EMPLOYMENT EQUITY AMENDMENT BILL

IS THIS BILL A BRIDGE TOO FAR?

While South African employers are reeling under the effects of the COVID pandemic, the Department of Employment & Labour ("Department") on 20th July 2020 published its Employment Equity Amendment Bill ("Bill") aimed, amongst others, at amending the definitions section of the current Employment Equity Act ("EE Act"). Furthermore, it gives the Minister the power to prescribe sectoral numerical targets to ensure the equitable representation of suitably qualified people from Designated Groups. The legislative process of this Bill began in 2018, so it has been a long time in coming. The amendments intend to support and expedite transformation in the South African national workforce.

Although the process of the amendments and the Bill has been a long time coming, the timing of it adds to a host of challenges organisations are currently facing. Even before the COVID pandemic in the first quarter of 2020 the outlook was bleak due to the loss of jobs across most sectors. Now, many employers are struggling to survive due to the dire economic circumstances brought about by the COVID pandemic. Consequently, organisations are restructuring, with retrenchment on the cards for most of them. In the worst cases, the loss of jobs is a consequence of organisations not able to weather the storm, thus closing their doors.

It is estimated that between February and April, our national workforce contracted by between 2,5 and 3,6 million people due to the lockdown brought about by the COVID pandemic. Women accounted for around two-thirds of such job losses. At this stage, it is safe to say that employment figures will continue to dwindle in the foreseeable future, which will, in effect, have an impact on organisations addressing their workforce demographic profiles. Since the onset of the COVID pandemic, there has been a shift where some employees, by the nature of their work, could do their job remotely. However, more often than not, this 'privilege' does not apply to unskilled or semi-skilled employees. Therefore, one has to ponder how employers will balance the various legislative demands, yet remain afloat. Furthermore, how does an organisation comply with the numerical targets that aim to catapult rapid change in their demographic profiles as per the intention of the Bill?

Some key amendments for consideration are:

Who is a "Designated Employer"?

Currently, the definition of a "Designated Employer" includes all workplaces where there are more than 50 employees. In the case of a workplace that has fewer than 50 employees, the employer must determine their annual turnover in comparison with Schedule 4 of the EE Act. If the annual turnover is more than the sectoral prescribed one the employer in the past had to comply with the prescripts on doing a barrier analysis, having an Employment Equity Plan, consulting with their employees and the like. The Bill does away with this part of the definition, thereby excluding small businesses from the ambit of Chapter III of the Act. Therefore, schedule 4 of the principal Act setting out the sectoral turnovers will subsequently be repealed. The requirement for non-designated employers to notify the Department of their voluntary compliance and submission of an EEA2 report fell away. Nevertheless, such employees will be able to obtain a Certificate of Compliance from the Minister, outlined further down in this article.

People with disabilities redefined

The definition of "people with disabilities" is revised as follows: People who have a long-term or recurring physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may substantially limit their prospects of entry into or advancement in employment".

The amendment aligns the EE Act's definition with that of the UN Convention on the Rights of Persons with Disabilities. The amendment to this definition was long overdue, as South Africa ratified the Convention in 2008. The Convention is a human rights instrument that adopts a broad categorisation of persons with disabilities, affirming that persons with different types of disabilities must enjoy equal rights and freedoms. It recognises that "disability is an evolving concept which results from the interaction between persons with impairments as well as any attitudinal and environmental barriers that hinder their full and active participation in the society on an equal basis with others".

1 Government Gazette 43535 dated 20th July 2020.
2 55 of 1998.
3 Stats SA 28th July 2020 Decline in formal sector jobs in the first quarter 2020 found on www.statssa.gov.za
4 Fin24 15th July 2020 Covid-19 cuts SA employment figures by three million, women worst affected – the study found on www.news24.com – the comprehensive study conducted by social science researchers from 5 SA Universities found that employment levels declined by 18% and that vulnerable groups were worse affected.
5 UN Convention on the Rights of People with Disabilities.
6 UN Convention, Preamble paragraph (e).

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The social model of defining disability diverges from the past medical model of disability whereby disability is seen as the interaction of a person's impairment, taking into account societal, environmental and attitudinal barriers.

The medical model focusses on a health condition that supposedly renders the person with the disability "abnormal". Subsequently, this model views a disability as a problem that needs to be fixed or cured. It focusses on what a person is unable to do or be. If a person cannot be fixed, they are disregarded by society. The social model, on the other hand, is all about changing the physical, attitudinal and social environment as well as communication methodologies to enable persons with disabilities to participate in society on an equal basis with others. Having only stairs leading into a building is an example of a barrier in the built environment. Stereotypical ideas, prejudices and assumptions about what a person with a disability can or cannot do, is a barrier. Stigmas attached to mental health conditions pose a barrier. Only communicating in visual or written formats can further constitute a barrier.

Although one cannot deny the reality of an impairment or the impact it has on a person, one can change society to reasonably accommodate the person living with a disability. Such a shift would allow a person with a disability to participate in the workplace, compete fairly and earn a living. The UN Convention thus views the removal of barriers and the provision of reasonable accommodation measures as a human rights issue. Many countries have been following this approach in their disability anti-discrimination legislation.

Although not without its limitations, the social model and the new express recognition thereof in the Bill are welcome. In my experience, employers and employees alike are still grappling with the status of this Designated Group. Therefore, awareness surrounding the social model interpretation in the South African workplace must be raised. It's a way of viewing the world, addressing the multiple barriers that people face and changing society.

Case law in SA has been following the social model, and it was well overdue for the EE Act to express such recognition. Not providing reasonable accommodation where such is required constitutes a form of unfair discrimination and employers will have to apply their minds afresh to this matter on a case-by-case basis.

Defend your psychometric and other tests, if you can

Psychological and similar assessments no longer need to be certified by the Health Professions Council of SA, as they seemingly lack the capacity. An employer, if challenged, will have to defend the instruments used in the workplace in the Labour Court in the event of a dispute. Employers should be cautious and carefully assess the instruments they apply when recruiting or seeking advice on the matter. The potential of discrimination due to the tests or assessments are well documented. The concept of indirect discrimination - otherwise known as disparate impact - came about in the USA when structural practices and policies affecting certain race groups were negatively recognised, and it was later drafted into South African legislation. When using psychometric testing appropriately, it can provide valuable insight; however, the test itself, the administration thereof and the interpretation must be in a non-discriminatory manner.

As the social model of disability within the workplace is a new concept and has not yet filtered into the South African workplace, tests and assessments can potentially serve as a barrier for persons with a disability.

The controversial section 15A

A controversial amendment is the introduction of section 15A, which reads as follows:

"15A.(1)The Minister may, by notice in the Gazette, identify national economic sectors for this Act, having regard to any relevant code contained in the Standard Industrial Classification of all Economic Activities published by Statistics South Africa.

(2)The Minister may prescribe criteria that must be taken into account in identifying sectors and sub-sectors for the purposes of this section.

(3)The Minister may, after consulting the National Minimum Wage Commission, for the purpose of ensuring the equitable representation of suitably qualified people from Designated Groups at all occupational levels in the workforce, by notice in the Gazette set numerical targets for any national economic sector identified in terms of subsection(1)."

7 PWDA 2018 Social Model of Disability found on www.pwd.org.au.
8 For example, Jansen vs Legal Aid SA (2018) 39 ILJ 2024 (LC) and Standard Bank of SA vs CCMA & Others (2008) JOL 21221 (LC).
9 Griggs v Duke Power Company (1971).

In line with these new provisions, the Minister may set different targets for different occupational groups, sub-sectors and regions. The Minister must publish such targets for public comment by interested parties for a period of at least 30 days. Essentially employers will be obliged to comply with the sectoral targets set under section 15A as applicable to them.

Until now, employers could set their numerical targets and goals considering various factors such as their labour turnover, organisational growth, skills availability and the like.

Such discretion is removed as the Department will set quotas that employers are obliged to comply with. Failing to meet such targets puts an employer at risk of being found guilty of non-compliance with the EE Act, thus face the prospect of a fine.

B-BBEE legislation uses the 'carrot approach' for compliance, whereby organisations are encouraged to reach the sectoral numerical target. Conversely, the Department has chosen the 'stick approach' for compliance with the EE Act, whereby they can issue hefty fines for non-adherence. In effect, a labour inspector or court, in terms of section 42 of the EEA Act, determines an employer's compliance, amongst others, based on the targets set by the Minister. Therefore, an individual employer must abide by the sector-specific targets, irrespective of its specific operational demands or circumstances, as a labour inspector or the court will not necessarily consider them. There is the potential conundrum whereby employers will have to navigate the different sectoral targets set by the Minister as well as the B-BBEE sectoral targets.

National Minimum Wage Commission acknowledged

Reference to the Employment Conditions Commission is replaced throughout the Bill to refer to the newly established National Minimum Wage Commission. Employers will report to the Department on the prescribed EEA4 form. Furthermore, an employer must submit a statement, on a prescribed format, to the National Minimum Wage Commission outlining all remuneration and benefits received by all employees. Similar to its predecessor, this body must research and advise on measures to establish proportionate income differentials and/or advise the Minister on measures to reduce disproportional differences. Employers are obligated to submit income differentials between their highest and lowest paid employees.

Doing business with the State

A Certificate of Compliance issued in line with the EE requirements will be a prerequisite for concluding state contracts. The Minister may only issue an employer with such a Certificate if, amongst others, the employer has complied with the section15A targets set or can provide reasonable grounds justifying its failure to do so. A provision of the Bill is that an employer may not have been found guilty by the CCMA or a court of law within the preceding three years of unfair discrimination. Further, an employer must not have an award issued against them in the previous three years for non-compliance with the national minimum wage prescripts.

There is currently no alignment or interaction between the EE system within the department to the CCMA case management system. Furthermore, the National Minimum Wage structure will have to incorporate systems to verify an employer's status before a Certificate of Compliance can be issued. It is, therefore, reasonable to surmise that the process could well be an administrative and arduous task for organisations to navigate.

The way forward

The government will gazette the Bill that will be introduced in the National Assembly shortly. Therefore, employers should stay abreast of how this Bill progresses through the law-making process. It will become known as the Employment Equity Amendment Act 2020 and will take effect on a date proclaimed in the Government Gazette. Whether the Department will enforce numerical targets, with due regard to the challenging and unusual circumstances facing employers today and in the foreseeable future, remains to be seen.