

Employment
Equity: An
Introductory
Workshop for
Trade Unionists
Organised by the
COSATU
Education
Department

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Employment Equity: An Introductory Workshop for Trade Unionists Organised by the COSATU Education Department

Introduction

This workshop is designed to give you a reliable introduction to the Employment Equity Act. It is based on hard information and on ACTIVITIES or discussion exercises that will help you to understand how the Act works, who it covers, and what the implications are for trade unionists.

Each of the Activities is complemented with information that will help you to understand the Act in more detail. Sections have been added to help you find further information, and to understand the terms that are used in the Act itself.

In a two day programme, you are not going to be an 'expert' on the Employment Equity Act, but we hope that you will feel more confident about using the Act, especially in ensuring that it is used to address a wide range of discriminatory practices at the workplace.

As with most legislation, the more that you begin to use it, the more its strengths and weaknesses will emerge. It is very important that any weaknesses in the practical application of the Act are reported through your Union to the Federation. This will help the Federation to campaign for improvements in the legislation, and to close any loopholes that allow employers to avoid their responsibilities.

All Labour Legislation, including the new Employment Equity Act should serve as a 'base-line' or minimum standard. Employer and Union observance of the minimum standards as laid down in law should be our starting point. Through collective bargaining and improved Union organisation, we aim to improve upon the standards set by the law, and

increase the protection of our members. This is a real challenge. It is especially important for us all to recognise that as we enter into a period where employers are demanding more 'flexibility', the introduction of a new law to correct the legacy of imbalances left by apartheid at the workplace deserves our special attention. We hope this workshop is the first in a series of educational events that will cover this vital new area.

The main aim of this workshop is to help you to understand the basic workings of the law, and how best it can be implemented. We also hope this programme encourages you to find out more about Employment Equity issues, and contribute positively to the struggle for the eradication of inequality.

This pack is designed for a series of two-day introductory workshops that are being sponsored by COSATU in each region. A workshop of COSATU Educators held in September 1999 helped to assemble the material, and to test its appropriateness. As a result there are a considerable number of educators who can advise, and facilitate this workshop and who can be contacted via COSATU Education Department.

We would also be very interested to hear how the pack has been used, and in particular how it can be improved to meet the needs of trade unionists who want to tackle discrimination using the tool of the Employment Equity Act, as well as other organisational means. If you use this pack, feedback would be most welcome.

Many thanks,

Shele Papane
National Education Officer
COSATU

The Aims of this Pack

The Aims of this Pack

This pack has been designed to achieve the following:

- To help you to understand the Employment Equity Act and how it can be used to tackle discrimination at the workplace.
- To gain an understanding of how the Act works, and the key areas it is supposed to address.
- To practice preparing for the full implementation of the Employment Equity Act, and to identify a Union approach to it
- To identify where the basic minimum's in the Act can be strengthened through Collective Bargaining.
- To help you begin to prepare your membership and the Union as a whole for implementation of the Act, and where you can get further help and information.

Model Programme

Below is a Model Programme that we hope regions can use as a basis for their educational activity on the Employment Equity Act. It can be adapted for longer or shorter workshops, and if you need advice please contact your national educator or COSATU.

Two Day Model Programme

Day 1

Session 1 Introductory Session

This session will help you to get to know everyone else on the workshop, to be clear about what the workshop is hoping to achieve, and to begin to share recent experiences of discrimination and affirmative action..

Session 2 Why Employment Equity is a Trade Union Issue

This session will help you to explore the thinking behind the Employment Equity Act, and to think through what a Union approach to discrimination and affirmative action should be. It will also help participants to begin to clarify their arguments in favour of an effective employment equity policy at work.

Session 3 Understanding the Basics

This session will help you to discover the main areas covered by the Act, how it is to be implemented, and to begin to think about the implications for Unions.

Session 4 Getting to Grips with Discrimination.

This session will help you to understand how the Act might work in practise, and through a typical case study, provide you with an opportunity to understand key definitions used in the Act, and how as a union representative you can best approach the issue.

At the end of the day, you will be given an **Overnight Activity** to complete to help consolidate your learnings of today, and to prepare for Day Two.

Day Two

Session 5 Affirmative Action.

This session will help you to understand the main definitions, and especially what is meant by affirmative action. It will help you to think about how to explain these definitions to your members.

Session 6 The Duties on Employers, and Unions.

This session will help you to understand the duties that the law places on both Employers and Unions. It will also help you to identify what the concerns of the employers are in relation to Employment Equity, and introduce to you to the idea of an Employment Equity Plan.

Session 7 The Next Steps

This session will help you to identify the continuing concerns of the employers and Unions on Employment Equity issues, and how these might be raised in your own workplace. It will also help you to identify how best your Union and Federation can support you and others in making sure that we tackle inequalities effectively.

Session 8 Workshop Evaluation

This session will help to give the Federation and your facilitator's feedback on the workshop, and will help to improve it for other participants. Many thanks.

Activity 1

Introductory Session

Aims

To help us to

- Get to know everyone else on the workshop.
- Be clear about what we want to try and achieve over the next two days.
- Share recent experiences of discrimination at the workplace.

Task

You will be placed in a small group with comrades that you do not know very well.

Elect a reporter to take a few notes, and then undertake the following:

1. Introduce yourselves to one another giving your union, workplace and job, position in the Union, and why you have come to this workshop.
2. Look at the Aims and the Programme for the Workshop. Are they clear? Do you need any clarifications? Are they relevant to your needs?
3. Share any recent experiences you have had of discrimination or affirmative action in your workplace. Make a note of them. Choose ONE that you would like to share with the rest of the workshop and be ready to describe it.

ACTIVITY 2

Why Employment Equity is a Key Trade Union Issue

AIMS

To help us to:

- Examine some of the prevailing attitudes about discrimination and how best it can be tackled.

- Think through what a trade union approach to addressing inequality should be.
- Familiarise ourselves with the thinking behind the Employment Equity Act.

TASK

In your group, look at the statements and questions below, and note down what your group thinks about them.

Challenging Attitudes:

1. There will always be discrimination. Its natural and it will always exist, even though we now have a government that is opposed to it.
2. The issue of sexual orientation is a side issue for trade unionists. We should concentrate on the big issues, job creation, and wages and job security.

Understanding the EEA:

3. Read through the notes on how the Act came into being. (Where Does the Employment Equity Act come from)? How would you explain this to your members? Make a few key points to share with the rest of the workshop.
4. Are there any terms or words that are unfamiliar to you? Make a note and add them to the Jargon Chart.

Elect a reporter.

Where does the Employment Equity Act (EEA) come from?

- Constitution set our rights in the Bill of Rights to the fleshed out in legislation - see s. 9 , especially s. 9 (2) on equality
- The new Department of Labour in 1994 issued a five year plan for reforming labour legislation and institutions
- Part of this plan included the issuing of a Green Paper on Employment Equity.
- A reference group including representative of interested groups like Disabled Person of SA met at interval to make comments.
- Some of the issues included:
 - Targets vs quotas,
 - Monitoring of arbitrary actions,
 - Recruitment,
 - The need for a flexible or prescriptive law,
 - Who could benefit and should there be a rating of who is the most disadvantages,
 - Fines, penalties and monitoring,
 - Threshold to apply affirmative action, and
 - The need for Code of Good Practice.
- A draft Act or Bill on 1 December 1997

- Labour, the government and business debated the Bill in Nedlac from February to May 1998
- In July 1998, the Bill was discussed by the parliamentary portfolio committee on Labour.
- There was a strong call from COSATU to ban wage discrimination, in other words:
 - Equal pay for equal work and
 - Wage gaps must close.
 As a result, the income differential clause and the "suitably qualified" definition were added.
- The redrafted Act was passed by parliament and signed by the State President on 12 October 1998
- On 14 May 1999 chapter 4 of the Employment Equity Act (EEA) took effect. This set up the commission for Employment Equity, which began to draft regulation and Codes of Practice.
- On the woman's Day, 9 August 1999, chapter 2 of the EEA took effect. This now covers all areas of unfair discrimination in the workplace, while the Labour Relations Act covers unfair discrimination dismissals.
- The official target for implementing the rest of the EEA is December 1999.
- The Department of Labour and the Commission for Employment Equity are presently drafting Codes of

Good Practice related to the EEA. Potential Codes conclude:

- Code on preparing employment equity plans
 - Code on advertising, recruitment procedures and selection criteria,
 - Code on special measures for the people with disabilities, especially related to benefit schemes,
 - Code on special measures on people with family responsibilities (workers' responsibilities in relation to their partners, children or family members needing care and support)
- But it seems more likely that Chapter 3 of the EEA on affirmative action measure sand employment equity plans may only come into force in January/February 2000.
- The provisions of the EEA relating to state contracts seem set to come into force in September 2000.

ACTIVITY 3

Understanding the Basics

Aims

To help us to:

- Begin to build an understanding of the main provisions of the Employment Equity Act, and familiarise the terms that are used in it.
- Explore how the Act will work in practice, and what the role of Unions is in ensuring that the Act is properly implemented.

Task

In your group, look at the attached 'What is the Employment Equity Act?' and the Act itself, and try and answer the following points:

- What do you think the Act is aiming to do?
- What different forms of discrimination does the Act seek to address?
- Who are the main players in making sure that the Act is implemented?
- What is the procedure for ensuring that the Act is properly implemented, and especially, what is the role of the Union?

Elect a reporter

What is the Employment Equity Act?

- Workers have struggled over racism, sexism and other discrimination in the workplace
- The democratically elected government in 1994 drew up a new constitution entrenching rights to equality, human dignity
- We need to recognise that factors including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth should not usually be relevant in the workplace.
- We need to recognise that in workplaces:
 - A worker should not be kept out of a job or fail to be promoted because of one of the factors above.
 - All workers should be treated with respect and dignity.
 - More workers from different backgrounds make for a better workplace.
 - Employers should be prepared to make reasonable changes to jobs or the work environment so everyone can do them.
 - Workplace should reflect the kind of workers who live in that region, in all level and categories of workplace.

- Workers should have access to training through a Sectoral Education and training Authority or the National Skills Authority to achieve the above balance.

ACTIVITY 4

Getting to Grips with Discrimination

Aims

To help us to:

- Analyse a typical problem of discrimination.
- Practice reading and applying the Law.
- Think about how unions respond to cases of discrimination.
- Devise a practical plan of action to deal with a discrimination issue

Task

In your small group, carefully read the attached case study on sexual harassment.

1. Refer to the supporting information 'Examples of Sexual Harassment' and the material we have used in previous activities.

2. Go through the case study together and note down what you think are the key facts and issues.
3. Now as the union representative who has been asked to represent Ms Jacobs. Note down the advice that would give her, and the practical steps that you would take to address this issue.
4. Use a chart to make your presentation to the rest of the workshop.
At the end of the activity read through the section on Sexual Harassment in the Appendix.

SEXUAL HARASSMENT CASE STUDY

You have to deal with a worker's complaint around sexual harassment.

This complaint comes from one of the union members, Ms Pinkie Jacobs. Ms Jacobs is alleging that she was harassed by her supervisor, Mr Abednego Radebe.

Ms Jacobs says that the previous Friday she was approached in the morning by Mr Radebe as she passed him in the corridor. He greeted her and stopped her. There was nobody else about. He backed her against the wall of the corridor with his body, putting his outstretched hands against the wall on either side of her. He said he would not release her until she agreed to go out with him that Friday night.

When she refused, he stared at her rudely and said: "I see you are still Daddy's little girl". He then walked off and left shaking with fright and embarrassment.

She said that before this incident, Mr Radebe had made her uncomfortable by frequently remarking on her physical appearance and by standing very close to her when she was working or when he was speaking to her.

She said that she had once told him that she was married and that she liked her work and she liked to be treated with respect in the workplace. But she was too shy of Mr Radebe and his authority to complain to him more directly until the incident happened.

She came to the union office and the organiser raised her problem in a meeting with the area manager Mr Will Stevens. He said this was not a serious issue and refused to address the grievance.

Example of Sexual Harassment

Example of sexual harassment may include the following but are not limited to the listed examples:

Verbal Forms

Sexual innuendo, persistence requests for unwanted dates, requests for sexual favours, unwelcome sexual jokes, unwelcome questions about a

person's sex life, comments about a person's body, telephone calls with sexual overtones.

Physical Forms

Fondling, Grabbing or rubbing against someone, unwelcome patting, touching, pinching, strip-search by a member of the opposite sex, exposing one's self, attempted rape or rape.

Non-verbal Forms

Leering whistling, offensive pin-ups or posters, winking, rude gestures.

Secondary Harassment

Secondary harassment occurs when a grievance reports a case of sexual harassment, and other employees then start harassing her/ him because of the grievance filed.

Quid Pro Quo Harassment

Quid pro quo harassment is an abuse of authority by an employer including all levels of management or co-workers who has power or can influence the process of employment, dismissal, promotion, salary increment or any other employment decisions. This can be done by suggestions of sex in return for a job, salary increase or other benefit.

Overnight Activity Crosswords or Cross Words!

Aims

To help you to:

- Further familiarise yourself with the content of the Employment Equity Act.
- Get used to the language used in the legislation.
- Start to tackle legal 'jargon' and make it understandable!

Task

Working in pairs, small groups or individually (small groups is best!) fill in the Crossword puzzle on Employment Equity which is attached.

In addition to the crossword puzzle, you will be allocated a phrase or term that is used in the EEA or which is on the Jargon Sheet. Find a place where the term is used in the Act (note the page and paragraph number reference), and then describe it in simple, understandable language that members could understand. Put your definition on a card ready for display in the morning. Sleep well!

In the morning we will check the puzzle together, and share our definitions.

Affirmative action crossword puzzle

ACROSS

1. The EEA provides in Chapter Three that a person may be ----- (8) qualified for the job because of their formal qualifications, prior learning, relevant experience or their capacity to acquire, within a reasonable time, the ability to do the job
2. Fair and equal treatment for all at work is the theme of the Employment----- (5) Act (EEA)
3. Disproportionate (too big) ----- (13) in income between different job categories should be made smaller by designated employers under the EEA
4. Actions by employers to ensure equal employment opportunities for groups disadvantaged in the past may be called -----(11) action
5. Affirmative actions measures in equity plan should not make an absolute barriers to the continuity employment of non-designated groups or in other words, force the -----(10) of e.g white men
6. Designated groups under the EEA include people who are black, disabled or -----(5)

DOWN

1. Affirmative action under the EEA is designed primarily to include people who are black, women or -----(8)
2. The EEA aims to redress the disadvantages suffered by, amongst others, -----(5) people in the Apartheid past.
3. The EEA provides in Chapter Three that a person may be suitably ----- (9) for the job because of their formal qualifications, prior learning, relevant experience or their capacity to acquire, within a reasonable time, the ability to do the job
4. Affirmative action measures aim to address the workplace problems workers suffer in the present and suffered in the -----(4)

5. All designated employers must submit information on their affirmative action measures to come, to the Department of Labour, in the form of an employment equity -----(4)
6. Affirmative action measures approved by the EEA include preferential treatment and numerical goals but exclude-----(6)

Activity 5

Affirmative Action

Aims

To help you to:

- Understand what is meant by Affirmative Action
- Think about the arguments you can use to ensure that Affirmative Action is taken up properly by the employer.
- Identify the range of Affirmative Action measures available.
- Think through how Unions can organise for Affirmative Action Measures.

Task

In your group you will be given one or more of the following cases. Using your knowledge of the Act so far, and the notes in their appendix 'Affirmative Action in the Employment Equity Act' and 'Unfair Discrimination in the Employment Equity Act, decide what possible

Affirmative Action Measures, if any, could be taken to tackle these cases.

In addition, briefly describe what the Union can do to encourage the employer to respond positively.

Elect a reporter

1. A member employed by the Metropolitan Council was injured in a work-related accident, and is now unable to lift heavy loads. The employer has said that the member will have to leave because functioning as before is no longer possible.
2. In the bank office, black people occupy all the minor positions, and white people occupy all the senior positions. When a senior vacancy arises, the employer disregards internal applicants from the lower grades even though they often do large parts of the work required. The employer has to date, always appointed a white person explaining that only white people have the skills and are sufficiently educated to do the job.
3. At the foundry, three workers have been refused places on a training programme that would normally lead to promotion because it has become known that they are HIV+ and the employer says that the training will be a waste of money.
4. A woman ticket office worker has applied to become a trainee train driver, but has been told by her supervisor that there is a long waiting list of male trainees who applied before she did, and that there is little chance of her becoming a driver and therefore to withdraw.

Elect a reporter.

ACTIVITY 6

The Duties on Employers and Unions

Aims

To help you to:

- Be clear about the role of the employer in implementing the provisions of the EEA
- Identify the role of the union in tackling inequalities at the workplace, and begin to understand what an Employment Equity Plan is.

Task

In your group, using the information we have already looked at, and the 'The Features of an Employment Equity Plan in the appendix, note down what you think about the following:

The Right to be Consulted

1. Does an employer have to consult the Union on Employment Equity? How and when? What can be done if the employer refuses to consult? What happens if not all the workers are members of the Union or are in different unions?
2. How are Affirmative Action Measures assessed to check if they are working? What can unions do to monitor progress?
3. Can an employer refuse to give you information relating to Employment Equity? What is the legal position on the disclosure of information?

Towards an Employment Equity Plan

4. How would you explain what an Employment Equity Plan (EEP) is to workers?
5. Who is responsible for drawing up an Employment Equity Plan and how can Unions influence the process?
6. Given the guidelines on drawing up an EE Plan, what do you think are the most important areas to include for workers?

ACTIVITY 7

The Next Steps

Aims

To help you to:

- Analyse the longer-term position of the Employers and Unions in regard to Employment Equity.
- Think through how your Union and Federation can give workplace representatives and members support to ensure that inequalities in the workplace are tackled successfully.

Task

In your group, read through the two checklists on **Employers and Unions Concerns about the Employment Equity Act** in the appendix.

1. Think about your own workplace, or the sectors you cover, and identify any concerns that have already been raised or are likely to be raised by the employer. What arguments can you use to respond to your employers concerns?

2. Note down any suggestions for making sure that your Union and Federation are able to give on going and longer term practical support to Union representatives on Employment Equity.

Elect a reporter.

ACTIVITY 8

Workshop Evaluation

Aims

To help us to:

- Identify the usefulness of this workshop and how it might be improved.
- Evaluate the way the workshop was structured and conducted.

Task

In your group,

1. Look back at the Aims and the Programme of the Workshop. Have the Aims been met? Please explain. Was the programme manageable?
2. Which parts of the programme did you think were useful, and which less so? Please be frank.
3. Please comment on the organisation of the workshop, and the educational methods used to facilitate it.
4. How do you think the workshop could have been improved?
5. Any other comments? Many thanks.

WORKERS'
GLOSSARY ON
EMPLOYMENT
EQUITY

Introduction to the Workers Glossary

This Workers Glossary has been written to help you to understand a range of the terms used in the Employment Equity Act, and also in the Skills Development Act. It is divided up into three sections covering **Unfair Discrimination**, **Affirmative Action**, and the beginnings of a Workers Glossary of terms used in the **Skills Development Act**. It is hoped that as you work through the workshop programme you will be able to refer to the terms that are most often used in the section you are dealing with. Although we are not covering in detail the Skills Development Act, it is closely linked to the Employment Equity Act, and so familiarising yourself with the terms used in the SDA should help at a later stage.

Please feel free to add to the Glossary if you develop or find a useful definition yourself, and pass it on to your Federation for inclusion in this list. Thanks.

UNFAIR DISCRIMINATION

- **Belief** - a system of acceptance without proof, involving traditions, religion, customs or culture, e.g. to shave one's head during a mourning period
- **Birth** - refers to the place, region or country where a worker was born, e.g. the EEA forbids discrimination against a worker born in Nigeria, on the basis that the person was born in Nigeria
- **CCMA** - the Commission for Conciliation, Mediation, and Arbitration which attempts to settle and if this is not successful, later rules on the majority of labour disputes (others go on to the Labour Court) [*as set up by s. 112 of the Labour Relations Act no. 66 of 1995*]
- **Collective agreement** - a written agreement between two or more parties, including an employer or group of organised employers and one or more registered trade unions that regulates one or more aspects of the relationship between the parties [*see s.1 of the EEA*]
- **Colour** - an arbitrary and unscientific term suggesting that people with different skin "colour" or hair or eyes etc linked to family descent are

somehow different in any way other than through their historical experience, e.g. people who are "black" or "white"

- **Conscience** - state of awareness with the capability to act rightly or wrongly. Discrimination against someone who is taking a stand according to their own personal conscience is not acceptable, e.g. taking disciplinary action against a union legal officer who refused to defend a member charged with rape may be forcing them to act against their conscience.
- **Direct unfair discrimination** - is an evident or clear discrimination in terms of gender, colour, creed or sexual orientation etc e.g. gays are not allowed to become union members
- **Ethnic or social origin** - Discrimination against a worker because of where they come from, or what class they are, is not acceptable; unless this is affirmative action or based on the requirements of the job, e.g. it would not be unfair to choose Chinese man above a black woman for a manager in a Taiwanese firm if the firm receives a large volume of documents written in Chinese
- **Family responsibility** - is that kind of support given by workers to their immediate family members who need care or support, that is, their spouse, partner, dependent children and other members of their immediate family, e.g. taking time off to deal with deaths, child care, birth, adoption [*see s.1 of EEA*]
- **Gender** - refers to the different behaviour expected from women and men in society e.g. women wear skirts and do most of the household cooking and men wear trousers and fix the car
- **Harassment** - is a form of discrimination or victimisation meted out to individuals or groups by those with power; it means annoying, troubling or making repeated attacks on people. This could be interpreted as including, for instance, racist or sexist speech. Other examples of harassment would be sexual harassment, or the harassment of a woman on the basis that she is pregnant. [*see s. 6(3) of the EEA and Code of Good Practice on the Handling of Sexual Harassment Cases, general notice 1367 in Government Gazette 19049 of 17 July 1998*]

- **HIV status** - determining whether or not the Human Immunodeficiency Virus has entered a person's body, meaning that they could live for some considerable time before they suffer from the fatal Acquired Immuno Deficiency Syndrome (AIDS) [*see s.1 and s. 6 and 7 of the EEA*]
- **Indirect unfair discrimination** - a hidden or subtle discrimination, not as evident as direct discrimination. This occurs where "criteria, conditions or policies are applied which appear to be neutral, but which adversely affect a disproportionate number of a certain ... group in circumstances where they are not justifiable..." For example, a supermarket chain which only offers a pension after a certain number of years of full time work, is discriminatory against part-time workers. As most of the part-time workers are women, and this provision is indirectly discriminatory against women.
- **Language** - a common tongue used as a medium of communication between two people. Using the same language promotes relationships and interaction. Being able to use your own language helps someone to express herself. For example, speaking Chirwa as a Malawian person should not be a reason for being victimised in a workplace
- **Marital status** - this used to be a test of whether people were legally married or not. Now SA law has begun to recognise life partnerships including same-sex partners ... generally this should not be relevant in the workplace but employers may not discriminate against partners and in favour of legal spouses e.g. a policewoman recently won the right to have her lesbian partner recognised by the provident fund.
- **Medical testing** - is usually done when you are going to be employed, e.g. testing to see whether a worker is HIV+ - this is now strictly forbidden under the EEA unless the employer has an order from the Labour Court [*see s.1 and s.7 of the EEA - note that this "testing" could be indirect, e.g. asking whether a worker has been refused for an insurance policy that provides disability cover relating to certain illnesses*]
- **Political opinion** - one of the opinions held by a member of the community on a burning issue in a community; could reflect the understanding of a whole grouping in a community on an issue about

how the community is governed e.g. a member of the Vryheidsfront thinks there should be a "white homeland"

- **Pregnancy** - when a woman has a child developing in her womb, and including "intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy" e.g. a woman should not be discriminated against if she cannot stand for long periods because she is pregnant [*see s. 1 of the EEA*]
- **Psychological testing** - refers to a situation where an employer checks your intelligence. Sometimes you are asked about things which have nothing to do with your work, e.g. made to do arithmetic [*see s.8 of the EEA; such tests must be scientific, fair and unbiased towards any group*]
- **Race** - means all kinds of people in respect of their "colour" or family descent e.g. a South African with a straight nose, brown skin and long straight black hair will be arbitrarily called an "Indian" by some people
- **Religion** - to worship God, or having faith in a supernatural being or power, e.g. Islam or Christianity
- **Sex** - refers to the biological characteristics that mark a person as male or female e.g. usually women have bigger breasts
- **Sexual orientation** - whether you have a sexual preference for people of the same sex or the opposite sex or both sexes e.g. gay or lesbian or trans-sexual people

AFFIRMATIVE ACTION

- **Affirmative action** - refers to special measures used in the workplace, which are designed to ensure equality of opportunities by eliminating historical imbalances, e.g. black women should be targeted for training to ensure that they are able to obtain the same levels of skill as white fellow workers [*see s.15(1) - (4) of the EEA "measures ... to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer"*].

- **Black people** - before 1994 in South Africa, means all people who do not have a "white" skin colour and includes so-called Africans, Coloureds and Indians [*see s.1 of the EEA*]
- **Commission for Employment Equity** - is a commission appointed by the Minister of Labour to hold office on a part-time basis. It consists of representatives from labour, business, the government, communities and development organisations [*see Chapter IV of the EEA and the attached list of short CV's of the current CEE*]
- **Designated employer** - A "designated employer" includes an employer with 50 or more workers, an employer with a high turnover (see schedule 4 at the back of the EEA), a municipality, an "organ of state", including any state department or provincial and national administration, local government department or administration, any person or institution functioning according to the national or provincial constitution, any person or institution exercising a public power (except a court or a judicial officer), and an employer who agrees, in a collective agreement, to become a "designated employer" [*see s.1 of the EEA*]
- **Designated groups** - black people, women (any race) and people with disabilities (any race); that is, people who were disadvantaged in the past [*see s.1 of the EEA*]
- **Employment equity plan** - a plan to achieve a fair and equal environment in the workplace e.g. the promotion of a black "tea lady" to the position of wages clerk and receiving the necessary training and support for her to succeed [*s.20(1) and (2) of the EEA ... a plan to achieve "equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce"*]
- **Employment policy or practice** - policy and practice in a workplace that guides and defines how a person is recruited, advertised for and selected for a job, appointed, how their job is classified and graded, how they are paid, what benefits they get and other terms and conditions of employment, what work they are assigned to do, the working environment, workplace facilities, training, development, performance evaluation systems, promotion, transfer, demotion, disciplinary measures, dismissals and others [*see s.1 of the EEA*]

- **Formal equality** - Equal treatment for all individuals no matter what their circumstances are, e.g. saying that men and women will be promoted on the basis of how many hours overtime they work, regardless of family responsibilities
- **Income differential** - the wage gap, or the anomalies between one group of workers' income and another group, e.g. between the wages of artisans and the wages of trained operators, or the differences between the wages of supervisors in different departments [*see s.27 of the EEA*]
- **People with disabilities** - people who have long-term mental or physical damage which makes it definitely more difficult for them to get a job or to get promotion [*see s. 1 of the EEA*]
- **Reasonable accommodation** - means changing a job or a workplace or facilities or processes so that it will be easier for a black, woman or person with disabilities to get a job or get promotion e.g. making a ramp so that someone with a wheelchair will be able to get up the stairs by themselves and reorganising an office so that the person can work in it [*see s. 1 of the EEA*]
- **Substantive equality** - A positive recognition of the need to redress past disadvantages by the redistribution of social and economic power and the provision of opportunities for each worker to develop themselves to their full creative potential, e.g. making sure that black women clerks in a company get proper training to ensure that they are able to be promoted to the same higher-paid positions as white women may presently occupy, because the white women had easier access to training in the past [*see how this is different from "formal equality" above*]
- **Suitably qualified person** - a person who should get a job because she has formal qualifications, or because she has done this job before, or because she has done a similar job before, or because she will be able to learn to do the job within a reasonable space of time [*see s.20(3) of the EEA*]

Workers Glossary of definitions used in the Skills Development Act (SDA)

- **Employment services/Labour centres** - it is a service centre that renders services to job seekers and students in the community for career orientation, advising about job opportunities and offering training. For example, the labour centres run by the Department of Labour can refer community members to training centres to learn skills like brick-laying, cooking and so on. These centres also keep data about vacancies and provide names of workers to companies who are recruiting or advise companies who are retrenching about developing social plans [*see s.1 of the EEA and ss.23-26 of the EEA*]
- **Learnership** - replaces the apprentice system. A learnership must have systematic training, include practical work experience, lead to a recognised SAQA-linked qualification and be registered with the Department of Labour [*see sections 16 to 19 of the SDA*]
- **National Skills Authority** - a body in charge of skills development implementation. It consists of organised labour, business, community development, the state, educators, employment agencies, designated groups and someone from SAQA (see below). It must advise the Department of Labour, help to target and finance key groups for skills development and link with the Sectoral Education and Training Authorities [*see s.4 of the SDA*]
- **National skills development policy** - a plan of action for the development of skills in South Africa, developed by the Department of Labour on the advice of the National Skills Authority [*see s.5 of the SDA*]
- **National skills development strategy** - the way the above plan of action would be undertaken [*see above and s.5 of the SDA*]
- **National Skills Fund** - collect money (levy) from all employers to finance the work of the National Skills Authority (see above). The national skills fund collects 20% of the levy from employers where there is a Sectoral Education and Training Authority or SETA, and all of the levy for employers who do not fall under a SETA. [*see sections 27 to 30 of the SDA*]
- **Sector skills plan** - plan to develop the range of skills needed by learners and workers in workplaces in a certain sector, and outlining targets for such a plan [*see section 10(1)(a) and (b) of the SDA*]

- **SETA** - is a Sector Education and Training Authority, to be established in agreed sectors by unions and employers to develop a sector skills development plan, monitoring workplace training, allocating grants to employers for training, collecting levies from employers, and promoting learnerships *[see sections 9-15 of the SDA, especially s.9(1)]*
- **Skills development levy** - is a levy that is paid for skills development programmes and the administration of a SETA (see below). This levy is paid by employers. For most employers, it will be first 0,5% of the employer's payroll (from 1 April 2000), then 1% of the employer's payroll (from 1 April 2001) *[see s.3 of the Skills Development Levies Act]*.
- **Skills Development Planning Unit** - a department or section of the Department of Labour to look at the skills needs of workplaces or sectors or national priorities *[see section 22 of the SDA]*
- **Skills programme** - is a training programme designed to train employed workers, or the working class more broadly, on skills they would be expected to perform at work. The programme could also be to train workers to be able to perform the jobs that they are doing, better. On completion of such a programme, a nationally recognised certificate is issued *[see sections 20 and 21 of the SDA]*
- **South African Qualifications Authority** - means the national education body set up to link education and training standards to a national qualifications framework, to make it easier for workers to move jobs and get recognition for previous experience *[see s.3 of the SA Qualifications Authority Act no 58 of 1995]*

Who must implement affirmative action?

The Employment Equity Act (EEA) says that a "designated employer" must make an affirmative action plan in their workplace.

A "designated employer" includes:

- An employer with 50 or more workers
- An employer with a high turnover
(see schedule at the back of EEA)
- A municipality
- An "organ of state", including
- Any state department or administration
- provincial and national
- Local government department or administration
- Any person or institution exercising a public power
- (except a court or a judicial officer)

- an employer who agrees, on a collective agreement, to become a "designated employer"

Who is affirmative action for?

The EEA says affirmative action is for "designated groups".

So far the EEA defines "designated groups" as:

- black people (including Africans, "coloureds" and "Indians")
- women
- people with disabilities:
 - long term or recurring
 - mental or physical impairment (damage or weakening)
 - which limits their prospects of jobs or promotion

What are affirmative action measures?

1. Measures designed to ensure:

- Equal job opportunities for
 - People from designated groups

- Who are "suitably qualified" due to
 - Formal qualifications
 - Prior learning
 - Relevant experience
 - Capacity to learn/ become able to do the job, within a reasonable time
- **Equitable representation in all job categories/
Levels for:**
 - People from designated groups
 - Who are "suitably qualified" due to
 - Formal qualifications
 - Prior learning
 - Relevant experience
 - Capacity to learn/ become able to do the job, within a reasonable time

2. Measures to retain and develop people from designated groups:

- Including appropriate training
- Especial using the new Skills Development Act

NB - These above measures:

- **Include numerical goals**
- **Include preferential treatment**
- **Exclude quotas**

- Exclude “ absolute barriers” to non-designated groups

3. Measures to make “reasonable accommodation”, defined as:

- Modification or adjustment,
- To a job or to be working environment,
- To enable someone from a designated group,
- To have access to, participate in or advance in, employment

4. Measures to identify and remove barriers to employment of blacks, women and people with disabilities (including unfair discrimination)

5. Measures to make workplaces more diverse, because all people deserve equal respect and dignity

How will the success of affirmative action measures be assessed?

Compliance by an employer with the EEA will be measured by relating that workplace to the:

- Demography of that region, or nationally
(demography = statistics on people in communities)

- Pool of suitably qualified people available, from which employer could be reasonable expected to draw,

e.g labour pool in that sector or region

- Economic and financial factors relevant to the sector

e.g mental sector is 80:20 men: women
and mining sector ratio is worse, so
what is reasonable progress?

- Present and anticipated economic and financial circumstances of the employer
- Vacancies in different categories and levels and labour turnover
- Progress compared to similar companies in the same sector
- Reasonable efforts in dealing with unfair discrimination
("eliminating employment barriers")
- Any other factor

Who must a designated employer consult?

- Consult with workers, including:

- workers in all job categories and levels,
 - designated workers, and
 - non-designated workers
- If there is a representative trade union, the employer will consult with the union and shop stewards in the workplace, provided that the union represents all the types of workers listed above
 - If there is no representative union, or the union does not cover all the types of workers listed above, the employer must consult with representative chosen by the unorganised workers

The designated employer must consult workers on:

1. How to prepared a workplace analysis including:
 - Employer barriers for designated groups, looking at factors including recruitment, selection, job grading, pay and benefits, training + development, promotions, demotions, transfers, workplace +facilities
 - Skills profile for all job categories and levels, to check where blacks, women and people with disabilities are not well represented
2. Preparing and implementing an employment equity plan for the workplace

3. Reporting on the employment equity plan to the Department of Labour

STEPS TOWARDS AN EMPLOYMENT EQUITY PLAN

1. Discuss with the shop stewards committee/ trade representative in a workplace:
 - what affirmative action means and
 - what affirmative measures are suggested in the Employment Equity Act (EEA) S. 55 and
 - what process the EEA for an employment equity plan.
2. Find out what the union policy is on these issues. Plan how to get a mandate from workers on these issues.
3. Check whether you employer is a "designated employer"; or negotiate from you employer to volunteer to become a designated employer.
4. Set a date for employer to consult with the shop stewards committee and a union organiser on affirmative action in the workplace.
5. Prepare this meeting with the management by getting together proposals on:

- how to conduct the workplace analysis;
- what demands the union has to go into the employment equity plan; and
- how the union will monitor the employer's progress report to the Department of Labour.

6. To do the analysis, the employer must collect the information on:

- employment policies (e.g only matriculants),
- employment practices (e.g no night shift work for a women),
- employment procedures (e.g white male HR does all interviews),
- the working environment (e.g are there protective screens screens on the VDU terminals?) and
- a profile of each job category (and all levels on each categories) explaining how many black, women and disabled workers are in each category and level.

The union needs to have demands on how they will monitor and intervene in this process of collecting information and analysing it. The employer must consult with the union on this.

7. An employment equity plan must cover the following items. The union needs a mandate for negotiating each one:

- affirmative action measures including
 - Eliminating unfair discrimination against blacks, women and the disabled.
 - Promoting diversity based on equal dignity and

respect for all workers,

- moving towards equal opportunities and equitable representation for blacks, women and the disabled,
- retaining and developing women, blacks and disabled (including skills development),
- provided that there are no quotas and no absolute bars against able white men (people not from designated groups);

- the objective for each year of the plan;
- the numerical goals for affirmative action and a

timetable

and a strategy in each category (e.g 5 women out of ten workers in the dispatch department, after a suitable training and filling the vacancies left as workers leave);

- other plans (other the above; for example, desegregating the canteen) and a timetable for them;
- how long the plan will take (must be between one and five years);
- how the plan will be carried out and monitored;
- internal procedures to resolve the disputes about understanding the plan or putting it into practice;
- who in the workforce will be responsible for monitoring and implementing the plan.

The union needs to have its demands ready on each of these items, or to propose a process for working on these items. The employer must consult with the union on this.

8. The EEA sets out a timetable for reporting to the Department of Labour on this plan and how it is going. Such reports are public documents. The time within which an employer must do this depends on the size of workplace. An employer with a workforce or less than 150 workers must get its first report to the Department of Labour within 12

months of the date when the EEA commences and then report again at least by the beginning of October every two years after that.

The employer must consult the union about this report before they submit it to the Department of Labour. So the union must have its demands ready.

General duty of employer on unfair discrimination:

- The employer must:
 - take steps to provide equal opportunity,
 - by eliminating unfair discrimination,
 - in any employment policy or practice.

- An employment policy or practice includes:
 - Recruitment procedures, advertising and selection criteria,
 - Appointments and the appointments process,
 - Job classification and grading,

 - Remuneration, employment benefits and terms and Conditions of employment,

 - Job assignments,

 - The working environment and facilities,

 - Training and development,

 - Performance and evaluation systems,

 - Promotion,

- Transfer,
- Demotion,
- Disciplinary measures other than dismissal, and
- Dismissal.

Types of unfair discrimination:

- DIRECT DISCRIMINATION-

This is when an employer treats a worker or a group of workers differently because of some characteristic or choice that is not related to the workplace.

This can include:

- race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

This can also include other forms of discrimination where the employer's action is arbitrary.

- INDIRECT DISCRIMINATION-

This is when an employer applies criteria, conditions or policies which appear to be Neutral, but which adversely affects a disproportional number of a certain group in circumstances where they are not justifiable.

- For example, if an employer says any applicant for a job as a factory general assistant, doing cleaning

and maintenance, must have a Matric certificate, this seems to be neutral. But such a requirement will adversely affect more black workers because of their previous unequal access to better quality education. And it would be hard for an employer to justify the need for a general assistant to have a Matric certificate.

Unfair discrimination includes harassment:

- Harassment of a worker is a form of unfair discrimination. This can involve troubling, annoying or making repeated attacks on a worker.
- Employers and their workers should respect one another's integrity, dignity, privacy and right to equity in the workplace.
- A worker may not be harassed on any of the grounds below, or any combination of these grounds:
 - race,
 - gender,
 - sex,
 - pregnancy.
 - Marital status,
 - family responsibility,
 - ethnic or social origin,
 - colour,
 - sexual orientation,
 - age,
 - disability,

- religion,
- HIV status,
- conscience,
- belief,
- political opinion,
- culture,
- language and
- birth.

Who is affected by what the EEA says about unfair discrimination?

- The Employment Equity Act (EEA) talks about:
 - an employer,
 - an employee, or any person who:
 - is not an independent contractor,
 - who works for another person, or the state (remember "person" can include companies, close corporations, organisations etc with legal personality),
 - who receives or is entitled to receive remuneration (money usually, or shares or benefits like housing),
 - who assists in the employer's business.
 - A job applicant (s. 9 of the EEA).

The NEDLAC Code on sexual harassment goes wider.
It includes:

- Owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors, and others having dealings with the business/ workplace.

A trade union could negotiate to include others like those above in any grievance procedure or procedure on unfair discrimination through a collective agreement.

When can discrimination be "fair"?

The employment Equity Act (EEA) gives two possibilities.

- Affirmative action measures do not amount to unfair discrimination

In other words, measures to address the injustices and inequalities of the past for groups of people, are not giving them unfair advantages.

- Choosing, excluding or making differences between people at work because of a job's "inherent requirement" do not amount to unfair discrimination

For example, only an attorney who is admitted to practice may sign certain court papers on behalf of clients. This would be an "inherent requirement" for a litigation job in a legal practice.

When does testing workers amount to unfair discrimination?

MEDICAL TESTING

THE EEA BANS MEDICAL TESTING OF WORKERS UNLESS:

- A law requires workers in a workplace to be tested, e.g recruits to the army , or
- The employer can show that testing is justifiable because of:
 - Medical facts,
 - Employment conditions,
 - Social policy,
 - fair distribution of employee benefits, or the
 - Inherent requirements of the job.

HIV testing:

An employer may not test any worker for HIV unless s/he gets an order from the Labour Court that such a test is justifiable.

The Labour Court will look at the factors above.

The Labour Court may make conditions for such test, for example:

- Employers must provide counselling,
- The test and result must be confidential,
- The time period for such tests may be limited,

- The categories of workers who may be tested, may be limited,
- PSYCHOLOGICAL TESTING

The EEA bans psychological testing or psychological assessments of a Worker,

Unless:

- The test is scientifically valid and reliable,
- The test does not discriminate against some workers and can be applied fairly to all workers,
- The test is not biased against any worker or group.

The procedure for making an unfair discrimination dispute:

- DISMISSAL DISPUTES
 - Referral to the CCMA or Bargaining Council for conciliation, within 30 days of the dismissal
 - If conciliation does not succeed, referral to the Labour Court for adjudication
 - If both parties agree, the dispute could be referred to arbitration
- OTHER DISPUTES

- The union or worker referring a dispute must show that they made a reasonable attempt to settle it first
- If this fails, the dispute may be referred to the CCMA for conciliation. This must be done within six months of the act, or failure to act, that constituted the unfair discrimination
- If conciliation does not succeed, refer to the Labour Court for adjudication
- If all parties agree, the dispute could be referred to arbitration

Pitfalls and potential gains for unions around the Employment Equity Act (EEA), especially around employment equity plans

| ISSUES | UNIONS | EMPLOYERS |
|----------------------|---|--|
| NEED TO CHANGE | <ul style="list-style-type: none"> • Unions have always struggling against racism and discrimination; more recently, most unions have pushed for gains for women • Unions need more internal education on sexism, discrimination against people with disabilities etc | <ul style="list-style-type: none"> • Employers do not select, promote |
| DESIGNATED EMPLOYERS | <ul style="list-style-type: none"> • Some unions are calling on all companies in their sector to agree to become "designated employers" • Unions may need to do research on some companies to determine their actual structure and turnover, considering off-shore assets etc to assess whether employers fall within the turnover thresholds in the EEA's Schedule 4 | <ul style="list-style-type: none"> • Employers are out-sourcing, looking for ways to reduce turnover, to • Some large employers may be a way to unleash Skills Development |

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| <p>TIME PERIOD FOR CHANGE</p> | <ul style="list-style-type: none"> • Unions need to show concrete gains to members • Unions want transformation in workplaces, not only some level of worker participation in decision-making • Unions have been campaigning for a better deal for black workers, and more recently, for women workers and workers with disabilities. • "Reasonable progress" in employment equity should become negotiated agreed point(s) which are practical but constantly advancing | <ul style="list-style-type: none"> • Employers are targets to be measured against competitive edge • Employers can compromise on training grants • Employers are "progress" to "equality" for people in relation |
| <p>PREJUDICE</p> <p>PRIOR LEARNING</p> <p>"SUITABLY QUALIFIED"</p> | <ul style="list-style-type: none"> • Unions want an end to discrimination. • Another long-term union demand is the recognition of prior learning and experience, and opportunities for workers to advance or have a "career path". • Unions will need to push for a union-friendly meaning for "suitably qualified" workers; and • be prepared to contest the application and interpretation of "suitably qualified" and other definitions in the Labour Court; and • be prepared to reinforce these in collective agreements | <ul style="list-style-type: none"> • Employers were blacks, women prejudices behaviour slightly happier employ those who highly contested decision on who hands by section employer must suitably qualified |
| <p>RETRENCH</p> <p>PROMOTIONS</p> | <ul style="list-style-type: none"> • Unions do not have to be concerned about members losing jobs in forced retrenchments to make new spaces • While waiting for jobs to open up, unions can focus on promotions in line with the EEA obligation for employers to "retain and develop" members of designated groups [Eskom case] • Unions should try to protect the positions of all members, especially older ones, under the "retain and develop" provision • Unions should beware of attempts by employers to promote black, women, disabled workers to jobs and then reduce the wages and benefits attached to the same jobs, arguing recession and the need to retrench | <ul style="list-style-type: none"> • Employers were workers to make • Employers who from designated employing/provisions 15(4) of the EEA "an absolute bar on employment or designated groups" • Employers are numerical goals |
| <p>PERFORMANCE STANDARDS</p> | <ul style="list-style-type: none"> • Unions need to be aware that some employers will be very tough on performance now, and try to protect members by pushing for full job descriptions and transparent and simpler grading systems | <ul style="list-style-type: none"> • Employers have if they have to name of integrity be tougher on route in the Labour Court |
| <p>MORE ADMINISTRATION</p> | <ul style="list-style-type: none"> • Unions should try to wean employers away from expensive consultants and token EEA appointments towards a joint approach to unleashing creativity • if unions are well-prepared and energetic, this will help employers to see the EEA as more than simply another legally imposed administrative/accounting procedure • Unions should examine the role of "equity officers" employed by management to see that the union is fully involved | <ul style="list-style-type: none"> • Employers are administrative • Employers are |

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| <p>AVOIDING UNFAIR DISCRIMINATION</p> <p>CHECK POLICIES AND PRACTICES</p> <p>SEXUAL HARASSMENT POLICY</p> <p>MEDICAL (HIV) AND OTHER TESTING</p> <p>DISPUTE RESOLUTION</p> <p>RECORDS TO FIGHT CASES</p> | <ul style="list-style-type: none"> • Unions should brief shop stewards to check for potential unfair discrimination issues and on how to take up unfair discrimination cases • Unions should look to play a role in negotiating real gains for members as employers do the following to avoid potential unfair discrimination cases: <ul style="list-style-type: none"> • Check employment policies and practices for discrimination, • Analyse workplace recruitment and selection procedures for hidden discrimination, • Set up a company sexual harassment policy, • Employers must justify any medical or psychological testing, (especially HIV testing which they can only do with a Labour Court order) and unions should research and monitor any ground rules established for such tests • Set up a dispute resolution path to look at resolving unfair discrimination cases before they get to the CCMA, • Organise themselves to keep very detailed records on any allegations of unfair discrimination, as the duty to prove that their actions were fair or non-discriminatory will fall on them, after the union has made out a case for unfair discrimination on the face of it • Unions need to set up a way of keeping their own records to use to challenge employers | <ul style="list-style-type: none"> • Employers are following prevent discrimination <ul style="list-style-type: none"> • Checking all discriminat • Analysing w for hidden • Setting up • Done their psychologic can only do • Setting up unfair disc. • Organising any allegat prove that will fall on unfair disc. |
| <p>DEADLINES FOR AFFIRMATIVE ACTION</p> | <ul style="list-style-type: none"> • Unions and employers are under pressure as the affirmative action section of the EEA is likely to come into force in December or early next year • This means that the first reports on an employment equity plan will probably be due between June/July 2000 and December 2000 (depending on the size of the workforce) | <ul style="list-style-type: none"> • Unions and emp action section December or e • This means the plan will probat December 200 |
| <p>PREPARATIONS FOR AFFIRMATIVE ACTION BY END OF 1999</p> <p>RESEARCH</p> <p>PROFILE OF WORKFORCE</p> | <ul style="list-style-type: none"> • Unions need to be aware that consultants are suggesting the following to employers, and begin to prepare to put a union position on these issues: <ul style="list-style-type: none"> • Setting up a consultation with unions and other workers, • Researching the statistics on workers in their area and sector, drawing on UNISA and regional technikons, or the HSRC, • Drafting a profile of their workplace(s) covering all job categories and levels (regulations and Codes on this are not out yet), • Appointing a senior manager to manage the employment equity plan (monitoring procedure, disputes, goals etc) • Checking on the new regulations as they come out | <ul style="list-style-type: none"> • Consultants are <ul style="list-style-type: none"> • Setting up • Researchin sector, dra HSRC, • Drafting a categories not out yet • Appointing equity plan • Checking o available ye <ul style="list-style-type: none"> • Prepari • An outl • Report |

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| <p>NEW REGULATIONS AND CODES</p> <p>EXEMPTIONS</p> | <p>(not available yet) on:</p> <ul style="list-style-type: none"> • Preparing an analysis (s.19 of the EEA), • An outline for an employment equity plan (s.20), • Reporting to the Dept of Labour (s.21), • Summarising the EEA for display (s.25), • Keeping records (s.26), • Income statements to check for wage gaps (s.27), • Checking for relaxations/exemptions for businesses employing less than 150 workers (s.55), • Other administrative and procedural regulations, forms etc (s.55), • Checking out Codes of Good Practice as they are issued (s.50 (4) - footnote gives list or see summary earlier). | <ul style="list-style-type: none"> • Summa • Keeping • Income • Checkin • employ • Other • forms |
| <p>CONSULTATION OR NEGOTIATION</p> | <ul style="list-style-type: none"> • Unions are calling on employers to negotiate employment equity plans, not merely "consult" over them • Unions need to intervene and start dealing with management on these issues to pre-empt divisive and greedy consultants | <ul style="list-style-type: none"> • Employers are |
| <p>AFFIRMATIVE ACTION TASKS FOR 2000</p> | <ul style="list-style-type: none"> • If the above tasks are completed in 1999 in workplaces, then the tasks for unions in most workplaces in 2000 will be: <ul style="list-style-type: none"> • Consultation and drafting a workplace analysis, employment equity plan and report, • Preparing the first equity plan, • Preparing the first report for the Department of Labour • Unions should develop a framework or model agreement for all workplaces inside the union to use | <ul style="list-style-type: none"> • If the above to • the tasks for e • Consultatic • employmen • Preparing t • Preparing t |
| <p>PENALTIES FOR LACK OF AFFIRMATIVE ACTION</p> | <ul style="list-style-type: none"> • Unions can help the Dept of Labour to monitor employers who do not comply with the EEA, by reporting the lack of compliance to the labour inspectors and assisting the labour inspectors in the process of getting undertakings, compliance orders, review by the Director General of Labour, fines by the Labour Court | <ul style="list-style-type: none"> • Employers are compliance with • These range fr • Only the La • process of • issuing com • General of • The fines c |
| <p>MONITORING</p> | <ul style="list-style-type: none"> • Where the employment equity plan requires a senior manager to monitor it, perhaps unions should call for a joint union/employer monitoring committee instead? • Unions will probably bear the primary practical responsibility for monitoring employment equity plans for the first few years and need to set up mechanisms to achieve this • If unions leave the assessment of "reasonable progress" on employment equity issues in workplaces to | <ul style="list-style-type: none"> • Employers are monitoring cap • to see union ac • autonomy in wo |

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| | employers or to the state, this could become as watered-down as the economic trickle-down theory? | |
| CREATING NEW JOBS | <ul style="list-style-type: none"> Unions need to monitor all new jobs through shop stewards in the workplace to assess the possibilities for employing a person from a designated group | <ul style="list-style-type: none"> Some consultation to create additional jobs makes it clear that "present and planned" should lead to... |
| LABOUR POOL DEMOGRAPHIC STATISTICS NUMERICAL GOALS SOCIAL GOALS | <ul style="list-style-type: none"> The EEA requires employers to match their workforce to the numbers of blacks, women and disabled persons in the relevant labour pool ... unions may be demanding that the pool considered should be the biggest possible and get the relevant statistics, and unions will demand that the social composition of the pool should change to accommodate those workers who did not previously have access to those kinds of jobs, e.g. because of job reservation in favour of whites Unions need to push that employment equity means a break with the past. If there are only 20% women in the metal sector, must it stay that way forever? Progress, even if gradual, must be the aim of the EEA; not just saying that "society" prefers this! | <ul style="list-style-type: none"> Employers are narrowing the size of the pool to match or draw from a narrow pool Employers are concentrating on high concentrations restricting the pool with its preponderance of whites. "Coloured labour" in the Western Cape Employers are following trends in social policy. Lack of women in the pool is not obliged to look... |
| SMALL BUSINESSES | <ul style="list-style-type: none"> Unions aim to use mass power and labour laws to establish a floor of rights so that conditions of organised workers will not be undermined by hungry unorganised workers, and that the value of labour power will be increased Unions want small employers also to be covered by the EEA discrimination protections, affirmative action provisions and other labour laws Unions should monitor this and intervene and respond vigorously to proposals for new laws/amendments | <ul style="list-style-type: none"> Employers are small businesses under s.55 Businesses believe that small concerns under 150 workers are not covered |
| OUTSOURCING | <ul style="list-style-type: none"> Unions are particularly concerned that more and more big businesses are out-sourcing "non-core" departments or functions where workers lack basic protections and solidarity is hard as the workplaces are so small Unions should call for a moratorium on outsourcing which is intended to free employers from the EEA Unions need to intensify their present campaigns on outsourcing or at least monitor and record changes in the workplace to prepare towards a legal challenge that the employer is seeking to avoid their EEA (and BCEA, LRA) obligations. Where tendering/out-sourcing is taking place - build into collective bargaining that only "affirmed employers" are used | <ul style="list-style-type: none"> Employers are outsourcing and trying to change their... |
| INCOME DIFFERENTIALS | <ul style="list-style-type: none"> Unions have fought for a provision in the EEA to assist in long-running union campaigns in some sectors to... | <ul style="list-style-type: none"> Business is aiming to avoid the obligation... |

| | | |
|--------------------------------------|---|--|
| | <p>reduce wage gaps</p> <ul style="list-style-type: none"> • The EEA has a provision on confidential reporting by employers to the Dept Labour on wages at all levels and job categories, s.27; this includes employers having a plan to reduce any wage gaps • If employers argue that s.27 limits union access to income differential statistics, unions can argue their rights to relevant information under the Labour Relations Act for consultations and bargaining • Wage differentials were linked to job reservation (long outlawed) and now forbidden as a discriminatory policy or practice | <p>employment eq confidential mc Labour,</p> <ul style="list-style-type: none"> • Business does r unions on any w |
| <p>LABOUR COURT JURISDICTION</p> | <ul style="list-style-type: none"> • It seems as if the Labour Court will have exclusive jurisdiction to deal with matters arising from the EEA (except for appeals to the Constitutional Court). The composition of the Labour Court, its leadership and the stances taken by it will thus become very significant to unions. | <ul style="list-style-type: none"> • Employers have can be inclined implementation |

SUGGESTED SOLUTION SHEET FOR SEXUAL HARASSMENT CASE

The union could take the following steps to address this as sexual harassment, which is a form of unfair discrimination.

1. If you want to refer any unfair discrimination dispute to the labour dispute resolution bodies, you must be able to show that you have made a "reasonable attempt" to resolve this dispute.

In this case, you could argue that raising the case with the area manager and saying it should be treated as a grievance would have given management and the alleged harasser a chance to respond to the problem and offer to try to resolve it.

2. If there are any agreed procedures in the workplace on harassment or in collective agreement, including a Bargaining Council agreement, you should follow those.

In this case, there is no indication of any company or council agreement or policy.

3. Nedlac has issued a Code of Good Practice on the Handling of Sexual Harassment Cases, published in Government Gazette 19049 of 17 July 1998. This gives general guidelines to follow. It suggests that if a potential dispute is not resolved according to any existing internal procedures, either the worker or any other party involved may refer a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) within 30 days of the "dispute having arisen".

The general procedure for unfair discrimination case is set out more fully in section 10 of the EEA. This suggests that any dispute must be referred to the CCMA within 6 months of the act or failure to act that caused a problem.

This referral (the CCMA has a form for this - "7.11" form) should also be brought to attention of the company by registered post, delivering it by hand or faxing/e-mailing a copy. The key is being able to prove

that the union has done so, and when (see section 1 of the EEA on "serve" or "submit").

In this case the union must then refer the dispute to the CCMA within six months of the incident, but also within 30 days of the meeting with the area manager. If not, the union will have to show "good cause" for being late. This means explaining how late the referral is, why it is late and showing the good that you have a good case and it is worth proceeding with the dispute. CCMA commissioners are becoming more strict about this as the workload pressure increase.

4. The CCMA will then try to resolve the dispute by calling both parties to a conciliation meeting. If this meeting is not successful, then the referring party may refer the dispute to the Labour Court within 90 days of the CCMA conciliator's Certification of Outcome.

If both parties agree, then the CCMA may arbitrate this dispute instead of the dispute going to the Labour Court.

In this case, the union would probably try to get the company to agree to go to arbitration if the conciliation fails, as this is simpler and cheaper and (in some regions) faster. If the company will not agree, this matter could go to the Labour Court. To prepare for all of this, the union would look up recent cases and try to work out how the arbitrators and judges would view this case.

5. When you are taking such cases to arbitration or to the Labour Court, the principle in the Code on Sexual Harassment (see point 3. Above) will help you to know how good your case is.

In this case, sections 3 (Definition of sexual harassment) and 4 (Forms of sexual harassment) and 6 (Policy statements) and 7 (Procedure) will help you to select and weigh the relevant facts.

6. Another important part of preparing your case, is understanding what you have to prove. Section 11 of the Employment Equity Act explains that the worker has to show that the unfair discrimination happened. Then the employer has to try to show that what happened was fair. If the worker shows that there was discrimination, and the employer

cannot show that the discrimination was fair, then the union will have proved a case of unfair discrimination.

In this case, the worker has show that there was sexual harassment in terms of the Code (see 5. above) and you have no facts for the employer to show that it was fair.

7. A further important part of taking an unfair discrimination is knowing what outcome you want for your case or dispute. Being well prepared on this and looking at all the issues involved for the union, will often help you to win this dispute long before it is necessary to go to arbitration or to the Labour Court.

In this case, you might ask for some form of discipline against Mr Radebe or an undertaking that he will refrain from the unacceptable behaviour or face sanctions. You might also try to negotiate some policy on sexual harassment based on the Code to try to protect your member in future.

Steps to resolve sexual harassment

STEP 1

Exhaust all internal grievance and disciplinary procedures. The internal grievance and disciplinary procedures in the collective agreement override the Labour Relations Act.

Workplace that do not have internal grievance and disciplinary procedures in place, grievance have the right to directly contact CCMA. In a situation of a dismissal dispute, the dispute must referred to the CCMA within 30 days of the dismissal.

STEP 2

If the outcome is not satisfactory, refer the dispute in writing to the Commission for Conciliation, Mediation and Arbitration or bargaining council.

Conciliation will take at CCMA's office, statutory or bargaining councils.

Conciliation must be concluded within 30 days.

After 30 days parties will receive a certificate whether or not the dispute is resolved.

STEP 3

If the dispute is not resolved at conciliation, it may be referred to the Labour Court.

(Steps to resolve the dispute as published by the Dept. of Labour, Sowetan, November 1996- drawn the Nedlac Code on Sexual Harassment)

Before behavior can be classified as sexual harassment, the following element must be present:

- the behaviour is unwanted by the recipient
- the behaviour is of a sexual nature
- the behaviour is as expressed in verbal, physical or non-verbal ways.

ADDITIONAL READINGS ON SEXUAL HARASSMENT

(From the Sexual Harassment Education Project-SHEP)

What is Sexual Harassment?

Although South Africa women has experience sexual harassment at work for a long time, few cases have made to the labour courts. A common law definition was finally made in 1989 by well-known J v M case, heard in the Industrial Court by the President Officer, Arthur de Kock.

Judge de Kock in his judgement defines sexual harassment as occurring when:

" a woman or man is expected to engage in sexual activity in order to obtain or keep employment or obtain promotion or other favourable working conditions. In its wider view it is, however, any unwanted sexual behaviour or comment which has a negative effect on the recipient.

Conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints of fondling without consent or by force to its worst form, namely rape. It is my opinion also not necessary that the conduct must be repeated. A single act can constitute sexual harassment".

In this ruling judge de Kock captures the notion of sexual harassment as a continuum, ranging from unwanted and offensive comments, through to its most extreme manifestation: sexual assault or rape. He also sets out both a narrow and broad approach to defining sexual harassment.

According to this ruling, there is both a narrow and a broad way of defining sexual harassment:

A narrow view recognises behaviour as sexual harassment when someone is coerced into sexual activity in order to get a job, be promoted, or enjoy favourable working conditions. The narrow view would also recognise sexual assault.

A broad view describes sexual harassment as any unwanted sexual behaviour or comment that negatively affects the recipient.

What are the features of an employment equity plan

- At least one year -> 5 years
- Objectives for each year
- Affirmative action measures
- Changes in number of blacks, women and people with disabilities at all relevant job categories and levels
- Timetable to reach this goals
- Strategies and procedures to implement this goals
- Chose people to monitor the plan and evaluate if progress is reasonable
- Report a prescribe intervals on progress to the Director General of the Department of Labour
- Dispute procedure if there are differences on implementing and interpreting the plan
- Any other issue (as practice develops around the new EEA)

Income differential and the EEA

- When reporting to the Employment Equity Plan, a designated employer must report the levels of wages and benefits in each job category or level.

- Where there is a wage gap, the designated employer must take steps to reduce this over time, including:
 - Through collective bargaining,
 - Through sectoral determinations under the new Basic Condition of Employment Act(replacing former wage determinations for sectors)
 - Through playing a standards set by the Employment Conditions Commission (EEA)
 - Through improving skills of workers using the Skills Development Act
 - Through others measures
- The EEA must research on appropriate differentials between job categories and levels, and advise the Minister of Labour on ways to reduce wage gaps. Information on specific workplace will be confidential.
- Workers are entitled to disclosure of information by employers to negotiate reducing wage gaps
- Workers have a general right to information under the Labour Relations Act for any consultations needed in terms of the EEA, including consultations about drawing and monitoring an Employment Equity Plan.

What is the Commission for Employment Equity?

- It consists of part-time representative from labour, bussiness, government and community and development organisations. They sit up to five years.
- This commission is supposed to advise the Minister of Labour on policy, regulations and Codes, following research and public hearing open to all.
- One particular task is advise the Minister on the distribution of the population and reasonable goals to acheve more in each sector.

Monitoring and enforcement of employment equity plans

- Designated employers must report to the Director General of the Dept of Labour on their EE plan:
 - < 150 workers, the employer reports within 12 months of Chapter 3 of the EEA coming into force (? Jan/ Feb 2001) and thereafter at intervals of 2 years,
 - > 150 workers, the employer reports within 6 months of Chapter 3 of the EEA coming into force (Aug/ Sept 2000) and thereafter at intervals of 1 year.
- Report on employment equity plans is available to employer, employee, Director General of the

Department of Labour, Commission for Employment Equity

- Workers can:
 - complain to a Labour inspector if there is no EE plan or if there are problem and delays

- Labour inspector can:
 - inspect/ investigate complaint,
 - discuss with employer and get an undertaking, or
 - issue a compliance order,
 - if the employer still does not comply or even appeal,
 - the Director General can ask the Labour Court to make the compliance order of the Labour Court.

- The Director General of the Department of Labour can:
 - review employment equity plans,
 - make recommendations
 - go to the Labour Court and get an order

- The employer can:
 - Give an undertaking
 - Object to a compliance order
 - Appeal to the Labour Court against a compliance order

- The EEA makes provision for the Department of Labour to review employment equity plans. But as this is unlikely for a few years, the focus will be on

trade unions to complain and investigate and initiate the process to challenge discrimination

Background to the Skills Development Act

- COSATU/ANC/SACP alliance develops Reconstruction and Development Plan (RDP)
- ANC sets up democratic government in 1994 but unilaterally shift policy to Growth, Employment and Redistribution (GEAR)
- Business and the government agree to focus on economic growth and increased production, also agree this requires a more skilled workforce, more focus on training youth
- Long-term union campaigns for more access to training and promotions, recognition of on-the-job learning/ experience, and affirmative action from below
- Tripartite "social partners" at Nedlac/Parliament pass a package of skills Development Act and Skills Development Levy Act to boost individual performance, productivity and individual access to jobs
- Challenge for unions is to use this to build organization, and use gains to shift balance of power from capitalist orientation

- Remember to take into account that this challenge occurs in the current period of:
 - tension within the Alliance on policy and expenditure,
 - Worldwide job insecurity, cost-cutting and investment strike not economic growth

How will the national skills development plan work?

This plan consists of:

- A national skills authority
- A national skills fund
- A skills development planning unit in the department of Labour
- Employment centres set up by the Department of Labour

Purpose of the Skills Development Act (SDA):

FOR WORKERS-

- To encourage workers to learn,
- to better their quality of life, and
- to improve their chances to become self-employed

FOR EMPLOYERS-

- to improve productivity and competitiveness,
- to encourage employers to spend more on training and
- to see the workplace as a place for ongoing training

The
COMMISSION
FOR
EMPLOYMENT
EQUITY (CEE)

(Who is who? Abridged CV's drawn from
Dept of Labour handout)

Professor Mapule Francis Ramashala, chairperson of the Commission - prize-winning academic, government consultant, university vice-chancellor at the University of Durban-Westville and TRC commissioner

1. **Mr Karl von Holdt** - co-founder of Adult Literacy Project, editor of the SA Labour Bulletin, NALEDI researcher, board member of the SA Post Office and labour representative on the CEE
2. **Mr Tefo Raditapole** - attorney, IMSSA member, CCMA commissioner, consultant to the International Institute for Democracy and Electoral Assistance (IIDEA), the Electoral Institute of SA and Workplace Solutions and labour representative on the CEE
3. **Dr Frans Barker** - academic, holder of positions at the SA Reserve Bank, SA Breweries, and the Central Economic Advisory Service. He was chairperson of the former National Manpower Commission, before Nedlac replaced it. He is an advisor to the Chamber of Mines, member of the Labour Market Chamber at Nedlac and is a representative for organised business on the CEE
4. **Mr Tom Boya** - has held positions at Ellerines, African Life, Rockoil, and Firechem. He has been Mayor of Daveyton and holds various positions including in NAFCOG, and as chairperson of the Daveyton Adult Centre and of the Northern Province Community College. He is currently managing director of TS Marketing and is a representative for organised business on the CEE
5. **Ms Crecentia Mofokeng** - holder of various certificates, formerly employed by the Urban Training Project and Advance Laundries, is currently Education Co-ordinator for the National Council of Trade Unions (Nactu) and she is a representative nominated by the community constituency of Nedlac
6. **Mr Kgotso Charles Tau** - has a degree and certificate and has worked for the SABC and the Free State Development Corporation where he is currently Public Relations Manager and Corporate Secretary. He has been nominated by the community constituency of Nedlac
7. **Ms Thuli Madonsela** - is an arbitrator, a mediator, was a former researcher and part-time lecturer with the Centre for Applied Legal

Studies (CALS) and is a government consultant. She currently serves in a team responsible for developing equality legislation in compliance with the equality clauses in the Constitution. She is currently Chief Director Transformation and Equality at the Department of Justice.

8. **Mr Meko Ernest Magida** - is an attorney, former project consultant for an engineering firm, former deputy director of the Western Cape Provincial Office of the Department of Labour and currently Director, Equal Opportunities of the national Department of Labour in Pretoria.

Additional
Information on
Sexual
Harrassment

Affirmative
Action in the
Employment
Equity Act

Unfair

Discrimination in

the Employment

Equity Act

The Features of an Employment Equity Plan

Employer and
Union Concerns
about the
Employment
Equity Act

Brief Background to the Skills Development Act

APPENDIX

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Apologies are humbly offered for any oversights. Please don't complain too much, help us improve it!

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