

SABPP FACT SHEET

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EMPLOYMENT EQUITY

Introduction

The management of Employment Equity (EE) is one of the most complex areas that HR professionals have to deal with. If EE is badly handled, or not handled at all, the organisation faces legal action from the Department of Labour and possibly heavy fines. Other results of “not getting it right” include damage to the organisation’s reputation among talented individuals of all races; and possibly failure to reach the organisation’s strategic objectives due to not having the right talent in place. And yet, it is not easy to get it right. There are many obstacles including a severe shortage of people from the designated groups with sufficient qualifications and experience to fill critical positions; conservative, entrenched attitudes of people currently in top and senior management positions; and last, but certainly not least, the economic environment of uncertainty, volatility and



poor profit prospects for many companies, which leads to companies reducing management positions and thereby blocking advancement for designated groups. But the good news is that optimising diversity and EE can yield significant business benefits if correctly implemented.

“Employment Equity” is a term used in South Africa’s labour legislation to refer to two related but different concepts:

- promoting equal opportunity and fair treatment in employment through the removal of unfair discrimination on arbitrary grounds;
- implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workforce.

So, “equity” will have been achieved when organisations’ workforces at all levels and in all categories reflect the labour market.

This Fact Sheet will cover the legislation and good practice in the management of EE programmes. An understanding of this will contribute towards an HR professional's ability to give good advice and support to management in the implementation of EE.

1. Background

EE as a national strategy was embarked on post 1994, and formalized in the EE Act of 1998, with high hopes and on the basis of two major assumptions. The assumptions were that the demand for labour would be on a growth path as economic growth accelerated; and that the quality of skills offered by job seekers would be improving due to improvements in the basic and higher education systems.

As recent history has now shown, growth in employment has not matched expectations and the failure of the basic and higher education systems to produce people readily employable is well documented. This has had a profound impact on progress towards EE. However, the imperative to achieve EE as part of the transformation of organisations remains as important today as it was in 1998.

The government's oversight of EE is exercised through the Employment Equity Commission, a tri-partite body (government, organised labour and organised business). The Commission is served by a Secretariat within the Department of Labour. The Commission sets itself goals for action, which are reported on, together with the statistics on workforce EE trends supplied by organisations in their compulsory reporting, in an annual report.

2. Legislative Framework

The Employment Equity Act of 1998 (EEA) is the governing statute. Relevant sections are summarised below.

a) Scope

The provisions of the EEA on unfair discrimination apply to all employers, while the provisions on Affirmative Action apply only to employers of more than 50 people¹, municipalities and organs of state. Designated groups to whom Affirmative Action applies are: "black people, women, or people with disabilities"².

b) Unfair Discrimination

The grounds for discrimination which are prohibited are: "race, gender, 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". It is specifically noted that discrimination in favour of designated groups for Affirmative Action is not unfair, and neither is it unfair discrimination to prefer or exclude any person on "the basis of an inherent job requirement".

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¹ Some employers believe it is appropriate to create a structure of subsidiary companies, each employing less than 50 people, to avoid the EEA. This is contrary to the spirit of the Act and the SABPP does not support this type of avoidance. There is, in any case,

² Although there has been discussion recently around removing White women from the designated groups, the 2012 EEA amendment bill did not do so.

Medical testing is allowed only where it can be justified, and psychometric tests can only be used where they are shown to be “scientifically valid and reliable, can be applied fairly to all employees, and are not biased against any employee or group”³.

Complaints of alleged unfair discrimination may be made by any employee, or any applicant for employment, to the CCMA, who must conciliate the dispute. An unresolved dispute may be referred to the Labour Court for arbitration.

c) Affirmative Action

The thrust of Chapter III on Affirmative Action is that an employer must take measures, in consultation with employees, to enable people from designated groups to be employed, developed and promoted so that eventually the workforce is distributed equitably among designated and non-designated groups. The employer must analyse its situation and then, by reference to national and regional demographics, set itself targets over a specified time period and identify actions which will result in EE. These actions “must include:

- identification and elimination of barriers with an adverse impact on designated groups;
- measures which promote diversity;
- making reasonable accommodation for people from designated groups;
- retention, development and training of designated groups (including skills development); and
- Preferential treatment and numerical goals to ensure equitable representation. This excludes quotas.”

It is specifically noted that “Designated employers are not required to take any decision regarding an employment policy or practice that would establish an absolute barrier to prospective or continued employment or advancement of people not from designated groups.” In other words, a company is able to continue to recruit and employ White males, but a company may equally decide not to accept applications from any particular group for a certain vacancy if the vacancy should, in terms of the company’s EE Plan, be used to advance persons from designated groups⁴.

Every designated employer must submit an EE Plan and an EE Report each year. Employers with less than 150 employees must report every second year, while employers with 150 or more employees are required to report each year.

There are various enforcement provisions. Any employee or trade union representative may report alleged contraventions, either internally within the company or to a labour inspector or to the Director General. A Department of Labour inspector may visit the employer to determine whether the EE Plans and Reports have been submitted and may, in addition, make a judgement, based on the Plan and Report, as to whether the employer is making reasonable progress towards achieving EE. If the inspector is not satisfied, he/she may request that the employer give a written undertaking to comply by a certain date. If this is not done, a compliance order may be issued. (Non-compliance could be in any or all of the areas such as consultation, analysis, preparing and implementing the plan, reporting, keeping records or assigning management responsibilities.)

³ The Amendment Bill prefers the term “psychometric testing” to that of “psychological testing” and introduces the requirement that each test used must have been certified by the Health Professions Council. Note that good practice in any case requires testing to be only one of several selection methods used.

⁴ This was the situation in September 2012 where Woolworths advertised in the Western Cape for African black candidates only for a specific vacancy. The Department of Labour confirmed that this approach is in accordance with the EEA.

The employer may object to the Director General (DG) against a compliance order, and the DG must within 60 days consider the employer's representations and any other relevant information and may vary, confirm or cancel the order and specify the time period for compliance. Failing compliance with the order or an objection, the DG may apply to the Labour Court for an order of court. The employer may appeal against a DG order to the Labour Court.

The DG may (and does) conduct a review at any time to determine if an employer is complying. On completion of the review, the DG may issue recommendations for compliance within a specified time frame. These recommendations may also be referred to the Labour Court for an order if not implemented.

The Labour Court may make orders and impose fines. Fines range from R0.5m for a first offence to R0.9m for fourth offence within 3 years of the same provision.

d) What is "reasonable progress"

The Department of Labour inspectors and/or the DG may also assess non-compliance qualitatively on the grounds of: s. 42:

- a. "The extent to which suitably qualified people from amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the
 - i. Demographic profile of the national and regional economically active population;
 - ii. Pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
 - iii. Economic and financial factors relevant to the sector in which the employer operates;
 - iv. Present and anticipated economic and financial circumstances of the employer; and
 - v. The number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;
- b. Progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;
- c. Reasonable efforts made by a designated employer to implement its employment equity plan;
- d. The extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and
- e. Any other prescribed factor."

e) Proposed amendments to the EEA

The 2012 proposed amendments to the EEA, which is currently under discussion in Parliament, seek to (amongst some minor administrative adjustments):

- i. Introduce the concept that differences in terms and conditions of employment for employees performing the same work or work of equal value will be considered unfair discrimination unless the employer can show justification;
- ii. Allow arbitration by the CCMA, rather than the Labour Court, for disputes of unfair discrimination. An appeal against the CCMA's arbitration award may be made to the Labour Court;
- iii. Clarify how an employer would prove that alleged discrimination is not unfair – using balance of probabilities to show how it is rational;
- iv. Remove the requirement to have plans and submit reports on occupational categories – leaving the requirement to have plans and submit reports per occupational level;

- v. Create two tiers of fines – the less serious being the failure to consult, analyse, inform, publish, allocate management responsibility (where the fines are tripled from the 1998 figures) and the more serious being the failure to prepare a plan, report, prepare a successive plan and to comply with a recommendation from the DG. These fines are expressed as the greater of the fines for the less serious offences or a % of the employer’s turnover, ranging from 2% for a first offence to 10% for the fourth offence.
- vi. Remove the detailed provisions for assessing reasonable progress and substitute a general provision “reasonable steps taken ..”, while allowing for more detailed regulations to be issued after the Minister has consulted with NEDLAC.

3. EE Commission Report 2011/2012

The latest EE Commission Report shows that progress toward achieving EE by South Africa’s larger employers is much slower than was hoped for. The Report shows the EE status at occupational levels and categories for all employers, and then splits them between government and private sector. There are also tables showing movements: terminations, recruitments and promotions.

The tables in the Report which show trends over time must be treated with extreme caution, because the number of employers’ reports included in the consolidated figures has grown tremendously (from 1493 in 2007 to 4370 in 2011). Thus, the comparisons are not like for like.

The overall picture is as shown below:

		African		Coloured		Indian		White		Foreign Nationals
		M	F	M	F	M	F	M	F	
Economically Active Population		40.3%	33.8%	5.9%	5.2%	1.8%	1.1%	6.6%	5.3%	
Top Management	Private sector	8.1%	3.1%	2.8%	1.4%	6.1%	1.6%	61.7%	10.8%	4.4%
	Gov’t	45.4%	23.6%	7.7%	1.6%	4.4%	1.2%	12.2%	3.3%	0.5%
Senior Management	Private sector	9.4%	4.0%	4.4%	2.3%	7.3%	2.8%	50.4%	16.5%	2.8%
	Gov’t	38.4%	22.5%	5.6%	2.5%	4.6%	2.4%	15.4%	7.7%	0.7%
Professional/mid management	Private sector	13.9%	8.3%	5.5%	4.3%	6.9%	4.5%	35.3%	19.3%	2.0%
	Gov’t	30.9%	34.3%	4.3%	5.6%	3.0%	2.7%	9.7%	8.1%	1.4%
Skilled/first line supervisors	Private sector	48.9%	23.3%	5.8%	6.8%	2.0%	2.0%	3.1%	4.7%	3.3%
	Gov’t	32.5%	44.3%	4.0%	3.3%	1.9%	2.2%	5.5%	5.7%	0.6%
Semi-skilled	Overall	46.2%	28.5%	5.7%	6.5%	1.7%	1.8%	2.7%	4.3%	2.6%
Unskilled	Overall	52.8%	31.3%	5.2%	5.2%	0.7%	0.4%	0.7%	0.3%	3.5%

		African		Coloured		Indian		White		Foreign Nationals
		M	F	M	F	M	F	M	F	
Temporary labour	Overall	43.9%	32.0%	5.8%	5.7%	1.9%	1.1%	3.9%	3.4%	2.1%

Clearly, the results so far in achieving equity across all occupational levels have been disappointing. But what will the figures look like in a few years' time? To derive some answer this question, one has to look at the figures on recruitments. (These figures are not split into private/government sectors as the Commission's Report does not reveal this data.)

	African		Coloured		Indian		White		Foreign Nationals
	M	F	M	F	M	F	M	F	
Economically Active Population	40.3%	33.8%	5.9%	5.2%	1.8%	1.1%	6.6%	5.3%	
Top Management	20.4%	10.8%	3.9%	1.6%	5.5%	1.8%	39.7%	9.1%	7.0%
Senior Management	16.6%	10.0%	4.4%	2.2%	6.2%	3.2%	39.5%	14.1%	4.1%
Professional/mid management	18.5%	16.1%	4.9%	4.1%	5.6%	4.6%	26.4%	16.1%	3.7%
Skilled/first line supervisors	19.5%	21.2%	7.0%	6.6%	3.4%	2.7%	15.8%	11.5%	2.3%

Recruitments over the period 2011/12 are still showing severe under-representation of designated groups, meaning that the overall figures are not likely to change much in the short, medium or even long term. This table also shows that White recruitment is prevalent at all levels – contradicting the frequent complaints in the media that White people cannot get jobs. The Commission remarks in its Report that at the present rate of progress, it would take 127 years to transform in the middle to upper layers of management.

To arrive at some estimate of whether discrimination and prejudice are skewing recruitment patterns, one can compare recruitments at professional level to the racial composition of university outputs. The SA Institute of Race Relations reported that in 2008, 45% of university degrees were awarded to African students, while in 1991 only 25% of degrees were awarded to African students. Yet it would appear that, 3 years later, this proportion is not reflected in recruitments either at the professional level or at the skilled level. This is usually attributed to the lack of African graduates with science, engineering and technology degrees, directly attributable to poor preparation in maths and science in the basic education system.

The current situation for people with disabilities (PWD) is as disappointing as for that of African people. There are no statistics of PWD as a proportion of the Economically Active Population, but the National Skills Development Strategy I in 2001 set as a target that 4% of the beneficiaries of training programmes should be PWD, and the target the public sector set for itself for employment of PWD was 2%. In 2011/12, a total of 0.8% of people included in the EE reporting were PWD. More rapid progress is needed on EE in the area of disability.

Although the lack of EE in terms of gender is disappointing at most levels and in particular in traditionally male dominated professions such as accounting and engineering, significant progress has been made in EE at top management level. South Africa is now 17th in the world on gender representivity at top management level.

4. BBEE Scorecards

Recent changes in BBEE scorecards are likely to increase the pressure for improvements in the rate of progress on EE. The targets have been set as follows:

Measurement Category & Criteria	Weighting points	Compliance Targets	
		Years 0 - 5	Years 6 - 10
Black Disabled Employees as a % of all employees	2	2%	3%
Black employees in Senior Management as a % of all such employees using the adjusted recognition for gender	5	43%	60%
Black employees in Middle Management as a % of all such employees using the adjusted recognition for gender	4	63%	75%
Black employees in Junior Management as a % of all such employees using the adjusted recognition for gender	4	68%	80%
Bonus points for meeting or exceeding EAP targets in each category	3		

It should be noted that, in the opinion of the SABPP based on the current statistics, it will be impossible for the aggregate of employers to reach these targets. Only employers which take EE extremely seriously will be able to meet the targets.

Key success factors for EE achievement

As early as 2002, in the first EE Commission Report stressed that the attitude of an employer's leadership is the main success factor:

The organisations who seemed to make visible progress in attracting, developing, advancing and retaining suitable qualified persons, black people, woman and people with disabilities, the designated groups in terms of the Act, were those who saw affirmative action in favour of these groups as one of their key strategies for pursuing corporate goals such as achieving and maintaining productivity, excellence and global competitiveness. These are employers who saw employment equity as a business imperative rather than simply an issue of complying with the law. In many of these companies accelerated human resource development is a critical part of the affirmative action measures.

Case studies presented at conferences since then tend to confirm this point. Leading companies treat EE seriously, plan for it and invest in it.

Statistics show that staff turnover at top management levels is higher among Africans than other groups (15% compared to 8.8% for White males). From the limited research available in South Africa on EE, this can be attributed to an uncongenial environment. It could also reflect a common occurrence where senior African people are sought after for non-executive positions or start their own businesses. Whatever is the case, this turnover fuels a salary package spiral – research by 21st Century Pay Solutions has shown that starting salaries offered to Africans are higher than to other groups, but that employers then adjust all present employees at the same level upwards, so that the executive pay spiral is accelerated. This underlines once again that for as long as the pipeline is insufficient in quantity and quality, employers will compete against each other for the available qualified people, and that is then reflected in increasing executive packages. The only way out of this is for more employers to invest more in developing pipelines for the long term.

5. The role of HR professionals

a. Forecasting and planning

In order to make a realistic EE Plan, an employer needs to get hold of statistics on the racial composition of the recruitment pipeline for the specific industry, and critical skills within that industry (in other words, a demand and supply forecast). However, it will not be sufficient to wait for the State tertiary institutions to produce skilled people for you. You need to forecast over about a 10 year period how many of what skills you will need for your business as it evolves and adapts to the changing environment and how many people you are likely to lose to retirement, normal turnover and other losses. You then need to think how you as an employer can find people internally or externally and develop them to have those skills, also over a 10 year period. With that sort of time-scale, and focused attention on expedited development, it should be possible to secure your talent pipeline and at the same time achieve EE.

b. Leadership

It is unequivocally the role of all HR professionals to take ownership of and leadership in EE. EE is essentially a special case of Talent Management, and all the good practices of Talent Management should be used to achieve EE. The SABPP believes that this means that employers should ensure that their HR function is staffed with qualified HR professionals who can take on this role.

c. Compliance

HR professionals must ensure that the employer is fully compliant with the procedural aspects of EE. This means that accurate and complete Plans and Reports must be submitted on time to the Department of Labour.

d. Ethics

There are many areas of EE implementation where HR professionals need to be skilled in ethical decision making. There are various interests to be balanced and the imperatives of transformation together with competence mean that individual cases are often not easy to handle. Typical examples of unethical behaviour and practices relevant to EE to be addressed by HR are discrimination, window-dressing, fronting and false reporting to inflate EE/BBBEE scorecards. More details on Ethics and EE are given in the SABPP publication Ethics Guide to HR Practice (available from <http://www.sabpp.co.za/products/>).

e. Skills Development

HR needs to step up in ensuring a more dedicated focus to skills development at all levels, in particular at the professional level to create a pool of senior employees who could be developed into management positions. A more integrated approach is needed with the utilisation of different HR and capacity-building interventions such as mentoring and coaching.

f. Diversity Management

While diversity awareness programmes have been very popular in the 1990's and early 2000's, they have lost momentum in recent times. It is essential to reintroduce diversity workshops and other related support systems in driving a culture conducive to EE.

6. Conclusion

Despite good progress being made by a few top companies, most organisations are still struggling with EE. HR professionals can play a key role in driving and supporting EE, but an integrated approach is needed to create a large pool of EE candidates.

Mastery of the legislation and extensive knowledge of good practices in EE are essential skills for HR professionals.

A more complete analysis of the current situation and published research, together with detailed guidelines and recommendations is included in the SABPP's Position Paper on Employment Equity and Transformation (available on www.sabpp.co.za).

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