

South African Human Rights Commission identifies issues with affirmative action and employment equity provisions

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The South African Human Rights Commission (the “**Commission**”) is mandated by section 184 of the Constitution to promote respect for human rights and a culture of human rights; to promote the protection, development and attainment of human rights; and to monitor and assess the observance of human rights in South Africa. The Commission publishes annual reports in which it highlights what it regards as problematic issues and makes recommendations in this regard. The Commission recently published its Annual Equality Report for the period 2017/2018 (the “**report**”). In its report, the Commission highlighted the following issues.

The Employment Equity Act definition of “designated groups”

The report points out that the Employment Equity Act, 1998 (“**EEA**”) classifies beneficiaries of affirmative action, ie, the “designated groups”, along the same racial lines that were utilised in the apartheid era, but also includes the categories of people with disabilities and women. Because the EEA uses such a rigid system of classification, indigenous peoples, those born from mixed race marriages, and linguistic or tribal minorities within designated groups, are not provided for in the EEA. The report recommends that the EEA’s definition of “designated group” be amended to include more nuanced groups on the basis of need, taking into account these groups’ socio-economic needs specifically.

Government’s failure to measure the impact of affirmative action on the basis of need and disaggregated data

The report argues that because socio-economic data collected by the state is disaggregated along the same racial lines described above, the degrees of disadvantage within a group, and the possible overlap of more than one form of discrimination faced by members of these broadly categorised groups (eg, race and gender) cannot be determined. Furthermore, discrimination among members of the same group cannot be identified. The report recommends that government collaborates with Statistics South Africa to gather data disaggregated by ethnic origin, language and disability, as well as data that includes social and economic indicators. Steps must be taken to amend the EEA to disaggregate data and to measure the impact of affirmative action on vulnerable groups, including indigenous groups. In addition, various relevant state departments should determine whether and how the EEA can be amended “to require a qualitative and context-sensitive assessment of need” by employers when employment equity plans are implemented.

Rigid and absolute quotas in the context of affirmative action which are misaligned to the constitutional object of achieving equality

In *South African Police Service v Solidarity obo Barnard*, the Constitutional Court held that an employer may choose to not promote a white woman (in this case, Ms Barnard) in cases where white women are over-represented in a specific workplace, irrespective of the fact that women are a designated group in terms of the EEA. In the subsequent case of *Solidarity and Others v Department of Correctional Services*, the same court confirmed that the so-called “Barnard principle” applies to African, Coloured and Indian persons and to different genders.

The report argues that the “Barnard principle” is therefore in direct conflict with the requirement that statutes such as the EEA address the needs of individuals within a designated group, taking into account the socio-economic needs of the specific individual. It also means that inequality in the labour market in the broad sense could be exacerbated and compounded. Lastly, this principle may lead to unintended consequences such as, for example, a white heterosexual man being employed in a position rather than a black homosexual woman, because of a so-called “over-representivity” of women in the workplace.

It further argues that, in order to achieve substantive equality, the object of affirmative action must be to constitute workforces in such a way that they are “broadly representative” of the people of South Africa. In *Solidarity v Department of Correctional Services*, the Constitutional Court determined that regional demographics must be taken into account when measuring whether a workforce is “broadly representative”. At the time that the court considered the *Solidarity* case, section 42(a)(i) of the EEA **required** employers to consider both national and regional demographics when setting representivity targets in the workplace. After the judgment in *Solidarity*, section 42 was amended and now makes the consideration of regional demographics merely **discretionary**. The report recommends that the EEA should be amended to revert to the position where consideration of regional demographics is mandatory. Failing to consider regional demographics leads to a failure to adopt a “context-sensitive” approach to affirmative action and could also lead to severe prejudice to the members of designated groups in areas where they have greater representivity.

Lack of contribution to transformation of the labour market by the private sector

The report finds that the lack of contribution by the private sector to transformation is a serious inhibitor to achieving substantive equality in South Africa. The private sector still mainly employs white males to senior positions while black representivity at senior level has decreased to pre-2005 levels in recent years. It proposes that employers should pay more

attention to, and allocate more resources to, the training and development of persons from the designated groups. In addition, the bringing into force of chapter 5 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, which contains important provisions imposing obligations relating to the achievement of equality, may assist in this regard. Finally, increased funding should be provided to the Commission and the Commission for Gender Equality in order for these institutions to effectively perform their functions in terms of this Act.

The way forward

If the Commission's recommendations relating to affirmative action in the workplace are accepted, it seems clear that the process of drafting and implementing employment equity plans will become a far more complex and time-consuming process.

The Minister of Labour has instructed the National Economic Development and Labour Council ("NEDLAC") to study the report and respond to the Commission's recommendations. She has also stated that it may prove useful for NEDLAC to meet with the Commission to discuss their recommendations and the basis for their findings. It remains to be seen how many of the recommendations made by the Commission will be implemented.

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