Get to work on unemployment

KAREN CALITZ
Professor of Law, Vista University
BRENDA GRANT
Associate Professor, School of Law, University of Natal Pietermaritzburg
BARRY SHIPMAN
Legal counsellor, Chamber of Mines
ESTHER VAN KERKEN
Associate Professor, Faculty of Law, Vista University

1 INTRODUCTION

South Africa enacted its first compulsory unemployment insurance scheme on a national basis in 1937. Since 1966 the position was regulated by the Unemployment Insurance Act 30 of 1966 (UIA), which is soon to be replaced by new legislation. The proposed legislation is currently in the form of the Unemployment Insurance Bill[1] (UIB) and the Unemployment Insurance Contributions Bill (UICB).

In this contribution the unemployment insurance system in South Africa under the UIA and the proposed legislation will be discussed against the background of the constitutional provision regarding the right of access to social security (s 27(1)(c) of the Constitution) and the constitutional imperative to consider international law when interpreting this fundamental right, and also the constitutional empowerment to consider foreign law (s 39 of the Constitution).

2 THE AIM AND PURPOSE OF THE LEGISLATION

The purpose of the UIA as well as the UIB is to insure employees who had contributed to the Unemployment Insurance Fund (UIF) against the risk of losing their earnings fully or partly because they became unemployed, or fell ill, or fell pregnant, or adopted a child. Unemployment benefits may also be claimed by a dependant of a deceased contributor.

In foreign systems unemployment insurance schemes generally provide only for the risk of losing employment (hereafter referred to as unemployment benefits), while separate funds provide for benefits in the event of maternity, adoption, illness and death. It is suggested that the example of foreign systems be adopted so that the regulation of unemployment

1 Government Notice 943 in *Government Gazette* 20952 of 2 March 2000.

insurance is restricted to "pure" unemployment issues, and one or more separate systems cater for the other contingencies. To do otherwise leads to a loss of proper focus on the provision of benefits in the event of unemployment and achieving the purpose discussed here. From a social security point of view especially it is preferable to deal with each of these risks together with other aspects of each risk, for instance, illness may be dealt with together with health care, maternity and adoption benefits with family benefits, and death benefits with survivors' benefits. In this contribution the concept of unemployment will be dealt with in the narrow sense, namely where a contributor to the UIF is without a job.

In the preamble to the ILO Convention on Employment Promotion and Protection against Unemployment 168 of 1991 (C168) it is recognised that the best protection against the adverse effects of involuntary unemployment lies in policies leading to stable, sustained, non-inflationary economic growth; a flexible response to change; and the creation and promotion of all forms of productive and freely chosen employment, including the creation and promotion of small undertakings, co-operatives and self-employment. In various articles C168 clearly advocates a move away from purely assistance-oriented activities towards activities which promote employment and also make unemployment less attractive than employment.[2]

In countries where unemployment levels have been reduced and employment levels increased, the reduction has been attributed largely to a shift from passive labour market policies (ie providing passive financial assistance by paying benefits to the unemployed) to active labour market policies (ie paying for active measures conducive to creating conditions that will increase employability and encourage the hiring of employees, and providing incentives for the unemployed to activate them to enter or reintegrate into the world of work, be it as employees or as self-employed). Active labour market policies are aimed at strengthening the shift from welfare to work and at addressing the causes of unemployment rather than merely the consequences. Active policies are perceived to be more cost-effective. They have been proven to be effective in providing incentives toward fuller employment and reintegrating unemployed persons.

In the European Union the development of active labour market policies reflects a reaction to the fiscal and sociological strain arising from the comprehensive and sophisticated unemployment support systems that had been generally instituted. The measures are reflected in the Policy Guidelines of the European Union, which are binding on member states, and in the legislation of the various member states.[3] Various countries outside the EU have also shifted from passive labour market policies to active market policies, notably the United States, Canada, Australia, New Zealand and Chile.[4]

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2 Article 8 further sets out the need to promote productive employment.

3 See MISSOC 1997; Kessler F in MISSOC 1999; European Council *The 1999 Employment Guidelines*.

4 See Waldfogel 1997:20, Gorlick and Brethour 1998; Hawke 1998:33; Maloney 1997 http//www.ssc.wisc.edu/irp/; Spitznagel 1998.

The UIA to some extent addresses the need to activate the labour market. Its stated purpose includes "the combatting of unemployment" and the Act contains several measures aimed at combatting unemployment and reintegrating the unemployed into the world of work. Firstly, if the Minister of Labour is of the opinion that unemployment exists or is likely to arise in any business or area, he may provide for a scheme to keep contributors in employment or to place the unemployed in employment (s 46). The purpose of this provision will hopefully be promoted by the recently legislated Skills Development Act 97 of 1998. Secondly, contributors who become unemployed, and accept employment at less than half the average rate of earnings during the three months preceding the date on which they became unemployed, are entitled to receive a special weekly allowance equal to the difference between their new remuneration and half their previous average earnings (s 48). Thirdly, contributors who were employed by two employers simultaneously and lose one job while continuing in the other do not lose their entitlement in respect of the lost employment simply because they retain the other position (s 35(11)). The second and third provisions mentioned here are aimed at reintegrating unemployed persons into the workplace. They give effect to C168 which requires the provision of benefits in circumstances of partial unemployment, described as the loss of earnings as a result of the temporary reduction in the normal or statutory hours of work (art 10.1).

In contrast, the proposed legislation contains no provision indicating that the legislature has seriously considered, or plans to seriously consider, measures to prevent unemployment, nor are there any measures aimed at reintegrating the unemployed. In fact, only persons who are fully unemployed will be entitled to benefits.[5] In this regard the UIB was drafted in disregard of international law as well as developments in foreign legal systems, and also represents a step backwards from the position under the UIA.

The stated purpose of the UIB is (*inter alia*) to establish an unemployment insurance fund (UIF) from which the unemployed are entitled to benefits "and in so doing to alleviate the harmful economic and social effects of unemployment" (clause 2). In not taking into account the wider aim of unemployment insurance, namely preventing or avoiding or combatting unemployment, and not promoting integrative labour market policies aimed at preventing unemployment and creating incentives for integration and/or re-integration in the labour market, the UIB does not move away from a

5 The only provision which may possibly lead to measures to this effect is clause 39 of the UIB which empowers the Unemployment Insurance Board to advise the Minister on unemployment insurance policy and to make recommendations to the Minister on changes to legislation insofar as it impacts on unemployment policy. However, in view of the fact that the stated purpose of the UIB, as well as the provisions of the proposed legislation, are completely silent on an active labour market policy, it is unlikely that the Board and the Minister will utilise clause 39 to achieve an active policy. Since these additional purposes are not presently included in clause 2 of the UIB, it is highly unlikely that any surplus in the Fund will be used towards giving effect to funding any programme, scheme or even research into preventative measures – given the provision in the UIB that the surplus may be utilised to give effect to the purposes of the Bill.

passive labour market policy to an active policy and is therefore not in keeping with an approach to unemployment insurance which is increasingly being adopted world-wide.

On the other hand, the requirement in C168 that benefits must be provided in periodical payments calculated in such a way that the unemployed receives a partial and transitional wage replacement and, at the same time, to avoid disincentives either to work or to create employment, are met by the UIB in that partial payments are made. The limitation of benefits is also aimed at encouraging the unemployed to work.

3 ADMINISTRATION OF THE SYSTEM

Under the UIA the administration and regulation of the statutory scheme for unemployment insurance fall fully within the jurisdiction of the Department of Labour. In terms of the proposed legislation the UICB (administered by the Commissioner of the South African Revenue Service (SARS)) will regulate the compulsory payment of contributions and other fiscal aspects, while the UIB (administered by the Department of Labour) will regulate the administration of the Unemployment Insurance Fund (UIF) and individuals' entitlement to benefits.

The general scheme of the proposed legislation is that the SARS Commissioner has the duty to collect contributions and pay these[6] into the National Revenue Fund to the credit of the UIF. The Director-General of the Department of Labour must within seven days allocate these amounts to the Fund. The UI Commissioner must receive the contributions paid into the Fund, must create and maintain a database of contributions and employers, and may pay benefits to contributors in accordance with the information on the database (UIB clause 56).

Various problems arise from the manner in which the dual administration is dealt with. First, despite the general provision that the SARS Commissioner has the duty to collect contributions, contributions in regard to an employee who is taxable must be paid to the Commissioner of SARS (UICB clause 7) whilst contributions in regard to an employee who is not taxable must be paid to the UIF (UICB clause 8). This may lead to cumbersome administration for employers and also to administrative problems for the authorities as well as employers where a particular employee at times falls within the tax net and at other times outside it. Secondly, the SARS Commissioner may delegate the power to collect contributions to the UI Commissioner. It is possible that delegation of the power to collect contributions will nullify the purpose of regulating the collecting of contributions under the fiscal regime, and that confusion may arise as to where specific powers are to be exercised. Thirdly, the South African Revenue Services Commissioner must collect contributions whereas the database of the Fund is located with the UI Commissioner. The administrative overlap may cause confusion and severe problems for an unemployed person when claiming benefits and cause additional state expenditure.

6 And also interest and penalties.

4 FUNDING OF THE SYSTEM AND CALCULATION OF CONTRIBUTIONS

Whereas the UIA excludes persons earning R93 288 per annum from the operation of the Act, the proposed legislation will remove the earnings threshold so that contributions are payable in respect of every employee. The proposed legislation complies with section 27 of the Constitution in that no employee is barred from access to unemployment insurance on the grounds of level of earnings.

In terms of the UIA as well as the UICB every employer and every contributor or employee who falls within the ambit of the Act or Bill must contribute 1 % of the employee's remuneration to the UIF on a monthly basis (s 29 UIA and clause 6 UICB). Contributors earning above the threshold of R132 000 per year will contribute 1 % of the threshold and will receive benefits payable at this level (schedule 1 UICB). The employer must withhold the employee's contribution from the normal wages and pay the deduction to the authorities together with its own contribution.

UIA contributions are calculated on the basis of an employee's "earnings", and UIB/UICB contributions on "remuneration".[7] "Remuneration" is defined in the UICB with reference to the Fourth Schedule of the Income Tax Act (a definition that differs from "earnings" in the UIA) but is not defined in the UIB. Inconsistent treatment of the basis for contributions and benefits may arise from problems concerning the definition, and also because personnel of the two departments may interpret "remuneration" differently.

Since employees may be prejudiced by an employer's failure to pay over the prescribed contributions to the authorities, the legislator penalises such an employer. In terms of the UIA the Director-General may, in addition to requiring payment of the overdue amount, impose a penalty on an employer for late payment, underpayment and non-payment. However, the penalty may be waived (s 31). The UICB provides improved protection of contributors' right to access to unemployment benefits. An employer who fails to deduct contributions is liable for payment of the full contributions and is not allowed to deduct arrear contributions from the employee. However, if the employer deducted an amount that was not due or payable in terms of the Act, or was in excess of the amount due, the employer must refund the amount to the employee notwithstanding the fact that the amount was not refunded to the employer (clause 6 UICB). A penalty of 10% of an unpaid amount is payable together with interest on the outstanding amount.[8] Lastly, if a late payment or an underpayment has the effect that an employee loses his/ her entitlement to benefits or becomes entitled to a reduced benefit, the employer has to pay the employee the amount to which the employee is actually entitled and must in addition pay a penalty of 200% of the unpaid amount.

Apart from these provisions, the proposed legislation contains various other provisions aimed at efficiently collecting all contributions that are

7 See s 3 UIA, and s 1 UICB read with the Fourth Schedule of the Income Tax Act.

8 Calculated at the prescribed rate in s 1 of the Income Tax Act.

payable and at maintaining a solvent Fund. To this end the basis for calculating contributions is by way of using the definition in the Income Tax Act; the SARS Commissioner must collect the bulk of contributions; more categories of employees are included as contributors; the earnings limit as barrier to access is removed; and provisions aimed at avoiding double-dipping from the UIF are to be enacted. From a social security point of view these provisions are welcomed since solvency of the UIF is of crucial importance to ensuring the payment of benefits.

5 THE CATEGORIES OF PERSONS WHO MAY BE ENTITLED TO CLAIM UNEMPLOYMENT BENEFITS

In terms of both the UIA[9] and the UIB[10] certain categories of persons are not in a position to contribute to the Fund and accordingly cannot claim unemployment benefits. They are therefore excluded from access to the statutory unemployment insurance scheme. The proposed legislation does, however, broaden the contributor base by including more categories and by removing the earnings level. This broadening of the contributor base is conceivably the greatest achievement of the proposed legislation. Not only will it strengthen the financial base of the Fund and thereby help to sustain the unemployed, but it will bring the proposed legislation closer to compliance with section 27 of the Constitution and with international norms. It is, however, doubtful whether the proposed legislation is sufficiently close to international norms, considering that the norm as stated in C168 is that the persons protected should comprise not less than 85% of all employees in a country.

The continued exclusion of some groups might constitute an unjustifiable limitation on the constitutional right of access to unemployment benefits.

Public servants are excluded by both the current and proposed legislation. In the past the rationale for excluding public servants from the statutory unemployment insurance scheme was that they were regarded as having job

9 In terms of the UIA the following categories are excluded: (1) Persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership, if there is a legal or a contractual requirement that such persons must leave the Republic upon termination of the contract. This provision excludes many foreign workers from access to the Fund. (2) Persons whose rate of earnings exceed R93 288 per annum. Due to the fact that employees may be granted salary increases, which may take them outside the category of contributors, together with the fact that the limit has been raised on annual basis, many employees contribute to the Fund on an irregular basis. (3) Persons employed casually and not for the purposes of the employer's business. (4) Persons employed for less than one full working day or less than eight hours per calendar week, whichever is less. (5) Domestic servants. (6) The husband or wife of an employer who works for that employer. (7) Persons who are officers in terms of the Public Service Act of 1994. (8) Persons employed by a provincial administration (including a school governing board or a hospital board which is under the control of a provincial administration) who contribute to the Government Employees Pension Fund. (9) Certain educators. (10) Officers on the fixed establishment of Parliament.

10 In terms of the UIB the following categories are excluded: (1) Employees of the Government (national and provincial). (2) Persons entitled to remuneration in terms of a learnership under the Skills Development Act. (3) Persons employed for less than 24 hours per month with a particular employer. (4) Domestic workers.

security and therefore not in need of protection against unemployment. However, public servants in South Africa no longer have job security (neither legally nor factually) to the extent that their exclusion from unemployment protection can be justified. The unemployment figures released by Statistics SA at the end of March 2000 and June 2000 indicate that the public service has recently suffered more job losses than most other sectors. A second argument for excluding public servants was that they are cared for financially by the State as employer and/or the state pension fund through advantageous severance packages in the event of loss of a job. However, it is doubtful that these payments are more favourable than those in the private sector. The exclusion of public servants may therefore well be attacked on constitutional grounds. It is, furthermore, not in accordance with C168 in terms of which public servants may be excluded from protection only if their employment is guaranteed up to the normal retirement age (art 11.1).

Learners are expressly excluded by the proposed legislation in contrast to the position under the UIA where any person who has entered into or works under a contract of apprenticeship or a contract of learnership is a contributor. The exclusion of a group that was previously included bucks the trend towards extended coverage. The administration of contributions and enforcement of the statutory provisions should be reasonably manageable since learners are normally employed for a considerable time (mostly 1 to 2 years). Learners belong to a particularly vulnerable group, especially in times where the economy is unable to absorb the young and newly qualified. This exclusion is also contrary to international norms. Article 11.1 of C168 requires that apprentices should enjoy protection.

Domestic workers are excluded presently and also by the proposed legislation. Neither the UIB nor the UICB defines "domestic worker". Without a definition the position of many employees will remain uncertain. The intention is clearly that domestic workers should be granted access to unemployment benefits since section 4 of both bills provide that

> "there shall be an investigation undertaken by an appropriate body, appointed by the Minister, to investigate methods and make recommendations to the Minister, in regard to including domestic workers under coverage of this Act".

Persons whose remuneration is based on the output of their work are effectively excluded by the proposed legislation if their remuneration is based on the quantity or output of work done, unless the amount is part of their minimum compensation in terms of any law, collective agreement or contract or employment.[11] This is in contrast with the UIA definition of "contributor" which includes somebody "whose earnings are calculated . . . by work done". In light of the fact that the quantity or output of work done is increasingly made to constitute the sole contractual basis for remuneration, this exclusion will probably not be a justifiable limitation on the right of access to unemployment benefits. In addition, the exclusion of a previously included category does not seem justifiable.

11 See par (d) of the exclusions for purposes of the definition of "remuneration" in cl 1 UICB.

Independent contractors, the informally employed, and the atypically employed are excluded under both the current and the proposed legislation. It is suggested that provision for voluntary access to the UIF, or the setting up a separate social protection and/or unemployment insurance schemes,[12] would be in keeping with section 27 of the Constitution, with the recommendations made by the 1996 ILO country review (Standing *et al* 1996:446), the SA Labour Market Commission Report (Van Ginneken 1999) and with the findings of an important ILO study (Standing *et al* 1996:66) on the position of the atypically employed. Such voluntary access may be granted also for other employees who cannot comfortably be fitted into the statutory scheme.

6 CONTINGENCIES COVERED

Whilst Convention 168 aims at promoting active labour market policies, it acknowledges that involuntary unemployment does exist and that social security systems should therefore provide unemployment assistance and economic support to those who are involuntarily unemployed (art 10).

Whereas unemployment benefits are granted under the UIA irrespective of whether a contributor resigned or was dismissed, the UIB comes closer to the international norm according to which benefits arise only from involuntary unemployment. It provides that an unemployed contributor is entitled to unemployment benefits if the reason for the unemployment is the termination of employment by the employer (clause 8(1) UIB). However, this wording does not cover all circumstances where unemployment arises outside the control of the employee, for example where an employer becomes insolvent.[13] The legislation should be brought in line with C168 which provides that benefits may be refused, withdrawn, suspended or reduced to the extent prescribed when it has been determined by the competent authority that the person concerned has left the employment voluntarily without just cause (art 20(b)).

It also provides that benefits may be refused, withdrawn, suspended or reduced to the extent prescribed if the person concerned had deliberately contributed to his or her own dismissal (art 20(c)). No reference is made in the UIB to such grounds for disqualification.

Convention 168 provides for the contingency of *full unemployment* (described as loss of earnings by a person who is capable of working, available for work and actually seeking work), *partial unemployment* (described as loss of earnings as a result of the temporary reduction in the normal or statutory hours of work), the situation where there is a *lack of earnings* during a period that a part-time worker seeks full-time employment (where benefits should be kept to a level where the total of benefits and earnings from the part-time work may maintain incentives to take up full-time work) (art 10.1), and in

12 This has been done in certain European countries, where schemes usually allow the self-employed to make voluntary contributions. See Schoukens 1994:57.

13 In terms of s 38 of the Insolvency Act 24 of 1936 the contract of employment terminates automatically in the event of insolvency of the employer. The contract is also automatically terminated where a company or close corporation is wound up.

circumstances of *suspension or reduction of earnings* due to a temporary suspension of work, without any break in the employment relationship, for reasons of an economic, technological, structural or similar cause (the rationale being to protect and maintain some measure of income replacement in the event of such a contingency occurring and to ensure speedy reintegration into the labour market once the suspension comes to an end) (art 10.2). The ILO's broad view of contingencies covered reflects the importance attached to integrating and reintegrating the unemployed into the world of work.

Whereas the UIA provides for the contingency of full and partial unemployment the proposed legislation takes a narrower view, providing only for full unemployment. Other serious shortcomings in the UIB are that it makes no provision for a right to benefits for any period that a contributor has a part-time work and that unemployed persons will not retain some benefits while making their way back into the world of work. Furthermore, in South African law the suspension of the contract of employment, for example in the event of a protected strike or as a result of the employer's operational requirements, legally has the result that the employer's obligation to remunerate and grant ancillary benefits is also suspended. In these circumstances employees may be without income. It is recommended that the contingencies covered should be extended beyond full unemployment in accordance with international norms.

7 THE CALCULATION OF BENEFITS

Convention 168 as well as the SA legislation (current and proposed) limit the quantum of benefits to a portion of the wages that were lost due to unemployment, as one aspect of the underlying policy is to encourage an unemployed person to return to the workforce. Article 15 of Convention 168 requires that benefits should be no less than 45% of the previous earnings. Whereas the UIA complied with this requirement by granting benefits of 45% of previous earnings, the UIB deviates from this norm by providing for a graduated scale of benefits ranging from 29.5% to 58.5% of previous earnings. The bottom of the scale is considerably lower than the international norm, and the top scale may be too high to discourage continued unemployment. The graduated scale will lead to discrepancies and disparities that may find disfavour with contributors.[14]

The accrual of a contributor's entitlement to benefits under the UIB, at a rate of seven days for every completed 42 days of employment as a contributor,[15] is subject to a maximum accrual of 238 days' benefit in a period of four years immediately preceding the date of application for benefits, less any days of benefit received by the contributor during this period (clause 5 UIB). The calculation of the four-year period is unclear and

14 For example a person who earned R9 000 per month will get R3 420 per month (38% of income) whereas a person who earned R10 000 per month will get R2 945 per month (29.5% of income) although the latter and his or her employer paid more in contributions.

15 Which is effectively remains the same as under the UIA, which provided for 1 week's benefit for 6 weeks' contributions.

uncertain, and may become problematic where a person is intermittently employed and unemployed, or where a person receives benefits for a period and leaves the country for some period during the four-year period[16] and thereafter returns to South Africa (either as an employed or unemployed person).

8 NON-ELIGIBILITY FOR BENEFITS

In terms of the UIB a contributor who would otherwise be entitled to benefits loses entitlement in various circumstances. Entitlement is lost *for any period that a contributor is outside the Republic* (clause 6(1)(a)(i)). This arrangement is not only practical but also in accordance with C168 in terms of which benefits may be refused, withdrawn, suspended or reduced to the extent prescribed for as long as the person concerned is absent from the territory of the member state (art 20(a)). However, it seems to be unfair to workers to require the payment of benefits regardless of citizenship and simultaneously preventing payment of benefits while they are outside the Republic of South Africa.

International law accepts that so-called *double-dipping* should be prohibited. Convention 168 provides that benefits may be refused, withdrawn, suspended or reduced to the extent prescribed for as long as the person concerned is in receipt of another income maintenance benefit provided for in the legislation of the ILO member concerned, except family benefit, provided that the part of the benefit which is suspended does not exceed that other benefit (art 20(g)). In the UIA this principle was adhered to in regard to UIF benefits but not in regard to other state-aided funds. The UIB on the one hand provides that a contributor is not allowed to claim both unemployment and illness benefits from the UIF (clauses 8 and 12) and, on the other hand, that entitlement to unemployment benefits is not exhausted by claiming maternity benefits.[17]

In regard to double-dipping from other state-provided funds the UIB comes closer to international norms by prohibiting the payment of benefits from the UIF for any period that the unemployed is in receipt of a monthly pension or disability grant from the State or in receipt of a benefit from the Compensation Commissioner as a result of an occupational injury or disease which caused total or temporary unemployment (clause 6(1)(b)(i) and (ii)). Since the rationale behind double-dipping provisions is that an amount of benefits received as unemployment benefits should take into account income-replacement benefits received from other branches of the social security system, in particular state-provided benefits, it is advisable to include a general provision in the envisaged legislation which avoids double-dipping with regard to all state-provided income-replacement benefits.

16 There is no entitlement to benefits during a period of absence from the country.

17 UIB cl 5 (5). The stated aim of the latter provision is to eliminate discrimination against women. However, it is submitted that the UIB now introduces an unjustifiable discrimination between pregnant women and ill women.

A contributor is also prevented from claiming unemployment benefits while receiving benefits from any unemployment fund or scheme established by a bargaining or statutory council (clause 6(1)(b)(iii) UIB), and while receiving retrenchment, gratuity, severance or similar payment that was received from any source as a result of the contributor's unemployment with a particular employer, except when such payment has been exhausted at a rate equal to the contributor's usual remuneration while employed by that employer (clause 6(1)(b)(iv)). This is apparently in line with C168 which provides that where a person received benefits directly from the employer or from another source (under national laws, or collective agreements, or as severance pay) the principal purpose of which is to contribute towards compensating for the loss of earnings suffered in the event of full unemployment, benefits may be suspended for a period corresponding to that during which the severance pay compensates for the loss of earings. The severance pay may be reduced by an amount corresponding to the lump-sum value of the unemployment benefit for a period corresponding to that during which the severance pay compensates for the loss of earnings (art 22).

In line with international norms, entitlement is lost if the contributor fails to comply with a law relating to unemployment.

Under the UIA it is a criminal offence to make a fraudulent application for benefits or other fraudulent conduct (art 61). In terms of C168, benefits may be refused, withdrawn, suspended or reduced to the extent prescribed when the person attempted to obtain, or has obtained, benefits fraudulently (art 20(e)). The UIB decriminalises fraudulent conduct and brings South African legislation in line with international law by providing that a person is suspended from receiving benefits for twelve years for making a false statement in an application for benefits, or submitting a fraudulent application for benefits, or failing to inform an officer that he or she had resumed work during the period in respect of which benefits were paid, or failing to comply with a written demand issued to pay tax (clause 6(1)(d) read with clause 28).

Lastly, C168 provides that benefits may be refused, withdrawn, suspended or reduced to the extent prescribed when the person concerned has failed without just cause to use the facilities available for placement, vocational guidance, training, retraining or redeployment in suitable employment.[18] The UIB provides that entitlement to benefits is lost upon failure to report at the times, dates and places stipulated by the claims officer (clause 8(2)(a)) and upon refusal without good reason to undergo training and vocational counselling for employment under any scheme approved by the Director-General (clause 8(2)(b)).

9 THE RESOLUTION OF DISPUTES

Convention 168 requires dispute resolution mechanisms. The UIA makes no provision in this regard. In terms of the UICB the provisions of the Income Tax Act relating to the contributions paid or payable in terms of the UIB,

18 Convention 168 article 20 (f). Article 21 gives clear guidelines in regard to determining whether work is suitable.

assessments, objections and appeals, apply (with the necessary changes required by the context) to "any assessment, objection and appeal and the payment, recovery or refund of the contribution, interest or penalty" (clause 13 UICB). A contributor who is aggrieved by a decision of the Unemployment Insurance Commissioner to suspend a right to benefits, or a claims officer's decision relating to the payment or non-payment of benefits, may refer the dispute for resolution to the CCMA (clause 29 UIB).

It is thus clear that the SARS will adjudicate disputes concerning the assessment of contributions, while disputes concerning the quantum or refusal of benefits may be referred to the CCMA. However, it is not clear what the position will be if a dispute involves both contributions and benefits. The wisdom to have two bodies, in two different departments, adjudicating contribution and benefit disputes respectively is questionable. There is also uncertainty concerning the forum for determining disputes presently falling within the ambit of the UIB. According to clause 65 the Labour Court has jurisdiction in respect of all matters in terms of the UIB except in respect of an offence, and "except where this Act provides otherwise". It is not clear that the UIB does provide otherwise in any instance, except for clause 29 which determines that disputes concerning benefits may be referred "for resolution" to the CCMA. Since the term "resolution" is normally used to refer to the finalisation of a dispute, the proper interpretation is apparently that the CCMA has to arbitrate the dispute. If this is correct, the UIB does not meet the international requirement that there should be an appeal procedure. It is in any event debatable whether CCMA arbitration is appropriate for settling disputes relating to unemployment benefits. The issues on which disputes have to be resolved will be legal questions whereas CCMA commissioners are not always legally trained.

10 CONCLUSION

Although many aspects of the proposed legislation should be reconsidered, it is an improvement on the UIA in complying with the constitutional right of access to social security and bringing South African legislation in line with the norms of international law.

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