-term contracts. If it is necessary to employ people on such contracts, the employer should consider linking the contracts to a temporary project, thus making it viable. Provisions such as "fluctuating operational needs" contain no merit and are therefore unacceptable.[160]

The questions likely to arise from this amendment include the definition of "on the whole less favourable" and "similar work". In addition, whether justifiable reasons exist for differential treatment or contracts exceeding three months.[161]

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[157]Grogan "New Labour Bills" 2011 27 *Employment Law* 2.
[158] Du Toit J "The South African Labour Guide: Amendments to labour legislation: Temporary employees" http://www.labourguide.co.za (date accessed 2012-08-29).
[159] Bosch 2013 *ILJ* 1643.
[160] Truter J "Amendments to labour legislation: What should employers be doing right now?" no date http://www.labourwise.co.za (date accessed 2012-08-29).
[161] Bosch 2013 *ILJ* 1642.

Furthermore, the amendments make provision for parties to refer only disputes relating to the interpretation and application of section 198 to conciliation and arbitration. They do not provide the CCMA with the jurisdiction to address possible infringements of this section of the Act.

1 18 Section 200B: Liability for employers' obligations

Employers are often confused when they engage the services of TES employees, particularly regarding their obligations under the LRA. The clients of TES frequently escape liability, as it is difficult to ascertain who the actual employer is, predominantly because the employment contract is between the TES and the employee. However, it is the client who provides work to the employee and who, albeit indirectly, remunerates the employee. Therefore, there is strong contention for the law to regard clients as employers.

Some feel that clients employ TES employees to circumvent the LRA. Section 200B mentions outsourcing and subcontracting, ruses frequently used to camouflage the actual employer. Furthermore, the section prohibits arrangements whose effect is directly or indirectly to defeat the purpose of employment law.[162] For example, clients using TES enjoy limited responsibilities towards employees while effectively being regarded as their employer. This results in the clients being able to avoid employment law in various ways. Furthermore, a business might, with a valid reason, outsource a part of its operation while retaining control of its new service provider. Through its strong economic advantage in the contract with the TES, the client can indirectly influence the price it would like to pay the employees, and if any issues arise regarding performance or conduct, the service provider would have to resolve them.[163]

Section 200B attempts to address the situation where the client is essentially the employer yet escapes the associated responsibilities. The amendment provides for joint and several

[162] Clause 40 of the Labour Relations Amendment Bill, 2012.
[163] Bosch 2013 *ILJ* 1643.

liability for those who fail to comply with the obligations bestowed upon employers by the LRA.[164] Either the client or the TES is liable for failing to adhere to the obligations bestowed upon employers in terms of the LRA. Therefore, parties to a TES agreement would find it increasingly difficult to escape their obligations towards employees.

In addition, it is the essence of South African labour law that if a party has the power to determine the fate of its employees by means of its economic advantage, it should be liable as an employer. If that happens to be the client, the client should be regarded as the employer.[165] This is a powerful move towards the externalisation described by Theron and may have far-reaching consequences in the future.[166]

Section 200B may therefore test the dividing line between economic freedom and flexibility on the one hand and employee rights and their protection on the other.[167]

Chapter 2: Basic Conditions of Employment Act amendments

2 1 Section 33A: Prohibited conduct

Some employers persuade their employees to purchase goods and the like from them. This type of conduct is abusive, as the employee is in a vulnerable position and frequently feels forced to agree to the purchase. Additionally, this practice leads to employees purchasing unnecessary goods they cannot afford for fear that their employer may see them in a negative light should they refuse.

[164] Clause 40 of the Memorandum of the Objects of the Labour Relations Amendment Bill, 2012.
[165] Bosch 2013 *ILJ* 1644.
[166] J Theron 'The Shift to Services and Triangular Employment: Implications for the Labour Market Reform' 2008 29 *ILJ* 1.
[167] Bosch 2013 *ILJ*1644.

The amendments seek to address this by inserting the following section:[168]

(1) An employer may not-
  (a) require or accept any payment by or on behalf of an employee in respect of the employment of, or the allocation of work to, any employee;
  (a) require an employee to purchase any goods, products or services from the employer or from any business or person nominated by the employer.

(2) Sub-section 1(b) does not preclude a provision in a contract of employment or collective agreement in terms of which an employee is required to participate in a scheme involving the purchase of specific goods, products or services, if-
  (a) the employee receives a financial benefit from participating in the scheme;
  (b) the price of any goods, products or services provided through the scheme is fair and reasonable; and
  (c) the purchase is not prohibited by any other statute.

These amendments not only prohibit the coercion of an employee to purchase goods, products or services from his or her employer, but also inhibit incidents of bribery and corruption unless transactions fall under the exclusions in subsection 2.

2 2 Section 43: Prohibition of work by children

In many developing or under-developed nations, employers use children as an "economical form of labour". This type of labour is work that deprives children of their childhood, potential and dignity, and it is harmful to their physical and mental development. Child labour refers to work that is mentally, physically, socially or morally dangerous and harmful to children, and interferes with their schooling by:[169]

(a) Depriving them of the opportunity to attend school;
(b) Obliging them to leave school prematurely; or
(c) Requiring them to attempt to combine school attendance with excessively long hours and heavy work.

[168] Clause 2 of the Basic Conditions of Employment Act Amendment Bill, 2012.
[169] GG 35212 of 2012-4-5.

The ILO aims to prevent children being enslaved or separated from their families, as these situations expose them to serious hazards and illnesses.

It is extremely difficult to classify child labour as it depends on various factors, such as the age of the child, the type of labour the child is performing and the country and sector in which the child finds himself or herself.[170]

The amendments seek to align the Act with international standards by the inclusion of the following section:[171]

"Prohibition of work by children

(1) No person may require or permit a child to work, whether as an employee or as an
(2) independent contractor, if the child –
    (a) is under 15 years of age; or
    (b) is under the minimum school – leaving age in terms of any law, if this is 15 or older[172]
(3) No person may require or permit a child to perform any work or provide any services –
    (a) that are inappropriate for a person of that age;
    (b) that place at risk the child's well being, education, physical or mental health or spiritual, moral or social development.
(4) A person who requires or permits a child to work in contravention of sub-section 1 or sub-section 2 commits an offence."

These regulations govern not only child labour in an employment relationship but also all work performed by children. By doing so, the BCEA aligns with the objectives of the International Labour Organisation Convention No. 182: "The prohibition and immediate

[170]Anonymous, "Programmes: Child Labour" no date http://en.wikipedia.org/wiki/International_Labour_Organization#Governance.2C_organization.2C_and_membership (accessed on 01.09.2012).
[171] GG 35212 of 2012-4-5.
[172]Section 31(1) of the South African Schools Act, 1996 (Act 84 of 1996) requires a learner to attend school until the last day of the year in which the learner reaches the age of 15 or the ninth grade, whichever is the first.

action for the elimination of the worst forms of child labour*",*[173] which focuses on preventing the most intolerable forms of child labour such as trafficking and abuse.
These amendments are aimed at protecting children who are regarded as vulnerable, yet in a society such as South Africa, many children have no option but to work in order to support their families and themselves. Therefore, although the legislature is correct in providing protection for children, others will unfortunately suffer.

2 3 Section 44: Regulation on work by children

Section 44 of the BCEA currently allows the Minister of Labour to introduce regulations to prohibit or place conditions on the employment of children who are at least fifteen years of age. At this age, the children are no longer subject to compulsory schooling in terms of any law. The Minister bases these regulations on the advice of the Employment Conditions Commission (ECC) and they are in effect extremely limiting.

The proposed amendment broadens the scope of this section of the Act to cover children who are employees and independent contractors.

2 4 Section 45: Medical examinations

Section 45 of the BCEA entitles the Minister to introduce regulations relating to the conduct of medical examinations on the advice of the ECC. The current provision limits the making of these regulations to children who are "in employment".

[173] Anonymous "New Amendments on the Labour Relations Act and the Basic Conditions of Employment Act" No date http://www.Labourguide.co.za (accessed 2012-11-29).

The amendment extends the powers of the Minister to enact regulations regarding the medical examination of children who work. However, in terms of section 90(3) of the BCEA, the confidentiality of any medical examination conducted in terms of the Act is protected.[174]

2 5 Section 46: Prohibitions

The current section 46 is limiting, as it is an offence only to assist an employer to require or permit a child to work. It does not address third parties who assist employers.

The proposed amendment reads:[175]

> "It is an offence to-
>
> (a) assist any person to require or permit a child to work in contravention of this Act; or
> (b) discriminate against a person who refuses to permit a child to work in contravention of this Act".

This amendment, like section 44 and 45, broadens the scope of the applicability of the Act to children. Under this section, it is a criminal offence for anyone to discriminate against a person who refuses to allow a child to work if it contravenes the Act. Whether this is justifiable under the Employment Equity Act or the Labour Relations Act is questionable unless it falls into unspecified ground. One should also note that the word "employed" has been replaced by "work" in subsection (b), which could create the presumption that it is not necessary to have an employment relationship in place to be guilty of discrimination.

2 6 Section 55: Sectoral determinations

The Minister of Labour currently has limited powers in respect of setting thresholds for representativeness in a sector. As a result, it makes unionising certain sectors challenging

[174] Memorandum of the Objects of the Basic Conditions of Employment Amendment Bill, 2012.
[175] GG 35212 of 2012-4-5.

or even impossible. This leads to some employers abusing the employees, as they do not fear the consequences of strikes.

The proposed amendments read as follows:[176]

(4) A sectoral determination may in respect to the sector and area concerned-
(b) provide for the adjustment of remuneration by way of –
(i) minimum rates; or
(ii) minimum increases of remuneration".

(g) provide or regulate task-based work, piece work, home work, sub-contracting and contract work."

(o) taking into account the consideration set out in section 21(8) of the Labour Relations Act, 1995 set a threshold of representativeness within a sector at Which a trade union automatically has organisational rights contemplated in sections 12 and 13 of the Labour Relations Act, 1995 in respect of all workplaces covered by the sectoral determination regardless of their representativeness in any particular workplace.

Sub-section 4(b) is fundamental as it not only allows the Minister to set the minimum wage, but also allows him or her to set minimum increases of remuneration. Sub-section 4(g) is amended by inserting the word *"sub-contracting"* to address all possible forms of atypical employment. Sub-section 4(o) is a new provision that empowers the Minister to set a threshold of representativeness for trade unions to grant them access to the workplace[177] and deductions of subscription fees or levies[178] automatically, irrespective of their representativeness in the workplace. This section provides the resolution of a dispute regarding whether a registered trade union is a representative trade union in a particular workplace for the purposes of awarding organisational rights to that trade union.[179]

[176] GG 35212 of 2012-4-5.
[177] Section 12 of the Basic Conditions of Employment Act 75 of 1997.
[178] Section 13 of the Basic Conditions of Employment Act 75 of 1997.
[179] Memorandum of the Objects of the Basic Conditions of Employment Amendment Bill, 2012.

Furthermore, by making the threshold more flexible, the amendment promotes unionisation in areas and sectors previously difficult to unionise.[180]

With these amendments, legislators aim to adjust the powers of the Minister and the ECC in sectoral determinations to aid the regulation of temporary employment by extending the protection of vulnerable workers.[181]

Further amendments in this regard propose that the Minister, through sectoral determinations, could set actual instead of minimum wages for vulnerable workers.

In addition, a proposed enabling provision in the BCEA could provide the Minister with the power to determine the conditions of employment of labour tenants.[182]

If the commission has to intervene to resolve these disputes, it must make a ruling in accordance with the parameters set out in that section, in the context of a 'sector' as opposed to a 'workplace', bearing in mind the injunction to curb union proliferation.
Moreover, the commission can withdraw any of the organisational rights conferred if the trade union is no longer representative.

There is, however, a number of issues legislators still need to address such as:

(a) How will the threshold be met?
(b) Where trade unions have higher representativeness in one sector than in another, will they automatically receive organisational rights in all sectors because they obtained the threshold in one sector?

This new sub-section is based on section 19 of the LRA, which reads as follows:[183]

[180] Memorandum of the Objects of the Basic Conditions of Employment Amendment Bill, 2012.
[181] Anonymous "New Amendments on the Labour Relations Act and the Basic Conditions of Employment Act" No date http://www.Labourguide.co.za (accessed 2012-11-29).
[182] Anonymous "New Amendments on the Labour Relations Act and the Basic Conditions of Employment Act" No date http://www.Labourguide.co.za (accessed 2012-11-29).

> "Registered trade unions that are parties to a council automatically have the rights contemplated in sections 12 and 13 in respect of all workplaces within the registered scope of the council regardless of their representativeness in any particular workplace."

2 7 Section 71: Objection to compliance orders

The Bill removes the possibility of objecting to compliance orders by removing section 71. This results in the Labour Court attending to all disputes without the need to involve the Director-General.

2 8 Section 72: Appeals

Because legislators have removed section 71, the right to appeal to the Labour Court against the decision of the Director-General under this section falls away. Therefore, this provision has been removed.

2 9 Section 73: Order made by the Labour Court

The legislature amended this section in light of the removal of sections 71 and 72. The amendments aim to achieve the adjudication of compliance orders by the Labour Court.

2 10 Section 74 and 77: Consolidation of proceedings and jurisdiction of the Labour Court

Under these sections, an employee may choose to recover any amount owing to him or her in terms of the BCEA by making a claim in the civil courts and in the Labour Court[184] or if dismissal has occurred, by instituting the claim jointly with proceedings in the Labour Court or in arbitration concerning the fairness of such dismissal. This claim is restricted to amounts that have not been outstanding for more than one year.[185]

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[183] GG 35212 of 2012-4-5.
[184] Section 77(3) of the Basic Conditions of Employment Act 75 of 1997.
[185] Section 74 (2) the Basic Conditions of Employment Act 75 of 1997.

The current section 74(2) is problematic in that it lacks clarity regarding calculation of the period of one year. One arbitration award rejected a claim because it had been outstanding for one year prior to the date of the arbitration,[186] and another held that the arbitrator is entitled to hear claims that arose in the year prior to the date of dismissal of the employee.[187]

The amendment clarifies this issue by providing certainty regarding the calculation of this period. According to the amendment, the year commences from the date of the dismissal.

2 11 Section 77: Jurisdiction of the Labour Court

The current Act limits the jurisdiction of the Labour Court to certain offences. This resulted in legislation excluding the Court from adjudicating offences such as those relating to child labour.[188]

The amendments effectively broaden the jurisdictional scope of the Labour Court by increasing its jurisdiction over matters from which it was previously excluded. In addition, the amendments clarify the Court's jurisdiction by specifying that it has the authority to grant civil remedies (such as interdicts) in respect of matters that relate to criminal offences.[189]

Chapter 3: Employment Equity Act amendments

[186] *Weller v Group 6 Security Services (Pty) Limited* (2001) 22 *ILJ* 1275 (CCMA)
[187] *Motaung v Issa* (2007) 28 *ILJ* 1351 (CCMA).
[188] Basson *Essential Labour Law* 73.
[189] Section 77 of the Basic Conditions of Employment Act 75 of 1997.

The amendments to the Employment Equity Act[190] ("the EEA") have resulted in much confusion, mainly due to the Bill's substance and the manner in which it was drafted. One can expect vigorous litigation around the affirmative action issues when it comes into effect.

The objects of the Bill can be placed into the following categories:[191]

(a) To give effect to and regulate the fundamental rights conferred by section 9 of the Constitution;
(b) To give effect to ILO conventions;
(c) To enhancing the effectiveness of primary labour market institutions such as the CCMA and the labour Inspectorate; and
(d) To address the uncertainties and issues that has plagued the EEA for over a decade.

The courts have been trying to find a balance between the competing needs for greater representation of designated groups at all levels in the workplace and the right to equality of individuals from non-designated groups. One can summarise the current position regarding affirmative action through the court as follows:[192]

(a) Where internal applicants are involved, the decision not to appoint must be on rational grounds and compliant with the internal procedures.
(b) Employers should consider together with past disadvantage, the skills and efficient operation of the organisation.
(c) It will not be automatically regarded as racial discrimination should a white candidate be appointed ahead of a black candidate.
(d) A designated person cannot demand to be retained in a retrenchment process ahead of a non-designated person with better skills.
(e) Special requirements need to be complied with prior to succeeding with a claim for discrimination based on unlisted grounds.
(f) Employers requiring persons with proven managerial experience to fill senior posts is acceptable provided it is bona fide.
(g) The Employment Equity Plan is limited to the extent that it discriminates against individuals.

[190] 55 of 1998.
[191] Memorandum of the Objects of the Employment Equity Amendment Bill 35799 of 2012.
[192] Jordaan, B "The courts have the say on affirmative action" 2011 *Finweek.*

(h) Where suitable candidates from a designated group cannot be found to fill a position, the refusal to appoint non-designated employees must be clearly and satisfactorily explained.
(i) It is still not clear whether employers should consider race and gender when selecting employees to be retrenched.

3 1 Section 1: Definition of 'designated group'

Under the current Act, the definition of "designated groups" was unclear with respect to persons regarded as black but without South African citizenship. The amendment clarifies who falls within the definition of "designated group" by qualifying the definition.

This amendment prevents employers from relying on the appointment of foreign nationals or persons who obtained citizenship after 1994 as affirmative action appointments. Designated persons are thus only those persons who were citizens prior to the democratic era.[193] This provision could be problematic for companies who have foreign nationals who arrived in the country after April 1994 as the majority of their workforces. These companies would have to revisit their employment equity plans to achieve a representative workforce.

3 2 Section 6: Prohibition of unfair discrimination

Some employers favour certain employees over others, whether due to their race, gender, religious beliefs or on any arbitrary ground not listed under section 6(1) of the EEA. Should the latter be the case, the employee would find it extremely difficult to prove discrimination. Furthermore, some employers tend to remunerate employees differently based on the grounds listed in section 6(1) of the EEA or on unlisted grounds.

The amendment seeks to deal with this situation in the following manner:[194]

(a) by the substitution for subsection (1) of the following subsection:
(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds,

[193] Memorandum of the Objects of the Employment Equity Amendment Bill, 2012.
[194] GG 35799 of 2012-10-19.

including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, **[and]** birth or on any other arbitrary ground; and

(b) by the addition of the following subsections:
(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.
(5) The Minister, after consultation with the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4).

Section 6(1) allows discrimination to be based not only on the listed grounds but also on arbitrary grounds, which is consistent with the wording of section 187(1)(f) of the LRA.

The amended section 6(4) states that differentiation based on the grounds listed in section 6(1) is discrimination unless the employer can justify the differentiation in employment conditions based on fair criteria such as experience, skill and responsibility. Furthermore, the amended act provides for the principle of equal pay for equal work (regarded as an unfair labour practice in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act [195]("the Equality Act"). This complies with ILO standards.

Therefore, under the amended Act, employers are vulnerable to claims for paying different wages to different employees who perform similar work.[196] Equal pay for equal work is a labour rights concept that specifies that individuals doing the same work should receive the same remuneration. To pay an employee less for the same or similar work on a prohibited ground constitutes less favourable treatment on a prohibited ground.

According to *Mangena v FILA*[197] however, the Labour court held that it is not unfair to pay different remuneration for work of equal value, unless the cause relates to discrimination

[195] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[196] Grogan 2011 *Employment Law* 18.
[197] *Mangena and Others v Fila South Africa (Pty) Ltd and Others* (2009) 12 *BLLR* 1224 (LC).

based on one of the prohibited grounds. The court further stated that in cases where there is a claim for equal pay, the complainant must establish a factual foundation that the work performed by the comparator is equal. The courts themselves are not experts in determining the value of a particular occupation, thus the court requires a factual foundation to assist it in making such determination.[198]

However, this concept may adversely affect the very employees that the legislation aims to protect. For instance, where a man and woman apply for the same job, the employer, who might be prejudiced against women, could employ the man if it is to comply with the concept of equal work for equal pay. Furthermore, even if the woman requests a lower salary, the employer would remain inclined to employ the man, as it could not pay the woman a lower salary if it is unequal to the salary of other employees performing the same or similar work. This could result in the employer being at a competitive disadvantage, as it would potentially lose a skilled employee willing to work for substantially less than other skilled employee's do, to a competitor whose remuneration package is substantially lower.[199] Furthermore, the environment within a particular workplace would become less productive as employers would be unable to compensate their best performers with higher salaries than those of employees who leave much to be desired.[200] In addition, although sections 6(4) and (5) of the EEA clarify rather than change the law, will they lead to increased wage equity litigation?

The *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *African Charter on Human and Peoples' Rights (ACHPR)* safeguard "equal pay for equal work" in the international framework. These ILO conventions have been applied in America in that employers may not discriminate against women and men in respect of payment

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[198] *Mangena and Others v Fila South Africa (Pty) Ltd and Others* (2009) 12 *BLLR* 1224 (LC).
[199] Tennant, M. "The Justice of Pay Discrimination" no date http://www.LewRockwell.com (accessed 2012-11-20).
[200] Anonymous "Equal work for equal pay" no date http://en.wikipedia.org/wiki/Equal_pay_for_equal_work (accessed 2012-11-20).

where the jobs they perform are similar in respect of skill, effort and responsibility.[201] Equal pay does not simply relate to basic salary but also to the full range of benefits, non-salary payments, bonuses and allowances paid.[202]

The adoption of ILO recommendations also poses numerous challenges. Firstly, the ILO recommends equal work for equal pay across all employers, rather than only the same employer[203]. This would be extremely burdensome, as it would require an industry-wide comparison. In a country such as South Africa where there are vast differences in regional salaries, it may be presumptuous to assume that this can be achieved in a manner fair to all parties.

The ILO further recommends an approach that does not require a comparator. All the organisation requires is to determine what an employer would have paid a man to perform a particular job.[204] This could cause challenges, as it would be akin to prevaricating because there is no certain way to determine what an employer would have paid an employee.

3 3 Section 10: Disputes concerning this chapter

Employees who wished to refer an unfair discrimination case were previously required to lodge a claim through the Labour Courts because it had exclusive jurisdiction. This was time consuming and resulted in employees incurring extensive legal costs.

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[201] Anonymous "EEOC facts about equal pay and compensation discrimination" no date http://www.U.S Equal-Employment-Opportunity-Commission (accessed 2012-11-19).
[202] Anonymous "Equal work for equal pay" no date http://en.wikipedia.org/wiki/Equal_pay_for_equal_work (accessed 2012-11-20).
[203] Everett "Equal pay for work of equal value" Paper presented at the 2013 CCMA Commissioner Indaba.
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The amendment however, allows those employees to refer the dispute to the CCMA if there is an agreement, the employee earns less than the threshold in terms of the BCEA or the claim emanates from sexual harassment.[205]

3 4 Section 11: Burden of proof

Under the current Act, section 11 places the burden to prove the discrimination is fair on the employer and does not distinguish between discrimination based on listed and arbitrary grounds. However, due to the amendment to section 6(1), legislators had to clarify this section.

The amendment distinguishes between discrimination based on a listed ground as opposed to one based on an arbitrary ground. If based on a listed ground[206], meaning that it falls under one of the grounds such as age, gender and race then unfairness is presumed and the onus is on the employer to prove the fairness thereof. If based on an arbitrary ground (i.e. not falling under the grounds listed in section 6 (1)) then the employee would have to prove the unfairness amongst other requirements. The amendment is now giving effect to the test for establishing discrimination, set by the Constitutional Court in *Harksen v Lane.*[207]

3 5 Section 20: Employment Equity Plan

The current section 20 of the EEA states that an employer must prepare and implement an Employment Equity Plan designed to achieve reasonable progress towards employment equity in that employer's workforce. Furthermore, designated employers must submit reports to the Department of Labour.[208]

[205] Memorandum of the Objects of the Employment Equity Amendment Bill, 2012.
[206] Section 6 of the Employment Equity Act 55 of 1998.
[207] *Harksen v Lane* (1997) *BLLR* 1489 (CC).
[208] Basson *Essential Labour Law* 221.

In terms of the amendment, it is no longer sufficient to comply with reporting requirements; employers are compelled to prepare or implement an Employment Equity Plan or pay a fine.[209] This amendment is therefore aimed at ensuring compliance with the provisions and also to give full effect to it.

3 6 **Section 57: Temporary employment services**

This amendment reads as follows:[210]

> ''(1) For purposes of Chapter III of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is deemed to be the employee of that client, where that person's employment with the client is of indefinite duration or for a period of six months or longer.''

This aligns with the LRA, as employees employed on fixed-term contracts are regarded employees of the employer for the purposes of affirmative action after three months instead of the previous six. [211] The corresponding provision in the LRA deems those employees permanent employees. This allows the employee to lodge a dispute against the client should the client commit an act of discrimination.

[209] Grogan 2011 *Employment Law* 20.
[210] GG 35799 of 2012-10-19.
[211] Memorandum of the Objects of the Employment Equity Amendment Bill, 2012.

Chapter 4: Conclusion

One of the primary objects of Labour legislations is to promote social justice as well as advancing economic development. However, when it came to atypical employees, legislation did not offer these employees much protection. The amendments seek to achieve this by offering atypical employees protection whilst at the same time creating flexibility for employers as a way of balancing these two competing objects.

It can be said that some of the amendments discussed are contradictory and ambiguous. When it comes to applying them, there might be challenges with regards to its interpretation and application.

The Labour Relations Amendment Bill 2012 attempts to structure the purpose and execution of industrial action. As with any proposed amendment, legislators must eradicate ambiguity to ensure successful implementation of the suggested changes.[212] Furthermore, the amendments seek to regulate rather than ban labour brokers, which was the most appropriate legislative action available considering the number of people employed by labour brokers.

The amendments provide fixed-term employees some protection against employers who abuse these contracts. However, this may prove to be problematic because it leaves employers with the decision of either terminating all affected fixed-term contracts or suffering the risk of having to appoint these employees permanently.

The legislation removes the substantive test for large-scale dismissals. This amendment is vital because the procedural and substantive requirements for the test have always been inter-twined, which resulted in the negation of the substantive requirements. The courts, however, interpreted the substantive requirements for section 189A dismissal for years.

[212]Brookshaw, L" Strikes, pre and post the LRA Amendments Bill" 2012 http://www.polity.org.za/article/strikes-pre--and-post--the-lra-amendments-bill-2012-2012-08-13 (accessed 2012-08-13).

Deleting section 189 (19) would entail reverting to the court's original interpretation of the substantive test.

The only major amendment to the Basic Conditions of Employment Act concerns child labour. South Africa is becoming increasingly compliant with international standards set by the ILO, as the amendments not only promote the safety of employed children but also allows for the prosecution of third parties involved in canvassing illegal child labour. Furthermore, the maximum fines prescribed by the Act have tripled, which should assist in ensuring compliance. Employers face a significantly harsher penalty than before and should be less likely to test the law because the imposition of the revised fines may cause the employer serious financial problems.

The amendments to the Employment Equity Act primarily revolved around discrimination in the workplace. However, this could lead to serious debate when the amendments come into effect. Furthermore, the increase in the fines for non-compliance with the Act could have the same effect as those of the BCEA.

Many of these amendments clarify ambiguous provisions, but others create more uncertainty. This may be problematic when it comes to effecting them. To avoid this, it is paramount that arbitrators and employers undergo intensive training in relation to the amendments.

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