

Code of Good Practice and Employment Discrimination

INDUSTRIAL RELATIONS ACT

Code of good practice : Employment discrimination

1. Introduction

1.1 This code is published in terms of Section 109 of the Industrial Relations Act.

1.2 This code applies to employees (including applicants for employment), employers, staff associations, trade unions and employer organisations, and must be taken into account by mediators, arbitrators and judges.

1.3 The objective of this code is to eliminate discrimination at the workplace and promote equality of opportunity and treatment in employment.

1.4 This code is a guideline and must be flexibly applied. It may be departed from in appropriate circumstances.

1.5 This code provides guidance by summarising some of the provisions of the law and providing guidelines on good practice. If there is any conflict between the provisions of any legislation and this Code, the provisions of the legislation must prevail.

2. Elimination of Discrimination

Every employer should take steps to eliminate discrimination in any employment policy or practice and must promote equal opportunity at the workplace.

3. Prohibition of discrimination

3.1 In terms of Section 29 of the Employment Act, no employer may discriminate, directly or indirectly, against any employee in any contract of employment.

3.2 Discrimination may include, but not be limited to, discrimination on the basis of race, gender, sex, ethnic or social origin, colour, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

3.3 Harassment of an employee, whether of a sexual nature or otherwise, constitutes a form of discrimination.

3.4 Not every differentiation based on one of the listed grounds in clause 3.2 constitutes discrimination. For example it is not discriminatory to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

3.5 Any employer that discriminates against any person in contravention of Section 29 of the Employment Act is guilty of an offence. Discrimination against an employee or an applicant for employment may form the basis of a dispute that may be reported to the Commission in accordance with Section 76 of the Industrial Relations Act.

4. Formulation and application of policy

4.1 Every employer should formulate a policy for the prevention of discrimination and promotion of equal opportunity in employment.

4.2 If there is a recognised staff association or trade union in the workplace, the employer must consult the organisation in developing the policy and, if possible, incorporate the policy in a collective agreement.

4.3 If there is no recognised staff association or trade union in the workplace, the employer must invite representatives of the employees to participate in the formulation of the policy.

4.4 The policy must take into account that all employees are entitled to equal opportunity and equal treatment, subject to an assessment of their abilities on relation to the employer's organisational needs.

4.5 The policy must address each of the following labour practices:

4.5.1 Access of vocational guidance, appointments, transfers and promotions;

4.5.2 Access to training and employment opportunities;

4.5.3 Advancement in accordance with their experience, ability and potential;

4.5.4 Security of employment;

4.5.5 Remuneration for work of equal value;

4.6 Collective agreements must not contain provisions which discriminate against employees in respect of any labour

practices such as those listed in clause 4.5

4.7 Employers' organisations, staff associations and trade unions may not discriminate in the admission or retention of membership or in the conducting their affairs.

4.8 If appropriate, the employer must establish a committee, or task an existing committee, to promote the application of the employment discrimination policy in the workplace including:

4.8.1 Taking all practical measures to foster and communicate understanding and acceptance of the principle of non-discrimination and to promote equality among employees;

4.8.2 Investigating complaints that the policy is not being observed and, if necessary, making recommendations or decisions about the manner in which discriminatory practices may be corrected.

4.9 Application of the policy must not adversely affect special measures designed to meet the particular requirements of employees who, for reasons such as age, sex, race, disability or marital status, require special protection or assistance.

5. Direct and indirect discrimination

5.1 This code aims to eliminate both direct and indirect discrimination.

5.2 Direct discrimination occurs if an employee is treated prejudicially on the listed grounds referred to in clause 3.2. For example a woman with the same experience and qualifications is paid less than a man doing the same job.

5.3 Indirect discrimination occurs if a requirement or condition, which, on the face of it, appears to be neutral, has the effect of discriminating against a person or category or persons on the grounds listed in clause 3.2. For example, if an employer stipulates knowledge of English as a requirement for the job when it is not an inherent requirement, that requirement, while appearing neutral may discriminate against applicants on the grounds of race or social origin.

6. Employer Responsibilities

6.1 It is primarily the employer's responsibility to ensure that there is equal opportunity in the work place. The employer must adopt, communicate, implement, monitor and review policies to eliminate discrimination, and the following guidelines are provided on specific issues.

6.2 Advertising

6.2.1 An employer must not unfairly limit advertisements for employment to areas or publications which may exclude or disproportionately reduce the numbers of applicants on the grounds referred to in clause 3.2.

6.2.2 An employer must as far as possible avoid being too prescriptive in the advertised requirements for a job, unless the prescriptions are genuinely required for the position. It would for example be unfair for an employer to frame the job advertisement in a way that only a particular applicant that the employer has predetermined as the preferred candidate, can fulfil.

6.2.3 An employer using recruitment agencies must ensure that those agencies subscribe to this Code. An agency should only advertise job criteria after consultation with the employer.

6.3. Selection

6.3.1 Selection criteria and tests must be analysed from time to time to ensure that they genuinely relate to the job requirements and do not directly or indirectly discriminate against candidates.

6.3.2 If reasonably possible, the short-listing and interviewing of applicants should not be done by only one person, and should ultimately be checked by someone at a more senior level.

6.3.3 Persons responsible for short-listing, interviewing and selecting candidates must be given guidance or trained on the proper application of the principle of equal opportunity in selection and the dangers of indirect discrimination.

6.4. Training

6.4.1 An employer must ensure that criteria for selecting employees for training, whether for induction, promotion or skill training are not discriminatory.

6.4.2 An employer should examine its policies periodically to avoid indirect discrimination.

6.5 Performance reviews

6.5.1 An employer must ensure that the assessment criteria do not discriminate directly or indirectly.

6.5.2 An employer must ensure those responsible for conducting performance evaluations do not discriminate.

6.5.3 Performance review criteria must relate to inherent requirements of the job.

6.6 Promotions

6.6.1 The same guidelines applicable to the advertising of posts and the selection of employees apply to the consideration of promotions by an employer.

6.6.2 All employees who have the capacity to fulfil the inherent requirements of the job should be given the opportunity of applying for a promotion and be given proper consideration when they do apply.

6.7 Job Grading

6.7.1 an employer must ensure that job grading criteria are fair and objective and bases on the inherent requirements of the jobs graded.

6.7.2 Job grading systems and remuneration systems based on job grading must recognise the principle of equal value for equal work, and pay differentials between grades must be based on objective criteria. This should not prevent the use of service allowances, merit pay systems and other similar methods of calculating remuneration provided they are based on objective criteria.

7. Employee Responsibilities

7.1 Employees, in carrying out their employment functions, must not discriminate and must take measures to prevent discrimination in the workplace.

7.2 In order to provide a non-discriminatory work environment, employees should

7.2.1 Comply with the policies and measures to avoid discrimination;

7.2.2 Implement the policies and measures;

7.2.3 Notify the employer or the recognised staff association or trade union of any suspected discriminatory conduct.

7.2.4 Refrain fro harassing or victimising employees.

8. Staff Association and Trade Union Responsibilities

8.1 Staff association and trade union officials and representatives play important roles on behalf of their members in preventing discrimination and in promoting equal opportunity and good employment relations.

8.2 These organisations must not discriminate by unfairly refusing membership or offering less favourable terms of membership on the grounds referred to in clause 3.2.