# Employment Law

## ALERT

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CLIFFE DEKKER HOFMEYR

INCORPORATING
**KIETI LAW LLP, KENYA**

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The 2023 amendments to the Employment Equity Act 55 of 1998 (EEA) aside, the Department of Employment and Labour (DEL) has in the recent past been active in the inspection of designated employers to monitor both general compliance with the EEA and to ensure that designated employers have prepared and implemented their employment equity plans (EEP).

### How to bring an incarcerated employee to an internal disciplinary hearing

Employers often face the practical difficulty of how an employee who has been incarcerated, typically awaiting trial (which on its own can take years), is to be brought to an internal disciplinary hearing.

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# The Employment Equity Act and employer inspections

The 2023 amendments to the Employment Equity Act 55 of 1998 (EEA) aside, the Department of Employment and Labour (DEL) has in the recent past been active in the inspection of designated employers to monitor both general compliance with the EEA and to ensure that designated employers have prepared and implemented their employment equity plans (EEP).

The purpose of an EEP is for an employer to map how to it intends to make reasonable progress towards achieving employment equity in the workplace. Under the EEA a defaulting employer may face a fine up to R2,7 million or 10% of its annual turnover for non-compliance with the EEA.

The DEL, through its labour inspectors, conducts the compliance inspections. Sometimes it does so without warning. These inspections ordinarily arise as a result of inadequate affirmative action measures or a lack of accurate reporting in respect of adherence to employment equity requirements. It is therefore important to understand the various types of inspections that designated employers can be subjected to, as well as the best ways to prepare for, and respond to them, when faced by a labour inspector.

## Types of employment equity inspections

### *General inspections*

These involve a general overview of whether the employer has implemented an EEP and ensuring that all reports relating to employment equity procedures are up to date. These inspections aim to look at whether the main aspects of EE compliance have been adhered to, by looking specifically at the documentation that is required.

### *Allegation of non-compliance*

This occurs as a result of a complaint made to the DEL that an employer is alleged to not have complied with the EEA. This contravention could fall under any of the grounds of unfair discrimination or transformation in adherence with the EEA. These inspections will include the procedure followed in a general inspection as well as interviews with various individuals in order to determine if the allegations are true and whether better compliance with the EEA would have resolved the issues alleged by employees.

# The Employment Equity Act and employer inspections

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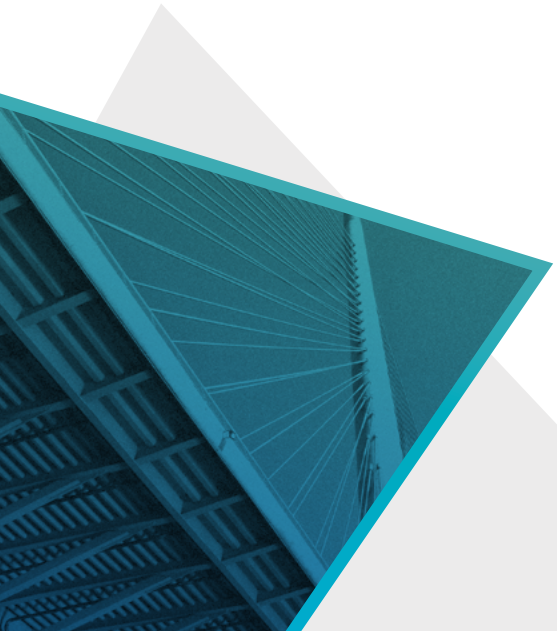
***Inspections by the Director-General***

This involves a full review of all employment equity documentation including, amongst other things, the minutes of meetings by a designated employment equity committee and employment equity policies going back as far as three years in order for the Director-General to make a determination as to whether or not the employer has complied.

## General tips to prepare for a compliant employment equity inspection

- Have a robust employment equity plan in place.
- Implement Adequate processess to ensure ongoing analysis and identification of issues and corrective measures in the tracking of compliance with the EEA.
- Ensure that your organisation adheres to requirements in respect of affirmative action.
- Keep records of all documents including your EEP, minutes of employment equity meetings and employment equity policies and procedures.
- Ensure that you appoint an employment equity manager to drive the organisation's employment equity goals.
- Ensure that employees have visable access to the EEA and company regulations.
- Co-operate with the relevent inspectors.



# The Employment Equity Act and employer inspections

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## Best practice in responding to an employment equity inspection

Employers must respond to any employment equity investigations in a manner that aims to promote the objects of the EEA by co-operating with labour inspectors during their inspections. This requires employer preparation.

A labour inspector has extensive power under the EEA, including the authority to issue a compliance order against a defaulting employer which, if not complied with, will end up in the Labour Court.

In our experience, litigation is avoidable. When confronted with an inspection, an employer must be prepared and co-operative towards the labour inspector. Where litigation is unavoidable because the process has run past the employer, it is sensible to put in place a proper strategy to deal with the litigation as the risks with an adverse order for non-compliance are not cheap.

Imraan Mahomed and
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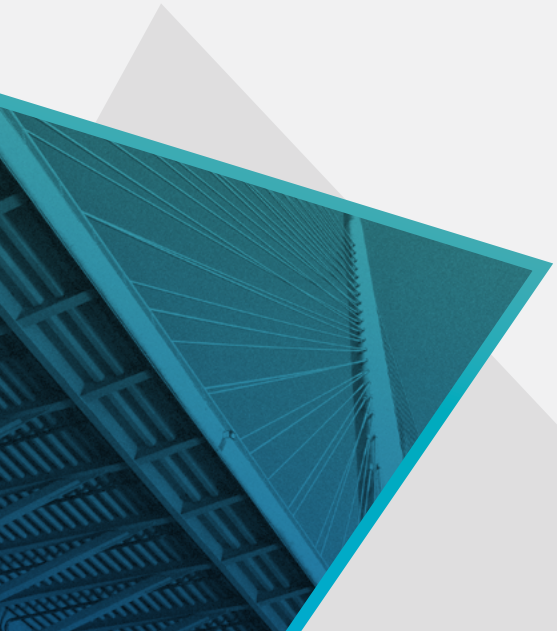

# How to bring an incarcerated employee to an internal disciplinary hearing

Employers often face the practical difficulty of how an employee who has been incarcerated, typically awaiting trial (which on its own can take years), is to be brought to an internal disciplinary hearing.

Employers can take comfort in knowing that the courts recognise it as a dilemma when there is a situation where an employer does not know when the employee will be capable of resuming his or her duties, or even whether they will be resumed at all. However, like in all other circumstances in the workplace, there is no universal answer and the question of whether the employer has acted fairly will depend on the facts of the case.

In March 2023 the Cape Town Labour Court again had to consider this question in the matter of *Ndzeru v Transnet National Ports Authority and Others* [2023] (C369/2020) which we look at in this article.

## Brief facts

Mr Ndzeru (the employee) was employed by Transnet National Ports Authority (the employer) as a marine shore-hand working at Cape Town harbour. The employee had requested leave for five days, which was rejected by the employer as only one day of leave had been approved. Regardless of this, the employee took more than one day and while on leave, was an alleged victim of an attempted hijacking in which he shot two persons, allegedly in self-defence. He was arrested and detained in Limpopo pending trial. He had been refused bail on two occasions. The employee did not advise the employer of his incarceration. The employer became aware of his situation as a result of its own investigations after the employee had not reported to work for several weeks.

Subsequently, the employer conducted an incapacity hearing. The notice of the hearing, detailing his rights, was given to the employee' spouse to convey to him. The employee then requested that his trade union represent him, which it did. Following the hearing, the employee was found guilty and dismissed for failing to discharge his duties for a period of almost two months. The employee then approached the bargaining council on the grounds that his incapacity hearing was procedurally unfair as he was not given the opportunity

# How to bring an incarcerated employee to an internal disciplinary hearing

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to give his side of the story and was denied a post-dismissal hearing. The bargaining council found that his dismissal was both procedurally and substantively fair.

## Findings of the Labour Court

The court held that there is no general right to a post-dismissal hearing in cases of incapacity due to incarceration. It found that in cases where a post-dismissal hearing takes place it is usually because the employer did not notify the employee that the disciplinary hearing was taking place in their absence, or the post-dismissal hearing was provided for in the disciplinary code.

The court held that the established principle is that an employee must be given an opportunity to present their case before being dismissed.

The court held that an employer who is uncertain about when an employee will return to work cannot be expected to wait for that employee indefinitely and that it is entitled to decide whether it is still feasible to keep the employee. A hearing in absentia can take place, provided the employee is given an opportunity to make representations. This can also be done in writing.

The court in this case found that the employee had failed to properly argue why the original hearing was not fair(inadequate), which would have justified the need for a post-dismissal enquiry. His dismissal was found to be procedurally and substantively fair and the review application was dismissed.

## Conclusion

The take home is that that an incapacity hearing can be held in absentia where an employee is incarcerated. What is required from the employer, however, is to ensure that the employee is given the opportunity to state a defence before a dismissal is effected. A post-dismissal hearing is not an automatic right. It may be necessary where the employer has failed to afford the employee an opportunity to state their defence and as a mechanism to remedy the defects of the original hearing in absentia.

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