

EMPLOYMENT EQUITY IN THE WORKPLACE

INTRODUCTION

South Africa has a legacy of unfair discrimination in the workplace. The Employment Equity Act (the EEA) was promulgated to address this legacy and to achieve equity in the workplace by -

- Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups so that there can be equitable representation at all occupational levels in the workforce of a designated employer.

WHY IS EMPLOYMENT EQUITY IMPORTANT?

South Africa is founded on constitutional values of human dignity, equality, and the advancement of human rights and freedoms. The EEA gives effect to the Constitution and prohibits 'unfair discrimination' on several listed grounds including, but not limited to, race, sex, belief, and disability. An unfair discrimination claim may also be based on "any other arbitrary ground". In this instance, whether there is unfair discrimination will depend on whether, objectively, the ground (arbitrary ground) is based on attributes and characteristics (things that a person cannot easily change, e.g. weight or height) which have the potential to impair the fundamental human dignity of the person(s) concerned.

Employment equity is a key factor in achieving sound human resource practices. This includes eliminating the historical barriers that prevented the advancement of designated groups (Black people, including African, Coloured, and Indian people, women, and people with disabilities who are citizens of the RSA by birth or descent or became citizens of the RSA by naturalisation before 27 April 1994, or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation before that date but who were precluded by apartheid policies) and applying positive affirmative action measures.

In terms of the Constitution and the EEA, it is not unfair discrimination to take affirmative action measures consistent with the purpose of the EEA (or to distinguish, exclude, or prefer any person based on an inherent requirement of a job).

For a measure to be justified as a valid "affirmative action measure", it must target categories of persons disadvantaged by unfair discrimination,

be designed to protect them, promote the achievement of equality and be rationally implemented and set out in an employment equity plan.

DISPUTE RESOLUTION

The CCMA has jurisdiction to conciliate all unfair discrimination disputes provided for within the EEA. The conciliation application form can be downloaded from the CCMA Website (<https://www.ccma.org.za/advicecategories/ccma-referral-forms/>). The employee must refer the matter to the CCMA within six months after the act or omission allegedly constituting unfair discrimination. In terms of the EEA, once an unfair discrimination dispute remains unresolved at conciliation, an applicant may take the matter further as follows:

Unfair discrimination based on grounds of sexual harassment:

An applicant, irrespective of earnings, may refer the unresolved dispute to either the CCMA for arbitration or to the Labour Court for adjudication.

Unfair discrimination based on grounds other than sexual harassment (this also includes equal pay for work of equal value disputes):

An applicant who earns below the Basic Conditions of Employment Act (BCEA) threshold may refer the unresolved dispute to either the CCMA for arbitration or the Labour Court for adjudication.

An applicant who earns equal to or above the BCEA threshold may refer the unresolved disputes to the Labour Court or, by written agreement, the CCMA for arbitration.

It is important to note that the person alleging differentiation or discrimination must allege one or more grounds on which this takes place. Reference must be made to a listed ground in s 6(1) EEA or any other arbitrary ground. The latter can be any ground which is based on attributes or characteristics that have the potential to impair fundamental human dignity or affect a person in a comparably serious manner and which are linked to the listed grounds. It is, therefore, not enough to make a blanket allegation of differentiation.

An equal pay claim for work of equal value can also be instituted. This applies not only to disputes related to remuneration but also to any difference in terms and conditions of employment.

Commissioners have the power to make any appropriate arbitration award that gives effect to the EEA, including an award ordering payment of compensation, payment of damages or an order directing the employer

to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees.

COMMISSION FOR EMPLOYMENT EQUITY

The Commission for Employment Equity advises the Minister of Employment and Labour on implementing the EEA and monitoring and ensuring compliance.

Designated employers, such as those that employ 50 or more employees, municipalities, most public service departments and employers bound by collective agreements, must submit an Employment Equity Plan to the Commission for Employment Equity. The plan should identify barriers to equity in the workplace and set targets for achieving employment equity.

The designated employers are required to consult with unions and employees to ensure that everyone accepts the plan; review all employment policies, practices and procedures that may act as a barrier to designated groups; prepare a profile of their workforce to identify any problems relating to employment equity; and prepare and implement an employment equity plan setting out the affirmative action measures they intend taking to achieve their employment equity goals. They must also display a summary of the provisions of the Act in all languages relevant to the workforce.

Employment Equity Regulations must be applied when dealing with employment equity plans and equal pay for work of equal value matters. The Minister has also issued various Codes of Good Practice to assist employers and employees with EEA matters. These codes may be found on the Department of Employment and Labour and CCMA websites.

RELEVANT LEGISLATION

- Constitution of the Republic of South Africa, 1996
- Employment Equity Act No 55 of 1998
- Basic Conditions of Employment Act 75 of 1997.