THE FREE MARKET FOUNDATION
SUBMISSION IN RESPONSE TO THE LABOUR RELATIONS AMENDMENT BILL [B77 – 2001]

1. INTRODUCTION

This submission by the Free Market Foundation focus on certain provisions of the Bill that will in our view have a significant impact on the free and effective functioning of the labour market in South Africa.

Currently about 80% of all labour law disputes result from the dismissal of employees. Of those disputes, by far the greatest number are dismissals for misconduct and retrenchments. The vast majority of cases in the CCMA and the Labour Court are misconduct dismissal and retrenchment cases respectively. For that reason we pay attention to especially the provisions that affect these aspects most profoundly.

The professed philosophy of protagonists of labour legislation includes the laudable values of sound labour relations, economic growth and fair labour practices. Laws that deal with dismissal are therefore ostensibly designed also to provide a measure of security of employment for employees. The irony is, however, that they mostly achieve the opposite effect in practice, in that the more obstacles the law places in the way of employers who want to dismiss workers, the greater disincentive it creates for employers to employ workers.

2. DISMISSALS BASED ON OPERATIONAL REQUIREMENTS (RETRENCHMENTS) (SECTIONS 47 AND 48)

By far the most important provisions in the Bill, in our view, are those relating to retrenchments.

2.1 CURRENT POSITION

The existing substantive position relating to retrenchments is that an employer may dismiss employees for a *fair reason* based on the *operational requirements* of the employer, provided the *procedure* prescribed by Section 189 of the Act is followed.

That procedure is a prescribed *written notice* setting out certain information, including the reasons for the proposed dismissal, alternatives considered, selection criteria, a proposed severance package and so on. That notice must be followed by *consultations* with the employee about a series of topics, including those required to be set out in the prescribed notice.

2.2 PROPOSED AMENDMENTS

The effect of the proposed amendments is far-reaching, and we wish to draw attention to the following:

- For purposes of the law on this aspect, employers are split into two groups, namely those with more than, and those with fewer than *fifty employees*.

- The amendments relating to employers with *fewer than* 50 employees are in our view *not* fundamental, and largely *preserve the status quo*.

- The same does not apply to companies with *more than 50* employers ("a larger company") where the proposed amendments are truly *incisive*.

- The proposed provision applies whenever a larger company wishes to retrench a prescribed percentage of its workers, according to a *sliding scale* from 10 employees if the employer has 200 employees, to 50 employees if the employer employs 500 or more.

- In that case the Bill *super-imposes* additional duties on the parties over and above the existing notice and consultation obligations.

- The most fundamental change in principle in our view is that now, for the first time employees will enjoy the *right to strike* about dismissals for operational reasons. If they follow prescribed steps, they may not be dismissed for striking. Employers may also *lock out* employees in a retrenchment dispute. Currently all retrenchment disputes are dealt with in the Labour Court or arbitration.

- The parties may *agree* to a *facilitator* being used to assist in resolving the dispute, who appears to be someone similar to present CCMA commissioners.

- The employees must *elect* whether to *strike* or *litigate* over any dispute: both are permitted.

- All strikes and lock-outs must be preceded by the same prescribed formalities currently applying to strikes, save that *14 days* advance notice is to be given of *secondary strikes*.

- During that 14-day period the Commission *must* appoint a facilitator if the employer requests it.

2.3 COMMENT

The first aspect about the proposed amendment that requires attention is the fact that it introduces more legalistic formalities and preconditions into what are otherwise normal commercial activities, namely retrenchment, negotiation and strikes. Such formalities will invite the participation of *lawyers*, and invariably increase the *transaction costs* of retrenchments. The parties have to "jump through hoops" to a greater extent even than presently in a process that is already the greatest single source of litigation in the Labour Court.

The strike threat that the Bill introduces is significant since employees may not be dismissed for engaging in a protected strike. In our view the market will perceive this as yet *another risk* that is imposed on any potential investor in employment. The right to strike places a significant *brake on the flexibility* of the labour market.

Since strikers too, have to comply with formalities, and employers may approach the Labour Court for interdicts if they do not, this proposed amendment will for that reason too, invite the intervention of lawyers. The more incentives that are created for lawyers to step into the breach, the more *legalistic* the interaction between the parties will become. That invariably makes relationships more adversarial.

The right to strike in retrenchment disputes potentially also further *undermines the efficiency* of the labour market. Already employers are discouraged from retrenching workers. That disincentive is now exacerbated by the right to strike. The likely perverse outcome of this is that employers will, in order to avoid the risk of all these costs (formalities, potential litigation, risk of strikes) employ fewer and fewer workers. This will be counterproductive since retrenched workers will have decreasing opportunities for re-employment.

Another notable feature of the formalities prescribed is that the time period before dismissal may occur, is longer (60 days) where a facilitator is used than where no facilitator is used. This creates in our view a disincentive to the use of facilitators. One of the most crucial

concerns in retrenchments is that of time. Under these proposed provisions retrenchments may take months to resolve. Say, in a given case, the prescribed notice is given and a facilitator engaged, then the employer will not be entitled to give notice of dismissal before the 60-day period has expired. When that happens, the employees may engage in protected strike action. Although many retrenchment processes currently carry on for longer than two months, many are completed earlier. By prescribing compulsory time periods, the flexibility of the market for labour is reduced even further. In a competitive global economy employers need to adapt to changing market circumstances quickly, while we fear that this Bill may have the opposite effect.

It may be argued that employees who run the risk of being retrenched, will be foolish to strike, since they will thereby possibly increase their vulnerability for economic reasons. Time will tell whether this argument is correct. What is clear however, is that not all sections of a workforce are equally vulnerable to retrenchments. An employer who proposes retrenching only one section of his workforce will then be exposed to the risk of a strike by the non-vulnerable group of workers. Secondary strikes are expressly permitted and are also not necessarily constrained by the above consideration. These considerations all unnecessarily distort the market-related bargaining powers of the parties.

In summary, the proposals relating to retrenchments will in our view unfortunately increase the adversarialism, inflexibility, costs, and disincentives to investors already present in this area of law, and it will serve little beneficial purpose save to serve entrenched interests. It will contribute to South Africa's current unemployment problem.

3. **PRESUMPTION OF WHO IS AN EMPLOYEE (SECTION 55 OF THE BILL)**

3.1 **PROPOSED AMENDMENT**

This amendment creates a rebuttable presumption that certain persons are *employees*, and therefore subject to the provisions of the Act. The ostensible purpose of the provision is to include in the ambit of the Act persons who conclude agreements as *independent contractors*.

The presumption is far-reaching in that a vast number of workers who previously worked as independent contractors will now be included in the operation of the Act, whereas currently they are not. So for example any person who worked for another person for at least 40 hours per month over the past three months, is included in the presumption. That is patently unfair as 40 hours amount to less than 25% of the working month.

3.2 **COMMENT**

Two examples will illustrate why this provision may have devastating consequences.

In a recent CCMA arbitration decision (*PPWAWU v Afric Mail Enterprising (Pty) Ltd WE 19785)* the employer employed a very large number of workers as independent contractors to package magazines in plastic bags. The workers were paid for every 1000 books packaged. They were free to come and go as they wished and worked under minimal supervision. Because payment was for work delivered rather than time spent, the workers were highly productive. The evidence of the employer was to the effect that, should it be ruled that he workers were "employees" as defined in the Act, it (the employer) would be unable to afford employing the workers, and would be obliged to import highly specialised machinery from overseas to do the same work. If it had to comply with the provision imposed by the Act, it would be more cost-effective to replace those workers with machinery.

Many freelance workers conclude independent contracts with radio and television stations. In another decision (*SABC v McKenzie (1999) 20 ILJ 585 (LAC)*) the Labour Court held that, mainly because the employee *deliberately chose* to opt for an independent contractor arrangement, he was in that case to be treated as an independent contractor.

In both the above examples the respective workers will probably be regarded as employees under the proposed amendment. While this may ostensibly serve the purpose of creating worker rights for them and ensure fair labour practices, it is likely to have perverse contrary effects: In the first example it will probably lead to mass unemployment; in the second case it may also lead to unemployment, but it will certainly undermine the freedom of the parties to regulate their relationship by agreement. The more the law limits the choices that the parties are able to make in arranging that relationship, ironically the weaker the bargaining powers of the employee will become. This is exactly the opposite of what the section sets out to achieve.

This proposed amendment will further contribute to unemployment and should in our view be removed from the Bill.

4. **IN-HOUSE ARBITRATIONS (SECTION 47 OF THE BILL)**

4.1 **PROPOSED AMENDMENT**

Section 47 introduces a new concept, namely that an employer may, against payment of a fee with the consent of an employee, request an arbitrator to conduct an arbitration into the *conduct or capacity* of an employee.

Such an arbitration will thus replace the usual disciplinary hearing or incapacity enquiry.

Legal representation will be permitted by agreement between the parties.

4.2 **COMMENT**

Since this proposal envisages agreement as precondition, and since the *fiscus* will not be burdened unduly provided market-related fees are charged, it might in fact hold some benefits for both sides. The benefit is that it will eliminate duplication of proceedings. A potential danger is that it may introduce lawyers into the fray at a much earlier stage, which may lead to even greater legalism in labour disputes and consequent adversarialism.

Of more concern is the possibility that in terms of the proposal the decision to dismiss or not, will be taken out of the hands of managers. This concern may however also be adequately addressed by the fact that employers have a choice whether to agree to the proposed process or not.

5. **INSOLVENCY (SECTION 54 OF THE BILL)**

One of the purposes of legislation is to create legal certainty. Labour markets operate most effectively if the legal environment in which they operate are clear and predictable.

5.1 **CURRENT POSITION**

As matters stand, the position relating to insolvency and its effect on labour law has been far from clear.

The following questions are currently not clear:

- Whether the insolvency of an employer amounts to a dismissal, or for that matter, an unfair dismissal.

- When a provisional liquidation order is discharged, whether employees are, or should be, re-engaged by the employer.

- Whether an employer facing insolvency have the same obligations as a solvent employer who wishes to retrench employees.

5.2 PROPOSED AMENDMENTS

Section 54 of the Bill introduces essentially two amendments:

- If a business is transferred from an insolvent employer or in order to prevent insolvency of the employer, the new employer takes over the rights and duties of the old employer *vis-à-vis* his workforce.

- An employer who faces financial difficulties which may result in liquidation or sequestration, has the duty to advise the employees of this fact.

5.3 COMMENT

None of the questions cited above as being unclear, are cleared up by the proposed amendments. The section should do so, and it is proposed that the amendment be adapted accordingly.

6. CONCLUSION

The above examples, with the exception of the in-house arbitration provision, illustrate in our view that the proposed amendments in many cases introduce undesirable intervention in our market, which we at the present stage of precarious growth can ill afford.