

EMPLOYMENT

The settlement agreement concluded at the ILO has not changed the new Employment Equity interventions

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In 2021, a complaint was filed with the International Labour Organisation (ILO) against the South African Government in relation to the proposed employment equity interventions which seek to introduce a more robust compliance framework, including the prescription of numerical targets. The complaint was grounded on the alleged non-observance of Convention, 1958 (No. 111) which deals with discrimination in the employment and occupation space.

Pursuant to the complaint, a voluntary conciliation process ensued under the auspices of the ILO, facilitated by the CCMA. Ultimately, on 28 June 2023, a settlement agreement was concluded in efforts to resolve the complaint. Given the current state of employment equity interventions, was the settlement agreement necessary? We are of the view that the complaint and consequently, the agreement was not necessary. The settlement agreement reaffirms and reinforces the very essence of the proposed employment equity regime.

Basically, the first condition of the agreement endorses the established and accepted principle that affirmative action is of a temporary nature. "Temporary nature" means that the transformative goals under the Employment Equity Act 55 of 1998, as amended (EEA) may potentially lose their relevance once the transformation intended by the Act has been achieved. Therefore, the transformative agenda remains relevant for as long as there is a need to eliminate employment barriers to designated groups and to promote diversity and proportional representation in the workplace. Where these objectives have been met, it would be difficult to defend the continued relevance of affirmative action in such a climate. So the "temporary nature" condition does not alter nor introduce anything new to the employment equity regime.

A bar against the termination of employment as a means of compliance with the employment equity targets is included in the settlement. Is this a necessary or helpful condition? No. Employment equity interventions must not apply in violation of a persons constitutional rights to human dignity, fair labour practices and freedom of trade, occupation and profession. Employment policies and practices are still subject to the Labour Relations Act 66 of 1995, as amended. A dismissal must be lawful and fair. No employer can justify an irrational and arbitrary decision to terminate employment on account of compliance with employment equity targets.

In any event, any employment policy or practice must comply with section 15(4) of the EEA. This provision clearly prohibits the implementation or enforcement of employment equity targets in a manner that creates absolute barriers to prospective or continued employment, including the advancement of individuals that are not part of the designated groups. So the "no absolute barrier" condition simply reiterates the status quo, as we know it.

The Government further undertakes to implement the employment equity interventions in a nuanced way. It appears that this nuance is achieved by prescribing that employment must not solely be based on the targets. Employment Equity Plans and the Government's assessment of compliance with the Plans must take into account the following criteria: inherent requirements of the job; the pool of suitably qualified persons; a candidate's qualification, skills, experience and capacity to acquire, within a reasonable time-frame, the ability to do the job; the rate of turn-over and natural attrition within the workplace; and recruitment and promotional trends within the workplace. Are these conditions adding anything new to the proposed regime? No.

This criteria is not new. In 2018, the Government proposed amendments to the Employment Equity Regulations, 2014. The proposed regulation 7A subjects the determination of targets to the very same criteria. In addition, section 15A(2) of the EEA limits individuals that may be considered for the purposes of employment equity targets to candidates who are suitably qualified. The idea that employers will be compelled to comply with employment equity targets at all cost, is detached from reality.

The agreement also reaffirms the justifiable / reasonable grounds exception incorporated under section 53(12)(b) read with 42(4) of the EEA. Employers may raise reasonable grounds to justify non-compliance with employment equity targets. The specific justifiable / reasonable grounds outlined in the agreement are derived from the proposed 2018 Regulation 16(4)(a). These grounds include insufficient recruitment and promotion opportunities; the lack of relevant qualification, skills and experience from the pool of candidates; court order; transfer of business; mergers/acquisitions; and the impact on business economic circumstances. Are these conditions different from what Government has proposed? No.

The agreement declares that where an employer demonstrates that there are justifiable/reasonable grounds for non-compliance, the employer will incur "[n]o penalties or any form of disadvantage". What is the significance of this declaration? Does it provide more protection? No. At the very least, the Government would be in violation of section 53(12)(b) of the EEA if employers who qualify for exemption under this provision are penalised. Such conduct would be unlawful, arbitrary and irrational.

Accordingly, the settlement agreement goes no further than to succinctly convey the existing and/or proposed employment equity regime. It was not necessary to approach the ILO as the outcome maintains the current course of developments.



Sandile July

Head of Employment

[View Profile](#)



Nonkosazana Nkosi

Director

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