

## EMPLOYMENT EQUITY IN THE WORKPLACE

### WHY THE EMPLOYMENT EQUITY ACT?

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 passed 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, employer 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 and human rights and freedoms. The EEA gives effect to the Constitution and it prohibits 'unfair discrimination' on a number of listed grounds such as race, sex, belief and disability, and any other arbitrary ground.

Employment equity is a key factor in achieving sound human resources practices. This includes eliminating the historical barriers that prevent the advancement of the 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 and the measure should promote the achievement of equality and be rationally implemented.

## THE EEA AMENDMENTS AND THE CCMA

The CCMA has jurisdiction to conciliate all unfair discrimination disputes. In terms of the amendments to the EEA, the CCMA is able to arbitrate unfair discrimination disputes as follows:

### **Unfair discrimination based on grounds of sexual harassment**

All applicants have the right to refer their disputes to either arbitration or the Labour Court for adjudication.

### **Unfair discrimination based on grounds other than sexual harassment, including equal pay for work of equal value**

Applicants earning below the BCEA threshold of R205 433.30 may elect to refer their dispute to either the CCMA or the Labour Court.

Applicants earning above the threshold may refer their disputes to the Labour Court or by written agreement, to the CCMA for arbitration.

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 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 actions measures they intend taking to achieve 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 Labour or the CCMA website.

## **RELEVANT LEGISLATION**

Employment Equity Act, No 55 of 1998.

## **SEXUAL HARASSMENT AT THE WORKPLACE: DISPUTE RESOLUTION**

### **WHAT SHOULD YOU DO IF YOU BELIEVE YOU HAVE BEEN SEXUALLY HARASSED?**

Keep notes of your complaint as close to the date of any relevant incidents.

As soon as reasonably possible report your complaint to a person you trust in the workplace: this could be a colleague or a human resources officer and seek advice and support.

If the problem is not resolved report the complaint to management and follow any grievance procedure (section 60(1) of the Employment Equity Act [EEA]). Keep a copy of your grievance and any response by management.

If your complaint is not resolved to your satisfaction you may refer the complaint of alleged sexual harassment to the CCMA for conciliation within six months after the act or omission that allegedly constitutes unfair discrimination (sexual harassment).

In your referral (on LRA Form 7.11) you must show that you have tried to resolve the dispute internally by following whatever grievance procedure is available to you.

If you refer your dispute late you will have to show good reasons why you did not refer the dispute in time and you must show that you have reasonable prospects of success.

### **THE EMPLOYER'S OBLIGATIONS**

As far as is practicable employers should designate one or more persons outside of line management who are available for people to approach for advice, assistance and if need be counselling and should inform employees who they may approach. If a complaint about sexual harassment is brought to the attention of an employer the following steps

should be taken by the employer.

- a) The designated person should consult the complainant and the alleged perpetrator and any relevant witnesses.
- b) The designated person must take steps to protect the confidentiality of the complainant and the alleged perpetrator.
- c) As sexual harassment is a sensitive issue employers must ensure that complainants and witnesses are protected against any reprisal.
- d) If the complaint appears to have some merit, management should offer help including counselling to the complainant.
- e) Employers must take appropriate remedial action to eliminate the sexual harassment.
- f) Employers must take appropriate disciplinary measures against any alleged perpetrator.

### **CONCILIATION OF DISPUTES ABOUT ALLEGED UNFAIR DISCRIMINATION ON THE GROUNDS OF SEXUAL HARASSMENT**

All disputes relating to alleged unfair discrimination, including sexual harassment, are conciliated by the CCMA. Bargaining councils do not have the jurisdiction to conciliate such disputes.

### **ARBITRATION OF DISPUTES ABOUT ALLEGED UNFAIR DISCRIMINATION ON THE GROUNDS OF SEXUAL HARASSMENT**

In cases of sexual harassment, all workplace related cases may be arbitrated by the CCMA irrespective of the amount that the employee earns. An employee has a choice between referring the matter to the CCMA for arbitration or to the Labour Court for adjudication. An applicant has **ninety days** in which to refer the matter to arbitration or to the Labour Court.

Legal representation is allowed at an arbitration hearing and at the Labour Court, but not in a conciliation hearing.

## **BURDEN OF PROOF IN UNFAIR DISCRIMINATION CASES**

Sexual harassment is a 'listed ground' in terms of section 6(1) of the EEA. Thus, once an allegation of sexual harassment is made, the employer must prove that such discrimination did not take place as alleged or that the conduct was rational and not unfair, or that it was otherwise justifiable.

## **REMEDIES**

If it is found that an employee has been unfairly discriminated against, an arbitration award may include an appropriate order that is just and equitable in the circumstance including payment of compensation, payment of damages and 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. The Labour Court has broader powers that also include the publication of the Court's order.

## **APPEAL TO THE LABOUR COURT**

Where an employee alleges unfair discrimination on the grounds of sexual harassment, a person affected by an award made by a commissioner of the CCMA may appeal to the Labour Court against that arbitration award within 14 days of the date of the award.

## **RELEVANT LEGISLATION**

Constitution of the Republic of South Africa (1996)

Employment Equity Act, No 55 of 1998 (as amended by Act 47 of 2013)

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA)

## SEXUAL HARASSMENT IN THE WORKPLACE

**Sexual harassment is unwelcome conduct of a sexual nature.**

### Unwelcome conduct

If you experience unwelcome conduct it is important to indicate that it is unwelcome by telling the person so, or walking away from him or her. If you have difficulty telling the perpetrator you should get help from a co-worker, superior, counsellor, human resources official, family member or friend.

There are times when harassment may constitute a single incident and there may be no opportunity to communicate that it is unwelcome.

You should report sexual harassment to the individual designated by management or to the human resources official as soon as possible.

### Conduct of a sexual nature

**Different types of conduct can amount to sexual harassment:**

**Physical conduct** can range from rape to physical touching, to other less direct physical acts. Spying on a person in a toilet or change room can constitute sexual harassment. Touching parts of a body e.g. breasts, hands, legs, buttocks, genitals, the neck and face may constitute physical conduct of a sexual nature. The test is whether a reasonable person in the victim's position would see it as conduct of a sexual nature.

If an employer conducts routine and regular searches it may not constitute conduct of a sexual nature if there is a good reason for the search (such as to avoid theft) and the search is conducted professionally by a member of the same sex.

**Verbal conduct** can range from suggestive and romantic to crude and offensive remarks, to a blatant demand for sex. Sex-related jokes, inappropriate enquiries about a person's sex life, and wolf whistling, are conduct of a sexual nature.

**Non-verbal conduct** of a sexual nature includes unwelcome gestures, indecent exposure, showing pornographic material, displaying or electronically sending explicit sexual pictures.

## Forms of sexual harassment

**Victimisation:** This occurs if a person is intimidated for failing to submit to sexual advances or where there is intention to humiliate or insult a person.

**Quid pro quo harassment:** This occurs if a person with power influences or attempts to influence a person's employment opportunities, e.g. employment or promotion in return for submitting to sexual advances. This may also include sexual favouritism where a person is rewarded for being available for sexual favours.

**Hostile work environment:** This occurs if a person's right to dignity, privacy, a safe working environment, fair labour practices and freedom and security of the person are harmed by being exposed to sexually unpleasant conduct to such an extent that the workplace becomes hostile.

## General Duties of Employers

- Employers should promote dignity and equality in the workplace by adopting and implementing policies and procedures to eliminate sexual harassment.
- The policy should be displayed in a public place such as notice boards and employees should be made aware of the policy.
- The policy should allow a complainant to raise a complaint informally (which could be resolved by discussion with or without the assistance of an appropriate third party) or formally.
- Employer policies must state that harassment is a form of discrimination and could in serious cases lead to the dismissal of a perpetrator. It should also state that victimisation of any complainant who lodges a complaint in good faith will be dealt with in terms of its disciplinary procedure.
- The policy should have clear reporting procedures so that a complainant may report via a friend, colleague, designated manager or any other person that the employee trusts.
- An informal procedure should allow the complainant or another appropriate person to explain to the perpetrator that the conduct complained of is not welcome even in appropriate circumstances without identifying the complainant. This would be appropriate if the conduct has been directed at more than one person.
- If, after investigation, the conduct raises significant risk of harm, the employer should assess the risk to the workplace and may advise the complainant to raise a formal

grievance. If the complainant does not wish to do so the employer may still have an obligation to initiate disciplinary proceedings against the perpetrator.

- Employers should notify employees and their trade union representatives, clients, suppliers and contractors of their policies and procedures and encourage them to report any violation of the policy.
- Special training should be given to managers, supervisors and shop stewards on sexual harassment and the need to eliminate it.
- An employer who fails to take the steps necessary to eliminate sexual harassment in the workplace and to comply with its obligations under the EEA may be held liable for the conduct of its employees, unless it can show that it did all that was reasonably practicable to ensure that the perpetrator would not contravene the EEA.

### Sources:

Code of Good Practice on the Handling of Sexual Harassment Cases (2008).  
Employment Equity Act 55 of 1998 (as amended)

## EQUAL PAY FOR WORK OF EQUAL VALUE

### WHAT IS MEANT BY EQUAL PAY FOR WORK OF EQUAL VALUE?

South Africa has a legacy of discrimination in relation to remuneration and benefits paid to employees, based on race, gender and other discriminatory grounds. The Employment Equity Act (the EEA) and Employment Equity Regulations provide protection to employees as follows:

- A difference in terms and conditions of employment between employees of the **same employer** performing the **same or substantially the same work or work of equal value** that is directly or indirectly **based** on any one or more of the **grounds** listed in section 6(1) of the EEA is unfair discrimination.
- The listed grounds are: 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, birth or on any other arbitrary ground.

- An arbitrary ground is one not listed above. The courts have described an arbitrary ground as one that is based on features and characteristics which have the potential to harm the basic dignity of a person or to affect the person negatively when compared to others (e.g. criminal record, citizenship, diabetes, asylum seeker status, obesity etc.)

### WHAT IS REQUIRED TO SHOW WORK IS OF EQUAL VALUE?

- The job is the same / identical as that of the job that it is being compared with (the 'comparator')
- The job is largely the same and it is possible for the employee to swap jobs with the comparator.
- The outputs of the job are of equal value to the employer.
- The responsibility for people, finances and material are similar.
- The skills, qualifications and experience on the job are similar
- The physical, mental and emotional effort required to perform the work are similar
- The conditions under which the work is performed (physical environment, psychological conditions, time and geographic location etc.) are similar.

### WHAT FACTORS MIGHT JUSTIFY A DIFFERENCE IN REMUNERATION?

EEA Regulation 7 provides the following:

“(1) If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following grounds:

- (a) the individuals' own **seniority or length of service**;
- (b) the individuals' own **qualifications, ability, competence or potential** above the minimum acceptable levels required for the performance of the job;
- (c) the individuals' own **performance, quantity or quality of work**, depending on fairness of the application of the performance evaluation system;
- (d) where an employee is **demoted** as a result of organisational restructuring or for any other legitimate reason without a reduction in pay and fixing the employee's salary at this level until the remuneration of employees in the same job category reaches this level;
- (e) where an individual is **employed temporarily in a position for purposes of gaining experience or training** and as a result receives different remuneration or enjoys different terms and conditions of employment;

- (f) the existence of a **shortage of relevant skill, or the market value** in a particular job classification; and
- (g) any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA.
- (2) A differentiation in terms and conditions of employment based on one or more ground listed in section 6(1) will be fair and rational if it can be shown that the differentiation won't be biased against an employee or group of employees based on race, gender or disability or any other ground; and it is applied in an equal or fair manner."

Employers should therefore conduct grading and job evaluation exercises to ensure that pay levels are fair and do not discriminate.

## DISPUTE RESOLUTION

Any employee who believes that he or she is being discriminated against in respect of these provisions must:

- Ensure that the job which the employee is comparing his or her own with is being performed by a fellow employee of the **same employer**.
- Ensure that the **ground** on which discrimination is claimed is clearly identified e.g. I perform the same work as A, but A is paid more than I am **because A is a male and I am a female** (discrimination on the basis of sex).

The EEA requires that the employee must:

- A:** Firstly **lodge a formal complaint** with the employer in order to show that a reasonable attempt has been made to resolve the dispute before referring it to the CCMA.
- B:** If the complaint is not resolved, a dispute may be referred to the CCMA for conciliation **WITHIN SIX (6) MONTHS** after the discriminatory act / omission. (Condonation may be applied for in cases of a late referral).
- C:** If the dispute is not resolved at conciliation an employee may, **WITHIN 90 DAYS** of the expiry of the 30 day conciliation period, or if it is earlier, within 90 days of the conciliation hearing, select one of the following options:

Refer the matter to the CCMA for arbitration or to the Labour Court for adjudication **if the employee earns less than the threshold**, or refer the matter to the Labour Court for adjudication **if the employee earns more than the threshold**.

**If there is a written agreement of consent** between the employer and employee parties, irrespective of the level of earnings of an employee, the employee may refer the dispute to the CCMA for arbitration.

Commissioners arbitrating such disputes 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.

## **HOW CAN AN EMPLOYER ENSURE THE PROVISION OF FAIR REMUNERATION AND BENEFITS?**

Employers should –

- consult with employees and unions to ensure the identification of any barriers to equity in the workplace, including terms and conditions of employment;
- Ensure that all jobs are objectively assessed and fairly remunerated, taking into account, *inter alia*:
  - (a) the responsibility demanded of the work, including responsibility for people, finances and material;
  - (b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
  - (c) physical, mental and emotional effort required to perform the work; and
  - (d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.

In addition to the criteria specified in above, any other factor indicating the value of the work may be taken into account in evaluating work, provided the employer shows that the factor is relevant to assessing the value of the work.

The assessment must be conducted in a manner that is free from bias on grounds of race, gender or disability, any other listed ground or any arbitrary ground that is prohibited in terms of the Act.

**NOTE:** An employer may **justify the value assigned to an employee's work** by reference to the classification of a relevant job in terms of a **sectoral determination** made by the Minister of Labour in terms of section 55 of the Basic Conditions of Employment Act 75 of 1997) which applies to the employer.

## SOURCES

1. Employment Equity Act 55 of 1998.
2. Employment Equity Regulations, GN R595 in GG 37873 of 1 August 2014.
3. Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN 448 in GG 38837 of 1 June 2015.