

080514 pc labour



PARLIAMENT
OF THE REPUBLIC OF SOUTH AFRICA

PO Box 15 Cape Town 8000 Republic of South Africa
Tel: 27 (21) 403 2911
www.parliament.gov.za

PORTFOLIO COMMITTEE ON LABOUR

**PUBLIC HEARINGS DRAFT REPORT:
EMPLOYMENT EQUITY AND WORKPLACE DISCRIMINATION**

1. INTRODUCTION

It is important for South Africa to undergo a fundamental transformation at all levels of society with the objective of ensuring greater equality and developing a more humane society. The Parliamentary Portfolio Committee on Labour is responsible for providing political oversight over the labour market, labour market interventions and ensuring compliance with key labour legislation. The Portfolio Committee decided to host hearings on compliance with the Employment Equity Act (Act 55 of 1998) on 4, 5, 11 and 12 September 2007. The Hearings on the compliance with the Employment Equity Act were designed to consult with key stakeholders, engage with the levels of compliance, evaluate the effectiveness of enforcement, identify challenges, make recommendations and recognise best practice. The hearings should be seen in the spirit of contributing to "bridging the gap" and uniting all South Africans. It should also be seen in the international context of work undertaken by the International Labour Organisation.¹ The Portfolio Committee notes that the Employment Equity Act focuses on both an equitable representation in the labour market and the establishment of more humane labour relations or decent working conditions. Companies that meet the objectives and goals of the Employment Equity Act should be applauded and recognised as role models within their respective sectors. Chapter Two of the Employment Equity Act focuses on the Prohibition of Unfair Discrimination for all employers while Chapter Three focuses on the requirements for designated employers based on the number of employees and/ or income. The Committee, through the hearings, wanted to address both designated and other employers. While an important element of the hearings focused on compliance with the legislation, the Committee recognised that it is also important to look beyond the legislation and engage mindsets and attitudes as they impact on compliance and labour relations.

The Committee notes the urgency with regard to transforming the labour market and the need to consult with stakeholders so as to ensure a common approach and general levels of compliance. The Committee is also aware that labour market interventions are not straightforward and require particular policy choices to be made. The Committee is also sensitive to any unintended consequences of any recommendation. It is ten years since the enactment of the Employment Equity Act, which places a responsibility on the shoulders of Parliament to address compliance and the transformation of the labour market.

The Committee notes that prior to 1990 the South African labour market was characterised by a number of distortions and inefficiencies. The democratic government has since 1994 enacted progressive legislation intended to transform the labour market and begin to restore the dignity of poor and vulnerable people. As part of strengthening transformation and providing oversight it is the responsibility of Parliament to evaluate compliance with the Employment Equity Act and monitor discrimination in the workplace. The Parliamentary Portfolio Committee on Labour notes the findings of the 7th Annual Report of the Commission for Employment Equity, which highlighted the poor

¹ See ILO Report of Director General (2007). Equality at Work tackling the Challenges

progress made with regard to ensuring representivity in terms of race and gender. All stakeholders have a responsibility to work towards transforming the South African labour market with the objective of ensuring greater representivity and creating a more humane working environment. The hearing is intended to investigate the pace of transformation, identify bottlenecks, engage stakeholders and make recommendations to the Department of Labour.

The Committee has engaged with the following organisations and institutions so as to get a broad range of perspectives on employment equity and workplace discrimination:

- Workplace Dignity Institute (WDI)
- Sociology of Work Unit: University of Witwatersrand
- National Department of Public Service and Administration (DPSA)
- AIDS Law Project
- Black Management Forum (BMF)
- Congress of South African Trade Unions (COSATU)
- Solidarity Union
- Commission for Employment Equity (CEE)
- South African Human Rights Commission (SAHRC)
- Women's Legal Centre (WLC) and the Rural Education Awareness and Community Health (REACH)
- Business Unity South Africa (BUSA)

The Portfolio Committee report will provide an overall assessment of the policy issues, nature of the problem, reasons and make recommendations.

2. METHODOLOGY

The following methodology was utilised for eliciting recommendations:

- All submissions received were analysed and summarised. The summaries covered three areas, namely the background of the organisation making the submission, key points made and finally recommendations made.
- All recommendations were assessed to identify whether there were emerging trends or patterns.
- Where an issue/ recommendation was raised in several submissions these were used.
- All issues/ recommendations that were raised more than once were extracted and noted for consideration.
- In some instances where an issue was raised that had political repercussions and required political deliberation these were flagged and reported on as such. These issues were deliberated on by the Committee.

3. OUTLINE OF KEY ISSUES

The various submissions that were made have highlighted certain areas of concern when dealing with discrimination in the workplace. Whilst these areas of concern might not be common to all the submissions, general trends have been identified as problems within the South African labour market.

Firstly, there seems to be a lack of Codes of Good Practice in various sections within the labour market. These aim to regulate the conduct of various institutions in the workplace and are seen as best practice models through which individuals and organisations should operate. The Workplace Dignity Institute highlighted that because of a lack of a Code of Good Practice to address workplace violence, incidences of violence has been relatively high. COSATU also highlighted the lack of a Code of Good Practice to establish best practice rules in enforcing employment equity effectively,

Almost all of the organisations that made submissions highlighted challenges in the prevailing legislative framework. The legislative framework has established the Commission for Employment Equity, Human Rights Commission, Equality Courts and the Commission for Conciliation Mediation and Arbitration (CCMA). SWOP highlighted that an enquiry needs to be launched into the efficacy of the employment equity principles and to what extent these principles have further perpetuated inequalities in the labour market. The CEE further highlighted that there exists a relative amount of overlap within various pieces of legislation and the measures that they provide to address discrimination in the workplace. These overlaps have been used by large employers to side-step certain obligations that have been placed upon them. Similar problems were highlighted by the SAHRC who noted that there existed a dual jurisdiction within certain pieces of legislation, particularly the Equality Act and the Employment Equity Act. The SAHRC felt that greater clarity was needed as to the judicial interpretations of both of the acts. Furthermore, and more importantly, the SAHRC noted that the regulations (which could possibly provide more clarity on the implementation of employment equity) have as yet not been passed by Parliament. COSATU highlighted the problems with the legislative framework by referring particularly to the lack of establishment of employment equity committees and large disparities in income. Moreover, Solidarity intimated that certain amendments to employment equity legislation were needed so as to include young people as a targeted group. The ALP however stated that whilst South Africa has a comprehensive legislative framework to deal with discrimination against workers affected by HIV/AIDS, certain gaps still remain that allow workers to fall victim to discrimination and that these need to be addressed urgently. Given the serious imbalances in the labour market that the employment equity legislative framework wishes to address, it is clear that certain stumbling blocks still exist and that they are being abused by large employers.

Almost all the presenters illustrated that there still exists a low level of awareness amongst employees with regard to employment equity. The ALP suggested that a low level of awareness existed particularly in medium to small enterprises where employers failed to inform employees about the HIV/AIDS policy. COSATU concurred, but expanded by highlighting instances where employers had distanced (to a certain degree) themselves from employment equity processes by outsourcing this function to external service providers, thereby excluding shop stewards in this process.

The low level of awareness of employment equity and workplace discrimination is linked to the inspectorate capacity of the Department of Labour (DOL). COSATU submitted that the DOL does not possess the capacity to properly monitor the level to which employment equity is implemented in the labour market. The BMF has also criticized the capacity of the DOL by highlighting the need for more effective punitive measures for large employers who continually flout employment equity legislation. The WLC and REACH submitted that the DOL should extend their capacity to specifically cater for workers who are situated in rural areas. It was proposed that the DOL should establish a strategic partnership with NGO's whose core focus is to cater for rural workers. Rural workers have poor access to legal resources and employers make no effort to inform workers about employment equity and workplace discrimination. This has led to incidences of sexual harassment amongst children as young as 13 on farms in the country.

Interaction with certain judicial bodies also proved to be a common theme in various submissions. The BMF highlighted the inability of the CCMA to effectively deal with instances of covert discrimination in workplaces. The CEE submitted that whilst the CCMA has been mandated to intervene in matters relating to discrimination, the organisation's power is limited to mere conciliation. Matters are inevitably referred to the Labour Court to be dealt with on a more specialised basis. It was noted that it is expensive for employees to defend cases at the Labour Court. The SAHRC noted that whilst there exists a distinct overlap in the legislative framework, the Equality Courts

were currently under-utilized and that these judicial mechanisms are more effective in dealing with instances of workplace discrimination by catering for class action suits.

4. UNDERLYING FACTORS

The submissions highlight a number of underlying factors that serve as causal factors. These causal factors are briefly discussed below.

The submissions point to a lack of appropriate policy and procedural framework for dealing with discrimination in the workplace in many organisations. This lack of a policy and procedural framework for addressing discrimination and devising appropriate interventions, has served to exacerbate discrimination experienced in the workplace. In addition to this, many organisations have a predominant organisational culture and management style that serve to create an enabling environment within which discrimination can take place. This coupled with a lack of appropriate policies and procedures can lead to situations where employers turn a blind eye to adhering to legislation pertaining to discrimination in the workplace. In such a context, employees are often reluctant to articulate experiences of discrimination and often remain silent without seeking recourse.

The submissions highlight that the pace of labour market transformation in South Africa should be improved. Businesses and institutions across the country have been slow to give effect to affirmative action. This situation is compounded by the fact that the Department of Labour does not have the capacity to adequately oversee the enforcement of employment equity. Many companies opt not to transform their organisations, given that they are prepared to pay the current fine for non-compliance. In some instances the work of employment equity committees is impeded by non-consultation between management and unions and the fact that worker participation in employment equity committees is not encouraged. Workers are, at times, not consulted with regards to employment equity decisions. Non-compliance and enforcement of the Employment Equity Act should be reviewed by the Department of Labour so as to encourage active participation.

Many submissions attest to the fact that racial discrimination, gender discrimination and discrimination directed at persons with disabilities and persons with HIV and AIDS, continue to be rife in the South African labour market. At times, this discrimination takes the form of income differentials. Racial discrimination emerges as a key form of discrimination in many organisations and many companies appear to lack the motivation to transform their organisations from a race perspective. Employment equity interventions have tended to focus on top-level management, often at the expense of middle and lower levels of the labour market. Income differentials in the labour market as a result of apartheid continue to exist, with black workers located at the very bottom of salary scales. In many organisations, there is a serious lack of professional African employees as well as a lack of adequate representation of black women.

Discrimination based on gender is also still very rife in many South African organisations. This takes the form of attitudinal stereotyping, insensitivity to gender issues, sexual harassment and income differentials. Women are sometimes excluded from certain sectors of the labour market based on their perceived "unsuitability" for certain job. The lack of childcare facilities in many workplaces, given the fact that women are predominantly the primary childcare givers, is also highlighted as a form of discrimination.

Workplace discrimination against persons with disabilities also emerged as a key cause for concern in many submissions. A target of 2.5% has been set for the employment of persons with disabilities in the South African public service. In its submission, the Department of Public Services and Administration noted that this target has still not been met. This situation should be remedied as the public sector should set an example

to the rest of the labour market. Submissions also raised the fact that many places of work have not been sufficiently restructured to cater for persons with disabilities and many buildings remain inaccessible to persons with disabilities.

Some submissions pointed to the fact that the casualisation of labour has been an increasing trend in the recent past. This is because casual workers do not fall within the ambit of the labour legislation insofar as benefits are concerned.

The fact that many vulnerable workers who are subjected to workplace discrimination do not have access to legal recourse exacerbates their vulnerable status. In some instances employers play on the lack of recourse to legal and other forms of intervention and blatantly defy the provisions of labour legislation. The Employment Equity Act empowers the Commission for Conciliation, Mediation and Arbitration to deal with cases of workplace discrimination. Failing the conciliation process, such cases are referred to the Labour Court for adjudication and final judgement.

Submissions also point to the fact that many workers are not aware of their rights in the workplace. In addition to this, workers do not seem to have a high level of awareness of employment equity. In some instances employers appear to be reluctant to educate employees about employment equity in a concerted manner. The lack of worker awareness serves as a serious impediment to eradicating workplace discrimination.

5. RECOMMENDATIONS

The current conditions in the labour market clearly do not match the policy priorities of transformation. Submissions from the above organisations highlight a broad range of challenges with regard to equity in the labour market and the nature of work in South Africa. The various submissions emphasize that employment equity covers questions of race, gender, HIV/ AIDS status, disability, public-private sector transformation, psychometric testing, designated groups, representivity, awareness and training. The following recommendations are a result of the Committees deliberations and dialogue with various stakeholders during the hearings:

- There is a need for greater compliance with employment equity legislation, particularly with regard to race, disability, HIV/AIDS and gender. Employment equity is relevant for both the private and public service. The approach should not be punitive but rather involve consultation and consensus. Employers should be encouraged to strengthen the process of transformation. Recognising that transformation is a national priority, employers that do not comply with the legislation should be faced with a compliance cost. It is important that the reporting requirements are streamlined, simplified and customer friendly. Employers and unions should ensure that workplace employment equity committees are established and meaningful participation by labour and management should be sustained. The objective of these measures is not to increase the cost of doing business in South Africa but rather to encourage transformation. Business organisations and trade unions should be consulted so as to ensure consensus and minimise resistance to change. It is important that pay differentials do not contribute to greater inequity in the society which in turn will erode the gains that we have made in employment transformation.
- Skills development and codes of good practice was echoed throughout the different submissions as initiatives that serve to reinforce transformation. Recognising the Joint Policy Statement by the Ministers of Education and Labour skills development must not be seen in isolation from formal education since the latter impacts on the former.² Therefore integration between

² Joint Policy Statement by the Ministers of Education and Labour. Enhancing the efficacy of the National Qualifications Framework.

education, training and skills development is essential. The Committee will continue to monitor the NEDLAC process of reviewing the SETAs as part of the broader skills strategy.³ There should also be dialogue between the Departments of Labour and Public Enterprises as state owned enterprises can play a role in skills development. The Sector Education Training Authorities (SETA's) and sector business chambers can play an invaluable role in skilling people so as to ensure meaningful transformation. The Committee will continue its ongoing dialogue with the Department of Labour on the impact of the skills strategy. The Committee will also continue to provide oversight over the SETA administration. Recruitment strategies should be transparent, training should be accelerated and tokenism discouraged. Government, organised labour and business should find common solutions through strengthening channels of communications. Institutions like Parliament and NEDLAC can play an important role in building consensus with regard to employment equity.

While recognising the role that SETAs play in advancing sector skills priorities, the portfolio Committee equally recognises the value of employer participation. The Portfolio Committee recognises that while the Codes of Good Practice do not impose duties, they set standards of practice for employers. The Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices provides a link between skills development and employment equity. Skills development of employees is a key driver for the achievement of employment equity objectives. Employers should see skills development and employment equity decisions as sound business decisions aimed at tapping into a greater pool of talent so as to improve productivity. Organised labour must play an active role in skills development and employment equity forums. In light of the above, employers and workers should view skills training in the context of promoting competitiveness and redressing the imbalances of the past. It is important for employers to assess the skills levels of workers and the appropriate training interventions. Skills training should not be seen as a burden to be avoided or a tool to perpetuate labour market inequalities.

- There is a need to review the current enforcement framework. Businesses that see enforcement measures and non compliance fines as part of a cost structure should be discouraged from such practices. The enforcement mechanisms and non compliance fines should be set at a level whereby it deters businesses from avoiding the requirements of the Act. The fine structure should be reviewed so as to ensure operational effectiveness. Similarly the enforcement framework should be simplified, time frames shortened and the process should be user friendly. While fines are a measure to ensure compliance, the enforcement strategy should also include self regulation and a more active monitoring role played by organised business and trade unions. Moral persuasion can also encourage compliance and address negative attitudes and mindsets. Organised business can play a role in strengthening enforcement and ensuring compliance with the labour inspectorate.

While the Committee favours a need to review the current enforcement framework, it also recognises the Department's turnaround strategy on labour inspectors which is meant to strengthen enforcement of the legislation. The turnaround strategy for the labour inspectorate should include a review of the conditions of service, vacancy rate and greater cooperation between the Departments of Labour, Health and Minerals and Energy. The Department of Labour should mobilise its resources to implement the mandate given to it under the Employment Equity Act. Meanwhile, worker organisations, businesses and

³ SINGIZI Consulting (2007) Employment Promotion Programme SETA Review and NEDLAC (2007) SETA Review Preliminary Report presentation of NEDLAC Conclusions Following the Review of SETA Functioning and Performance

government should cooperate in order to implement the Employment Equity Legislation, particularly with regards to the employment and development of black women and people with disabilities. The enforcement framework currently includes the CCMA, Equality Courts, the Human Rights Commission, Labour Inspectorate and the Commission for Employment Equity. These institutions should cooperate and coordinate activities so as to ensure that the legislation is implemented and enforcements contribute to a changing labour market.

- The state of the South African labour market and racial representation of the labour force highlights the structural challenges in transforming the labour market. The submission by Solidarity questioned the data used by the Commission for Employment Equity in the 7th Annual Report. There should be greater collaboration between Statistics South Africa and the CEE so as to work towards a comprehensive statistical audit. A comprehensive audit should also take into account the state of employment equity in the small business sector. In the absence of a comprehensive statistical audit the data of the CEE 7th Annual Report is noted.
- The area of employment equity awareness was raised as a concern by all submissions. Employment Equity awareness should include education, training, showcasing best practice and equipping shop stewards to contribute to workplace transformation. The Committee endorses the recommendations made by the various submissions to strengthen awareness amongst workers, employers, organised labour and business organisations. Awareness campaigns are not a once off event but should be an ongoing process with stakeholders publically renewing their commitment to transformation.
- The current levels of abuse and violence in the workplace is totally unacceptable and has no place in our society. There is a need for the strengthening of a human rights culture in both our communities and in the workplace. The establishment of a human rights culture requires all stakeholders to put in place a Code of Good Conduct, a workplace violence policy, the establishment of support services and procedures to address such eventualities. Organised business and the Department of Labour can play a key role in both establishing a framework and developing a culture of human rights in the workplace. Sexual harassment is linked to the issue of power and violence in the workplace. Poor access to legal resources for workers particularly those in vulnerable sectors including agricultural and domestic workers make these workers vulnerable to abuse. The Employment Equity Form should include information on sexual harassment and the Labour Inspectorate should monitor sexual harassment in the workplace. Employers have a responsibility to ensure a safe working environment and provide support to workers.
- Employment equity should not be seen in isolation from other transformation initiatives. These interrelationships make policy and legislative harmonisation very important. There is a link between the Broad Based Black Economic Empowerment strategy of the Department of Trade and Industry and employment equity. There should be greater dialogue between the Department's of Labour and Trade and Industry. Another area that requires greater legal clarity is the relationship between the Equality Act and the Employment Equity Act. The relationship between the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Equality Courts should be explored with greater dialogue between the Department's of Justice and Labour. While supporting greater cooperation it is important that the respective roles are clear and specific for each institution.

- With regard to designated groups the hearings noted the improvement of the representation of white women in the labour market. The monitoring of trends in the labour market is not a once off event and the Department should continue to monitor developments so as to ensure equity.
- Discrimination experienced by workers with HIV/ AIDS negatively impacts on employment equity. Civil society, organised labour and business can play an important role in highlighting the concern, creating greater awareness and lobby for greater support.
- The ultimate objective of labour market policy should be to increase employment levels and ensure decent work. It is important to remember that equity and transformation is a vehicle to restoring the dignity of people.

6. REFERENCES

- International Labour organisation (2007) Equality at Work: Tackling the challenges. Global Report under the follow up to the ILO Declaration on Fundamental Principles and Rights at Work
- Joint Policy Statement by the Ministers of Education and Labour. Enhancing the Efficacy of the National Qualifications Framework.
- NEDLAC (2007) SETA Review Preliminary Report presentation of NEDLAC Conclusions Following the Review of SETA Functioning and Performance
- Republic of South Africa (1998) Employment Equity Act (Act 55)
- SINGIZI Consulting (2007) Employment Promotion Programme SETA Review
- Submissions from the Following Organisations
 - AIDS Law Project
 - Black Management Forum (BMF)
 - Business Unity South Africa (BUSA)
 - Congress of South African Trade Unions (COSATU)
 - Commission for Employment Equity (CEE)
 - National Department of Public Service and Administration (DPSA)
 - Sociology of Work Unit: University of Witwatersrand
 - Solidarity Union
 - South African Human Rights Commission (SAHRC)
 - Workplace Dignity Institute (WDI)
 - Women's Legal Centre (WLC) and the Rural Education Awareness and Community Health (REACH)