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Discrimination law in South Africa

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Overview of South African Labour law

South African labour law is based on statute and is primarily governed by the Labour Relations Act 1995 (LRA). In addition, the Employment Equity Act of 1998 (EEA) deals with fair labour practises at three stages of the employment relationship: the beginning, when the employee is an applicant for employment; the middle, which continues as long as the relationship continues; and the end, which may take the form of a dismissal, resignation or retirement. Amongst other things, the EEA regulates issues of fairness regarding affirmative action as well as a workers HIV or disability status.

Independent contractors are implicitly excluded from the definition of employee in both the LRA and EEA.

Other statutes, such as the Basic Conditions of Employment Act (BCEA), the Health and Safety Act and the Skills Development Act, must be read together with the LRA and EEA. The BCEA effectively protects low-income earners (workers earning less than R89, 000- per annum). It prescribes the minimum wage, the maximum hours per week to be worked, required annual increases, etc. The Skills Development Act makes provision for a small percentage of a labourer's salary to be contributed to the Department of Labour enabling workshops to be run designed to develop skills.

The supreme law, to which all other legislation is bound and must be interpreted in the light and spirit of, is the Constitution. The South African Constitution provides for fundamental and general rights, for example: the right to pursue a livelihood; the right to equality; the right to protection against discrimination, *et al*. Section 23, however, specifically regulates fair labour practises. This includes, amongst other things, that employees having the right to form and join a trade union and participate in its activities, including a strike; and for employers to form and join an employer's organisation and participate in the organisations' activities. Any limitation to the constitutional rights or protections by, for example, the LRA, must comply with Section 36 (1), the limitations clause of the Constitution.

In practise, the general guarantee of fair labour practices since the abolishment of apartheid has had far-reaching implications and effects on the courts' interpretation of employment contracts. Many assumptions underlying the common law contract of employment, for example the employer's previous dominant rights in respect of promotion and dismissal have had to be reconsidered. And as "fair practise" is a dynamic concept of which there is no fixed definition, it is constantly evolving to keep up with socio-economic needs.

Discrimination law

The LRA, EEA and BCEA all aim to counteract and eliminate unfair discrimination against employees in the workplace. Section 6 of the EEA provides that "*no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or*

practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth".

Furthermore, it stipulates that "*it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act; or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.*"

Section 6 of the EEA is in fact wider than the Constitution as it not only prohibits an employer from discriminating, but has been interpreted to extend to and include fellow employees as well as independent pension or medical aid schemes dealing with the employees. In this regard, if an employee lodges a complaint of discrimination against another employee and the employer does not act, the employer may be held liable.

It is also important to note the difference between discrimination and differentiation. The latter does not always amount to discrimination and is regarded as fair if employees are differentiated between on the basis of, for example, experience, seniority, etc. However, if an employee is able to prove a differentiation, in terms of the LRA and Constitution there is a presumption of unfair discrimination and the onus lies on the employer to prove the differentiation is fair.

There are various forms of discrimination in the workplace, and this article will focus on common types that occur in the South African work environment.

Harassment

The EEA stipulates that harassment (sexual, racial, sexual orientation, religious) constitutes unfair discrimination and is as such prohibited. Of these, sexual harassment is the most common. The Code of Good Practice defines the various types of harassment and the courts have adopted both a subjective and objective test in determining, for example, whether sexual attention has progressed to sexual harassment.

In the event of an employee reporting harassment, the employer has a duty, in terms of EEA and the Code of Good Practice, which requires him/her to issue a policy statement that "all employees, job applicants or persons dealing in the business have the right to be treated with dignity; that sexual harassment in the workplace will not be permitted or condoned; and that persons who have been or are being subjected to sexual harassment in the workplace have the right to lodge a complaint about it and that appropriate action will be taken by the employer."

The Code places a positive duty on the employer to implement the policy and also to take disciplinary action against employees who do not comply with it. In dealing with such a problem, the employer is also responsible to deal with such allegations seriously, expeditiously, sensitively and confidentially. Should the employer fail to take these steps, he/she will be held liable.

Should an employee resign due to sexual harassment, it may be deemed to be a constructive dismissal, which would provide grounds for finding an automatically unfair dismissal.

Of course, a victim of harassment may also find legal redress by lodging a civil claim, based on delict, against the perpetrator. The employer can be sued as a co-defendant, based on the common law principles of vicarious liability.

HIV/AIDS

The EEA specifically lists HIV status as one of the grounds on which an employee may not be discriminated against. Case law has determined that the stigmatisation and prejudice attached to a person infected with HIV is in fact an assault on their dignity. Generally, an employer is prohibited from testing their employees for HIV. However, if the employer believes it necessary for such testing to be carried out, then it would have to be brought before the Labour Court, who if it deems it to be justifiable, may allow it on certain conditions (for example, confidentiality, *et al*). But first the court will have to be satisfied that a long list of requirements and conditions have been met before arriving at a proper decision.

The EEA does not however prevent voluntary and anonymous testing which can be undertaken confidentially for epidemiological purposes or with the intent to establish its prevalence among the workforce or promoting wellness.
"The Code of Good Practice on key aspects of HIV/AIDS and Employment" provides guidelines to employers and employees on how to deal with HIV/AIDS in the workplace. According to the Code, an employee that becomes too ill to work may be dismissed on grounds of incapacity.
Affirmative action
Unfair discrimination together with affirmative action makes for the two top priorities of the EEA. According to section 2 (b) of the EEA, the goal of affirmative action is "to ensure the equitable representation of certain groups in all occupational categories and levels in the workplace". To benefit from affirmative action, the applicant or employee must be suitably qualified and from a designated group. "Designated groups" are black people, women and people with disabilities. The generic term "black" includes Africans, Coloureds and Indians.
All employers, regardless of their size, are prohibited from unfairly discriminating against their employees. However, in terms of the EEA, only "designated employers" are bound by the provisions of affirmative action. A designated employer is one who employs at least 50 people and or one who generates an annual turnover in excess of what is set down in Schedule 4 of the Act. To achieve employment equity, an employer must draw up an Employment Equity Plan which is a 5 year plan showing how they aim to achieve their goals. Employers need to report to the Department of Labour, which monitors implementation. Failure to comply with this legislation will result in employers being excluded from the public register of the Department of Labour, which would significantly reduced their business opportunities, particularly in government contracts as well as potential court action taken against them.

Resolving a dispute over discrimination:

The Commission for Conciliation, Mediation and Arbitration (CCMA) is a dispute resolution body which was established in terms of the LRA. It is a totally independent administrative tribunal. A dispute about unfair discrimination must be referred to the CCMA for conciliation within six months of the alleged discriminatory act or omission. The referring party must indicate that it has made a reasonable attempt to resolve the dispute.
If conciliation fails, the matter may be referred to the Labour Court, unless the parties consent to the jurisdiction of the CCMA for arbitration. The Labour Court may make any appropriate order that is "just and equitable" in the circumstances, including compensation, damages, and orders directing the employer to take preventative steps. Again, once the employee proves that there was discrimination, the onus shifts to the employer to prove that the discrimination was in fact fair.

Black Economic Empowerment (BEE):

Broad Based Black Economic Empowerment, Act 53 of 2003 (B-BBEE): this Act lays the grounds for BEE by aiming to redress the inequalities of Apartheid by giving certain previously disadvantaged groups (predominantly black South Africans) economic privileges and work opportunities that were previously not available to them. This programme is referred to by the ANC government as "positive discrimination". B-BBEE includes providing measures such as employment preference and scorecard ratings. This is done within the framework of the Codes of Good Practice, issued by the Minister of Trade and Industry. All companies are BEE rated, albeit differently. Generally, there are various categories of scorecards depending on the industry (for example finance, tourism, mining, etc) or sector (public or private). Compliance with BEE practise is measured against 7 pillars, and these include: *Direct Empowerment* 1) Equity ownership, 20% 2) Management 10%; *Indirect and Human Resource Empowerment* 3) Employment equity 15%, 4) Skills development 15%, 5) Preferential procurement 20%, 6) Enterprise development 15%, 7) Socio-economic development 5%.
Companies with an annual turnover of less than R5mil are exempted as „micro enterprises". If the micro

enterprise is white owned, you automatically receive a BEE score of 65%; and if it is more than 50% black owned, you automatically receive a BEE score of 75%. Black owned businesses are more competitive over white owned ones in any tendering processes. However, even if the micro enterprise is exempted from BEE provisions, it may choose to improve its BEE status.

Companies that have an annual turnover of between R5mil and R35mil are classified as „small enterprises“. Such enterprises must comply with at least four of the seven BEE elements to generate a compliance score and status level.

And finally, companies that have an annual turnover of more than R35mil are classified as „generic enterprises“ and must generate a BEE score out of all 7 elements. They may choose to use the Generic Scorecard or their individual sector scorecard (which generally alligned with the standard generic scorecard).

Scorecard compliance is very complicated and many companies chose to employ the services of a certified Verification Agency who may also issue the BEE compliance certificate and who are themselves audited to ensure the consistency of standards.

The economic effect of non-compliance with BBBEE requirements places companies at a distinct disadvantage when tendering for contracts.In terms of the Preferential Procurement Act, government entities must procure goods and services from companies with a good BEE rating. The scorecard rating is valid for 12 months.

Pending Labour Law changes

The Employment Equity Amendment Act, No 47 of 2013, which has already been assented to and published in the Government Gazette, is about to come into operation very soon. The term „Designated Groups“ (ie the beneficiaries of affirmative action) will soon be limited to persons who were citizens before the democratic era. This amendment will have the effect that employees who are foreign nationals or who have become citizens after April 1994 will not assist employers who are trying to meet their affirmative action targets. This pending amendment is consistent with an upcoming change in the BBBEE Act.

IMPRESSUM

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