BIZCOMMUNITY

Adapting to change and the growing call for DEI

By Johan Botes

18 Jan 2024

Legislation regulating local and international employer-employee relationships, increasing focus on diversity, equity and inclusion (DEI), and a crackdown on employees abusing their rights - these are a few of the employment trends we'll unpack in this article.

Johan Botes, Partner and Head of the Employment & Compensation Practice, Baker McKenzie Johannesburg

Employment considerations for multinationals entering new markets

Two major considerations for international employers deciding whether to enter a market in 2024 will be the practical restrictions imposed by stringent, highly protective labour legislation, and the efficiency and expediency of the country's labour dispute resolution mechanisms. South Africa is considered by some to have a protective labour law regime; its labour laws are not as stringent as those of many other markets but provide greater employee protection than other developing countries.

South Africa's labour laws include various employee protections that provide entitlement to unemployment insurance, employee leave benefits, the national minimum wage, employment tribunal protections, and the right to strike. The country also has a very effective labour dispute resolution landscape that employers and employees can utilise to ensure legal clarity.

Multinational businesses with sound employment practices already in place will find this jurisdiction to be surprisingly welcoming to employers. However, it is important that labour law regimes do not become too rigid by regularly assessing the need for innovative, dynamic policies to encourage economic growth and alleviate inequality.

Beyond the traditional employer-employee model

In the face of rising labour costs and an uncertain global economy, almost all global businesses are subject to stringent requirements relating to increases in employee headcount. Businesses in need of increasing capacity without the ability to hire more staff often consider independent contractors and temporary workers as a (short-term) measure to manage internal restrictions.

In this regard, employee misclassification is a risk faced by businesses in most jurisdictions, where courts and tribunals will consider the true nature of a work arrangement to determine whether an independent contractor is indeed a party to a purely commercial arrangement or is a disguised employee entitled to protection under the employment laws.

Several countries, including South Africa, have already implemented protective laws that govern aspects of temporary workers' employment relationships to provide greater protection against potentially abusive practices, and further similar developments are expected in other countries in the next few years.

Clamping down on abuse of sick leave

In two recent decisions, South Africa's courts have shown no tolerance for sick leave abuse. In both the 2021 Labour Appeal Court judgment (*Woolworths v CCMA and others [2021]*) and the 2023 Labour Court decision (*SARS v CCMA & Others*), the courts reviewed and set aside arbitration awards handed down by the employment tribunal where the tribunal wrongly concluded that the employees ought not to have been dismissed.

The message from the courts is clear: dishonest conduct destroys the relationship of trust between employer and employee. Where employees advise employers that they are not fit enough to come to work but then partake in other activities that belie their inability to report for duty, such conduct is dishonest and warrants dismissal from service.

Employees often seem to labour under the misapprehension that the employer merely must accept their absence due to their stated illness and that it is almost impossible for the employer to show that they were not, in fact, ill. This perception is clearly wrong and is likely to cost mistaken employees their jobs in 2024.

Diversity, equity and inclusion – essential for business

Businesses around the world are increasingly investing in the resources needed to take action on diversity, equity, inclusion, and belonging, both in the workplace and in the ownership of business assets. Equal representation and a focus on real diversity and inclusion have become essential for the implementation of sustainable business practices.

In South Africa, a significant legal step towards addressing equality came in the form of the Employment Equity Amendment Act 2020 (EEA Act), signed into law in April 2023. The amendments include numerous changes to the legislation governing workplace transformation and will impose stricter compliance measures on designated employers – those businesses with more than 50 employees.

A significant change in the EEA Act was the introduction of sector and sub-sector targets for economic sectors and geographical regions, requiring employers in these sectors to meet specific transformation goals. This is a departure from the previous approach that allowed employers to set their own targets in their employment equity plans.

However, the Minister of Employment and Labour recently announced that the EEA Act would be further amended and submitted for further public comment, with these amendments expected in 2024.

Redundancies in challenging times

While some sectors contributed to a small rise in employment in South Africa in 2023 (the financial, retail, motoring, and hospitality sectors added employees), other sectors, including mining and manufacturing, announced significant redundancies. Challenges with regard to electricity supply and other economic concerns have led many South African employers to actively seek mechanisms to manage costs, consolidate employee headcount, and align their businesses with changes in customer demand and behaviour.

Companies are managing challenging conditions by closing offices or branches, enforcing hiring freezes and effecting staff reductions, while also exploring various staffing solutions. Redundancies can be effected with limited risk and impact, provided the broader approach resonates with staff and they feel that local aspects have been considered.

In South Africa, aspects such as the impact of redundancies on workplace transformation remain germane and contribute to the slow pace of improving ethnicity and gender representation in the country. Selecting staff to be made redundant or retained is arguably the most critical business consideration during any reduction process. This is a forward-looking exercise, with rearward-looking criteria to be used with caution.

Despite recent gains, South Africa's high unemployment rate also means the need to keep people in active employment is important, not only for employees but also for employers. Employers can avoid the economic and personal costs of retrenchment by securing reasonable alternative employment for in-scope staff.

A detailed evaluation of the business requirement to reduce headcount, proper consideration of the future structure and how to populate it, and a humane and sensible approach to agreed exits will allow global, multinational and local companies to manage this process with the lowest possible impact in 2024.

Flexibility for new parents

Balancing work and family life is set to become easier for growing families in South Africa in 2024 after a ground-breaking paternity leave judgment in the South Gauteng High Court declared certain provisions of the Basic Conditions of Employment Act (BCEA) unconstitutional.

In *Van Wyk and others v Minister of Employment and Labour*, certain sections of the BCEA relating to parental leave, together with the corresponding sections of the Unemployment Insurance Fund Act (2001), were found to be discriminatory in terms of sections 9 and 10 of the Constitution. The High Court judgment found that the BCEA provisions were discriminatory against South African workers who had become new parents either through birth, surrogacy, or the adoption of a child under two years.

Following the judgment, the government has been given two years to remedy these provisions in the BCEA. The court also stipulated that interim provisions would be implemented until such time as the BCEA had been amended. These interim provisions will allow new parents more flexibility in how they take statutory parental leave.

Under the proposed changes, both new parents will be able to choose which of them takes the statutory four-month parental leave period currently only available to new birth mothers. Parents may also freely allocate the four-month period between them. Here's to more family time in 2024!

ABOUT JOHAN BOTES

Johan Botes is Head of the Employment Practice for Baker McKenzie in Johannesburg. He has a Master's Degree in Labour Law, and regularly appears in the CCMA, Bargaining Councils, Labour Court and High Court. Contact Johan: Tel: +27 (0) 11 911 4400, mobile: +27 (0) 82 418 0157, switchboard: +27 (0) 11 911 4300, fax: +27 (0) 11 784 2855 Johan.Botes@bakermckenzie.com

- Ruling clarifies discrimination due to criminal history in the employment process - 14 May 2024
- #BizTrends2024: Adapting to change and the growing call for DEI - 18 Jan 2024
- Claiming constructive dismissal - take advice from your wingman - 21 Sep 2023
- Too sick to work, but well enough to march? Not so fast... - 26 Jul 2023
- #BizTrends2023: Quitting quiet quitting - balancing the needs of employers and employees - 23 Jan 2023