

EMPLOYMENT

Numerical Targets: No jobs will be lost!

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The publication of the Employment Equity Regulations on 12 May 2023 has been the subject of much public controversy. While a vibrant contestation of ideas is the lifeblood of a healthy constitutional democracy; public discourse must, at all times, heed to the factual and legal reality which informs it.

Imperatively, as the Constitutional Court in *South African Police Service v Solidarity obo Barnard* [2014] 11 BLLR 1025 (CC) so eloquently put it: the objects of employment equity are to “redress the effects of past discrimination in order to achieve a diverse workforce representative” of the South African populace. It goes without saying that these objectives are enveloped in and ought to promote the equally important ideal that “beneficiaries of affirmative action must be equal to the task at hand” and “efficacy and competence” should not be sacrificed at the altar of “remedial employment”. Certainly, these ideals are the cornerstone of our employment equity regime and serve as a guiding light as we navigate the seas of economic and social transformation in the workplace.

Much has been said, sounding an alarm that employers may be compelled to dismiss employees or reduce their workforce by targeting non-designated persons in order to meet the numerical targets. Considerable unease exists regarding the potential enforcement and implementation of numerical targets in an exclusionary manner that unjustly marginalises individuals outside the designated groups. It therefore begs the question: are numerical targets a threat to our labour and employment regime? The answer is simply no. Regardless of the perspective from which you approach the interpretation of the EE Regulations, it is highly unlikely to reach the conclusion that the Regulations permit dismissals.

Dismissal for the purposes of meeting the numerical targets would be in violation of the Labour Relations Act 66 of 1995. Lawful dismissals still have to meet the traditional misconduct, incapacity and operational requirements parameters. It would be unlawful to compel employers to retrench employees as a means of meeting numerical targets. As the Labour Court intimated in *Robinson & others v Price Waterhouse Coopers* [2006] 5 BLLR 504 (LC) “affirmative action is not and never has been legitimate ground for retrenchment”.

Applying and enforcing the targets as a threshold rather than a benchmark, leading to the systematic exclusion of individuals outside the designated groups, would also be unlawful. Our intentional and strategic approach should aim to work towards these targets as goals, rather than rigid thresholds that result in exclusion.

Undoubtably, these concerns may reasonably materialise through the rigid enforcement and implementation of the numerical targets, which disregards the rights of individuals outside the designated groups to dignity, fair labour practices and freedom of trade, occupation and profession.

However, as things stand, the numerical targets are in the form of percentages categorised in terms of population groups and gender, applicable over a 5-year period for 18 identified economic sectors. The numerical targets are divided between national and provincial targets for the economically active populations (EAP). Mainly, the intention is to roll-out the targets at Top Management, Senior Management, Professionally Qualified, and Skilled occupational levels including reforms for employees with disabilities. Employers are also required to apply their chosen EAP (either national or provincial) to semi-skilled and unskilled occupational levels.

Once again, the devil is in the detail of how these percentages will be applied by employers and enforced by the Department of Employment and Labour. As the Constitutional Court in *Barnard* noted, the distinction between numerical targets and quotas “lies in the flexibility of the standard”. It is presumptuous to label the introduction of percentages as quotas or to assume that they will be rigidly applied and enforced.

There is an intention to promote and uphold flexibility. For instance, designated employers have the option to either comply with national or provincial EAP targets. Therefore, employers have to think very strategically given the areas in which they operate and consider which targets

will give them the necessary flexibility. It may also be crucial to make submissions on whether the proposed percentages offer adequate flexibility whether at a national or provincial level. Notably, it is of utmost importance that the Department provides a comprehensive explanation regarding the methodology used to determine the percentages. This is particularly significant given that certain categories of population and gender groups have been consistently allocated a 0% representation across multiple sectors.

We must also not forget that employers may present reasonable grounds for non-compliance with the targets. We believe that the justifications for non-compliance present employers with an opportunity to craft Employment Equity Plans that progressively implement the targets over the 5-year period based on availability of qualifications, skills and expertise or financial feasibility. It may be essential to incorporate a provision that expressly permits the progressive implementation of the targets.

Public comments must be submitted within 30 days from the date of publication of the EE Regulations. When engaging with the numerical targets one must ever keep in mind whether the targets strike the critical balance between promoting representivity and retaining meaningful flexibility.



Sandile July

Head of Employment

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Nonkosazana Nkosi

Director

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