

The Possible Unintended Consequences of Zimbabwe's Labour Amendment Bill.

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Introduction

The Labour Amendment Bill [HB 14-21] (**hereinafter referred to as the Bill**) has raised employees' hopes around the country. Several positive changes come with it. It is the changes regarding maternity leave that are the subject of today's piece. The Bill undoubtedly makes life easier for female employees by scrapping off preconditions to claiming paid maternity leave. These changes include the ability to claim paid maternity leave more than three (3) times from an employer. Also, female employees will no longer be required to have worked for at least one year to claim paid maternity leave. A second thoughtful look at the Bill however suggests that the proposed changes may not all be rosy. The

Bill may lead to unintended consequences. In philosophy, the term, *“the law of unintended consequences”* refers to an act done in good faith but leads to unexpected adverse effects that may defeat the primary intention of the good act. To fully comprehend the possible unintended effects of the Bill, the article will be structured as follows; firstly it will briefly unpack the current law regarding maternity leave, then discuss the changes that the Bill brings and lastly opine on the possible unintended consequences of the Bill.

The law.

Under the current Labour Act [Chapter 28:01] (hereinafter referred to as **“the Act”**), an employer is obliged to pay maternity leave to an employee but after they satisfy certain preconditions¹. The first pre-condition is that an employee must have served for at least one year to be eligible to claim paid maternity leave from an employer². Secondly, the employee can *“be granted a maximum of three periods of maternity leave with respect to her total service to any one employer during which she shall be paid her full salary³, provided that paid maternity leave shall be granted only once during any period of twenty-four months calculated from the day any previous maternity leave was granted”*.

Simply put, an employee can claim paid maternity leave from the same employer only three times. Moreover, an employee can claim paid maternal leave at two (2) years intervals which are calculated from the date on which the last leave was paid. Hence by way of example, if the employer grants an employee paid maternity leave on the 28th of March 2020, the employer can only grant the next paid leave on or after the 28th of March 2022.

The patent risk associated with the current position is that employers can frustrate an employees’ eligibility to claim paid maternity leave by simply not giving them contracts exceeding a year.

Secondly, if the employee has exhausted the maximum number of times(3) within which she can claim paid maternity leave, an employer is no longer obliged to pay for subsequent maternity leaves. The full financial burden to fund the maternity leave passes to the employee. Hence, the position is not desirable for female employees as it limits their choice regarding how many

¹ See section 18 of the Labour Act [Chapter 28:01]

² See section 18(1) of the Labour Act[Chapter 28:01]

³ See section 18(3) of the Labour Act [Chapter 28:01]

children to have and when to give birth. Further, the current provision discriminates against women that are employed under fixed-term contracts of less than a year in that they are not protected the same way women engaged in contracts exceeding a year are. We will now move to discuss the proposed amendments and their effects.

The Bill.

The Bill deletes the words “*who has served for at least one year*”⁴ from section 18(1) of the Act. Section 18(1) of the Act reads as follows;

“Unless more favourable conditions have otherwise been provided for in any employment contract or in any enactment, maternity leave shall be granted in terms of this section for a period of ninety-eight days on full pay to a female employee who has served for at least one year.”
[underlining for emphasis]

The net effect of the Bill is that employees will no longer be required to work for *at least a year* to be eligible to claim *paid maternity leave* from an employer. Therefore employees will now enjoy equal rights regarding paid maternity leave regardless of the length of their contracts. The mischief being addressed by the Bill is the employer’s tendency of employing female workers on fixed-term contracts to evade the burden of funding them when they go on maternity leave. The second and probably far-reaching change is the repeal of subsection 3 of the current Act⁵.

Subsection 3 of the Act reads that “(3) *A female employee shall be entitled to be granted a maximum of three periods of maternity leave with respect to her total service to any one employer during which she shall be paid her full salary: Provided that paid maternity leave shall be granted only once during any period of twenty-four months calculated from the day any previous maternity leave was granted.*”

The repeal of the abovementioned subsection scraps off two (2) essential hurdles to an employee’s full realization of the right to paid maternity leave. The net effect of the removal of the preconditions is that an employee will now be able to claim paid maternity leave more than three times from the same

⁴ See Clause 11 of the Bill

⁵ Ibid

employer. Secondly, the employee will now be in absolute control regarding how she chooses to space their children. In summation, an employee will no longer be required to wait twenty-four (24) months from the date upon which she last claimed maternal leave to claim another leave with pay.

The possible unintended consequences of the Bill.

As stated above, the proposed provisions in the Bill are progressive and align the Act to section 65 of the Constitution. However, the changes may also add fuel to the fire.

Zimbabwe operates in a neo-liberal capitalistic industry. This reality entails that maximization of profits with little regulation is the primary motive for business. From the employer's perspective, the Bill places an enormous burden on them because female employees can now claim maintenance more than three (3) times which is a drastic change from the current position in which she can claim paid maternity leave from the same employer only thrice. Section 65(7) of the Constitution makes it clear that female employees have a right to fully paid maternity leave for three months.

Evidently, the Bill increases employers' exposure to costs of business because normally when female employees go on maternal leave, the employer is forced to hire a temporary replacement for that position. Thus under the current position, an employer pays twice the amount for every single month of those three months when an employee is on maternity leave. The first payment goes towards the employee that is on leave and the second towards the replacement one. However, with the current position, the exposure is at least regulated in that *"she needs to have worked at least a year"* for that employer and that she cannot claim paid maternity leave from the same employer more than three times. The spacing is also regulated by law. Planning for employers, therefore, is much easier.

Ultimately, the effect of the Bill is that it makes female employees less preferable to employ compared to their male counterparts. It is accepted that the Act protects women against discrimination but the hard reality is that proving discrimination in courts requires financial resources, an essential tool that very few employees have. Even if this is not precisely the case, employers will be discouraged from employing the majority of their workforce as women because the exposure is too high as compared to employing men *who don't go*

for maternity leave. In all senses of the Bill, the unintended consequence is clear. In trying to promote women’s rights in the workplace, the law might even cause hurdles that will adversely make women’s entry into the workplace on a larger scale difficult.

South Africa has introduced paternity leave to curb some of the ugly effects of inequality in the workplace. Admittedly, paternity leave is not enough to arrest the ugly situation of discrimination because the days that men are allowed this sort of leave are substantially less than a woman’s. In any event, in **South Africa, paternity leave is unpaid** hence there isn’t much of an incentive for men to take it. However, it is a small step in the fight to create substantial equality. Sadly, the **Bill** is silent on that pertinent issue regarding paternity leave.

The way forward

It would be disingenuous to conclude without making reference to the legislative mechanisms in the Act whose purpose is to protect employees from discrimination. Section 5 of the Act reads;

“(1) No employer shall discriminate against any employee or prospective employee on grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status or, subject to the Disabled Persons Act [Chapter 17:01], any disability referred to in the definition of “disabled person” in that Act, in relation to— (a) **the advertisement of employment; or (b) the recruitment for employment; or** (c) the creation, classification or abolition of jobs or posts; or (d) the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits; or (e) the choice of persons for jobs or posts, training, advancement, apprenticeships, transfer, promotion or retrenchment; or (f) the provision of facilities related to or connected with employment; or (g) any other matter related to employment.”

Therefore from the above-cited provision, the right to non-discrimination is enjoyed by both confirmed and *prospective employees*⁶. A confirmed or prospective employee that feels discriminated against because of *“pregnancy”* or *“gender”* or on any other ground listed under section 5 of the Act can file a

⁶ Ibid

claim in the relevant tribunal claiming an unfair labour practice⁷. In summation, the Act still provides some sort of legal insurance against possible cases of discrimination against female employees due to the proposed amendments to the Act.

In conclusion, the Bill will bring some positive changes as aforementioned already. However, the law of unintended consequences may impede the full realization of its primary objectives by creating an even uglier situation for women's entry into the workplace.

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⁷ Section 8(b) of the Act