

EMPLOYMENT EQUITY IN THE WORKPLACE

INTRODUCTION

South Africa has a legacy of discrimination in relation to race, gender and disability that has resulted in the denial of access to opportunities for education, employment, promotion and wealth creation for the majority of South Africans. The Employment Equity Act (the EEA) was promulgated to address this legacy and has two main objectives, namely —

- to ensure that South African workplaces are free of discrimination (this applies to all workplaces); and
- to ensure that affirmative action measures are implemented so that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer (generally, this refers to employers employing more than 50 employees, employers with a turnover in excess of a specified amount, municipalities or an organ of state).

WHY IS EMPLOYMENT EQUITY IMPORTANT?

South Africa is a country founded on constitutional values of human dignity, equality, human rights and freedoms. The EEA gives effect to the Constitution and it prohibits 'unfair discrimination' on a number of listed grounds including, but not limited to race, sex, belief and disability. A claim of unfair discrimination may also be based on "any other arbitrary ground". In this instance, whether or not there is 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) 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 on the basis of 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, should 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 employee must refer the matter to the CCMA within six months after the act or omission that allegedly constitutes 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 (as of 01 March 2023, this amount is R 241 110.59 per annum) may refer the unresolved dispute to either the CCMA for arbitration or to 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, to 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 the fundamental human dignity or affect a person in a comparably serious manner. It is therefore not enough to make a blanket allegation of differentiation.

A claim of equal pay for work of equal value can also be instituted. This is not only for disputes related to remuneration but could also be related 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 is responsible for advising the Minister of Employment and Labour on the implementation of the EEA and monitoring and ensuring compliance.

Designated employers, for example those that employ 50 or more employees, municipalities, most public service departments and employers bound by collective agreements, are required to 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 the achievement of employment equity.

The designated employers are required to consult with unions and employees to ensure that the plan is accepted by everyone; review all employment policies, practices and procedures that may act as a barrier to designated groups; prepare a profile of their workforce in order 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.

During 2014, new Regulations were made relating to work of equal value, the duties of a designated employer and enforcement mechanisms. The Minister has also issued various Codes of Good Practice to assist employers in developing their plans. These codes may be found on the Department of Employment and Labour website.

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.