

ConCourt clarifies employment equity measures

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On 15 July 2016, the Constitutional Court in *Solidarity and Others v Department of Correctional Services and Others* (CCT 78/15) [2016] ZACC 18 handed down its judgment on disputes surrounding the Department of Correctional Services' (Department) refusal to promote or employ individuals based on the demographic targets set out in the Department's Employment Equity Plan (EEP).



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In terms of s21(1) of the Employment Equity Act, No 55 of 1998 (EEA), certain employers are required to, among other things, “prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer’s workforce”. The Department’s EEP for the period 2010 – 2014 contained numerical targets to be achieved by the Department within a five year period based on national demographics. The Department assessed its level of racial and gender group representation exclusively on national demographics.

In 2011, the Department advertised vacant posts in the Western Cape. The 10 individual applicants in this case (five coloured women, four coloured men and one white male) applied for these posts. Nine out of the 10 applicants were recommended for appointment. However, eight of the applicants were denied appointment to the respective positions due to race and gender considerations which were “over represented”, according to the Department.

The Labour Court ruled in favour of Solidarity, the trade union representing the applicants, stating that the EEP was non-compliant with s42 of the EEA in that it failed to take into account both regional and national demographics. However, the Labour Court desisted from granting any relief to the applicants or declaring the EEP invalid. Instead, the Labour Court deemed it most appropriate to order that the Department take immediate steps to ensure that in the future both national and regional demographics are taken into account when the setting equity targets for its workforce.

The applicants appealed to the Labour Appeal Court (LAC) against the Labour Court's decision not to grant the individual applicants any relief and/or declare the EEP invalid due to its non-compliance with s42. The LAC dismissed the applicants' appeal, ruling that the EEP passed the test required in terms of the EEA, read together with the Constitution of the Republic of South Africa, 1996.

In the Constitutional Court, the court addressed the Barnard principle set out in *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 which states that an employer may refuse to appoint a candidate who falls within a category of persons that is already adequately represented at a certain occupational level. In this case, the court was required to consider whether the Barnard principle's application is limited to white people only and whether this principle may also be applied in respect of gender. The court ruled that the Barnard principle is not only limited to white people but rather to candidates from all racial groups as well as both men and women.

The applicants' submission that the Department's EEP be declared null and void due to its non-compliance with s42(a) was dismissed by the court, ruling that the EEP had already run its course and there was no need for an order declaring its invalidity.

The court also rejected Solidarity's contention that the numerical targets constituted 'quotas', which are outlawed under the EEA. One of the distinctions, as set out in Barnard, is that a quota is 'rigid' as opposed to numerical targets, which are flexible. The court ruled that because the EEP made provision for deviations from the set targets, the targets could not be said to be rigid and did not constitute quotas.

Most importantly, the court held that the Department acted unlawfully and in breach of its obligations under s42 of the EEA in failing to consider regional demographics in assessing the levels of representation and subsequently setting targets for its EEP. The Department thus made use of a benchmark which was not authorised under the EEA and as such had no justification for using race and gender as a means to refuse the appointment/promotion of the individual applicants. Therefore, the decision not to appoint most of the individual applicants constituted unfair discrimination.

The Department also argued that because it is a national department, it is excluded from the requirement to consider both national and regional demographics. The court similarly rejected this argument on the basis that s42(a) does not exclude national departments from its application.

Finally, the court ordered the coloured applicants, who were recommended for appointment, be appointed to the relevant posts, to the extent that those posts were vacant and be paid the remuneration attached to those posts with retrospective effect. Regarding the applicants whose posts were currently occupied, the court ordered that the Department pay the applicants the remuneration attached to those posts with retrospective effect.

The court's ruling serves as a reminder of the delicate position of employers who fall within the requirements of s42(a) of the EEA and goes a long way to clarify what is required, procedurally, to achieve a 'transformed' workplace which is compliant with the EEA.

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