

The exposure of senior employees in terms of the Labour Relations Amendment Act 2012

By Johanette Rheeder

In order to protect the interest of business, certain amendments to the Labour Relations Act are envisaged to create more flexibility to labour laws. One of those amendments is aimed at creating flexibility in a business' top structures to enable the business to terminate employment of senior employees in a quick and effective way, without protracted and expensive disputes. Employees in the top structures are often paid what is called a "golden handshake or parachute" after being placed on "garden leave" for extended periods of time, while the employer is trying to negotiate an exit package. Disciplinary hearings and arbitrations are often embarrassing or damaging to reputation and difficult to deal with as there are few more senior employees or directors available to chair the hearing and the long line of witnesses are senior employees who should be running the business, not testifying in hearings!

To provide some flexibility, the Amendment Act now boasts a new section 188B, dealing with the dismissal of employees earning, as at the date of dismissal, more than an amount determined by the Minister in accordance with subsection (4) of the Act.

The section determines that the dismissal of an employee who earns above this threshold, unless it is automatically unfair as contemplated in section 187(1) (a) to (f) or (h), is deemed to be substantively and procedurally fair, if the employer gives the employee a written notice that complies with certain conditions, alternatively if the employer pays the employee in lieu of that notice on or before the date of dismissal.

This notice must comply with some requirements. The minimum period of the notice must be three months or any longer period specified in the employee's contract of employment. The notice must also be in writing and the dismissal may not be one for an automatic unfair reason.

The notice period of existing employment contracts of employees earning above this threshold, will have to be amended and new notice periods negotiated, should the employer wish to make use of this section. This will create an opportunity for current and future employees covered by this section, to negotiate their notice periods in lieu of protection against unfair dismissals.

The Minister must, from time to time and in consultation with NEDLAC, determine the threshold applicable in this section. In making that determination the Minister must take into account certain specific factors. They are the extent to which employees, by reason of their earnings level and level of skill or position, have sufficient bargaining power to ensure that adequate provision may be made in their contracts of employment, for protection against unfair dismissal.

Contracts of employment concluded before the commencement date of this section will only be covered by this section, if the dismissal takes place two years after the commencement date of this section and if the notice period complies with the requirements of the section.

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