

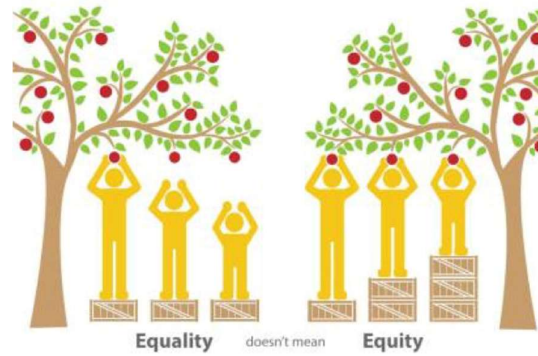


EMPLOYMENT EQUITY ACT

**BRENTWOOD EMPLOYMENT
RELATIONS SPECIALISTS**

MARK KERRUISH





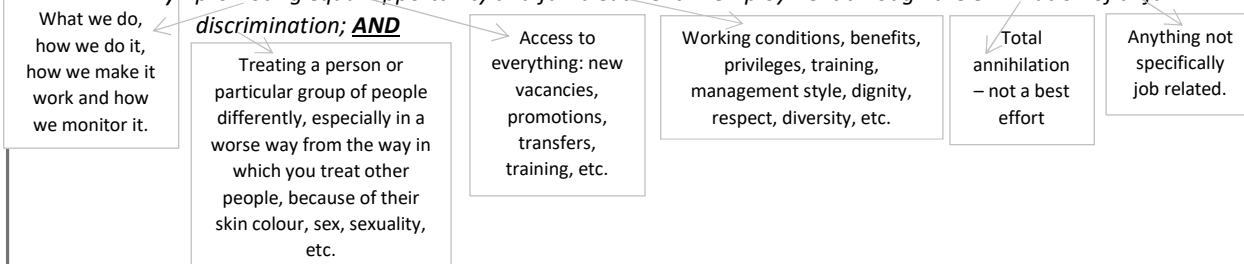
Purpose of the Employment Equity Act:

to achieve equity in the workplace

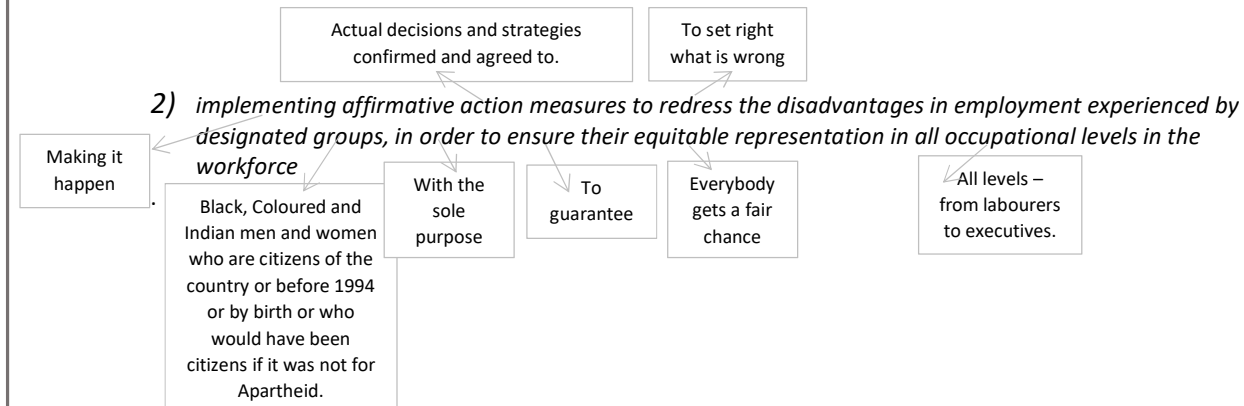
Each and every Human Resource related decision at the workplace must be done to *achieve equity*.

There are only two aspects it wants us to achieve in:

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, in order to ensure their equitable representation in all occupational levels in the workforce*



DESIGNATED EMPLOYERS

50 employees or more and/or over the following turnover thresholds

Industry	Old Thresholds	New Thresholds
Agriculture	R2 million	R6 million
Mining and quarrying	R7.5 million	R22.5 million
Manufacturing	R10 million	R30 million
Electricity, gas and water	R10 million	R30 million
Construction	R5 million	R15 million
Retail, Motor trade and repair services	R15 Million	R45 million
Wholesale trade and commercial trade	R25 million	R75 million

Catering, accommodation and other trade	R5 million	R15 million
Transport, storage and communication	R10 Million	R30 million
Finance and business services.	R10 Million	R30 million
Community, special and personal services	R5 million	R5 million

PROHIBITION OF UNFAIR DISCRIMINATION (Chapter 3)

Some parts of Employment Equity apply to ALL EMPLOYERS AND EMPLOYEES, even if they are not designated.

NOBODY IS FULLY EXEMPT FROM THE EMPLOYMENT EQUITY ACT

Elimination of unfair discrimination

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

Prohibition of unfair discrimination (includes applicants)

- 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, birth or on any other arbitrary ground
- It is not unfair discrimination to
 - take affirmative action measures consistent with the purpose of this Act; or
 - 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 anyone, or a combination of grounds of unfair discrimination listed above
- A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed above, is unfair discrimination.

Medical testing (includes Applicants)

Medical testing of an employee is prohibited, 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 a job.

Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court.

Psychological testing and other similar assessments (includes Applicants)

Prohibited unless the test or assessment being used –

- has been scientifically shown to be valid and reliable;
- can be applied fairly to all employees;
- is not biased against any employee or group; and
- has been certified by the Health Professions Council of South Africa, or any other body which may be authorised by law to certify those tests or assessments.

Disputes concerning this Chapter

- excludes an unfair dismissal dispute, which is referred to the CCMA or Bargaining Council.
- Any party to a dispute concerning this Chapter may refer the dispute to the CCMA within 6 months after the act or omission that allegedly constitutes unfair discrimination. (The CCMA can extend the 6-month period)
- the referring party must show that it has made a reasonable attempt to resolve the dispute.

- CCMA must attempt to resolve the dispute through conciliation.
- After Conciliation – Labour Court.
- The employee can opt for Arbitration at the CCMA, rather than the Labour Court if:
 - The allegation is discrimination on the grounds of sexual harassment; or
 - in any other case, that employee earns less than the UIF threshold.
 - Arbitration at the CCMA will also take place if both parties agree.
 - After a CCMA Award is made, an appeal may be lodged at the Labour Court within 14 (fourteen) days of the date of the award.
- Burden of proof

If unfair discrimination is alleged the employer must prove, on a balance of probabilities, that such discrimination

 - did not take place as alleged; or
 - is rational and not unfair, or is otherwise justifiable.

If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that

 - the conduct complained of is not rational;
 - the conduct complained of amounts to discrimination; and
 - the discrimination is unfair.

TARGETS

The annually moving target is based on the Economically Active Population, as published by StatSA and issued in the Commission for Employment Equity's annual report:

The Economically Active Population (EAP) are people between the ages of 15 and 64 years of age, who are either employed, unemployed or seeking employment. This figure includes foreign nationals, which can't be used for Employment equity or BBBEE planning.

The commission for Employment equity's EAP statistics are:

National Statistics	Male		Female	
	Employment Equity	BBBEE Compensation	Employment Equity	BBBEE Compensation
Black	42.8%	47.81%	35.1%	37.76%
Coloured	5.3%	5.71%	4.5%	5.64%
Indian	1.8%	1.82%	1%	1.39%
White	5.3%	N/A	4.2%	N/A
		Management Levels, Unemployed and Skills Development		Management Levels, Unemployed and Skills Development

Targets within targets

It is not sufficient for the company as a whole to work towards the goal of an overall effect to reflect the above statistics. The targets need to reflect on every management level as well to reach the overall target. Each level, and each department must have their individual targets. No recruitment, promotion or transfer may take place without consultation with this internal target. Ideally managers would have this target as part of their KPI and disciplined where it is not met. Recruitment becomes significantly more difficult because every candidate rejected must be accounted for and justified in terms of the job spec and inherent requirements of the job and the reason why the employment equity internal targets were disregarded.

In the following workforce profile:

	Male				Female				Total
	B	C	I	W	B	C	I	W	
Senior Management		1		3	1		1	1	7
Middle Management	2		1	5		2		2	12

Junior Management	11	2		4	2				19
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Senior Management Internal Targets

Employment Equity	Male				Female				Total
	B	C	I	W	B	C	I	W	
Senior Management		1		3	1		1	1	7
% Senior Managers	0%	14.3%	0%	42.6%	14.3%	0%	14.3%	14.3%	
% EAP	42.8%	5.3%	1.8%	5.3%	35.1%	4.5%	1%	4.2%	
Overstatement		Over		Over			Over	Over	
Understatement	Under		Under		Under	Under			

In this example the employer does NOT need any more senior managers who are:

Coloured Men, White Men, Indian Women and White Women.

The employer needs more Black Men, Indian Men, Black Women and Coloured Women.

The recruitment, promotion, transfer and even Skills Development emphasis must not focus on the Overstated groups of people, and focus exclusively on the understatement.

The priority of races and genders needs to be determined. As a rule, women are always chosen over men, and generally in the order of Black, Coloured and then Indian, but the extent of understatement will make the decision:

Understatement	Under		Under		Under	Under			
Extent of understatement	42.8%		1.8%		35.1%	4.5%			
Demographic focus	1		4		2	3			

When employing, promoting, transferring and training the focus must then be in the following priority:

- Priority 1: Black men
- Priority 2: Black Women
- Priority 3: Coloured Women
- Priority 4: Indian men.

BBBEE may complicate things, because the percentages are deliberately skewed to exclude White people completely.

Black Economic Empowerment	Male				Female				Total
	B	C	I	W	B	C	I	W	
Senior Management		1		3	1		1	1	7
% Senior Managers	0%	14.3%	0%	42.6%	14.3%	0%	14.3%	14.3%	
% EAP (ADJUSTED)	47.81%	5.71%	1.82%	0%	37.76%	5.64%	1.39%	0%	
Overstatement		Over		Over			Over	Over	
Understatement	Under		Under		Under	Under			
Extent of understatement	47.81%		1.82%		23.46%	5.64%			
Demographic focus	1		4		2	3			

In this example, the target requirement remains the same for Employment Equity and BBBEE

CAUTION: For every candidate not accepted, regardless of race there must be a reason for the non-acceptance. Incorrect race and gender is acceptable, but you must be able to justify why another race or genre's qualifications or experience is less than an unsuccessful candidate, but was still awarded the position.

MONITORING, ENFORCEMENT AND LEGAL PROCEEDINGS (Chapter 5)

Who is checking?

Monitoring

Any employee or shop steward (shop steward) may bring an alleged contravention of this Act to the attention of –

- another employee;
- an employer;
- a trade union;
- a workplace forum;
- a labour inspector;
- the Director General; or
- the Commission for Employment Equity.

Enforcement

1. Powers of labour inspectors

- a. has the authority to enter, question and inspect.
 - i. In order to monitor and enforce compliance with an employment law, a labour inspector may, without warrant or notice, at any reasonable time, enter any workplace or any other place where an employer carries on business or keeps employment records, that is not a home; any premises used for training in terms of any private employment office registered.
 - ii. A labour inspector may enter a home or any place other than a place referred to above only—
 - with the consent of the owner or occupier; or
 - if authorised to do so by the Labour Court
 - in writing
 - on written application by a labour inspector who states under oath or affirmation the reasons for the need to enter a place to monitor or enforce compliance with any employment law.
 - iii. If it is practical to do so, the employer and a shop steward must be notified that the labour inspector is present at a workplace and of the reason for the inspection.
- iv. Powers to question and inspect: To monitor or enforce compliance with an employment law, a labour inspector may—
 - require a person to disclose information, either orally or in writing, and either alone or in the presence of witnesses, on any matter to which an employment law relates, and require that the disclosure be made under oath or affirmation;
 - inspect, and question a person about, any record or document to which an employment law relates;
 - copy any record or document, or remove these to make copies or extracts;
 - require a person to produce or deliver to a place specified by the labour inspector any record or document for inspection;
 - inspect, question a person about, and if necessary remove, any article, substance or machinery present at the place.
 - inspect or question a person about any work performed; and
 - perform any other prescribed function necessary for monitoring or enforcing compliance with an employment law.



- b. A labour inspector may be accompanied by an interpreter and any other person who may be reasonably required to assist in conducting the inspection.
- c. A labour inspector must—
 - i. produce on request the certificate issued which provides the following information:
 - that the person is a labour inspector;
 - which legislation that labour inspector may monitor and enforce; and
 - which of the functions of a labour inspector that person may perform.
 - ii. provide a receipt for any record, document, article, substance or machinery removed.
 - iii. return anything removed within a reasonable period of time.

2. Undertaking to comply

- a. A labour inspector **may** request and obtain a written undertaking from a designated employer to comply with the following within a specified period, if the inspector has reasonable grounds to believe that the employer has failed to –
 - i. consult with employees;
 - ii. conduct an analysis;
 - iii. publish its report in the employer’s financial report;
 - iv. assign responsibility to one or more senior managers;
 - v. inform its employees; or
 - vi. keep records.
- b. If a designated employer does not comply with a written undertaking within the period stated in the written undertaking, the Labour Court may, on application by the Director-General, make the undertaking, or any part of the undertaking, an order of the Labour Court.
- c. Compliance order: A labour inspector may issue a compliance order to a designated employer if that employer has failed to comply with –
 - i. Consultation with employees
 - ii. Matters for consultation
 - iii. Analysis
 - iv. Publication of report
 - v. Designated employer must assign manager
 - vi. Duty to inform
 - vii. Duty to keep records
- d. A compliance order must set out –
 - i. the name of the employer, and the workplaces to which the order applies;
 - ii. those provisions which the employer has not complied with and details of the conduct constituting non-compliance;
 - iii. any written undertaking given by the employer and any failure by the employer to comply with the written undertaking;
 - iv. any steps that the employer must take and the period within which those steps must be taken;
 - v. the maximum fine, if any, that may be imposed on the employer for failing to comply with the order; and any other prescribed information.
- e. A copy of the compliance order must be served on the employer named.
- f. An employer who receives a compliance order must display a copy of that order prominently at a place accessible to the affected employees at each workplace named in it.
- g. An employer **must** comply with the compliance order within the time period stated in it.
- h. If an employer does not comply with an order within the period stated in it, the Director-General may apply to the Labour Court to make the compliance order an order of the Labour Court
- i. Limitations: a labour inspector may not issue a compliance order if
 - i. the employer is being reviewed by the Director-General in terms of section 43;
 - ii. the Director-General has referred an employer’s failure to comply with a recommendation to the Labour Court.

3. The Minister must keep a register of designated employers that have submitted reports.



4. Assessment of compliance.

In determining whether a designated employer is implementing employment equity in compliance with this Act, in addition to the affirmative action measures:

- a. The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational level in that employer's workforce in relation to the demographic profile of the national and regional economically active population;
- b. reasonable steps taken by a designated employer to train suitably qualified people from the designated groups;
- c. reasonable steps taken by a designated employer to implement its employment equity plan;
- d. the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups;
- e. reasonable steps taken by an employer to appoint and promote suitably qualified people from the designated groups; and
- f. any other prescribed factor.

The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of this Act, except where this Act provides otherwise.

5. Powers of Labour Court:

- a. The Labour Court may make any appropriate order including
 - i. on application by the Director-General making a compliance order an order of the Labour Court;
 - ii. condoning the late filing of any document with, or the late referral of any dispute to, the Labour Court;
 - iii. directing the CCMA to conduct an investigation to assist the Court and to submit a report to the Court;
 - iv. awarding compensation;
 - v. awarding damages;
 - vi. ordering compliance;
 - vii. imposing a fine;
 - viii. in an appeal confirming, varying or setting aside all or part of an order made by the Director-General; and
- b. If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including
 - i. payment of compensation by the employer to that employee;
 - ii. payment of damages by the employer to that employee;
 - iii. an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
 - iv. an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;
 - v. an order directing the removal of the employer's name from the register.
 - vi. the publication of the Court's order,
- c. The Labour Court, in making any order, may take into account any delay by the Applicant.
- d. If the Labour Court makes a decision on medical testing, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to
 - i. the provision of counselling;
 - ii. the maintenance of confidentiality;
 - iii. the period during which the authorisation for any testing applies; and
 - iv. the category or categories of jobs or employees in respect of which the authorisation for testing applies.



6. Fines must be paid into the National Revenue Fund.

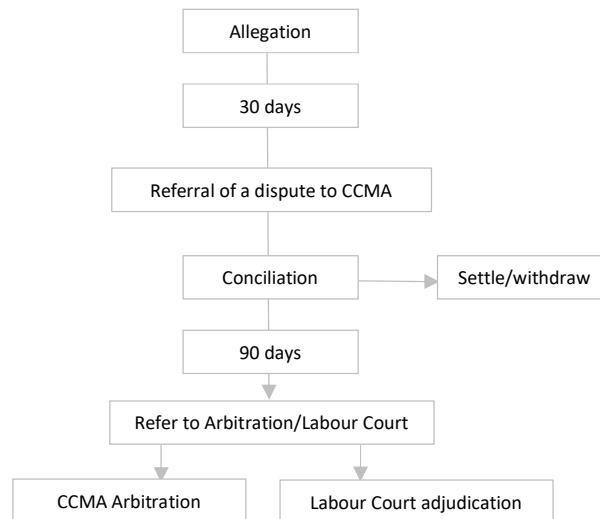
Previous Contravention	Contravention relating to consultation and informing employees, Analysis, publication, assigning a manager, keeping records.	Contraventions relating to the Employment Equity Plan, successive Employment Equity Plans and Reporting
No previous contravention.	R1 500 000	R1 500 000 or 2% of turnover, whichever is greater.
A previous similar contravention.	R1 800 000	R1 800 000 or 4% of turnover, whichever is greater.
Previous contravention within 12 months OR 2 previous contraventions for the same provision within 3 years.	R2 100 000	R2 100 000 or 6% of turnover, whichever is greater.
Three previous contraventions for the same provision within 3 years.	R2 400 000	R2 400 000 or 8% of turnover, whichever is greater.
Three previous contraventions for the same provision within 3 years.	R2 700 000	R2 700 000 or 10% of turnover, whichever is greater.

DISPUTE FLOW CHART

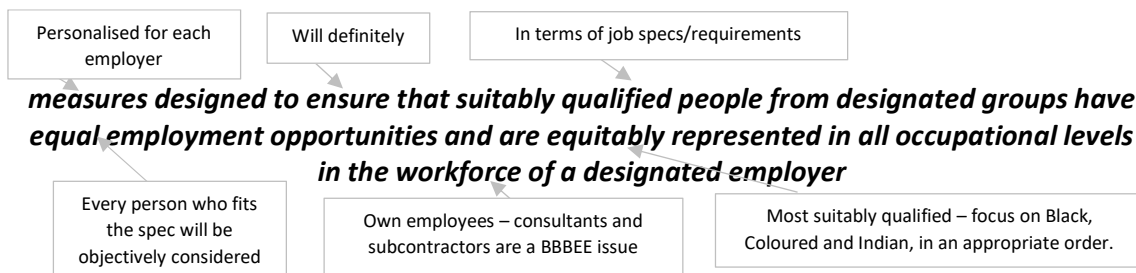


Protection of employee rights

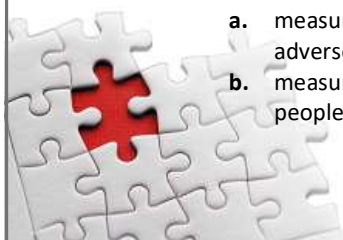
1. No person may discriminate against an employee who exercises any right conferred by this Act.
2. No person may threaten to do, or do any of the following:
 - a. Prevent an employee from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
 - b. prejudice an employee because of past, present or anticipated
 - disclosure of information that the employee is lawfully entitled or required to give to another person;
 - exercise of any right conferred by this Act; or
 - participation in any proceedings in terms of this Act.
3. No person may favour, or promise to favour, an employee in exchange for that employee not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.
4. Nothing precludes the parties to a dispute from settling the dispute.
5. "employee" includes a former employee or an applicant for employment.
6. Procedure for dispute:
 - a. refer it in writing to the CCMA.
 - b. Conciliation
 - c. any party to the dispute may refer it to the Labour Court; or CCMA.



COMPLIANCE: Affirmative action measures



1. 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 to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
 - d. Subject to preferential treatment and numerical goals, measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce
 - e. 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.
2. The measures include preferential treatment and numerical goals, but exclude quotas.
 3. 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.

COMPLIANCE: Consultation with employees

1. A designated employer must take reasonable steps to consult and attempt to reach agreement on:
 - a. the conduct of the analysis.
 - b. the preparation and implementation of the employment equity plan
 - c. the report.
2. Consultation takes place with:
 - a. with a representative trade union representing members at the workplace and its employees or representatives nominated by them; or
 - b. if no representative trade union represents members at the workplace, with its employees or representatives nominated by them.
3. The consultation group, taken as a whole, must
 - a. reflect the interests of employees from across all occupational levels of the employer's workforce
 - b. employees from designated groups; and
 - c. employees who are not from designated groups.

COMPLIANCE: Matters for consultation

1. A designated employer must consult on –
 - a. the conduct of the analysis;
 - b. the preparation and implementation of the employment equity plan;
 - c. the report referred

COMPLIANCE: Disclosure of information

1. During consultation, a designated employer **must** disclose all relevant information that will allow those parties to consult effectively.
2. This excludes the following in terms of section 16 of the Labour Relations Act:
 - a. Majority unions only, including the Employment Equity representatives
 - b. The employer must notify the shop stewards or union or committee representatives in writing if any information disclosed is confidential.
 - c. An employer is not required to disclose information-
 - i. that is legally privileged;
 - ii. that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order of any court;
 - iii. that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
 - iv. that is private personal information relating to an employee, unless that employee consents to the disclosure of that information.



- d. Disputes about disclosure are referred to the CCMA which conciliates and arbitrates. If the CCMA decides that the information is relevant it must balance the harm that the disclosure is likely to cause to an employee or employer against the harm that the failure to disclose the information is likely to cause to the ability of a committee to perform effectively.

COMPLIANCE: Analysis

1. A designated employer **must** collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, to identify employment barriers which adversely affect people from designated groups.

2. An analysis **must** include a profile of the designated employer's work force within each occupational level to determine the degree of underrepresentation of people from designated groups in various occupational levels in that employer's workforce

Temporary employment services

A person whose services have been procured for, or provided to, a client by a TES is deemed to be the employee of that client, if employment with the client is indefinite or three months or longer.

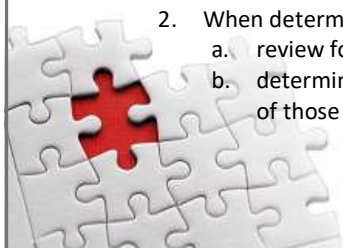
Where a temporary employment service, on the express or implied instructions of a client, commits an act of unfair discrimination, both the temporary employment service and the client are jointly and severally liable.

COMPLIANCE: Employment equity plan

1. A designated employer **must** prepare and implement an employment equity plan which **will achieve** reasonable progress towards employment equity.
2. The Plan must state –
 - a. the objectives to be achieved for each year of the plan;
 - b. the affirmative action measures to be implemented
 - c. where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational level in the workforce,
 - d. the strategies intended to achieve those goals
 - e. the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
 - f. the duration of the plan: minimum 1 year, maximum 5 years.
 - g. procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
 - h. the internal procedures to resolve any dispute about the interpretation or implementation of the plan;
 - i. the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
 - j. any other prescribed matter.

COMPLIANCE: Suitably qualified person

1. A person may be suitably qualified for a job in a combination of that person's –
 - a. formal qualifications;
 - b. prior learning;
 - c. relevant experience; or
 - d. capacity to acquire, within a reasonable time, the ability to do the job.
2. When determining whether a person is suitably qualified for a job, an employer **must** –
 - a. review formal qualification, prior learning, relevant experience, and capacity to acquire the skills AND
 - b. determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.



3. An employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience.

COMPLIANCE: Reports

1. A designated employer **must** submit a report to October 1st, or January 15th.
2. The first report will refer to the initial development of and consultation around an employment equity plan.
3. The subsequent reports will detail the progress made in implementing the employment equity plan.
4. If an employer that becomes a designated employer on or after April 1st, but before October 1st, only submits the first report on October 1st the following year.
5. The report **must** contain the prescribed information and must be signed by the CEO.
6. An employer that is not able to submit the report by October 1st, must notify the Director-General in writing before the 31st July in the same year giving reasons for its inability to do so.
7. The Director-General may apply to the Labour Court to impose a fine if an employer –
 - a. fails to submit a report in terms of this section;
 - b. fails to notify and give reasons to the Director-General; or
 - c. has notified the Director-General but the reasons are false or invalid.
8. Every report prepared in terms of this section is a public document.

Compliance: Publication of report

Every designated employer that is a public company must publish a summary of a report in that employer's annual financial report.

COMPLIANCE: Successive employment equity plans

Before the end of the term of its current employment equity plan, a designated employer **must** prepare a subsequent employment equity plan.

COMPLIANCE: Manager responsible

1. Every designated employer must –
 - a. assign one or more senior managers to take responsibility for monitoring and implementing an employment equity plan;
 - b. provide the managers with the authority and means to perform their functions; and
 - c. take reasonable steps to ensure that the managers perform their functions.
2. The assignment of responsibility to a manager does not relieve the employer of any responsibility.

COMPLIANCE: Duty to inform

1. An employer must display at the workplace where it can be read by employees informing them about the provisions of this Act, in each of its workplaces, and placed prominently which are accessible to all employees:
 - a. the most recent report submitted to the Director-General;
 - b. any compliance order, arbitration award or order of the Labour Court concerning the provisions of this Act in relation to that employer.
2. An employer who has an employment equity plan, must make a copy of the plan available to its employees for copying and consultation.

COMPLIANCE: Duty to keep records

1. An employer must establish and, for the prescribed period, maintain records in respect of its workforce, its employment equity plan and any other records relevant to its compliance with this Act.



COMPLIANCE: Income differentials and discrimination

1. Every designated employer, when reporting, must submit a statement, as prescribed, the remuneration and benefits received in each occupational level of that employer's workforce.
2. Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions are reflected in the statement, a designated employer must take measures to progressively reduce such differentials, which may include:
 - a. collective bargaining;
 - b. compliance with sectoral determinations
 - c. applying the norms and benchmarks set by the Employment Conditions Commission;
 - d. measures contained in skills development legislation;
 - e. other measures that are appropriate in the circumstances.

Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value**OBJECTIVES.**

1. Promote the implementation of pay /remuneration equity in the workplace
2. Encourage employers to manage their pay /remuneration policies, practices and proper consultation processes within a sound governance framework to drive and maximise on the principle of equal pay/remuneration for work of equal value that is fair, free from unfair discrimination and consistently applied.
3. Elimination of unfair discrimination in respect of pay /remuneration

REMUNERATION:

Any payment in money or in kind, or both, made or owing to any person in return for working for another person, including the State.

ELIMINATING UNFAIR DISCRIMINATION IN RESPECT OF PAY/REMUNERATION

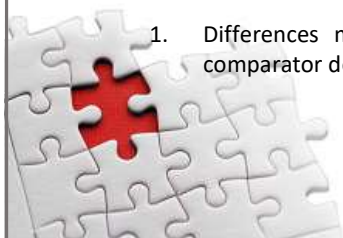
1. An employer **must** take steps to eliminate differences in pay /remuneration, of employees who perform the same or substantially the same work or work of equal value that are directly or indirectly based on one or more listed or on any other arbitrary ground.
2. In South Africa, for historical reasons, the undervaluing of work has the greatest significance when examining work performed by employees who are female, black or those with disabilities. However, differences based on any of the listed or any other arbitrary ground may constitute unfair discrimination.

KEY ISSUES

1. Three key issues require scrutiny-
 - a. Are the jobs that are being compared the same, substantially the same or of equal value in terms of an objective assessment?
 - b. Is there a difference in the terms and conditions of employment, including pay /remuneration, of the employees in the jobs that are being compared?
 - c. If there are differences in the terms and conditions of employment, can these be justified on fair and rational grounds?

DIFFERENCES MIGHT NOT BE UNFAIR DISCRIMINATION

1. Differences may not necessarily constitute unfair discrimination where the complainant and the comparator do not perform the same, similar or work of equal value.



2. A difference only be unfair discrimination if the differences are directly or indirectly based on race, sex, gender, disability or any other listed or on any other arbitrary ground.

OBJECTIVE ASSESSMENT:

1. The basic criteria commonly used
 - a. The responsibility demanded of the work, including responsibility for people, finances and material.
 - b. This includes tasks that have an impact on who is accountable for delivery of the company's goals, for example, its profitability, financial soundness, market coverage and the health and safety of its clients.
 - c. It is important to consider the various types of responsibility associated with the enterprise's or organisation's goals independently from the hierarchical level of the job or the number of employees it involves supervising.
 - d. The skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal.
 - e. Knowledge and skills which are required for a job
 - f. Physical, mental and emotional effort required to perform the work. This refers to the difficulty related to and the fatigue and tension caused by performing job tasks. It is important not to only consider physical efforts but also take mental and psychological effort into consideration.
 - g. Assessment of the physical environment, psychological conditions, time when and geographic location where the work is performed

FACTORS JUSTIFYING DIFFERENTIATION IN PAY / REMUNERATION

1. Ensure differentiation is not based on the arbitrary grounds.
2. It is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following factors –
 - a. the individuals' respective seniority or length of service
 - b. the individuals' respective qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
 - c. the individuals' respective performance, quantity or quality of work, if employees are equally subject to the employer's performance evaluation system, and that the performance evaluation system is consistently applied;
 - d. where an employee is demoted because of organisational restructuring or for any other legitimate reason without a reduction in pay /remuneration and fixing the employee's salary at this level until the pay /remuneration of employees in the same job category reaches this level;
 - e. where an individual is employed temporarily in a position for purposes of gaining experience or training and as a result receives different pay /remuneration or enjoys different terms and conditions of employment;
 - f. the existence of a shortage of relevant skill in a particular job classification; and

PROCESS FOR EVALUATING JOBS FOR THE PURPOSE OF EQUAL PAY/REMUNERATION FOR WORK OF EQUAL VALUE

1. Determine the scope of the audit to be conducted to identify inequalities in pay /remuneration on account of gender, race, disability or any other listed or on any other arbitrary ground;
2. Identify jobs that would be subjected to the audit;
3. Ensure that job profiles or job descriptions exist and are current before evaluating jobs;
4. Utilise a job evaluation and/or grading system that is fair and transparent and does not have the effect of discriminating unfairly on any listed or arbitrary ground;



5. Compare jobs that are the same, similar or of equal value in the employer's own organisation or company. This should include comparing female -dominated jobs with male- dominated jobs as well as other jobs that may have been undervalued due to, race, disability or other discriminatory grounds;
6. Select a method of comparing pay /remuneration, both in money and kind, in the relevant jobs: this can be done by using either the average or the median earning o employees in the relevant jobs as the basis for pay /remuneration comparisons or by using another method that will compare pay /remuneration in a fair and rational manner;
7. Identify the reasons for differentiating in pay /remuneration and determine whether they are justifiable;
8. Where differentiation is found not to be justifiable, determine how to address inequalities identified, without reducing the pay /remuneration of employees to bring about equal remuneration; and
9. Monitor and review the process annually

