



The Labour Relations Amendment Bill of 2010

SASLAW Workshop 25 January 2011

Section 65(1)(c): Right to strike

- “No person may take part in a strike or a lock-out [if] –
- the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law.”

Section 157(1): Labour Court jurisdiction

- The Labour Court is to have **exclusive jurisdiction** over 8 categories of matters, including –
 - (a) matters required to be determined by the Labour Court in terms of the LRA or any other employment law
 - (b) interpretation or application of any employment law;
 - (c) disputes concerning termination of a contract of employment;
 - (d) constitutional matters arising from employment or labour relations;
 - (e) any other matter arising from employment or labour relations.

Section 157(2): Labour Court jurisdiction

- “If the CCMA or a bargaining council has **exclusive jurisdiction** in a particular matter, no party may refer such matter to the Labour Court before finalisation by the CCMA or a bargaining council.”

- [Note: the Labour Court is to have exclusive jurisdiction over –
 - interpretation or application of any employment law;
 - disputes concerning termination of a contract of employment;
 - any other matter arising from employment or labour relations.]

Section 158: Labour Court powers

- New section 158(1B):

“No decision may be taken on review in respect of conciliation or arbitration proceedings under the auspices of the Commission or any bargaining council with jurisdiction in respect of a matter contemplated in section 65(1)(c)* until the dispute has been determined by the Commission or a bargaining council.”

- * I.e., where the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court.

Section 186(1)(b): Dismissal

- “Dismissal” means that—
- an employee engaged under a fixed term contract of employment reasonably expected the employer
- (i) 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; or
- (ii) to offer the employee an indefinite contract of employment on the same or similar terms but the employer offered it on less favourable terms, or did not offer it, where there was reasonable expectation [sic]

Section 186(2): Unfair labour practice

- 'Unfair labour practice' means any unfair act or omission that arises between an employer and client company in sub-contracting cases and an employee involving ...

Section 197: Business transfers

- Definition of transfer:

“transfer” means the transfer of a business **from** one employer ("the old employer") to another employer ("the new employer") as a going concern.

Section 200B: Temporary contracts

- An employee must be employed permanently, unless the employer can establish a justification for employment on a fixed term.
- [= a prohibition of fixed-term contracts unless the employer *believes* it is justified?]

Section 200C: Sub-contracting

- An employee must have recourse against the employer and its client company where there is unfair labour practice [*sic*].

Section 213: definitions

- “Contract of employment”:
 - (a) a common law contract of employment; or
 - (b) any other agreement or arrangement under which a person agrees to work for an employer but excluding a contract for work as an independent contractor

Section 213: definitions

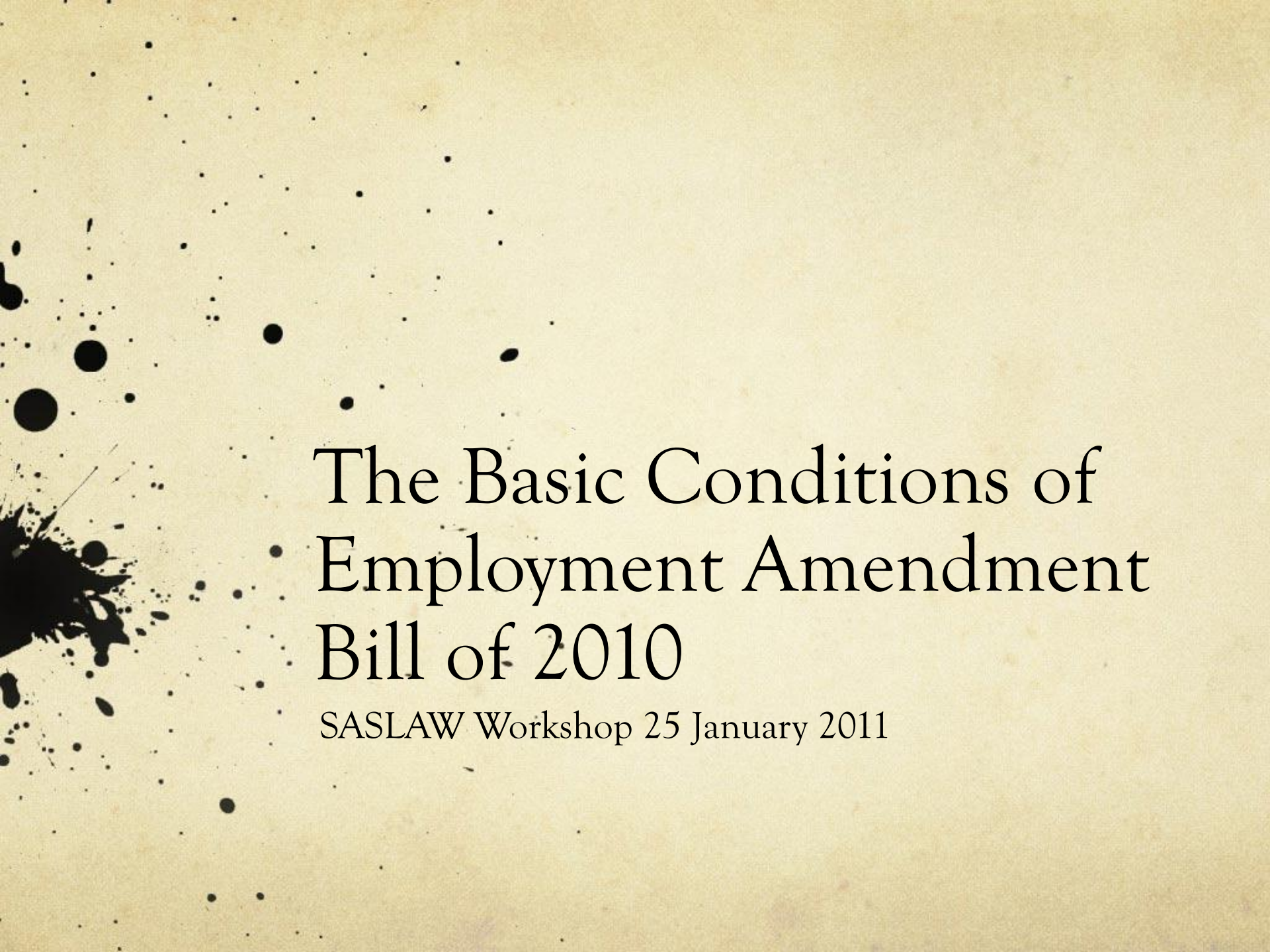
- “Employer”:
- “any person, institution, organisation, or organ of state who employs or provides work to an employee or any other person and directly supervises, remunerates or tacitly or expressly undertakes to remunerate or reward such employee [*sic*] for services rendered

Section 213: definitions

- “Employee”:
- “any person employed by or working for an employer, who receives or is entitled to receive any remuneration, reward or benefit **and** works under the direction or supervision of **an** employer”

Section 213: definitions

- “Independent contractor”:
- “a person who works for or supplies services to a client or customer as part of the person’s business, undertaking or professional practice”



The Basic Conditions of Employment Amendment Bill of 2010

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Section 32: payment of remuneration

- “(5) Employers must contribute benefits of similar or equal value to employees employed on a fixed term contract as the benefits afforded to permanent employees.” [sic]

Section 33A: Prohibited conduct

- “An employer must not -
 - (a) require or accept any payment by or on behalf of an employee or prospective employee;
 - (b) require an employee or prospective employee to purchase any goods from the employer, any business or person nominated by the employer; or
 - (c) accept or seek benefit of any kind;
- in respect of the employment of, or the allocation of work to, an employee or prospective employee.”

Sections 43 - 47: child labour

- The prohibition on “employing” a child under 15 is replaced by a prohibition on “requiring or permitting a child [under 15] to work as an employee or independent contractor”.
- The prohibition on “employing” a child in inappropriate or detrimental “employment” is replaced by a prohibition on “requiring or permitting a child to perform any work or provide services” that are inappropriate or detrimental.
- It is an offence to “require or permit a child to work”, not only to “employ” a child, in contravention of the above.
- In general, “employment” is replaced with “work”.

Section 55: sectoral determinations

Section 55(4) is to provide that a sectoral determination may

- “(b) provide for the adjustment of remuneration by way of –
 - (i) minimum rates; or
 - (ii) minimum increases of remuneration”;
- “(g) prohibit or regulate task-based work, piecework, homework, the placement of employees by temporary employment services, sub-contracting and contract work”; and
- (o) set a threshold of representativeness for a trade union to have organisational rights in terms of sections 12 and 13 of the LRA in respect of all workplaces covered by the sectoral determination.

Section 55: sectoral determinations

- Section 55(7) is to provide that a sectoral determination may be published covering employees and employers who are bound by a bargaining council agreement in respect of any matter not dealt with in that agreement.

Sections 64-73: labour inspectors

- Section 64(1)(d): the power of labour inspectors to secure undertakings to comply and issuing compliance orders is abolished.
- Section 65(5): “An interpreter, a member of the SAPS or any other assistant may, when required by a labour inspector, accompany the labour inspector when he or she performs his or her functions under this Act or any employment law.”
- Sections 68-73 are repealed (i.e., the previous enforcement procedure, from requiring an undertaking to comply and issuing a compliance order to having it made an order of court).

Sections 74: consolidation of claims

- Section 74(2) places certain restrictions on claims for payments owing in terms of the BCEA that could be included in an unfair dismissal action in terms of the LRA
(e.g.: the amount must not have been owing for longer than one year prior to the dismissal).
- These restrictions are to be abolished.
- Section 74(2) is to read: “If an employee institutes proceedings for unfair dismissal, the Labour Court or the arbitrator ... may also determine any claim for an amount that is owing to that employee in terms of this Act if the claim has not prescribed.”

Section 77: Labour Court jurisdiction

- (1) Subject to the Constitution, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act.
- (3) The Labour Court has exclusive jurisdiction to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

Section 93: Penalties

- Maximum terms of imprisonment are replaced with minimum terms of imprisonment [which is contradicted by s 93(2)]
- Minimum fines of R10 000 are added to minimum terms of imprisonment
- Failure to comply with minimum conditions of employment relating to working time, leave and payment of remuneration, or failing to cooperate with a labour inspector (?), is punishable by a minimum (?) sentence of 12 months' imprisonment
- Sentences for contravention of child labour provisions go up from a maximum of 3 years to a **minimum (?) of 6 years**



The Employment Equity Amendment Bill of 2010

SASLAW Workshop 25 January 2011

Section 1: new definition

- " 'designated groups' means black people, women and people with disabilities who
- (a) are citizens of the Republic of South Africa by birth or descent; or
- (b) became citizens of the Republic of South Africa by naturalisation –
 - (i) before 27 April 1994; or
 - (ii) after 26 April 1994 who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded by Apartheid policies based on race;"

Section 6: new sub-sections

- “(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 is a form of unfair discrimination and is prohibited on any one, or more grounds of unfair discrimination listed in subsection (1).
- “(5) The Minister may, after consultation with the Commission, issue a code of good practice setting out the criteria and the methodology for assessing work of equal value in terms of subsection (4).”

Section 10: referral to CCMA

- "(a) any party to the dispute may refer the dispute to the Labour Court for adjudication; or
- (b) an employee earning less than the amount prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act may refer the dispute to the CCMA for arbitration."

Section 11: Burden of proof (1)

- (1) If the employee makes out a prima facie case of unfair discrimination, the respondent must prove that –
 - (a) the discrimination did not take place as alleged; or
 - (b) the conduct is not based on one or more of the prohibited grounds listed in section 6(1).

Section 11: Burden of proof (2)

- (2) Discrimination is unfair, **unless the respondent proves that the discrimination is fair**, if the discrimination did take place –
 - (a) on a prohibited ground listed in section 6(1);
 - (b) on a ground not listed in section 6(1), and the discrimination-
 - (i) causes or perpetuates systematic disadvantage in the workplace; (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's right and freedom in a manner that is comparable to discrimination on a ground listed in section 6(1).

Section 11: Burden of proof (3)

- (3) For the purposes of this section, a respondent includes an employer of the employee or any other person contemplated in section 6(1).
- [Section 6(1) states that “**No person** may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race..”, etc.]

Section 20: new sub-section

- “(7) The Director-General may apply to the Labour Court to impose a fine contemplated in Schedule 1 of the Act if a designated employer fails to prepare and implement an employment equity plan in accordance with the provisions of this Act.”

Schedule 1

<i>Previous Contravention</i>	<i>Contravention of any Provision of Sections 16, 19, 20, 21, 22, 23 and <u>27</u></i>
No previous contravention	<u>2% of turnover</u>
A previous contravention in respect of the same provision	<u>4% of turnover</u>
A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years	<u>6% of turnover</u>
Three previous contraventions in respect of the same provision within three years	<u>8% of turnover</u>
Four previous contraventions in respect of the same provisions within three years	<u>10% of turnover</u>

Section 21: reporting

- Abolishes distinctions between designated employers with fewer or more than 150 employees for reporting purposes;
- New subsection 5A requires designated employers to notify the Director-General of any inability to submit a report on time;
- New subsection 5B enables Director-General to apply to Labour Court to impose a fine on an employer who fails to report as required in the absence of valid reasons for not doing so.

Section 27(2)

- “Where disproportionate income differentials or unfair discrimination in terms and conditions of employment as contemplated by section 6(4) are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to guidance as may be given by the Minister as contemplated in subsection (4).”

Sections 36 and 37

- Section 36 (undertakings to comply) is repealed;
- Section 37(1) provides for **compliance orders** to be issued for non-compliance with sections 16, 19, 22, 24, 25, 26 and 20 (employment equity plans);
- Section 37(2) (prescribing content of compliance order) is repealed;
- Section 37(4) requires employer to comply within time period stipulated by labour inspector and inform the inspector within 30 days thereafter of compliance or reasons for non-compliance.

Sections 39 and 40

- Both sections, providing for objections and appeals against compliance orders, are repealed.
- Employers are left with general recourse to review in terms of amended section 50(1)(h), which gives Labour Court the power of “reviewing an administrative action in terms of this Act”.

Section 42: Assessment of compliance

- Instead of detailed list of factors to be considered, the test is now essentially limited to two criteria:
- Equitable representation of persons from designated groups in the workforce in relation to
 - (a) “demographic profile of the economically active population”, and
 - (b) number of vacancies and labour turnover; and
- “Reasonable steps” taken and progress made by the employer towards achieving equitable representation.

Section 45: D-G's powers to enforce

- (1) If an employer fails to comply with a request or recommendation by the Director-General in terms of sections 43 or 44 (b), the Director-General may apply to the Labour Court for an order directing the employer to comply or, if the employer fails to justify its failure to comply, to impose a fine.
- “(2) Any challenge to the validity of the Director General’s request or recommendation may only be made in the proceedings contemplated in sub-section (1).”