EMPLOYMENT LAW
ALERT

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CDH
CLIFFE DEKKER HOFMEYR

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KIETI LAW LLP, KENYA

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IN THIS ISSUE

Paying the penalty for non-compliance with the EEA

Employers are increasingly being challenged to meet the targets set in their employment equity plans and are facing penalties for failing to do so.

Recently, there has been an increase in the number of employment equity audits conducted by the Department of Employment and Labour on the enforcement of a designated employer's obligations in terms of the Employment Equity Act 55 of 1998 (EEA). The Chief Director for Statutory and Advocacy Services, Ms Fikiswa Bede, recently said that a total of 60% of employers in the financial year ending 31 March 2022 have been referred to prosecution for failure to comply with employment equity legislation. She said that, in the year under review, a total of 860 Director-General reviews were conducted nationally.

The Department of Employment and Labour (DEL) is preparing to introduce an amended Employment Equity Act in 2022. According to the DEL all current employment equity plans will fall away on 22 September 2022, and new plans will have to be aligned with five-year targets.

This article will address the importance of compliance, and the penalties that may ensue should employers neglect their obligations.

PENALTIES

In terms of section 20(7) of the EEA, the Director-General may apply to the Labour Court to impose a fine, in accordance with Schedule 1, if a designated employer fails to prepare or implement an employment equity plan in terms of this section.

For a first-time offence, an employer will be subject to a fine of the greater of R1,5 million or 2% of the employer's turnover. If the employer has contravened the provision once before, the fine will be the greater of R1,8 million or 4% of the employer's turnover. The fine increases depending on the repetition of the contravention. Fines have been increased to a maximum of R2,7 million or 10% of annual turnover, whichever is the greater, for repeat offenders.

RELEVANT CASE LAW

In *Director-General, Department of Labour v Win-Cool Industrial Enterprise (Pty) Ltd* [2007] 28 ILJ 1774 (LC), the court considered the principles underlying fines imposed by the Director-General.

The court found that a fine imposed under the EEA is not a criminal penalty, but a "*regulatory mechanism*". Furthermore, the DEL must satisfy the court on a balance of probabilities that the employer indeed defied a compliance order, and that the fine it seeks is justifiable and reasonable.

What is interesting is the court also held that the fact that Win-Cool's workforce happened to be entirely comprised of Black people and its owner was of Chinese extraction did not relieve the company of its obligations under the EEA. Nor could the company rely on the argument that its consultant botched the preparation of a plan – responsibilities under the EEA cannot simply be outsourced.

Paying the penalty for non-compliance with the EEA

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The court held that a range of factors must be considered when determining the appropriate fine. These include, *inter alia*, the following:

- the extent of the contravention;
- the period the contravention has endured;
- the reason for non-compliance;
- the employer's willingness and intention to comply;
- the employer's investment in the development of its workforce;
- the nature and size of the employer;
- the industry and area in which the employer operates; and
- the deterrent effect of the penalty.

The court in this case imposed a penalty of R300,000, of which R200,000 was suspended on condition that the respondent complied with its obligations within a specified period.

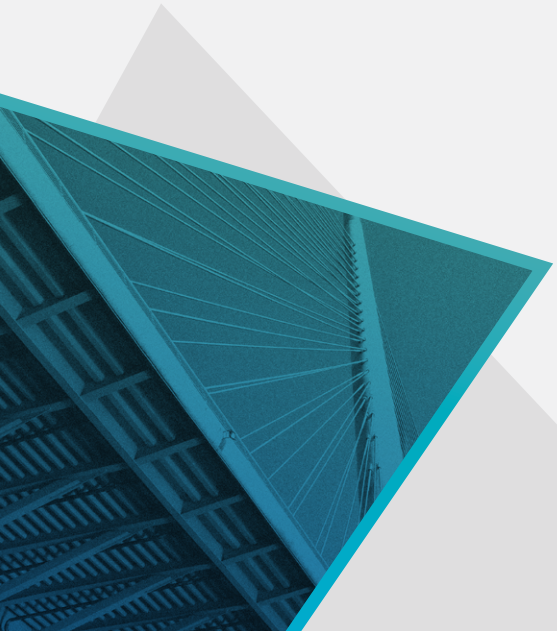
Most cases concerning non-compliance with the EEA involve instances where employers have failed to implement employment equity plans – not necessarily where there is a failure to achieve targets set out in an existing employment equity plan.

It is of interest to note that, according to Ms Bede, the most frequent areas of non-compliance for the financial year ending 31 March 2022 were the following: no proof of assignment of employment equity (EE) responsibility; EE managers not being provided with the required resources and budget; attendance registers not indicating the constituencies represented by the committee members; an analysis conducted post the development of the EE plan; barrier analysis not matching a true reflection of what is happening in the workplace; and EE plans not projecting reasonable progress towards transformation in line with the goals and numerical targets set by the designated employers.

The imposition of penalties in the case where a simple target was not achieved is likely to be less severe if the employer can prove mitigating circumstances such as attempts to meet the targets of the employment equity plan and attempts to abide and consult with the DEL in instances of lack of compliance.

It seems that courts will adopt a company specific test to determine the extent of the lack of compliance with the relevant employment equity plan and that there is a greater burden of proof on the DEL to prove that such non-compliance is substantive, and not merely impacted by a prima facie analysis of the numbers.

In this regard, the case of *Director-General, Department of Labour and Another v Comair Ltd* [2009] JOL 24060 (LC) is instructive. The applicants sought an order in terms of which the employer had to pay a fine in the sum of R900,000.



Paying the penalty for non-compliance with the EEA

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The court held that the EEA instructs the Director-General to take into consideration a number of factors before arriving at a decision as to whether a designated employer is implementing employment equity in compliance with the EEA, such as those set out in sections 15 and 42 of the Act.

Considering the Director-General's failure to take all these factors into account before arriving at his decision, the court agreed with the employer that the recommendation by the Director-General did not reflect that there had been an application of mind to the matter, or that he had properly exercised his discretion. Accordingly, the court dismissed the application.

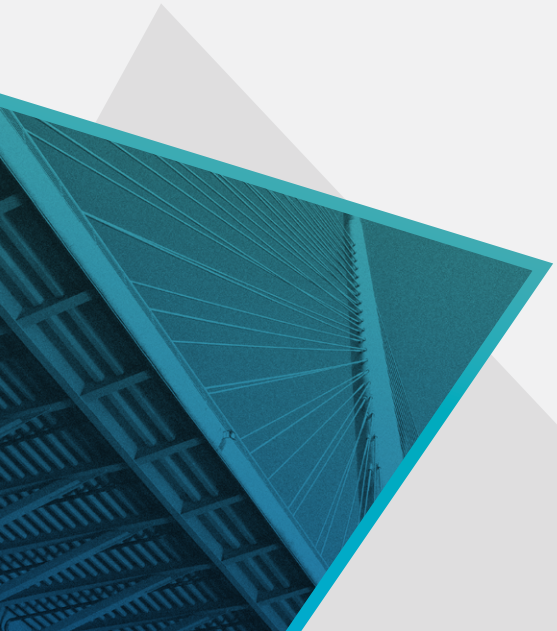
It is important to note that the penalties imposed in the above cases should not be taken as an indication of how much a penalty for non-compliance with the EEA will be for other offending companies. Rather, what they illustrate is the fact that the courts will consider a variety of factors in determining the amount of the penalty to be imposed on an offending employer.

CONCLUSION

In light of the above, it is clear that employers must be vigilant when it comes to compliance with their employment equity plans.

In cases where a dispute is referred to the Labour Court for non-compliance by an employer, it is important to note that the court will not merely impose a fine on the employer; the court will consider the substantive compliance of the employer with the EEA to determine whether there is, in fact, non-compliance, and it will consider a variety of factors to determine the amount of the fine an employer will owe if it is indeed guilty of non-compliance. Lastly, employers should guard against setting targets in their employment equity plans that are unrealistic and unachievable.

HUGO PIENAAR, ASMA CACHALIA AND RUAN JACOBS



Post-probation dismissal for failing (not refusing) to vaccinate unfair: CCMA award

On 5 April 2022 the CCMA issued an award in the matter of *Zaphia September v Inyosi Empowerment* (WECT17050-21), where it held that the dismissal of an employee who failed (although not refused) to vaccinate against COVID-19 was both procedurally and substantively unfair.

September was employed on 8 September 2021, subject to a three-month probation period. Her contract stated that the employer was considering implementing a mandatory vaccination policy.

On 29 of October 2021, the employer arranged a workshop for its employees with two experts on vaccinations. The employer's risk assessment plan was also provided to all employees, including September.

After attending the workshop, September was of the view that there was no debate on the implementation of the employer's vaccination policy. September approached Jones, a director in the company, to discuss the policy and how it would work. Jones referred her to clause 11 of the employment contract, but also agreed to meet. They met on 7 December 2021.

At the meeting, Jones' view was that there was no difference between antigen and PCR tests, while September considered the latter to be less invasive. She was leaning toward vaccinating, but had not decided and needed more time. This was the first time that the employer became aware that the employee was not vaccinated. At the end of the meeting, the employee was given two weeks' notice of termination based on her probation period. She had until the following day, 8 December 2021, to decide whether she would vaccinate. If September presented a vaccination certificate within the notice period, he would retract the dismissal.

On 10 December 2021, Jones attempted to retract the dismissal by extending September's probation period to 1 March 2022. September had until 1 March 2022 to get vaccinated. She rejected the extension and worked until the expiry of the notice period. Thereafter, she referred an unfair dismissal claim to the Commission for Conciliation, Mediation and Arbitration (CCMA).

At the CCMA, the employer argued that there was no dismissal. Once it retracted the dismissal, September was no longer dismissed. When she refused to accept the retraction, she in fact resigned. The CCMA rejected this proposition and reasoned that that when an employee resigns their employment and then seeks to withdraw the resignation, that can only be done with the consent of the employer. Conversely, where the employer has terminated the employment relationship by giving notice of termination, the employer needs the employee's consent to a retraction. Without September's consent, the dismissal remained in place.

Post-probation dismissal for failing (not refusing) to vaccinate unfair: CCMA award

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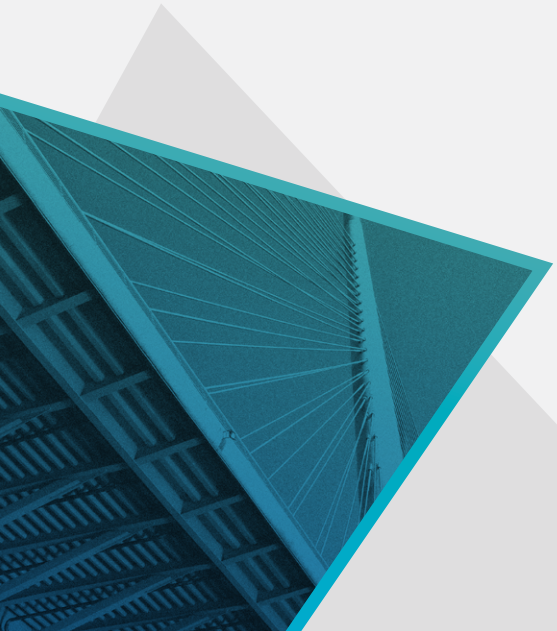
The employer went on to argue that the requirement for vaccination was a new competency and given that September was unvaccinated, she was not competent for the position. The CCMA differed with the employer and held that the employee would have had to be aware at the commencement of her probation period that vaccination against COVID-19 was a requirement for successful completion of her probation period. This was not the case. A further consideration was the fact that at the time of arbitration, the employer had still not implemented a mandatory vaccination policy.

The CCMA further found that September was competent in terms of her performance of the job; was compatible with her colleagues; and there was no question of misconduct. She would certainly have her appointment confirmed if she had not asked for a discussion, initiated in good faith, on the mandatory vaccination policy which revealed her vaccination status and indecision on vaccination. The dismissal was thus unfair.

PHETHENI NKUNA AND MBULELO MANGO



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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