
CONSULTATION DRAFT

September 21, 2007

WORKFORCE EQUITY ACT 2007

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WHEREAS it is expedient to enact the Workforce Equity Act 2007;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Short title

- 1 This Act may be cited as the Workforce Equity Act 2007.

Purpose

- 2 The purpose of this Act is to achieve equality of opportunity in the workplace in Bermuda so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by black Bermudians by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures to achieve equality of opportunity.

Definitions

- 3 In this Act —

"Bermuda labour force" means the body of persons, typically between the ages of 16 and 64 years, who furnish the supply of labour for the production of economic goods and services in Bermuda;

"black Bermudians" means persons of black African origin or descent who possess Bermudian status within the meaning of section 4 of the Bermuda Immigration and Protection Act 1956;

"board of enquiry" means a board of enquiry appointed under section 21(2);

"Commission" means the Commission for Unity and Racial Equality established under section 3 of the Commission for Unity and Racial Equality Act 1994;

"compliance officer" means a person designated as an employment equity compliance review officer under section 15(3);

"employee" means a person who is employed by an employer, is 16 years of age or over and regularly works 16 hours or more per week for the employer;

"employer" means any person or organization employing 40 or more employees in Bermuda and includes —

- (a) the Bermuda Government (including its departments and agencies),
- (b) the Bermuda Police Service,
- (c) the Bermuda Regiment,
- (d) the Corporation of Hamilton, and
- (e) the Corporation of St. George's;

"employer's workforce" in relation to a particular employer means all the employees of that employer;

"Minister" means the Minister responsible for human rights, race relations and the Commission for Unity and Racial Equality;

"occupational group" means a prescribed category of employment;

"prescribed" means prescribed by the regulations;

"representatives" means —

- (a) in the case where trade unions represent employees, those trade unions; and
- (b) in other cases, those persons who have been designated by employees to act as their representatives.

PART 1 EMPLOYMENT EQUITY

General duty of employer

4 Every employer shall implement employment equity by —

- (a) identifying and eliminating employment barriers against black Bermudians that result from the employer's employment systems, policies and practices that are not authorized by law; and
- (b) instituting such positive policies and practices and making such reasonable accommodations as will ensure that black Bermudians achieve a degree of representation in each occupational group in the

employer's workforce, that reflects their representation in the Bermuda labour force.

Certain measures not required

5 The obligation to implement employment equity does not require an employer to —

- (a) take a particular measure to implement employment equity if the taking of that measure would cause undue hardship to the employer;
- (b) hire or promote persons who do not meet the essential qualifications for the work to be performed; or
- (c) create new positions in the employer's workforce.

Analysis and review

6 (1) For the purpose of implementing employment equity, every employer shall —

- (a) collect information and conduct an analysis of the employer's workforce, in accordance with any regulations in order to determine the degree of representation of black Bermudians in each occupational group in the employer's workforce; and
- (b) conduct a review of the employer's employment systems, policies and practices, in accordance with any regulations, in order to identify employment barriers against black Bermudians that result from those systems, policies and practices.

(2) Only those employees who identify themselves, or have been identified by their employer, as black Bermudians are to be counted as black Bermudians for the purposes of implementing employment equity.

(3) Information as to the identity of individual employees that is collected by an employer under this section is confidential and shall be used by the employer only for the purpose of implementing the employer's obligations under this Act.

Employment equity plan

7 (1) Every employer shall prepare an employment equity plan that —

- (a) specifies the positive policies and practices that are to be instituted by the employer in the short term for the hiring, training, promotion and retention of black Bermudians, and for the making of reasonable

accommodations to correct any under-representation identified by the analysis under section 6(1)(a);

- (b) specifies the measures to be taken by the employer in the short term for the elimination of any employment barriers identified by the review under section 6(1)(b);
- (c) establishes a timetable for the implementation of the matters referred to in paragraphs (a) and (b);
- (d) if under-representation has been identified by the analysis under section 6(1)(a), establishes short term numerical goals for the hiring and promotion of black Bermudians in order to increase their representation in each occupational group in the employer's workforce in which under-representation has been identified, and sets out measures to be taken in each year to meet those goals;
- (e) sets out the employer's longer term goals for increasing the representation of black Bermudians in the employer's workforce and the employer's strategy for achieving those goals; and
- (f) provides for any other matter that may be prescribed.

(2) In establishing the short term numerical goals referred to in subsection (1)(d), every employer shall consider—

- (a) the degree of under-representation of black Bermudians in each occupational group in the employer's workforce;
- (b) the availability of qualified black Bermudians within the employer's workforce and in the Bermuda labour force;
- (c) the anticipated growth or reduction of the employer's workforce during the period in respect of which the numerical goals apply;
- (d) the anticipated turnover of employees within the employer's workforce during the period in respect of which the numerical goals apply; and
- (e) any other factor that may be prescribed.

(3) In this section, "short term" means a period of not less than one year and not more than three years, and "longer term" means a period of more than three years.

(4) For the purposes of subsection (2)(b), a person may be qualified for a job as a result of any one of, or any combination of, that person's —

- (a) formal qualifications;

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- (b) prior learning;
 - (c) relevant experience; or
 - (d) capacity to acquire, within a reasonable time, the ability to do the job.

Implementation and monitoring of plan

8 Every employer shall —

- (a) make all reasonable efforts to implement their employment equity plan; and
- (b) monitor implementation of their plan on a regular basis to assess whether reasonable progress toward implementing employment equity is being made.

Review and revision of plan

9 Every employer shall, at least once during the period in respect of which the short term numerical goals referred to in section 7(1)(d) are established, review their employment equity plan and revise it by —

- (a) updating the numerical goals, taking into account the factors referred to in section 7(2); and
- (b) making any other changes that are necessary as a result of an assessment made under section 8(b) or as a result of changing circumstances.

Information to employees and their representatives

10 (1) Every employer shall provide information to their employees explaining the purpose of employment equity and shall keep their employees informed about measures the employer has undertaken or is planning to undertake to implement employment equity and the progress the employer has made in implementing employment equity.

(2) Every employer shall provide their employees' representative with a copy of

- (a) the analysis and review under section 6(1);
- (b) their employment equity plan under section 7(1) and any revision under section 10; and
- (a) their employment equity report under section 13(1).

Consultation with employees' representatives

11 (1) Every employer shall consult with their employees' representatives by inviting the representatives to provide their views concerning —

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- (a) the assistance that the representatives could provide to the employer to facilitate the implementation of employment equity in the employer's workplace and the communication to its employees of matters relating to employment equity; and
 - (b) the preparation, implementation and revision of the employer's employment equity plan.

(2) Every employer shall collaborate with their employees' representatives in the preparation, implementation and revision of the employer's employment equity plan.

Keeping of records

12 Every employer shall, in accordance with any regulations, establish and maintain employment equity records in respect of the employer's workforce, the employer's employment equity plan and the implementation of employment equity by the employer.

Employment equity report

13 (1) Every employer shall, on or before June 1 in each year, prepare an employment equity report in respect of the immediately preceding calendar year containing a description of—

- (a) the measures taken by the employer during that calendar year to implement employment equity and the results achieved; and
- (b) the consultations between the employer and their employees' representatives during the reporting period concerning the implementation of employment equity.

(2) A report shall be certified, in the prescribed manner, as to the accuracy of the information contained in it and shall be signed by the employer or by a prescribed person on behalf of the employer.

(3) An employer shall, if required by the Commission, file a copy of their report with the Commission.

Publication of information from reports

14 The Commission may publish information from, or findings based on, reports that are filed by employers.

PART 2
COMPLIANCE

Responsibility of Commission

15 (1) The Commission is responsible for the enforcement of the obligations imposed on employers in Part 1.

(2) The Commission shall, in discharging its responsibility under subsection (1), be guided by the policy that, wherever possible, cases of non-compliance should be resolved through persuasion and the negotiation of written undertakings under section 17 and through directions issued under section 18, and that applications for orders under section 20 should be made only as a last resort.

(3) The Commission may designate persons or category of persons as employment equity compliance review officers for the purposes of conducting compliance audits of employers.

(4) The Commission may authorize any officer or employee of the Commission whom the Commission considers appropriate to exercise any power and perform any duty or function of the Commission under this Act and any power so exercised and any duty or function so performed shall be deemed to have been exercised or performed by the Commission.

Powers of compliance officers

16 (1) For the purposes of ensuring compliance with the provisions in Part 1, a compliance officer may conduct a compliance audit of an employer and, for that purpose, may —

- (a) at any reasonable time enter any place (other than a dwelling place) in which the officer believes on reasonable grounds there is any thing relevant to the enforcement of any of those provisions;
- (b) subject to any just claim of privilege, require any person to produce for examination or copying any record, book of account or other document that the officer believes on reasonable grounds contains information that is relevant to the enforcement of any of those provisions; and
- (c) interview employers, employees and any other persons who may have information relevant to the enforcement of any of those provisions.

(2) In conducting a compliance audit, a compliance officer may—

- (a) reproduce or cause to be reproduced any record from a data processing system in the form of a print-out or other intelligible output and remove the print-out or other output for examination and copying; and
- (b) use or cause to be used any copying equipment at the place to make copies of any record, book of account or other document.

(3) Compliance officers shall be provided with certificates in a form established by the Commission certifying their designation as compliance officers and, on entering a place under subsection (1)(a), a compliance officer shall show the certificate to the person in charge of the place if the person requests proof of the officer's designation.

(4) The person in charge of a place entered under subsection (1)(a) and every person found in the place shall —

- (a) give the compliance officer all reasonable assistance to enable the officer to exercise the powers conferred on compliance officers by this section; and
- (b) provide the officer with any information relevant to the enforcement of this Act that the officer may reasonably require.

Undertaking by employer

17 If a compliance officer is of the opinion that an employer—

- (a) has not collected information or conducted an analysis referred to in section 6(1)(a);
- (b) has not conducted a review referred to in section 6(1)(b);
- (c) has not prepared an employment equity plan referred to in section 7;
- (d) has prepared an employment equity plan that does not meet the requirements of section 7;
- (e) has not made all reasonable efforts to implement their employment equity plan in accordance with section 8;
- (f) has failed to review and revise their employment equity plan in accordance with section 9;
- (g) has failed to provide information to their employees or employees' representative in accordance with section 10;
- (h) has failed to consult or collaborate with their employees' representatives in accordance with section 11;
- (i) has failed to establish and maintain employment equity records as required by section 12;
- (j) has failed to prepare an employment equity report in accordance with section 13 or has provided information in the report that is false or misleading; or
- (k) has failed to file a copy of an employment equity report with the Commission if required to do so under section 13(3),

the compliance officer shall inform the employer of the non-compliance and shall attempt to negotiate a written undertaking from the employer to take specified measures to remedy the non-compliance.

Direction by Commission

18 (1) If a compliance officer fails to obtain a written undertaking that, in the opinion of the compliance officer, would be sufficient to remedy the non-compliance, the compliance officer shall notify the Commission of the non-compliance and the Commission may issue and send, by registered mail, a direction to the employer —

- (a) setting out the facts on which the officer's finding of non-compliance is based; and
- (b) requiring the employer to take such actions as are specified in the direction to remedy the non-compliance.

(2) If a compliance officer obtains a written undertaking and the compliance officer is of the opinion that the employer has breached the undertaking, the compliance officer shall notify the Commission of the non-compliance and the Commission may issue and send, by registered mail, a direction to the employer requiring the employer to take such actions as are specified in the direction to remedy the non-compliance.

(3) If a compliance officer is of the opinion that an employer has failed to give reasonable assistance or to provide information as required by section 16(4), the compliance officer shall notify the Commission of the non-compliance and the Commission may issue and send, by registered mail, a direction to the employer —

- (a) setting out the facts on which the officer's finding of non-compliance is based; and
- (b) requiring the employer to take such actions as are specified in the direction to remedy the non-compliance.

(4) The Commission may rescind or amend a direction issued under this section on the presentation of new facts or on being satisfied that the direction was issued without knowledge of, or was based on a mistake as to, a material fact.

Request by employer for review

19 An employer to whom a direction is issued under section 16 may make a request to the Minister for a review of the direction within 30 days after the day on which it is issued.

Application by Commission for order

20 (1) If the Commission is of the opinion that an employer has failed to comply with a direction issued by the Commission, the Commission may apply to the Minister for an order confirming the direction.

(2) No application may be made under subsection (1) if the employer has, under section 19, requested a review.

Reference to board of enquiry

21 (1) If an employer makes a request under section 19 or the Commission makes an application under section 20, the Minister shall refer the request or application to a board of enquiry appointed under subsection (2).

(2) The Minister shall from time to time publish a list of persons from whom boards of inquiry required for the purposes of subsection (1) shall be selected and the Minister shall appoint one or more persons from such list to be the board. If more than one person is appointed to the board, the Minister shall nominate one of those persons to be the chairperson of the board.

(3) Sections 8, 9, 10, 11, 12 and 13 of the Commissions of Inquiry Act 1935 shall apply to the hearing of a request or application by a board of inquiry.

Order of board of enquiry

22 (1) A board of enquiry may, after hearing a request made under section 19 or an application made under section 20 —

- (a) by order, confirm, vary or rescind the direction issued by the Commission;
- (b) make any other order it considers appropriate and reasonable in the circumstances to remedy any non-compliance with the provisions of this Act; and
- (c) make an order requiring an employer to pay a monetary penalty not exceeding \$50,000 for contravention of any provision referred to in section 17.

(2) A board of enquiry may vary or rescind any order made by it.

(3) A contravention referred to in subsection (1)(c) is not an offence and accordingly the Criminal Code 1907 does not apply in respect of such contravention.

Enforcement of order of board of enquiry

23 (1) An order of a board of enquiry made under section 22 may, for the purposes of its enforcement, be made an order of the Supreme Court and is enforceable in the same manner as an order of that Court.

(2) To make an order of a board of enquiry an order of the Supreme Court, a certified copy of the order must be filed with the Registrar of the Court, and from the time of filing the order of the board becomes an order of the Court.

Appeal from order of board of inquiry

24 (1) Any party against whom an order has been made by a board of inquiry may, subject to this section, appeal to the Supreme Court.

(2) Enforcement of the order of the board is stayed pending the final determination of the appeal by the Court.

(3) Any party to the proceedings before a board of inquiry is entitled to be heard on the appeal and the Commission is also entitled to be heard.

(4) An appeal under this section may be made on questions of law or fact or both and the Court may affirm or reverse the decision or order of the board or the Court may substitute its own order for that of the board.

(5) The Chief Justice has the same power to make rules in respect of appeals under this section as he or she has under section 62 of the Supreme Court Act 1905.

(6) Section 6 of the Statutory Instruments Act 1977 shall not apply to rules made under subsection (5) unless they impose fees, in which case the rules imposing fees shall be subject to affirmative resolution procedure.

Limitations respecting directions and orders

25 (1) The Commission may not issue a direction under section 18 and a board of enquiry may not make an order under section 22 if that direction or order would —

- (a) cause undue hardship to an employer;
- (b) require an employer to hire or promote persons who do not meet the essential qualifications for the work to be performed;
- (c) require an employer to create new positions in its workforce;
- (d) impose a quota on an employer; or

(e) in the case of a direction or order respecting the establishment of short term numerical goals, fail to take into account the factors set out in section 7(2).

(2) In subsection (1)(d), "quota" means a requirement to hire or promote a fixed and arbitrary number of persons during a given period.

PART 3 GENERAL

Report by Commission

26 The Commission shall include in its annual report referred to in section 9 of the Commission for Unity and Racial Equality Act 1994 a report of its activities under this Act during the year, including an assessment of their effectiveness.

Regulations

27 (1) The Minister may make regulations—

(a) respecting the collection of information and the conduct of analyses referred to in section 6(1)(a) and the conduct of reviews referred to in section 6(1)(b);

(b) respecting the establishment and maintenance of employment equity records referred to in section 12;

(c) prescribing anything that is to be prescribed by this Act; and

(d) generally, for carrying out the purposes and provisions of this Act.

(2) A regulation made under subsection (1) may be of general application or may apply to a particular employer or group of employers.

(3) The negative resolution procedure shall apply to regulations made under this section.

Commencement

28 This Act comes into operation on a day to be appointed by the Minister by Notice published in the Gazette.