



KEEPING UP WITH EMPLOYMENT EQUITY

Complying with the Employment Equity Act (EEA) is not merely a mechanical process. There are indeed some procedural requirements, but in assessing compliance consideration must be given to whether 'sufficient progress' has been made with the implementation of employment equity. This does not mean that the employer can simply be judged by comparing the demographic profile of its workforce to that of the general population.

The EEA provides a number of enforcement mechanisms to ensure compliance with the Act's affirmative action provisions, including procedures instituted by labour inspectors involving written undertakings and compliance orders and review by the Director-General of Labour ('DG') in terms of s 43 of the Act.

What factors must be taken into account when the DG assesses an employer's compliance with Chapter 3 of the EEA? The case of *DG Department of Labour & another v Comair Ltd* [2009] 11 BLLR 1063 (LC) involved an application by the DG to the Labour Court for an order declaring that the respondent, Comair, had breached several provisions of the Act relating to the preparation and implementation of an affirmative action plan. The court had to determine, amongst others, what factors the DG must take into account when determining whether an employer had made sufficient progress with the implementation of affirmative action.

In assessing an employer's compliance, the court held, the DG is obliged to consider not only demographic profiles, but also those factors listed in s 42 of the EEA, such as the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees; economic and financial factors relevant to the sector in which the employer operates; present and anticipated economic and financial circumstances of the employer; and the number of present and planned vacancies that exist; the employer's labour turnover; progress made by other, comparable employers in the same sector; reasonable efforts made by the employer to implement its plan; and the extent to which the employer has succeeded in eliminating employment barriers that face designated groups:

'It is clear from the foregoing that the EEA instructs the DG to take into consideration a number of factors before arriving at a decision [regarding compliance]. I am in agreement with the submission that this matrix of considerations allows and in fact forces the official to bring a sound judgment to bear in assessing compliance with the EEA. What is further clear from this section is the fact that the requirements or factors must be weighed cumulatively. In this regard this section specifically states that "all" of the factors must be taken into account. A labour inspector or the DG can therefore *not* exercise a discretion without taking into account the factors in section 15 of the EEA *and* those listed in section 42 of the EEA.'

The only documents the DG had submitted in support of his application were two cryptic tables, each of which merely cited some provisions of the EEA and a few 'sketchy' conclusions. These did not indicate that he had applied his mind to the matter or that he had even considered the mandatory directions of s 42 before making his application to the court. The court set aside the DG's decision to refer the employer to court for non-compliance.

Demographic factors therefore are but one of several factors that have to be considered in deciding whether an employer has made reasonable progress in promoting employment equity.

Source: Labourwise. Author: Prof. Barney Jordaan of Maserumule Employment Consultancy (GA)