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Module 1: Overview of the Employment Equity Act (EEA)

1. Understanding the Employment Equity Act

The following quotation from the 1996 Report of the Presidential Commission\(^1\) is an indication of the rationale for employment equity legislation:

"It is common cause that the linchpin of the apartheid political, economic and social regime was the purposive control and manipulation of the labour market in a manner which privileged the white minority while disadvantaging and discriminating against the black majority. The history of the development of the apartheid system and the legal framework that it imposed on the labour market have been extensively documented elsewhere and will not be discussed in great detail here. Suffice it to say that the legacy of apartheid is one of extreme racial inequality in the labour market; some of the statistical measures of this inequality are presented below. As is stressed in the ILO Review, however, it is important for policy makers to distinguish between the various sources of this labour market inequality in order to design effective remedial programmes. This requires that one distinguish between labour market discrimination and extra-market discrimination, and between the effects of discrimination versus disadvantage. It is also helpful to clarify the definitions of the terms equal opportunity, affirmative action, and employment equity.

 Discrimination in the labour market can be said to occur when non-productivity-related criteria are relied upon in the allocation and utilisation of labour such as in recruitment, remuneration, firing and retrenchment. These non-productivity criteria may relate to factors such as race, gender, age, ethnicity, disability, sexual orientation, and others. Apartheid government policies such as reserving certain categories of jobs for white workers and enforcing race-based wage systems were legal manifestations of this form of discrimination. For example, as recently as 1989 skilled jobs in the mining industry were reserved for whites by law.

The overall consequences of the legacy of apartheid are deeply embedded in the polity, society and economy of the country and will not be resolved overnight, even in the face of the political transformation that has occurred and the elimination of overtly discriminatory laws and regulations. The legacy of apartheid can be said to be structural in the sense that it tends to be self-reproducing and self-reinforcing in the absence of concerted policy interventions to reverse this legacy. In particular, non-discrimination, or equal opportunity, cannot by itself produce equity in employment in a reasonable time frame. This observation provides the fundamental justification for corrective measures or affirmative action. Following the Interim Constitution, the Commission defines affirmative action as a policy and programme applied by an employer that is aimed at redressing the inequalities that exist within the workplace as a result of unfair discrimination. Such a policy or programme shall have the objective of increasing the rate of progress towards equity in employment. Employer-provided training and skills upgrading, designed to compensate for both extra-market discrimination in the provision of education and past discrimination in training by employers, occupy a central position in the Commission's recommended affirmative action.

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action strategy. This programme is not intended to promote cosmetic changes resulting from the hiring of a few members of disadvantaged groups into key positions, nor is it designed to promote black and women employees into positions for which they are not qualified. Rather, it involves a systematic move towards promoting the employment and improving the labour market security of groups previously discriminated against, bolstered by the necessary education and training, and in co-ordination with extra-market reforms designed to reduce the degree of socio-economic disadvantage of the majority."

The evidence that blacks and women fare poorly in the labour market is overwhelming and has been extensively analysed elsewhere, including the ILO Review and earlier chapters of this Report. A few summary measures of the scale of the problem are presented below. Following this is a brief discussion of the various mechanisms by which discrimination operates in the workplace. We also examine the difficult but important policy question: to what degree is overt labour-market discrimination, as opposed to extra-market forms of disadvantage, to blame for the current lack of equity in employment?

The most compelling evidence of the lack of equity in the labour market is the differential incidence of unemployment by race. The African unemployment rate in 1994 (41%) was more than six times the unemployment rate for whites (6.4%). The rates for coloureds (23%) and Asians (17%) fell between these two extremes. These differences remain large and statistically significant even if one controls for the effects of education and age. Within each race group, unemployment rates are higher for women than for men. Unemployment rates among African women are particularly alarming: fully 50% of those who want jobs cannot find them.

Next there is the matter of sectoral segregation by race. Blacks are disproportionately represented in sectors that pay poorly and offer few benefits and poor job security. Chief among these are agriculture and domestic service. In 1993, 16.7% of regularly employed Africans and 13.4% of coloureds were working in agriculture compared to just 3.1% of whites. Another 13.4% of Africans and 3.6% of coloured workers were employed as domestics, compared to just 0.6% of whites. Blacks are correspondingly under-represented in the better paying sectors such as finance. Just 1.2% of employed Africans, 2.7% of coloureds, and 4.6% of Asians were found in this sector, compared to 11.8% of whites.

The same pattern is evident when employment figures are broken down by occupation and race; 27.7% of regularly employed Africans and 28.8% of coloureds were working as labourers in 1993, compared to just 0.4% of whites. By contrast, just 10.4% of Africans, 11.7% of coloureds and 29.5% of Asians were employed as managers or professionals, compared to 48.5% of whites.

Occupational and sectoral segregation are also stark when the data is analysed by gender. Women are considerably disadvantaged by conventions that ensure that "women's work" is paid less than comparably demanding work that is performed largely by men. Roughly 19% of regularly employed women were working in the extremely low-paid domestic service sector, compared to just 1.4% of men. Women are also disproportionately represented among poorly-paid clerical workers. For African women the problem is again particularly severe. Thirty-one per cent of all
regularly employed African women were working as domestics in 1993. Only 15% were employed in a professional or managerial capacity, compared to 44% for white women.

The foregoing data raises the question: to what degree are these labour market outcomes determined by disadvantage (e.g. lack of education, poor quality of education, lack of job experience, etc.) versus the effects of current discriminatory practices in the labour market? Some light may be shed on this question by means of statistical analyses of the data which attempt to measure discrimination in compensation. One such analysis yields the result that even if one holds constant such factors as education, age, language, province, settlement type, sector, occupation, type of employer and union membership, the effects of race and gender are still very strong.

Whites are estimated to enjoy a 104% wage premium over Africans, and men to receive 43% higher wages than similarly qualified women in similar sectors, occupations and so forth. These numbers should not be taken to imply that blacks and whites working side by side in identical jobs in the same establishment are paid differently. Rather, the numbers likely reflect differences between jobs that fall within the same broad occupational categories of the survey, differences between establishments, and other factors. They reflect a combination of the effects of disadvantage and of discrimination in compensation and in hiring.

Further evidence submitted to the Commission also supported the claim that even where women are in the same jobs as men, or in jobs formally accorded similar value, discrimination in pay occurs, with women workers paid less than their male counterparts. One submission compared workers holding C grade jobs of the Paterson grading and evaluation system. Setting the white male wage to an index value of 100, the analysis found that white women earned between 98 and 100, Indian women 84, coloured women 73, and African women 70.

Another measure of race and gender discrimination is obtained by comparing the income of men and women, black and white, of similar educational levels. Analyses of the SALDRU data have shown that black women with a standard 5 to 6 education receive 10% as much income as their white male counterparts with similar educational credentials. Black men at this level of education have incomes that average just 25% of white male incomes for the same level of education. Black women with diplomas receive 35 cents to every rand of income received by white men with diplomas; for white women the gap is only slightly smaller: they take home 55 cents for each rand of income accruing to similarly educated white men.

Other statistical analyses of the data have concluded that discrimination effects are smaller than the above figures suggest, and have also found that discrimination has declined over time. Some have argued, for instance, that because of the poor quality of education provided to blacks, black and white matriculants are not in fact equally qualified and that this goes a long way towards explaining the earnings differentials shown above. Others argue that the occupational categories used in the household surveys are insufficiently detailed to allow for the proper comparison of identically demanding jobs. The Commission recognises that existing estimates of the magnitude of discrimination are imperfect and that different researchers and
methodologies yield different interpretations of the data. However, no credible studies of which the Commission is aware have been able to show that discrimination has been eliminated from the South African labour market. Furthermore, numerous submissions to the Commission attest to the fact that discriminatory attitudes and behavioural tendencies are still dominant. For this reason, the Commission holds that both discriminatory and non-discriminatory (skills-based) processes are at work in the current labour market, and thus recommends a multi-pronged strategy for creating equity in employment, as outlined above, of which equal opportunity and affirmative action in the labour market are crucial components.

Discrimination manifests itself in a variety of forms, some more subtle than others. The ILO Review provides a useful list of the various kinds of discrimination, including so-called pure discrimination; statistical discrimination (the exclusion of particular groups based on the claim that "past experience" shows that members of this group perform poorly on average); workforce induced discrimination (when employers exclude certain groups on the grounds that other employees would refuse to work with them); and many other variants. The Review also notes that discriminatory attitudes can persist on the shop floor long after senior management has stated a commitment to equal opportunity. A report cited by the ILO concludes:

*What happens in the departments and on the factory floor on a day-to-day basis has a powerful impact on who learns and who gets ahead, so that the attitudes of managers and employees, and their behaviour, overshadow what is planned and decided in the boardroom or in the personnel department.*

The statistics on enrolment in training programmes also shows a continued and indeed increasing bias against women and Africans. The ILO cites evidence that there were no female apprentices in the food processing sector, that women made up just 2.4% of apprentices in paper and printing, and just 3.5% of apprentices in metals and engineering. Furthermore, women made up just 23% of enrollees in non-apprenticeship job training programs, far less than their share in employment. The ILO also argues that access to apprenticeships is still a racially segregating mechanism. One study notes that:

*In 1982, for example, 10,659 new white and 3,838 black apprenticeship contracts were registered, while in 1986 the corresponding figures were 8,032 and 1,628; thus black apprenticeship contracts decreased from 26% to 17% of the total.*

In the light of these figures, and in consideration of the various submissions received, the Commission asserts that there is a need for more deliberate policy intervention directed at dealing with discrimination and rectifying the effects of past disadvantage, in the labour market. The Commission’s recommendations in this regard are presented in the pages that follow. Before discussing these however, we address the important question as to the relation between employment equity and economic efficiency."
2. Definitions, purpose, interpretation and application of the Employment Equity Act

In terms of the EEA employment equity is concerned with two aspects of employment law, namely

1. the prohibition of unfair discrimination in the workplace, and
2. the duty of designated employers to implement affirmative action programmes.

The Act requires all employers to promote equal opportunity in the workplace and to prohibit unfair discrimination in all employment policies and practices. In addition, designated employers are obliged to adopt and implement affirmative action measures for people from designated groups.

Affirmative action measures are defined in section 15 of the EEA as measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

2.1 Definitions

“Designated Employer” is defined as a person employing more than 50 employees or a person with fewer than 50 employees, but who has a total annual turnover that is equal to or above the applicable annual turnover of small businesses as published in terms of Schedule 4 of the Act. It also includes a Municipality, an organ of state, and any employer bound by a collective agreement in terms of whereof the employer is appointed as a designated employer. The Act applies to all employers, but excludes the Defence Force, the Intelligence Agency and the Secret Service.

“Designated Groups” means black people, women and people with disabilities.

In terms of the recent High Court decision of Chinese Association of South Africa and Others v the Minister of Labour, Chinese citizens have also now been declared to qualify as a designated group of the Employment Equity Act and the Broad-Based Black Economic Empowerment Act. Chinese people, who became citizens of South Africa before 1994, will therefore qualify as part of the designated groups.

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2 Chinese Association of South Africa v Minister of Labour case no 59251/2007 (TPD). During the 18th and 19th centuries large numbers of Chinese people were imported to work in mines in South Africa (Thompson A History of South Africa xxi). Before 1994, Chinese people were classified as “coloureds” but were not included under any of government’s benefit programmes after 1994. This led to the Chinese Association of South Africa lobbying for Chinese people to be classified as a designated group in terms of the EEA and to benefit from affirmative action measures. After public hearings by the Portfolio Committee it was recommended that an amendment to the EEA be drafted to ensure that South African citizens of Chinese descent would be recognised as historically disadvantaged. After informal discussions between business, labour and government, it was, however, decided that the issue was of a political nature and could not be supported. Since then the Chinese Association has brought a successful application to the (then) TPD for an order to declare Chinese people “disadvantaged.”
“Employee” is widely defined to mean any person other than a contractor who receives or is entitled to receive any remuneration and in any manner assist in carrying on or conducting the business of the employer.

“Employment policy or practice” includes, but is not limited to:

a. recruitment procedures, advertising and selection criteria;
b. appointments and the appointment process;
c. job classification and grading;
d. remuneration, employment benefits and terms and conditions of employment;
e. job assignments;
f. the working environment and facilities;
g. training and development;
h. performance evaluation systems;
i. promotion;
j. transfer;
k. demotion;
l. disciplinary measures other than dismissal; and
m. dismissal.

“Family responsibility” means the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support;

“Large employer” means designated employers who employ 150 or more employees.\(^3\)

“Small employer” means designated employers who employ less than 150 employees.\(^4\)

“Temporary employee” means workers who are employed to work for three consecutive months or less.\(^5\)

2.2 Purpose

Although the democratic dispensation in South Africa has brought about formal political equality and freedom, some of the ills of the apartheid regime are still prevalent in the new era. These include occupational segregation, inequalities in pay, lack of access to training and development opportunities, and high levels of restructuring and retrenchment with resultant unemployment.

As a way of dealing with some of these discrepancies, various strategies have been proposed to alleviate the inequalities of the past. One of these is the Employment Equity Act. It prohibits discrimination, embodies affirmative action and listed the

\(^3\) Regulation 32393 of 14 July 2009 of GG 9118
\(^4\) Regulation 32393 of 14 July 2009 of GG 9118
\(^5\) Regulation 32393 of 14 July 2009 of GG 9118
procedures to be followed in enforcing the necessary rules as well as monitoring the progress of bringing about equity in the labour market.

Inequalities within the labour market are reflected in, and reinforced by, extreme inequalities outside the labour market, such as disparities in ownership of productive assets, the unequal division of household labour and the geographic distribution of population groups that existed under apartheid.

The Employment Equity Act aims to achieve equity in the South African workplace by:

1. Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
2. Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups (blacks, women and people with disabilities), in order to ensure their equitable representation in all occupational categories and levels in the workforce.

Employment equity is a term in line with the government’s long-term objectives while affirmative action is perceived as the only method of achieving employment equity which is a business objective and will be realized by means of targets instead of quotas.

2.3 Interpretation

Constitutional equality forms the backdrop of the EEA and should always be considered when studying Employment Equity. Everybody is equal before the law and nobody may unfairly discriminate against each other. Section 9 of the Constitution reads as follows:

9. Equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

3. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

“Both the Constitutional Court and the Labour Court have already made clear that although affirmative action is constitutionally mandated and sanctioned by the
Employment Equity Act, representativity cannot be the only criteria used to decide on the appointment or promotion of an individual. The Employment Equity Act had to be interpreted in the light of the Constitution – especially section 9(2) of the Act which prescribes at least three conditions for a valid affirmative action policy.

As the Constitutional Court found in the case of Minister of Finance & another v Van Heerden [2004] 12 BLLR 1181 (CC), for an affirmative action plan to be valid there had to be a plan (not random preferential treatment) in which the overwhelming majority of the group targeted for advancement had to consists of individuals who belonged to a group who had suffered from past unfair discrimination.

Second, the measures had to be designed to protect or advance those disadvantaged by past discrimination. This meant that the measures had to be reasonably capable of achieving its goal. If the measures were arbitrary, capricious or displayed naked preference it would not be constitutionally valid.

Third, the measures used had to promote the achievement of equality in the long term. While the achievement of this goal may often come at a price for those who were previously advantaged (in other words, whites), the long-term goal of our society is a non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity. In assessing therefore whether a measure will in the long-term promote equality, it should be asked whether the measures constituted an abuse of power or imposed such substantial and undue harm on those excluded from its benefits that our long-term constitutional goal would be threatened.

The Employment Equity Act reflects this careful balance struck by the Constitutional Court between the important goals of correcting past injustices and challenging inherent pro-white racial bias in appointment and promotion on the one hand, and guaranteeing respect for the human dignity of excluded individuals on the other.

The Act places a positive duty on employers to implement corrective measures but places several limits on the way this could be done.

First, it could not be done through the imposition of rigid employment quotas but rather had to be done by setting (and trying to meet) certain targets for each category of employment. Second, where there were inherent requirements for a job and members from designated groups (blacks women, the disabled) did not meet these requirements, white (often male) applicants who did meet these requirements could be appointed. Lastly, employment policies or practices which had the effect of placing an absolute barrier on the appointment or promotion of white employees would not be allowed.

The EEA is meant to give expression to the broader constitutional right to equality. It seeks to achieve this task by two means, which are reflected in the structure of the Act. The first is to prohibit unfair discrimination, and the second is to promote affirmative action. The Act therefore attempts to achieve a balance between prohibiting “negative” discrimination, and promoting “positive” discrimination.6


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2.4 Application

The Employment Equity Act applies to all employers, workers and job applicants, but not members of the:

- National Defence Force;
- National Intelligence Agency; and

The provisions for affirmative action apply to:

- employers with 50 or more workers, or whose annual income is more than the amount specified in Schedule 4 of the Act;
- municipalities;
- organs of State;
- employers ordered to comply by a bargaining council agreement;
- any employers who volunteer to comply.

Although the Act distinguishes between Africans, Coloureds and Indians and between Blacks, women and people with disabilities, no preferential ranking is specified. No provision is made for compound groups, such as black women.
Module 2: Prohibition of unfair discrimination

1. Understanding unfair discrimination

Previously unfair discrimination was included as a form of residual unfair labour practice in Schedule 7 to the LRA. This is now dealt with in Chapter II of the EEA. Section 6 of the EEA is the cornerstone of the prohibition of unfair discrimination in the workplace and places a positive obligation on all employers to “promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6 reads as follows:

**Prohibition of unfair discrimination:**

1. No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, 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.

2. It is not unfair discrimination to:
   a. take affirmative action measures consistent with the purpose of this Act; or
   b. distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)

Section 6 does not prohibit discrimination, but prohibits unfair discrimination against employees by any person. Not only employees are protected – applicants for employment are protected too if they are able to prove that they were overlooked on some discriminatory criterion.

There is no definition of the word “discrimination” in the EEA. According to http://oxforddictionaries.com, discrimination is “the unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age, or sex”.

In order to prove that an employee was discriminated against, the first question is whether the employee was discriminated against, and the second is whether the discrimination was unfair. Section 11 of the EEA states:

**Burden of proof**

Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.

In terms of section 9(5) of the Constitution, the respondent is given the first opportunity to justify its conduct. In terms thereof, the respondent is required to demonstrate that its conduct, even though discriminatory, is not unfair. If the
respondent fails on that score, it has a second opportunity to demonstrate that even though such conduct constitutes unfair discrimination, it is nevertheless justifiable in terms of section 36(1) of the Constitution.

In light of the provisions of section 9(3), (4) and (5), an understanding of Goldstone J’s infamous two stage analysis⁷ - to establish whether the relevant legislative provision or the conduct complained of is unfairly discriminatory - is pivotal.

The first enquiry is whether the impugned provision or conduct differentiates between people or categories of people. If it does so differentiate, it is necessary to enquire whether ‘there is a rational connection between the differentiation in question and the legitimate .... Purpose ... it is designed to achieve’. If there is no such rational relationship, then the differentiation amounts to discrimination. However, if there is a rational relationship, it is still necessary to determine whether, despite such rationality, the differentiation nevertheless amounts to discrimination.

The second enquiry is whether the differentiation amounts to unfair discrimination. This process involves a two stage analysis:

a. Does the ‘differentiation’ amount to ‘discrimination and

b. If so, does it amount to ‘unfair discrimination’?

The first stage:

- If the ‘differentiation’ is on the basis of one or more of the specified grounds, then the ‘differentiation’ constitutes discrimination.
- If the ‘differentiation’ is not on a specified ground, then ‘whether or not there is discrimination will depend on whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner’.
- the determination as to whether there has been ‘differentiation’ on the basis of specified or unspecified ground must be answered objectively.

The second stage:

- If the ‘differentiation’ amounts to ‘discrimination’, does it in fact amount to ‘unfair discrimination’?
- If the discrimination is on a specified ground, then it is presumed to be unfair.
- If the discrimination is on an unspecified ground, then the onus is on the complainant to establish the ‘unfairness’.
- Given the Constitutional Court’s recognition that ‘discrimination’ has acquired a particular pejorative meaning unfair discrimination on an unspecified ground effectively means treating persons differently in a way which impairs their fundamental dignity as human beings.

⁷ Harksen v Lane NO & others 1998 (1) SA 300 (CC)
In order to determine the ‘unfairness’, if any, of discrimination on an unspecified ground, various factors must be considered, including: a) the position of the complainants in society and whether they have suffered historically from patterns of disadvantage; b) the nature of the provision or power and the purpose sought to be achieved by it; c) any other relevant factors including the extent to which the provision or conduct has limited the rights of the complainants or whether it has impaired their fundamental human dignity or constitutes impairment of a comparably serious manner.

The final stage deals with the justification:

- Once the discrimination is held to be unfair, the final enquiry is whether the provision can be justified in terms of section 36(1) of the Constitution.
- This, the Constitutional Court indicates, ‘will involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality’.
- This proportionality exercise is focussed on the purposes, actions, reasons, extent and necessity of the respondent’s conduct.

It followed that in a work situation where the employee alleged that he or she was discriminated against by the employer on the ground of race the onus on the employee was only to prove the existence of the alleged discrimination on such specified ground. Once that was proven, the onus shifted to the employer to satisfy the court, on a balance of probabilities, that the discrimination was not unfair.

2. Differentiation / discrimination

“Mere differentiation” (a neutral term in the sense that the mere fact of differentiation does not necessarily mean that the differentiation took place for a negative reason) occurs in those situations where distinctions are made between people and are not based on any suspect characteristics (such as their race, religion, sex, sexual orientation) but on a benign distinction (such as their profession or their income or another difference that we do not think of as problematic). Differential treatment could take place when one employee is promoted, another not; where one employee is paid more than another etc.

Not all forms of differentiation will, however, constitute discrimination. Where the criteria for a differentiation or classification are reasonably justifiable and objective, such differentiation will not necessarily constitute discrimination. Put differently, where the effect of the differentiation is not based on an objective ground and such differentiation has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms, it would constitute discrimination.

Although, as a rule, clauses outlawing discrimination do not purport to eliminate all forms of discrimination, it does seem to be the intention to eliminate unjustified and arbitrary discrimination based purely on an immutable personal characteristic such as sex or race. Where a direct differentiation is based on one of the immutable personal
characteristics of a person, in particular as far as hiring or employment of employees are concerned, such a differentiation may be legitimate in most legal systems, if such a differentiation is prescribed by the inherent requirements of a particular job. In other words, the inherent requirements of a particular job may, for example, require the employment of a person of a particular sex. But, it should immediately be stressed that a differentiation based on the inherent requirements of a particular job should only be allowed in very limited circumstances and should not be allowed in circumstances where the decision to differentiate is based on the perception that one sex is superior to the other. Also, where a differentiation is based on a stereotyped notion about women, such distinction should also be outlawed as unfair discrimination. Perceptions such as this which are used as a basis on which to differentiate between men and women, often lead to a woman not being employed or promoted or, in receiving less benefits than she would have received had she been a man. The financial consequences flowing from such differentiation often have a crippling effect on women and have the result of perpetuating the often poorer financial position women often find themselves in.

What does discrimination and in particular sex discrimination mean? In simple terms, sex discrimination may be described as the less favourable or differential treatment of a woman solely on the basis of her sex. “Discriminate” is specifically defined by The Shorter Oxford English Dictionary to mean “to make or constitute a difference in or between; to differentiate”.

A differentiation in pay structures based purely on a person’s sex would be considered to be unlawful in American Law. *In Los Angeles Department of Water and Power v Manhart 435 US 702 (1978)*, the court found that a practice whereby an employer's pension scheme required a larger deduction from the salary of female employees than men, constituted sex discrimination. The employer attempted to justify the contribution differentiation on the fact that since women live longer than men, they would draw pension for a longer period.

Britannia Security systems operated a security station which was staffed by two female operators. They worked shifts up to 12 hours in length, and were allowed to sleep during the shifts or up to five hours. Within the control station, they had an area where they changed into their uniform, and a collapsible bed that they used. When they slept, they stripped to their underwear so that their uniforms would not become creased. Sisley applied for a post as security officer and was rejected on the grounds that he was a man and there was a Genuine Occupational Qualification for a woman on the grounds of decency and privacy – because the employees had to ‘live’ on the premises, there were no separate sleeping and sanitary arrangements for different sexes, and because the employees stripped to their underwear while sleeping. Sisley claimed sex discrimination.

The EAT held that the Genuine Occupational Qualification was allowed on the grounds of decency and privacy, and hence dismissed the claim of sex discrimination.

Section 8(2) of the Constitution seems to confirm the general view that not all forms of differentiation based on one of the listed grounds are outlawed, but only those branded as "unfair". The strategical placing of the word “unfair” in conjunction with
the word “discrimination” leads to the conclusion that more is required than a mere finding of a distinction between the treatment of individuals or groups. By inserting the word “unfair”, a type of qualifier is built into section 8(2) to limit those distinctions or forms of discrimination which are outlawed in this section to those which are “unfair”. In order to alleviate the burden on the complainant of a discriminatory practice to prove the “unfairness” thereof, section 8(4) of the Constitution provides for a presumption of unfairness once a differentiation or difference on one of the grounds listed in section 8(2) has been established.

“Discrimination has both a pejorative and a non-pejorative sense. The adjective ‘unfair’ settled the ambiguity. Not all forms of discrimination are prohibited. Employment is replete with distinctions made in the criteria for hiring, training, treatment, promotion and termination. Only the unacceptable face of discrimination is targeted by this unfair labour practice. The distinction between acceptable and unacceptable forms of discrimination is premised in comparative labour law on the ‘inherent requirements of the particular job’. In other words the distinctions based on qualifications, occupational status, skill, training, experience (in a word ‘merit’) will not, all things being equal, constitute unfair discrimination. This was the basis of the decision in SACWU v Sentrachem. There the Court, basing its decision on the existence of discrimination ‘in the sense of a difference in wages between people doing the same job’ required the employer to remove the discriminatory practices within a period of time.”

The use of the word “unfair” in conjunction with the word “discrimination” leads to the conclusion that the drafters intended that a distinction be made between “permissible” and “impermissible” discrimination. Unfair discrimination used in this context should accordingly be read to imply prejudicial differentiation.

The following illustrates that certain forms of (sex) discrimination are not unlawful:

<table>
<thead>
<tr>
<th>Section 30, Australia, Sex Discrimination Act, No. 4 of 1984:</th>
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</thead>
<tbody>
<tr>
<td>1. Nothing in paragraph 14(1)(a) or (b), 15(1)(a) or (b) or 16(b) renders it unlawful for a person to discriminate against another person, on the ground of the other person’s sex, in connection with a position as an employee, commission agent or contract worker, being a position in relation to which it is a genuine occupational qualification to be a person of the opposite sex to the sex of the other person.</td>
</tr>
<tr>
<td>2. Without limiting the generality of subsection (1), it is a genuine occupational qualification, in relation to a particular position, to be a person of a particular sex (in this subsection referred to as the relevant sex) if:</td>
</tr>
<tr>
<td>a. the duties of the position can be performed only by a person having particular physical attributes (other than attributes of strength or stamina) that are not possessed by persons of the opposite sex to the relevant sex;</td>
</tr>
<tr>
<td>b. the duties of the position involve performing in a dramatic performance or other entertainment in a role that, for reasons of</td>
</tr>
</tbody>
</table>
authenticity, aesthetics or tradition, is required to be performed by a person of the relevant sex;
c. the duties of the position need to be performed by a person of the relevant sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex;
d. the duties of the position include the conduct of searches of the clothing or bodies of persons of the relevant sex;
e. the occupant of the position is required to enter a lavatory ordinarily used by persons of the relevant sex while the lavatory is in use by persons of that sex;
f. the occupant of the position is required to live on premises provided by the employer or principal of the occupant of the position and:
   i. the premises are not equipped with separate sleeping accommodation and sanitary facilities for persons of each sex;
   ii. the premises are already occupied by a person or persons of the relevant sex and are not occupied by any person of the opposite sex to the relevant sex; and
   iii. it is not reasonable to expect the employer or principal to provide separate sleeping accommodation and sanitary facilities for persons of each sex;
g. the occupant of the position is required to enter areas ordinarily used only by persons of the relevant sex while those persons are in a state of undress; or
h. the position is declared, by regulations made for the purposes of this paragraph, to be a position in relation to which it is a genuine occupational qualification to be a person of a particular sex.

3. Unfair / fair discrimination

It sometimes happens that employers are forced to discriminate. For example, an employer who runs a restaurant and wants to create a certain theme (Chinese) may want to employ waiters of Chinese descent and deny members of other groups the opportunity to work in the restaurant. A hospital may insist that female nurses be employed in its maternity ward.

A sensible approach to discrimination should make allowance for permissible discrimination in cases where the employer is able to justify the discrimination.

4. Direct and indirect discrimination

Using sex as an example, direct discrimination is generally easily recognisable as it involves a direct differentiation between the two sexes. For example, an employer follows a policy of remunerating a female employee on a lower scale simply because she is a woman, whereas a male employee is remunerated at a much higher scale for the same work.

The intention to discriminate is not regarded to be a necessary ingredient in order to prove direct discrimination. If an employee is treated worse than other employees,
simply because she is black or a woman, the discrimination is direct. The employer intends to discriminate; its actions are deliberate. The employer may mean well by what it does, but that makes no difference; the road to the hell of discrimination is paved with good intentions too."

Indirect discrimination, on the other hand, is usually a more veiled form of discrimination and is not always easily recognisable. In simple terms this form of discrimination may be defined as the imposition of a gender-neutral condition but which has a disproportionate impact on one sex.

In American Law direct discrimination is generally referred to as “disparate treatment” whereas indirect discrimination is sometimes referred to as “disparate impact” discrimination. The difference between direct and indirect discrimination is explained as follows in *International Brotherhood of Teamsters v United States*:

"Claims of disparate treatment, which involve employer’s alleged treatment of some people less favourably than others because of their race, colour, religion, sex or national origin, and as to which proof of discriminatory motive is critical, may be distinguished from claims that stress disparate impact, which involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."

In Ontario, *Human Rights Commission v Simpson Sears Ltd (1985) 2SCR 536* at page 551, discrimination (in that case adverse effect discrimination) was described in these terms:

"It arises where an employer . . . adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce."

It was held in this case (as is the case with direct discrimination) that no intent was required as an element to prove indirect discrimination, for it is in essence with impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint. “It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons, obligations, penalties, or restrictive conditions not imposed on other members of the community, it is discriminatory."

Since the Griggs case, the concept of indirect discrimination has been adopted world-wide. It has been used to challenge seemingly neutral requirements set by employers. The facts are as follows:

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8 97 SCt 1843 (1977) at 1844 
9 Association of Professional Teachers & another v Minister of Education & others [1995] 9 BLLR 29 (IC) 
In the 1950's Duke Power's Dan River plant had a policy that African-Americans were allowed to work only in its Labour department, which constituted the lowest-paying positions in the company. In 1955 the company added the requirement of a high school diploma for its higher paid jobs.

After the passage of the Civil Rights Act the company removed its racial restriction, but retained the high school diploma requirement, and added the requirement of an IQ test as well as the diploma. African American applicants, less likely to hold a high school diploma and averaging lower scores on the IQ tests, were selected at a much lower rate for these positions compared to white candidates. It was found that white people who had been working at the firm for some time, but met neither of the requirements, performed their jobs as well as those that did meet the requirements.

The Supreme Court ruled that under Title VII of the Civil Rights Act, if such tests disparately impact ethnic minority groups, businesses must demonstrate that such tests are "reasonably related" to the job for which the test is required. Because Title VII is passed pursuant to Congress's power under the Commerce Clause of the Constitution, the disparate impact test later articulated by the Supreme Court in *Washington v. Davis*, 426 US 229 (1976) is inapplicable. (The *Washington v. Davis* test for disparate impact is used in constitutional equal protection clause cases while Title VII's prohibition on disparate impact is a statutory mandate.) As such, Title VII of the Civil Rights Act prohibits employment tests (when used as a decisive factor in employment decisions) that are not a "reasonable measure of job performance," regardless of the absence of actual intent to discriminate. Since the aptitude tests involved, and the high school diploma requirement, were broad-based and not directly related to the jobs performed, Duke Power's employee transfer procedure was found by the Court to be in violation of the Act.

**Chief Justice Burger:**

The Court of Appeals' opinion, and the partial dissent, agreed that, on the record in the present case, "whites register far better on the Company's alternative requirements" than Negroes. This consequence would appear to be directly traceable to race. Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are Negroes, petitioners have long received inferior education in segregated schools, and this Court expressly recognized these differences in *Gaston County v. United States*, 395 U.S. 285 (1969). There, because of the inferior education received by Negroes in North Carolina, this Court barred the institution of a literacy test for voter registration on the ground that the test would abridge the right to vote indirectly on account of race. Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.
Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken into account. It has -- to resort again to the fable -- provided that the vessel in which the milk is proffered be one all seekers can use. The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

On the record before us, neither the high school completion requirement nor the general intelligence test is shown to bear a demonstrable relationship to successful performance of the jobs for which it was used. Both were adopted, as the Court of Appeals noted, without meaningful study of their relationship to job performance ability. Rather, a vice-president of the Company testified, the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the workforce.

The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily, and make progress in departments for which the high school and test criteria are now used. The promotion record of present employees who would not be able to meet the new criteria thus suggests the possibility that the requirements may not be needed even for the limited purpose of preserving the avowed policy of advancement within the Company. In the context of this case, it is unnecessary to reach the question whether testing requirements that take into account capability for the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need. In the present case, the Company has made no such showing.

The Court of Appeals held that the Company had adopted the diploma and test requirements without any "intention to discriminate against Negro employees." We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.

The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training. But Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.

The facts of this case demonstrate the inadequacy of broad and general testing devices, as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but
Congress has mandated the common sense proposition that they are not to become masters of reality.

The first was that all black employees were hired on hourly rates, while whites were employed on a monthly-paid basis irrespective of the work for which they were hired. True, blacks were occasionally 'promoted' to the monthly-paid staff. But even when that happened, membership of the Benefit Fund was not automatically conferred on them as it was on newly-hired whites. So even if the monthly/hourly criterion was a valid reason for differentiating between the membership rules of the funds, it had not been consistently applied. Whites were required to join the Benefit Fund immediately, while blacks were not. This was the second reason for the conclusion that the whole edifice was constructed on race.11

The following are examples of neutral job requirements that can cause discrimination:

Refusing to hire single custodial parents may discriminate against women, since women are more likely to have physical custody of their children. In the USA, requiring applicants to speak fluent English for a job that does not require communication skills may discriminate against applicants whose nation of origin is not the United States. Height and weight standards can discriminate based on sex and national origin.

Whenever seemingly neutral requirements have a discriminatory effect, the employer must be able to show that the requirements are related to job performance. Thus, requirements for job-related experience and specific job-related skills are usually valid.

More examples12

<table>
<thead>
<tr>
<th>Seemingly neutral requirement</th>
<th>Disproportionate impact on</th>
</tr>
</thead>
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<tr>
<td>height and weight (prison guards)</td>
<td>women</td>
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<tr>
<td>arrest records</td>
<td>blacks</td>
</tr>
<tr>
<td>previous experience</td>
<td>women</td>
</tr>
<tr>
<td>no beard (fire fighters)</td>
<td>black males (skin conditions that make shaving uncomfortable)</td>
</tr>
<tr>
<td>no beard (sweets factory)</td>
<td>Sikhs</td>
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<tr>
<td>lower hourly rate for part time employees</td>
<td>women</td>
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5. Discrimination “based on” one or more prohibited grounds

For an adverse employment policy or practice to be found directly “discriminatory” it must be proved by the complainant that such policy or practice is “based on” one or more of the listed or analogous prohibited grounds. In Louw v Arrow Bus Services (Pty) Ltd (1998) 19 ILJ 1173 the court noted that “it is necessary to distinguish clearly between discrimination on permissible grounds and impermissible grounds. An unfair

12 Essential Employment Discrimination Law 2010, Dupper et al
labour practice is only committed (even by omission) if the impermissible grounds are the cause of the discrimination. Discrimination on a particular “ground” means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less than Mr Beneke’s salary because of his race."

6. **Grounds of discrimination**

6.1 **Race**

Professor Reynhardt\(^\text{13}\) claimed compensation from UNISA under the EEA for discrimination on the basis of race. Reynhardt served two years as Dean of Science at UNISA, and applied to serve a second term. A “coloured” junior professor was appointed, even though the selection committee found, and the university ultimately itself conceded, that the new Dean was far less qualified and experienced than Reynhardt. However, the university claimed that the appointment of a “black” Dean was necessary to advance employment equity. This argument was the university’s downfall.

Prof Reynhardt took early retirement and sued UNISA for unfair discrimination the court noted that the university’s equity policy provided that merit would be the only criterion for selection once equity targets had been reached in departments or operational areas. The equity officers responsible for guiding the appointment process had misled the selection committee by instructing it to apply equity considerations. In truth, there were at the time already more black Deans than required by the university’s equity formula. The decision to overlook Prof Reynhardt on the basis of his race alone accordingly constituted unfair discrimination, which the court found particularly inexcusable as it had prejudiced an employee who had served the university with dignity, loyalty and diligence for 35 years. That humiliation, according to the court, was aggravated by the arrogant manner in which the professor had been treated by the university authorities when he tried to complain. UNISA was ordered to pay, in addition to an undisclosed sum already agreed between the parties, punitive damages equivalent to 12 months’ remuneration on the Dean’s salary scale. The total came to just over R1m, excluding the costs of the application\(^\text{14}\).

6.2 **Pregnancy, marital status and family responsibility**

In the matter of *Wallace v Du Toit* [2006] 8 BLLR 757 (LC), the respondent, Dr Du Toit, employed the applicant as an au pair to care for his two young children. After two years, the applicant fell pregnant, and her employment was terminated. The respondent claimed that he had made it clear at the pre-employment interview that the applicant would no longer qualify for employment if she had children of her own, as her loyalties to her own children would be divided, and that the employment

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\(^{13}\) *Reynhardt v University of SA* [2008] 4 BLLR 318 (LC)

\(^{14}\) Grogan, Employment Law Journal 2008 April Case Roundup Recent judgments and awards
relationship had lapsed by virtue of a “resolutive condition” having been satisfied. The applicant admitted that she and the respondent had discussed her marital status before she commenced employment, but denied that she had been told that being childless was a condition of employment. The applicant sought compensation under the Labour Relations Act (“LRA”) for what she claimed was an automatically unfair dismissal and damages under the Employment Equity Act.

The Court held that, on the probabilities, the verbal contract between the parties did not contain a term that the relationship would terminate automatically if the applicant fell pregnant. Apart from the fact that a term of that nature would be contra bonos mores and unconstitutional, such a term could not in any event be inferred from the mere fact that the applicant had stated at the pre-employment interview that she did not then intend to marry or have a child. Had the respondent wished to subject the relationship to so unusual a condition, he would surely have recorded it in writing. That the applicant had at the time stoically accepted that her employment would terminate was immaterial. The Court accordingly held that the applicant had been dismissed.

Since it could not be accepted that not being pregnant or a parent was an inherent requirement of the work of an au pair, the dismissal constituted unfair discrimination and was an automatically unfair dismissal.

Turning to relief, the Court noted that, since the respondent and his wife were entitled to their views concerning how their domestic relationships should be conducted, reinstatement was not an option. The Court noted that simultaneous claims for damages under the Employment Equity Act and compensation under the LRA could create a duplication that could be unfair to the respondent. However, where the claim for a solatium was less than the maximum compensation prescribed by the LRA, it was unnecessary to untangle the two forms of relief.

The applicant was awarded R71 500: R25 000 as a solatium and the equivalent of a year’s salary (R58 500), less an amount she had been given on termination (R12 000), as compensation for her patrimonial loss.

In another case, Woolworths (Pty) Ltd v Whitehead [2000] 6 BLLR 640 (LAC), Ms Whitehead claimed she was unfairly dismissed and/or unfairly discriminated against on the basis of her sex because Woolworths declined to appoint her after discovering that she had fallen pregnant. However, Ms Whitehead failed to satisfy the majority of the LAC bench that the company had declined to appoint her because she was pregnant; the company satisfied the majority that the true reason it had appointed a white male was that Ms Whitehead would for several months be unable to perform the work for which she was urgently needed. The court found against Ms Whitehead partly because it was not prepared to accept that the appointment of a white male rather than a pregnant female in itself gave rise to the conclusion that Woolworths was biased against women in general, or pregnant women in particular.

6.3 Age

Bedderson, a teacher, commenced her career in 1955 and was employed in various schools. Her employment came to an end as a result of the fact that she

15 Bedderson v Sparrow Schools Education Trust [2010] 4 BLLR 363 (LC)
would soon reach the retirement age of 65 set by the Gauteng Department of Education (“GDE”). On 14 February 2001 when she was 64 years and 9 months old, she was appointed as an educator at one of the respondent’s schools. Despite the fact that she was approaching the age of 65, an age that is often regarded as a normal or agreed retirement age, this was not an issue raised at any stage prior to her employment. Her contract of employment did not contain a retirement age and there was no retirement policy in force at that time.

On 6 October 2006, during the course of a staff meeting, staff was informed that a mandatory retirement age of 65 years of age had been introduced. Employees older than 65 years of age could be considered for temporary employment in terms of fixed-term contracts until the age of 70 years when this type of employment would also cease.

The introduction of this new arrangement was confirmed by means of a document provided to employees on 10 October 2006. This took the form of a letter dated 9 October 2006 addressed to the principals and staff of the various schools operated by the respondent. In this letter the respondent’s human resources practitioner stated that it appeared that there were still educators on the permanent staff who were older than 65. It went on to state that no employees were to be employed on a permanent basis after the age of 65. However, if an employee was delivering the same level of performance as that which was required of them they could be re-employed in a temporary capacity, but that this could not occur after an employee had reached the age of 70.

The above was reflected in a policy that came into force on 2 October 2006. In October 2006 the applicant was a few months older than 70. On 15 November 2007 the applicant received a letter from the respondent informing her that, according to the respondent’s policy on retirement age, she would not be offered an employment contract for 2007 and that her final salary would be transferred electronically into her bank account on 31 December 2006.

It is common cause that the reason for the applicant’s dismissal was the fact that she was older than 70. Her dismissal was therefore due to her age.

The question is whether the application of such a retirement age can be justified in a case such as this where the employee had already reached and passed the retirement age? In my view, it cannot. It is one thing to be able to justify the implementation of general retirement age but this does not mean that it is necessarily fair to dismiss somebody on the basis that she had already reached that age when the policy was introduced.

In my view, whilst the aim of introducing a retirement age was legitimate, I do not think that the respondent’s response was proportional with respect to the way in which it was implemented in the context of the unique circumstances of the applicant. It is true that the applicant did concede that the introduction of a policy on retirement age could or would be fair.
However, what is also clear is that it was not so much the introduction of a policy that she challenged but its application to her in her circumstances. The dismissal was found to be automatically unfair.

6.4 Disability

When a 31-year-old male law enforcement officer requested an internal transfer to a vacant post of fire fighter in the City of Cape Town's fire and emergency services department, he was then medically assessed and found to be unfit for a fire fighting position. The reason being that, as an insulin dependent diabetic, it was feared that he might suffer a debilitating hypoglycaemic attack while working under pressure, which could endanger the employee himself, his colleagues and the public. The employee claimed that in spite of his condition he was physically fit and that his exclusion was the result of outdated and prejudiced stereotyping. He claimed that in the years he had served as a voluntary fire fighter, he had never suffered a severe hypoglycaemic episode, even during periods of prolonged stress and physical exertion. The applicant also contended that any adverse effects he might suffer as a result of a fall in blood glucose levels could be rapidly controlled by drugs.

The court noted that it was common cause that, apart from his diabetic condition, the employee was sufficiently fit to perform the arduous and stressful tasks entailed in fire fighting. The only issue was whether the volatility of particular situations coupled with the unpredictable effects of decreased blood glucose levels brought on by insulin injections might create unacceptable risks in emergencies. International studies proved that there were significant increases of risk among insulin dependent diabetic drivers, and courts in other jurisdictions have held that the risk posed by diabetics in potentially hazardous occupations does not warrant the imposition of blanket bans on employment of such individuals.

The court noted further that the EEA provides that it is not unfair to distinguish, prefer or exclude somebody on the basis of an inherent requirement of the job. This effectively creates a rebuttable presumption that once discrimination is shown to exist, it will be presumed unfair unless the employer justifies it. It was common cause that the respondent had adopted a general policy not to employ insulin dependent diabetics as fire fighters. The question was whether this constituted unfair discrimination. The answer required two inquiries:

i. whether a policy which differentiates between people or categories of people has a rational connection with a legitimate purpose;
ii. whether the discrimination nevertheless constitutes unfair discrimination. Whether or not the ground for discrimination is listed in the EEA, the onus rests on the employer to prove that the discrimination is fair.

The most common form of discrimination for persons with disabilities is the denial of opportunities. Prejudice and misconceptions mean that men and women with disabilities are very often shut out of the labour market, and from education and training. Unemployment rates for people with disabilities reach 80 per cent or more in many developing countries. When disabled people do find jobs, the work is often low-paid, unskilled and menial. The jobs are often in the informal economy with little or no social protection. (http://digitalcommons.ilr.cornell.edu/nondiscrim/2)

IMATU & another v City of Cape Town [2005] 11 BLLR 1084 (LC)
The court held further that the impact of alleged discrimination is generally the determining factor regarding its fairness. Factors to be considered include the position of the complainants in society and whether they have suffered from past patterns of unfair discrimination; the nature of the policy and the purpose to be achieved; the extent to which the discrimination has affected the rights or interests of the complainants and whether it has impaired their human dignity.

The respondent had admitted discriminating against the employee, but claimed that this discrimination was rationally connected with a legitimate governmental purpose. Local authorities are required by legislation to supply fire protection services and to provide a safe working environment for their employees. Under the common law, municipalities are also under a general duty to prevent reasonably foreseeable harm. The evidence indicated that blanket bans against employment of insulin dependent diabetics as fire fighters are applied in other jurisdictions. The court accepted that the respondent’s policy was rationally connected to a legitimate government purpose and that it did not per se constitute a violation of the employee’s right not to be unfairly discriminated against.

Turning to whether the differentiation was on a specified or listed ground, the court noted that the word “disability” is not defined in the EEA. However, the Code of Good Practice on the Employment of People with Disabilities defines “people with disabilities” as those “who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”. The EEA therefore focuses not on the medical condition per se, but rather on its effects on the sufferer’s job prospects. Type 1 diabetes is a long-term physical impairment for which there is no known cure. It must be kept under control through the regular dosages of insulin. There was accordingly no doubt that diabetes was a long term impairment. However, the inquiry did not end there; an impairment only constitutes a disability for purposes of the EEA if it substantially limits the sufferer’s career prospects. In the light of the evidence that diabetes can be controlled with the correct medication, a sufferer cannot be regarded as a person with a disability. The differentiation in casu did not accordingly take place on a listed ground. That being the case, the onus rested on the applicants to show that the employee’s dignity had been seriously affected. The court held that this was indeed so. Controlled diabetics seek dignity with the demand that their capacity to function as normal members of society be recognised to the extent that modern pharmacological and technical advances make possible. Arbitrary exclusions predicated on anachronistic generalised assumptions impair their dignity and seriously affect them. The discrimination in casu was accordingly unfair discrimination as contemplated by the EEA, and the onus rested on the respondent to prove that it was fair.

The court also dismissed as paternalistic the respondent’s submissions that the impact of its refusal to transfer the employee to the fire department on his career prospects was no more severe than the impact of any unsuccessful application for a transfer, that the positions of diabetics in society is not “notoriously disadvantaged”, and that employers have an inherent right to determine their risk management policies, even if they erred on the side of caution. Other things being equal, employees have a right to determine their career paths.
The applicant had not been disappointed as a result of deficiencies in training, performance or qualifications. In practice, it had been shown that insulin dependent diabetics are denied employment in various occupations simply because of their medical condition and misapprehension about its nature. The respondent’s blanket ban on the employment of diabetics in its fire service accordingly impaired the employee’s rights more than necessary to achieve the purpose it was meant to serve. This discriminatory policy affected the rights, not only of the employee, but of diabetics generally, and accordingly constituted unfair discrimination.

The court held further that section 36 of the Constitution, which provides for limitation of entrenched rights, had no application in casu. The applicants relied exclusively on the EEA which meant that the only defence available to the respondent was to prove that the discrimination related to an inherent requirement of the job. The term “inherent requirements of the job” means a permanent attribute or quality forming an essential part of the job in question. While it may be essential that fire fighters should not be liable to suffer a severe hypoglycaemic episode in emergencies, this supported the need for individual assessment, not for blanket bans on persons suffering from this condition. The risks vary from diabetic to diabetic. The risk of a diabetic suffering from an episode was no greater than the risk of an overweight fire fighter suffering a heart attack. The relatively minimal risk could not justify a total ban on the employment of such individuals:

1. The respondent’s failure to transfer the second applicant from his position as law enforcement officer to that of fire-fighter within the Directorate: Protection Services is declared to be unfair discrimination.
2. The respondent’s employment policy of refusing to employ insulin dependent diabetics as fire-fighters is declared to be unfair discrimination.

6.5 Sexual orientation, sex and gender

When, in CWIU v Johnson & Johnson (Pty) Ltd [1997] 9 BLLR 1186 (LC), the employer attempted to select women for retrenchment in “male type” jobs, the court had the following to say:

18 Sex is determined biologically and refers to an individual’s physical anatomy – genitalia, facial hair, body structure and composition. Sex refers to the biological characteristics that separate male from female. Gender is determined by social interaction, exchange, and absorption of peer, familial, and larger cultural values that determine gender identity and affiliation. Gender can be considered fluid in the sense that one can challenge their own gender identity, in some instances holding it completely opposed to their sex. For example, a woman who considers herself to be a male, possessing the same sexual desires as a male, and is contemplating undergoing surgery in order to become male is an example of sex and gender being separate as well as disparate. Gender roles and identities are also culturally proscribed; these roles are commonly a crucial argument in the feminist theory aspect of sociology or philosophy. Boys play with toy soldiers, while girls play with Barbie dolls – this commonly held viewpoint or assumption is offensive to many feminist theorists who advocate a stripping of stereotype and gender bias. What is the Difference Between Sex and Gender?: Sociology, Theory, Cultural Understanding, Physical Anatomy | Suite101.com http://suite101.com/article/what-is-the-difference-between-sex-and-gender-a146502#ixzz1wNMNjU2K
“The union’s challenge of the selection criterion used in this case is directed at the belief or assumption by the respondent that the female workers who were ultimately retrenched could not perform the jobs which the male workers with shorter service periods than themselves who were not retrenched were doing. The applicant’s case in this regard is that this position or attitude by the respondent was discriminatory, directly or indirectly, against female workers on grounds of gender. In this regard the applicant says this rendered the dismissal automatically unfair by reason of section 187(1)(f). Those provisions say a dismissal is automatically unfair if the reason for the dismissal is “that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility”. The respondent hotly denies any allegation of discriminatory conduct on its part towards female employees in general and those employees in particular. It contends that its attitude that women could not perform those jobs which it regarded as male-type jobs was based on its knowledge of what those jobs entailed as well as on its evidence that in the opinion of Mr Lane those jobs were too physically demanding for women.

Implicit in the respondent’s attitude in this respect is the assumption that there are jobs for which every male person is suitable and for which every woman would be physically unsuitable. Linked to that assumption is the clearly erroneous belief on the respondent’s part that all women are physically weaker than all men and that all men are physically stronger than all women. I agree with the applicant that an approach which is founded upon such a sweeping generalisation is totally wrong and is prima facie discriminatory against women on grounds of their gender. Such an attitude is not only contrary to the spirit of the new Act but also offends against the values which our final Constitution seeks to infuse into the post 1994 society of this country. I am aware that section 187(2)(a) of the Act makes provision to the effect that it will not be regarded as discriminatory to require in respect of a particular job an employee of a particular gender on grounds of inherent requirements for that job. Quite frankly I have serious difficulty in thinking what job (other than perhaps the oldest profession) exists under the sun which can be said to inherently require a worker to be a male or female in order to perform. Although Mr Lane gave evidence of what the various jobs entailed, no evidence was led to the effect that either those women had been tried on such jobs and found unable to perform them or that it had been found that they did not have the physical strength required for such jobs or that there existed any objective basis to support the conclusion that they could not perform those jobs. To the extent that Mr Lane expressed his opinion in this regard, I decline the invitation to accept that opinion as it has no sound foundation. The result of this is that the selection criteria which was used to select the retrenched in this matter is one which I am unable to find to be fair and objective as required by section 189(7) of the Act. However, this is not the end of the enquiry. In order for a dismissal to be unfair by reason of the selection criteria used to select those to be retrenched I think there must be a causal link between the use of such selection criteria and the ultimate dismissal.”
6.6 Ethnic or social origin and birth

In Sweden the issue of ethnic discrimination was raised when a young woman born in Bosnia came to live in Sweden at the age of 10. She attended Swedish schools and became a student. In May 2001, she contacted a telemarketing company and said that she was interested in working as a telephone interviewer. She was invited to an introductory meeting where she was informed about the company and also signed a promise of professional secrecy. She was informed that the company's recruitment process involved three test situations, with test interviews carried out with the applicants' friends and the public while the company staff was listening. The job applicant took part in the first test. Some days later, she called a member of the staff to make an appointment for the second test. During this phone call, the member of company staff told the woman that she had a slight foreign accent. After the call there was no more contact between her and the company.

A key question in the case was whether the telemarketing company had interrupted the recruitment process for the job applicant and consequently caused ethnic discrimination.

Considering the circumstances, the Court found that it was the company that broke off the recruitment process. The Ombudsman against Ethnic Discrimination submitted to the court a letter from the company which lent support to this opinion. The letter stated that 'our judgment after the interview was that the applicant did not fill the demands we have on staff working at our telephone centre.' The Court found that the reason why the company broke off its relations with the job applicant, was partly that she had become angry, and partly that her Swedish was defective.

However, the Court found that no direct discrimination had occurred. It is objectively justified for a company working in market research to demand that its telephone interviewers have a good knowledge of Swedish and be able to express themselves in a clear and distinct way. The company did not, however, repudiate the assertion from the Ombudsman that the job applicant to a reasonable extent met the demand for clear Swedish actually required by the position applied for. Therefore the company, in the job applicant's case, used a demand for language knowledge that was higher than necessary considering the work tasks she would have had at the company. The company used criteria appearing to be neutral but in practice, considering the job applicants' ethnic background, this criterion was unfavourable to her. The Court thus found that there was indirect discrimination against the applicant.

6.7 Religion, belief, culture and conscience

When five correctional services officers refused to cut off their dreadlocks they were dismissed. Three of the employees claimed that they were members of the Rastafarian faith, two gave cultural reasons for wearing this hairstyle, and one claimed that he had been told to do so by his ancestors. The employees claimed that their dismissals were automatically unfair, maintaining that they had been

19 Arbetsdomstolen (AD nr 128/02)
20 Department of Correctional Services & another v POPCRU & others [2012] 2 BLLR 110 (LAC)
discriminated against on the basis of their religion, belief, culture and gender. The Labour Court rejected the employees’ claim that they had been discriminated against on the basis of religion or culture, but accepted that they had been discriminated against on the basis of gender, because female officers were permitted to wear dreadlocks. The appellants confined their grounds of appeal to the contention that the court a quo had erred by finding that the employees had been discriminated against on the basis of gender.

Turning to whether the employees had been discriminated against on the basis of religion, culture or gender, the Court noted that the first enquiry into whether there has been unfair discrimination on proscribed grounds in the context of a dismissal involves determining whether there has been differentiation between employees or groups of employees which imposes burdens or disadvantages, or withholds benefits, opportunities or advantages from certain employees, on one or more prohibited grounds. The employees had to demonstrate that the prohibition on dreadlocks interfered with the practice of their religion or culture, or that they suffered a disadvantage because of their gender. If differentiation on specified grounds is shown, unfairness is presumed and the employer bears the onus of rebutting that presumption. The test for unfairness focuses on the impact of the discrimination, its effect on the employees’ dignity, and on its proportionality. A discriminatory dismissal might be justified if it is based on an inherent requirement of a particular job.

The Court noted further that the Correctional Services dress code permitted women to wear “Rasta style” hairdos, but prohibited men from doing so. However, another comparator besides gender operated in the circumstances of the case. This was between male officers whose religious and cultural beliefs were compromised by the prohibition, and those whose were not. The norm embodied in the dress code was not neutral. It enforced “mainstream” male hairstyles (of the short back and sides military variety), at the expense of minority and historically excluded hairstyles, such as hippy, punk or dreadlocks. The code, therefore, imposed disadvantages on some male officers who were prohibited from expressing themselves fully in a work environment where their practices were rejected and in which they were not accepted for who they were. The employees all wore dreadlocks because that hairstyle was an expression of their religious belief or culture. There was no dispute that dreadlocks were indeed an expression of the Rastafarian religion and of Xhosa culture. Courts are not concerned with the rationality of practices when determining issues of equality and religious freedom, provided the assertion of the belief is sincere and bona fide.

The Court held that the reasons given by the court a quo for rejecting the claim of religious and cultural discrimination did not withstand scrutiny. The trial court had accepted that the ban on dreadlocks affected the employees’ religious or cultural beliefs. But instead of assessing the justification advanced by the department, the trial court had simply held that no religious or cultural discrimination had been proved. The dress code directly discriminated against the employees because they were treated less favourably than their female colleagues and those upon whom the code imposed no religious or cultural disadvantage. But for their beliefs, the employees would not have been dismissed. The Court, accordingly, held that the Labour Court had erred by finding that the employees had not been discriminated
against on religious or cultural grounds, but that it had correctly found that they were discriminated against on the basis of gender.

The Court noted further that the appellants’ submission that the employees had not been dismissed because of their religious or cultural practices, but to ensure compliance with the department’s policies raised the question whether an employer’s subjective intention can save a dismissal from being deemed automatically unfair. The LRA states that a dismissal is automatically unfair if the reason is prohibited. The reason for the dismissal must be determined objectively. A discriminatory act cannot be defended by citing benign motives. In cases of direct discrimination, the employer need not subjectively intend to discriminate on a prohibited ground. The issue is purely causal. In the present case, the employees would not have been dismissed but for the fact that they chose to adhere to their religious or cultural beliefs. The appellants’ attempt to rely on its officials’ motives for enforcing the dress code was accordingly misplaced.

Turning to whether the discriminatory treatment was fair, the Court noted that the test for fairness in that context under the LRA and the EEA concentrates on the nature and extent of the limitation of the complainants’ rights, the impact of the discrimination, whether the discrimination impaired the employees’ dignity, whether the discrimination was for a legitimate purpose and whether the employer had taken steps to accommodate the diversity sought to be advanced and protected by the principle of non-discrimination. While the Constitution was not directly applicable to the present dispute, it was also necessary to ask whether the act would survive the limitation provisions of the Bill of Rights.

The Court noted that the central purpose of the prohibition on dreadlocks was to achieve neatness and uniformity of dress and appearance of correctional officers, with the underlying objective of enhancing discipline and security. Courts must show a measure of deference to statutory authorities charged with running the security organs of State. But that deference does not extend to unjustified violations of the fundamental right to equality. Of importance in the current case was the employees’ right to dignity. The appellants were required to prove that the objective of discipline was rationally connected with its purpose, and could not have been achieved by other means. Employers should, as far as possible, avoid forcing employees to choose between adhering to their faiths and beliefs and submitting to instructions. The appellants had not led any evidence to prove that short hair was an essential requirement of the employees’ jobs.

Their argument that the dress code was “neutral” could also not be sustained, because it impacted only on employees with particular beliefs. Furthermore, the code permitted various forms of exotic appendages, like handlebar moustaches. This made it clear that only styles favoured by certain marginalised groups evoked the department’s disfavour. No evidence had been led to prove that the behaviour of any of the employees was adversely affected by their hairstyles; on the contrary, the evidence showed that all were exemplary officers who had worn dreadlocks for several years before the arrival of the new commander who decided to enforce the code. Many submissions made by the department were based on nothing more than negative stereotyping. The department’s attempts to justify the discrimination along
gender lines were equally meritless. No rational connection between the purpose and the measure had, accordingly, been proved.

6.8 Political opinion

Mrs Walters\(^{21}\) alleged \textit{inter alia} that the Council discriminated against her on grounds relating to political opinion. It was testified on behalf of Mrs Walters that during the closed deliberations of the selection panel:

“Councillor Mdaka said that the appointment of Mr Sohena was a “political appointment” and that he wanted to appoint not the feet but the head. The words “political appointment” can have various shades of meaning. They must be interpreted in their context. They could mean that Mr Sohena was being appointed on account of his political opinion (with the implication that Ms Walters was not being so appointed) because his opinions coincided with those of a councillor or both councillors.

Councillor Mdaka denies that he made the remark. However, the councillor was not a satisfactory witness as compared to Mr Shand. I am mindful that Mr Shand has an interest, albeit a legitimate one, in the appointment of council officials for whom he is administratively responsible. I find that the statement was uttered. However, the statement was made in the context of what appears to be an “unfriendly” relationship between the councillor and Mr Shand. The tension undoubtedly arises from the competing interests as seen from the perceptive of the officials and the councillors on staffing. I am not convinced, on the evidence, that the statement bears a sinister or improper implication.

It was contended on behalf of Ms Walters that this remark about making a political appointment takes on a sinister shade when it is considered together with an alleged remark by the SAMWU representative who attended as an observer. Mr Niehaus testified that the SAMWU representative said to him, prior to the announcement of the formal selection, that he knew who the councillors would select or had selected. This is clearly hearsay evidence, although it could be admitted in proper circumstances. However, Mr Niehaus, after the last postponement, re-entered the witness stand and testified that in the meantime the SAMWU representative had told him that he would not testify in this Court and that if compelled to do so he would deny making the statement. I do not think that this evidence can be admitted without calling the representative. Even if I were to accept it, it is not indicative of much more than that the SAMWU representative knew that Mr Sohena was the councillors’ favourite but not that they had closed their minds.

I therefore conclude that Ms Walters has not shown that the Council discriminated against her on the grounds of political opinion or favouritism.”

However, it can be deduced that had the court found that the successful candidate had been appointed solely because of his past political affiliations, it would have

\(^{21}\) Walters v Transitional Local Council of Port Elizabeth & another [2001] 1 BLLR 98 (LC)
found that Ms Walters had been unfairly discriminated against on the basis of her political opinion.

6.9 Language and colour

In *Stokwe v MEC, Department of Education, Eastern Cape Province & another* [2005] 8 BLLR 822 (LC), a black female teacher applied for promotion to the post of principal of the Despatch Primary School. The interviewing committee initially rated her equally with a “coloured” male candidate, but recommended Stokwe. The school’s governing body rejected that recommendation, apparently because there were doubts about her fluency in Afrikaans. The Department then rejected that recommendation because it discriminated against the applicant on the basis of language and appointed a “review panel”, consisting of three white male primary school principals. They insisted that the proceedings be conducted in Afrikaans. The applicant refused, but agreed to speak English. She was told that she should not have applied for the post because the language of instruction at Despatch Primary was Afrikaans, and she was asked whether she was “bold enough” to compete for the post with a man. Immediately after attending the review panel, the applicant complained to an officer of the department, who told her to submit a written complaint by the next morning. She did so. Without replying to the applicant’s letter, the review committee’s recommendation that the third respondent be appointed to the post was forwarded to the department’s acting regional director, who approved his appointment. The applicant then launched an urgent application, claiming that she was the victim of unfair discrimination.

The court noted that the issue of language had not arisen before the interviewing committee decided to nominate the applicant. The advertisement had merely stated that Despatch Primary was an Afrikaans-medium school. The interviewing committee was satisfied with the applicant’s proficiency in Afrikaans. The language issue had only reared its head when the school governing body had realised that the applicant was a black woman. The minutes of the SGB meeting did not support the respondent’s evidence that the SGB had selected the male candidate because he was more qualified in psychology. The court held that, on the probabilities, the applicant’s race and language had been the main reasons for rejecting her. The assumption that a black would not be proficient in Afrikaans was an obvious manifestation of bias and prejudice.

(The matter was settled after it was argued)

6.10 HIV status

In September 1996 Mr. Hoffman applied for employment as a cabin attendant with SAA. He went through a four-stage selection process comprising a pre-screening interview, psychometric tests, a formal interview and a final screening process involving role-play. At the end of the selection process, the appellant, together with eleven others, was found to be a suitable candidate for employment. This decision, however, was subject to a pre-employment medical examination, which included a blood test for HIV/AIDS. The medical examination found him to be clinically fit and

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22 *Hoffmann v South African Airways* [2000] 12 BLLR 1365 (CC)
thus suitable for employment. However, the blood test showed that he was HIV positive. As a result, the medical report was altered to read that the appellant was “HIV positive” and therefore “unsuitable”. He was subsequently informed that he could not be employed as a cabin attendant in view of his HIV positive status.

The Constitutional Court held that the court a quo had erred by finding that the respondent had proved that the appellant would have posed a danger to passengers and himself because he could not be vaccinated against, inter alia, yellow fever.

SAA refused to employ the appellant saying that he was unfit for world-wide duty because of his HIV status. But, on its own medical evidence, not all persons living with HIV cannot be vaccinated against yellow fever, or are prone to contracting infectious diseases – it is only those persons whose infection has reached the stage of immunosuppression, and whose CD4+ count has dropped below 350 cells per microliter of blood. Therefore, the considerations that dictated its practice as advanced in the High Court did not apply to all persons who are living with HIV. Its practice, therefore, judged and treated all persons who are living with HIV on the same basis. It judged all of them to be unfit for employment as cabin attendants on the basis of assumptions that are true only for an identifiable group of people who are living with HIV. On SAA’s own evidence, the appellant could have been at the asymptomatic stage of infection. Yet, because the appellant happened to have been HIV positive, he was automatically excluded from employment as a cabin attendant.

Another question to consider, is whether an employee has to disclose his/her HIV status. When Gary Allpass was interviewed, he did not disclose his HIV status. His letter of appointment confirms his appointment commencing on 1 November 2008 “on a temporary basis for a period of three months, where after the position will (sic) reviewed.” His duties were, inter alia:

- managing and overseeing the Mooikloof Equestrian Centre in close cooperation with Aletta Herbst;
- horse grooming, care and supervision (24 hours);
- crisis management of horses and clients;
- assisting the veterinarian; and
- reporting to Dawie Malan on all aspects.

In his pre-employment interview Allpass stated that he was in good health, had a bond over an immovable property, was a homosexual in a same-sex civil union and that he was agnostic. His responses were not seen in an unfavourable light – in fact, the employer had already employed a same-sex couple. A week after the employee’s appointment, he and the members of the other civil union were asked to complete “personal particulars” forms in which they were asked to list allergies and chronic medications they were taking. The employee disclosed that he was HIV positive and was taking retroviral drugs. The day after he handed in his form, he was told that he had been dismissed - “the basis on which you are being dismissed from your temporary appointment at the Mooikloof Equestrian Centre is because you were dishonest in the interview.”
The issues to be determined by the court were:

A: whether the dismissal of the employee was automatically unfair, or alternatively procedurally and/or substantively unfair, and if so, the appropriate measure of compensation to which he is entitled; and

B: whether the employee was unfairly discriminated against on the basis of his HIV status and if so, the appropriate relief to which he is entitled.

As far as A is concerned, the court found that the real reason for the employee’s dismissal was the fact that he had not disclosed his HIV status. That being the case, the employee’s dismissal was automatically unfair, and the employer is burdened with an evidentiary burden to prove that the discrimination was justified, meaning that employee’s termination was justified based on an inherent job requirement. The employer failed to do this.

With reference to claim B, the court noted that the employee sought relief in the form of a solatium for the injuria or damages to his humiliating treatment based on his sexual orientation and his homeless status following his dismissal, as well as the unfair discrimination and loss of dignity arising from the expectation that he should have disclosed his HIV status at the interview.

According to the court the incidents surrounding his eviction could not be attributed to the employer because the security guard who removed him was acting on the instructions of the homeowners’ association. But even if it could be, the court could not entertain the claim arising from the eviction because it occurred after the employee’s dismissal.

With regard to relief, the court noted that the compensation for an automatically unfair dismissal must be “just and equitable in all the circumstances, but not more than the equivalent of 24 months’ remuneration”. Referring to Davis AJA in Kroukam v SA Airlink (Pty) Ltd [2005] 12 BLLR 1172 (LAC) the court quoted that compensation for an automatically unfair dismissal should be no less than the amount the employee would have been entitled to receive if reinstatement had been sought and should reflect the serious nature of the transgression. The fact that the employee was employed on a three month temporary employment contract, subject to review at the end of that period, was taken into consideration.

The employee was granted compensation equivalent to 12 months’ remuneration for his automatically unfair dismissal. His claim for unfair discrimination was dismissed.

6.11 Other grounds

6.11.1 Level of the position

The applicant in Mothoa v SAPS [2007] 9 BLLR 879 (LC) complained that his non-appointment to the post of Divisional Commissioner: Criminal Record and Forensic Sciences Services of the South African Police Services (SAPS) amounted to unfair discrimination.
This was a senior post and the incumbent would report to the deputy national commissioner. The post was advertised and Mothoa and seven others applied. The panel that was appointed to consider the applications decided not to fill the position but to re-advertise it due to the fact that insufficient applications were received from people with appropriate managerial experience.

The post was re-advertised with the requirement that the applicants should be at the level of at least assistant commissioner/chief director – that is, level 14 – and that they should have ‘excellent managerial planning, problem-solving and strategic thinking ability’. Fifteen people applied, including Mothoa. A short-list was compiled which excluded Mothoa, but included two white males and two black males. Du Toit, a white male, was appointed.

Mothoa was not satisfied and lodged a grievance in which he alleged, *inter alia*, that the requirement that the applicant must be on level 14 was ‘unfair to black people’. He was informed that he was not short-listed because there were applicants ‘with longer experience at a higher level of senior management’. Mothoa thereupon brought an unfair discrimination claim.

He did not, however, persist with the allegation that there was unfair discrimination on the basis of race and he conceded that there were two black candidates that were short-listed. Mothoa alleged that the level 14 – requirement amounted to unfair discrimination.

The Labour Court, per Moshoana AJ, held that there was nothing discriminatory in the advertisement, nor was there any basis for the court to interfere with the criteria set out by the SAPS. It stated that, as long as it is not capricious, there is nothing wrong with an employer requiring proven managerial experience in the filling of senior posts.

The court furthermore noted that the level 14 – requirement was not one of the grounds listed in s 6 of the Employment Equity Act 55 of 1998. Consequently, Mothoa bore the onus to show that the differentiation amounted to ‘discrimination’.

This meant that the basis for differentiation had to be such that it affected Mothoa’s inherent human dignity (see also *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) and *Ntai v South African Breweries Ltd* (2001) 22 ILJ 214 (LC)). The court held that Mothoa failed to cross this threshold. In the circumstances, the application was dismissed with costs.

### 6.11.2 Experience

Although the lack of experience is not listed as a prohibited ground, section 20(5) of the EE provides as follows:

(5) …. an employer may not unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience.
With regards to the above mentioned, the Labour Court noted that “The history of deliberate discrimination in our country provides a harrowing and almost limitless range of discriminatory policies and practices in employment and other spheres of our society. If an employer’s conduct falls within this category of unfair discrimination (solely on the grounds of lack of relevant experience), what may the employee do? The employee may refer the instance of unfair discrimination to this Court (whether or not one regards it as an independent prohibition). This would be consistent with one of the purposes of the Act, namely, “promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination”. To hold otherwise would place a restriction on the jurisdiction of this Court which is warranted neither by the express language of the Act nor by its purpose.”

Harmse argued that he was suitably qualified for all the posts for which he had applied and that, being a designated employee, the municipality had failed to comply with its obligation under the EEA to determine whether he was suitably qualified and, if he was found suitably qualified, to appoint him. His dispute therefor falls within the scope of the EEA because, being designated and suitably qualified, the municipality must have discriminated against him on the basis of “lack of relevant experience”.

7. Harassment

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)

Harassment in the wider sense may include anything from taunting an employee about some personal characteristic, nagging, unpleasantness, or persecuting them with frivolous disciplinary action, provided this is done on one or other of the grounds mentioned in the Act. Since discrimination on non-listed grounds is possible, it is submitted that harassment could be committed on such grounds (citizenship etc) as well.

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (4 of 2000) defines harassment as follows:

“…unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to:

a. sex, gender or sexual orientation; or
b. a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.”

In employment context, employees may be harassed in a number of ways – normally by superiors.

24 Harmse v City of Cape Town[2003] 6 BLLR 557 (LC)
The following 3 types of harassment can be identified:

1. **Quid pro quo**
   Sexual harassment may involve physical violence or the procurement of sexual favours – the employee is “blackmailed” into surrendering to sexual advances against his/her will for fear of losing a tangible job related benefit such as a promotion or raise in salary. The perpetrator usually is in a position of authority.

2. **Hostile working environment harassment**
   This type of harassment involves an environment which is created through jokes, sexual innuendo’s, racist or other remarks that are offensive to the recipient and which result in a violation of his/her dignity.

When Transnet received a complaint that a white male manager had sent a racist e-mail to his colleagues, the company tried to resolve the matter amicably. The black female complainant would not relent. So the company referred the matter for advisory arbitration. It turned out that the e-mail contained a quotation from a report on a speech at a business breakfast by Reserve Bank president and former Minister of Labour, Tito Mboweni. He was quoted as saying that affirmative action was not working because “competent blacks leave the moment they are trained”. The quotation ended with the words: “I am stopping the employment of black people. I am okay with Afrikaners”. Ms Dlamini, who had had an uneasy relationship with the manager who transmitted the e-mail, claimed that the quotation offended her because it suggested that blacks were untrustworthy. In *SATAWU obo Dlamini / Transnet Freight Rail, a division of Transnet Ltd & another [2009] 8 BALR 770* (Tokiso) the arbitrator noted that the manager was not only not the author of the quotation, but that it had been transmitted to him and other managers by the company’s equity officer. None of the other black managers who had received the e-mail had been offended. While Ms Dlamini’s sensitivities had to be considered, the test for racist harassment does not turn only on the views of the complainant – the complainant must be a “reasonable victim”.

The arbitrator found that Ms Sibiya was not a reasonable victim. She had not bothered to identify the source of the quotation, and had read a few words out of context and without regard to the circumstances in which they had been uttered. Had Ms Sibiya reflected for a moment, she would have seen that Mboweni was referring to his own experiences at the Reserve Bank. Furthermore, there was also the issue of freedom of speech. Whether affirmative action is working is a subject of legitimate public debate. Transnet’s equity manager had considered it worth distributing for debate. The only charitable conclusion was that Ms Sibiya harboured resentment against her manager, which had coloured her view of the e-mail. The arbitrator ruled that the e-mail did not constitute harassment.²⁶

²⁶ Grogan, Employment Law Journal 2009 August. Case Roundup Recent judgments and awards: Unreasonable victim
Other examples of harassment that may constitute a hostile working environment are pregnancy harassment, racial, ethnic and national origin harassment and disability harassment.

3. Sexual favouritism
As per the Harassment Code, this form of harassment refers to the situation where a person in a position of authority rewards only those who respond to his/her sexual advances.

8. Employment applicants, job / work analysis and inherent requirements of the job

8.1 Employment applicants

Section 1 of the EEA defines an employee as follows:

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<th>“employee” means any person other than an independent contractor who:</th>
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<tr>
<td>a. works for another person or for the State and who receives, or is entitled to receive, any remuneration; and</td>
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<tr>
<td>b. (b) in any manner assists in carrying on or conducting the business of an employer</td>
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The meaning of “employee” is extended, for purposes of sections 6, 7 and 8 to include applicants for employment.

[27] Julie, who was earning £120,000 a year as a senior analyst, resigned because her complaints about unequal pay went unanswered. She was described by SSL (Schroder Securities LTD) as: “had cancer, been a pain, now pregnant”. Julie was awarded £1.4 million.

[28] A Northern Irishman driven from his job because he refused to laugh along with Irish jokes and taunts has won £6,000 compensation after an industrial tribunal ruled that he was a victim of racial discrimination. The Commission for Racial Equality - which supported Mr McAuley, 36, in his fight - said the case was a landmark as it sent a message to employers that it was unacceptable to allow such a workplace culture to develop. The Independent 19 June 2012.

[29] Financial assessment officer Simon Ninsiima was awarded £81,550 when he brought a claim under the Disability Discrimination Act (DDA). His former employers, Waltham Forest Council, failed to adapt his workplace to meet his needs. Mr Ninsiima, who is a wheelchair user, asked Waltham Forest Council to make adjustments for several years but his employer's constant refusal and inaction led to long periods of absent work. He eventually resigned in March 1998. Ninsiima v London Borough of Waltham Forest [1999] ET/3201853/98

[30] 6. Prohibition of unfair discrimination.—(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, 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.

(2) It is not unfair discrimination to—

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

[31] 7. Medical testing.—(1) Medical testing of an employee is prohibited, unless—

(a) legislation permits or requires the testing; or

(b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.
9. **Applicants:** For purposes of sections 6, 7 and 8, “employee” includes an applicant for employment.

Employees are protected against the whole range of discriminatory policies and practices, whereas an applicant is only protected against unfair discrimination in the employer’s definition about whom to appoint.

Since employers may not discriminate against employees, the result of a job analysis may serve as a defence against a discrimination (or pay equity) claim. The difference between a job analysis and work analysis is explained as follows:

### 8.2 Work analysis

Work analysis is related to job analysis but is wider in scope. Job analysis involves looking at an individual job to identify the individual tasks involved. Work analysis involves looking at several or, indeed, many jobs at the same time. Like job analysis, work analysis is both detailed and systematic. The outcome, however, is different.

Job analysis identifies tasks and duties, whereas work analysis identifies potential new jobs and a need to reorganize and restructure. Work analysis involves a systematic examination and assessment of jobs in:

- an entire enterprise
- a particular department
- a section or unit within a department.

The general purpose of work analysis is to advise enterprise managers on how they can improve the overall performance of their enterprises. Once shortcomings have been identified, this information can be used to reallocate work from existing jobs to create a new job.

For placement officers concerned with assisting people with disabilities the specific purpose of work analysis is to encourage the enterprise to solve its performance problems by creating one or more jobs that could be done by people with disabilities. A secondary purpose is to use work analysis as an opportunity to identify opportunities for work experience in enterprises for persons with disabilities.

In a garment enterprise, sewing machinists are under pressure to produce a daily quota. They do not have time to keep their workplaces tidy, so empty boxes and off-cuts of material clutter their workstations and passageways. The machinists say that the cleaners will come at the end of the shift and make the workplace tidy. The placement officer, in undertaking a work analysis exercise, observes that the poor...
housekeeping during the shift actually slows down the production rate and creates a risk of accidents and fires.

The placement officer recommends that the enterprise employ two additional workers to keep the workplace tidy on an on-going basis and then convinces the employer to engage workers with disabilities to fill the jobs. It is possible the placement officer has two people already in mind! The next example illustrates a situation in which a number of jobs are re-organized to create one new job. One or two tasks are taken from various jobs and put together to create a new job suitable for a person with a disability.

Ten secretaries in a very busy office are so pressured with their word processing and routine correspondence work that the sending of faxes and the photocopying and collating of documents is always delayed. Work is piling up but not being done. These delays are an indication of inefficiency in the office and will result in criticisms from customers and clients, as well as managers. If nothing is done, the secretaries will face even more pressure and stress and their work performance will go down further as they struggle to keep up with the work flow.

The placement officer undertakes a work analysis exercise and identifies that the secretaries are unable to do all the tasks associated with their jobs, particularly the faxing, photocopying and collating. The placement officer recommends to the enterprise that it create one additional job to do all the faxing, photocopying and collating, and that the job be offered to a person with a disability. Alternatively, depending on an assessment of the actual work volume and the identification of peak periods, the placement officer might suggest one full-time post and one or two part-time posts.

8.3 Job analysis

Job analysis refers to a detailed and systematic process of breaking down work performed into a number of separate tasks and duties. It is a detailed process in that it considers all tasks to be performed, sometimes dividing them between main tasks and secondary tasks. It is a systematic process in that it follows a step-by-step approach to collect, record, analyse and interpret the information collected.

In order to understand what job analysis is it is necessary to make a clear distinction between:

- an occupation
- a position
- a job.

Occupation

An occupation is a group of jobs that are reasonably similar with regard to the tasks performed and the knowledge, skills and abilities required to perform them successfully. Examples include primary teacher, computer programmer, civil engineer, accountant, nurse, sales person, airline pilot, secretary and security guard.
Position

A position (or post) refers to the level of a job within an organization or enterprise. This is usually shown by the title of the position. For example:

- Clerical Assistant, Grade 2
- Professional Officer, Level 3
- Assistant Sales Manager
- Senior Technical Officer, Level 1
- Employment Officer.

These titles say very little about the actual job or work to be performed. Every job has a position or title, but for one position there may be many jobs. For example, an enterprise may employ 20 Clerical Assistants, Grade 2. They all have the same position and title but the actual job or work performed could be different for each one.

Job

A job refers to the specific tasks and duties to be performed for a particular position. For example, a clerical assistant may have the specific tasks of drafting correspondence, drafting monthly reports and filing reports and documents. Another clerical assistant, with the same position, may have different tasks, such as arranging the printing of reports, preparing distribution lists and arranging for the distribution of documents.

A placement officer’s concern is with job analysis for matching purposes. More specifically, your role is to use job analysis as a tool to assist employers to identify jobs that people with disabilities can do, thereby assisting more disabled people to find suitable jobs. In order to do this you need to have a broad understanding of its uses and benefits and how it can be used to the advantage of people with disabilities. Job analysis is a tool that can provide enterprises with the means to deal with:

- individual issues and problems which arise in the enterprise
- organizational needs, particularly in restructuring exercises
- legal requirements
- workplace labour-management issues.

All four of these areas are of concern to people with disabilities.

Job analysis and the individual worker

Job analysis makes it easier for enterprises to manage their human resources (personnel) function in a systematic and structured way. As such, it also makes it easier to engage workers with disabilities on grounds of their potential contribution to the business, rather than due to a legal obligation or on grounds of charity or conscience. Job analysis assists individual people with disabilities by:
• improving their prospects for placement in meaningful, rather than token, jobs, through a matching process that meets the requirements of both the job seeker with a disability and an enterprise with job vacancies
• providing the means to modify job descriptions so as not to exclude people with disabilities
• providing a basis for broadening disabled people’s job horizons while also moderating unrealistic expectations on the part of both individuals and enterprises
• highlighting the induction and on-the-job training (or job coaching) that people with disabilities may need to enhance their contribution to the enterprise.

Job analysis and the enterprise as a whole

Job analysis makes an important contribution to the enterprise as a whole, particularly in times of restructuring, organizational change or technological innovation. In times of organizational change, particularly if job losses are involved, people with disabilities are too often the first to be laid off. By contrast, organizational change and restructuring can also provide opportunities for new jobs for disabled people. In both circumstances, job analysis can assist people with disabilities by:

• ensuring downsizing and retrenchments are handled objectively and without discrimination
• identifying new jobs that provide challenges and opportunities for advancement for people with disabilities such as, for example, jobs with computers and their applications
• providing opportunities for workers with disabilities to benefit from multiple-skilling and job broadening. This involves enabling disabled workers to undertake new tasks and responsibilities beyond those specified in their original job descriptions and so contributes to a sense of having a career rather than having a job.

Job analysis and the law

Job analysis can be used to help to determine whether enterprises comply with laws and regulations. This is particularly important for people with disabilities who frequently face discrimination and unequal treatment in accessing employment opportunities and in employment itself.

Job analysis can assist people with disabilities in their quest for fair treatment under the law by:

• assisting in the implementation of quota schemes. For example, where the law indicates that a proportion of jobs in an enterprise must be allocated to people with disabilities, job analysis can assist the employer to identify suitable jobs
• contributing to the application of non-discriminatory legislation. For example, job analysis can help to ensure that pay is based on the job rather than on the person performing it
• assisting in ascertaining whether an enterprise qualifies for financial incentives such as subsidies and tax concessions. For example, if an enterprise employs people with disabilities who have lower productivity than non-disabled people doing the same jobs, job analysis can help to determine productivity.

Job analysis and labour relations

Job analysis can make an important contribution to enterprise-level labour relations by providing a useful tool for the prevention and resolution of disputes. Job analysis can assist people with disabilities in their relations with management by:

• providing information to prevent individual disagreements escalating into larger conflicts. For example, if a disabled worker threatens to take his case to the labour court because he claims he is being paid less than a non-disabled worker doing the same job, job analysis can be used to show whether, in fact, the jobs are the same.
• reducing conflict. For example, in cases where workers with disabilities fear being dismissed on the introduction of new machinery because new tasks will be involved, job analysis can help to identify the new tasks to be performed and can show how workers with disabilities can be retrained to do these tasks.

8.4 Inherent requirements of the job

Inherent requirements are the essential activities of the job: the core duties that must be carried out in order to fulfil the purpose of a position. They do not refer to all of the requirements of a job, but rather contrast with peripheral or non-essential tasks, which may be negotiable and flexible. Inherent requirements relate to results, or what must be accomplished, rather than means, or how it is accomplished.

An inherent requirement of a storeman’s job is to move packages. How the employee moves the packages is not relevant and therefore not an inherent requirement. If a job involves only occasional photocopying, an applicant who difficulty photocopying because of a disability should not be disqualified from consideration, providing they are able to fulfil the inherent requirements. The occasional photocopying would be a peripheral rather than an inherent requirement and alternative arrangements could be made (for example, a colleague could do the photocopying in return for some other task the applicant could perform).

A worker might be required to take shorthand but is unable to do so because of a physical disability. In these circumstances, the worker might still be able to get the job done by taking messages on a Dictaphone and then transcribing these messages. Taking shorthand is therefore not an inherent requirement of the job because the job can be done another way. It would, therefore, be unlawful to refuse to give that person the job simply on the grounds of their inability to take shorthand.

9. Discrimination in employment policies and practices
Section 6 of the EEA prohibits unfair discrimination in any employment policy or practice. An employment policy or practice includes the following:

- Recruitment procedures, advertising and selection criteria;
- Appointments and the appointment process;
- Job classification and grading;
- Remuneration, employment benefits and terms and conditions of employment;
- Job assignments;
- The working environment and facilities;
- Training and development;
- Performance evaluation systems;
- Promotion;
- Transfer;
- Demotion;
- Disciplinary measures other than dismissal; and
- (m) Dismissal.

**9.1 Recruitment procedures, advertising and selection criteria**

The recruitment of candidates is the function preceding the selection, which helps create a pool of prospective employees for the organisation so that the management can select the right candidate for the right job from this pool. The main objective of the recruitment process is to expedite the selection process. Recruitment is a continuous process whereby an employer attempts to develop a pool of qualified applicants for the future human resources needs even though specific vacancies do not exist.

In the recruitment process, employers should take cognisance of the power of perception:

**Perception:** The process by which humans receive, organise and make sense of the information they receive from the outside world. The quality or accuracy of our perceptions will have a major impact on our response to a situation. There is much data suggesting that when we perceive other people – particularly in an artificial and time-constrained situation like a job interview – we can make key mistakes, sometimes at a subliminal level. One key to enhancing effectiveness in recruitment and selection, therefore, lies in an appreciation of some core principles of interpersonal perception and, in particular, of some common potential mistakes in this regard.

**Selective perception:** Our brains cannot process all of the information which our senses pick up so we instead select particular objects – or aspects of people – for attention. We furthermore attribute positive or negative characteristics to the stimuli: known as the ‘halo’ and ‘horns’ effect respectively. For example, an interviewee who has a large coffee stain on their clothing, but is otherwise well-presented, may have difficulty creating a positive overall impression despite the fact that it might be that their desire for the new job that resulted in nervousness and clumsiness.
Self-centred bias: A recruiter should avoid evaluating a candidate by reference to himself or herself because this may be irrelevant to the post in question and run the risks of a ‘clone effect’ in a changing business environment. The sentence ‘I was like you 15 years ago’ may be damaging in a number of respects and should not be the basis for employment in most situations.

Early information bias. We often hear apocryphal stories of interview panels making very early decisions on candidates’ suitability and spending the remaining time confirming that decision. Mythical though some of these tales may be, there is a danger of over-prioritising early events – a candidate who trips over when entering an interview room may thus genuinely be putting themselves at a disadvantage.

Stereotyping: This is a common short cut to understanding an individual’s attributes, which is a difficult and time-consuming process, because we are all unique and complex beings. The logic of stereotyping attributes individuals’ characteristics to those of a group they belong to – for example, the view that because Italians are considered to be emotional, an individual Italian citizen will be too. Stereotypes might contain elements of truth; on the other hand they may be entirely false since we are all unique. Everyone is different from everyone else. Stereotyping may well be irrelevant, therefore, and if acted on, also discriminatory.

9.1.1 Internal recruitment

Internal recruitment means that a job vacancy is filled from within the business; an existing employee rather than employing externally. A policy of recruiting internally only will contribute little in changing the composition of an unrepresentative workforce, which may be discriminatory.

Advantages:

- uses in-house resources and builds on skills and expertise of existing staff
- retains valuable employees: avoids recruitment costs ensures a return on any investment in training and development
- motivation: provides opportunities for development and promotion for existing staff
- shorter induction period
- generally quicker and cheaper

Disadvantages:

- limited number of applicants
- external candidates might be better suited or qualified for the job
- creates another vacancy
- the organisation may become resistant to change
9.1.2 External recruitment:

External recruitment refers to the situation when employers intend to fill the vacancy from any suitable applicant outside the organisation. The following methods are often used:

**Job advertisements** - Advertisements are the most common form of external recruitment. They can be found in many places (local and national newspapers, notice boards, recruitment fairs) and should include some important information relating to the job (job title, pay package, location, job description, how to apply—either by CV or application form). Where a business chooses to advertise will depend on the cost of advertising and the coverage needed (i.e. how far away people will consider applying for the job.

**Recruitment agencies** - Provides employers with details of suitable candidates for a vacancy and can sometimes be referred to as ‘head-hunters’. They work for a fee and often specialise in particular employment areas e.g. nursing, financial services, teacher recruitment.

**Personal recommendation** - Often referred to as ‘word of mouth’ and can be a recommendation from a colleague at work. A full assessment of the candidate is still needed however but potentially it saves on advertising cost.

9.1.3 Advertising

Advertising as an effective means by which employers attract candidates, has the potential to discriminate. The language and medium used may render the advertisement inaccessible to some.

A job analysis should be done in order to determine what the minimum requirements for the job are. Job requirements should not reflect prejudices or requirements which may disadvantage certain groups. Sex specific job titles such as “waitress” or “salesman” should be avoided.

Language is an important factor to keep in mind when advertising. The use of a specific language may prevent applicants who do not understand that language from applying for a position.

In *NEHAWU and Council for Geoscience (1997) 6 ARB 6.12.2* the union challenged the employer’s decision to advertise in an Afrikaans newspaper. The arbitrator held that:

“A company is entitled at its discretion to make appointments and to choose with whom they wish to contract. This is a well-established principle in our law. Yet, this discretion does not provide to the company an unbridled free reign. Appointments must be made fairly and in good faith. In the case at hand, the company advertised the post internally for some days and externally. The external advertisement of the post in only one Afrikaans-medium newspaper has been challenged by the union and it was suggested that agreement has been reached between the parties regarding the newspapers to be used in all future job advertisements. Whilst the
company is not obliged to advertise in certain newspapers, I am of the view that in
order to display fairness in the procedure adopted in calling for applications, different
language newspapers should be used. Such displays of fairness not only ensure a
wider pool of applications, but project an image to the workforce of an open-minded
employer prepared in good faith to consider a range of applicants. Although
ultimately it must be accepted that the decision to employ or not to employ lies in the
hands of the employer, in the absence of any agreements with the union to the
contrary. Such displays by the company can in my view truly lead to a better
relationship between management and labour."

9.2 Selection and appointment

9.2.1 General

Appointment refers to the process of selecting from the pool of recruited candidates
the person most suited for the job. There is no legally prescribed method of selection – what must be understood is that no discriminatory selection practices may be followed.

After pre-selection, an employee may be required to undergo selection tests, which
may range from interviews to various forms of standardised selection tests.

Tests used for screening applicants on the basis of skills, abilities, and aptitudes can be classified as either paper and pencil tests or job sample tests. Both kinds are scored, and minimum scores are established to screen applicants. The "cut-off" score can be raised or lowered depending on the number of applicants. If selection ratios are low, the cut-off score can be raised, thereby increasing the odds of hiring well-qualified employees.

Tests should be selected only after thorough and careful job analysis. For example, examination of a job description for an auto mechanic would probably show that manipulation of parts and pieces relative to one another and the ability to perceive geometric relationships between physical objects were required. These abilities are a part of a construct called mechanical aptitude. Various parts of mechanical aptitude can be measured using either paper and pencil or job sample tests.

Job sample tests, which require applicants to demonstrate specific job duties, can also be used to measure mechanical ability. For example, applicants for a mechanic's job could be asked to locate and fix a number of things wrong with a car or truck. Organizations can develop their own job sample tests. Closely related to job sample tests are job simulation exercises that place an applicant in a simulated job situation to see how well he or she can cope.

9.2.2 Educational requirements and experience

Educational requirements may be indirectly discriminatory if they are not job-related. Employers will have to prove the fairness of the educational requirements by establishing their job-relatedness. Bachelor's degrees for teachers and doctoral degrees for professors are job-related.
In the USA the court struck down a high school diploma requirement for employment in skilled labour positions in an electrical power plant. On the other hand, educational requirements were found to be lawful if the job requires a high level of skill, discretion or judgment. The requirement of a college degree (or other educational qualification) was found not to be unlawful for airline flight officers, inter-city bus drivers, police officers, correctional officers, social workers and health care professionals. The court reasoned that these jobs involve a high degree of skill and the economic and human risks involved in hiring unqualified applicants are great.

The same principles governing discriminatory educational requirements apply to educational requirements or experience as a job requirement. If the requirement adversely affects a group it will be deemed unfair. Section 20(5) of the EEA stipulates that in making a determination whether a person is suitably qualified for a position, an employer may not unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience.

20. Employment equity plan

(5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience.

9.3 Remuneration: equal pay for equal work v work of equal value

The notion of ‘equal pay for equal work’ could imply that individuals with similar qualifications and experience should receive equal pay only when they are performing exactly the same work under identical conditions. In SACWU v Sentrachem Ltd and others34 employees were dismissed after a lengthy strike. The employees alleged that the employer discriminated between black and white employees on the grounds of race by paying black employees less than white employees in the same grade. It was held that wage discrimination based on race or any other difference between employees, other than skills and experience, is an unfair labour practice.

Recognising that society undervalues work predominantly done by women in comparison to work predominantly done by men, comparable worth theory (equal pay for work of equal value) takes the idea of equal pay for equal work one step further, comparing not only jobs that are the same but jobs that have the same value to the organization — that is, jobs that are comparable.

The principle “equal work should receive equal pay” in its true form may be extended to an analogous situation namely that work of equal value should receive equal pay. These premises have not been enshrined as principles of law in the unfair labour practice definition. They are principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed, eg the payment of unequal pay for equal work or work of equal value in the context of unfair discrimination. In other words it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is, however, an

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34 (1988) 9 ILJ 410 (IC)
unfair labour practice to pay different wages for equal work or work of equal value if
the reason or motive, being the cause for so doing, is direct or indirect discrimination
on arbitrary grounds or the listed grounds, eg race or ethnic origin.\textsuperscript{35}

The court held in \textit{Mangena \& others v Fila South Africa (Pty) Ltd \& others [2009] 12
BLLR 1224 (LC)} that although the EEA does not expressly regulate equal pay claims,
there is no reason why these should not be claimed under that Act, which prohibits
employment practices based on the prohibited or analogous grounds. To succeed in
an equal pay claim, the applicant must prove that the inequality arises from
discrimination on an impermissible ground. This entails identification of a comparator,
establishing that the work done by the comparator is the same or similar, or of equal
value having regard to the degree of skill, physical and mental effort and
responsibility and establishing a link between the differentiation and a prohibited or
analogous ground. The onus then shifts to the employer to prove that the
discrimination is not unfair. It is not therefore sufficient for a claimant to prove
differentiation, then baldly state that it is based on race or some other prohibited
ground.

After analysing the evidence, the Court held that the applicants had failed to establish
that the applicant concerned and the chosen comparator, a White woman, performed
the same work as theirs. While the applicants had not expressly pleaded a case
based on equal pay for work of equal value, it would be anomalous for a claimant to
plead both a right to equal pay for the same work and to equal pay for work of equal
value. In any event, the applicants had also failed to prove that the work performed
by the applicant concerned and his White colleague was of equal value. While it
appeared that this was not the case, the Court pointed out that comparison of the
value of jobs was a matter for expert evidence. There was accordingly no basis for
the alternative claim.

\subsection*{9.4 Job assignments}

Job assignments refer to the distribution of job duties amongst employees. It would
amount to discrimination if a female bartender /waitress is expected to work the day
shift with shorter hours and less earnings and do cleaning, whilst her male
colleagues are not expected to do the same.

\subsection*{9.5 The working environment and facilities}

Rude and boorish behaviour on the part of a co-worker may be inappropriate and it
may border on harassment, but it doesn't mean the work environment is hostile. To
be considered a hostile environment, the courts must determine that intimidating
conduct is specifically directed at you because of your gender, age, race or other
personal trait protected by the EEA. A hostile work environment can be created by
an act of sexual harassment on the part of co-workers or bosses, or an act carried
out or any remarks made that could be portrayed as discriminatory with regards to
gender, age, sexual orientation, race, disability etc.

\textsuperscript{35} \textit{Louw v Golden Arrow Bus Services (Pty) Ltd [2000] 3 BLLR 311 (LC)}
Not only a hostile working environment, but also the employer’s failure to make reasonable attempts to accommodate an employee’s workplace, may be discriminatory. In *Standard Bank of South Africa v CCMA & others* [2008] 4 BLLR 356 (LC), the employee was involved in an accident. After resuming work, the employee found that she could not cope with travelling as a result of severe back pain caused by the accident. She was assigned light administrative work. Finding this uninspiring, the employee applied for more responsible office work. She was able to undertake telephonic sales work if she could use a headset, but the bank declined to purchase a headset for her. The employee was again assigned tasks which did not involve using a telephone, including paper-shredding, which she found demeaning and painful. The employee’s application to be medically boarded was refused. A few months later, the bank informed the employee that she would be appointed to the home loans division, but later decided to terminate her services on the grounds of incapacity, due to continuing absenteeism. The employee was dismissed two years after the accident.

The court held that the requirement that employers should make reasonable efforts to accommodate disabled employees is balanced against imposing unreasonable hardship on employers. Employers are required to adopt a four-stage inquiry before dismissing employees for incapacity. The questions to be asked are:

1. whether the employee is unable to perform his or her work, and if not;
2. the extent to which the employee is capable of working;
3. whether the employee’s work circumstances can be adapted and, if not;
4. whether alternative work is available. If an employer dismisses an incapacitated employee without taking these steps, the dismissal is not only unfair, but also automatically unfair, because people with disabilities constitute a designated group. The obligation to accommodate a disabled employee is accordingly even more onerous than the obligation to take affirmative action measures.

The Court held further that where an employer pleads that a disabled employee has been dismissed because of excessive absenteeism, it must establish whether this was caused by the disability, because lengthy unpaid leave may be a reasonable adaptive measure. However, disability must be distinguished from incapacity; dismissing an employee who is disabled but not incapacitated is automatically unfair; whereas dismissing an employee who is incapacitated may be fair. In the case of incapacitated employees, dismissal is fair where the obligation to accommodate the employee imposes unreasonable hardship on the employer. Hardship in this context means more than mere inconvenience.

Applying the requirements laid down by the Employment Equity Act 55 of 1998, the Labour Relations Act 66 of 1995 and the applicable codes, the Court held that the bank had failed properly to investigate the nature and extent of the employee’s disability. As a result, the bank could not properly exercise its duty to consult the employee. In the final analysis, the bank had assessed the employee’s performance against the standard of a fit employee, and had dismissed her for poor performance. The employee’s admission that she could not perform her normal work had to be seen in the context of her attempts to be granted an early retirement. Although the
bank had not pertinently relied on undue hardship to justify the dismissal, it could not
do so as no evidence had been led in that regard.

The Court held further that by failing to make reasonable efforts to accommodate the
employee, the bank had discriminated against her, and had dismissed her in bad
faith.

9.6 Training and development

Training and development improve an employee’s performance at work and enhance
prospects for career advancement. Employers must ensure that employees are not
discriminated against. The type of training may have a discriminatory effect. Training
for employees at lower levels often merely enhances current skills, whereas training
for senior employees may prepare employees for promotion.

Not only the type of training, but also its scheduling should be carefully considered.
For example:

An employer only offers one chance to do a training course which is on a Friday in
winter starting at 8.30am and finishing at 5.00pm, by which time it is dark. Unless the
employer can objectively justify only offering this one chance on that particular day,
this may be indirect discrimination against women (who are more likely to work
flexibly) and Jewish people (who may need to have finished work before dark to
observe the Sabbath).

An employer uses computer-based training. They should not assume everyone will
be able to use a computer without checking this first. Some disabled workers may not
be able to use a computer without reasonable adjustments.

An employer does not check that an external training venue is accessible to a worker
who has a mobility impairment. When the worker, who uses two sticks to walk with,
arrives, they cannot access the training room, which is up two flights of stairs with no
lift. It is likely that offering the training at an accessible location would have been a
reasonable adjustment.

9.7 Promotion

The same issues relevant to the selection and appointment of applicants are relevant
as far as promotion is concerned. Vacancies should be duly advertised so that
eligible candidates from protected groups are not excluded from promotion
opportunities.

One has to accept that some form of objectivity will exist in all performance appraisal
methods, but objectivity may be increased when employees are allowed to
participate in the process, are afforded the opportunity to respond to an evaluation
etc.

As is the case with recruitment and selection, job descriptions and person
specifications should be investigated to ensure that they are sufficiently job related.
An employer promotes a male worker to a post without advertising the vacancy internally. There are female workers who are qualified for the role and would have applied if they had known about it. They have missed out on an opportunity and if they can show either that the employer ignored them just because they were female (which would be direct discrimination) or applied a requirement to the role which had a worse impact on the female workers and which the employer could not objectively justify and this was why the employer did not consider them (which would be indirect discrimination), then the employer may find themselves facing a tribunal claim.

9.8 Transfer

Transfer policies and procedures may raise issues of discrimination in many different respects:

- Protected groups may be disadvantaged by being excluded from the opportunity to transfer into other jobs;
- Even if these groups are not excluded, their circumstances may be such that they find it more difficult than others to be transferred (women);
- If the reasons for the transfer are related to victimisation, the transfer may amount to discrimination;
- If an employee is not transferred because of his/her disability etc, it may constitute a breach of the employer’s duty of reasonable accommodation.  

9.9 Disciplinary measures

Disciplinary measures should be applied consistently. Inconsistency occurs when employees who commit the same offence are not all disciplined, or receive different sanctions. Where the different treatment relates to prohibited grounds, the differential application of discipline will be discriminatory.

Male nurse disciplined more harshly than female

In Lynn, the trouble began when a male nurse had a series of run-ins with his supervisor for lying on a couch and watching television during his shift. His supervisor verbally counselled him after the incident. Subsequent minor work rule violations by the employee led to more verbal discipline, followed by three disciplinary letters. Surprisingly, his supervisor did not mention this series of disciplinary action in his annual performance review, which noted only that the misconduct had ceased and that his performance was satisfactory. A few months after that review, the male nurse received two more disciplinary letters for failing to follow work procedures, followed by a recommendation for his discharge. He was

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36 (i) adapting existing facilities to make them accessible;  
(ii) adapting existing equipment or acquiring new equipment including computer hardware and software;  
(iii) re-organising workstations;  
(iv) changing training and assessment materials and systems;  
(v) restructuring jobs so that non-essential functions are re-assigned;  
(vi) adjusting working time and leave; and  
(vii) providing specialised supervision, training and support in the workplace."

37 http://ppspublishers.com/articles/gl/discipline.htm
given the option to resign and he did.

He then filed a sex discrimination lawsuit under Title VII based primarily on inconsistent discipline. He alleged that he was disciplined more severely than a female nurse who slept on the job and whose offenses continued for eleven months before she received written discipline. The lower court ruled in favour of the employer, deciding that the male nurse and his female colleague were not similarly situated because the male nurse’s personnel file contained more disciplinary records and his offenses differed from those committed by the female nurse.

**Court rules male nurse may have been discriminated against**

The Court of Appeals disagreed with the lower court and determined that the male nurse and his female colleague were similarly situated and that the male nurse had sufficient evidence for a jury to consider a sex discrimination charge against the employer. In finding that the male and female employees were similarly situated, this court looked at the nature and the severity of the offenses committed by both employees and found they were comparable offenses. In addition, the court pointed out that the employer should have compared the male and female nurses’ situations to be sure it was administering the same level of discipline for similar offenses. For these reasons, the court decided that the case should go to trial based on the employee’s evidence that he was disciplined more severely than the female employee for offenses that were less serious.

**Consistent discipline considers situation and offense**

This case illustrates the consequences of not disciplining employees consistently. Consistent discipline does not mean that employers must apply the exact same discipline and follow the exact same procedures for each employee. Rather, as the court found in this case, employers should try to treat "similarly situated" employees in the same manner. This court looked at comparable offenses to determine whether the employees were similarly situated. Other criteria that courts consider for similarly situated employees are past performance and disciplinary records, job duties, length of employment, and status or position within the organization.

A second lesson from this case is that employers should document disciplinary actions consistently. The male employee’s performance review characterized his performance as satisfactory and did not reflect his offenses or the disciplinary action taken. Thus, the performance review made the employer’s subsequent termination decision less credible and instead may have supported the employee’s contention that he was disciplined more harshly because he was male. Therefore, employers should document the reasons for administering discipline in employee files so that performance reviews, disciplinary records, and notes in the files all reflect the same disciplinary issues.

A final lesson is that although it’s uncommon, men can sue for sex discrimination.
9.9.1 Demotion

Cornwell v. Electra Central Credit Union, No. 04-35408, U.S. Court of Appeals, Ninth Circuit

Facts:

- Cornwell was the Vice President and Chief Operating Officer of Electra when Jim Sharp was hired as the CEO of Electra. Cornwell was African-American.
- Although Cornwell had worked with Electra for 8 years and had been promoted twice, Sharp demoted Cornwell to Vice President of Lending and replaced him with a white person who had much less experience.
- Cornwell complained to Bob Pearson, a member of Electra’s Board of Directors, that he disagreed with Sharp’s decision to demote him and also told him that his race might have been a factor in Sharp’s decision.
- Sharp also allegedly made comments about women that Cornwell considered unprofessional and close to sexual harassment. Cornwell told HR about these comments but did not explicitly tell HR to investigate them, nor did HR do so.
- The chairman of the Board of Directors sent a letter to Cornwell stating that his race had never been a factor in any decisions regarding his employment. However, there was no indication that any investigation had occurred regarding the alleged race discrimination.
- Eventually, Cornwell was terminated.

Court’s Analysis:

- The Court held that, given the facts, a jury might infer that Cornwell was treated differently because of his race. For example, Cornwell was the only African American member of Electra’s management team and the only senior executive whom Sharp demoted; Sharp excluded Cornwell from management meetings that involved topics within Cornwell’s scope of responsibility; and the white employee who replaced Cornwell had significantly less management experience than Cornwell. The Court decided that a jury could conclude that Sharp excluded Cornwell for discriminatory purposes rather than business reasons.
- Regarding Cornwell’s alleged retaliation claim, the Court noted that because the evidence showed that Sharp and Potter discussed Cornwell’s complaint about Sharp’s sexual harassment after Cornwell’s demotion, it minimized Cornwell’s retaliation claim. In addition, although Cornwell claimed that Sharp had threatened to fire any member of Electra’s management team who circumvented Sharp and spoke directly to the Board of Directors, there was sufficient evidence that Cornwell had been terminated for not cooperating with Potter during severance negotiations.

Conclusion:

- In this case, there was evidence of possible race discrimination since
9.9.2 Dismissal

See “Grounds of discrimination” above.

10. Medical and psychological testing

10.1 HIV testing

People who are living with HIV must be treated with compassion and understanding. Great care should be taken by all employers to ensure that they are not condemned to “economic death” by the denial of equal opportunity in employment. This is particularly true in our country, where the incidence of HIV infection is said to be disturbingly high. Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected.38

In Hoffman v SAA39 the appellant applied for employment as a cabin attendant with SAA. He went through a four-stage selection process comprising a pre-screening interview, psychometric tests, a formal interview and a final screening process involving role-play. At the end of the selection process, the appellant, together with eleven others, was found to be a suitable candidate for employment. This decision, however, was subject to a pre-employment medical examination, which included a blood test for HIV/AIDS. The medical examination found him to be clinically fit and thus suitable for employment. However, the blood test showed that he was HIV positive. As a result, the medical report was altered to read that the appellant was “H.I.V. positive” and therefore “unsuitable”.

The Constitutional Court declined to pass judgment on whether the SAA’s policy of testing for HIV infection was permissible. The EEA prohibits all medical testing unless the Labour Court authorises testing “in the light of the medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job”. However, the judgment indicates that, even if the SAA had been permitted to test Hoffmann, it would not have been able to do anything with the results.

38 Hoffman v South African Airways 2001 (1) SA 1 (CC)
39 2001 (1) SA 1 (CC)
10.2 Voluntary testing

Testing of an employee to determine that employee’s HIV status is prohibited unless such testing is determined justifiable by the Labour Court. In *Irvin & Johnson Ltd v Trawler & Line Fishing Union & others [2003] 4 BLLR 379 (LC)* the following question arose: would the court’s permission be necessary if testing is to be done on a voluntary basis and for the purpose of determining prevalence?

The applicant, which employs more than 1 100 workers in its trawling division, wishes to arrange for the voluntary and anonymous HIV testing of these employees. It seeks an order declaring that the testing in question does not fall within the ambit of section 7(2) of the Employment Equity Act 55 of 1998 (“the Act”). In the alternative, the applicant seeks an order that the testing is justifiable as contemplated in section 7(2), subject to certain conditions set out in the notice of motion.

The applicant believes that it requires information on HIV prevalence in its workforce to assess the potential impact of HIV/AIDS on the workforce; to enable the applicant to engage in appropriate manpower planning so as to minimise the impact of HIV/AIDS mortalities and HIV/AIDS-related conditions on its operation; to enable it to put in place adequate support structures to cater for the needs of employees living with HIV/AIDS; and to facilitate the effective implementation of proactive steps to prevent employees from becoming infected with HIV/AIDS.

The applicant states that it is dedicated to applying the principle of non-discrimination against AIDS sufferers. It permits HIV-positive employees to perform their normal duties for as long as they are able to do so. HIV-positive employees who disclose their status to the Connections/Isibindi counsellors are advised of the various non-governmental organisations and clinics that provide services to HIV sufferers and of the fact that they may, if they wish to do so, consult the applicant’s doctor and enrol in the applicant’s wellness programme. The latter programme includes weight monitoring, the provision of vitamins, the treatment of opportunistic diseases and counselling.

The applicant wishes to arrange for the voluntary and anonymous testing of its employees, on an on-going basis, to allow employees to determine their HIV status at any time and to enable the applicant to assess its manpower planning needs on a continuing basis. The only information which the applicant will obtain concerns the age and job category of the various employees who have been tested. This information will be used for statistical purposes.

The court referred to the following provisions of the EEA:

1. **Definitions:** In this Act, unless the context otherwise indicates—“medical testing” includes any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition.

7. **Medical testing:**
1. Medical testing of an employee is prohibited, unless:

   a. legislation permits or requires the testing; or
   b. it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

2. Testing of an employee to determine that employee’s HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50 (4) of this Act.

50. Powers of Labour Court:

(4) If the Labour Court declares that the medical testing of an employee as contemplated in section 7 is justifiable, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to:

   a. the provision of counselling;
   b. the maintenance of confidentiality;
   c. the period during which the authorisation for any testing applies; and
   b. the category or categories of jobs or employees in respect of which the authorisation for testing applies.

The conclusion to which the court came is that compulsory testing is not limited to the case of taking a sample from an employee by physical force. In the absence of consent, such conduct would amount to an assault, and it would not require any statutory provision in order to render it unlawful. By compulsory testing is meant, in this context, the imposition by the employer of a requirement that employees (or prospective employees – see section 9 of the Act) submit to testing on the pain of some or other sanction or disadvantage if they refuse consent. This is to be contrasted with voluntary testing, where it is entirely up to the employee to decide whether he or she wishes to be tested and where no disadvantage attaches to a decision by the employee not to submit to testing.

In considering the permissibility of voluntary testing, it is perhaps appropriate to observe that the avoidance of discrimination against those infected with HIV is not likely to be best served by encouraging a climate of secrecy. It is one thing to protect employees against compulsory testing. It is quite another thing to place obstacles in the way of voluntary testing. Clause 15.2 of the Code of Good Practice: Key aspects of HIV/AIDS and employment recommends that every workplace works towards developing and implementing a workplace HIV/AIDS programme, and it is recommended that the programme should, inter alia, encourage voluntary testing. The programme should also “create an environment that is conducive to openness, disclosure and acceptance amongst all staff”. Clause 7.2 of the Code, while acknowledging an employee’s right to privacy, states that mechanisms should be created “to encourage openness, acceptance and support” for employers and employees who voluntarily disclose their HIV status within the workplace.
If section 7(2) were interpreted as applying to voluntary testing, it would mean that although voluntary testing is regarded in the Code as something to be encouraged, an employer would not (without the expense of a court application) be entitled to assist in the attainment of this objective by making its own testing facilities available to its staff.

In determining the sort of medical testing contemplated by section 7(2), I believe some assistance can be derived from a consideration of the provisions of section 7(1). As I have already observed, the latter provision applies to medical testing other than for HIV status. Such testing is prohibited unless legislation permits or requires the testing or unless the testing is justifiable “in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job”. Although the quoted criteria are expressed in fairly broad terms, they appear to refer to considerations which would make it objectively justifiable for an employer to require employees to undergo testing. The individual employee’s attitude to the testing is not stated to be a relevant factor and would not seem to be naturally accommodated within any of the stated criteria of justifiability. It follows that if medical testing under section 7(1) were to include voluntary testing, the employee’s desire and willingness to undergo the testing would not be relevant in assessing the justifiability thereof. Since there is no procedure for the court to approve testing other than in respect of HIV status, such employees could not be tested at an employer’s facility at all (even though keen and willing) unless this were objectively justifiable with reference to the factors listed in section 7(1)(b) or unless legislation permitted or required the testing.

I doubt whether this could have been the legislature’s intention. There must be many large employers which provide medical or nursing facilities to employees. In the ordinary course of the operation of such facilities, employees who choose to consult the medical or nursing staff would undergo tests or be asked questions designed to ascertain whether they are suffering from some or other medical condition. I do not believe that the legislature could have intended that before assistance could be offered by an employer to such employees a decision would in each case need to be made as to whether the undertaking of medical investigation was objectively justifiable on one or other of the grounds set out in section 7(1)(b) of the Act.

There is thus good reason to conclude that the legislature did not intend section 7 to apply to voluntary testing.

10.3 Testing for drugs and alcohol

Substance abuse is the excessive and compulsive use of drugs/substances for their effect on the mind. Because the body eventually develops tolerance to the drug, an increasingly higher dose of the drug is needed. If the drug is stopped, it will cause physical problems. Often large quantities of the same or similar drugs are needed to get the desired effect and withdrawal symptoms occur.

Among the substances that cause addiction include illegal hard drugs like heroin and cocaine. Over the counter drugs can also cause addiction, such as benzodiazepines (Drugs for the endocrine and metabolic). Two other addictive substances are nicotine and alcohol. Nicotine addiction often disrupts social life or work, but alcohol
The reasons why an employer would want to test for these substances are obvious. The annual costs of drug use among the civilian workforce are millions, primarily due to loss of productivity, medical expenses, and workplace crime related to drug abuse. In addition, drug abusers suffer from impaired memory, lethargy and/or reduced coordination which, in turn, is responsible for work-related performance problems and increased employee absenteeism. Marijuana and alcohol, for example, interfere with driving ability and negatively affect other skills needed to operate equipment safely and effectively. Drugs are continuously being implicated in railway collisions and derailments, bus and heavy equipment accidents, and poor product assembly.

Although an employer may argue that the inherent requirements of a job justify drug and alcohol testing, the individual’s right to privacy must be carefully weighed against the inherent requirements of the job.

In the USA the courts are of the opinion that employers have a greater need for conducting drug testing at the pre-employment stage than in the case of existing employees.

In Canada, courts have been less protective of individual privacy rights. So for example, in Alberta, the court allowed pre-employment drug tests in an highly hazardous workplace where the purpose of the policy is to prevent workplace accidents by reducing workplace impairment, because the policy identifies individuals who may engage in recreational use of marijuana, and evidence showed impairment is possible days after use, thus posing a safety risk in the workplace. In the particular case, the court found that the employee was fairly terminated when the test revealed that he had smoked marijuana before he was hired, because the workplace was already dangerous and the lingering effects of marijuana raised concerns about his ability to function in a safety-challenged environment.

10.4 Psychometric testing

The word psychometric is formed from the Greek words for mental and measurement. Psychometric tests attempt to objectively measure aspects of your mental ability or your personality. Such tests are in principle permissible provided they do not unfairly discriminate against any employee.

8. Psychometric testing
Psychometric testing and other similar assessments of an employee are prohibited unless the test or assessment being used:

- has been scientifically shown to be valid and reliable;
- can be applied fairly to employees; and
- is not biased against any employee or group.
In the earlier drafts of the Bill that eventually became the EEA, psychological testing was completely forbidden. As a result of a good deal of lobbying and debate, the Parliamentary Portfolio Committee on Labour was persuaded that the complete banning of all psychological assessment devices would result in a situation in which the employees and employers of the country would lose a great deal. The way in which most of the unscientific and unethical practices of the past could be dealt with, was clearly to ensure that users of assessment devices would comply with internationally recognised standards of assessment practice and ethics. To accomplish such a requirement implied that basic psychometric requirements had to be enshrined in law.

By the time that the Portfolio Committee was finalising the legislation, it had also become clear that a number of organisations had abandoned their previous assessment practices, and that they had tended to follow the route of making use of unstructured interviews under the often fatuous and witless belief that they would thereby avoid infringing the provisions of the draft legislation. Another route that had emerged was for people to use assessment devices which were clearly psychological tests or assessment devices in terms of their content domain, structure, instructions, and so on. They tried to convince their clients (and themselves, it would appear) that these devices were not psychological tests because the people who were selling them were not trained as psychologists, and because they had removed most of the terminology that sounded vaguely as if it pertained to psychology. Suddenly, it became acceptable in certain circles to talk about “brightness” or “astuteness” rather than “intelligence” or “mental alertness”, about “character” rather than “personality”, and so on.

It was clear that the abuses of the past would have been exacerbated had the legislature turned a blind eye to the situation. The wording in section 8 was consequently deliberately couched in terms that constitute the building blocks of sound measurement theory — regardless of whether it applies to psychology, sociology, nursing science, criminology, education etc. The Portfolio Committee also decided that all procedures and practices that were used in taking decisions about employees’ careers had to be controlled, and hence the insertion of the phrase “…and other similar assessments” … in this section of the Act. Such control, far from being crass authoritarianism and excessive state involvement, was a measure carefully crafted to comply with the spirit of the Constitution, the LRA and the EEA, and to place obstacles in the way of any possible continuation, or exacerbation, of some of the excesses of the past.\(^{42}\)

\(^{42}\) http://www.pai.org.za
Module 3: Employment Equity, Affirmative Action and Broad Based Black economic empowerment

11. Understanding affirmative action

Affirmative action measures:

1. Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

2. Affirmative action measures implemented by a designated employer must include:
   
   a. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
   
   b. measures designed to further diversity in the workplace based on equal dignity and respect of all people;
   
   c. making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
   
   d. subject to subsection (3), measures to:
      
      i. ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and
      
      ii. retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.
   
3. The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.

4. Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

The EEA requires all designated employers to implement affirmative action measures in order to achieve employment equity for people from designated groups. Affirmative action is defined as “measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

Employers should, however, note that affirmative action measures need to be applied consistently and fairly. Therefore the employer cannot use affirmative action as an excuse to treat non-designated employees in an unfair manner. Employers should
have a proper consulted employment equity plan in terms whereof affirmative action measures can take place in order for it to be fair. Ad hoc retrenchments or barriers will not pass the test of fair treatment.

In Du Preez v Minister of Justice and Constitutional Development & others [2006] 8 BLLR 767 (SE) the complainant, a District Court magistrate with 19 years’ experience as a magistrate and holding B Iuris, LLB and Master of Public Administration degrees, applied for one of two vacant posts of Regional Court magistrate in Port Elizabeth, a minimum requirement for which was stated as at least seven years’ post-university experience in law. The complaint was not short-listed. He claimed that the criteria used for short-listing was irrational and unfairly discriminatory on the basis of race and gender because it made it impossible for a White male to score higher than a Black female, whatever her experience.

The respondents claimed that the Department was merely seeking to promote the constitutional imperative to ensure that the judiciary “reflects broadly the racial and gender composition of South Africa”. To this end, score sheets had been developed for the assistance of selection committees in terms of which points were allocated to candidates on the basis of experience (maximum 3 points), qualifications (2 points), race (3 or zero) and gender (3 or zero). Based on these scores, two Black female candidates were short-listed and recommended for the Port Elizabeth posts. Each had less than two years’ experience as District Court magistrates.

The Court noted the Employment Equity Act and the Promotion of Equality & Prevention of Unfair Discrimination Act 4 of 2000 both attempt to give effect to the value of equality, which lies at the heart of the Constitution. The EEA does not apply to magistrates, who are judicial officers independent of the public service, and as such subject only to the Constitution. The dispute was accordingly governed by the Equality Act. That Act declares unequivocally that neither the State nor persons may discriminate against any person. The Court observed that the qualities of a good judicial officer have nothing to do with race or gender; were it not for the Constitutional and statutory approval of affirmative action, it would be improper and unfairly discriminatory to take such factors into account when appointing magistrates.

The Court noted that the stated objectives of the Equality Act are inter alia to give effect to the values of non-racism and non-sexism. However, that Act also gives fulsome recognition to affirmative action measures, and states that it is “not unfair to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination ...”. This provision must not be viewed in isolation, but through the prism of constitutional values and objectives. In that respect, the affirmative action provisions in the Act amount to a legislative declaration that discrimination aimed at promoting affirmative action are not unfair.

The Court held further that to escape constitutional invalidity affirmative action measures must come within the protection afforded by section 9(2) of the Constitution. The nature and extent of the protection afforded affirmative action measures must be established by interpreting the Constitution in accordance with all values enshrined in the Bill of Rights. An interpretation that sees the Act’s approval of affirmative action measures as excluding or negating the right to equality would offend against constitutional principles. Such measures must rather be seen as
essential and integral to the goal of equality, not as limitations of or exceptions to equality rights. Reverse discrimination is nonetheless justiciable in terms of the Equality Act. The relationship between particular affirmative action measures and the right to equality is typical of the tensions between competing values which arise in constitutional law, and must be resolved by the exercise of a value judgment with due cognisance of the values underlying the Constitution.

The Court noted further that the Magistrates Commission had adopted the short-listing criteria in obeisance to the constitutional dictate that the racial and gender composition of the country must be considered when judicial officers are appointed. That purpose does not include the objective of benefiting previously disadvantaged persons. However, both the Constitution and the Act clearly encourage measures designed to benefit the previously disadvantaged. The promotion of persons previously disadvantaged by non-representivity on the bench must accordingly be given due weight.

The Court noted further that the Act provides that once a complainant makes out a prima facie case of discrimination, the respondent must prove that the discrimination was fair. The criteria listed in the Act to be applied when deciding whether a respondent has proved that discrimination is fair do not supplant the test for the constitutionality of affirmative action measures, but give substance to it. While the list of factors is comprehensive, it is not exhaustive. Each case must be decided on its own facts, regard being had specially to the impact of the discriminatory action on the people concerned and whether that impact furthers the constitutional goal of equality.

The Court held further that, while there is little authority on the interpretation or application of the Equality Act, interpretations of the EEA are relevant because the two Acts complement each other. However, to the extent that they differ in content and scope, interpretations of one act may be subtly misleading when interpreting the other.

Turning to the facts, the Court noted that the respondents had argued that the short-listing formula did not absolutely exclude White males, but merely discriminated against them to an extent inevitable when pursuing affirmative action. It was common cause that the complainant had been discriminated against. Since there was a real need for racial and gender diversification of the Port Elizabeth Regional Court bench, the Department’s goal was unimpeachable. The question, however, was whether the discrimination against the complainant by the appointments committee was fair.

The Court noted that, in terms of the short-listing formula, White males with maximum points (which required possession of an LLM degree) would score the same as Black males and White females with minimum points, Black males and White females with maximum points would score the same as Black females with minimum points, and Black women with minimum points would outscore all other categories of candidates with only an LLB degree. Moreover, the formula used in other regions varied significantly, although the racial composition of the benches correlated. In other regions, White males were less disadvantaged. Overall, there was an obvious connection between the discrimination and its purpose. The general policy of the commission – although not beyond criticism – could not be said to be haphazard or random. Regard had to be had to the fact that the complainant did not belong to a
group that had suffered from past patterns of disadvantage. However, this did not place the measures that had been applied to him beyond judicial scrutiny.

While it was so that the selection criteria negated at a broad sweep experience as a factor favouring White male magistrates, an overemphasis on experience would in the nature of things perpetuate past discrimination. However, the Court had to ask itself whether the discrimination “reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned”. Regional magistrates bear a heavy workload and endure stress in their unremitting and onerous task of presiding daily over trials. That task requires insight and maturity, for which there is no substitute for experience. Only experience can indicate whether a person will be able to cope with the work of a Regional Court magistrate; appointing those with insufficient experience would subject them to considerable stress and detract from their performance.

Moreover, it is of cardinal importance that Regional Courts, which play a crucial role in the administration of justice, are staffed by suitably qualified and sufficiently experienced persons. At no stage in the selection process had the successful candidate’s experience as magistrate been taken into account. No equitable assessment of the merits of the complainant’s application could possibly have taken place without proper consideration of the relative value of his previous experience as a magistrate against that of the other candidates.

Furthermore, by basing selection solely on the short-listing scores, no regard had been had to the candidate’s profile and CVs. Nor was account taken of legal knowledge, leadership and management skills, communication capability, vision, potential, commitment to transformation and development, integrity, social context, sensitivity and interpersonal relationships – all criteria accepted by the commission as relevant. Ignoring these criteria during the final stage of the selection process was neither fair to the candidates themselves nor in the interest of society, which requires that the Regional Courts should function at the highest possible level of efficiency. Judged against its own terms and objectives, the selection policy applied in the selection of Port Elizabeth magistrates was therefore irrational.

The Court noted further that the EEA does not require employers to impose absolute barriers to advancement on any group. For the complainant, the selection criteria constituted an absolute barrier. The inflexible modus operandi of the commission constituted an absolute inclusion of a designated group and the absolute exclusion of members of a non-designated group. It also frustrated the complainant’s ambition for advancement in his chosen career and denied him enhanced status and benefits. The discrimination therefore had a serious impact on him.

The Court noted further that, while the Department was not required to adopt an affirmative action plan, transparency and fairness indicated that this should be done so that judicial officers knew where they stood.

The Court accordingly concluded that the respondents had failed to prove that the discrimination against the complainant was fair.

The criteria used in short-listing candidates for the Port Elizabeth Regional Court
were accordingly set aside, and the first respondent ordered to re-advertise the vacant posts\textsuperscript{43}.

12. The equality test: section 9(2) of the Constitution

Section 9(2) authorises measures that promote the achievement of equality. It is designed to protect and advance persons disadvantaged by unfair discrimination.

In \textit{Minister of Finance & another v Van Heerden} [2004] 12 BLLR 1181 (CC) the Court held that this requirement involves a threefold enquiry:

“When a measure is challenged as violating the equality provision, its defender may meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination. It seems to me that to determine whether a measure falls within section 9(2) the enquiry is threefold. The first yardstick relates to whether the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination; the second is whether the measure is designed to protect or advance such persons or categories of persons; and the third requirement is whether the measure promotes the achievement of equality.

The first question is whether the programme of redress is designed to protect and advance a disadvantaged class. The measures of redress chosen must favour a group or category designated in section 9(2). The beneficiaries must be shown to be disadvantaged by unfair discrimination. In the present matter, the Minister and the Fund submitted that the differentiated contribution scheme was set up to promote the attainment of equality between members of the CPF and new members who were in the past excluded on account of race and or political affiliation. This objective they would advance by identifying three separate indicators of need for increased pensions for new parliamentarians. On the facts, however, it is clear that not all new parliamentarians of 1994 belong to the class of persons prejudiced by past disadvantage and unfair exclusion. An overwhelming majority of the new members of Parliament were excluded from parliamentary participation by past apartheid laws on account of race, political affiliation or belief.

The starting point of equality analysis is almost always a comparison between affected classes. However, often it is difficult, impractical or undesirable to devise a legislative scheme with “pure” differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or “hard cases” or windfall beneficiaries. That, however, is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies. In this regard I am in respectful agreement with the following observation of Gonthier J in \textit{Thibaudeau v Canada}:

“The fact that it may create a disadvantage in certain exceptional cases while benefiting a legitimate group as a whole does not justify the conclusion that it is prejudicial.”

\textsuperscript{43}\textit{LexisNexis online law reports}
In the context of a section 9(2) measure, the legal efficacy of the remedial scheme should be judged by whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion. It is clear that the existence of exceptional cases or of the tiny minority of members of Parliament who were not unfairly discriminated against under the apartheid regime, but who benefited from the differential pension contribution scheme, does not affect the validity of the remedial measures concerned.

The second question is whether the measure is “designed to protect or advance” those disadvantaged by unfair discrimination. In essence, the remedial measures are directed at an envisaged future outcome. The future is hard to predict. However, they must be reasonably capable of attaining the desired outcome. If the remedial measures are arbitrary, capricious or display naked preference they could hardly be said to be designed to achieve the constitutionally authorised end. Moreover, if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by section 9(2).

In Public Servants Association, Swart J, in interpreting section 8(3)(a) of the interim Constitution, held that: “The measures must be designed to achieve something. This denotes . . . a causal connection between the designed measures and the objectives.”

In the present matter Thring J followed this approach and held that no such causal nexus is present because the sponsor of the differentiated employer contribution scheme does not say that less had to be paid for the disfavoured category in order to give more to the favoured group. I cannot support this approach. Section 9(2) of the Constitution does not postulate a standard of necessity between the legislative choice and the governmental objective. The text requires only that the means should be designed to protect or advance. It is sufficient if the measure carries a reasonable likelihood of meeting the end. To require a sponsor of a remedial measure to establish a precise prediction of a future outcome is to set a standard not required by section 9(2). Such a test would render the remedial measure stillborn, and defeat the objective of section 9(2).

It is untenable to require, as Thring J did, that a sponsor of remedial measures must show a necessity to disfavour one class in order to uplift another. The provisions of section 9(2) do not prescribe such a necessity test because remedial measures must be constructed to protect or advance a disadvantaged group. They are not predicated on a necessity or purpose to prejudice or penalise others, and so require supporters of the measure to establish that there is no less onerous way in which the remedial objective may be achieved. The prejudice that may arise is incidental to, but certainly not the target of, remedial legislative choice. On the facts of this case, the members of the disfavoured class, barring a few, are beneficiaries of a generous publicly funded pension scheme which pre-dates the differential measure. The favoured categories are, in the main, not. The disfavoured category was and, as the High Court observed, remains better situated than its new parliamentary counterparts as far as state-funded pension benefits go.
The third and last requirement is that the measure “promotes the achievement of equality”. Determining whether a measure will in the long run promote the achievement of equality requires an appreciation of the effect of the measure in the context of our broader society. It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged. Action needs to be taken to advance the position of those who have suffered unfair discrimination in the past.”

13. Understanding Broad-based Black Economic Empowerment

Broad-based Black Economic Empowerment (B-BBEE) is an initiative launched by the South African Government to address the restrictions that exist within the country for Black individuals to participate fairly in the economy.

The BEE Act allows for the existence of the BEE ‘Codes of Good Practice’ which provide the structures for the Scorecards and certain rules associated with claiming BEE points.

BEE is essentially a buyers’ club. If you have a BEE Certificate then your customers can claim BEE points on their BEE Scorecard for buying from your business. You can get different level BEE certificates (from level 8 to level 1) depending on what contributions you have made to black people from your business. The better level of BEE Certificate you have the more BEE points they can claim.

When your customers are choosing which supplier to use they are likely to look at price, quality and service and your BEE Score. Depending on how important BEE points are to your customer, the more they will consider your BEE Score over the other three elements.

BEE’s effect on different sized entities

The BEE Codes of Good Practice allow for three levels of measurement. The intention is to take into account the challenges faced by small businesses.

Exempted Micro Enterprises (EMEs)

It is unrealistic to expect a start-up business to contribute to BEE as there are likely to be few employees. Most businesses try to limit their staff costs in the first few years and including additional senior staff of any colour can put the business in danger.

For this reason any business that turns over less than R5 million is exempted from being measured against any BEE Scorecard. They get allocated a Level 4 BEE status (100% procurement recognition) or a Level 3 BEE status (110% procurement recognition) if they have more than 50% black ownership.

http://www.bee.co.za/Content/Information.aspx
EMEs are still required to produce a BEE Certificate to give to customers to confirm that they are exempted.

**Qualifying Small Enterprises (QSEs)**

Any business that turns over more than R5 million but less than R35 million qualify as a QSE. QSEs tend to be family run businesses that would struggle to include additional people at ownership and Senior Top Management level. However, a white owned QSE can start to employ black staff, train black staff, buy from BEE Certified Suppliers and support black businesses and communities. QSEs get scored against a QSE Scorecard and can choose to be scored against any 4 of the 7 sections on the Scorecard. The QSE Scorecard is easier to score points against than the Generic Scorecard.

**Generic enterprises**

Any business that turns over more than R35 million per annum is measured against a Generic BEE Scorecard. The same 7 sections are included on the Generic and the QSE Scorecards. The targets and the point allocations are different and Generic companies are measured against all 7 sections of the BEE Scorecard.

**BEE scorecard**

As described above there are two types of BEE Scorecard; a QSE Scorecard and a Generic Scorecard. The Scorecards provide the 7 elements against a company will be scored and give the targets and the associated points available. Companies can then consider the elements and attempt to score points in each of the 7 elements. The points in each element can be secured by achieving the required targets. Should you achieve a percentage of the target then the same percentage of points can be claimed. The Scorecard is simply a framework against which your business can score points in order to secure a BEE Certificate. Your BEE Certificate can then be used by your customers to claim BEE spends when they procure goods and services from your business.

**BEE Verification**

BEE Certificates can be issued by any Verification Agency so long as they are approved to do so by SANAS.

The Certificate can only be issued once a full verification has been performed and the documentation presented by your company has been verified.

On your certificate you should find the following information:

- Company name and number
- Type of Certificate (Group/Entity/Division)
- BEE Category (QSE/Generic)
- BEE Level (1-8)
Employment Equity

- Procurement Recognition %
- Black Ownership %
- Black Women Ownership %
- Value Adding Supplier (Yes/No)
- Certificate Issue Date
- Certificate Expiry Date

You do not need to provide any additional information to your customers. Your BEE Certificate is regarded as sufficient as supporting evidence of your B-BBEE credentials.

How to develop a strategy

When you are either starting down the BEE road or if you are in the process of improving your score you need to have a strategy. Your BEE score will not manage itself and it is very dangerous to simply call a verification agency in to find out what score you achieved this year without managing it and being sure you have achieve your desired score before getting verified! Someone in your business should have a sound understanding of BEE and be able to calculate your BEE score. There are software tools available to help in this process (see www.boxsmart.co.za for QSEs). You need to choose which elements you are going to be scored against and then develop a strategy to ensure you score those points. Your strategy may span a 12 month period, 5 year period or simply be a once off project.

- Ownership – Once off project
- Management Control – Once off project (with succession planning)
- Employment Equity – 12 month period
- Skills Development – 12 month period
- Preferential Procurement – 12 month period
- Enterprise Development – 5 year period
- Socio-economic Development – 5 year period

You should note that each section is also scored against different periods. These tend to tie in with your strategy timelines. If you want to do this properly it is advisable to call on consultants who can assist and share best practice tips and experience. As they have been developing strategies for other businesses that can share in their experience of what does and does not work.

BEE and the importance of administration systems

BEE is all about being strategic and having good administration systems in place. This is good for South African business as typically we are weak on administration and having a good administration system will improve our businesses. Without the documentation to prove your BEE activities you cannot claim the associated BEE points. All activities relating to BEE have to be documented and then provided as proof to a verification agency. Should you
choose to self-assess (not use a verification agency) then you still have to produce evidence that support your claims.

Listed below are the administration systems you should have in place:

- Ownership - none
- Management Control – none
- Employment Equity – Payroll system, Employment Documentation File
- Skills Development – Skills spend tracker, Skills Documentation File
- Preferential Procurement – Procurement system
- Enterprise Development – Documentation File
- Socio-economic Development – Documentation File

Who should manage BEE in a business?

You have three options when considering who should manage your BEE Score:

a. The Chief Executive Officer (CEO) in any business should take direct responsibility for the company’s BEE Score. We have not seen any business succeed in driving BEE successfully without the CEOs direct involvement. The CEO is likely to delegate certain operational responsibility to other staff members but the drive should come from them.

The best structure is as follows:

Chief Executive Officer – Ownership and Management Control
Chief Financial Officer – Preferential Procurement and Enterprise Development:


The Employment Equity Committee would need some training as they are likely to have limited experience in making strategic recommendations to the CEO on these issues. The CEO should sit in the Employment Equity Committee along with someone with HR experience (preferably the HR Manager).

b. If the company to too small for this type of structure then the responsibility would fall back on the senior executive team.

c. In very large businesses it is advisable to appoint a Head of Transformation. See BEE and Transformation
BEE and Transformation:

It is important to note that BEE is not transformation. BEE is a reporting exercise and encourages specific activity in a business. However it is a quantative measure and does not take into account any qualitative elements. If Transformation is not achieved then the business will struggle to maintain their BEE Score. This becomes more evident the larger the business. Transformation, in essence, is the establishment of a fair working environment along with the removal of preconceptions and assumptions.

Once a staff team is operating together side by side with a common goal in mind and within a clearly understood corporate culture then you have achieved transformation.

Employment Equity numbers do come into the equation but reporting on Employment Equity is obviously not transformation.

13.1 The BEE Scorecard

The basics of the BEE Scorecard

Government needed a way to asses companies BEE status. They wanted to know if a company was black or non-black. The most obvious is "are you owned by a black person". This is a narrow based BEE.

The B-BBEE (Broad Based BEE) Scorecard is a guideline to gauge a company's Empowerment score.

Broad Based BEE covers a wide variety of elements, such as Human Resource Development: broken down into two categories. Skills Development and Employment Equity which is then broken down into its own sub-categories etc. In total there are 7 different elements and over 40 indicators that are used to rate a business's BEE compliance.

This is the BEE scorecard. Each element is given a value in points. A company needs to try and achieve as many points as possible. There are a total of 100 points available - which is the target to be achieved in the next ten years.

For example: In order to gain another 15 points, a business can involve itself in developing the skills of its employees (Skills Development). The entire scorecard lists all aspects of the various elements and shows the maximum points that can be earned, based on achieving specified targets. The Act splits empowerment into four different sections and has two types of entities:

The Generic Scorecard

<table>
<thead>
<tr>
<th>Section</th>
<th>Subsection</th>
<th>dti points</th>
</tr>
</thead>
</table>

45 http://www.econobee.co.za
14. The relationship between employment equity, affirmative action and Black empowerment

Employment equity is one of the seven pillars of BEE. The Code on Employment Equity describes the way in which an enterprise will be measured in respect of its contributions in the fields of employment equity. This Code carries a weight of 15 points for larger businesses or 20 points for qualifying small enterprises that choose to perform in this pillar. It should be noted that only employment-equity strides relating to black women, black men and black people with disabilities will be recognised. The achievement of targets in relation to white women and whites persons with disabilities does not count for BEE purposes. The measurement of employment equity, i.e. compliance with BEE targets, is different from the manner of reporting and measurement in terms of the EEA. The BEE Code requires a calculation of black representation in employment with a gender-adjustment factor, i.e. the target is achieved not as a straight percentage calculation and it incorporates targets for both black men and black women.

The Code does not cover all employment levels as per Form EEA 9; it covers the following levels only and sets the following corresponding targets as five and ten year targets respectively:
## Code 300 Employment equity

<table>
<thead>
<tr>
<th>Area:</th>
<th>Target</th>
<th>Weighting Points:</th>
<th>% of Points</th>
<th>Formula</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Years 0-5</td>
<td>Years 6-10</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Statement 300:</strong> General Principles</td>
<td>15</td>
<td></td>
<td></td>
<td></td>
<td>Where possible, use information submitted</td>
</tr>
<tr>
<td>1. Black Disabled Employees as a % of all employees</td>
<td>2%</td>
<td>3%</td>
<td>2</td>
<td>13%</td>
<td>(ARG / target) x 2</td>
</tr>
<tr>
<td>2. Black Employees in Senior Management as a % of all such employees</td>
<td>43%</td>
<td>60%</td>
<td>5</td>
<td>33%</td>
<td>(ARG / target) x 5</td>
</tr>
<tr>
<td>3. Black Employees in Middle Management as a % of all such employees</td>
<td>63%</td>
<td>75%</td>
<td>4</td>
<td>27%</td>
<td>(ARG / target) x 4</td>
</tr>
<tr>
<td>4. Black Employees in Junior Management as % of all such employees</td>
<td>68%</td>
<td>80%</td>
<td>4</td>
<td>27%</td>
<td>(ARG / target) x 4</td>
</tr>
<tr>
<td>5. Bonus Points for meeting or exceeding EAP targets in 2 – 4</td>
<td>3</td>
<td></td>
<td></td>
<td>0.2</td>
<td></td>
</tr>
</tbody>
</table>

It is important to note that non-designated employers are not precluded from implementing affirmative action measures. They may do so voluntarily, or may in the interest of a good BBEEE score, decide to comply.
Module 4: Compilation and submission of employment equity reports

The Department of Labour has laid down certain steps to follow when developing an Employment Equity Plan. These guidelines are based on those steps with recommendations being made in appropriate sections to assist municipalities develop their own plans.

1. Assigning responsibility

- The Employment Equity Act requires that the municipality assign one or more managers to take responsibility for implementing and monitoring the employment equity plan. The municipality is also required to provide the managers with authority and means to perform their functions and take reasonable steps to ensure that the managers perform their functions.
- It is recommended that Directors or Managers of Corporate Services be assigned the responsibility to draft, co-ordinate, implement and monitor the employment equity plan. These managers must also act as chairpersons of the Employment Equity Consultative Forums.
- The Human Resources Managers of the municipalities must act as alternatives both for the purposes of implementing and monitoring of the employment equity plans as well as chairing the consultative committees if the assigned managers are unavailable.
- The Act requires that the Assigned Manager be provided with all the necessary resources required to implement the plans successfully, including the budget, and authority such as reporting to the Council on matters of employment equity, after having consulted with the Local Labour Forum.
- The Act requires that municipality forms an Employment Equity Forum that holds meetings at agreed intervals and is consulted on all matters pertaining to employment equity.
- In order to satisfy this requirement an Employment Equity Forum must be formed which shall have representatives from all different groups such as trade unions, employees from the designated groups, non-designated group, all occupational categories and levels. The Council nominates employees who shall represent management in the forum and employees be requested to nominate their own representatives.
- This responsibility to drive employment equity must form part of each manager's performance agreement.

2. Communication and awareness

- Once the manager has been assigned the responsibility to drive employment equity, he or she must embark on a process of making all employees:

46 http://www.kznlgta.gov.za/
a. aware of the scope, content and application of the Employment Equity Act;
b. sensitive to employment equity and anti-discrimination issues;
c. aware of the process to be followed; and
d. aware of their role in the process.

- It is recommended that the manager utilize different communication methods to communicate with employees, such as presentations to different stakeholders, conducting workshops, issuing pamphlets, circulars and newsletters as well videos and training sessions.
- All managers of the municipality must be made aware of their obligations in terms of the Act and be offered skills in diversity management.

3. Consultation

- In terms of the Code of Good Practice, consultation should commence as early as possible in the process. Consultation also includes the opportunity to meet and report back to employees and management, reasonable opportunity for employees to meet with the employer, the request, receipt and consideration of relevant information and adequate time for all of these;
- Information requested by members of the forum for purposes of input into the plan must be disclosed and made available to them.

4. Conducting the analysis

4.1 Review of employment policies, practices, procedures and the working environment

In terms of the Code of Good Practice, the purpose of the analysis is to assess all employment policies, practices, procedures and the working environment so as to:

- identify any barriers that may contribute to the under-representation or underutilization of employees from designated groups;
- identify any barriers or factors that may contribute to the lack of affirmation of diversity in the workplace;
- identify other employment conditions that may adversely affect designated groups;
- identify practices or factors that positively promote employment equity and diversity in the workplace; and
- determine the extent of under-representation of employees from designated groups in the different occupational categories and levels of the employee workforce.
4.2 The Municipality must review the following policies, procedures and practices

- all employment practices, such as recruitment, selection, pre-employment testing and induction policies that could be biased, inappropriate and disempowering;
- policies related to succession and experience planning, promotions and transfers to establish whether designated groups are excluded or adversely impacted;
- utilization and job assignments to establish whether designated groups are able to meaningfully participate and contribute towards the achievement of business goals;
- current training and development methods and strategies, including access to training for designated groups;
- remuneration structures and practices such as equal remuneration for work of equal value;
- employee benefits such as retirement, risk and medical aid schemes to establish whether designated groups have equal access;
- working conditions that may not accommodate cultural or religious differences, such as the use of traditional healers and observance of religious holidays;
- the number and nature of dismissals, voluntary terminations and retrenchments of employees from designated groups that may indicate internal or external equity related factors contributing to such terminations;
- corporate culture;
- practices related to the management of HIV / AIDS in the workplace to ensure that people living with HIV / AIDS are not discriminated against; and
- the review of the physical environment such as building, toilets, etc. to determine if it accommodates people with disabilities.

4.3 Analysis of the workforce profile

- An analysis of the workforce profile should provide a comparison of designated groups by occupational categories and levels according to the relevant demographic data. The municipalities can use Form EEA 8 developed by the Department of Labour for this purpose;
- The first step in conducting an analysis of the workforce profile is to establish which employees are members of the designated groups. This information must be obtained from employees through the use of declaration provided for in Regulation 2(1). The municipalities could also use employee information on their database such as that contained in application forms, however, employees must have the opportunity to verify or update personal information;
- The municipality must take into account the availability of suitably qualified staff from the designated groups in the relevant recruitment area as well as the internal skills profile of designated employees when conducting the workforce profile. The relevant recruitment area is that geographic area
from which the municipality would reasonably be expected to draw or recruit employees.

5. **Components of an Employment Equity Plan**

5.1 **Duration of the plan**

In terms of the Code of Good Practice, the plan should be between 1 and 5 years in duration, based upon the particular employer circumstances and the timeframe in which meaningful progress can be made and measured. Within that timeframe milestones should be specified and target dates set for reaching such milestones.

5.2 **Broad objectives of the plan**

The broad objectives of the plan must be specified and a timetable developed for the fulfilment of each objective. These objectives must take into account the output of the planning phase, particular circumstances of the municipality and be aligned with and included in the broader business strategy of the municipality.

5.3 **Developing affirmative action measures**

In terms of the Code of Good Practice, affirmative action measures to address barriers identified during the analysis should be developed to improve the underrepresentation of designated groups. Such measures relate to, but are not limited to the following:

- appointment of members from the designated groups using transparent recruitment strategies, unbiased selection criteria, representative selection panels and targeted advertising;
- increasing the pool of available candidates through training and development of people from designated groups;
- retention of people from the designated groups. Retention strategies could include promotion of a more diverse organizational culture, an interactive communication and feedback strategy and on-going labour turnover analysis;
- reasonable accommodation for people from the designated groups. The measures include providing an enabling environment for people with disabilities so that they may participate fully, and in doing so, improve productivity. Examples of reasonable accommodation would include accessible working areas, modifications to buildings and facilities and flexible working hours; • steps to ensure that members of designated groups are appointed in such positions that they are able to meaningfully participate in corporate decision making processes of the municipality. A conscious effort must be made to avoid all forms of tokenism. Candidates must be appointed with commensurate degrees of authority; and
- Transforming culture of the past in a way that affirms diversity in the workplace and harnesses the potential of all employees.
5.4 Developing numerical goals

- Where under-representation of people from designated groups has been identified by the analysis, numerical goals must be established. The purpose of these goals will be to increase the representation of people from designated groups in each occupational category and level in the municipality’s workforce.
- In developing the numerical goals, the municipality must take the following into consideration:

  a. The degree of under-representation of employees from the designated groups in each occupational category and level in the workforce;
  b. The provincial and national economically active population;
  c. The pool of suitably qualified people from the designated groups, from which the municipality may be expected to draw for recruitment purposes;
  d. Economic and financial circumstances of the municipality;
  e. Expected turnover of employees in the municipality’s workforce during the time period for the goals; and
  f. The labour turnover trends and underlying reasons, specifically for employees from designated groups.

5.5 Allocating resources

In terms of the Code of Good Practice the resources, including budgets, should be appropriately allocated in order to implement the agreed components of the Employment Equity Plan. To make things happen, resources must be allocated, managers must be given the responsibility for its implementation.

6. Communication

The plan must be communicated to all stakeholders. The communication should include the following:

- Who is responsible for the implementation of the plan;
- Where information regarding the plan can be obtained;
- Objectives and duration of the plan;
- Dispute resolution procedures; and
- Roles and responsibilities of the role players tasked with ensuring the success of the plan.

7. Monitoring and review of the plan

In terms of the Code of Good Practice municipalities must do the following:

- Keep the records of the plan. They need to be able to review their starting position and track the movements over the duration of the plan;
- Implement one or more mechanisms to monitor and evaluate the implementation plan;
• Evaluate progress at structured and regular intervals;
• Report on progress to the consultative forum and all stakeholders;
• Where progress is unsatisfactory or flaws emerge in the plan, review and revise the plan through the consultation process; and
• Provide internal procedures to resolve any dispute about the interpretation and implementation of the plan.

8. Reporting to the Department of Labour

All designated employers are required to report their employment equity activities to the Department of Labour annually for those employers who employ more than 150 employees or every two years for those who employ less than 150 employees. When reporting the municipalities are expected to comply with the following requirements:

• Complete and submit the Employment Equity Report Form EEA2 obtainable from the Department of Labour website;
• Complete and submit Income Differentials Form EEA4 also obtainable from the Department of Labour website.

9. Penalties

Schedule 1

MAXIMUM PERMISSIBLE FINES THAT MAY BE IMPOSED FOR CONTRAVENING THIS ACT

This Schedule sets out the maximum fine that may be imposed in terms of this Act for the contravention of certain provisions of this Act.

<table>
<thead>
<tr>
<th>Previous Contravention</th>
<th>Contravention of any Provision of Sections 16, 19, 20, 21, 22 and 23</th>
</tr>
</thead>
<tbody>
<tr>
<td>No previous contravention</td>
<td>R500 000</td>
</tr>
<tr>
<td>A previous contravention in respect of the same provision</td>
<td>R600 000</td>
</tr>
<tr>
<td>A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years</td>
<td>R700 000</td>
</tr>
<tr>
<td>Three previous contraventions in respect of the same provision within three years</td>
<td>R800 000</td>
</tr>
<tr>
<td>Four previous contraventions in respect of the same provision within three years</td>
<td>R900 000</td>
</tr>
</tbody>
</table>

In his article *Equitable fine*™ professor John Grogan discusses the consequences of an employer’s failure to comply with the EEA – even where the employer’s staff complement consisted of Blacks only.

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“The deadline for submission by designated employers of their first equity plans to the Department of Labour (“DOL”) has long since come and gone, and the DOL is now showing signs of restlessness with some of those who have not yet complied. So far, it has referred only a few cases to the Labour Court, which is the process the department must follow if it wishes to penalise recalcitrant employers with the hefty fines provided for by the Employment Equity Act 55 of 1998.

One of the first targets chosen was Win-Cool Industrial Enterprise (Pty) Ltd, a concern owned by a person of Chinese extraction with, some might consider an irony, an entirely black staff. That, as the company was to learn, was not in itself sufficient ground to escape liability for not preparing an equity plan or filing reports. But what are the consequences of such a lapse? This issue was considered in Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd [2007] 9 BLLR 845 (LC). The Director-General submitted that Win-Cool should pay the maximum fine prescribed by the Act for a first transgression (R500 000). Wincool argued that before it could be compelled to do that, the court had to be satisfied that it was criminally liable – which would have meant that the DOL had to prove not only that the employer had failed to do what the Act required, but also that the employer had the necessary criminal intent. In that regard, Win-Cool argued that it had always intended to complete an equity plan, but that it had been “let down” by a consultant.

The DOL argued that the Act did not convert enforcement proceedings into a criminal trial. The court drew a distinction between statutes which impose criminal liability and those which impose civil liability. The penalties prescribed by the EEA are not fines, but “regulatory instruments”. That means that the Director-General is not required to act as a State prosecutor, but must prove the elements of a contravention only on a balance of probabilities. However, the purpose of the sanction sought must be reasonable, justifiable and necessary, as required by the Constitution of the Republic of South Africa, 1996. Although the fines that may be imposed are relatively high, a court can ensure that procedural safeguards are proportionate to the sanction for breaches of the statute. Its specialist nature equips the Labour Court to apply such safeguards.

To assess whether a civil process justifies a penalty, the elements of the statutory provision that the employer is alleged to have contravened and the onus of proving the contraventions must be determined. Win-Cool was alleged to have contravened sections 16, 19, 20 and 21 of the EEA. These require, respectively, consultation with employees on specified matters, an analysis of the employer’s policies and practices to determine the degree of under-representation of designated employees, preparation of an equity plan, and submission of the plan and reports to the DOL. The court noted that these provisions are designed to bring about genuine transformation. The mere fact that an employer employs black people only cannot in itself prove that it has redressed all forms of discrimination. Freedom of trade is not a defence because affirmative action and fair labour practice laws trump that freedom.

Nor did it help Win-Cool to blame its consultant; if employers could farm out their responsibilities, enforcement would become almost impossible. But, said
the court, this does not mean that the maximum penalty must be imposed in each case. When evaluating a suitable penalty, various factors must be considered, including the nature of the contravention, the employer’s willingness to make redress, the area and industry in which the employer operates and the deterrent effect of the penalty. Win-Cool’s owner had abdicated his responsibility by simply outsourcing his obligations under the EEA to a labour consultant, and had failed to exercise reasonable care in ensuring that the company complied with its obligations. The company had been stirred into action only when confronted with legal proceedings. All this indicated that the company had been reluctant to transform its workplace. But, although the employer is obliged to submit mitigating factors, the DOL must also persuade the court that the fine sought is balanced. Maximum penalties should be reserved for the most egregious violators, and for those who refuse to comply at all. Since Win-Cool was a small employer operating in an impoverished area in an industry which appeared to be under considerable pressure, the maximum penalty was inappropriate. Win-Cool was fined R300 000, of which R200 000 was suspended on condition that it complied with its obligations within a specified period.”
Module 5: The application of employment equity

1. The codes of good practice and relegation of powers

1.1 GNR.1394 of 23 November 1999: Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans

Notice is hereby given under Section 54 of the Employment Equity Act, 1998, that the Minister of Labour, having been advised by the Commission for Employment Equity, has issued a Code of Good Practice on the preparation, implementation and monitoring of an Employment Equity Plan, as set out in this schedule.

Arrangement of regulations

1. Objective
2. Legal framework
3. Scope
4. Purpose and rationale for the plan
5. Structure of the plan
6. Process for constructing a plan
7. Planning phase
8. Developing the plan
9. Monitoring and evaluating the plan

1. Objective

The objective of this code is to provide guidelines of good practice, in terms of the requirements of the Employment Equity Act, 1998 (Act No. 55 of 1998) (hereafter referred to as “the Act”), for the preparation and implementation of an employment equity plan (hereafter referred to as “the plan”).

2. Legal framework

2.1 This code is issued in terms of Section 54 of the Act, and relates to Section 20.

2.2 This code does not impose any legal obligations in addition to those in the Act and the failure to observe it does not, by itself, render a designated employer liable in any proceedings, except where the code refers to obligations that are required by the Act.

2.3 When interpreting the Act, any relevant code of good practice must be taken into account.1

Footnotes:

1 Section 3 (c) of the Act
3. **Scope**

3.1 This code is relevant to all employers that are regarded as designated employers in the Act.2

3.2 Designated employers and the employees of designated employers should apply the guidelines set out in this code to develop their employment equity plans, taking into account the specific circumstances of their own organisations.

3.3 This code may be read in conjunction with other codes of good practice that may be issued by the Minister of Labour.

Footnotes:

2 See the definition of “designated employer” in the Act

4. **Purpose and rationale for the plan**

4.1 The plan reflects a designated employer’s employment equity implementation programme.

4.2 The plan represents the critical link between the current workforce profile and possible barriers in employment policies and procedures, and the implementation of remedial steps to ultimately result in employment equity in the workplace.

5. **Structure of the plan**

5.1 The plan may be a separate document or a component of a broader document such as a business plan.

5.2 In terms of the manner in which it is set out, the plan may closely follow the sections of the Act and the relevant items of the Code, or may be organised differently, as long as the statutory requirements in Section 20 of the Act are reflected in the plan.

5.3 The plan should be accessible and structured in such a way that it is easy to understand.

6. **Process for constructing a plan**

6.1 The development of a plan should be undertaken as an inclusive process that will result in a documented plan.

6.2 The process of developing a plan has three sequential phases: planning, development, and implementation and monitoring.
6.3 The planning phase of the process should include:

- assignment of responsibility and accountability to one or more senior managers;
- a communication, awareness and training programme;
- consultation with relevant stakeholders;
- an analysis of existing employment policies, procedures, and practices;
- an analysis of the existing workforce profile;
- an analysis of relevant demographic information such as that contained in form EEA 8; and
- an appropriate benchmarking exercise, such as comparing the organisation’s workforce profile with those of other organisations within the same sector, or the development of other meaningful comparisons.

6.4 In the development phase, in consultation with the identified role players, should include:

- objectives set;
- corrective measures formulated;
- time frames established;
- the plan drawn up;
- resources identified and allocated for the implementation of the plan; and
- the plan communicated.

6.5 Implementation and monitoring is an ongoing process and should continue to include components of the earlier phases, such as consultation, communication, awareness and training. This phase should include:

- implementation;
- monitoring and evaluating progress;
- reviewing the plan; and
- reporting on progress.

7. Planning phase

7.1 Assignment of senior manager

7.1.1 The planning phase should commence with the assignment of one or more senior managers who should have the responsibility for the development, implementation and monitoring of the plan. They should:

- be permanent employees; and
- report directly to the Chief Executive Officer.
7.1.2 The assignment of one or more senior managers implies that:

- the employer should also provide the assigned managers with the necessary authority and means, such as an appropriate budget, to perform their allocated functions;
- the employer is not relieved of any duty imposed by this Act or any other law; and
- the employer should take reasonable steps to ensure that these managers perform their allocated functions. This could be done through the incorporation of key employment equity outcomes in performance contracts of the responsible managers as well as line managers throughout the organisation.

7.2 Communication, awareness and consultation

7.2.1 All employees should be made aware and informed of:

- the content and application of the Act as preparation for their participation and consultation;
- employment equity and anti-discrimination issues;
- the proposed process to be followed by the employer;
- the advantages to employees of participation in the process; and
- the need for the involvement of all stakeholders in order to promote positive outcomes.

7.2.2 Employers are required to consult with regard to conducting an analysis, the preparation and implementation of the plan, and the submission of employment equity reports to the Department of Labour.

7.2.3 To ensure the successful implementation of a plan, employers should make every effort to include employee representatives in all aspects of the plan, especially the planning and development phases.

7.2.4 Managers should be informed of their obligations in terms of the Act, and training should be provided to them where particular skills do not exist. Examples of required training could include diversity management, coaching and mentoring programmes.

7.2.5 The communication of an employment equity strategy should focus on positive outcomes, such as the better utilisation of all of the employer’s human resources and the creation of a diverse and more productive workforce.

7.2.6 Communication should also include employees from non-designated groups and focus on the contribution that can be made by them.

7.2.7 Consultation with employees should commence as early as possible in the process.
7.2.8 A consultative forum should be established or an existing forum utilised. The forum should include employee representatives reflecting the interests of employees from both designated and non-designated groups and across all occupational categories and levels of the workforce. Representative trade unions, where these exist, or representatives nominated by such trade unions must be included in the consultation process.

7.2.9 The employer should be represented by one or more members of senior management.

7.2.10 Consultation would include:

- the opportunity to meet and report back to employees and management;
- reasonable opportunity for employee representatives to meet with the employer;
- the request, receipt and consideration of relevant information, and
- adequate time allowed for each of these steps.

7.2.11 To ensure an informed and constructive consultation process, structured and regular meetings of the consultative forum or forums should be held.

7.2.12 The disclosure of relevant information by designated employers is vital for the successful implementation of the plan. Such information could include:

- the particular business environment and circumstances of the employer;
- information relating to the relevant economic sector or industry;
- relevant local, regional, and national demographic information relating to the economically active population;
- the anticipated growth or reduction of the employer’s workforce;
- the turnover of employees in the employer’s workforce;
- the internal and external availability for appointment or promotion of suitably qualified people from the designated groups;
- the degree of representation of designated employees in each occupational category and level in the employer’s workforce; and
- employment policies and practices of the employer.

7.2.13 All parties should, in all good faith, keep an open mind throughout the process and seriously consider proposals put forward.

7.2.14 Where a representative body or trade union refuses to take part in the consultation process, the employer should record the circumstances, in writing, including those steps that the employer has taken to communicate and initiate the consultation process. A copy of this document should be provided to the representative body or trade union concerned.
7.3 Conducting an analysis

The purpose of the analysis is:

a. to assess all employment policies, practices, procedures, and the working environment so as to:

   • identify any barriers that may contribute to the under-representation or under-utilisation of employees from the designated groups;
   • identify any barriers or factors that may contribute to the lack of affirmation of diversity in the workplace;
   • identify other employment conditions that may adversely affect designated groups;
   • identify practices or factors that positively promote employment equity and diversity in the workplace; and

b. to determine the extent of under-representation of employees from the designated groups in the different occupational categories and levels of the employer’s workforce.

While the first type of analysis is of a more qualitative and legal nature, the second is mainly a statistical and data processing exercise.

7.3.1 Review of employment policies, practices, procedures, and working environment

A review of all employment policies, practices, procedures, and of the working environment should be undertaken in order to identify any barriers that may be responsible for the under-representation or under-utilisation of employees from designated groups.

a. The review should include a critical examination of all established policies, practices, procedures and working environment. These would include:

   • employment policy or practices, such as recruitment, selection, pre-employment testing, and induction that could be biased, inappropriate, or unaffirming;
   • practices related to succession and experience planning, and related promotions and transfers to establish whether designated groups are excluded or adversely impacted;
   • utilisation and job assignments to establish whether designated groups are able to meaningfully participate and contribute;
   • current training and development methodologies and strategies, including access to training for designated groups;
   • remuneration structures and practices such as equal remuneration for work of equal value;
   • employee benefits related to retirement, risk, and medical aid to establish whether designated groups have equal access;
• disciplinary practices that may have a disproportionately adverse effect on designated groups and that may not be justified;
• working conditions that may not accommodate cultural or religious differences, such as the use of traditional healers and observance of religious holidays;
• the number and nature of dismissals, voluntary terminations and retrenchments of employees from designated groups that may indicate internal or external equity-related factors contributing to such terminations;
• corporate culture, which may be characterised by exclusionary social and other practices;
• practices relating to the management of HIV/AIDS in the workplace, to ensure that people living with HIV/AIDS are not discriminated against; and
• any other practices or conditions that are tabled arising out of the consultative process.

b. All practices should be assessed in terms of cross-cultural and gender fairness.

c. The review should take into account more subtle or indirect forms of discrimination and stereotyping which could result in certain groups of people not being employed in particular jobs, or which could preclude people from being promoted. Examples would include pregnancy, family responsibility, exclusionary social practices, sexual harassment, and religious or cultural beliefs and practices.

7.3.2 Workforce profile

a. The first step in conducting an analysis of the workforce profile is to establish which employees are members of designated groups. This information should be obtained from employees themselves, either from a declaration as provided for in Regulation 2 (1) or from existing and dependable sources. An example of an existing and dependable source would be an employer’s database that contains the information required on employment application forms. If such existing records are utilised for this purpose, each employee should have the opportunity to verify or request changes to this information.

b. An analysis of the workforce profile should provide a comparison of designated groups by occupational categories and levels to relevant demographic data. Form EEA 8 contains some demographic data for this purpose, but there are many other sources of information that could be utilised and might be more relevant.

c. In addition to the demographics, both the availability of suitably qualified people from designated groups in the relevant recruitment area, as well as the internal skills profile of designated employees, should be taken into account. The ‘relevant recruitment area’ is that geographic area from which the employer would reasonably be expected to draw or recruit employees.

d. Recruitment areas may vary depending upon the level of responsibility and the degree of specialisation of the occupation. Usually, the higher the degree of
responsibility or specialisation required for the job, the broader the recruitment area.

e. The standard occupational classification as defined in form EEA 10 should form the basis for determining occupational categories. Occupational levels could be determined by any of the professional job grading systems (Paterson, Peromnes, Hay, etc.) or their equivalents as detailed in form EEA 9. In the absence of a formal job grading system, designated employers may use equivalent occupational levels as the basis for the workforce analysis.

f. Sections B and C of the Employment Equity Report as defined by form EEA 2 should guide employers in establishing information requirements to develop a plan, and provide the basis for developing a workforce profile.

Footnotes:

3 See section 24 of the Act
4 See sections 16 and 17 of the Act
5 See the definition of “designated groups” in the Act
6 See section 19 of the Act
7 See the definition of “family responsibility” in the Act

8. Developing the plan

8.1 Duration of the plan8

The duration of the plan should be for a period that will allow the employer to make reasonable progress towards achieving employment equity. This period should be no shorter than one year and no longer than five years, as specified in the Act.

8.2 Broad objectives of the plan

The broad objectives of the plan should be specified and a timetable developed for the fulfilment of each objective. These objectives should:

- take into account the output of the planning phase;
- take into account the particular circumstances of the employer; and
- be aligned with and included in the broader business strategy of the employer.

8.3 Affirmative action measures9

8.3.1 Affirmative action measures, to address the barriers identified during the analysis, should be developed to improve the under-representation of designated group members. Such measures relate to, but are not limited to the following:

- Appointment of members from designated groups
• This would include transparent recruitment strategies such as appropriate and unbiased selection criteria and selection panels, and targeted advertising.

• Increasing the pool of available candidates

• Community investment and bridging programmes can increase the number of potential candidates.

• Training and development of people from designated groups

• These measures include access to training by members of designated groups, structured training and development programmes like learnerships and internships; on the job mentoring and coaching, and accelerated training for new recruits. Where required, diversity training should be provided to responsible managers, as well as training in coaching and mentoring skills.

• Promotion of people from designated groups

• This could form part of structured succession and experience planning and would include appropriate and accelerated training.

• Retention of people from designated groups

• Retention strategies would include the promotion of a more diverse organisational culture; an interactive communication and feedback strategy; and ongoing labour turnover analysis.

• Reasonable accommodation for people from designated groups

• These measures include providing an enabling environment for disabled workers and workers with family responsibilities so that they may participate fully and, in so doing, improve productivity. Examples of reasonable accommodation are accessible working areas, modifications to buildings and facilities, and flexible working hours where these can be accommodated.

• Steps to ensure that members of designated groups are appointed in such positions that they are able to meaningfully participate in corporate decision-making processes

• A conscious effort should be made to avoid all forms of tokenism. Candidates must be appointed with commensurate degrees of authority.

• Steps to ensure that the corporate culture of the past is transformed in a way that affirms diversity in the workplace and harnesses the potential of all employees

• Such steps could include programmes for all staff, including management, contextualising employment equity and sensitising employees with regard to the grounds of discrimination such as race, diversity, gender, disability, and religious accommodation.

• Any other measures arising out of the consultative process

8.3.2 All corrective measures to eliminate any barriers identified during the analysis should be specified in the plan.

8.3.3 The employer is under no obligation to introduce an absolute barrier relating to people who are not from designated groups, for example having a policy of not considering white males at all for promotion or excluding them from applying for vacant positions.
8.4 Numerical goals

8.4.1 Numerical goals should be developed for the appointment and promotion of people from designated groups. The purpose of these goals would be to increase the representation of people from designated groups in each occupational category and level in the employer’s workforce, where under-representation has been identified and to make the workforce reflective of the relevant demographics as provided for in form EEA 8.

8.4.2 In developing the numerical goals, the following factors should be taken into consideration:

- the degree of under-representation of employees from designated groups in each occupational category and level in the employer’s workforce;
- present and planned vacancies;
- the provincial and national economically active population as presented in form EEA 8;
- the pool of suitably qualified persons from designated groups, from which the employer may be reasonably expected to draw for recruitment purposes;
- present and anticipated economic and financial factors relevant to the industry in which the employer operates;
- economic and financial circumstances of the employer;
- the anticipated growth or reduction in the employer’s workforce during the time period for the goals;
- the expected turnover of employees in the employer’s workforce during the time period for the goals; and
- labour turnover trends and underlying reasons, specifically for employees from designated groups.

8.5 Consensus

In setting objectives and developing corrective measures, parties to the consultative processes should attempt to reach consensus on what would constitute reasonable progress over the duration of the plan.

8.6 Resources

Resources, including budgets, should be appropriately allocated in order to implement the agreed components of the plan.

8.7 Assignment of responsibility

Responsibility for implementation and monitoring of the plan, as assigned during the planning phase, should be confirmed and noted.
8.8 Dispute resolution

8.8.1 Internal procedures for resolving any dispute about the interpretation and implementation of the plan should be agreed and specified.

8.8.2 The use of existing dispute resolution procedures should be encouraged provided that they are appropriate, and if necessary adapted to the needs of employment equity.

8.8.3 Alternatively, a mechanism with appropriate representation from employer and employees may be established in order to address and resolve such disputes.

8.9 Communication

8.9.1 The plan should be appropriately and comprehensively communicated to employees. This communication mechanism should indicate the parties responsible for the implementation of the plan and the agreed dispute resolution procedures. Information about the plan should be easily accessible to all levels of employees.

Footnotes:

8 See section 20 (2) (e) of the Act
9 See sections 15 and 20 (2) (b) of the Act
10 See the definition of “reasonable accommodation” in the Act
11 See section 20 (2) (c) of the Act

9. Monitoring and evaluating the plan

9.1 Records should be kept to effectively monitor and evaluate the plan.

9.2 Mechanisms to monitor and evaluate the implementation of the plan should be agreed and include benchmarks that would permit assessment of reasonable progress.

9.3 The plan should be evaluated at regular intervals to ensure that reasonable progress is made. This evaluation should be integrated into mechanisms that the employer normally utilises to monitor its operations.

9.4 The consultative forum(s) should continue to meet on a regular basis, and should receive progress reports. Progress should be recorded and communicated to employees. Such meetings should take place at reasonable intervals to ensure feedback and inform the ongoing implementation process.

9.5 The plan should be reviewed and revised, as necessary, through consultation.
9.6 Reporting

9.6.1 Larger employers, with 150 or more employees, will be required to submit first reports by 1 June 2000 and thereafter annually on the first working day of October, starting in 2001.

9.6.2 Smaller employers, with fewer than 150 employees, will be required to submit their first reports by 1 December 2000 and thereafter every second year, on the first working day of October, starting in 2002.

9.6.3 The reporting format for employers is contained in the Employment Equity Report as defined in form EEA 2.

9.6.4 Designated employers whose operations extend across different geographical areas, functional units, workplaces or industry sectors may elect to submit either a consolidated or a separate report for each of these. This decision should be made by employers after consultation with the relevant stakeholders.

Footnotes:

12 See sections 21 of the Act


Arrangement of regulations

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2. Objective
3. Scope and legal principles
4. Structure
5. Implementing employment equity

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6. Job analysis and job descriptions
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11. Terms and conditions of employment
1. Foreword

The Employment Equity Act, 55 of 1998 (“the Act imposes a duty on employers to eliminate unfair discrimination. It also provides a framework for the attraction, development, the advancement and retention of an employer’s human resource talent. Research has shown that employers can increase productivity, motivation and resourcefulness in the workplace when they invest in their people and treat them with fairness and equity. This is secured by eliminating the historical barriers that prevent the advancement of the designated groups (Black people including African, Coloured and Indian, Women and People with Disabilities). This ensures that positive or affirmative action measures are in place to expedite their growth and advancement.

In the context of challenges of a compounded diverse global economy and constraints around infrastructure, skills, poverty, unemployment and service delivery, employers are increasingly aware that having racial, gender and disability diversity is key to business growth and development. Sustaining this growth requires ongoing commitment toward eliminating barriers, including skills development, in its general and specific forms. Some of the main challenges for employers include; attracting, managing, developing and retaining talent in the workforce through effective human resource management. In this context, the implementation of effective employment equity strategies will assist employers to maximise human resource development through the eliminating unfair discrimination and barriers and by promoting affirmative action. This Code provides guidelines to assist employers in implementing these initiatives.

2. Objective

2.1 The objective of this Code is to provide guidelines on the elimination of unfair discrimination and the implementation of affirmative action measures in the context of key human resource areas, as provided for in the Act. This Code is not intended to be a comprehensive human resources Code, but rather an identification of areas of human resources
that are key to employment equity and can be used to advance equity objectives.

2.2 The guidelines in the Code will enable employers to ensure that their human resource policies and practices are based on non-discrimination and reflect employment equity principles at the commencement of employment, during employment and when terminating employment.

3. **Scope and legal principles**

3.1 This Code is issued in terms of section 54 of the Employment Equity Act and must be read in conjunction with the Act and other Codes issued in terms of the Act1.

3.2 The Code should also be read in conjunction with the Constitution of South Africa and all relevant legislation, including the following:

- the Labour Relations Act, 66 of 1995 as amended;
- the Basic Conditions of Employment Act, 75 of 1997 as amended;
- the Skills Development Act, 97 of 1998;
- the Skills Development Levies Act, 9 of 1999; and

3.3 This Code applies to all employers and employees covered by the Act.

3.4 This Code is intended to be a tool to aid employers to implement employment equity by providing principles that should be incorporated into employment equity plans and that guide policies and practices. This Code is also intended to provide guidelines to employers to consider and apply as appropriate to their circumstances.

4 **Structure of the code**

4.1 The structure of this Code mirrors the life cycle of an employee in employment. It deals with possible barriers and unfair discrimination that could occur at each phase, including commencing employment, during employment and on termination of employment. It also describes affirmative action measures that could be used at each phase to advance the objectives of the Act.

4.2. Each topic focuses on the following areas:

4.2.1 Scope. This section provides a brief definition of the topic in the context of the employment life cycle.

4.2.2 Impact of employment equity. This section deals with non-discrimination principles and affirmative action measures that are relevant to the topic.
4.2.3 Policy and practice matters. This section provides information about the policy and practice matters that could arise, and makes suggestions regarding their implementation.

4.2.4 Link with other areas. This section identifies cross-references to other key topics as well as other relevant Codes and legislation dealt with in the Codes.

5. Implementing employment equity

5.1 Scope

5.1.1 Implementing employment equity involves two key initiatives:

- Eliminating unfair discrimination in human resource policies and practices in the workplace; and
- Designing and implementing affirmative action measures to achieve equitable representation of designated groups in all occupational categories and levels in the workplace.

5.1.2 This section provides a general outline of these areas and the different conceptual and methodological approaches used to deal with them in the workplace.

5.2 Impact on employment equity

Eliminating unfair discrimination

5.2.1 Section 6 of the Employment Equity Act prohibits unfair discrimination against employees or job applicants on one or more grounds of personal or physical characteristics like race, gender, sex, 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. These “prohibited” or other arbitrary grounds cannot be taken into account in employment decision-making. However, it is fair for them to be taken into account where they are relevant to either affirmative action measures or the inherent requirements of a job.

5.2.2 The Act prohibits both direct and indirect unfair discrimination. Direct unfair discrimination is easy to identify in the workplace because it makes a direct distinction on the basis of one or more of the prohibited grounds. Indirect unfair discrimination (often called adverse impact or systemic discrimination) on the other hand, is more difficult to recognise. Indirect unfair discrimination occurs when a policy and practice appears to be neutral but has a discriminatory effect or outcome for a particular group of employees and cannot be justified. The employer’s motive and intent is generally considered to be irrelevant in determining whether unfair discrimination has occurred. In certain circumstances, the refusal to make reasonable accommodation of an employee’s needs and circumstances,
where this can be done without undue hardship to the employer, can constitute unfair discrimination.

5.2.3 Equality can involve a formal notion of treating everyone who is in a similar position the same. This can perpetuate unfairness when those who hold similar positions e.g. all senior managers have different needs and circumstances that impact on their ability to perform effectively. The Constitution requires employers to move beyond formal equality to substantive equality by acknowledging the differences between employees and treating them differently on the basis of those differences. This is necessary to ensure that all employees are treated fairly. Equity therefore invokes the requirement of “fair” treatment in order to achieve substantive equality as an outcome in the workplace. Equal treatment and equal opportunity, like equality, subjects everyone to the same rules without distinction. Equity requires changing the rules so that their application is fair.

5.2.4 Unfair discrimination is prohibited in the workplace. In order for employers to execute one of their primary responsibilities of eliminating all forms of unfair discrimination in the workplace, it is recommended that all employers should conduct an audit and analysis of all their employment policies and practices, as well as the working environment and facilities. The audit should identify whether any of the policies or practices applicable in the workplace contain any unfair discrimination or barriers to the recruitment, promotion, advancement and retention of members of designated groups. Once the actual or potential barriers are identified, an employer should consult about the strategies for eliminating these barriers. These strategies should be incorporated into the development and implementation of the Employment Equity Plan for that workplace. Regular monitoring in the workplace should occur to ensure that the unfair discriminatory policies or practices do not recur or manifest themselves in different ways.

Implementing affirmative action measures to achieve employment equity

5.2.5 Removing barriers is only the first step towards ensuring fairness and equity in the workplace. In the context of historical disparities in South Africa, the Act requires employers, employees and representative trade unions to jointly develop strategies to advance designated groups by adopting appropriate affirmative action measures and incorporating them into formal Employment Equity Plans. Affirmative action measures are essentially remedial measures designed to redress the imbalances of the past. This is a mandatory strategy to achieve equity in employment as an outcome.
5.3 Policy and practice

5.3.1 This section provides guidance in relation to the audit, analysis and consultation aspects of the employer’s obligations.

5.3.2 Under the Act every designated employer is required to undertake four processes when developing a strategy to implement employment equity:

- consulting with its employees and representative trade unions;
- auditing and analysing all employment policies and practices in the workplace and developing a demographic profile of its workforce;
- preparing and implementing an employment equity plan; and
- reporting to the Department of Labour on progress made on the implementation of its employment equity plan.

The policy and practice analysis

5.3.3 Employers should develop realistic employment equity plans that are workplace specific and capable of measurement. This should be informed by conducting a comprehensive audit and analysis of all existing and potentially unfair discriminatory practices and barriers.

5.3.4 The analysis of policies and practices as well as other written documentation can be done through the collection of the information, listing what is applicable and identifying whether any documentation reflects direct or indirect unfair discrimination or barriers to the advancement of designated groups.

5.3.5 Practices are generally the informal or unwritten rules that prevail in the workplace and can be analysed through a combination of employee attitudinal surveys, individual interviews and focus groups to establish perceptions of their impact on achieving employment equity.

5.3.6 The relevant questions to be posed in the analysis would involve looking at whether the policy or practice is:

- unfairly discriminatory;
- valid;
- applied consistently to all employees; and
- compliant with legislation.

5.3.7 An employer should formulate appropriate barrier removal measures for each of the forms of unfair discrimination identified in the audit of policies and practices. These mechanisms would also be the subject of consultation and should be incorporated into the Employment Equity Plan of that employer. Appropriate timeframes, strategies and responsibilities should be allocated for each barrier removal measure.
5.3.8 An employer should communicate the outcome of the audit and analysis to employees in as transparent a manner as possible. The method of communication will depend on the culture of the employer; the frequency and common terms of communication; and the role of the Employment Equity Forum or other consultative structure. The leadership of the employer should also receive feedback to be able to provide strategic input with regard to appropriate barrier removal. Developing a workforce profile and setting numerical targets for equitable representivity.

5.3.9 A workforce profile is a snapshot of employee distribution in the various occupational categories and levels. Under-representation refers to the statistical disparity between the representation of designated groups in the workplace compared to their representation in the labour market. This may indicate the likelihood of barriers in recruitment, promotion, training and development.

5.3.10 Collection of information for the workforce profile is done through an employee survey. It is preferable for employees to identify themselves to enable the employer to allocate them to a designated group. Only in the absence of an employee’s self-identification, can an employer rely on existing or historical data to determine the employee’s designated group status.

5.3.11 The workforce profile should indicate the extent to which designated groups are under-represented in that workforce in occupational categories and levels. This should be compared to the Economically Active Population at national, provincial or regional, or metropolitan economically active population or other appropriate benchmarks. Employers should set numerical targets for each occupational category and level informed by under-representation in the workforce profile and national demographics. The extent of under-representation revealed by the workforce profile represents the ideal goal reflected as the percentage for each occupational category and level for that workplace.

5.3.12 Employers, employees and trade unions should prioritise the least under-represented groups within the workforce. For example, an employer in the consultation process should focus more on the areas where the most imbalances appeared during the audit and analysis.

5.3.13 Numerical targets will contribute to achieving a critical mass of the excluded group in the workplace. Their increased presence and participation will contribute to the transformation of the workplace culture and to be more affirming of diversity. Employers are required to make reasonable progress towards achieving numerical targets to achieve equitable representation. This means that an employer should track and monitor progress on a regular basis and update its profile continuously to reflect demographic changes.

5.3.14 Consultation: The success of employment equity depends largely on the efficacy of the consultation process. Employers, employees and trade
unions must be willing to play a constructive role in the consultation process. Regular and meaningful consultation will contribute to a joint commitment to workplace transformation. It may also foster workplace democracy and productivity. Consultation will ensure that realistic employment equity plans are prepared which address the training and development of designated groups and the adaptation of the workplace to affirm difference. The involvement of trade unions in the consultation process is not enough. Employers must also consult with employees from across all occupational categories and levels.

5.3.15 It is essential to ensure that whatever form consultation takes, it does not undermine existing collective bargaining processes or existing relationships.

5.3.16 Transformation committees or other structures that already exist, which bring together employees and management, may need to be adopted in order to serve the consultation purposes of the Act. Necessary adaptations may include bringing in representatives from segments of the workforce that do not already participate, including designated or non-designated groups or trade unions. Where workplace forums exist, there should be a vehicle for consultation, and attempts should be made to ensure that these are as representative as possible. Where no structures exist or current structures are impractical for employment equity consultation, the employer should initiate a process to establish a consultative structure and or support an employee initiative of this nature. Criteria for appointment of representatives to the structure, the number of representatives, their roles and responsibilities and mandates will have to be clearly set out. The representatives on the structure should be trained on understanding and implementing the key components of the Employment Equity Act.

5.3.17 Disputes will inevitably arise in the course of consultation. Employees may feel that they are not being sufficiently included in decision-making, or employers may grow frustrated at delays that are occasioned as a result of the need to consult.

5.4 Key links to other topics in the code

5.4.1 Performance management – senior management performance should be, amongst others, measured against the extent to which they have achieved their numerical targets.

5.4.2 Recruitment and selection – an employer must take cognisance of numerical targets when offering employment to suitably qualified job applicants.

5.4.3 Promotions – succession planning and decisions on promotion must take account of an employer’s numerical targets and ensure that under-represented groups in identified categories are developed and promoted.
Part A: 

Commencing employment

An employer can use a number of outreach and proactive mechanisms to attract applicants from under-represented groups.

6. Job analysis and job descriptions

6.1 Scope

6.1.1 A job description outlines the role and duties of the job and consists of two components:

- A description of the outputs of the job (what the job proposes to do). This description should provide an accurate and current picture of what functions make up a job, and should not include unrelated tasks. This should outline the job’s location, purpose, responsibilities, authority levels, supervisory levels and interrelationships between the job and others in the same area; and
- A description of the inputs of the job (i.e. what the person doing the job is required to do). This description should provide details about the knowledge, experience, qualifications, skills and attributes required to perform the job effectively.

6.1.2 Employers should conduct a job analysis when developing a job description. A job analysis is the process used to examine the content of the job, breaking it down into its specific tasks, functions, processes, operations and elements.

6.2 Impact on employment equity

Job descriptions may either advance or undermine employment equity depending on how they are written. A job description should clearly state the essential or inherent requirements of the job. These are the minimum requirements that an employee needs in order to be able to function effectively in that job. These requirements should not be overstated so as to present arbitrary or discriminatory barriers to designated groups. However, in the interests of promoting the appointment of employees who may not meet all the essential or inherent job requirements, an employer may decide that an employee who has, for instance, six out of the ten threshold or essential requirements, will be considered to be suitably qualified, subject to obtaining the outstanding requirements within a specified time.

6.3 Policy and practice

6.3.1 In order to ensure that job descriptions refer only to the essential or inherent job requirements, they should comply with the following criteria:

- Each task or duty in the job description is essential to be able to
• perform the job and is not overstated;
• The job description is free of jargon and is written clearly;
• The competency specification includes only criteria essential to perform
• the duties. This should be objective and avoid subjective elements that can be interpreted differently;
• Experience requirements that are not essential, related or arbitrary to the job should be excluded; and
• Criteria do not disadvantage employees from designated groups.

6.3.2. An employer may also use job descriptions to promote affirmative action, for instance, by incorporating potential as a requirement and making reference to development and training to acquire additional skills and competencies.

6.3.3. A job description should be capable of flexible interpretation in the interest of promoting affirmative action. In this regard, an employer may list all the minimum or essential requirements of the job.

6.4 Key links to other topics in the code

6.4.1 Recruitment and selection – Job descriptions that are flexible may aid the recruitment of employees from designated groups in order to create equitable representation. Rigid job descriptions may operate as a barrier to attracting individuals from designated groups with potential.

6.4.2 Performance management – Specificity of job descriptions contributes to setting clear performance objectives in an employee’s career development plan. This may avoid perceptions of unfair or discriminatory treatment in performance.

6.4.3 Skills development – A clear job description enables the identification of skills and competency gaps. These gaps could be closed through appropriate interventions like training and development.

7. Recruitment & selection

7.1 Scope

7.1.1. Recruitment and selection is the process that employers use to attract applicants for a job to determine their suitability. This involves various selection techniques such as short listing, scoring, interviews, assessment and reference checks.

7.1.2. This section identifies some of the strategies that can be used to attract a wide pool of applicants from designated groups.
7.2 Impact on employment equity

Recruitment and selection processes should be conducted fairly and without unfair discrimination. One of the barriers in the recruitment process is the inability to attract sufficient numbers from the designated groups. Attracting as many applicants as possible from designated groups may ensure that a larger skills pool is available from which to recruit. Recruitment and selection is often the most important mechanism to achieve numerical targets and to increase the representivity of designated groups in the workplace.

7.2.1 A number of areas in recruitment and selection should be reviewed to eliminate unfair discrimination: These include:

- Advertising and head hunting;
- The job application form;
- The short listing process;
- Interviews;
- Job offers;
- Record keeping; and
- Reference checking.

7.3 Policy and practice

7.3.1. The recruitment process should be informed by the employer’s employment equity plan, including the recommended affirmative action provisions.

7.3.2. Employers should have written policies and practices that outline their approach to recruitment and selection. This document should:

- reflect the values and goals of the employer’s employment equity policy or ethos; and
- include a statement relating to affirmative action and the employer’s intention to redress past inequalities.

7.3.3. Where an employer utilises the services of recruitment agencies, it should make the recruitment agency aware of its employment equity policy.

Advertising positions

7.3.4. When advertising positions employers should refer to their employment equity policy or values and indicate their position on affirmative action.

7.3.5. Job advertisements should place emphasis on suitability for the job, and should accurately reflect the inherent or essential requirements (i.e. the core functions) of the job and competency specifications.
7.3.6. Employers may consider placing all advertisements for positions internally even if a job is being advertised externally. This will make current employees aware of the opportunities that exist within the workplace.

7.3.7. When advertising positions, employers may state that preference will be given to members of designated groups. However, this does not suggest that the process of recruitment excludes members from non-designated groups.

7.3.8. Where possible, employers should place their job advertisements so that it is accessible to groups that are under-represented.

- Employees who are on maternity leave should be informed of positions advertised in the workplace.

**Job Application Forms**

7.3.9. A job application form is a mechanism that is used by an employer as part of selecting a suitable applicant for a position.

7.3.10. The purpose of a job application form is to:

- standardise the information employers receive from job applicants. This should reduce the probability for unfair discrimination;
- ensure that the information received from job applicants focuses on the requirements of the job and does not result in indirect unfair discrimination; and
- obtain biographical information to provide an employer with an easy mechanism for monitoring applications from various designated groups.

**Short-listing of Job Applicants**

7.3.11 Short listing is a process in which an employer considers all applications, including curriculum vitae and other relevant documents. An employer should place those job applicants who meet the criteria on a shortlist.

7.3.12 The process of short-listing job applicants should be standardized. Where no standards exist, an approach should be decided on before short-listing commences.

7.3.13 an employer should consider involving more than one person in the process of short-listing applicants to minimize individual bias.

7.3.14 The short-listing panel should be balanced in terms representivity.

7.3.15 Where an employer has outsourced the short-listing process, every effort must be made to ensure that the process is consistent with the recruitment and selection policies of the employer.
7.3.16 An employer should not rely on second hand knowledge or assumptions about the type of work the applicant may be able to do.

7.3.17 An employer should ensure that it short-lists as many suitably qualified applicants from designated groups as possible.

7.3.18 Suitably qualified applicants must meet the essential job requirements.

7.3.19 When short-listing, an employer could include applicants from designated groups who meet most but not all the minimum requirements. These applicants with potential could be considered for development to meet all the job requirements within a specified timeframe.

Interviews

7.3.20 An interview is a selection tool that provides an employer with the opportunity to meet a job applicant face-to-face.

7.3.21 Employers should use the same panel in the short-listing and interviewing process.

7.3.22 Employers should provide training and guidance to the panel conducting the interviews on:

- interviewing skills;
- the measuring system;
- employment equity and affirmative action; and
- matters relating to diversity, including skills for recognizing different dimensions of merit.

7.3.23 Employers may develop a standard interview questionnaire. This is a questionnaire prepared before the interview listing a set of questions that will be asked of each applicant interviewed to determine the applicant’s suitability for the job. The interview questionnaire should be based on the job description, particularly essential elements of the job and competency specifications. Employers should regularly audit their interview questionnaires to ensure that they do not contain questions that are potentially discriminatory.

7.3.24 An employer should consistently and objectively assess all applicants interviewed using as a basis the job description, competency specification and the measuring system. The same amount of time should be allocated for each candidate and the same or similar questions should be asked.

7.3.25 The measuring system should be standardized. An employer must allocate weightings to ensure that there is a balance between matching job requirements, numerical targets and the needs of the employer.
Making the job offer

7.3.26 Employers should ensure that a realistic job preview is provided to ensure that both the candidate and employer’s expectations are congruent. This is to facilitate the retention of employees from designated groups by effectively managing expectations before the candidate accepts a position, i.e. it must be clear to the candidate on what their expectations are, lines of authority and specific responsibilities;

7.3.27 Where a candidate does not accept a job offer, an employer should conduct an “exit” type interview to establish the reasons for not accepting the offer. This will enable the employer to identify and remove existing barriers.

Record keeping

7.3.28 An employer should keep copies of all documents relating to each stage of the recruitment process for a reasonable period of time after the position has been filled. These documents will be important in the case where an applicant challenges the recruitment process and selection.

7.3.29 An employer may keep data on its recruitment processes to inform its employment equity strategy and for monitoring changes in attitudes and actions of managers. This information could include:

- the demographic details of candidates who apply, those who are short listed, interviewed and those who are made offers;
- the demographic details of candidates in relation to short listing, interviewing and job offers made in each department to establish which sections within the workplace are advancing the employment equity profile of the employer. The employer can then focus attention on those departments that are not successful in advancing the employment equity objectives; and
- the persons who were involved in the short listing, interview and job offer process.

Reference checks of job applicants

7.3.30 The purpose of a reference check is to verify information provided by an applicant during the selection process.

7.3.31 Reference checks should not be conducted in a manner that unfairly discriminates. The same type of reference checks must be conducted on all short-listed applicants.

7.3.32 An employer should only conduct integrity checks, such as verifying the qualifications of an applicant, contacting credit references and investigating whether the applicant has a criminal record, if this is relevant to the requirements of the job.
7.4 Key links to other topics in the code

7.4.1 Implementing Employment Equity – Recruitment and selection must be aligned to the employer’s affirmative action strategy, as reflected in its Employment Equity Plan, which sets out the detail in relation to the numerical targets for each designated group by occupational categories and levels.

7.4.2 Disability – The employer should not unfairly discriminate on the ground of disability. In the context of disability, there are specific recruitment and selection issues that arise. In particular, an employer is required to make reasonable accommodation for the needs of applicants with disabilities. Employers should seek guidance from the Code of Good Practice on the Employment of People with Disabilities and the Technical Assistance Guidelines on the Employment of People with Disabilities.

7.4.3 Attraction and Retention – The ability of an employer to attract employees from designated groups will depend on a combination of factors, which include recruitment and selection practices, competitive benefits, career opportunities, an affirming environment, reputation and image of the employer.

7.4.4 Assessments – Where an employer makes use of assessments during the selection process, they should refer to the relevant section of this Code.

7.4.5 HIV and AIDS Status – An employer should not unfairly discriminate on the ground of HIV and AIDS. Employers could use the Code of Good Practice on Key Aspects of HIV/AIDS and Employment for guidance in this area.

8. Induction

8.1 Scope

Induction refers to the process where an employer introduces a new employee. This includes familiarizing the new employee with the vision, mission, values, job requirements and the policies and practices, as well as colleagues and the workplace environment.

8.2 Impact on employment equity

A carefully planned and implemented induction process will ensure that all new employees, and in particular designated groups, are effectively integrated into the workplace from the commencement of their employment. Proper induction can also function as a retention measure, since an employee who is properly integrated is less likely to be marginalized and more likely to thrive within the workplace.
8.3 Policy and practice

8.3.1 The induction process is an opportunity to convey the employer’s expectations and values and to indicate its commitment to equity and diversity. This can occur, not only at the level of introducing the new employee to policies that prohibit unfair discrimination, but also through ensuring that existing employees and leadership demonstrate the necessary supportive behaviour toward all employees.

8.3.2 The induction process can be useful in demonstrating the leadership’s commitment to employment equity by creating an opportunity to send the appropriate message about zero tolerance for harassment and discrimination, as well as support for affirmative action. It can also serve to project senior role models from among the designated groups already employed.

8.3.3 To ensure that the induction process contributes to the effective integration of new employees from designated groups in the workplace, the employer could ensure that managers and human resource staff receive training on the induction process. Managers could also receive training on avoiding stereotypes or assumptions about new employees based on their personal or physical or racial characteristics, ethnicity or other arbitrary criteria.

8.3.4 During the induction process, new employees should receive copies of the applicable policies. Such policies should include a grievance procedure and other dispute resolution mechanisms. Reasonable accommodation should be made for employees with disabilities.

8.4 Key links to other topics in the code

8.4.1 Training and development and work assignment – Where gaps have been identified during the interview, a training and development plan should be prepared with the new employee and should be introduced during the induction process.

8.4.2 Elimination of barriers – A successful induction will ensure that the employee does not experience barriers in socialising and networking, which would inevitably impact on prospects for advancement. The integration of employees from designated groups should be a conscious effort that extends beyond the induction process.

8.4.3 Elimination of unfair discrimination – The employment environment should be free from unfair discrimination and harassment and should also promote a common understanding of what discrimination means and how it will be dealt with.

8.4.4 Grievance & resolution – The grievance procedure should be conducive to raising issues that arise in the induction process.
8.4.5 Performance Management – All new employees should be provided with information of the work they are required to perform and the standard to which this work must be produced.

9. PROBATION

9.1 Scope

Probation involves the trial period for a new employee where the employer assesses the employee’s ability and skills to function in the position in order to determine whether to offer the employee a permanent position.

9.2 Impact on employment equity

The probation period can either undermine or support an employee from a designated group. An employer should provide the necessary organizational support to ensure that the new employee is successful. An employer should consider the initial work allocation given to a probationary employee to ensure that the new employee can cope with the demands of the new workplace.

9.3 Policy and practice

9.3.1 An employer should ensure that probationary employees from designated groups are not subjected to unfair discrimination. This can be done by ensuring that managers treat them fairly and consistently. There should be a written probation policy that clearly sets out the roles and responsibilities of the employee and company policies and procedures. These could include the expected performance standards; the frequency and form of performance reviews; the procedures the probationary employee should comply with when raising problems or grievances; the nature of support, mentoring and training and development.

9.3.2 An employer should ensure that managers understand the need for consistent fair treatment of all probationary employees in order to avoid unfair discrimination and perceptions.

9.3.3 Where an employee from a designated group requests reasonable accommodation during the probationary period, the employer should, as much as possible, provide it. Failure to provide reasonable accommodation may be construed as unfair discrimination.

9.3.4 Managers should, where relevant and appropriate, provide regular supervision and guidance to probationary employees, including training and counselling, to improve performance. Managers should keep records of their discussions with probationary employees, as it may provide useful data about an employee’s movement in the employment equity planning and measurement process. Information used to make decisions about employees should be reviewed, signed and dated by the employee. If the employer has a human resources department, this department should be informed of issues concerning the probationary employee’s performance.
9.3.5 By conducting an audit of policies and practices, an employer may identify barriers in the probationary process that impact on designated groups. Strategies to remove these barriers may then be developed and incorporated into the Employment Equity Plan.

9.3.6 An employer may consider keeping a record of the number of employees from designated groups who are not appointed at the end of their probationary period and compare this to probationary employees from non-designated groups. This analysis may indicate the existence of problems in a particular department or with a particular manager. Corrective measures can then be undertaken. To the extent possible, exit interviews may be conducted of probationary employees who are not appointed in order to identify barriers in the process or perceptions of unfair discrimination. Record keeping can facilitate measurement of employment equity progress and may enable an employer to identify problems with retention of designated groups.

9.4 Key links to other topics in the code

9.4.1 Induction – The links mentioned in the induction section are equally applicable to probation.

9.4.2 Performance management – success during probation is often associated with meeting the employer’s clearly specified and objective performance standards according to which regular evaluations of the employee’s performance are conducted.

9.4.3 Mentoring and Development – An employer may consider mentoring, coaching and training interventions to support employees from designated groups during the probationary period.

10. Medical, psychological and other similar assessments

10.1 Scope

Appropriate medical, psychological and other similar assessments, if properly used by employers, could contribute positively toward the recruitment and development of suitably qualified applicants and employees. Assessments, whether medical, psychological or other similar assessments, should include rather than exclude individuals with potential and those suitably qualified.

10.2 Impact on employment equity

10.2.1 The Act prohibits medical testing, unless legislation permits or requires the testing; or it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job. Psychological and similar assessments are also prohibited by the Act, unless the assessment being used has been scientifically shown to be valid and reliable; can be applied fairly to all employees; and is not biased against any employee or group.
Assessments are required to be free from unfair discrimination based on the prohibited grounds. Tests that directly or indirectly unfairly discriminate on these grounds are inappropriate and should be avoided.

10.2.2 An assessment is seen to be directly unfairly discriminatory when it excludes employees from designated groups on the basis of one or more of the prohibited grounds. Indirect unfair discrimination, however, is the more likely outcome. This occurs when, on average, the majority of a particular group assessed scores below the minimum requirement compared to other groups or individuals.

10.2.3 Assessments should be used to identify candidates with potential and persons who are suitably qualified. These assessments should then be followed-up by relevant intervention measures like appropriate training and development.

10.3 Policy and practice

10.3.1 An employer who uses medical, psychological and other similar assessments should develop a written policy for the workplace, which identifies the purpose, context, methods and criteria applicable to selecting and conducting assessments.

10.3.2 An employer should ensure that assessments used are valid, reliable and fair, so that no group or individual is unfairly disadvantaged as a result of the assessment. Bias in the application of the assessment should be eliminated. The test should match the job in question and should measure the minimum level of the competencies required to perform the job, which must be based on the inherent requirements or essential functions of the relevant job. Tests should avoid arbitrary or irrelevant questions. Only assessments that have been professionally validated as reliable predictors of performance for a particular job, irrespective of race, gender or disability, should be used.

10.3.3 Administrators and users of medical, psychological and other similar assessments should be qualified and registered with the appropriate recognised professional body of South Africa. Assessors should be trained to understand, evaluate and interpret the evidence or outcomes of the assessment objectively against the skills and abilities required for the job and must be able to justify their decisions. The assessment process should also minimise the opportunity for assessors to make subjective or arbitrary judgments that could, deliberately or inadvertently, work to the advantage of one group over another. Assessors should make sure they assess against the competencies for the job.

10.3.4 Special care should be taken to ensure that the language used is sensitive and accessible to those who are being assessed.
10.3.5 All employees or applicants for a particular job should be assessed against the same criteria. The process should make accommodation for diversity and special needs.

10.3.6 An employer should keep assessment records for at least one year.

10.3.7 Employers should ensure that reasonable accommodation is made for employees or applicants where required, and that unfair discrimination does not occur in the arrangements for the administering of tests or in using assessment centres.

10.4 Key links to other topics in the code

10.4.1 Skills development – Assessments can be used to identify potential amongst employees or applicants from designated groups. This links to affirmative action in training and development. Enabling an individual access to specific training and development programmes or any other relevant intervention can eliminate skills and competency gaps identified in an employee.

Part B:

During employment

11. Terms and conditions of employment

11.1 Scope

This section of the Code deals with terms and conditions of employment including working time and rest periods, leave of all kinds, rates of pay, overtime rates, allowances, retirement schemes, medical aid and other benefits.

11.2 Impact on employment equity

11.2.1 An employer may not discriminate unfairly in the terms and conditions of work or access to benefits, facilities or services that are available to employees.

11.2.2 Eligibility for benefits should not be determined on the basis of one or more of the prohibited grounds or other arbitrary grounds.

11.3 Policy and practice

11.3.1 Every employer is required by the Act to audit its terms and conditions of employment to identify whether they contain any unfair direct or indirect discrimination policies and practices. This should be followed by monitoring all changes in the terms and conditions of employment to ensure that all barriers or unfair discrimination policies and practices are removed. An employer should also regularly conduct practice audits to test the perceptions of employees about whether its terms and conditions of
employment and practices are non-discriminatory. An employer may address deficiencies identified through appropriate awareness raising initiatives and other barrier removal mechanisms. These should form a component of the employer’s Employment Equity Plan.

11.3.2 Employers should provide training, information and literature to trade union representatives and employees on the applicable terms, conditions and available benefits.

11.3.3 Maternity leave should not result in the loss of benefits for employees upon return to employment.

11.3.4 An employer should provide reasonable accommodation for pregnant women and parents with young children, including health and safety adjustments and antenatal care leave.

11.3.5 Employers should endeavour to provide an accessible, supportive and flexible environment for employees with family responsibilities. This includes considering flexible working hours and granting sufficient family responsibility leave for both parents.

11.3.6 Employers should examine the use of terms and conditions of their fixed term contract employees to ensure that they are not unfairly discriminated against. Fixed-term contracts can potentially undermine employment equity. This may occur where the employer tends to appoint certain groups of employees (i.e. black people, lower level employees and women) to fixed term contracts as a matter of practice.

11.4 Key links to other topics in the code

11.4.1 Remuneration – An employer must provide equal pay for equal work or for work of equal value.

11.4.2 Retention – Favourable terms and conditions of employment for employees can serve as an affirmative action measure to promote, attract and retain individuals from designated groups, but should be used with caution as a justified affirmative action measure.

11.4.3 Working environment – Flexibility in the terms and conditions of employment (i.e. working hours and schedules, work from home options, job sharing, career breaks, etc.) are examples of a flexible working environment that may promote the retention of employees, particularly members from designated groups.

12. Remuneration

12.1 Scope

Remuneration is any payment in money or in kind, or both in money and in kind, made or owing to any person in return for services rendered. Employers must ensure
that remuneration policies and practices are applied consistently without unfair discrimination on the basis of any one or combination of the prohibited grounds.

### 12.2 Impact on employment equity

12.2.1 Remuneration differentials most commonly constitute direct unfair discrimination, where an employer pays designated employees less than non-designated employees doing the same or equivalent work simply because they are designated employees. Remuneration discrimination can also be indirect or systemic because it stems from remuneration policies and practices that have an adverse or disparate impact on black people, women and people with disabilities.

### 12.3 POLICY AND PRACTICE

12.3.1 Employers should audit their existing remuneration policies to ensure that they are based on the principles of pay equity. This requires a comparison of jobs as well as a job evaluation system that is objective, rational and applied consistently to all job functions. It is recommended that all employers consider developing a written remuneration policy, or at the very least written guidelines, to ensure that clear rules exist on how remuneration is determined. This should be communicated in an appropriate format to all employees.

12.3.2 Employers should conduct regular audits of their remuneration practices among employees to identify the lack of awareness about applicable criteria and perceptions of unfair discrimination in remuneration.

12.3.3 Where barriers or discrimination in remuneration are identified, and unless these can be justified, the employer should in consultation with stakeholders develop a strategy for barrier removal.

12.3.4 Job evaluation systems should be objective as these are often the basis on which remuneration differentials emerge.

12.3.5 Remuneration should be based on the value of the post. In this regard, the following factors may be taken into account:

- Performance and Outputs: the employee’s outputs, measured by the performance management process, should carry the most weight in determining individual remuneration levels.
- Employee potential: This involves estimated ability and competence, as well as the capacity to develop these over time. Estimated ability refers to conceptual and management skills which have not yet been demonstrated, whilst competence refers to knowledge and expertise gained, which can be informed by previous outputs or experience.

12.3.6 Employers should monitor income differentials to ensure that these do not contribute to unfair discrimination.
12.4 Key links to other topics in the code

12.4.1 Performance Management – Although indirect factors such as motivation and commitment may be considered, it is important to ensure that these are free of unfair discrimination.

12.4.2 Recruitment and Selection – In order to attract employees from designated groups, an employer should offer market related salaries and benefits.

13. Job assignments

13.1 Scope

Job assignments relate to the type of work that is allocated to an employee by their employer. An employer should make decisions on the allocation of job assignments on objective criteria.

13.2 Impact on employment equity

Unfair direct and indirect discrimination often occur as a result of the way in which work is allocated in a workplace. Where job assignments are based on prohibited grounds or arbitrary characteristics, this may perpetuate unfair discrimination and may result in undermining employment equity. Discrimination in job assignments may occur where there is informal mentoring by a manager who is perceived to favour a particular employee.

13.3 Policy and practice

13.3.1 As part of the policy and practices audit, an employer should identify whether any unfair discrimination occurs in the ability of all employees to access opportunities.

13.3.2 Employers should guard against conduct that perpetuates perceptions of favouritism, which could lead to allegations of unfair discrimination. Access to opportunities should occur on an objective and fair basis to ensure that such perceptions do not arise, and where they do arise, they should be dealt with effectively and expeditiously.13.3.3. Employers should also monitor behaviour of managers in allocating job assignments, particularly where certain trends can be determined, as these may indicate the existence of indirect unfair discrimination.

13.4 Key links to other topics in the code

13.4.1 Induction - An employer should explain, especially during the induction process, the policies or guidelines that apply in relation to how work or opportunities are allocated.
13.4.2 Job analysis and job descriptions - A clear job description could ensure that no unrealistic expectations are raised regarding access to opportunities.

13.4.3 Performance management - Access to work assignments that enhance career opportunities, or are considered to be desirable, should be allocated objectively by linking them to the career path of employees. These should be clearly communicated to employees to ensure that no misperceptions arise and to prevent allegations of unfair discrimination.

13.4.4 Retention - In some instances, allowing certain employees access to work related opportunities that are considered to be "exciting" could be used as a retention measure - i.e. where an employer gives preference to senior managers from designated groups in allocating these opportunities. This should be used with caution as it can have significant organizational implications and can cause resentment where the objectives of such a strategy are not clearly understood or communicated.

13.4.5 Skills development - Access to opportunities and work assignments should form part of an employee's development plan and an employer's Workplace Skills Plan.

14. Performance management

14.1 Scope

Performance management is a business process that is used to monitor, measure and link what employees do on a continuous basis with the goals, values, culture and business objectives of the employer. It is a process intended to establish a shared understanding about what is to be achieved; how it is to be achieved; and the implications where it is not achieved. This includes clarifying the expectations that the employer has of the employee. Performance management also involves the training and development of employees.

14.2 Impact on employment equity

14.2.1 Discrimination in work assignments and performance measurement is more difficult to detect and difficult to prove without an objective, written system that clearly expresses criteria according to which performance will be measured and managed.

14.2.2 The manner in which the performance of an employee is managed may impact on the value that the employee adds to the workplace. It may also impact on how peers perceive the performance and advancement of an employee and on the support received by that employee. Performance management should not be a punitive process, but rather one that facilitates setting clear objectives for development and growth. Providing opportunities for development for employees from designated groups is a critical challenge for many employers.
14.3 Policy and practice

14.3.1 In order to effectively manage performance in a non-discriminatory and fair manner that encourages development, an employer should ensure that managers:

- Receive coaching and diversity training to ensure that they are able to objectively and consistently manage performance and provide honest feedback whilst being sensitive to employee differences;
- Understand and are able to properly implement the performance management system; and
- Are able to provide the necessary coaching, mentoring and support to employees to motivate them towards performance excellence.

14.3.2 Performance management systems could in addition:

- Measure and incentives managers for their leadership, mentoring and diversity skills, as well as for achieving employment equity objectives;
- Incorporate review processes, which may apply measures relating to competencies of managers in diversity management, including feedback from employees and peers;
- Develop clear learning objectives for all employees, particularly from designated groups. This should link to the acquisition of additional skills and competencies for challenging positions into which employees may be promoted or transferred; and
- Ensure that the performance management system is linked to the inherent requirements of the job and is free of any unfair discrimination.

14.3.3 Employers should review the results of performance appraisals to assess if there are any significant variations across designated groups. Where such variations exist, employers should identify the reasons for these discrepancies and take action to remove them.

14.4 Key links to other topics in the code

14.4.1 Working environment - a consistent and sustained performance management culture may impact on the integration and retention of employees from designated groups. It may also have implications for issues that go beyond performance and productivity, e.g. elevating employee morale, which in turn leads to productive employees and a more enabling workplace.

14.4.2 Remuneration - because performance management is linked to reward, it would be useful for employers to conduct an analysis of the distribution of increases and/or bonuses paid to employees that can be attributed to performance outcomes. This will enable the identification of areas of potential unfair discrimination and ensure that action is taken to eliminate barriers.
14.4.3 Skills development - effective and regular performance management may facilitate the identification of training and development needs, which may be addressed through appropriate interventions. These will enable an employee to effectively perform in the existing position or to develop into a more challenging position.

14.4.4 Retention - If performance management is linked to employee development and growth, it will impact significantly on an employer's ability to retain its employees.

15. Skills development

15.1 Scope

15.1.1 The Skills Development Act and the Skills Development Levies Act provide reinforcing and supporting tools for developing employees in line with employer business objectives. This contributes to a critical pool of candidates from designated groups from which employers could recruit, thus facilitating accomplishment of Employment Equity Act objectives.

15.1.2 This section describes the areas that impact on an employer's ability to develop employees from designated groups, which includes:

- effectively identifying training needs and matching these with the needs of the employer;
- providing effective mentoring and coaching;
- providing structured on-the-job training;
- considering accelerated development for employees with potential;
- providing meaningful job roles;
- implementing individual development plans;
- providing access to opportunities to act in a higher position;
- providing shadowing opportunities;
- creating challenging work assignments; and
- developing and promoting positive role models for designated groups.
- The section also deals with the retraining of managers and supervisors to enable them to effectively manage a diverse workforce.

15.2 Impact on employment equity

Skills development of employees is a key driver for the achievement of employment equity objectives. The Act positions skills development of designated groups as an affirmative action measure. Development and training are key strategies to enable designated groups to advance and to reach equitable representation in all occupational categories and levels.
15.3 Policy and practice

15.3.1 Every employer should develop written policies and practices to reflect its commitment to training and development. These policies and practices should refer to the objective of encouraging the training of employees while prioritising designated groups. The policy may incorporate preference in access to training and development opportunities for designated groups; until their representation in all occupational categories and levels has reached critical mass. This policy may then form the basis for the Workplace Skills Plan.

15.3.2 Employers should assist employees to identify and address their skills gaps by formulating appropriate objectives in their personal development plans, agreeing to timeframes and accessing the resources required to meet these objectives.

15.3.3 Employers and employees should also strive to create an organizational culture that encourages and rewards learning for everyone in the workplace. An employer may achieve these objectives through:

- appropriately structured career breaks;
- bursary schemes;
- on the job learning;
- mentoring and coaching;
- employee counselling for growth and advancement; and
- access to literacy and numeracy programmes.

15.3.4 The competency requirements for senior managers, team leaders, line managers, supervisors and professional staff should include specifications related to the development of employees.

15.3.5 Employers should consider conducting leadership and management development programmes to ensure that leaders and managers have the necessary knowledge and skills to effectively manage, develop and empower employees. Every effort should be made to create a work climate that is conducive to the successful integration and retention of employees from designated groups.

15.3.6 Employers should communicate their training and development priorities to all senior and line managers responsible for performance management. An employer should use these requirements to guide the identification of potential individuals in a proactive manner and identify individuals who can be scheduled for training and development.

15.3.7 All formal training offered to employees, whether through in-house training or from an external training provider, should ideally be linked to unit standards or qualifications that are registered on the National Qualifications Framework. This ensures that employees are able to receive nationally recognised credits and certificates for their learning.
achievements. This may redress past imbalances in formal education opportunities for people from designated groups.

15.3.8 Where employers consider implementing the Recognition of Prior Learning (RPL) principles to redress historical education and training disadvantages to promote employment equity and validate employee skills and knowledge, this should be based on an employer specific RPL policy.

15.3.9 Where applicable, employers should consider implementing Learnerships18 to offer occupationally driven, outcomes based learning while creating employment opportunities for previously disadvantaged individuals.

15.3.10 In procuring formal training courses from internal or external providers, employers should take into account the equity profile of the provider.

15.3.11 In procuring formal training courses from external providers, employers should ideally offer preference to suitable Black Economically Empowered companies in support of the development and sustainability of Black Economic Empowerment initiatives.

15.3.12 Employers, particularly those whose workforces include employees who are not functionally literate, should consider offering Adult Basic Education and Training (ABET) opportunities.

15.3.13 An employer's employment equity policy or policies should be a standard component of all training and development courses to ensure that employees understand its philosophy in relation to the workplace.

15.3.14 An employer should offer diversity training to all employees.

15.3.15 Staff responsible for selecting employees for training, either as part of their induction or to develop particular skills, should themselves be trained to:

- recognise potential, particularly from designated group employees;
- select trainees according to objective criteria or in terms of the Workplace Skills Plan or training and development policy;
- align training and development access for designated groups to numerical targets and other objectives set in the Employment Equity Plan; and
- identify and address any barriers or unfair discrimination practices in the allocation of training opportunities.

15.3.16 An employer should monitor training opportunities in order to identify and address any disparities between groups and to ensure that training is done to achieve the employment equity objectives set out in its Employment Equity Plan.
15.3.17 An employer should conduct post training impact evaluations to track the progress of employees to ensure that training employment equity objectives are met.

15.4 Key links to other topics in the code

15.4.1 Implementing employment equity - Employees from designated groups who are provided with effective training and development interventions are likely to perform better. This may contribute towards improved workplace performance and may increase the profile of employees from designated groups.

15.4.2 Performance management - The performance management system should include the measurement of line managers and supervisors in relation to the contribution they make to the skills development of employees.

15.4.3 Promotion - Effective training and development of employees from designated groups may enhance their skills and knowledge and ultimately their chances for career advancement.

16. Promotion and transfer

16.1 Scope

Promotions and transfers are processes that facilitate employee mobility for various purposes, including career development, succession planning and operational requirements. This should facilitate representation of members of designated groups in all occupational categories and levels, thus meeting employment equity objectives.

16.2 Impact on employment equity

Promotions and transfers have the potential to impact on numerical goals and accelerate equitable representation of all groups in occupational categories and levels within a workplace. These initiatives are key drivers for employment equity in that they can involve fast tracking the advancement towards achieving numerical targets.

16.3 Policy and practice

16.3.1 Employers are prohibited from unfair discrimination in promotion and transfer decisions. One of the mechanisms for eliminating unfair discrimination is to ensure that written policies and practices specify the criteria, which apply to promotions and transfers. Managers implementing the policies and practices should be monitored to ensure that they are not applying these inconsistently.

16.3.2 An employer may implement a policy of preference toward members of designated groups in transfers and promotions as a legitimate affirmative action measure.
16.3.3 Lateral transfers to equivalent positions may be effectively used to achieve employment equity targets. Reasonable provision must be made where an employee requests a transfer.

16.4 Key links to other topics in the code

16.4.1 Retention - Promotions and transfers may contribute to retention, specifically in instances where employees from designated groups do not feel sufficiently challenged or rewarded in an existing position.

16.4.2 Skills Development - Linking promotions and transfers to development and growth opportunities for designated groups will ensure that they do not occur in isolation from numerical targets and employment equity objectives.

16.4.3 Remuneration - Linking promotions and transfers to remuneration may encourage employees to transfer to a less popular operational or geographic area.

17. Confidentiality and disclosure of information

17.1 Scope

17.1.1 This section deals with information employees are entitled to obtain from their employers and information employers may disclose about their employees.

17.1.2 The relevant provisions of Section 16 of the Labour Relations Act, 1995, apply to the disclosure of information in terms of this part of the Code, in addition to any other laws, including the Regulation of Interception of Communications and Communication-Related Information Act, 2002 and the Promotion of Access to Information Act, 2000.

17.2 Impact on employment equity

17.2.1 When engaging in employment equity consultation, the Act requires that designated employers disclose to consulting parties all relevant information.

17.2.2 The object of disclosure is to make the process of consultation as participative and as meaningful as possible to ensure good faith engagement and to develop trust between employers and employees.

17.2.3 Timeous disclosure of information will facilitate consensus regarding appropriate employment equity initiatives to reduce challenges.

17.2.4 An employer must disclose information that is relevant and that is reasonably required by the consulting parties to engage effectively on employment equity.
17.2.5 Information is generally considered to be relevant if it is likely to influence the formulation, presentation or pursuance of a position or demand proposed by a consulting party in their deliberations on employment equity.

17.3 Policy and practice

Type of information

17.3.1 The employer can comply with many of these requirements by referring the consulting parties to the documents that contain the necessary information if they are reasonably accessible to such consulting parties.

17.3.2 Information should be supplied in a manner and format that are accessible to all employees in the workplace.

Confidentiality and Disclosure

17.3.3 Private, personal information is regarded as confidential information. It will include information that may be typically found in an employee's personnel file. This may include information concerning the employee’s financial circumstances, marital circumstances, criminal record or health status (e.g. HIV and AIDS, alcoholism, etc.). The employer may not disclose this kind of information unless the employee consents in writing.

Collection and communication of employee data: Balancing the need for information against the right to privacy

17.3.4 Information is collected on employees from the time when they are job applicants. The collection and disclosure of information may in some circumstances violate the right to privacy. It is therefore important for employers to balance the need for requiring certain information against the need to maintain high standards of personal privacy and the confidences of third parties.

17.3.5 An employer should not collect personal information from employees, unless:

- The information is collected for a lawful purpose that is directly related and necessary to implement employment equity in the workplace, e.g. for making recruitment, development and promotion decisions; and
- The information is reasonably necessary for that purpose.

17.3.6 An employer may not collect personal data regarding an employee’s sex life, political, religious or other beliefs, or criminal convictions, except in exceptional circumstances where such information may be directly relevant to an employment decision.
Security of disclosed information

17.3.7 Information collected on employees, such as race, gender, sexual orientation, religion, performance, training records, psychological assessments or health, or any other information imparted by employees to their employer, should be kept secure and only those entitled to see it in the course of their duties should have access.

17.3.8 For governance purposes, employers should ideally have a written security policy for the gathering and disclosure of information. Employers should keep a written record of the names of those, whether internal or external to the employer, to whom employee information has been revealed and for what purpose.

Employee rights

17.3.9 Employees should be afforded opportunities of checking the accuracy of their information and rectifying and updating it, particularly where it relates to employment equity.

17.3.10 Employees can insist on the rectification or deletion of incorrect or misleading information. Where information is corrected, those Alterations should be communicated to subsequent users of the information.

17.4 Key links to other topics in the code

17.4.1 Employment equity implementation - The disclosure of information by an employer must occur within the context of an employer's employment equity policies. Disclosure of information is a necessary pre-requisite to meaningful consultation by parties, as required under the Act.

17.4.2 Recruitment and Selection - Information about employees, which is collected by an employer during the recruitment process or during employment, must be collected for a lawful purpose and must be directly related to the function or job requirement.

17.4.3 Assessments - An employee's manager, with the assistance of an expert in testing, should only consider psychological assessments of an employee if the assessments are current.

18. Retention scope

The retention of all employees, specifically employees from designated groups, is a key challenge for employers given the opportunities for mobility that exist in the global economy. This section identifies some challenges and their implications for implementing employment equity to retain employees from designated groups.

IMPACT ON EMPLOYMENT EQUITY Retention of employees from designated groups is critical for achieving and sustaining numerical targets and goals as envisaged in the Act. Employers who seek to retain their talented and skilled
employees, particularly those from designated groups, should develop and implement retention strategies.

18.1 Policy and practice

18.1.1 Employers may consider identifying trends that exist in their workplaces regarding the reasons for termination. This will enable employers to develop appropriate strategies to retain employees, particularly employees from designated groups. These strategies should be directed at removing barriers that cause termination of employment.

18.1.2 Employers may consider negotiating retrenchment criteria that deviate from the "last in first out" principle, where the implementation of this principle will detrimentally affect the representivity of designated groups in that workplace.

18.1.3 Employers could also implement various incentives to promote retention.

18.2 Key links to other topics in the code

18.2.1 Induction - An effective induction process should be implemented to integrate employees, particularly those from designated groups, into the workplace.

18.2.2 Terms and conditions of employment - Equitable and favourable terms and conditions of employment as well as an environment that affirms diversity contribute to long-term employee retention.

18.2.3 Skills development - Providing equitable training and development opportunities contribute towards employee retention, especially if this is linked to career development.

18.2.4 Remuneration - fair remuneration contributes to the retention of employees.

18.2.5 Performance Management and Reward - Recognising and rewarding good performance may contribute to retention.

18.2.6 Termination - An exit interview may provide information on the reasons for employee turnover.

19. Harassment

19.1 Scope

This section deals with the elimination of harassment in the workplace. It provides a framework for facilitating and promoting the development and implementation of policies and practices that result in workplaces free of harassment where employers, employees and associated parties put a premium on one another's integrity and
dignity. This in turn builds a workforce that respects one another’s privacy and the right to equity and equality in the workplace.

19.2 Impact on employment equity

19.2.1 Section 6 of the Act and other related legislation recognize that harassment in the workplace, whether direct or indirect, is a form of unfair discrimination and is prohibited on one or a combination of the following grounds: Race, gender, sex, 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.

19.2.2 Harassment is unwanted or unsolicited attention based on one or more of the prohibited grounds. It involves conduct that is unwanted by the person to whom it is directed and who experiences the negative consequences of that conduct. The conduct can be physical, verbal or non-verbal. It affects the dignity of the affected person or creates a hostile working environment. It often contains an element of coercion or abuse of power by the harasser.

19.3 Policy and practice

19.3.1 Every employer is under obligation in terms of the Act to take steps to prevent workplace harassment. This includes ensuring that a clear rule prohibiting harassment and other forms of unfair discrimination that exits in the workplace, and that all employees understand it. This should be incorporated in a formal written policy like a code of conduct with an appropriate dispute resolution procedure that is communicated throughout the workplace and displayed in prominent places.

19.3.2 The policy should make it clear that harassment is a form of unfair discrimination, and will be regarded by the employer as a serious form of misconduct, which will be subjected to disciplinary action and may result in dismissal.

19.3.3 On an incremental scale of "minor", "serious" and "very serious", harassment is a very serious offence. The disciplinary code of an employer should provide for very serious offences like harassment by placing a waiver on all warning procedures, and moving directly to a disciplinary enquiry that could be followed by a hearing.

19.4 Key links to other topics in the code

19.4.1 Recruitment & Selection - Applicants for a job are normally most vulnerable to harassment in exchange for special favours. Therefore special attention should be placed on behaviour that is likely to be interpreted as harassment.
19.4.2. Promotion & Transfer - Mechanisms should be put in place to prevent ‘welcome’ or ‘unwelcome’ harassment that could be seen as influencing promotion and transfer decisions.

19.4.3. Discipline, Grievance & Dispute Resolution – Appropriate policies and procedures, which promote appropriate behaviour and serves as a guard against harassment, should be developed and implemented by employers.

20. Scope

20.1.1. This section deals with issues employers may consider when managing grievances filed by employees or disciplining employees for transgressing workplace policies and practices.

20.2 Impact on employment equity

20.2.1 The manner in which discipline and grievance are managed can generate conflict in a workplace and may undermine employment equity achievements and policies. Employers should ensure that their disciplinary and grievance policies are consistently and impartially applied.

20.2.2 This section of the Code is not intended to serve as a substitute for grievance or disciplinary procedures concluded at a workplace. An employer should evaluate whether their existing grievance, discipline and dispute resolution procedures are conducive to dealing with unfair discrimination and harassment.

20.3 Policy and practice

The Grievance Process

20.3.1 Unfair discrimination or allegations of a breach of the Act should be dealt with as quickly and as thoroughly as possible. Conflict is best managed if addressed expeditiously and according to fair and impartial principles.

20.3.2 Employers should endeavour to protect complainants and ensure that complaints and grievances lodged are dealt with sensitively and discretely.

20.3.3 Employers should take disciplinary action against any employee who retaliates against a fellow employee for using the grievance procedure to address a concern or grievance concerning an alleged act of harassment, unfair discrimination or a breach of the Act.

20.3.4 Employers should consider workplace policies that make any act of unfair discrimination or breach of the Act a form of very serious misconduct.

20.3.5 Employers should ensure that employees are aware of or can reasonably be expected to be aware of workplace policies and practices, particularly in relation to unfair discrimination.
20.3.6 Employers are responsible for ensuring the consistent application and enforcement of policies to avoid allegations of arbitrary or unfair application of discipline on the basis of one or more of the prohibited grounds. Policies on discipline must apply equally to all employees.

20.3.7 Disciplinary action should seek to correct an employee's behaviour. Disciplinary measures may include counselling, warnings or creative solutions. The primary aim of discipline should be to encourage a culture of respect for difference and dignity.

20.3.8 Employers should value and encourage greater awareness of diversity.

20.3.9 Employers should keep a record of all grievances, disputes and disciplinary actions taken and conduct regular audits to determine the extent to which:

- employees have utilised the procedures. This information should be disaggregated by race, gender and disability;
- the grievances filed by employees where breaches of the Act are alleged; and
- the outcome of processes.

20.3.10 Employers may use the outcome of this review to assess whether its policies are being utilised and whether they are being used to address grievances and disputes that arise in the workplace in relation to unfair discriminatory practices or any other breaches of the Act.

20.4 **Key links to other topics in the code**

20.4.1. **Working environment -** Conflict is inherent in workplaces. Employers need to manage the manifestations of conflict in a manner that discourages unfair discrimination.

20.4.2. **Harassment -** Employees must be made aware that harassment is serious misconduct, and it will be dealt with effectively and efficiently.

**Part C: ending employment**

**21 Terminating employment**

**21.1 Scope**

An employer may terminate the employment of an employee by agreement or for reasons based on misconduct, incapacity or for operational requirements. This section outlines some of the key employment equity considerations in ensuring that employment is terminated in a fair and consistent manner.
21.2 Impact on employment equity

21.2.1 Terminations should be fairly and lawfully effected and must serve the purposes of the employer without discriminating against any employee.

21.2.2 In the context of termination for operational requirements, an employer, when consulting with the affected party, should consider the appropriateness of adopting the standard selection criteria of Last in First out (LIFO) as this may undermine the retention of designated groups. In the context of employment equity, traditional criteria may undermine the progress made to achieve numerical targets and would need to be revisited to ensure that they support the achievement of employment equity objectives.

21.3 Policy and practice

21.3.1 In order to achieve numerical targets, employers may initiate voluntary exit strategies to make space for designated groups. This strategy should be preceded by consultation in order for it to be accepted as a legitimate affirmative action measure. It should be transparent and effectively communicated to those existing incumbents who may be affected. Employers should be guided by the long-term viability and sustainability of institutional knowledge in making the decisions to use voluntary exits of non-designated groups, as a strategy to achieve numerical targets. An employer should implement this strategy in tandem with skills development, career development and succession planning to ensure that skills that are core to the employer are replaced.

21.3.2 When terminating the employment of an employee for reasons of incapacity based on disability or chronic illness, employers should refer to the Code of Good Practice on Key Aspects of HIV/AIDS and Employment and the Code of Good Practice on the Employment of People with Disabilities.

21.4 Key links to other topics in the code

21.4.1 Skills development - An employer should provide skills training to its managers to ensure that they do not act in a discriminatory manner.

21.4.2 Disputes and grievance resolution - Termination of employment must be conducted according to fair labour practices and in line with the employer's procedures, including its discipline, grievance and dispute resolution procedures.
22. Exit interviews

22.1 Scope

22.1.1 Exit interviews are conducted by the employer with the employee at the time of voluntary termination, retirement or retrenchment.

22.1.2 The purpose of an exit interview is to obtain information about the employee’s experience during employment. These exit interviews could provide valuable information about barriers and other factors that could have contributed to the termination.

22.2 Impact on employment equity

An employer should analyse the information it obtains from exit interviews and identify trends, which should inform barrier removal initiatives.

22.3 Policy and practice

22.3.1 To make exit interviews an effective process, employers should consider:

- Conducting a standard exit interview providing a set of guidelines for consistent application;
- Conducting an exit interview that allows the departing employee to comment on any discriminatory practices in the workplace;
- Senior employees, who are skilled at obtaining information, should conduct exit interviews. Alternatively, an employer may consider using an independent person or persons from designated groups to ensure that the departing employee is able to speak as openly and honestly as possible about their experiences; and
- Information disclosed in exit interviews is confidential and can only be used to identify themes or problems in the workplace.

22.3.2 Employers may consider developing periodic reports reflecting trends that may have emerged during exit interviews, including the identification of barriers experienced by employees from designated groups.

22.3.3 Senior management should take action to eliminate barriers that are identified during exit interviews.

22.3.4 Employers may consider comparing their staff turnover rates against similar jobs within the same sector. If turnover is higher than these benchmarks then an employer should consider initiating interventions to address the problems.

22.4 Key links to other topics in the code

22.4.1 Retention - There are numerous factors that impact on the retention of employees from designated groups. These factors include work climate,
Employment Equity

competitive remuneration, effective performance management, learning pathways, organisational culture, incentive schemes, challenging work assignments, work-life balance and workplace environment.

1.3 GNR.1345 of 2002: Code of Good Practice: Key Aspects on the Employment of People with Disabilities

Arrangement of regulations

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1. Foreword

[Foreword amended by GN 1064 of 2002.]

The Employment Equity Act, No. 55, 1998 constitutes one of the key legislative and policy interventions within the ethos of South Africa’s new constitution to give effect to the provisions relating to removal of policies which result in inequalities in the country. Specific emphasis is placed to ensure equity, the right to equal protection and benefit of the law, inter alia, by people with disabilities.

Although many barriers such as widespread ignorance, fear and stereotypes have caused people with disabilities to be unfairly discriminated against in society and in employment, South Africa can take pride in its efforts to formulate policies to protect the rights of people with disabilities.

Unfair discrimination against people with disabilities is perpetuated in many ways, including the following:

- Unfounded assumptions about the abilities and performance of job applicants and employees with disabilities;
- Advertising and interviewing arrangements which either exclude people with disabilities or limit their opportunities to prove themselves;
- Using selection tests which discriminate unfairly;
- Inaccessible workplaces; and
- Inappropriate training for people with disabilities.

The Code of Good Practice on the Employment of People with Disabilities is thus part of a broader equality agenda for people with disabilities to have their rights recognised in the labour market where they experience high levels of unemployment and often remaining in low status jobs or earn lower than average remuneration. This is particularly important since disability is a natural part of the human experience and in no way diminishes the rights of individuals to belong and contribute to the labour market. When opportunities and reasonable accommodation is provided, people with disabilities can contribute valuable skills and abilities to every workplace, and contribute to the economy of our society.

2. Aims

2.1 The Employment Equity Act, No. 55 of 1998 protects people with disabilities against unfair discrimination in the workplace and directs employers to implement affirmative action measures to redress discrimination.

2.2 The Code is a guide for employers and employees on promoting equal opportunities and fair treatment for people with disabilities as required by the Employment Equity Act (the Act).

2.3 The Code is intended to help employers and employees understand their rights and obligations promote certainty and reduce disputes to ensure that people with disabilities can enjoy and exercise their rights at work.

2.4 The Code is intended to help create awareness of the contributions people with disabilities can make and to encourage employers to fully use the skills of such persons.

3. Status of code

3.1 The Code is not an authoritative summary of the law, nor does it create additional rights and obligations. Failure to observe the Code does not, by itself, render a person liable in any proceedings. Nevertheless when the courts and tribunals interpret and apply the Employment Equity Act, they must consider it.

3.2 The Code should be read in conjunction with other relevant Codes of Good Practice issued by the Minister of Labour.

3.3 The Code is intentionally general because every person and situation is unique and departures from the guidelines in this code may be justified in appropriate circumstances.
3.4 Employers, employees and their organizations should use the Code to develop, implement and refine disability equity policies and programmes to suit the needs of their own workplaces.

4. Legal framework

The Code is issued in terms of section 54 (1) (a) of the Employment Equity Act, No. 55, 1998 and is based on the Constitutional principle that no one may unfairly discriminate against a person on the grounds of disability.

5. Definition of people with disabilities

5.1 Definition of persons with disabilities under the Act:

The scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment. People are considered as persons with disabilities who satisfy all the criteria in the definition:

i. having a physical or mental impairment;
ii. which is long term or recurring; and
iii. which substantially limits their prospects of entry into, or advancement in employment.

5.1.1 Impairment:

i. An impairment may either be physical or mental or a combination of both.
ii. “Physical” impairment means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired.
iii. “Mental” impairment means a clinically recognized condition or illness that affects a person’s thought processes, judgment or emotions.

5.1.2 Long-term or recurring:

i. “Long-term” means the impairment has lasted or is likely to persist for at least twelve months.
ii. “Recurring impairment” is one that is likely to happen again and to be substantially limiting (see below). It includes a constant chronic condition, even if its effects on a person fluctuate.
iii. “Progressive conditions” are those that are likely to develop or change or recur. People living with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially limiting. Progressive or recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities.
5.1.3 Substantially limiting:

i. Impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person’s ability to perform the essential functions of the job for which they are being considered.

ii. Some impairments are so easily controlled, corrected or lessened, that they have no limiting effects. For example, a person who wears spectacles or contact lenses does not have a disability unless even with spectacles or contact lenses the person’s vision is substantially impaired.

iii. An assessment to determine whether the effects of an impairment are substantially limiting, must consider if medical treatment or other devices would control or correct the impairment so that its adverse effects are prevented or removed.

iv. For reasons of public policy certain conditions or impairments may not be considered disabilities. These include but are not limited to:

   a. sexual behaviour disorders that are against public policy;
   b. self-imposed body adornments such as tattoos and body piercing;
   c. compulsive gambling, tendency to steal or light fires;
   d. disorders that affect a person’s mental or physical state if they are caused by current use of illegal drugs or alcohol, unless the affected person is participating in a recognized programme of treatment;
   e. normal deviations in height, weight and strength; and conventional physical and mental characteristics and common personality traits.

f. 

v. An assessment may be done by a suitably qualified person if there is uncertainty as to whether an impairment may be substantially limiting.

[Sub-para. (v) amended by GN 1064 of 2002.]

6. Reasonable accommodation for people with disabilities

6.1 Employers should reasonably accommodate the needs of people with disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person’s capacity to fulfil the essential functions of a job.

6.2 Employers should adopt the most cost-effective means that is consistent with effectively removing the barriers to perform the job, and to enjoy equal access to the benefits and opportunities of employment.

6.3 Reasonable accommodation requirement applies to applicants and employees with disabilities who are suitably qualified for the job and may be required:

   i. during the recruitment and selection processes;
   ii. in the working environment;
   iii. in the way work is usually done, evaluated and rewarded; and
   iv. in the benefits and privileges of employment.
6.4 The obligation to make reasonable accommodation may arise when an applicant or employee voluntarily discloses a disability related accommodation need or when such a need is reasonably self-evident to the employer.

6.5 Employers must also accommodate employees when work or the work environment changes or impairment varies which affects the employee’s ability to perform the essential functions of the job.

6.6 The employer should consult the employee and, where reasonable and practical, technical experts to establish appropriate mechanisms to accommodate the employee.

6.7 The particular accommodation will depend on the individual, the degree and nature of impairment and its effect on the person, as well as on the job and the working environment.

6.8 Reasonable accommodation may be temporary or permanent, depending on the nature and extent of the disability.

6.9 Reasonable accommodation include but not limited to:

i. adapting existing facilities to make them accessible;
ii. adapting existing equipment or acquiring new equipment including computer hardware and software;
iii. re-organizing workstations;
iv. changing training and assessment materials and systems;
v. restructuring jobs so that non-essential functions are re assigned;
vi. adjusting working time and leave; and
vii. providing specialized supervision, training and support in the workplace.

6.10 An employer may evaluate work performance against the same standards as other employees but the nature of the disability may require an employer to adapt the way performance is measured.

6.11 The employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.

6.12 “Unjustifiable hardship” is action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.

6.13 An accommodation that imposes an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time.
7. **Recruitment and selection**

7.1 **Recruitment**

7.1.1 When employers recruit they should:

i. identify the inherent requirements of the vacant position;

ii. describe clearly the necessary skills and capabilities required for the job;

iii. set reasonable criteria for selection, preferably in writing, for job applicants for such vacant positions.

7.1.2 The “inherent requirements of the job” are those requirements the employer stipulates as necessary for a person to be appointed to the job, and are necessary in order to enable an employee to perform the essential functions of the job.

7.1.3 Application forms should focus on identifying an applicant's ability to perform the inherent requirements of the job.

7.1.4 Advertisements should be accessible to persons with disabilities and, where reasonable and practical, circulated to organizations that represent the interests of people with disabilities.

7.1.5 Advertisements or notices should include sufficient detail about the inherent requirements of the job so that potential applicants with disabilities can make an informed decision.

7.1.6 Employers may not include criteria that are not necessary to perform the essential functions of the job because selection based on non-essential functions may unfairly exclude people with disabilities.

7.1.7 On request, and if reasonable in the circumstances notices and advertisements should be provided in a format appropriate to persons with disabilities, such as large print, Braille, or audiotape.

7.2 **Selection:**

7.2.1 Subject to reasonable accommodation, employers should apply the same criteria to test the ability of people with disabilities as are applied to other applicants.

7.2.2 The purpose of the selection process is to assess whether or not an applicant is suitably qualified. This may require a two-stage process if an applicant has a disability:

i. Determining whether an applicant is suitably qualified;

ii. Determining whether a “suitably qualified applicant” needs any accommodation to be able to perform the essential functions of the job.
7.2.3 When assessing if an applicant is suitably qualified, an employer may not request information about actual or perceived disability from a previous employer or third party unless with the written consent of the applicant.

7.2.4 Employers should monitor their criteria for selection. If these criteria tend to exclude people with disabilities, they should be reviewed to ensure that they do not unfairly discriminate against persons with disabilities.

7.3 Interviews:

7.3.1 Selection interviews should be objective and unbiased. Interviewers should avoid assumptions about people with disabilities.

7.3.2 If an applicant has disclosed a disability or has a self-evident disability, the employer must focus on the applicant’s qualifications for the work rather than any actual or presumed disability but may enquire and assess if the applicant would, but for the disability, be suitably qualified.

7.3.3 Interviewers should ask applicants referred to in 7.3.2 above, to indicate how they would perform essential functions and if accommodation is required.

7.3.4 If the employer knows in advance that an applicant has a disability, or if the applicant has a self-evident disability, the employer should if necessary, make reasonable accommodation during the interview.

7.4 Conditional Job Offers:

7.4.1 If an applicant with a disability is suitably qualified, an employer may make a job offer conditional on medical or functional testing to determine an applicant’s actual or potential ability to perform the essential functions of a specific job.

7.4.2 The testing must comply with the statutory requirements and should determine if the applicant is able to perform the essential functions of the job, with or without reasonable accommodation.

7.4.3 An employer may test applicants with disabilities for a specific job and not require all other applicants to undergo testing.

7.4.4 A conditional job offer may only be made to one person at a time, not to all applicants with disabilities that may have applied for the job.

7.4.5 The employer may withdraw the job offer if the testing shows that:

i. accommodation requirements would create unjustifiable hardship; or
ii. there is an objective justification that relates to the inherent requirements of the job; or
iii. there is an objective justification that relates to health and safety.
7.5 Terms and Conditions of Employment:

7.5.1 An employer may not:

a. employ people with disabilities or,
b. retain employees who become disabled, on less favourable terms and conditions than employees doing the same work, for reasons connected with the disability.

7.5.2 No person may harass an employee on the ground of disability. Such harassment may include teasing, ridicule and offensive remarks. Any alleged harassment should be handled by the employer in terms of the guidelines contained in the Code of Good Practice on the Handling of Sexual Harassment Cases published in terms of the Labour Relations Act, 1995.

8. Medical and psychological testing and other similar assessments

8.1 Medical Testing:

8.1.1 Tests must comply with sections 7 and 8 of the Employment Equity Act, No. 55 of 1998. They must be relevant and appropriate to the kind of work for which the applicant or employee is being tested.

8.1.2 Employers should establish that tests do not unfairly exclude and are not biased in how or when they are applied, assessed or interpreted.

8.1.3 Tests to establish the health of an applicant or employee should be distinguished from tests that assess the ability to perform essential job functions or duties.

8.1.4 Testing to determine the health status of an employee should therefore only be carried out after an employer has established that the person is in fact competent to perform the essential job functions or duties and after a job offer has been made. The same applies to medical testing for admission to membership of an employee benefit scheme.

8.1.5 An employer who requires a person to undergo any medical, psychological testing and other similar assessments must bear the costs of the test.

8.2 Testing after Illness or Injury

8.2.1 If an employee has been ill or injured and it appears that the employee is not able to perform the job, the employer may require the employee to agree to a functional determination of disability.

8.2.2 Such medical or other appropriate tests shall be used to:

a. Determine if the employee can safely perform the job; or
8.3 Health Screening and Safety

8.3.1 Employers are required to provide and maintain a safe and healthy working environment.

8.3.2 An employer should not employ a person if the employer can demonstrate that a person with a disability would represent an actual risk to him or her or other people, which could not be eliminated or reduced by applicable reasonable accommodation.

8.3.3 An employer may withdraw a conditional job offer, or need not retain an employee with a disability in the same position, if an objective assessment shows that the work would expose the employee or others to substantial health risk. This would only apply where there is no reasonable accommodation to mitigate the risk.

8.4 Pre-benefit Medical Examinations

8.4.1 Employees may be required to submit to medical examination or tests before becoming members of employee benefit schemes that are offered within the employment relationship.

8.4.2 The purpose of these examinations is to assess a person’s suitability for membership of a benefit scheme and is not relevant to a person’s capability to perform the inherent requirements of the job.

8.4.3 Therefore an employer may not refuse to recruit, train, promote or otherwise prejudice any person only because that person has been refused membership of a benefit scheme.

9. Placement

9.1 Placement involves the orientation and initial training of a new employee.

9.2 Orientation and initial training should be accessible, responsive to and able to reasonably accommodate the needs of employees who have disabilities.

9.3 Subject to reasonable accommodation, new employees with disabilities and other employees who do not have disabilities must be treated equally.

9.4 An employer must make an effort to include disability sensitisation in the orientation/induction and other relevant training programmes of their organisations.
10. **Training and career advancement**

10.1 Employees with disabilities should be consulted in order to ensure input specific to their career advancement.

10.2 Facilities and materials for training, work organisation and recreation should be accessible to employees with disabilities.

10.3 Systems and practices to evaluate work performance should clearly identify and fairly measure and reward performance of the essential functions of the job. Work that falls outside the essential functions of the job should not be evaluated.

11. **Retaining people with disabilities**

11.1 Employees who become disabled during employment should, where reasonable be re-integrated into work. Employers should seek to minimize the impact of the disability on employees.

11.2 If an employee becomes disabled, the employer should consult the employee to assess if the disability can be reasonably accommodated.

11.3 If an employee becomes disabled, the employer should maintain contact with the employee and where reasonable encourage early return-to-work. This may require vocational rehabilitation, transitional work programmes and where appropriate, temporary or permanent flexible working time.

11.4 If an employee is frequently absent from work for reasons of illness or injury, the employer should consult the employee to assess if the reason for absence is a disability that requires reasonable accommodation.

11.5 If reasonable, employers should explore the possibility of offering alternative work, reduced work or flexible work placement, so that employees are not compelled or encouraged to terminate their employment.

12. **Termination of employment**

12.1 If the employer is unable to retain the employee in employment in terms of paragraph 11 above, then the employer may terminate the employment relationship.

12.2 When employees who have disabilities are dismissed for operational requirements, the employer should ensure that any selection criteria used do not either directly or indirectly unfairly discriminate against people with disabilities.

12.3 Employers who provide disability benefits should ensure that employees are appropriately advised before they apply for the benefits available and before resigning from employment because of a medical condition.
13. **Workers’ compensation**

13.1 Employers should assist employees whose disability arose from a work related illness or accident, to receive the relevant statutory compensation, including compensation from the Compensation Fund and the Unemployment Insurance Fund.

14. **Confidentiality and disclosure of disability**

14.1 Confidentiality:

14.1.1 Subject to sections 720 and 18 of the Employment Equity Act21, employers, including health and medical services personnel, may only gather private information relating to employees if it is necessary to achieve a legitimate purpose, with the written consent of the person.

14.1.2 Employers must protect the confidentiality of the information that has been disclosed and must take care to keep records of private information relating to the disability of applicants and employees confidential and must be kept separate from general personnel records.

14.1.3 When an employer no longer requires this information, it must be destroyed.

14.1.4 Subject to paragraph 14.2.7, employers may not disclose any information relating to a person’s disability without the written consent of the employee concerned unless legally required.

14.2 Disclosure:

14.2.1 People with disabilities are entitled to keep their disability status confidential. But if the employer is not aware of the disability or the need to be accommodated, the employer is not obliged to provide it. This does not absolve an employer from their responsibility not to discriminate unfairly, directly or indirectly against job applicants.

14.2.2 A person with a disability may disclose their disability at any time, even if there is no immediate need for reasonable accommodation.

14.2.3 If the disability is not self-evident the employer may require the employee to disclose sufficient information to confirm the disability or the accommodation needs.

14.2.4 If on reasonable grounds the employer does not believe that the employee is disabled, or that the employee requires accommodation, the employer is entitled to request the employee to be tested to determine the employee’s ability or disability, at the expense of the employer.

14.2.5 As information about disability may be technical, employers should ensure that a competent person interprets the information.
14.2.6 If an employer requires further information this must be relevant to a specific job and its essential functions.

14.2.7 An employer may not reveal the fact of an employee’s disability, unless this is required for the health or safety of the person with the disability or other persons.

14.2.8 The employer may, after consulting the person with the disability, advise relevant staff that the employee requires accommodation.


15. **Employee benefits**

15.1 An employer who provides or arranges for occupational insurance or other benefit plans directly or through a separate benefit scheme or fund, must ensure that they do not unfairly discriminate, either directly or indirectly against people with disabilities.

15.2 Employees with disabilities may not be refused membership of a benefit scheme only because they have a disability.

15.2.1 To increase job security for employees who have disabilities and to reduce the costs of benefit schemes, designated employers should investigate and, if reasonable, offer benefit schemes that reasonably accommodate persons with disabilities. These include—

i. vocational rehabilitation, training and temporary income replacement benefits for employees who, because of illness or injury, cannot work for an extended period, and

ii. financial compensation for employees who because of a disability are able to continue to work but at lower levels of pay than they enjoyed before becoming disabled.

1.4 **GN 1367 of 1998: Notice of code of good practice on the handling of sexual harassment cases**

1. **Introduction**

1. The objective of this code is to eliminate sexual harassment in the workplace.

2. This code provides appropriate procedures to deal with the problem and prevent its recurrence.

3. This code encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another’s integrity and dignity, their privacy, and their right to equity in the workplace.
2. Application of the code

1. Although this code is intended to guide employers and employees, the perpetrators and victims of sexual harassment may include:
   a. Owners.
   b. Employers.
   c. Managers.
   d. Supervisors.
   e. Employees.
   f. Job applicants.
   g. Clients.
   h. Suppliers.
   i. Contractors.
   j. Others having dealings with a business.

2. Nothing in 2(1) above confers the authority on employers to take disciplinary action in respect of non-employees.

3. A non-employee who is a victim of sexual harassment may lodge a grievance with the employer of the harasser where the harassment has taken place in the workplace or in the course of the harasser’s employment.

3. Definition of sexual harassment

1. Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

2. Sexual attention becomes sexual harassment if:
   a. The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
   b. The recipient has made it clear that the behaviour is considered offensive; and/or
   c. The perpetrator should have known that the behaviour is regarded as unacceptable.
4. Forms of sexual harassment

1. Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:

   a. Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.

   b. Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person’s body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person’s sex life, and unwelcome whistling directed at a person or group of persons.

   c. Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

   d. Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.

2. Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases.

5. Guiding principles

1. Employers should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which victims of sexual harassment will not feel that their grievances are ignored or trivialised, or fear reprisals. Implementing the following guidelines can assist in achieving these ends:

   a. Employers/management and employees are required to refrain from committing acts of sexual harassment.

   b. All employers/management and employees have a role to play in contributing towards creating and maintaining a working environment in which sexual harassment is unacceptable. They should ensure that their standards of conduct do not cause offence and they should discourage unacceptable behaviour on the part of others.

   c. Employers/management should attempt to ensure that persons such as customers, suppliers, job applicants and others who have dealings with the business, are not subjected to sexual harassment by the employer or its employees.
d. Employers/management are required to take appropriate action in accordance with this code, when instances of sexual harassment which occur within the workplace are brought to their attention.

2. This code recognises the primacy of collective agreements regulating the handling of sexual harassment cases, and is not intended as a substitute for disciplinary codes and procedures containing such measures, where these are the subject of collective agreements, or the outcome of joint decision making by an employer and a workplace forum. However, collective agreements and policy statements should take cognisance of and be guided by the provisions of this code.

6. Policy statements

1. As a first step in expressing concern and commitment to dealing with the problem of sexual harassment, employers should issue a policy statement which should provide that:
   a. All employees, job applicants and other persons who have dealings with the business, have the right to be treated with dignity.
   b. Sexual harassment in the workplace will not be permitted or condoned.
   c. Persons who have been subjected to sexual harassment in the workplace have a right to raise a grievance about it should it occur and appropriate action will be taken by the employer.

2. Management should be placed under a positive duty to implement the policy and take disciplinary action against employees who do not comply with the policy.

3. A policy on sexual harassment should also explain the procedure which should be followed by employees who are victims of sexual harassment. The policy should also state that:
   a. Allegations of sexual harassment will be dealt with seriously, expeditiously, sensitively and confidentially.
   b. Employees will be protected against victimisation, retaliation for lodging grievances and from false accusations.

4. Policy statements on sexual harassment should be communicated effectively to all employees.

7. Procedures

Employers should develop clear procedures to deal with sexual harassment. These procedures should ensure the resolution of problems in a sensitive, efficient and effective way.

1. Advice and Assistance:
Sexual harassment is a sensitive issue and a victim may feel unable to approach the perpetrator, lodge a formal grievance or turn to colleagues for support. As far as is practicable employers should designate a person outside of line management whom victims may approach for confidential advice. Such a person:

a. Could include persons employed by the company to perform inter alia such a function, a trade union representative or co-employee, or outside professionals.
b. Should have the appropriate skills and experience or be properly trained and given adequate resources.
c. Could be required to have counselling and relevant labour relations skills and be able to provide support and advice on a confidential basis.

2. Options to resolve a problem:

a. Employees should be advised that there are two options to resolve a problem relating to sexual harassment. Either an attempt can be made to resolve the problem in an informal way or a formal procedure can be embarked upon.
b. The employee should be under no duress to accept one or the other option.

3. Informal procedure:

a. It may be sufficient for the employee concerned to have an opportunity where she/he can explain to the person engaging in the unwanted conduct that the behaviour in question is not welcome, that it offends them or makes them uncomfortable, and that it interferes with their work.
b. If the informal approach has not provided a satisfactory outcome, if the case is severe or if the conduct continues, it may be more appropriate to embark upon a formal procedure. Severe cases may include: sexual assault, rape, a strip search and quid pro quo harassment.

4. Formal procedure:

Where a formal procedure has been chosen by the aggrieved, a formal procedure for resolving the grievance should be available and should:

a. Specify to whom the employee should lodge the grievance.
b. Make reference to timeframes which allow the grievance to be dealt with expeditiously.
c. Provide that if the case is not resolved satisfactorily, the issue can be dealt with in terms of the dispute procedures contained in item 7(7) of this code.

5. Investigation and disciplinary action:

a. Care should be taken during any investigation of a grievance of sexual harassment that the aggrieved person is not disadvantaged, and that the position of other parties is not prejudiced if the grievance is found to be unwarranted.
b. The Code of Good Practice regulating dismissal contained in Schedule 8 of this Act, reinforces the provisions of Chapter VIII of
this Act and provides that an employee may be dismissed for serious misconduct or repeated offences. Serious incidents of sexual harassment or continued harassment after warnings are dismissible offences.

c. In cases of persistent harassment or single incidents of serious misconduct, employers ought to follow the procedures set out in the Code of Practice contained in Schedule 8 of this Act.

d. The range of disciplinary sanctions to which employees will be liable should be clearly stated, and it should also be made clear that it will be a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment.

6. Criminal and civil charges:

A victim of sexual assault has the right to press separate criminal and/or civil charges against an alleged perpetrator, and the legal rights of the victim are in no way limited by this code.

7. Dispute resolution:

Should a complaint of alleged sexual harassment not be satisfactorily resolved by the internal procedures set out above, either party may within 30 days of the dispute having arisen, refer the matter to the CCMA for conciliation in accordance with the provisions of section 135 of this Act. Should the dispute remain unresolved, either party may refer the dispute to the Labour Court within 30 days of receipt of the certificate issued by the commissioner in terms of section 135(5).

8. Confidentiality

1. Employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential.

2. In cases of sexual harassment, management, employees and the parties concerned must endeavour to ensure confidentiality in the disciplinary enquiry. Only appropriate members of management as well as the aggrieved person, representative, alleged perpetrator, witnesses and interpreter if required, must be present in the disciplinary enquiry.

3. Employers are required to disclose to either party or to their representatives, such information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of this code.

4. The relevant provisions of section 16 of this Act will apply to the disclosure of information in terms of this code.

9. Additional sick leave

Where an employee’s existing sick leave entitlement has been exhausted, the employer should give due consideration to the granting of additional sick leave in
cases of serious sexual harassment where the employee on medical advice requires trauma counselling.

10. Information and education

1. The Department of Labour should ensure that copies of this code are accessible and available.

2. Employers and employer organisations should include the issue of sexual harassment in their orientation, education and training programmes of employees.

3. Trade unions should include the issue of sexual harassment in their education and training programmes of shop stewards and employees.

4. CCMA commissioners should receive specialised training to deal with sexual harassment cases

1.5 South African Code of Good Practice on HIV and AIDS and the World of Work

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Preamble

HIV and AIDS continue to negatively impact on the livelihoods of millions of persons living with or affected by the epidemic in South Africa. Within the world of work, HIV and AIDS impact severely on productivity as a consequence of ill health resulting in increased absenteeism, low morale, and increased staff turnover due to early deaths and possibly a change in markets and demands for services.

In 2000, South Africa published a Code of Good Practice on Key Aspects of HIV and AIDS and Employment (the Code) in line with the Employment Equity Act. The Code’s primary objective was to guide employers, workers and trade unions to develop and implement HIV and AIDS workplace policies and programmes. The Code was intended to protect and promote mutual respect, dignity and the workers’ rights through the elimination of unfair discrimination against people living with or affected by HIV and AIDS.

This Code has been utilised and referred to extensively in the development and implementation of HIV and AIDS workplace Policies and Programmes. It has also been taken into account in some of the judgments by the Courts in cases of unfair discrimination in relation to HIV.

Subsequent to the adoption of the International Labour Organization (ILO) Recommendation concerning HIV and AIDS and the World of Work, 2010 (No.200), South Africa as a member state took a decision to review its Code and align it to the ILO Recommendation. The revised Code seeks to assist employers, workers and their organizations in developing appropriate responses in order to manage HIV and AIDS, TB and STIs in the world of work within the framework of decent work in both the formal and informal sectors and in the public and the private sectors.
In line with the ILO Recommendation No. 200, this Code provides for further emphasis on the fundamental human rights of all workers, including the principle of gender equality and the broadening of the scope to cover all those involved in the world of work.

1. Definitions

In this Code, unless the context indicates otherwise:

"Affected Persons" means persons whose lives are changed by HIV and AIDS owing to the broader impact of the pandemic;

“AIDS” means Acquired Immunodeficiency Syndrome which results from advanced stages of HIV infection and is characterized by opportunistic infections or HIV-related cancers, or both;

“CCMA” means the Commission for Conciliation, Mediation and Arbitration; 4

“Confidentiality” means the right of every person, worker, job applicant, jobseekers, interns, apprentices, volunteers and laid-off and suspended workers to have their information, including medical records and HIV status kept private;

“Counseling” means a confidential interactive session between a professional and a client aimed to explore and identify the risks of the client to HIV and AIDS;

"EAP" means Employee Assistance Programme offered by many employers which is intended to help workers deal with personal problems that might adversely impact their work performance, health, and well-being;

“the Act” means the Employment Equity Act, 1998 (Act No. 55 of 1998);

“HIV” means the Human Immunodeficiency Virus, a virus that weakens the human immune system;

“Informed consent” means a process of obtaining consent from a patient/worker to ensure that the person fully understands the nature, implications and future consequences of the HIV test before such person consents to take the test;

“PLHIV” means persons living with HIV;

"Post Exposure Prophylaxis" means antiretroviral, including medicines that are taken after exposure or possible exposure to HIV. The exposure may be occupational, as in a needle stick injury, or non-occupational, as in unprotected sex with a person with HIV infection. The latter is sometimes referred to as Non Occupational-Post Exposure Prophylaxis;

“Reasonable accommodation” means any modification or adjustment to a job or to the working environment that enables a person living with HIV and AIDS to have access to or participate or advance in employment;

“STI’s” means Sexually Transmitted Infections which are
spread by the transfer of organism from person to person during sexual contact e.g. syphilis;

“Stigma” means the social mark which, when associated with a person, usually causes marginalisation or presents an obstacle to the full enjoyment of social life by the person living with or affected by HIV and AIDS;

“TB” means tuberculosis which is an infectious disease characterised by the growth of nodules (tubercles) in the tissues, especially the lungs. Tuberculosis is more common in persons with immune system problems such as HIV and AIDS;

“Unfair discrimination” means any distinction, exclusion or preference which has the effect of nullifying or Impairing equality of opportunity or treatment in employment or occupation;

“VCT” means Voluntary Counseling and Testing, which provides the opportunity for the client to confidentially explore and understand his or her HIV risks and to learn his or her HIV status with the support of a counselor;

“Vulnerability” means the unequal opportunities, social exclusion, unemployment or precarious employment, resulting from the social, cultural, political and economic factors that make a person more susceptible to HIV infection and to developing AIDS;

“Worker” means any person working under any form or arrangement;

“Workplace” means any place where workers work;

“World of work” means a working environment in which persons are in some way or another associated with and also includes persons as reflected in Clause 4 of this Code.

2. Introduction

2.1 HIV and AIDS are a serious public health challenge which has socioeconomic, employment and human rights implications.

2.2 HIV poses a significant obstacle to the attainment of decent work and sustainable development. It has led to the loss of the livelihoods of millions of persons living with or affected by HIV and AIDS. Its effects are concentrated among the most productive age groups and it imposes huge costs on enterprises through falling productivity, increased labour costs and the loss of skills and experience.

2.3 HIV and AIDS affect every workplace, with prolonged staff illness, absenteeism, and death, which impacts on productivity, employee benefits, occupational health and safety, production costs, workplace morale and escalating HIV associated with TB and STIs.
2.4 HIV thrives in an environment of poverty, rapid urbanisation, violence and destabilisation. Transmission is exacerbated by disparities in resources and patterns of migration from rural to urban areas. Women are particularly more vulnerable to infection in cultures and economic circumstances where they have limited sexual reproductive choices and rights.

2.5 Through this Code, the country commits to mitigate the impact of the epidemic in the world of work taking into account all relevant Conventions of the International Labour Organization, including Recommendation No. 200.

2.6 One of the most effective ways of reducing and managing the impact of HIV and AIDS in the workplace is through the implementation of workplace HIV and AIDS policies and programmes. Addressing aspects of HIV and AIDS in the workplace will enable employers, workers and their organisations and government to actively contribute towards local, national and international efforts to prevent and control HIV and AIDS.

2.7 Every person should take personal responsibility in relation to HIV and AIDS to educate themselves, prevent transmission, seek available treatment and treat others with dignity and respect. All persons have the responsibility to support the achievement of the objectives of this Code.

2.8 Partnerships between government, employers, workers and their organisations and other relevant stakeholders are encouraged to ensure effective delivery of services and increased coverage.

3. Objectives of the code

The primary objective of this Code is to provide guidelines to assist employers, workers and their organisations to develop and implement comprehensive gender sensitive HIV and AIDS workplace policies and programmes. These policies and programmes must be developed within the framework of decent work in the formal and informal sectors in both the public and private sectors to:

- a. eliminate unfair discrimination and stigma in the workplace based on real or perceived HIV status, including dealing with HIV testing, confidentiality and disclosure;
- b. promote access to education, equitable employee benefits and employment protection;
- c. manage grievance procedures in relation to HIV and AIDS;
- d. create a safe and healthy working environment;
- e. promote appropriate and effective ways of managing HIV and AIDS and TB in the workplace; and
- f. give effect to the international and regional obligations of the Republic of South Africa on HIV and AIDS and TB in the world of work.
4. Scope of the code

This Code applies to:

4.1 All workers working under all forms or arrangements, and at all workplaces, including:
   a. persons in any employment or occupation;
   b. those in training, including interns and apprentices;
   c. volunteers;
   d. jobseekers and job applicants; and
   e. laid-off and suspended workers.

4.2 All sectors of economic activity, including the private and public sectors and the formal and informal economies.

4.3 Armed forces and uniformed services.

5. Key principles

The guiding principles in this Code are based on International Conventions and Recommendations, The Constitution of the Republic of South Africa and national laws, which include:

5.1 Respect for human rights, fundamental freedoms and equality

The response to HIV and AIDS must be recognised as a contributing factor to the realization of human rights, dignity, fundamental freedoms, responsibility and equality for all, including workers and their dependants.

5.2 HIV and AIDS is a workplace issue

HIV and AIDS is a workplace issue and must be treated like any other serious illness or condition in the workplace. HIV and AIDS must be included among the essential elements of the national, provincial, local and sectoral response to the pandemic with full participation of all stakeholders.

5.3 Reduce HIV-related stigma and unfair discrimination and promote equality of opportunity and fair treatment

Elimination of unfair discrimination remains a key principle for protection of the rights of individuals. There must be no unfair discrimination against or stigmatisation of workers on the grounds of real or perceived HIV status. It is the responsibility of every worker and employer to eliminate unfair discrimination in the workplace.

5.4 Gender Equality

Women and girls are at greater risk and more vulnerable to HIV infection and are disproportionately affected by HIV compared to men as a result of gender inequality. Women's empowerment is a key factor in responding to HIV and AIDS and the world
of work. Measures must be taken in the world of work to ensure gender equality, prevent violence and harassment, protect sexual and reproductive health and rights and involve men and women workers, regardless of their sexual orientation, in the HIV response.

5.5 The right to access and continuation of employment

Real or perceived HIV status is not a valid cause for termination of employment. Workers with HIV-related illness must not be denied the possibility of continuing to carry out their work unless proven medically unfit to do so. As with many other conditions, workers with HIV and AIDS must be reasonably accommodated and be able to work for as long as medically fit. Medical examination should be limited to the capacity of a worker to perform the task(s) of a particular job.

5.6 Prevention

Prevention of all modes of HIV transmission and TB is a fundamental priority for the country. In keeping with this principle the workplace must facilitate access to comprehensive information and education to reduce the risk of HIV transmission and HIV-TB co-infection and STI's.

5.7 Treatment, Care and Support

Treatment, care and support services on HIV and AIDS must be accessible to all workers and their dependants. All workers must have access to affordable health services, social security, insurance schemes or other employment-related benefits either through the employer, the State or nongovernmental organisations. Programmes of care and support must include measures of reasonable accommodation in the workplace for persons living with HIV or HIV-related illnesses.

5.8 Social Dialogue/Consultations

Implementation of policies and programmes on HIV and AIDS should be based on cooperation and trust amongst government, employers and workers and their representatives. Employers and workers should engage in the design, implementation and evaluation of national and workplace programmes, with the active involvement of persons living with HIV and AIDS.

5.9 Occupational Health and Safety

The workplace must be safe and healthy for all workers, and they must benefit from programmes to prevent specific risks of occupational transmission of HIV and related transmissible diseases, such as TB, especially in jobs most at risk, including the health care sector.

5.10 Testing, Confidentiality and Disclosure

Workers and their dependants must enjoy protection of their privacy, including confidentiality relating to their own HIV status or that of their co-workers. Workers must not be required to undergo HIV testing or other forms of screening for HIV.
unless found to be justified by the Labour Court. The results of HIV testing must be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement.

6. Legal framework

6.1 This Code must be read in conjunction with The Constitution of the Republic of South Africa, 1996 (Act, No. 108 of 1996) and all relevant legislation as amended, which includes:

a. Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997);
b. Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);
c. Employment Equity Act, 1998 (Act No. 55 of 1998);
d. Labour Relations Act, 1995 (Act No. 66 of 1995);
e. Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);
f. Unemployment Insurance Act, 2001 (Act No. 63 of 2001);
g. Children’s Act, 2005 (Act No. 38 of 2005);
h. Medical Schemes Act, 1998 (Act No. 131 of 1998);
i. Mine Health and Safety Act, 1996 (Act No. 29 of 1996);
j. National Health Act, 2003 (Act No. 61 of 2003);
k. Occupational Diseases in Mines and Works Act, 1973 (Act No. 78 of 1973);
l. Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); and

6.2 The contents of this Code must be taken into account when developing, implementing or reviewing any workplace policies or programmes and must be read in conjunction with the following legislative provisions as amended:

6.2.1 In accordance with both the common law and Section 14 of The Constitution of the Republic of South Africa, all persons with HIV and AIDS have a right to privacy, including privacy concerning their HIV status. Accordingly, there is no general legal duty on a worker to disclose his or her HIV status to his or her employer or to other workers;

6.2.2 This Code is issued in terms of Section 54(1)(a) of the Employment Equity Act and is based on the principle that no person may be unfairly discriminated against on the basis of real or perceived HIV status;

6.2.3 Section 6(1) of the Employment Equity Act provides that no person may unfairly discriminate against a worker or an applicant for employment, in any employment policy or practice, on the basis of his or her HIV status;

6.2.4 Section 6(3) of the Employment Equity Act prohibits harassment of a worker based on his or her HIV status. Measures must be adopted at the workplace to reduce the transmission of HIV and AIDS to alleviate its
Impact by ensuring actions to prevent and prohibit violence and harassment in the workplace;

6.2.5 Section 7(2) of the Employment Equity Act prohibits testing of a worker to determine that worker's HIV status unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of the Employment Equity Act;

6.2.6 In accordance with Section 187(1)(f) of the Labour Relations Act, a worker with HIV and AIDS must not be dismissed based on his or her HIV and AIDS status;

6.2.7 In terms of Section 8(1) of the Occupational Health and Safety Act, an employer is obliged to provide a safe workplace;

6.2.8 Sections 2(1) and 5(1) of the Mine Health and Safety Act provide that an employer is required to create a safe workplace;

6.2.9 A worker who is infected with HIV as a result of an occupational exposure to infected blood or bodily fluids must apply for benefits in terms of Section 22(1) of the Compensation for Occupational Injuries and Diseases Act;

6.2.10 In accordance with the Basic Conditions of Employment Act, every employer is obliged to ensure that all workers receive certain basic standards of employment, including the minimum number of sick leave days [Section 22(2)];

6.2.11 In accordance with Section 24(2)(e) of the Medical Schemes Act, a registered medical aid scheme must not unfairly discriminate directly or indirectly against its members on the basis of their "state of health";

6.2.12 In accordance with Section 20 of the Unemployment Insurance Act, every employer is obliged to ensure that all workers are able to exercise their right to illness benefits;

6.2.13 Section 20(1) of the National Health Act states that Health Care personnel must not be unfairly discriminated against on account of their health status. However, the head of the health establishment concerned, subject to any applicable law and in accordance with any guidelines determined by the Minister, may impose conditions on the service that may be referred by a health care provider or health care worker on the basis of his or her health status;

6.2.14 In terms of section 13(1)(b) of the Children's Act, every child has the right to have access to information regarding his or her HIV Status;

6.2.15 In accordance with section 16(5) of the Labour Relations Act an employer is not required to disclose the HIV status of a worker unless that worker consents to the disclosure of his or her HIV status;
6.2.16 Sections 37(1) and 63(1) of the Promotion of Access to Information Act provide that employers must not disclose the HIV status of a worker unless that worker agrees to or consents to the disclosure of his or her HIV status;

6.2.17 In terms of section 1(c) of the Occupational Diseases In Mines and Works Act, TB is a compensable disease where it is found, in the opinion of the certification committee, that a person contracted such disease while the person was performing risk work or where such person was already affected at any time within the twelve month period immediately following the date on which that person performed such work for the last time; and

6.2.18 According to section 99(3) of the Occupational Diseases in Mines and Works Act, where the certification committee has found that a person is suffering from TB which is attributable partly to HIV but not mainly to work at a mine or works and where such person is not in receipt of full benefits for the TB in terms of the Compensation for Occupational Injuries and Diseases Act, or any other law, such person may receive benefits not exceeding one half of the benefits provided for in terms of the Occupational Diseases In Mines and Works Act

7. Elimination of unfair discrimination and promotion of equal opportunity and treatment

Policies and programmes must respect national guidelines on Counselling, HIV Testing, Confidentiality and Disclosure.

7.1 Counselling and Informed Consent

7.1.1 HIV testing of workers must be provided with informed consent and proper counselling. Where employers or workers facilitate provision of HIV testing facilities, they must ensure a conducive environment for counselling.

7.1.2 Pre-Test counselling should take place prior to a worker being tested to determine his or her HIV status.

7.1.3 Post-Test counselling should take place to determine whether a worker has tested negative or positive. Proper procedures should be followed in advising the worker on the next steps, depending on the HIV test results.

7.1.4 No employer may require a worker or an applicant for employment to undertake an HIV test in order to ascertain that worker’s HIV status. Testing must be with consent and voluntary.

7.2 HIV Testing

7.2.1 Authorisation for mandatory HIV testing of workers may only be obtained from the Labour Court in terms of Section 7(2) of the Employment Equity Act.
7.2.2 Mandatory Testing for HIV is not a requirement in the world of work, including the following circumstances:

a. during an application for employment;
b. as a condition of employment;
c. during procedures related to termination of employment; and
d. as an eligibility requirement for training or staff development programmes.

7.2.3 Anonymous, unlinked surveillance or epidemiological HIV testing in the workplace may occur provided it is undertaken in accordance with ethical and legal principles. The information obtained must not be used to unfairly discriminate against workers. Testing will not be considered anonymous if there is a reasonable possibility that a worker's HIV status can be deduced from the results.

7.3 Confidentiality and Disclosure

7.3.1 All persons, including those with HIV and AIDS have the legal right to privacy. A worker is therefore not legally required to disclose his or her HIV status or related medical information to his or her employer or to other workers.

7.3.2 The results of HIV testing must be confidential and not endanger access to jobs, tenure, job security or opportunities for advancement.

7.3.3 Where a worker chooses to voluntarily disclose his or her HIV status to the employer or to other workers, this information must not be disclosed to others without the worker's express written consent. Where written consent is not possible, steps must be taken to confirm that the worker wishes to disclose his or her HIV status.

7.3.4 Mechanisms must be created to encourage openness, acceptance and support for those employers and workers who wish to voluntarily disclose their HIV status within the workplace.

7.3.5 Access to personal data relating to a worker's HIV status and related medical data must be bound by the rules of confidentiality consistent with the relevant national laws.

7.4 Reasonable Accommodation

7.4.1 Section 15(2)(c) of the Employment Equity Act requires employers to provide reasonable accommodation for all workers, including persons living with HIV and AIDS, in order for them to access and enjoy equal employment opportunities.

7.4.2 The obligation to make reasonable accommodation may arise when a worker voluntarily discloses his or her HIV status.
7.4.3 Employers must also accommodate workers when the work or the work environment changes or impairment varies which affects the worker’s ability to perform the essential functions of the job.

7.4.4 Reasonable accommodation includes but is not limited to:

a. adapting existing facilities to make them accessible;
b. adapting existing equipment or acquiring new equipment including computer hardware and software;
c. re-organizing workstations;
d. changing training and assessment materials and systems;
e. restructuring jobs so that non-essential functions are re-assigned;
f. adjusting working time and leave; and

g. providing specialised supervision, training and support in the workplace.

7.5 Employee Benefits

7.5.1 Workers with HIV and AIDS must not be unfairly discriminated against in the allocation of employee benefits.

7.5.2 Where an employer offers a medical benefit, that employer must ensure that this benefit does not unfairly discriminate, directly or indirectly, against any worker on the basis of his or her real or perceived HIV status.

7.5.2.1 There should be no unfair discrimination against workers or their dependants based on real or perceived HIV status to access social security systems and occupational insurance schemes or in relation to benefits under such schemes, including health care and disability, death and survivor's benefits.

7.6 Grievance Procedures

7.6.1 Grievance mechanisms and procedures must be easily accessible to ensure effective redress in cases of violation.

7.6.2 Employers must make workers aware of the grievance procedures, particularly to address unfair discrimination relating to HIV in the workplace.

7.6.3 Employers should ensure that the rights of workers with regard to HIV and AIDS, TB and other Illnesses and the remedies available to them In the event of a breach of such rights become integrated Into existing grievance procedures.

7.6.4 Where all internal dispute resolution process has been exhausted and the grievance remains unresolved, any party to the dispute may refer the dispute to the CCMA for the unfair discrimination within six months In terms of section 10(2) of the Employment Equity Act.

7.7 Termination of Employment

7.7.1 Real or perceived HIV status in itself is not a valid cause for termination of employment. Workers with HIV-related illness must not be denied the opportunity of continuing to carry out their work.
7.7.2 Where a worker has become too ill to perform his or her current work, an employer is obliged to explore alternatives, including reasonable accommodation and redeployment.

7.7.3 Where a worker has become too ill to perform his or her current work, an employer is obliged to follow accepted guidelines regarding dismissal for Incapacity before terminating a worker’s services, as set out in the Code of Good Practice on Dismissal contained in Schedule 8 of the Labour Relations Act.

7.7.4 The employer must ensure that as far as possible, the worker's right to confidentiality regarding his or her HIV status is maintained during any incapacity proceedings. A worker must not be compelled to undergo an HIV test or to disclose his or her HIV status as part of such proceedings unless the Labour Court has authorized such a test.

7.7.5 Where a worker alleges unfair dismissal for HIV and AIDS, he or she should refer the matter to the CCMA for unfair dismissal in terms of sections 185 or 187 of the Labour Relations Act within 30 days of the dismissal.

8. Promoting a healthy and safe working environment

Prevention strategies must be adapted to national conditions and the type of workplace and must take into account gender, cultural, vulnerable populations, social and economic concerns.

8.1 Prevention Programmes Workplace prevention programmes must ensure:

a. That accurate and up to date relevant and timely information is made available and accessible to all in a culturally sensitive format and language through the different channels of communication available;

b. Comprehensive education programmes to help women and men understand and reduce the risk of all modes of HIV transmission. This must include mother-to-child transmission and to understand the Importance of changing risk behaviours related to Infection

c. Effective occupational safety and health measures, including harm-reduction strategies;

d. Measures to encourage workers to know their own HIV status through voluntary counselling and testing;

e. Access to all means of prevention, Including male and female condoms, medical male circumcision, elimination of mother-to-child transmission and where appropriate information about correct use and the availability of post-exposure prophylaxis; and f) Effective measures to reduce high-risk behaviours, including for the most at-risk groups with a view to decreasing the incidence of HIV and AIDS.
8.2 Treatment, care and Support

8.2.1 Employers must ensure that workplace policies and programmes pertaining to health interventions are determined in consultation with workers and their representatives and should be linked to public health services.

8.2.2 Employers must ensure that those workers and their dependants living with HIV and AIDS related illnesses benefit from access to health care, whether this is provided under public health, social security systems or private insurance or other schemes.

8.2.3 All persons covered by this Code, including workers and their dependants living with HIV and AIDS, must be entitled to health services in terms of clause

8.2.2 of this Code including access to free or affordable:

a. Voluntary counselling and testing;
b. Antiretroviral treatment and adherence education, information and support;
c. Nutrition consistent with treatment requirements;
d. Treatment for opportunistic Infections and STIs, and any HIV-related Illnesses, in particular tuberculosis; and
e. Support and prevention programmes including psychosocial support.

8.2.4 Programmes of care and support must include measures of reasonable accommodation in the workplace for workers living with HIV or HIV-related Illnesses. 8.2.5 Care and support are critical elements that must guide a workplace in responding to HIV and AIDS. Mechanisms must be created to encourage openness, acceptance and support for workers Infected and affected by HIV and AIDS and to ensure that they are not unfairly discriminated against nor stigmatised.

8.2.6 Workplaces must endeavour to provide counselling and other forms of social support to workers Infected and affected by HIV and AIDS. Where health-care services exist at the workplace, appropriate treatment must be provided. Where these services are not possible, workers must be informed about the location of available outside services.

8.2.7 Workers with HIV and AIDS must be treated no less favourably than workers with other serious illnesses in terms of benefits, workers' compensation and reasonable accommodation.

8.2.8 Workers with HIV and AIDS should be encouraged to use expertise and assistance from within the organisation for counselling. Where this is not available, employers may then acquire the necessary assistance and expertise from the outside.

8.3 Occupational Health and Safety

8.3.1 An employer is obligated to provide and maintain a workplace that is safe and without risk to the health of its workers.
8.3.2 HIV and AIDS must form an integral part of any workplace Occupational Health and Safety strategy.

8.3.3 The working environment must be safe and healthy in order to prevent transmission of HIV and TB in the workplace.

8.3.4 Every workplace must ensure that it complies with the provisions of the Occupational Health and Safety Act, including the Regulations on Hazardous Biological Agents and the Mine Health and Safety Act. Every workplace must also ensure that its policy deals with, amongst others, the risk of transmission, appropriate training, awareness, education on the use of universal infection control measures so as to identify, deal with and reduce the risk of HIV transmission in the workplace.

8.3.5 All workers must be made aware of the procedures to be followed in applying for compensation for occupational infections and diseases and the reporting of all occupational accidents.

8.3.6 Health and safety measures adopted at the workplace to prevent workers’ exposure to HIV and TB and to minimise the risk of such workers contracting HIV and TB, must include universal precautions, accident and hazard prevention strategies, work practice control, personal protective equipment, environmental control measures and post exposure prophylaxis.

8.3.7 Employers, workers and their organizations must take responsibility for contributing towards a safe and healthy working environment as per the Occupational Health and Safety Act.

8.4 Children and Young Persons

8.4.1 Government, employers and workers, including their organisations, must adopt appropriate measures to combat child labour and child trafficking that may result from the death or Illness of family members or caregivers due to HIV and AIDS and to reduce the vulnerability of children to HIV and AIDS and TB. This is considered In view of the relevant International, Regional and National standards on Fundamental Principles and Rights of children and young persons. Special measures must be taken to protect these children from sexual abuse and sexual exploitation.

8.4.2 Measures must be taken to protect children and young workers against HIV and TB Infection. Such measures must include the special needs of children and young persons in the response to HIV and AIDS In national, provincial, local, sectoral and workplace policies and programmes. These should include objective sexual and reproductive health education, in particular the dissemination of information on HIV and AIDS through vocational training and in youth employment programmes and services.
9. Management of HIV and AIDS in the workplace

9.1 Assess the Impact of HIV and AIDS in the Workplace

Employers, trade unions and employees must develop and effectively implement integrated gender sensitive strategies to respond to the impact of HIV and AIDS, including TB and STIs, in the workplace. This must be done as far as possible in cooperation with national, provincial, local and sectoral initiatives, including:

a. Impact assessment that includes risk profiling, resource implications, environmental assessment, vulnerability and susceptibility to HIV infection, and

b. The development and implementation of HIV and AIDS workplace policies and programmes that are free from unfair discrimination and promote human rights.

9.2 Developing HIV and AIDS Workplace Programmes

In developing and implementing long and short term measures to deal with and reduce this Impact, the following must be taken into account:

a. Compliance with legal obligations;

b. Management commitment;

c. Consultation with relevant stakeholders;

d. Development and effective Implementation of HIV and AIDS and TB Workplace Policies, Prevention and Wellness Programmes;

e. Resources, Including human, financial and operational resources must be allocated for the effective development and Implementation of policies and programmes;

f. Policies and programmes must be informed by the outcomes of research and evidence; and

g. Monitoring and Evaluation of HIV and AIDS policies and programmes must be put in place.

9.3 Education, Training and Information

All social partners have the responsibility to promote education, training and Information about HIV and AIDS in the world of work.

9.3.1 Training, safety instructions and any necessary guidance in the workplace related to HIV and AIDS must be provided in a clear and accessible form for all workers.

9.3.2 Training, instructions and guidance must be sensitive to gender and cultural concerns and adapted to the characteristics of the workforce, taking into account the risk factors for the workforce.

9.3.3 Up to date scientific and socio-economic information and, where appropriate, education and training on HIV and AIDS must be available to employers and workers' representatives, in order to assist such employers and workers' representatives to make informed decisions and take appropriate measures in the workplace.
9.3.4 Workers including the most vulnerable must receive awareness raising information and appropriate training on HIV Infection control procedures in the context of workplace accidents and first aid. All Workers, including those whose jobs put them at risk of exposure to human blood, blood products and other body fluids must receive additional training in exposure prevention, exposure registration procedures and post-exposure prophylaxis.

9.3.5 Workers and their representatives must be informed and consulted on measures taken to implement workplace policies and programmes related to HIV and AIDS, TB and other related Illnesses.

10. Monitoring and evaluation (M&E)

10.1 Employers and workers, including their organisations, should:
   a. design and implement a HIV and AIDS workplace M&E plan that includes strategies to address TB and STIs in the world of work;
   b. identify the key elements needed to make the M&E system work;
   c. select and make use of indicators that are specific, measurable, attainable, relevant and time-bound; and
   d. gather and analyse qualitative and/or quantitative information and communicate it effectively.

10.2 Employers in collaboration with the workers must establish monitoring and evaluation mechanisms for workplace programmes in order to track implementation and strategically respond to the epidemic.

10.3 Data should be disaggregated in order to prioritise targeted intervention measures.

10.4 The monitoring mechanism strategies should take into account and support the national monitoring and evaluation efforts that relates to curbing HIV and AIDS, TB and STIs.

10.5 Small businesses that are not in a position to have sophisticated monitoring and evaluating mechanisms in place must adopt simple strategies to monitor and evaluate the HIV and AIDS, TB and STIs programmes in order to track implementation.

2. Breach of confidentiality; liability of employers; obstruction, undue influence and fraud

59. Breach of confidentiality

1. Any person who discloses any confidential information acquired in the performance of a function in terms of this Act, commits an offence.

2. Subsection (1) does not apply if the information:
   a. is disclosed to enable a person to perform a function in terms of this
Act; or
b. must be disclosed in terms of this Act, any other law or an order of court.

3. A person convicted of an offence in terms of this section may be sentenced to a fine not exceeding R10 000, 00.

4. The Minister may, with the concurrence of the Minister of Justice and by notice in the Gazette, amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation.

60. Liability of employers

1. If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee’s employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

2. The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

3. If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

4. (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

In his article, “Damages for sexual harassment” professor Grogan deals with the following question:

Under what circumstances are employers liable for the sexual misdemeanours of their employees? This article discusses the first case in which an employee has successfully sued her employer under the Employment Equity Act. The judgment indicates that turning a deaf ear to a victim’s complaints can prove costly for employers.

After six years of job seeking, Ms Ntsabo secured a job as a guard with Real Security CC. She had no idea what she was letting herself in for. Ms Ntsabo, a single mother, found herself stationed at Khayelitsha Day Hospital. She reported to a supervisor who turned out to be worse than a mere groper. After one amorous incident, she told her brother, a female colleague and her mother about the supervisor’s inclinations and activities. About two weeks later she was called to a meeting with management, and told that her supervisor had complained about her work. Ms Ntsabo informed the
meeting about her supervisor’s conduct. The following day, the supervisor all but raped her, then threatened to shoot her if she told anybody about the incident.

Horrified by this experience, Ms Ntsabo told her mother. Ms Ntsabo Snr advised her daughter to return to work, and assured her that her brother would arrange a meeting and “sort the matter out”. The matter was “sorted out” by transferring Ms Ntsabo to another site, where she was required to work at night. When she complained, Ms Ntsabo was told that if she did not like night work she could resign. She did so. After resigning, she approached the Labour Court for relief, claiming compensation for an automatically unfair dismissal and damages for future medical costs and humiliation, impairment of dignity, pain, suffering, emotional trauma and the loss of the normal amenities of life. All this relief was sought against her former employer.

Before the promulgation of the Employment Equity Act 55 of 1998, the Labour Court would have had jurisdiction to entertain only the first claim, and Ms Ntsabo would have had to seek recourse against the supervisor and/or the employer in a civil court. To succeed against the employer, she would have had to prove that it was vicariously liable (see Employment Law 19(5)). The EEA now gives the Labour Court power to grant compensation and/or damages to employees who are victims of discrimination on various grounds cited in the Act (see sections 50(1)(d) and (e), read with sections 50(2)(a) and (b)), which specifically includes “harassment” (section 6(3)). The Labour Court was willing to entertain both claims in Ntsabo v Real Security CC [2004] 1 BLLR 58 (LC). This demonstrates that claims for unfair discrimination under the EEA and for unfair dismissal under the LRA are not mutually exclusive; an employee is entitled to refer a single dispute under both the EEA and the LRA, and to claim damages for harassment and compensation for unfair dismissal in the same action. And, as the case also proved, damages and compensation can be awarded cumulatively.

However, the court had to decide these issues separately. The first prayer required the court to decide whether Ms Ntsabo had been dismissed, and, if so, whether that dismissal was “automatically unfair” for purposes of section 187(1)(f) of the LRA. To prove that she had been dismissed, Ms Ntsabo had to satisfy the court that her resignation constituted a dismissal for purposes of section 186(1)(e) – i.e. that she had terminated the contract “because the employer had made continued employment intolerable”. The court had no hesitation in finding that the situation in which Ms Ntsabo found herself at the time of her resignation was indeed intolerable.

But can an employer be held to have made continued employment intolerable for an employee if the cause of the intolerable situation is the conduct of another employee who, while he may have harassed the employee during working hours, could hardly be said to have been acting in the course and scope of his duties? The answer to this question can only be in the affirmative if it is accepted that the employer can be held to create an intolerable situation by failing to prevent one of its employees from creating and perpetuating an intolerable situation for another. And an employer can only be held to have failed to prevent an employee from creating and maintaining an intolerable situation for another if it (or its management) was aware of the situation and did nothing about it.
Real Security somewhat inconsistently denied in one breath that the incidents of which Ms Ntsabo complained had occurred, and in the next breath that she had not brought them to the attention of management in time for preventive action to be taken. On the facts, the court dismissed both claims. Pillay AJ held that Ms Ntsabo had done all that could reasonably be expected of her “to attempt to hold onto her employment and avoid being sexually harassed”. The employer had “brushed aside her complaint”. This inaction was unfair and had created an intolerable working environment for Ms Ntsabo. Her resignation accordingly constituted a constructive dismissal.

But whether the dismissal was automatically unfair was another question. According to the court, the dismissal could only be automatically unfair if it was “related to discrimination”. However, the court held that “from an LRA perspective”, the dismissal could not have been described as being based on discrimination. Moreover, Ms Ntsabo had not cited discrimination as a basis for her resignation. Her compensation was accordingly limited to the maximum allowed for an “ordinary” dismissal – i.e. an amount equal to 12 months’ wages.

**Ordinary dismissal**

Since the application was also brought under the EEA, this was not the end of the matter (see below). But it is nevertheless worth asking whether the court was correct in finding that an employee who has resigned because of an employer’s failure to take steps to prevent her from being harassed, sexually or otherwise, cannot claim to have been the victim of discrimination as contemplated by section 187(1)(f) of the LRA.

Every case must be decided on its own facts. But if the court intended to suggest that a resignation induced by sexual discrimination can never form the basis for an automatically unfair dismissal claim, it probably overstated the position. A dismissal falls within the ambit of section 187(1)(f) if the reason for the dismissal (or, in the case of a constructive dismissal, for the resignation) is discrimination on one of the listed grounds, including the employee’s sex. The form of the discrimination does not matter. It can hardly be argued that the victim of unwanted sexual advances is not being singled out on the basis of his or her sex, since it is that very characteristic that by definition attracted the advances. If that were not so, employees who are physically maltreated because of, say, their religion, would not be able to claim to have been discriminated against. The Act defines dismissals as automatically unfair in terms of the grounds for the discriminatory conduct, not in terms of its form.

That the employer did not perpetrate the actual harassment does not matter; its failure to prevent the harassment must be judged on the same terms. Employees who resign because they are being harassed by superiors do so because they are singled out for repeated attacks (i.e. harassed) for some reason; if that reason is directly or indirectly related to the grounds listed in section 187(1)(f), they must be deemed to have been “dismissed” as a result of discrimination.
Discrimination

There is a further consideration. Section 6(3) of the EEA specifically states that "[h]arassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)". The grounds listed in section 6(3) include all those mentioned in section 187(1)(f) of the LRA. While the provisions of one statute need not in all cases necessarily be imported into another, it seems that in this case, the EEA and the LRA should be seen as complementary. It would be strange indeed that conduct, which the Legislature deems unfair discrimination for purposes of one statute, should not be regarded as unfair discrimination for purposes of another.

True, the EEA specifically provides in section 6(10) that disputes dealt with in that section exclude disputes concerning unfair dismissals. However, this does not mean that the substantive provisions of section 6 must be disregarded when a case of discrimination as contemplated by the EEA also gives rise to a dismissal. It is therefore arguable that, had Ms Ntsabo framed her unfair dismissal claim appropriately (for the requirements of such a plea see Aarons v University of Stellenbosch [2003] 7 BLLR 704 (LC), a court could have found that her dismissal was automatically unfair, and she could have been awarded compensation in excess of the maximum prescribed by section 194(1) of the LRA. In Aarons, the court expressly accepted, with reference to section 6 of the EEA, that harassment could constitute a form of discrimination for purposes of section 187(1)(f) of the LRA.

The liability of employers for the conduct of their employees is limited by section 60(1) of the EEA. This provides:

"If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer."

Section 60(2) obliges the employer to “consult all relevant parties” and to “take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act”. Section 60(3) deems the employer to have contravened the provisions of the applicable section if it “fails to take the necessary steps referred to in subsection (2), and if it is proved that the employee has contravened the relevant provision”.

Necessary steps

These provisions indicate that a duty rests in the first instance on the employee to inform the employer immediately after the harassment occurs. As the court correctly found in Real Security, the word “immediately” cannot be taken literally. There may, as the court found to be the case in Real Security, be understandable reasons for the victim’s initial reticence, including embarrassment, confusion or fear. The time that passes between the incident and the report must obviously be assessed in relation to the facts. But this provision does indicate that an employer cannot be held liable under the EEA for incidents of which it was ignorant.

Despite the aforementioned provision an employer is not liable for the conduct of an employee “if that employer is able to prove that it did all that was reasonably
practicable to ensure that the employee would not act in contravention of this Act” (section 60(4)). Steps that may be taken are set out in sub-section (2) – i.e. the relevant parties must be consulted and the “necessary steps” taken. Further guidance is to be obtained from the Code of Good Practice on Sexual Harassment. The Code suggests that an “informal” procedure might be suitable in less serious cases, but that a “formal” procedure, including disciplinary action against the perpetrator, may be followed in serious cases. Real Security had no procedures in place. Although the court ruled that the company could not be held liable for this omission, its failure to take the steps recommended by the Code were fatal to its case. The provisions of the Code certainly constitute a sensible test for establishing whether an employer is liable to compensate an employee who has resigned because of the conduct of a superior or colleague. Real Security failed that test for purposes of the EEA. That being the case, it must also have failed the appropriate test for purposes of the LRA.

Breach of duty

Why Real Security was deemed to have failed the test is instructive. The court held, first, that the supervisor’s conduct constituted harassment on the ground of sex, which is prohibited in terms of section 6 of the EEA. Ms Ntsabo had brought the supervisor’s conduct to the attention of management. This had perhaps not been done “immediately”, but her initial hesitation was understandable in the circumstances. When Ms Ntsabo did so, management at first ignored her, then transferred her in circumstances that induced her to resign. While Real Security could not be penalised for not having followed the steps laid down in the Code of Good Practice on Sexual Harassment, what mattered for purposes of the claim was that the employer’s failure to heed her complaint aggravated a situation which could perhaps have been defused. While the court did not specifically say so, the course of action Real Security should have taken was to dismiss the supervisor. Had it done so timeously, the court would certainly not have held the employer liable for the consequences of the supervisor’s conduct.

What, then, is the basis of an employer’s liability in cases of harassment by one employee of another? It seems that the ground for liability is a breach of the obligation to assist the victim by taking steps to prevent the harassment. In Real Security, the court likened this to a case of vicarious liability. The test applied by the court seems similar to that used in cases of vicarious liability, but went somewhat wider. The court expressly found that the supervisor was not acting within the course and scope of his duties. It did so to counter Real Security’s argument that the Labour Court lacked jurisdiction to entertain the damages claim because the claim should have been dealt with under the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

However by so saying, the court confirmed that an employer may be held responsible even for “frolics” by employees that occurred in circumstances over which, at the time, the employer had no control if it does not take steps to prevent a repetition. Indeed, the Code of Good Practice on Sexual Harassment indicates that employers may be held liable for the conduct of clients, contractors and even job applicants. As the court recognised in Real Security, the Code of Good Practice obliges employers to discourage employees from indulging in sexual harassment, and to put procedures
in place for the resolution of incidents that may yet occur. However, the court held that since the Code is merely a guideline, Real Security could not be held liable for the conduct of its supervisor merely because it had not implemented the steps and procedures laid down in the Code. Ms Ntsabo also had to prove that the employer could actually have prevented further harassment by acting decisively after her initial complaint. The court was satisfied that Real Security could have done so, and that it did not.

It seems, however, that the breach of the obligation to assist is not in itself enough to found a claim for damages; it must also be proved that the employer’s failure to assist the employee was causally related to the harm or loss for which damages are claimed. Unlike the LRA, the EEA does not set a ceiling for damages that may be awarded to the victim of harassment.

This indicates that a claim against an employer under the EEA is akin to an ordinary delictual claim. The question must accordingly be, whether the employee would have suffered the harm or loss had the employer taken steps that could reasonably have been expected of it. In Real Security, the court found that Ms Ntsabo had failed to justify a case for the full medical costs claimed by her; she was granted 40 per cent of her claim. However, the court found that R50 000 was an appropriate solatium for the pain, suffering and embarrassment she had suffered and would continue to suffer until counselling had its effect.

It may seem a trifle unfair that the employer should bear the full brunt of an action for damages caused by the conduct of an employee. However, it is doubtful whether Ms Ntsabo could have cited the supervisor as a respondent in the Labour Court. Section 6(1) provides that no person may unfairly discriminate against employees. The prohibition is not limited to employers. Section 6(5) provides that any party to a dispute under section 6 may refer it to the Labour Court for adjudication. However, section 10(2) requires the dispute first to be referred to the CCMA for conciliation, and section 10(7) provides that the provisions of Chapter VII of the LRA apply in respect of such disputes. The CCMA may only adjudicate disputes between employees and employers (see section 134(1)). Conciliation is a necessary precondition for adjudication in terms of the EEA. It seems, therefore, that the Labour Court lacks jurisdiction to award damages against the perpetrators of harassment, but can only do so against their employers.

This probably means that Ms Ntsabo can, if she wishes, now bring a separate civil action against the supervisor. The Code specifically provides that a victim of sexual assault or harassment has the right to “press separate criminal and/or civil charges against an alleged perpetrator, and the legal rights of the victim are in no way limited by this Code”. Should Ms Ntsabo now institute an action for damages in a civil court, the matter would not be res judicata because the supervisor was not party to the action under the EEA.

### 61. Obstruction, undue influence and fraud

1. No person may:

   a. obstruct or attempt to improperly influence any person who is
exercising a power or performing a function in terms of this Act; or

b. Knowingly give false information in any document or information provided to the Director-General or a labour inspector in terms of this Act.

2. No employer may knowingly take any measure to avoid becoming a designated employer.

3. A person who contravenes a provision of this section commits an offence and may be sentenced to a fine not exceeding R10 000,00.

4. The Minister may, with the concurrence of the Minister of Justice and by notice in the Gazette, amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation.
Module 6: Annexures

3. Schedule 4

TURNOVER THRESHOLD APPLICABLE TO DESIGNATED EMPLOYERS

<table>
<thead>
<tr>
<th>Sector or subsectors in accordance with the Standard Industrial Classification</th>
<th>Total annual turnover</th>
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</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>R2,00 m</td>
</tr>
<tr>
<td>Mining and Quarrying</td>
<td>R7,50 m</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>R10,00 m</td>
</tr>
<tr>
<td>Electricity, Gas and Water</td>
<td>R10,00 m</td>
</tr>
<tr>
<td>Construction</td>
<td>R5,00 m</td>
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<tr>
<td>Retail and Motor Trade and Repair Services</td>
<td>R15,00 m</td>
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<tr>
<td>Wholesale Trade, Commercial Agents and Allied Services</td>
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<tr>
<td>Catering, Accommodation and other Trade</td>
<td>R5,00 m</td>
</tr>
<tr>
<td>Transport, Storage and Communications</td>
<td>R10,00 m</td>
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<tr>
<td>Finance and Business Services</td>
<td>R10,00 m</td>
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<tr>
<td>Community, Special and Personal Services</td>
<td>R5,00 m</td>
</tr>
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Profile of the national EAP by race and gender

<table>
<thead>
<tr>
<th>ECONOMICALLY ACTIVE POPULATION</th>
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<tbody>
<tr>
<td>Male (1000)</td>
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<tr>
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<tr>
<td>AM</td>
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<tr>
<td>FM</td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
</tbody>
</table>

Profile of the national EAP by race and gender
4. Profile of the EAP by race and gender per province

<table>
<thead>
<tr>
<th>Province</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A</td>
<td>C</td>
<td>I</td>
</tr>
<tr>
<td>Western Cape</td>
<td>15.4%</td>
<td>30.0%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Eastern Cape</td>
<td>39.3%</td>
<td>5.9%</td>
<td>0.6%</td>
</tr>
<tr>
<td>Northern Cape</td>
<td>23.0%</td>
<td>22.7%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Free State</td>
<td>46.1%</td>
<td>1.2%</td>
<td>0.2%</td>
</tr>
<tr>
<td>KwaZulu-Natal</td>
<td>41.7%</td>
<td>0.6%</td>
<td>7.4%</td>
</tr>
<tr>
<td>North West</td>
<td>51.7%</td>
<td>1.5%</td>
<td>0.5%</td>
</tr>
<tr>
<td>Gauteng</td>
<td>44.6%</td>
<td>2.1%</td>
<td>1.4%</td>
</tr>
<tr>
<td>Mpumalanga</td>
<td>47.3%</td>
<td>0.6%</td>
<td>0.8%</td>
</tr>
<tr>
<td>Limpopo</td>
<td>53.2%</td>
<td>0.3%</td>
<td>0.2%</td>
</tr>
</tbody>
</table>

*Table 2: Profile of the EAP by race and gender per province*
Purpose

The purpose of this document is to provide simple and easy to follow guidelines to help employers to successfully complete and submit their employment equity report. The Employment Equity Regulations published in Government Gazette No. 9118 dated 14 July 2009 are applicable for the 1 October 2012 reporting deadline.

Step I — Items to consider before completing an EE report

- Ensure an Employment Equity Plan exists and informs the content of the EE Report. The latter is a progress report on the EE Plan.
- The tables in the EEA2 forms on numerical goals and targets, as well as the section on affirmative action measures, are informed by the EE Plan.
- If the company is part of a group of companies, consider whether to submit a consolidated or a workplace report.
- An employer should be consistent regarding the cut-off date for the workforce profile.
- An employer should be consistent regarding the twelve-month period (or twenty-four month period in the case of small employers) to be covered for workforce movements i.e. recruitment, promotions and terminations.
- An employer should ensure that ALL the information required in the different sections of the reporting forms is available and correct.

Step II — How to complete the prescribed forms

- The prescribed reporting forms EEA2 (Employment Equity Report, 12 pages) and EEA4 (Income Differential Statement, 4 pages) published on 14 July 2009 in Government Gazette 32393 must be completed.
- Note that non-prescribed forms, fax copies and e-mailed copies are not acceptable. (This includes payroll printout).
- The forms may be downloaded from the Department of Labour website, www.labour.gov.za
The forms may also be completed online by accessing the Department website, www.labour.gov.za, scroll down to “Online Services” and select “EE Online Reporting”.

The EE Online Service is open from 1 September 2012 to 15 January 2013.

Guidance to overcome difficulties on how to complete the forms properly must be obtained from the Department prior to the reporting deadline of 01 October 2012.

Consult the instructions on page 2 of the EEA2 form and page 2 of the EEA4 form.

Guidelines for the completion of section A of the EE reporting forms EEA2 and EEA4 forms are available on a separate document. Visit www.labour.gov.za to obtain a copy.

Ensure all sections of the forms are fully and accurately completed. Failure to do so may result in the employer’s report being rejected and omitted from the EE Public Register.

Ensure accuracy of tables pertaining to numerical goals and targets.

Numerical goals and targets that reflect only the projected workforce changes are not acceptable. Numerical goals and targets are required to project the entire workforce profile at the projected date.

Ensure that the CEO’s signature on page 12 of the EEA2 form corresponds with the name of the CEO in section A of the EEA2 form on page 1 of 12.

Ensure that section G of the EEA2 form is fully and accurately completed (Signature of the CEO, full name in print and the date signed).

Assistance may be obtained from the following:::

Website www.labour.gov.za
EE Helpline 0860 101018
The Department of Labour Provincial offices and Labour Centres
The Department of Labour, Directorate Employment Equity front desk service at Laboria House, 215 Schoeman Street, Pretoria 0001

Step III -- Consultation

Ensure that all consultative processes fulfill the requirements of section 16 of the Employment Equity Act.
Ensure that consultation has taken place with all relevant stakeholders before the forms are forwarded to the CEO for signature.

- The EE senior manager/s as representative/s of the CEO on the forum, must keep the CEO updated regarding progress made on the report during consultations.

**Step IV — Signature of the CEO**

- The CEO must approve and authorize the EE Report before it is submitted.

  In the case of online submission of the EE Report, the employer should retain the signed original copy as required by paragraph 4(10) of the EE Regulations, as well as the EE System generated print out on the EE Online Service.

- In the case of print submissions, unsigned EEA2 forms are rejected and returned to the employer. *Section 21(4) of the Employment Equity Act, No 55 of 1998 states: “The reports referred to in subsections (1) and (2) must contain the prescribed information and must be signed by the chief executive officer of the designated employer”.*

**Step V -- Submission**

- Ensure that the EEA2 and EEA4 forms are submitted together, failing which the form submitted will be rejected and returned to the employer.

  In the case of online submissions, online users must press the submit button. Forms completed online not submitted will not appear in the Public Register. Note that no changes to the content of the EE Report are possible after the electronic submission of the EE report.

  **Hand deliveries**

  - EE Reports may be hand delivered to the Front Desk at Head Office, 215 Cnr Schoeman and Paul Kruger Street, Laboria Building Pretoria, 0001.

  - Hand delivered reports are quality checked and rejected if they fail quality assurance.

  - EE Reports may also be hand delivered to Provincial Offices and Labour Centres nationwide. (A list of addresses can be obtained from [www.labour.gov.za](http://www.labour.gov.za), go to “contact”).

  **Post Office and courier**

  - Mail (Private Bag X117, Pretoria, 0001).

  - Courier services, 215 Cnr Schoeman and Paul Kruger Street, Laboria house Pretoria 0001.
Online

- The EE online service may be accessed at www.labour.gov.za.
- The EE online service may also be directly accessed using http://ee.labour.gov.za.
- A reminder letter to the CEO and assigned EE manager is forwarded annually with instructions regarding the username & password.
- Employers may also request their username and password online: click “forgot password”.
- Employers retain responsibility for the confidentiality of their username and password.
- Employers are requested not to refer their consultants and service providers to the Department for the issuing of their username and password.
- The Department provides encrypted passwords to ensure greater security of employer's data.

Step VI — Duty to keep records

Always file a signed copy of the Employment Equity Report for at least three years in the case of large employers and 2 years in the case of small employers.

It is advisable to retain records of Employment Equity Reports and plans longer than the minimum prescribed period for future reference and benchmarking purposes.
# Employment Equity Guide

## SECTION A: EMPLOYER DETAILS & INSTRUCTIONS

**PURPOSE OF THIS FORM**

This form enables employers to comply with Section 21 of the Employment Equity Act 55 of 1998. This form contains the format for employment equity reporting by employers to the Department of Labour. Both small employers (i.e. employers employing fewer than 150 employees) and large employers (i.e. employers employing 150 or more employees) are required to use this form.

Those employers who are not designated but wish to voluntarily comply must also use this reporting form.

Although all sections of the form apply to large employers, small employers are not required to complete Section F of the form.

**WHO SHOULD COMPLETE THIS FORM?**

All designated employers that have to submit a report in terms of the Employment Equity Act 55 of 1998. Employers who wish to voluntarily comply with the reporting requirements of the Act are also required to complete this form.

**WHEN SHOULD EMPLOYERS REPORT?**

Large employers must submit their first report within six months of being designated, and thereafter annually on the first working day of October. Small employers must submit their first report within twelve months of being designated, and thereafter on the first working day of October of every year that ends with an even number.

**ESSENTIAL REQUIREMENTS**

Large employers, i.e. employers with 150 and more employees, must complete the entire EEA2 reporting form. Small employers, i.e. employers with fewer than 150 employees, must only complete areas of the EEA2 form that apply to them.

Guidance to overcome difficulties in order to complete the form properly must be obtained from the department prior to completing and submitting the report.

**SEND TO:**

Employment Equity Registry
The Department of Labour
Private Bag X117
Pretoria 0001

Email reporting: empl-rpt@labour.gov.za
 Helpline: 0860 10 0115

---

<table>
<thead>
<tr>
<th><strong>SECTION A: EMPLOYER DETAILS &amp; INSTRUCTIONS</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Field name</strong></td>
</tr>
<tr>
<td><strong>Trade name</strong></td>
</tr>
<tr>
<td><strong>DTI registration number</strong></td>
</tr>
<tr>
<td><strong>PAYE/SARS number</strong></td>
</tr>
<tr>
<td><strong>UPIN reference number</strong></td>
</tr>
<tr>
<td><strong>EE reference number</strong></td>
</tr>
<tr>
<td><strong>Sector classification</strong></td>
</tr>
<tr>
<td><strong>Industry/Sector</strong></td>
</tr>
<tr>
<td><strong>Telephone number</strong></td>
</tr>
<tr>
<td><strong>Fax number</strong></td>
</tr>
<tr>
<td><strong>Email address</strong></td>
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<tr>
<td><strong>Postal address</strong></td>
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<tr>
<td><strong>City/Town</strong></td>
</tr>
<tr>
<td><strong>Province</strong></td>
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<tr>
<td><strong>Physical address</strong></td>
</tr>
<tr>
<td><strong>Postal code</strong></td>
</tr>
<tr>
<td><strong>City/Town</strong></td>
</tr>
<tr>
<td><strong>Province</strong></td>
</tr>
<tr>
<td><strong>Details of CEO at the time of submitting this report</strong></td>
</tr>
<tr>
<td><strong>Name and Surname</strong></td>
</tr>
<tr>
<td><strong>Telephone number</strong></td>
</tr>
<tr>
<td><strong>Fax number</strong></td>
</tr>
<tr>
<td><strong>Email address</strong></td>
</tr>
<tr>
<td><strong>Details of Employment Equity Senior Manager at the time of submitting this report</strong></td>
</tr>
<tr>
<td><strong>Name and Surname</strong></td>
</tr>
<tr>
<td><strong>Telephone number</strong></td>
</tr>
<tr>
<td><strong>Fax number</strong></td>
</tr>
<tr>
<td><strong>Email address</strong></td>
</tr>
<tr>
<td><strong>Business type</strong></td>
</tr>
<tr>
<td><strong>Information about the organization at the time of submitting this report</strong></td>
</tr>
<tr>
<td><strong>Number of employees in the organization</strong></td>
</tr>
<tr>
<td><strong>Is your organization an organ of State?</strong></td>
</tr>
<tr>
<td><strong>Is your organization part of a group / holding company?</strong></td>
</tr>
<tr>
<td><strong>Date of submitting this report</strong></td>
</tr>
</tbody>
</table>
Please indicate below the period the report covers (in the case of large employers the preceding twelve months and for small employers twenty-four months, except for first time reporting where the period may be shorter):

<table>
<thead>
<tr>
<th>From (date):</th>
<th>To (date):</th>
</tr>
</thead>
<tbody>
<tr>
<td>DD / MM / YYYY</td>
<td>DD / MM / YYYY</td>
</tr>
</tbody>
</table>

Please indicate below the duration of your current employment equity plan:

<table>
<thead>
<tr>
<th>From (date):</th>
<th>To (date):</th>
</tr>
</thead>
<tbody>
<tr>
<td>DD / MM / YYYY</td>
<td>DD / MM / YYYY</td>
</tr>
</tbody>
</table>

### Please read this first

a. The method of reporting should remain for the period of the plan, and must be consistent from reporting period to reporting period.

b. Employers must refrain from leaving blank spaces or using a dash (-) when referring to the value '0' (Zero) or the word "No". All relevant areas of the form must be fully and accurately completed by employers. Designated employers who fail to observe this provision will be deemed not to have reported.

c. "Temporary employees" mean workers who are employed to work for three consecutive months or less.

d. The Numerical goal is the workforce profile the employer projects to achieve at the end of the employer's current employment equity plan (EE Plan). The numerical goals of the employer must be the same for the entire duration of the EE Plan.

e. The Numerical target is the workforce profile the employer projects to achieve by the end of the next reporting period.

f. Large employers, i.e. employers with 150 and more employees, must complete the entire EEA2 reporting form. Small employers, i.e. employers with fewer than 150 employees, must only complete areas of the EEA2 form that apply to them. Areas that only apply to small employers shall be made available by the Department of Labour in a separate form as well.

g. The alphabets "A", "C", "I", "W", "M" and "F" used in the tables have the following corresponding meanings and must be interpreted as "Africans", "Coloureds", "Indians", "Whites", "Males" and "Females" respectively.
### SECTION B: WORKFORCE PROFILE AND CORE & SUPPORT FUNCTIONS

#### 1. WORKFORCE PROFILE

1.1 Please report the total number of employees (including employees with disabilities) in each of the following occupational levels: Note: A=Africans, C=Coloureds, I=Indians and W=Whites

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Foreign Nationals</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A</td>
<td>C</td>
<td>I</td>
<td>W</td>
</tr>
<tr>
<td>Top management</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Senior management</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professionally qualified and experienced specialists and mid-management</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintendents</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Semi-skilled and discretionary decision making</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Disabled and defined decision making</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL PERMANENT</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Temporary employees</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>GRAND TOTAL</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

1.2 Please report the total number of employees with disabilities only in each of the following occupational levels: Note: A=Africans, C=Coloureds, I=Indians and W=Whites

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Foreign Nationals</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A</td>
<td>C</td>
<td>I</td>
<td>W</td>
</tr>
<tr>
<td>Top management</td>
<td></td>
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<tr>
<td>Senior management</td>
<td></td>
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</tr>
<tr>
<td>Professionally qualified and experienced specialists and mid-management</td>
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<tr>
<td>Skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintendents</td>
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</tr>
<tr>
<td>Semi-skilled and discretionary decision making</td>
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<td>Disabled and defined decision making</td>
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<tr>
<td>TOTAL PERMANENT</td>
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<tr>
<td>Temporary employees</td>
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</tr>
<tr>
<td>GRAND TOTAL</td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>
2. Core Operation Functions and Support Functions by Occupational Level

A job could either be a Core operation function or a Support function. Core operation Function positions are those that directly relate to the core business of an organization and may lead to revenue generation e.g. sales production, etc. Support Function positions provide infrastructure and other enabling conditions for revenue generation e.g. human resources corporate services etc.

2.1 Please indicate the total number of employees (including people with disabilities), that are involved in Core Operation Function positions at each level in your organization only. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Foreign Nationals</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A</td>
<td>C</td>
<td>I</td>
<td>W</td>
</tr>
<tr>
<td>Top management</td>
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<tr>
<td>Senior management</td>
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<tr>
<td>Professionally qualified and experienced specialists and mid-management</td>
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<tr>
<td>Skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintendents</td>
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<tr>
<td>Semi-skilled and discretionary decision making</td>
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<tr>
<td>Unskilled and defined decision making</td>
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<tr>
<td>TOTAL PERMANENT</td>
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</tr>
<tr>
<td>Temporary employees</td>
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<td></td>
</tr>
<tr>
<td>GRAND TOTAL</td>
<td></td>
<td></td>
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</tbody>
</table>

2.2 Please indicate the total number of employees (including people with disabilities), that are involved in Support Function positions at each level in your organization. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Foreign Nationals</th>
<th>Total</th>
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<tbody>
<tr>
<td></td>
<td>A</td>
<td>C</td>
<td>I</td>
<td>W</td>
</tr>
<tr>
<td>Top management</td>
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<tr>
<td>Senior management</td>
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<tr>
<td>Professionally qualified and experienced specialists and mid-management</td>
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<tr>
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<tr>
<td>Unskilled and defined decision making</td>
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<tr>
<td>TOTAL PERMANENT</td>
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<tr>
<td>Temporary employees</td>
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<tr>
<td>GRAND TOTAL</td>
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</tbody>
</table>
SECTION C: WORKFORCE MOVEMENT

3. Recruitment

3.1 Please report the total number of new recruits, including people with disabilities. Note: A=Africans, C=Coloureds, I=Indians and W=Whites

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Foreign Nationals</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<tr>
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<td></td>
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<tr>
<td>Temporary employees</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>GRAND TOTAL</td>
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</tbody>
</table>

4. Promotion

4.1 Please report the total number of promotions into each occupational level, including people with disabilities. Note: A=Africans, C=Coloureds, I=Indians and W=Whites

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Foreign Nationals</th>
<th>Total</th>
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<tbody>
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</tr>
<tr>
<td>Semi-skilled and discretionary decision making</td>
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<td>Unskilled and defined decision making</td>
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<td>GRAND TOTAL</td>
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</table>
5. **Termination**

5.1 Please report the total number of terminations in each occupational level, including people with disabilities. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Foreign Nationals</th>
<th>Total</th>
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<tbody>
<tr>
<td>Tip management</td>
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<tr>
<td>Senior management</td>
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<tr>
<td>Professionally qualified and experienced specialists and supervisors</td>
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<tr>
<td>Skilled technical and academically qualified workers, junior managers, supervisors, foremen, and technicians</td>
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<tr>
<td>Semi-skilled and discretionary decision making</td>
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</table>

5.2 Please report the total number of terminations, including people with disabilities, in each termination category below. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

<table>
<thead>
<tr>
<th>Terminations</th>
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<td>Retirement – Operational requirements</td>
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<tr>
<td>Dismissal – misconduct</td>
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<tr>
<td>Death</td>
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</table>
SECTION D: SKILLS DEVELOPMENT

6. Skills Development

6.1 Please report the total number of people from the designated groups, including people with disabilities, who received training solely for the purpose of achieving the numerical goals, and not the number of training courses attended by individuals. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Total</th>
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</thead>
<tbody>
<tr>
<td>Top management</td>
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<tr>
<td>Senior management</td>
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<tr>
<td>Professionally qualified and experienced specialists and mid-management</td>
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<tr>
<td>Skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintendents</td>
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<tr>
<td>Semi-skilled and discretionary decision making</td>
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<td>Unskilled and defined decision making</td>
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<td>GRAND TOTAL</td>
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</table>

6.2 Please report the total number of people with disabilities only who received training solely for the purpose of achieving the numerical goals, and not the number of training courses attended by individuals. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

<table>
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<th>Occupational Levels</th>
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<th>Total</th>
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<tbody>
<tr>
<td>Top management</td>
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<td>Senior management</td>
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<td>Professionally qualified and experienced specialists and mid-management</td>
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<td>Skilled technical and academically qualified workers, junior management, supervisors, foremen, and superintendents</td>
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### SECTION E: NUMERICAL GOALS & TARGETS

#### 7. Numerical goals

7.1 Please indicate the numerical goals (i.e. the workforce profile) you project to achieve for the total number of employees, including people with disabilities, at the end of your current employment equity plan in terms of occupational levels. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

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<tr>
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7.2 Please indicate the numerical goals (i.e. the workforce profile) you project to achieve for the total number of employees with disabilities only at the end of your current employment equity plan in terms of occupational levels.

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<tr>
<th>Occupational Levels</th>
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</table>
8. Numerical targets

8.1 Please indicate the numerical targets (i.e. the workforce profile) you project to achieve for the total number of employees, including people with disabilities, at the end of the next reporting in terms of occupational levels. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Foreign Nationals</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top management</td>
<td>A</td>
<td>C</td>
<td>I</td>
<td>W</td>
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<tr>
<td>Senior management</td>
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<tr>
<td>Professionally qualified and experienced workers</td>
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<tr>
<td>Skilled technical and academically qualified workers, junior</td>
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<td>management, supervisors, foremen, and</td>
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<td>executives</td>
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<tr>
<td>Semi-skilled and discretionary decision making</td>
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<td>Unsuitable and denied decision making</td>
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</table>

8.2 Please indicate the numerical targets (i.e. the workforce profile) you project to achieve for the total number of employees with disabilities only at the end of the next reporting period in terms of occupational levels. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

<table>
<thead>
<tr>
<th>Occupational Levels</th>
<th>Male</th>
<th>Female</th>
<th>Foreign Nationals</th>
<th>Total</th>
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<tbody>
<tr>
<td>Top management</td>
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<td>Senior management</td>
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9. Disciplinary Action

9.1 Disciplinary action: Report the total number of disciplinary actions during the twelve months preceding this report. Report on formal outcomes only. Note: A=Africans, C=Coloureds, I=Indians and W=Whites.

<table>
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10. Awareness of Employment Equity

10.1 Please indicate which of the following awareness measures were implemented by your organization:

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<th>No</th>
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<tr>
<td>Policy statement includes reference to employment equity</td>
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<tr>
<td>Summary of the Act displayed</td>
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<td>Diversity management programmes</td>
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<td>Discrimination awareness programmes</td>
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</table>

11. Consultation

11.1 Please indicate which stakeholders were involved in the consultation process when developing and implementing your employment equity plan and when preparing this Employment Equity Report:

<table>
<thead>
<tr>
<th>Stakeholders</th>
<th>Yes</th>
<th>No</th>
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</thead>
<tbody>
<tr>
<td>Consultative body or employment equity forum</td>
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<tr>
<td>Registered trade union(s)</td>
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<tr>
<td>Employees</td>
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</table>
12. Barriers and affirmative action measures

12.1 Please indicate in which categories of employment policy or practice barriers to employment equity were identified. If your answer is ‘Yes’ to barriers in any of the categories, please indicate whether you have developed affirmative action measures and the timeframes to overcome them.

<table>
<thead>
<tr>
<th>Categories</th>
<th>BARRIERS</th>
<th>AFFIRMATIVE ACTION MEASURES</th>
<th>TIMEFRAME FOR IMPLEMENTATION OF AA MEASURES</th>
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<tbody>
<tr>
<td>Recruitment procedures</td>
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<td>Advertising positions</td>
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<td>Selection criteria</td>
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<td>Appointments</td>
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<td>Job classification and grading</td>
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<td>Remuneration and benefits</td>
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<td>Terms &amp; conditions of employment</td>
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<td>Job assignments</td>
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<td>Work environment and facilities</td>
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<td>Training and development</td>
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<td>Performance and evaluation</td>
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<td>Transfers</td>
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<td>Succession &amp; experience planning</td>
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<td>Disciplinary measures</td>
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<td>Dismissals</td>
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<td>Retention of designated groups</td>
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<td>Corporate culture</td>
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<td>Reasonable accommodation</td>
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<td>HIV&amp;AIDS prevention and wellness programmes</td>
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<tr>
<td>Appointed senior manager(s) to manage EE implementation</td>
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<td>Budget allocation in support of employment equity goals</td>
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<td>Time off for employment equity consultative committee to meet</td>
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</table>

13. Monitoring and evaluation of implementation

13.1 How regularly do you monitor progress on the implementation of the employment equity plan? Please choose one.

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<thead>
<tr>
<th>Weekly</th>
<th>Monthly</th>
<th>Quarterly</th>
<th>Yearly</th>
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</thead>
</table>

13.2 Did you achieve the annual objectives as set out in your employment equity plan for this period?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
<th>Please explain</th>
</tr>
</thead>
</table>
SECTION G: Signature of the Chief Executive Officer

Chief Executive Officer

I hereby declare that I have read, approved and authorized this report.

Signed on this _____ day of ____________ year __________

At place: ____________________________

Chief Executive Officer (Full Name)

Chief Executive Officer (Signature)
**PURPOSE OF THIS FORM**
This form enables employers to comply with Section 21 of the Employment Equity Act 55 of 1998. Employers who wish to voluntarily comply with the reporting requirements of the Act are also required to complete this form.

**WHO SHOULD COMPLETE THIS FORM?**
All designated employers that have to submit a report in terms of the Employment Equity Act 55 of 1998. Employers who wish to voluntarily comply with the reporting requirements of the Act are also required to complete this form.

**WHEN SHOULD EMPLOYERS REPORT?**
Large employers must submit their first report within six months of being designated, and thereafter annually on the first working day of October; and small employers must submit their first report within twelve months of being designated, and thereafter on the first working day of October of every year that ends with an even number.

**ESSENTIAL REQUIREMENTS**
Large employers, i.e. employers with 150 and more employees, must complete the entire EEA2 reporting form; small employers, i.e. employers with fewer than 150 employees, must only complete areas of the EEA2 form that apply to them.

**GUIDANCE TO OVERCOME DIFFICULTIES IN ORDER TO COMPLETE THE FORM PROPERLY**
Guidance to overcome difficulties in order to complete the form properly must be obtained from the Department prior to completing and submitting the report.

**BAND TO:**
Employment Equity Registry
The Department of Labour
Private Bag X17
Pretoria 0001

**Email reporting:** www.labour.gov.za

**Telephone:** 0860/10/1018

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### SECTION A: EMPLOYER DETAILS & INSTRUCTIONS

<table>
<thead>
<tr>
<th>Field</th>
<th>Information</th>
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<tbody>
<tr>
<td>Trade name</td>
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<tr>
<td>DTI registration name</td>
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<td>DTI registration number</td>
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<td>PAYE/SARS number</td>
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<td>UIF reference number</td>
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<td>EE reference number</td>
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<tr>
<td>Seta classification</td>
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<td>Industry/Sector</td>
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<td>Telephone number</td>
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<td>Fax number</td>
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<td>Email address</td>
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<td>Postal address</td>
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<td>Postal code</td>
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<td>City/Town</td>
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<td>Province</td>
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<tr>
<td>Physical address</td>
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<tr>
<td>Details of CEO at the time of submitting this report</td>
<td>Name and surname, Telephone number, Email address</td>
</tr>
<tr>
<td>Details of Employment Equity Senior Manager at the time of submitting this report</td>
<td>Name and Surname, Telephone number, Email address</td>
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<tr>
<td>Business type</td>
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<tr>
<td>Private Sector</td>
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<td>National Government</td>
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<td>Local Government</td>
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<td>Non-profit Organization</td>
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<td>Parastatal</td>
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<td>Provincial Government</td>
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<tr>
<td>Educational Institution</td>
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<tr>
<td>Information about the organization at the time of submitting this report</td>
<td>Number of employees in the organization, Is your organization an organ of State?</td>
</tr>
<tr>
<td>Date of submitting this report</td>
<td>DD/MM/YYYY</td>
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</table>
THE FOLLOWING MUST BE TAKEN INTO CONSIDERATION WHEN COMPLETING THE EEA4 FORMS

1. Foreign nationals should be included when completing the EEA4 form in the appropriate space provided in the table below.

2. Temporary employees mean workers who are employed to work for three consecutive months or less.

3. The calculation of remuneration must include twelve months of a financial year that is in line with the period covered by the EEA2 reporting form. Where a person has not worked for a full twelve month period, the total remuneration worked should be included.

4. All payment amounts to be reflected in the table below must be rounded to the nearest Rand (R) and included as total remuneration for each group in terms of race and gender. No blank spaces, commas (,), full stops or decimal points (.) or any other separator should be included when capturing the payment amounts in each of the cells in the table below – for example R7 345 567.22 must be captured as 7345567 with no separators.

5. The payments below indicate what must be included and what must be excluded in an employee's remuneration for the purposes of calculating pay in order to complete the EEA4 form.

5.1 Included

a) Housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind;

b) Car allowance or provision of a car, except to the extent that the car is provided to enable the employee to work;

c) Any cash payments made to an employee, except those listed as exclusions in terms of this schedule;

d) Any other payment in kind received by an employee, except those listed as exclusions in terms of this schedule;

e) Employer's contributions to medical aid, pension, provident fund or similar schemes;

f) Employer's contributions to funeral or death benefit schemes.

5.2 Excluded

a) Any cash payment or payment in kind provided to enable the employee to work (for example, an equipment, tool or similar allowance or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work);

b) A relocation allowance;

c) Gratuities (for example, tips received from customers) and gifts from the employer;

d) Share incentive schemes;

e) Discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme);

f) An entertainment allowance;

g) An education or schooling allowance.

6. The value of payments in kind must be determined as follows –

a) a value agreed to in either a contract of employment or collective agreement, provided that the agreed value may not be less than the cost to the employer of providing the payment in kind; or

b) the cost to the employer of providing the payment in kind.

7. An employee is not entitled to a payment or the cash value of a payment in kind as part of remuneration if:

a) the employee received the payment or enjoyed, or was entitled to enjoy, the payment in kind during the relevant period; or

b) in the case of a contribution to a fund or scheme that forms part of remuneration, the employer paid the contribution in respect of the relevant period.

8. If a payment fluctuates over a period of 13 weeks or if an employee has been in employment for a shorter period, the actual amount for that period should be calculated.
## INCOME DIFFERENTIALS STATEMENT

Please use the table below to indicate the number of employees, including people with disabilities, and their remuneration in each occupational level in terms of race and gender.

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<thead>
<tr>
<th>Occupational levels</th>
<th>MALE</th>
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<th>FEMALE</th>
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<th>FOREIGN NATIONALS</th>
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<td>Senior Management</td>
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<td>Professionally qualified and experienced specialists and</td>
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<td>Skilled technical and academically qualified workers,</td>
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<td>junior management, supervisors, forestry and</td>
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<td>Semi-skilled discretionary decision making</td>
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<td>Unskilled and defined decision making</td>
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<td>Temporary employees</td>
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<td>Please provide reasons for the disparities in remuneration within the various occupational levels</td>
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