

EXPECTATIONS OF STATUTORY NECS IN LINE WITH LABOUR ACT NO. 11/23

9TH ANNUAL GENERAL SYMPOSIUM FOR NECS & THE MINISTRY OF PUBLIC SERVICE, LABOUR & SOCIAL WELFARE

ELEPHANT HILLS RESORT, VICTORIA FALLS

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PRELUDE

- The Labour Amendment Act, No 11 of 2023 became law on 14 July 2023.
- A lot of issues arose in the new law and there were a lot of uncertainties.
- Most issues are now being tested in our courts and may take upto year end to have pronouncements made
- The major talking point is the amendment to Section 56 of the Labour Act.
- Presentation will track that issue and other ancillary issues affecting NECs.

STRUCTURE OF PRESENTATION

- Retrenchment -
- Disciplinary proceedings – appeal in terms of proviso to Section 101(5)
- Section 56
- Section 63A (Labour amendment Act No 5 of 2015)
- Legal issues dogging the courts right now.

RETRENCHMENT PROCEDURE – S12C

- As this is an issue which somehow gets to the NEC (especially the Exemption Committees), understand:
 - a. difference between a minimum retrenchment package and an agreed retrenchment package (no definition of minimum retrenchment package though – drafting error)
 - b. 14-day notice period
 - c. Effective date of retrenchment –
 - d. Time within which to pay –
 - e. Role of the Retrenchment Board – notification- certificate (notification & non compliance)
 - f. Consequences of default in paying retrenchment package

Exemption Applications ss9-12

- Where employer alleges incapacity
- Apply in writing to the NEC [or RB] for exemption
- Employer to provide necessary albeit plausible evidence of financial incapacity
- Employer to serve employees with the application
- EC [or RB] consider exemption application within 30 days of the application
- EC [or RB] to conduct a hearing
- Determination appealable to LC within 21 days of its pronouncement
- Failure to decide application within 30 days, aggrieved party appeals to LC within 21 days from expiry of 30 day period – avoid this!

ENHANCED RETRENCHMENT PACKAGE

Enhanced Retrenchment Package ss 13-14

- Within 60 days of issuance of notification certificate (*ito* ss5), employees can petition RB (or, by extension NEC – ss 14) alleging employer's capacity to pay enhanced retrenchment package.
- Employees to give '*particulars of any proof*' of capacity to pay. Note – particulars. Not actual proof???
- NEC [or RB] to receive representations from employer in the form of an affidavit and attaching audited financial statements.
- Determination to be made within 30 days of receipt of application. Determination appealable to LC within 21 days and so is the failure to decide application within 30 days
- Failure to comply with NEC or RB decision which is extant is criminal contempt of court (punishable by a level 6 fine or imprisonment for 1 year or both)

Piercing the Corporate veil – Fraud, recklessness or negligence in not paying package – s12CC

- Rationale in Bill – to ensure employees do not evade having to pay retrenchment packages by fraudulent or reckless conduct of their business in a manner that render the employer unable to pay the package.
- Employer who alleges financial incapacity in s12C(9) proceedings will be asked by RB or NEC to respond to allegations in affidavit form if it emerges that it;
 - (a) deliberately stripped or downgraded assets in contemplation of retrenchment
 - (b) carried on business recklessly, fraudulently or negligently (gross)

Continued – s / 2CC

- RB or NEC to issue provisional order after hearing parties
- Order subject to discharge or confirmation by the LC.
- Order to be registered at MC or HC just like all LC orders.
- LC can issue a general declaration confirming provisional order and/or a specific declaration imputing liability on the specific owner or director of the employer who is liable including anyone who was a knowing party to the carrying on of the business. – *food for thought -*

STATUTORY EMPLOYMENT COUNCILS – S56

- All NECs, voluntary or otherwise, now governed by the LA.
- Seats allocation or votes subject to annual review – ss6
- Inadequate membership for a union/association to get a seat, it may discretionally be admitted as an observer – ss9 [con - ss5]
- Dispute as to allocation of seats dealt with by registrar upon referral
- Aggrieved party with registrar's decision to appeal to the LC

ADMISSION OF MEMBERS TO NECS – S58

- Constitution of an NEC to provide for the admission of new parties in accordance with the new s56
- Parity of votes in NECs specified – through proportional representation
- Employers - based on number of members of each employer member/employers' association has.
- Employees - based on number of members of each employee member/trade union.
- Insufficient membership to qualify for a vote, constitution must provide for allocation of a fraction of a vote— ss5

DESIGNATED AGENTS' JURISDICTION – S63

- No longer exclusive jurisdiction for DA. LO can get involved even where an NEC with a DA exists.
- If matter is not decided during the first 30 days '*after the date when the dispute or unfair labour practice arose*' labour officer may assume jurisdiction provided proceedings to determine that dispute '*have not earlier commenced*' before a DA.
- Registrar now empowered to receive complaints against Das (from any interested party or a LO) for failure or undue delay in exercising statutory mandate or conducting self in an improper manner.
Registrar to conduct inquiry and;
 - (a) Withdraw appointment of DA (failure to exercise mandate)
 - (b) Direct the NEC to allocate the matter to another DA (delay in finalising a dispute), or,
 - (c) Refer the matter to a LO (delay in finalising a dispute)

COLLECTIVE BARGAINING AGREEMENTS – S74

- Paid educational leave now a subject of collective bargaining negotiations(*ILO convention 140 on Paid Educational Leave*).
- Minister now a party to CBA negotiations in respect of state entities – equal footing with the employer – how is

REGISTRATION & AMENDMENT OF CBAS – S79 & S81

- Minister no longer has veto power to register a CBA on the ground that it appears to him/her that its terms are 'unfair or unreasonable'. Parties have wherewithal to determine what is fair or reasonable to them
- Where Minister considers CBA terms to be inconsistent with any law or contrary to public interest (before or after registration), he/she should specify in writing for the attention of the parties to renegotiate in absolute good faith.

BINDING NATURE OF CBAS – S82

- The right to ‘*just, equitable and satisfactory conditions of work*’ espoused in Section 65(4) of the Constitution enjoins the uniform application of all CBAs to all members in a particular sector. As such the collective bargaining process must be free for all
- Every employer or employee is entitled to freely engage in collective bargaining directly or indirectly under s56. *[if not in terms of s56, what does direct engagement entail?]*
- Failure to engage in collective bargaining is not a lawful excuse for failing to abide by a registered CBA freely negotiated in a particular industry.

PROCEEDINGS /TO CODES OF CONDUCT – S101

- LO and, by extension DAs, now have jurisdiction to entertain appeals from decisions made after the conclusion of internal disciplinary hearings (*direct response to Sakarombe v Montana*)
- Appeal made within 30 days of conclusion of proceedings – (*should include appeal processes?*)
- LO to conciliate on a completed matter - – ‘or exercise any other power provided for in that section’ (*which other power*) –s93.

TRANSITIONAL PROVISIONS – NEW SI 28

[CURRENT SI 28 BECOMES SI 29]

- All unregistered draft rulings are automatically deemed to be judgments or rulings of the LO for purposes of execution and could be registered with the appropriate court for enforcement and execution purposes – just like the Certificates of Settlement.
- “Employer” has right of appeal to LC within 30 days ‘*after notice of registration*’
- Quantum of to be based on the currency of the judgment but payable in Zimbabwean dollars at the prevailing official rate – *currency of judgment?*

SECTION 63A – AUDITED FINANCIAL STATEMENTS – ADMINISTRATION OF NECS

- Engagement of registered auditors in terms of the Public Accountants and Auditors Act [cap 27:12] to audit accounts
- Section 20 of the PAA Act, register is open for inspection by anyone.
- Section 26 of the PAA Act, these professional have to have Practicing Certificates.
- Submission of audited financial statements to Registrar
- Within 3 months after the end of financial year or 14 days after the preparation of the audited accounts whichever is later.
- Registrar may seek clarity from NEC or auditors. Failure to respond in 7 days - ground for cancellation of NEC registration or investigation – discretion is with registrar
- Investigation process – recommendation for administration – application to LC to appoint administrator - administration

CONTEMPORARY JUDGMENTS ARISING FROM THE LAA

- Section 128 of the LAA – transitional provisions (**Zimbabwe Women Bureau v Bozho LC/H/311/23**) – does it affect pending matters?
- Section 31 of the LAA – right of appeal to DA or LO ito s101(5) (**Ntini v Rydings College LC/H/80/24**) 28 February 2024
- **Brenda Garudzo & Anor v Zimbabwe State Universities and Allied Workers Union & Ors LC/H/347/23** – matter filed in May 2023 - order on 21 July 2023 lecturers – court said there is no jurisdiction – is it a correct decision?
- Section 56 of the LA – **DGL Investments P/L v Ndlovu & Ors LC LC/MT/70/23** – s56 – repeal of NECs.

THANK YOU ALL

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