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AFFIRMATIVE ACTION: WHERE THE LAW STANDS AT PRESENT

The proposed amendments to the Employment Equity Act ('EEA'), which were published in December 2010, created much discussion and concern. The concern arose from both the substance of some of the proposals – e.g. how to ensure quicker and more stringent enforcement of the EEA's affirmative action provisions – and the poor manner in which they were drafted. For now it would appear that the proposed changes (as well as proposed changes to the LRA and the BCEA) have been shelved. Word has it that the labour market parties at Nedlac, i.e. government, organised labour and organised business, will at some point in future develop fresh, and hopefully better considered and drafted, proposals for change. Nevertheless, change will happen at some point in the foreseeable future and one can expect that greater emphasis will be placed on employers' obligations with respect to affirmative action, contained in Chapter 3 of the Act. This article takes a brief look at what the courts have said to date about affirmative action, its limits and its implementation. But first, it might be useful to provide some context.

Statistics from last year's Employment Equity report by the Employment Equity Commission, established under the EEA, suggest that while good progress has been made in terms of representation of designated groups at most levels in the private sector, there has been slow progress at the more senior levels. While some (including people in the Department of Labour) have blamed business for being 'anti-transformation' or at least tardy in their commitment to affirmative action, there is reason to believe that our skills shortage at those senior levels is real and could provide at least part of the answer to the lack of transformation at the top of the organisational pyramid. A report in Sake24 dated 11 May 2011, quoting statistics from Adcorp's Recruitment Index, states that roughly 829 800 vacancies existed in SA for 'highly skilled' employees. This includes positions in management, accounting, medicine, engineering, law, specialised technicians and artisans. This contrasts with unemployment figures of roughly 967 000 and 247 400 among entry level job seekers and domestic workers, respectively.

Since 2000, the shortage of highly skilled employees has resulted in an inflation adjusted increase of 286.4% in the salaries of people in that category – scarce skills simply became more expensive. Meanwhile, the National Skills Fund is reportedly sitting on roughly R3.5 billion for skills development which it has yet to distribute.

What all of this means is that employers in the private sectors will have to contend with two opposing pressures, one coming from organised labour and government for quicker transformation and the other from the labour market. This is likely to result not only in greater and more frequent demands from trade unions in particular but probably also an increase in the Department of Labour's vigilance and in litigation around affirmative action issues.

What we do know about affirmative action

So what have the courts said so far about affirmative action? Herewith a summary of the principles the courts have developed in the numerous cases over the years dealing with affirmative action:

- those acting in a higher position do not have a right to be promoted to it, but must be treated fairly;
- where internal applicants are involved, the decision not to appoint them must comply with internal procedures and be based on rational grounds, e.g. suitability, skill or promotion of representivity;

- internal applicants may be able to challenge their non-appointment to a higher position on the basis of unfair discrimination *and* unfair labour practice;
- the absence of a plan is not fatal to an employer's reliance on affirmative action, but may create evidentiary problems for it;
- when applying affirmative action, employers should not only focus on past disadvantage, but also the retention of skill and the efficient operation of the organisation or, in the public sector, service delivery and good administration;
- the mere fact that a white person is appointed to a position and that the unsuccessful candidate happens to belong to a different race does not necessarily constitute race discrimination under the EEA;
- there is no right to affirmative action in our law;
- because there is no right to affirmative action, designated person cannot demand, as of right, to be retained in a retrenchment exercise in favour of persons from non-designated groups who have skills better suited to available positions;
- mechanical compliance with the prescribed processes of the EEA is not genuine compliance with the letter and spirit of the EEA;
- compliance is not an end in itself – employers must systematically develop the workforce out of a life of disadvantage;
- there are special requirements to be met before one can succeed in a claim for discrimination based on a ground not listed in the EEA;
- provided the requirement is genuine, there is nothing wrong with an employer requiring proven managerial experience in the filling of senior posts, even if that excludes members of the designated groups;
- where an affirmative action plan contains a 'sunset clause, the exclusion of non-designated candidates in favour of less qualified persons from the designated groups may constitute unfair discrimination if equity targets have been achieved in a particular job category; and
- designated persons who are not appointed because they fell out of consideration following a fair selection process and in terms of which a more suitable non-designated person was selected, cannot claim unfair discrimination;
- the extent to which the implementation of an employment equity plan could discriminate or adversely affect individuals is limited by law;
- in implementing employment equity, the affected employee's right to equal treatment before the law and to dignity must be recognised;
- where a suitable person from an under-represented group cannot be found, the promotion of someone from a different group should not be denied without a clear and satisfactory explanation; and
- there has to be a rational connection between the provisions of the employment equity plan and the measures adopted to implement its provisions. In the case of the State, due regard must be given to the efficient operation of the public service;
- it has not yet been decided whether an employer is entitled, rather than obliged, to take race or gender into account when selecting the employees to be dismissed in a retrenchment exercise.

In summary then, the courts try to find a balance between the competing needs for greater representivity of designated groups at all levels in the workplace on the one hand, and the right to equality of individuals from the excluded groups (minorities among the designated categories or non-designated people, i.e. able-bodied white males).

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