Targets and quotas: The impersonal arithmetic of transformation

Are you a designated employer seeking to prepare your Employment Equity Plan (EE Plan) for the first time or renew an existing EE Plan?

By Lauren Salt and JJ van der Walt 7 Mar 2018

© Edhar Yuralaits – 123RF.com

If so, be(a)ware: the Constitutional Court does not take issue with EE Plans that rigidly allocate positions along the lines of race and gender, provided that the EE Plan provides for certain specific deviations or exclusions.

In terms of section 15(3) of the Employment Equity Act, No. 55 of 1998 (EEA) an EE Plan (as an affirmati action measure) may provide for preferential treatment and numerical goals, but not quotas. In light of this, we discuss the practical implications of the Constitutional Court (CC) judgment in the case of Solidarity v Department of Correctional Services 2016 (5) SA 594 (CC) (Solidarity).

In Solidarity, the CC was divided on the meaning of and difference between numerical goals and quotas when it was called upon to decide, among other things, whether an EE Plan provided for quotas or numeri targets.

In Solidarity, the Majority of the CC relied on one of its earlier judgments South African Police Service v Solidarity obo Barnard 2014 (6) SA 123 (CC) (Barnard). In Barnard, it was held that:

- the primary distinction between numerical goals and quotas lies in the flexibility of the standard;
- quotas amount to job reservation that are prohibited in terms of the EEA; and
- numerical goals serve as flexible employment guidelines.

In applying these principles, the Majority held that the EE Plan was not rigid because it provides for deviati from its ambit in two specifically defined circumstances. In terms of the EE Plan, the EE Plan may be

deviated from where:

- a candidate has scarce skills; or
- the operational requirements of the employer justify deviation.

However, the Minority of the CC in Solidarity, although also following Barnard, described the relevant EE Plan as "a cold and impersonal arithmetic". Specifically, it stated that "[a] person familiar with the arithmetic functions of an Excel spreadsheet might have produced [the EE Plan] in a morning."

The Minority held that, in assessing the flexibility of an EE Plan, the relevant question was whether the general application of the EE Plan was flexible. The enquiry was not whether the EE Plan provided for special cases that were excluded from its ambit. The critical enquiry, for the Minority, was whether there wa scope for flexibility in the general application of an EE Plan with regard to positions not excluded from its general ambit.

In Solidarity, the relevant EE Plan provided for exact instructions regarding the identity of who can be appointed in each operational level. For example, in operational level 5, the EE Plan provided that "... only African Females, Whites and Indians can be appointed".

In following the Majority, the EE Plan does not provide for quotas because an African Male applicant may l appointed, if he has scarce skills and/or on the basis of the employer's operational requirements. Howeve in following the Minority, the EE Plan should have merely provided for numerical guidelines. For example, EE Plan should have read as follows: 'at level 5, African Males are currently sufficiently represented and preference, on the basis of employment equity, may only be provided to African Females, Whites, and Indians'. In other words, the EE Plan must still allow an African Male to be appointed, irrespective of the numerical targets of the EE Plan - even if there is no provision or reason for deviation.

Applying the Majority's view, a designated employer need only provide for limited flexibility; that is, deviatic or exclusion from its general application. However, applying the Minority's view, a designated employer should provide for flexibility in the general application of the EE Plan. By doing so, the employer can be concerned with the relationship between, but most importantly, the dignity of both the previously disadvantaged and those adversely affected by transformation. It is up to designated employers to decide whether they will adopt the Majority’s or the Minority’s approach in their EE Plans, neither of which is unconstitutional.

ABOUT THE AUTHOR

Lauren Salt is a senior associate and JJ van der Walt, a candidate attorney, Employment & Compensation Practice, Baker McKenzie Johannesburg.