COSATU SUBMISSION ON THE EMPLOYMENT EQUITY AMENDMENT BILL AND THE EMPLOYMENT SERVICES BILL

COSATU

PRESENTED TO THE PORTFOLIO COMMITTEE ON LABOUR

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INTRODUCTION

COSATU welcomes the opportunity to make a submission on the Employment Equity Amendment Bill and the Employment Services Bill. This submission follows extensive engagement at NEDLAC (National Economic and Development Labour Council) that was completed in mid-2012, and in respect of which extensive consensus was reached amongst all NEDLAC constituencies on the bulk of the provisions, with a few exceptions. The Bills before the Portfolio Committee on Labour reflect the consensus reached at NEDLAC, and in the main have COSATU's support. Accordingly our comments here are not comprehensive, also noting that some of the Bills' provisions focus on addressing narrow technical objectives as opposed to policy matters.

A. THE EMPLOYMENT EQUITY AMENDMENT BILL

1. COMMENTS ON SPECIFIC SECTIONS

1.1. Definitions

Section 1 of the Employment Equity Amendment (EEA Bill) amends specific definitions found under the Employment Equity Act.

Designated Employers

In particular we note with support that subsection 1(a) expands the definition of a "designated employer" by deleting the current exclusion of "local spheres of government". This would mean that in future local municipalities would have to apply affirmative action provisions under Chapter 3, entailing amongst other things implementing employment equity plans and submitting employment equity reports to

the Director General. In our view the current exclusion of local government has never made sense considering especially the scope of employment that this affects. Furthermore municipalities provide employment affecting a wide range of sectors and occupations, reflecting the need for greater transparency and accountability to applying principles of employment equity.

Designated Groups

Furthermore we note and support that the definition of "designated groups" have been qualified and limited to black people, women and people with disabilities who are South African citizens by birth or descent. In the case of naturalised citizens they must have acquired citizenship before 27 April 1994 or were entitled to acquire it prior to this date but were precluded from doing so by apartheid policies. This latter part would be of assistance to descendants of former exiles of apartheid South Africa who would have lost their rights to citizenship.

This would prevent employers from misrepresenting the extent of their compliance and progress in promoting employment equity by using, for example, the employment of black foreign nationals in data reported in employment equity reports. The main objective of the affirmative action chapter in the EEA is to ensure that there is redress for those have been disadvantaged by apartheid policies. If it is applied incorrectly it would subvert this objective.

Notwithstanding our support for the above section we wish to register that COSATU maintains its historical stance that affirmative action must address in particular the position of black women, who face disadvantages that are qualitatively different and greater than the sum of the disadvantages experienced by women generally and black people generally. White women, in particular, have managed to leverage benefits from affirmative action that considerably outweigh the disadvantages that they suffered historically. It is of particular concern that employers have continued to use white women to reflect notional compliance with the EEA whilst at the same time avoiding meaningful compliance.

1.2. Prohibition of Unfair Discrimination

Section 3 amends section 6 of the EEA by, firstly by prohibiting unfair discrimination in an "arbitrary ground", and secondly by recognising as "unfair discrimination" where there is a difference in employment terms and conditions amongst employees who are doing the same or substantially same work or work of equal value.

It has always been difficult for employees to seek redress where discrimination is based on an "arbitrary ground" that is not currently listed in the EEA, even where the discrimination has been clearly unfair. This would now provide the Labour Courts with a mechanism to address such complaints, and we therefore strongly support this clause.

Similarly we strongly support the inclusion of the provisions that would prohibit unfair discrimination for work of equal value. This would assist in addressing in unfair discrimination in wages and other employment conditions, and is in line with recommendations made by the International Labour Organisation (ILO). Furthermore in line with these sentiments we support complementary amendments to section 27 of the EEA requiring that measures be taken to progressively reduce income differentials on the basis of work for equal value.

We note and support the provision under the new section 6(5) that authorises the Minister of Labour to prescribe criteria and methodology for assessing work of equal value. In our view this would assist in providing clarity with regards to the implementation of this section.

1.3. Disputes Concerning Unfair Discrimination

Currently a dispute relating to unfair discrimination may be referred to the CCMA for conciliation only, and if it remains unresolved it may then be referred to the Labour Court.

Section 5 amends section 10 of the EEA and thereby extends the jurisdiction of the CCMA to arbitrate disputes relating to unfair discrimination. An employee earning below the income threshold prescribed under section 6(3) of the Basic Conditions of Employment Act (BCEA) may refer an unfair discrimination dispute to the CCMA for arbitration. This extends further to employees earning above the BCEA threshold, if both parties agree or it involves an allegation of sexual harassment.

As the current dispensation of limiting recourse to the labour court is more costly and time consuming than the CCMA, it acts as a major disincentive to workers to pursue unfair discrimination disputes. Accordingly, we support the amendments proposed in this respect.

1.4. Burden of Proof

Section 6 amends section 11 of the EEA in relation to the provisions on the "burden of proof". In relation to the "unfair discrimination" on a "listed" ground, once alleged the employer must prove on a balance of probabilities that either the discrimination "did take place" or that it was "rational and not unfair". Whereas under the current provision an employer has only the option of proving that the discrimination was fair. We are support of this provision, which believe is primarily technical in nature since it will now be aligned with comparable provisions in the Promotion of Equality and Protection Against Unfair Discrimination Act 4 of 2000.

In terms of a new subsection 6(2), where unfair discrimination is alleged on an arbitrary ground the complainant must prove on a balance of probabilities that the conduct complained of is "not rational; ....amounts to discrimination; and ....is unfair". This provides clarity as to the nature of the evidentiary burden in respect of cases involving unfair discrimination on arbitrary grounds. We will monitor the application of this provision to ensure that in its implementation it does not result in watering down of the underlying objectives of the amendments targeting unfair discrimination in arbitrary grounds.

1.5. Failure to Prepare or Implement an Employment Equity Plan

Section 20 of the EEA currently outlines the requirements that designated employers must comply when preparing and implementing an employment equity plan. Notwithstanding this employers often do not comply with the requirements, with many not even bothering to prepare employment equity plans or implement them if they have been prepared. It is also rare for trade unions to be and employees to be consulted meaningfully or at all despite sections 16 -18 setting out detailed requirements to do so. Up until now there has been no recourse for workers or trade unions.

Accordingly we support section 10 of the Bill, which inserts a new section 20(7) that authorises the Director-General to apply to the Labour Court to impose a fine should a designated employer fail to "prepare or implement an employment equity plan in terms of this section". This we believe would be valuable against recalcitrant employers

1.6. Employment Equity Reports

Section 20 of the EEA sets out the obligations that designated employers must follow when submitting employment equity reports to the Director-General. Currently there is a distinction between employers that employ fewer than 150 workers and those that employ more in relation to how often they must report, with the former only being required to report every two years and the latter on an annual basis. Section 11(a) of the Bill removes this distinction and in future all designated employers will be required to submit reports on annual basis.

Furthermore under a new subsection 21(4A) an employer that is not able to submit a report on time must notify the Director-General in writing giving reasons for not being able to comply. Under a subsection 21(4B) the Director-General may apply to the Labour Court to impose a fine if an employer "fails to submit a report; fails to notify and give reasons" for not being able to submit; or the "reasons are false or invalid.

We are generally in support of these new provisions as they will assist promoting increased compliance and affords the Department of Labour appropriate enforcement mechanisms.

1.7. Streamlining of Compliance and Enforcement Mechanisms under Chapter Three

Considering the difficulties and blockages experienced in addressing compliance and enforcement, various sections in the EEA have been amended to streamline procedures and increase the stringency of the Act. For example, in terms of the current provisions where a designated employer has failed to comply with any of the obligations under Chapter 3, the labour inspector, as a necessary first step, "must" request and obtain a written undertaking to comply in terms of section 36. A new amendment under section 13 of the Bill now makes this a discretionary step, thereby allowing the labour inspectorate the discretion to proceed directly to issuing a compliance order. A new section 36(2) provides that where a written undertaking is made by a designated employer who nevertheless still fails to comply, the Director-General may apply make the undertaking an order of court.

Sections 30 and 40 of the EEA, respectively dealing with objections against compliance orders and appeals from compliance order, have been repealed as they added unnecessary steps that hindered the ability of the Department of Labour to enforce the EEA. Nevertheless an employer retains the right to challenge the a compliance order in terms of amendments to section 37 (6), which provides that if a designated employer fails to comply with the compliance order the Director-General may apply to the Labour Court to make it an order of the Court. It is during this stage of the process that the employer will have the option to challenge the compliance order.

Furthermore there are extensive amendments to section45 of the EEA in terms of section 17 of the Bill. These amendments are intended to complement the powers of

the Director-General to conduct reviews of employers' compliance in terms of section 43 and to make recommendations to an employer in terms of section 44(b). The current section 45 merely provides that the Director-General may refer to the Labour Court an employer's non-compliance in terms of the aforementioned sections.

Whereas the amendments now provide that the Director-General may apply to the Labour Court either to direct the employer to comply or to impose a fine if the employer fails to justify non-compliance.

On the whole we support the above amendments as necessary taking into account experience gained in the 15 years that the EEA has been in operation. In the absence of more stringent measures it s doubtful that we would make meaningful progress in promoting employment equity.

1.8. Assessment of Compliance

Section 42 outlines the provisions that the Director-General must consider when assessing whether a designated employer is implementing employment equity in accordance with the EEA.

Quite controversially an initial draft of the Bill published in 2010 deleted the words "national and regional" from section 42(1)(a)(i), which required the Director-General to consider the "demographic profile of the national and regional economically active population", when determining whether designated groups were equitably represented in the workforce. This raised fears that "regional" elements would be discarded in favour of an exclusive emphasis on the national demographic profile. Underlying this concern was that workplaces in provinces with a vastly different regional profile from that reflected nationally would be considered non-compliant and that insufficient emphasis would be placed on historic factors affecting geographic settlement patterns. However, as a result of the NEDLAC discussions both the "national and regional" emphasis has been retained.

Instead the emphasis of amendments in this section are focused on tightening up enforcement with explicit emphasis on introducing positive obligations for designated employers such as "reasonable steps taken ....to train; ....appoint and promote suitably qualified people from designated groups". This we believe is an improvement over the vague obligations currently in the EEA that have proven difficult to enforce.

In terms of a new subsection 42(2) the Minister may issue a regulation to guide the determination of whether or not a designated employer is compliant, after consulting NEDLAC. We are of the view that the requirement to consult NEDLAC is an important safeguard against possible unintended consequences that may be introduced or which would raise fears regarding displacement of an emphasis on the regional demographic profile under section 42(1). Further regulations issued in terms of this section are subject to the requirement that they not limit the emphasis of subsection 42(1)(a) on both the national and regional demographic profile.

1.9. Temporary Employment Services

1.10. Fines

Schedule 1 of the EEA sets out the maximum fine that may be imposed for contraventions. Apart from the fact that the amounts imposed have not been adjusted since the Act was brought into operation, it was also imperative to review the approach adopted in the original EEA with the emphasis being on increasing compliance. Currently there are four categories of fines, ranging from R500 000 for a first contravention to R900 000 where there has been four previous contraventions of the same provision for three years. Apart from the fines being too lenient and not ensuring an adequate deterrent effect, the current approach fails to distinguish between contraventions on the basis of severity.

The amendments to Schedule 1 has revised this approach, and distinguishes between contraventions of sections 16, 19, 22, 24, 25, 26 and 43(2) on the one hand from contraventions of sections 20, 21, 23 and 44(b) on the other. In the respect of the former fines have been revised and range from R1 500 000 to R2 700 000 depending on whether it is a first or further offence within a three year period. In respect of the latter the same amounts are imposed provided it is not greater than the relevant percentage of the employer's turnover, ranging from 2 to 10 percent, in which case then the percentage of the turnover will be used to determine the amount of the fine.

We fully support the provision for more stringent fines that would act as a deterrent against non-compliance.

B. THE EMPLOYMENT SERVICES BILL

The Employment Services Bill (ESB) provides for a variety of different employment-related matters. Some of these are mainly to effect technical as opposed to introducing new policy, such as the provisions reinstating the Department of Labour as the lune function department under which Productivity South Africa (PSA) falls. Others are significantly more substantive such as the provision for public employment services.

2. COMMENTS ON SPECIFIC SECTIONS

2.1. Public Employment Services

Section 5 of the ESB requires the Department of Labour to provide a range of public employment services free of charge, which include amongst others matching work seekers with work opportunities and facilitating placements ; registering job vacancies; advising workers on access to education and training. We note further that section 10 permits the Minister to make regulations requiring employers to notify it of any vacancy as well as when a work seeker is appointed after being referred by the Department. Section 11 provide for the development of employment information system that is aligned with the services referred to under section 5(1).

We believe that this is major advancement considering not only the high rate of structural unemployment, but also how this tends to overlap with historical and continue factors of disadvantage. Many of the unemployed lack access to information about employment vacancies, in respect of which the proposed public employment services can play an important intermediary role.

2.2. Promotion of Employment of Youth and other Vulnerable Work Seekers

Section 6 authorises the Minister to establish work schemes for facilitating entry of youth and other vulnerable work seekers into employment or the retention thereof.

Measures targetting the unemployed should not inadvertently provide opportunities for exploitation of vulnerability through a multi-tiered labour market. Therefore we note with support that subsection 6(2) provides the employment through such a scheme will be subject minimum terms and conditions, as determined by the Basic Conditions of Employment Act (BCEA) or a collective agreement if there is one present.

Notwithstanding our general support for section 6, we are calling for the amendment of subsection 6(1), which we propose should replace the words "the Board" with "NEDLAC. The current formulation requires that Minister consult with the Employment Services Board when establishing a work scheme. Whereas in our view such schemes relate to matters of social policy, which should more correctly be consulted at NEDLAC.

2.3. Job Retention

Section 7 authorises the Minister to establish schemes to mitigate against retrenchments in Protectecr Employment enterprises that are in economic distress. This allows for a pro-active intervention, which may include such measures as turn-around strategies and re-training.

Here again, we are calling for the amendment of subsection 7(1) to require the Minister consult with NEDLAC, as opposed to the Employment Services Board. IN our view such schemes constitute policy matters of a socio-economic nature.

2.4. Employment of Foreign Nationals

Sections 8 and 9 set out the legal requirements in respect of the employment of "foreign nationals". For the purposes of this Bill a "foreign national" excludes permanent residents who afforded the same status as South African citizens.

The emphasis of subsection 8(2) is to enforce requirements that employers only be allowed to employ foreign national persons who have valid immigration documents that allow them to work in South Africa. Further employers must first "satisfy themsleves" that no South African citizen or permanent resident has the skills to fill a vacancy before recruiting a foreign national person.

In South Africa, as is consistent with global patterns, employers often rely on undocumented labour who are forced to work under inferior working conditions. This contributes to a multi-tiered labour market, which in turn leads to xenophobia with local workers incorrectly targeting immigrant workers as opposed the bosses who perpetrate the exploitation.

Accordingly we are in support of section 8. Further we wish to register specific support for subsection 8(4), which provides that an undocument immigrant worker may still enforce his/her labour rights against an employer. This provision corrects a gap in our law, which failed to recognise immigrant workers' contractual rights to compensation , notwithstanding his/her undocumented status. Section 9 further prohibits an employer from permitting or requiring a foreign national person to perform work that is not in accordance with the work permit.

The approach of sections 8 and 9 correctly make the employer the target for compliance with labour and immigration laws as opposed to vulnerable migrant workers.

2.5. Private Employment Agencies

Sections 13-19 collectively regulate private employment agencies (PES). We note here that PESs are not limited to labour brokers (or "temporary employment services"), but include agencies that provide other employment services such as assisting clients with recruiting employees without entering into a triangular employment relationship. Our in principle and general support here for the above clauses, notwithstanding our continued call for the ban on labour broking specifically, takes into account the need for regulation of private employment agencies more generally.

Section 13 introduces a new requirement for PESs to apply for registration. Together with sections 14, 16 and 17, it sets out further requirements and standards on the maintenance, retention and confidentiality of information.

Section 15 provides PESs may not charge fees for providing employment services unless it involves specific categories of workers or specialised services that have been prescribed. This provision is in line with the article 7 of the International Labour Organisation's(ILO) Private Employment Agencies Convention, 1997 (No. 181), which requires ratifying states to disallow such charges.

Further we note that section 18 provides for the power of the registrar to cancel the registration of a PES for failure to comply with the ESB or its regulations. We believe that this provision is important to counter potential abuses of PESs the rights of work seekers.

2.6. Promotion of Protected Work for Persons with Disabilities

Chapter 6 of the Bill, encompassing sections 42-47 provides for the regulation of "Protected Employment Enterprises", wherein people with disabilities are employed. Under section 42, "service factories" that were previously established in 1948, will be reconstituted as "Protected Employment Services". As such it will operate as a national government component, thereby bringing them closer under the

administration of the Department. Section 43 goes on to provide that such enterprises facilitate protected employment and develop programmes to promote the employability of persons with disabilities.

Historically this sector has poorly regulated despite the vulnerability of the employees affected.

Accordingly we support the overall approach of Chapter 6. Notwithstanding our support we are of the view that over and above "Protected Employment Enterprises", there is a need for more holistic measures that are aimed ultimately at ensuring that workers with disabilities have opportunities to work in the mainstream labour market. Too often "Protected Employment Enterprises" become a dead end option, rather as a transitional measure promoting reintegration into the mainstream labour market. In our view there is a need for further policy measures, in addition to those provided in the ESB, which should be developed in an inclusive manner in consultation with all relevant stakeholders including organisations representing people with disabilities.