The Employment Equity Bill: a critique

INDEPENDENT MEDIATION SERVICE OF SOUTH AFRICA
Mediation Notes

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The long awaited Employment Equity Bill (1997) has been published for comment. In the Explanatory Memorandum accompanying the Bill, its purpose is explained as achieving equality in the workplace by eliminating unfair discrimination and implementing positive measures to redress disadvantages experienced by black people, women and the disabled, to ensure equitable representation in all occupational categories and levels in the workforce.

Given the concern of employers about statutory quotas and regulation, the Bill is largely an enabling one, facilitating workplace reform through self-regulation by employer and employee parties.

Key terms

Interpretation of certain clauses by parties, including CCMA commissioners, will be informed by definition of terms. This is important in establishing clear parameters for employment equity (EE) plans, giving guidelines to employers and labour, and clarity in dispute settlement. The following terms and clauses should be defined and explained.

- In Chapter II, Prohibition of unfair discrimination, Section 5.3, 'harassment', either racial or sexual as a form of unfair discrimination, is not defined. It could be interpreted as using racist or sexist speech as well as conduct
- Section 5 (1) refers to direct and indirect discrimination; these terms and the differences between them should be defined, giving examples.
- The term 'equitable representation' is used in several sections of the Bill. Although the Bill allows for employers to consider regional/sectoral, and industry-specific factors, demographics and labour market supply of certain skills, the longer-term vision is a diverse workforce reflecting the national demographic profile of groups at all levels. There is a need to give clearer guidelines on what would constitute 'equitable representation'. This is important in considering more carefully what appointing 'suitably qualified people' means. This could mean academic, occupational or experience-based competencies Employers will be required to train and develop people from designed groups (Chapter 111, 12(e)). Failure to appoint 'suitably qualified' people from designed groups, with the argument that there were not enough in the labour market, will not necessarily be acceptable. Proactive measures, such as scholarships and bursaries, are important in giving effect to an active employer role in tertiary occupational education.

Flexibility

The Bill is complemented by the Skills Development Bill (1997) which requires a payroll levy of 1-1,5% for training and development. Too much specificity in law around terms such as 'equitable representation', will likely result in practice in quota setting and detract from a more flexible feature of the Bill, that of targets. The latter takes situational factors into account in a more pragmatic way. The Bill tries to allay employer fears about quotas (Section 3(a)), appointing people not suitably qualified (Section 3(b)), and appointing white males (Section 3(c)). Employers are also not required to create supernumerary posts for designed groups.

Despite this apparent flexibility, penalties under Chapter II are severe, particularly the prospect of paying compensatory damage. This is especially true for smaller organisations. Punitive damages lie in the discretion of the Labour Court. Fines of R500 000 to R900 000 are somewhat high. Larger organisations, realising they are not making progress, or who show little intention of addressing employment equity, may cynically budget for this contingency.

Although flexibility is important, if labour turnover of current staff is low, it will be difficult to make reasonable progress, given that employers do not have to take on new employees. The Bill should rather have a mix of sticks and positive incentives to achieve equity plans.

A diverse workforce

The Bill has the long-term goal of creating a diverse workforce. It seems unlikely that legislation on employment equity and affirmative action will be an interim measure. More likely, employment equity plans, programmes and reporting requirements will continue indefinitely, although subject to review. A positive feature of the Bill is that it allows for self regulation by employers, employees and trade unions.

In Section 17 dealing with employment equity plans, there are however, vagaries which need to be explained. The notions of 'under representation' of people from designated groups, and 'reasonable progress' towards implementing equity, are vague. It might be left to the interpretation of a CCMA commissioner or the Labour Court to give substance to these terms, but Codes of Practices or guidelines from the Department of Labour, rather than prescriptive definitions, are preferable. The notion of 'reasonable accommodation' in Section 61 is limited to people with a disability. One could ask whether this concept should not be extended to other areas with discriminatory potential, for example religious observance and working mothers.

Dispute resolution

Sections 39 and 40 give the Director General wide powers. These should rather be made a last resort, given dispute resolution procedures envisaged through the CCMA and the Labour Court. An employer can, however, challenge the Director General's decision in the Labour Court.

The Bill's dispute resolution procedures is complemented by Schedule 7 of the LRA, which includes unfair discrimination provisions which can be referred to the CCMA for conciliation and to the Labour Court for subsequent arbitration.

Disputes about duties of designated employers, should, in terms of Section 24, be referred to the CCMA for conciliation, and if not resolved, to arbitration by the CCMA. These duties include consultation, disclosure, analysis of employment practices, an employment equity plan and an annual progress report to the

Department of Labour on implementation (Sections 13-17).

A dispute about protection of employee rights conferred by the Act (Section 48) may, in terms of Section 49 be referred to the CCMA for conciliation. If remaining unresolved after conciliation, it may be referred to the Labour Court for adjudication or by consent of all the parties to arbitration by the CCMA.

These procedures are satisfactory, but the CCMA is likely to carry a large additional load as a result of this Bill. There have been surprisingly few cases brought to it in terms of discriminatory provisions in Schedule 7 of the LRA, but this could quickly change when the EE Bill is enacted. CCMA offices will have to consider creating a division/team of designated commissioners and CMOs who have knowledge, experience and training in this area.

There are potentially many disputes requiring specialist knowledge, for example, recruitment and selection practices and other human resource practices. Understanding diversity management and legal aspects of employment and labour market discrimination will be necessary Commissioners will need wise judgement, expert knowledge, sensitivity and ability to deal with complex information. This will likely become an area of specialised dispute resolution.

To alleviate the added CCMA case load, alternative dispute resolution provisions should be included in the Act. Both bargaining council dispute procedure and use of alternative agencies such as IMSSA are not provided for in the Bill. This is a serious omission. The law should encourage preventative dispute systems design

As disputes around discrimination are often complex, mediation and arbitration may not always be effective. There is a need for independent facilitation, joint problem solving and alternative, proactive forms of dispute resolution. The Bill should provide for this

The current procedure in the Act will provide a remedy for aggrieved individuals, but cannot address the underlying basis for discrimination and inequity. It is arguable that the law should seek to remedy only symptoms. Obviously, it cannot be expected to solve deep-rooted problems and conflicts, but it would go some way towards this by providing a broader framework which includes provisions for alternative dispute resolution.

To achieve equity through affirmative action, the Bill should be more explicitly complemented by measures contained in the Skills Development Bill. Equity will not be achieved without substantial investment in human resource development, linked with strategic organisational goals. Legal 'carrots and sticks' will help, but, ultimately, effective human resource development is a function of the strategic importance given to it within an organisation and mobilising resources to create a culture of people development and equity. ★

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