EMPLOYMENT EQUITY WORKSHOP

Programme: Day 1

Time	*Item*	*Activity*
9 - 10am	**1. Introductions:** 1.1. Participant introductions 1.2. Introduction to the Workshop 1.3. Participants expectations	Worksheet 1
10 - 10.30am	2. Aims of the Workshop and Outcomes	Slide 2.
10.30 - 11am	*TEA BREAK*	
11am - 12pm	2. Experiences of Discrimination at the Workplace 3. Solutions to discrimination at the workplace.	Worksheet 2
12 - 1pm	4. International Experiences of Affirmative Action – Overview: ***Namibia, Malaysia, Sri Lanka, USA & Zimbabwe***	Inputs using slides 4.1. – 4.9.
1 - 2pm	*LUNCH*	
2 - 3.30pm	4. International Experiences of Affirmative Action continued…	Worksheet 3. and Plenary Session
3.30 - 4pm	*TEA BREAK*	
4 - 5pm	5. Current Context of EE in South Africa	Input on S.A socio-economic indicators Slides 5.1. – 5.3.

WORKSHEET 1.

Getting to know each other

Tasks:

In groups of three introduce yourselves to each other. Elect one person to introduce all of you to the rest of the workshop participants. You need to introduce each other focussing on:

- Name?
- Area where you live?
- Family situation?
- Hobbies/Personal interests?
- How long in the union? How long as a union official, shcp-steward and/or elected leader?
- Expectation/s from this workshop?
- Any other relevant information about yourself?

Time: 10 minutes

WORKSHOP AIMS:

- To assess discrimination and inequality at the workplace
- To learn from international experiences of affirmative action as a method for addressing discrimination and inequality
- To understand the Employment Equity Act, its strengths and limitations.
- To assess our own strengths and weaknesses as trade unions in relation to taking forward affirmative action at the workplace
- To begin to develop a clear perspective and approach to affirmative action at the workplace
- To evaluate the workshop and its materials in order to improve and develop a user friendly workshop pack for trade unionists

WORKSHEET 2.

Our Experiences of Discrimination at the Workplace

Tasks:

1. In your group discuss your experiences of discrimination at the workplace in all its forms, including:

- Wages and conditions of employment (including benefits)
- Opportunities for advancement
- Opportunities for education and training (skills development)
- Attitudes of senior or fellow employees
- Facilities at work and your working environment
- Any other

2. What do you think is the main basis for these discriminatory practices and experiences, i.e. race, gender, class, disability, educational qualifications or any other reasons? Motivate fully.

3. Summarise your answers to the above questions and write these up on flipchart paper. Discuss the following:

"If we were the political party in government and the owners of all companies, list all the measures we would implement to eradicate discrimination at the workplace."

Write up the summary of your group's position on flipchart paper and prepare for report-back and discussion in the plenary session to follow.

Time: *60 minutes*

(Slide 4.1.)

AFFIRMATIVE ACTION

The term (but not the practice) – **originated in the USA in the early 1960s**. Numerous laws and regulations were introduced such as:

- ***Title VII of the Civil Rights Act of 1964*** and later in 1991. This forced employers to compensate for discriminatory practices of the past.

- President Lyndon Johnson's ***Executive Order of 1965*** – prescribed affirmative action in employment and promotion (minorities and women) for companies who wanted government contracts. Included **numerical goals and time-tables.**

- **Quotas in employment for certain minority groups** established and monitored by the ***Equal Opportunities Employment Commission*** in the early 1970s.

- The Commission has the ***right to sue any employer for discrimination*** should the company not follow a fair employment policy. ***This covers any private or public company employing more than 15 people.***

US society:

- African Americans a "minority" – albeit the largest (approximately 12% of the population).

- Racial discrimination in the 20th century has never been the official government policy in the Apartheid mould.

(Slide 4.2)

Have these measures addressed racial and gender based inequality in the USA?

- It was and still is characterised by heated debates and court battles over the question of **individual vs. group rights.**
- The policy was **designed and driven by the ruling class** aiming to **integrate** "minority" groups, and later women, into the mainstream of American life.
- A **response to the protest movements** of the 1960s and early 1970s.
- Affirmative action **mainly benefited the middle class** members of minority groups. Did not affect the social and economic system. Institutions became more representative of the population but did not challenge the institutional culture or become an instrument of redistribution.
- Has not significantly improved the lives of African Americans. The African American elite has grown and so has the poor and white high-income group.
- Over $96 billion has been spent with "very little returns" according to some critics.
- During the Reagan and Bush era, numerous court judgements reversed affirmative action gains.

(Slide 4.3.) # *Affirmative Action in Malaysia*

Historical Background:

At independence in 1957 the Malay (~ 50% of the population) were regarded as the victims of historical discrimination consisting of "structural constraints" on Malay participation in the modern sector of the economy" **Most Malays were engaged in subsistence agriculture and small-holding rubber cultivation.**

By contrast the Chinese (~ 40% of the population) were predominantly engaged in trading and business. They were regarded as privileged due to their **higher standard of living**.

Affirmative action measures:

- ***Special rights clause*** in the Constitution (Article 153) to correct the socio-economic differences between Malays and other ethnic groups, e.g. by **reserving positions in the civil service and by allocating scholarships and trade permits to Malays**.

- Article 8 of the Constitution required that the government safeguard the legitimate interests of other communities.

- Improvement of the quality of life in rural areas through rural development projects, land settlement schemes, provision of schools and clinics etc.

- 1969 – Special provisions became a permanent constitutional clause and was an integral part of the government's New Economic Policy (NEP). The government's aim was to achieve an ethnic balance in all sectors of the economy and

(Slide 4.4.)

at all levels of employment. **Ethnic quotas were established in education, employment and the corporate sector**.

RESULTS:

- Affirmative Action achieved a higher degree of ethnic balance in Malaysia's public and private institutions.

- Members of the **Malay middle class were the main beneficiaries** but due to **high economic growth rates of 6 – 8%**, rural poverty was also reduced significantly.

- Ethnic inequalities were reduced without imposing undue hardships on the non-beneficiary groups.

However, inequalities within each group widened as affirmative action shifted inequalities from the basis of ethnicity to the basis of class.

(Slide 4.5)

Affirmative Action in Sri Lanka

Historical Background

- At the time of independence in 1948, the **Tamils** (18% of the population, predominantly Hindu) occupied most professional and administrative positions because they had **better access to education under colonial rule.**

- The Sinhalese (74% of the population, predominantly Buddhist) called for **affirmative action to correct historical injustices.**

Affirmative Action Measures:

1956: Sinhala became the official language

This made state jobs more accessible for Sinhalese while Tamils had to pass a Sinhala language examination. By the mid-1960s, the Tamils' share of jobs in the civil service dropped from 50% to 15%.

1970: change in the university admission system

The "open national competition examination" was replaced by "standardised" marks, which allocated places in proportion to a group's share of the total population. This resulted in a drop of Tamil enrolment and increased Sinhalese enrolment in areas such as medicine and engineering.

Privileged education at private schools was eliminated while the facilities at a number of **rural schools** were improved.

(Slide 4.6.)

Results

- Increased access to universities, government jobs and the professions benefited predominantly members of the **middle class** who were able to attend good secondary schools.

- Lack of special support programmes at universities led to a **drop in "academic standards"**

- **Alienation of the Tamils,** especially the youth, resulted in **armed conflict** around the question of **a separate Tamil state in the North of the country**.

Despite several reforms to address this problem, such as declaring English and Tamil official languages, establishing a university in Jaffna, the conflict has not been resolved. Slow economic growth fuelled ethnic competition for jobs and affirmative action was perceived by the Tamils as a new form of discrimination.

Affirmative action did not allocate benefits on the basis of economic standing that would have benefited the poor of all ethnic groups.

(Slide 4.7.)

Affirmative Action in Southern Africa

Zimbabwe and Namibia

Historical Background

- Both countries confronted by post-colonial dilemma that despite independence (1980 and 1990), **economic power** and top positions in the civil service were dominated by the **White settler minority**.

- Both ZANU-PF in Zimbabwe and SWAPO in Namibia abandoned socialist programmes when they came to power. They opted for "mixed economies" and a policy of **reconciliation.** Property relations remained largely untouched.

- Affirmative action was seen as imperative to overcome some of the colonial apartheid legacies.

Zimbabwe

2 May 1980: **Presidential directive** to the Public Service Commission prescribed the achievement of a representative civil service by giving preference to Black Zimbabweans with the necessary qualifications

No such directive or law was imposed on the private sector and affirmative action was implemented at a much slower pace

By 1984, 95% of senior posts in the civil service were occupied by Black Zimbabweans while the share of Whites dropped from 37% in 1981 to 1.3% in 1989.

(Slide 4.8.)

Contributing factors were:

- Availability of qualified and experienced black Zimbabweans
- Expansion of civil service from 40 000 in 1980 to 90 000 in 1989
- Exodus of over 90 000 whites between 1980 and 1984

Namibia

- Affirmative action was entrenched as **Article 23 of the constitution** that allowed parliament to pass laws aimed at redressing "social, economic or educational imbalances".

- The Public Service Commission implemented affirmative action by giving preference to applicants who were not White males. At the end of 1994, 70% of the management in the civil service came from disadvantaged groups. Women accounted for only 16% of these posts.

- To date **no laws** were passed to enforce affirmative action in the private sector or elsewhere. A draft bill was withdrawn before it was tabled in parliament.

Affirmative action aimed at **redistribution** remained insufficient:

- Educational reforms merely abolished discrimination but did not close the gap between urban and rural schools
- Affirmative action in the allocation of fishing quotas benefited only a few business people but not disadvantaged communities as a whole
- The affirmative loan scheme enabled only a few business people to buy commercial farms (96 loans were granted between 1992 and 1995).

(Slide 4.9.)

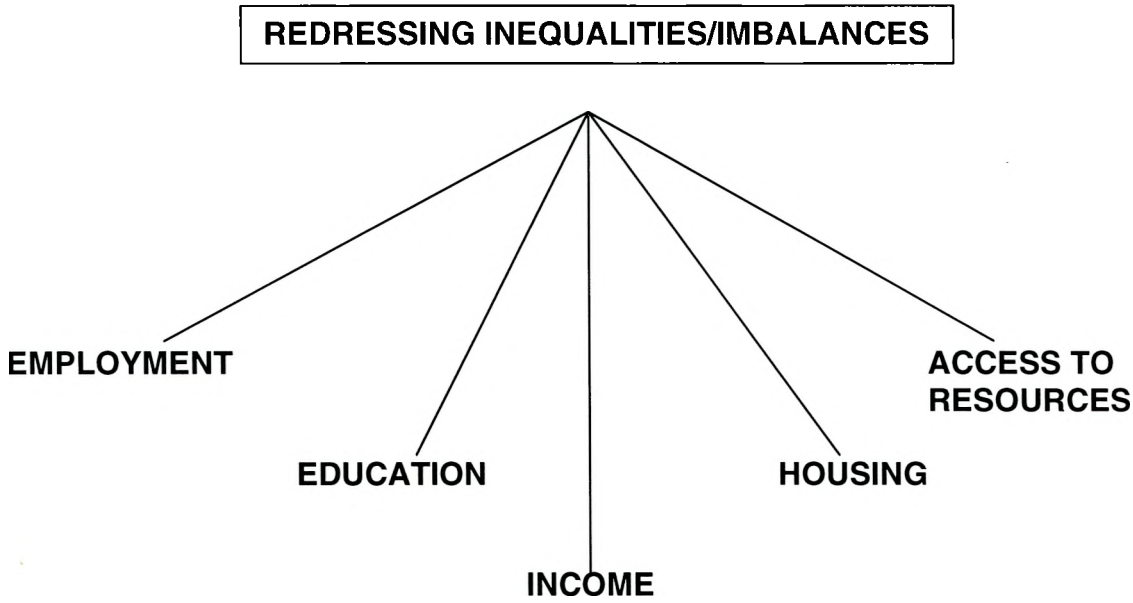
Results:

- Affirmative action replaced the old White bureaucratic elite with a new black elite and altered the institutional culture to some extent. However, it did not fundamentally change the structure of the state bureaucracy.

- Black males were the main beneficiaries but little progress was made in advancing Black women.

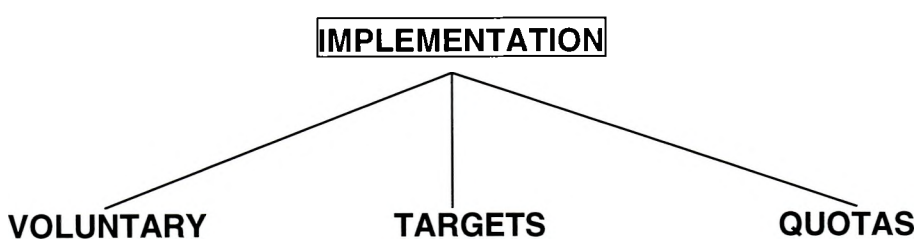
- Affirmative action progressed well at the level of representation but was far less successful in changing institutional cultures in bringing about socio-economic redistribution.

AFFIRMATIVE ACTION



INSTRUMENTS TO IMPLEMENT AFFIRMATIVE ACTION

- CONSTITUTION (eg. NAMIBIA)
- EMPLOYMENT QUOTAS (eg. USA, SRI LANKA)
- PUBLIC SERVICE EMPLOYMENT POLICY (eg. ZIMBABWE's "AFRICANISATION")
- AFFIRMATIVE ACTION LEGISLATION (eg. SOUTH AFRICA)



WORKSHEET 3.

Lessons for South Africa from International Experiences

Tasks:

Discuss the following:

1. List the similarities and differences between our situation and that of the other countries.

2. What are the main lessons from the experiences of the other countries most relevant to South Africa?

3. What measures need to be taken in order to avoid the problems highlighted previously in 2. above?

Prepare your points for discussion in the plenary session.

Time: *60 minutes*

(Slide 5.1.)

5. Why 'Equity'?

Socio-Economic Polarisation:

65% of Africans are poor

41% of Africans are unemployed

3% of top managers are African; 96% are white

+ *SLOW CHANGE*

From 1994 – 1997 black top managers increased by 2,3% and black middle managers by 1.6%

(Slide 5.2.)

- Since 1994, the gap between rich and poor in South Africa has widened

- Africans' share of national income has increased to 35.7% in 1996 from 29,9% in 1991 while the white share fell from 59,5% to 51,9%.

- Change has benefited mainly the growing black middle-class and bourgeoisie with their increased presence among the richest South African households:

1975 = 2%

1991 = 9%

1996 = 22%

(Slide 5.3.)

- Black poor on the other-hand worse off, with the poorest 40% of black households seeing a 20% drop in their income from 1991 to 1996.

- **1 million jobs lost since 1994** *(Andrew Levy Annual Report 1999 – 2000)*

- Other estimates of job-losses range from 500 000 upwards.

EMPLOYMENT EQUITY WORKSHOP

Programme: Day 2

Time	*Item*	*Activity*
9 - 9.15 am	6. Introduction to the Employment Equity Act	Facilitator summarises on flip-chart
9.15 - 10am	7. Understanding the concept of discrimination	Buzz-groups around case-studies (Worksheet 4.)
10 – 10.45am	8. Focus on the provisions of Chapter II of the EEA	(Worksheet 5.) Input by facilitator
10.45 – 11am	TEA	
11 - 12pm	9. Cases of Discrimination and burden of proof. (Putting Ch 2. into practice)	Worksheet 6.(1) & (2) Group-work & Plenary discussion followed by facilitators input
12 - 1pm	10. Implementing Employment Equity at the Workplace (Chapter III)	Group Activities Worksheet 7.
1 – 2pm	LUNCH	
2 – 3.30pm	11. Critical examination of the Framework provided by the Employment Equity Act for achieving equity.	Group-work Worksheet 8.
3.30 – 3.45pm	TEA BREAK	
3.45 – 4pm	12. Duties of employers & the role of trade unions.	Facilitator's input
4 - 5pm	13. Drafting Employment Equity Plans	Group-work Worksheet 9.

WORKSHEET 4.

CASE STUDY: INDIRECT DISCRIMINATION

Tasks: (Buzz-groups)

Read the following and respond to the challenge outlined thereafter:

The ABC company, in its conditions of employment, required employees to join one of three retirement benefit funds: the staff-benefit fund, the pension fund, or the provident fund. The members of the pension fund were all black, weekly paid employees; the members of the staff benefit fund were, with four exceptions, white, monthly paid employees; and the members of the provident fund had as its members weekly and monthly paid employees. It is also significant that the company contributed more to the staff benefit fund than to the provident fund.

Some of the company's employees (who were black) requested permission to join the staff benefit fund. The company refused on the basis that membership of the staff benefit fund was open only to monthly paid employees.

These employees felt that this company policy was unfair. They come to you for advice. Is there anything that they can do?

Detail the advice that you would give them and prepare for discussion in the plenary session.

Time: 15 minutes

WORKSHEET 5.

Inherent requirements of the job

Tasks: In buzz-groups, discuss which of the following, in your opinion, are genuine inherent requirements of a job?

1. Need females to assemble intricate computer equipment. Must have excellent hand-eye coordination and dexterity. No experience necessary, we will train.

2. Large broom and mop manufacturer needs aggressive salesman to cover large southern territory. Prefer previous experience.

3. Regional airline needs young, attractive female to fly west coast routes. Must pass height and weight requirements.

4. Local theatrical group needs men to star in a Laurel and Hardy comedy. Some acting experience necessary.

5. Small lumber company needs six men to work in the warehouse. Job involves lifting and carrying heavy lumber products (over 50kg).

6. Experienced male prison guards needed for maximum security male facility. Must be able to work effectively in a potentially violent and dangerous environment.

7. Catholic School needs a catholic art teacher to teach painting, sculpture and ceramics. Master's degree in art education is desirable.

8. Need male to head the international division of the ABC corporation in Venezuela.

9. Japanese restaurant needs Japanese chef with previous experience in a sushi - restaurant in Japan.

Time: 15 minutes

WORKSHEET 6 (1).

CASE STUDY: UNFAIR DISCRIMINATION - HIV TESTING

Tasks: In groups, read the case-studies, 7 (1) and 7 (2) and answer the questions that follow

Mr Hoffman applies for a job as a flight attendant with South African Airways (SAA) in March 2000. The recruitment process consists of various stages, including a number of interviews. His progress throughout the process was successful. One of the final steps in the process was to have a medical examination to establish his state of health and fitness for the work required of him. He was found to be medically suitable for employment. During the course of the examination, a blood sample was taken from Mr Hoffman. This sample was later tested, and it became apparent that he was HIV positive. As a result, he was found to be unsuitable for employment with SAA and his application was turned down.

Mr Hoffman is upset by this state of affairs and approaches you for advice on how he can challenge SAA's treatment of him.

The following facts may be relevant:

1. SAA has a recruitment policy in terms of which applicant flight attendants who have any type of medical condition, or who are shorter than 157,7cm or taller than 188cm are excluded from employment. This policy is applied in all recruitment situations.
2. People who are in the first stage of HIV infection (as is the case with Mr Hoffman), have a reasonable life expectancy (possibly up to 10 years) with proper treatment and management of the disease.
3. Flight attendants, in the course of their job, are required to fly to countries where yellow fever is endemic. Accordingly, they are required to be vaccinated against the disease. Immunisation against yellow fever is potentially dangerous and ineffective to persons who are HIV positive.
4. It costs SAA approximately R30 000,00 to train a flight attendant.

Questions:

1. ***What advice would you give him on how he could proceed with his case, if at all?***
2. ***Describe the process that Mr Hoffman would need to follow in order to have his dispute with SAA resolved, if indeed it is decided that he should declare a dispute.***
3. ***What arguments, if any, could SAA raise in defence to Mr Hoffman's claim of unfair treatment?***

Refer to chapter 2 of the Employment Equity Act in answering these questions.

WORKSHEET 6 (2).

CASE STUDY: UNFAIR DISCRIMINATION - PAY EQUITY

Mr Louw, a "coloured" man, works for Company X as a buyer. He started working for the company in 1984, at a starting salary of R750,00 per month. He was earning R1 500,00 in 1990, when Mr Ben, a white man, was appointed as a buyer in the same company. Mr Ben was appointed on a salary of R2 300,00 per month.

From the period 1990 – 1998, the monthly cash earnings of Mr Louw and Mr Ben can be set out as follows:

Year	Mr Louw	Mr Ben
Differential		
1990	R1 500,00	R2 300,00
53,3%		
1991	R1 690,00	R2 575,00
52,4%		
1993	R1 990,00	R3 135,00
57,5%		
1994	R2 130,00	R3 385,00
58,9%		
1996	R2 540,00	R4 050,00
61,6%		
1998	R3 335,00	R5 390,00
61,6%		

The following significant events should be taken into account:

1990: Mr Ben joins company X as a buyer, earning R2 300,00.
1991: Mr Louw, through his union, files a formal grievance concerning the disparity in wages between him and Mr Ben.
1993: Mr Ben acts as a warehouse supervisor.
1994: Mr Ben is appointed as a warehouse supervisor.
1996: On 11 November, the LRA comes into operation.
1998: Mr Louw, through his union declares a formal dispute with Company X.

In the period 1991-1998 the union was involved in an ongoing battle with the company to try and ensure that Mr Louw's grievance was satisfactorily dealt with. The union is unhappy with the difference in pay between the two men, and the fact that the differential increases exponentially each year because the company implemented pay increases based

on an individual's starting salary. The company argued that Mr Ben was paid more, not because he was white, but because he would only agree to work for the company if he were paid R2 300,00.

Finally, in 1998, the union declares a dispute with the company in terms of schedule 7 of the LRA. Conciliation fails to resolve the dispute, and the matter has been referred to the Labour Court for adjudication. It is January 1999 and the union organiser hands the matter over to you, the union's legal officer, to prepare for trial. Both Mr Louw and Mr Ben are still employed by Company X at the wages referred to in the table above. Mr Louw tells you that, in his opinion, the job which he does and the job which Mr Ben does, while not exactly the same (content-wise), nevertheless resemble each other in terms of levels of responsibility, stress and pressure, skills required to do the job, and value of the function to the company.

Questions:

1. What would the main points of your argument to the court be, in trying to ensure the success of Mr Louw's claim in terms of schedule 7 of the LRA?

2. Do you foresee any difficulties with the timing of your dispute (i.e. the date on which you decided to declare your dispute)? If so, what difficulties do you foresee?

3. What will the union have to prove in order to win their case?

4. What line do you think the company is likely to take with this case? What is their argument likely to be?

WORKSHEET 7.

IMPLEMENTING EQUITY IN THE WORKPLACE

Tasks:

In groups, answer the following questions. Write up your answers on sheets of newsprint. Appoint a report back person to report back to the plenary session on behalf of your group. Be as imaginative and creative as possible. It is not a requirement for this exercise that you refer to any existing legislation or employment equity plans that you have had experience with.

1. Imagine that you have been approached to draft an equity programme for your workplace. Set out in as much detail as possible the key elements and characteristics of your programme. How would you set about achieving equity in your workplace? What measures would you implement, assuming that you were given a free hand to implement any measure that you considered necessary?

2. In the event that your programme was to include affirmative action measures, what would these measures entail? Provide details of any time periods that you would consider necessary, the beneficiaries of these measures, who would be responsible for implementing these measures and who would be responsible for monitoring and enforcing these measures.

3. What would the role of the employer be in your equity programme?

4. What would the role of the trade union be in your equity programme?

Time: 30 minutes

WORKSHEET 8.

AFFIRMATIVE ACTION MEASURES: CHAPTER III

Tasks: *In groups, read sections 12 – 20 & 42 of the EEA and answer the following questions:*

1. What are the duties of designated employers?

2. What are the affirmative action measures for which the EEA makes provision?

3. What are the different ways in which someone could be "suitably qualified" in terms of the EEA?

4. What steps can an employer take to ensure that his/her workforce becomes demographically representative across all occupational categories and levels?

5. Can an employer dismiss persons from non-designated groups in order to make space for recruits from designated groups? Will such a dismissal be fair?

6. Give examples of the ways in which people from designated groups ought to be accommodated in order to ensure their equitable representation in an employer's workforce.

Time: **30 minutes**

WORKSHEET 9.

DRAFTING AN EMPLOYMENT EQUITY PLAN

Tasks: In your group, read the following case-study and complete the task/s required

Mr Andrews, the newly appointed (and slightly confused) human resources manager of ABC Company comes to you in a state. He has heard that the sections of the Employment Equity Act dealing with affirmative action have come into effect in December 1999. He knows that his company will have to comply with this legislation. The company has 1000 persons in its employ and its employment profile looks as follows:

	EMPLOYMENT CATEGORIES						
		PRODUCTION	FINANCE	PERSONNEL	ADMIN.	MARKETING	TOTAL
LEVELS	SENIOR MANAGERS	10	5	5	1	1	22
	MIDDLE MANAGERS	25	15	5	5	2	52
	SUPERVISORS	90	25	5	5	4	129
	SKILLED ARTISANS	90					90
	LABOURERS	690	5	5	4	3	707
	TOTAL	905	50	20	15	10	1000

The current demographic profile at senior manager level is as follows:

MALE				FEMALE			
WHITE	AFRICAN	INDIAN	COLOURED	WHITE	AFRICAN	INDIAN	COLOURED
13	1	2	2	2	0	1	1

No disabled persons are employed in this occupational category.

The majority of workers who are either skilled artisans or labourers in the workplace are represented by the National Union, which is recognised by the company in terms of a collective agreement. Its membership has however declined from 87% of the bargaining unit in 1996 to 55% at present. The New Workers Union increased its membership amongst the workforce in the past year and currently has the support of 30% of the bargaining unit. In addition, a registered in-house union represents the interests of 20% of the supervisors and middle managers.

The human resources manager is also concerned about the perceptions that employees of the company have towards affirmative action appointments. A number of white persons have expressed the belief that the appointment of black persons in key positions smacked of 'tokenism'. Some black managers have confided in him that they find it very difficult to operate within the white male culture of the organisation. He also heard that black managers were contemplating establishing their own representative body/caucus. In addition, he is concerned about the lack of certain skills amongst person from designated groups.

He informs you that the company has been awarded a major overseas contract and the company may be in position to increase its workforce by 1% over the next three years. Last year, labour turnover in all occupational categories was approximately 2.5%.

In addition, he tells you that the demographic norms and benchmarks are as follows:

RACE				GENDER		
WHITE	**AFRICAN**	**INDIAN**	**COLOURED**	**MALE**	**FEMALE**	**DISABLED**
20%	62%	8%	10%	45%	55%	1%

As a union negotiating team, you agree to assist Mr Andrews in the drafting of an employment equity plan for his company. Limit your calculation of numerical goals to the senior managers' position.

Time: 30 minutes

Day 2. Facilitator's guide

The Employment Equity Act:

Facilitator introduces the topic on sheets of newsprint/overhead transparencies and goes through the programme for the day.

6. Background and introduction to Employment Equity (15 min)

Facilitator explains the following:

- Background to the promulgation of the EEA;
- Aims and objectives of the EEA;
- Structure of the EEA: chapter II, chapter III, scope & application, exclusions, monitoring and enforcement, dispute resolution.

7. Concept of discrimination (45 minutes) – Worksheet 4.

Format of the session

- ***Break group into "buzz" groups and ask participants to attempt definitions of the following:***

  "What is discrimination? Give examples of discrimination"
  "What is employment equity?"

- ***In plenary, use the feedback from these group discussions to explain the concept of*** *equity* ***and the distinction between*** *formal and substantive equality;* ***the concept of*** *discrimination* ***and the distinction between*** *fair and unfair discrimination.*

- ***Use the facts of the*** **Leonard Dingler** ***case study (Worksheet 4.) to explain the difference between*** *direct and indirect discrimination.*

- ***Place the discussion on equality in a Constitutional context and mention the test set out in the*** **Harksen** ***judgement.***

  - Focus on the definition of discrimination, and the distinction between fair and unfair discrimination (explain the test set out in the Constitutional Court case of *Harksen*) & direct and indirect discrimination (*Leonard Dingler* case);
  - Draw out the fact that not all differentiation amounts to unfair discrimination, and that in order successfully to challenge an act of discrimination, the act in question should have been arbitrary and without a statutory defence.

Proposed outcomes

- Participants will be comfortable with the theory underlying discrimination law.
- Participants will be able to identify instances of discrimination.

8. Chapter II of the EEA (45 minutes) – Worksheet 5.

- Focus on sections 5 & 6 of the EEA
    - Definition of employment policies and practices – employer has a general duty to eliminate all forms of unfair direct and indirect discrimination
    - Prohibition of unfair discrimination: prohibited grounds – these are not exhaustive; legal implications of alleging discrimination on a prohibited ground
    - Defences to an allegation of unfair discrimination – render what would otherwise be unfair discrimination, not unfair; affirmative actions measures and inherent requirements of a job.

Format of the session

- Ask participants to identify, in plenary, as many employment policies and practices as they can think of. Write these on newsprint. Compare this list to the list provided in the definition section of the EEA.

- ***Prepare an input*** on the topics mentioned above.

- In plenary, work through the practical exercise on "inherent requirements" and discuss what the requirements for genuine inherent requirements are.

Proposed outcomes

- Participants will be able to analyse a discrimination dispute in terms of its fairness and the possible defences available to an employer.
- Participants will know what the prohibited statutory grounds are.
- Participants will be familiar with the definition of employment policies and practices.

9. Putting chapter II into practice (1 hour) Worksheet 6 (1) & (2)

- Practical application of the unfair discrimination prohibition – in the context of HIV status or pay equity (choose one)
    - Introduce the framework for unpacking unfair discrimination cases: step-by-step
    - Focus on sections 7 (if HIV case study is used), 10 and 11 – medical testing, dispute resolution and onus requirements.

Format of the session

Format of the session

- Refer participants to sections 5, 6, 7, 10 & 11 of the EEA and the notes on pay equity (if the pay equity case study is used). Hand out case study on HIV discrimination OR pay equity, and ask participants to work through the case study in groups. Allow 30 minutes for group discussion. Use the remaining 30 minutes of the session for a report back. Illustrate the way in which sections 5 and 6 would apply in a working context. In particular, go through the definition of "employment policy or practice" and touch on the law pertaining to pre-employment testing/pay equity (as the case may be).

- Set out the framework for unpacking discrimination cases on newsprint/overhead transparency. Recap how the defences to an allegation of unfair discrimination can render discrimination not unfair.

- Hand out the solution sheet to the case study.

Proposed outcomes

- Participants will be able to apply the law of unfair discrimination in a practical context.
- Participants will be familiar with the provisions of chapter 2 of the EEA.
- Participants will understand how the onus requirements for proving unfair discrimination are applied by the courts.
- Participants will know where to refer a discrimination dispute, and the time limits that apply.

10. Implementing equity in the workplace (1 hour) – Worksheet 7.

- Focus of this session is to identify the key elements for a hypothetical equity programme: what are the essential requirements for achieving equity in a workplace.
- Participants are asked to think about what they would identify as key elements of an equity programme and to discuss the details of these elements.
- Participants are encouraged to focus on the practical implementation of equity in the workplace, and identify what the fundamental principles of equity are.
- In the light of this exercise, an understanding of affirmative action should be identified in terms of characteristics such as time periods, designated beneficiaries, implementation, monitoring and enforcement and responsibility for implementation, which might emerge from group discussions.
- The respective roles of trade unions and employers should also be identified.

Format of the session

- Divide the participants into groups and ask them to work through Worksheet 7. Allow 30 minutes for group discussion.
- Ask groups to report back on their discussions – record their discussions on sheets of newsprint.
- Summarise the elements identified in terms of the topics mentioned above.
- Explain that these elements will be compared with the actual provisions of the EEA to form a critical assessment of the Act in the next session.

11. Affirmative action measures: chapter III of the EEA (1h30) – Worksheet 8.

- The focus of this session is to explore the affirmative action measures for which the EEA makes provision, and to understand the strengths and weaknesses of the model provided by the Act for establishing equity in the workplace.

- The following terms and concepts will be scrutinised:
  Affirmative action measures; designated employers; designated groups; equitably represented; numerical goals; suitably qualified; reasonable accommodation.

Format of the session

- Divide the participants into groups and ask them to work through Worksheet 8. Refer the groups to sections 15-27 of the EEA. Allow 30 minutes for discussion.

- In the report back session, introduce chapter 3 in terms of its application, scope and enforcement. Go through the definitions of designated employer. Explain the central concern of chapter 3. Explain the purpose of a workplace analysis, refer participants to the Code of Good Practice.

- Unpack the following terms used by the EEA, and place these terms in the context of the duties that are placed on employers – how these terms fit in to the overall framework created by the EEA to achieve equity: affirmative action measures, numerical goals and equitable representation, designated groups, suitably qualified, reasonable accommodation. Draw out discussion on the distinction between affirmative action in chapter 3 and affirmative action in chapter 2; whether the provision for affirmative action in chapter 3 is sufficient to ensure equity; the debate about goals versus quotas; suitably qualified and the scope of the designated groups identified by the EEA.

Proposed outcomes

- Participants will understand the meaning of the above terms in the context of the EEA, and in the context of achieving equity generally (as envisaged by the EEA).

12. Roles of stakeholders (15 minutes)

- Focus on the ancillary duties of employers and the role of employers as envisaged by the EEA.
- Focus on the role of unions provided for by the Act.
- Compare these roles and duties with the roles and duties identified in session 5.
- The role of collective bargaining.

Format of the session

- In an input by the facilitator, use newsprint/transparencies to deal with the other duties of an employer: in particular the duty of consultation.

- Entertain plenary discussion on the unions' role in monitoring and enforcing the EEA.

Proposed outcomes

- Participants will have a clear understanding of the duties on employers in transforming their workplaces (as envisaged by the EEA), and the correlating duty on trade unions to monitor and ensure enforcement of the EEA.
- Participants would have engaged critically with the roles provided for trade unions by the Act.

13. Employment equity plans (1 hour) – Worksheet 9.

- Content and structure of plans
- Code of Good Practice and regulations
- Practical implementation of the requirement for equitable representation in establishing numerical goals.

Format of the session

- Ask the participants to work through the last case study in groups, to gain practical experience in doing the maths of numerical goals. Deal with any confusion/problems in the report back session. Allow 30 minutes for the exercise & 30 minutes for report back.

Proposed outcomes

- Participants will be acquainted with the Code of Good Practice and the regulations published by the Department of Labour in respect of chapter 3.
- Participants will have begun to engage with the practical steps involved in drafting a plan.

Materials needed for participants:

- Employment Equity Act
- Code of Good Practice for drafting employment equity plans
- Regulations (if possible)
- Course materials

SOLUTION SHEETS (Day 2. Exercises on the Employment Equity Act)

Worksheet 4. *Solution sheet*

CASE STUDY: Indirect discrimination

The facts of the ABC case study are based on the facts of the *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* case.[1] This case illustrates the way in which indirect discrimination can happen in a workplace.

The excluded employees can declare a dispute with the company on the basis that the employer had discriminated against them on the basis of their race.

The criteria for joining the staff benefit fund was, on the face of it, neutral, namely that one was required to be a monthly paid employee. However, the exclusion of weekly paid employees affected a disproportionate number of black employees, because black employees in the company were generally weekly paid, while white employees in the company were monthly paid.

The contention by the applicants in this matter that they were indirectly discriminated against because of their race, was upheld by the court. The employer could not show that it had a legitimate and rational reason for excluding weekly paid employees from the staff benefit fund.

[1] [1997] 11 BLLR 1438 (LC).

Worksheet 6 (1) – Solution Sheet:

CASE STUDY: HIV testing

1. The basis of Hoffman's claim of unfair discrimination is as follows: in terms of the Employment Equity Act (EEA), he is entitled, as an applicant for employment, to be treated fairly/not to be discriminated against. In this case, he will argue that he was discriminated against, unfairly, on the basis of his HIV status (section 6 of the EEA). In other words, that he was treated differently to other applicants, to his disadvantage (he was denied employment), because of his HIV status, and not because of his skills, ability to do the job etc. HIV status is a listed ground in the EEA. Hoffman would need to show that the reason for the company's refusal to employ him was his HIV status. Should he succeed in this, there would be a presumption of unfair discrimination, and the company would have the onus of proving that the discrimination was fair.

   Furthermore, in terms of section 7(2) of the EEA, testing of an employee to determine his HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court. Hoffman would argue that it was unlawful for the company to test him for HIV before deciding whether or not to employ him – and that consequently, the results of his test should be disregarded in making the decision to employ him. Given that he met all the other selection criteria for the job, he should be given the job, otherwise be compensated for the unfair treatment of the company - in its decision not to employ him. The company is required in this instance to prove to the Labour Court that it was justified in conducting the HIV test.

2. Mr Hoffman would need to declare a dispute with SAA within 6 months of his being notified that his application was unsuccessful. He would refer his dispute to the CCMA for attempted conciliation. If conciliation fails to resolve the dispute, he can proceed to the Labour Court to have his dispute adjudicated.

3. The arguments that the company is likely to raise: SAA bears the onus of proving that the non-appointment of Mr Hoffman did not amount to unfair discrimination. In order to be successful in discharging this onus they will have to rely on one of the defences provided for in the EEA, alternatively convince the court on other rational, objective grounds that there was a need to discriminate against Mr Hoffman. SAA will also be required to prove that the pre-employment HIV testing of Mr Hoffman was justified. The arguments raised in support of both these contentions are likely to overlap, and will contain allegations such as the following:

   The inherent requirements of Mr Hoffman's job necessitated that he be able to be vaccinated against yellow fever; that he be of strong enough constitution to withstand the germs and diseases that circulate in the cabin during a flight; it was required – in terms of international policy and standards – for SAA to maintain

certain safety standards. Persons with physical disabilities would not be able to comply with some emergency procedures and safety standards; that SAA's competitors all had similar policies regarding staff who had diseases, and that in order to remain competitive in the market place, it was necessary for SAA to have the same policies; that training a flight attendant costs R30 000,00 - SAA is entitled to a reasonable expectation that such a person will serve in this capacity for at least 10 years. Because HIV infection reduces life expectancy, SAA's expectation of such a period would not be met. Further, in terms of its recruitment policy, SAA could argue that it was not discriminating against HIV people per se, but rather, that the policy applied to everyone equally: height and weight and health requirements had to be met by all applicants. Not only HIV infection was targeted – all infection or diseases that compromised the health and safety of the employee him-/herself, other employees and passengers had to be dealt with strictly in terms of the inherent requirements of a flight attendant's job.

Worksheet 6 (2) – *Solution Sheet*

CASE STUDY: Pay equity

1. The main aspects of the union's argument are likely to be: firstly, that the work done by Messrs Louw and Ben are of equal value, and accordingly should be remunerated equally. Failure to remunerate equally amounts to unfair discrimination because the reason for the difference in pay is the race of Mr Louw. Ie: argument is based on unfair race discrimination. Further, that the difference in salary constitutes direct race discrimination against Mr Louw. There are no rational, objective reasons why there is a difference in pay between Mr Louw and Mr Ben.

   In the alternative the union could argue that despite the fact that the jobs done by Mr Louw and Mr Ben are different, the difference in their salaries is disproportionate to the value of the jobs. Further, that this constitutes unfair discrimination because there is no justification for a wage differential of that magnitude. This argument is premised on the allegation that the jobs were "valued" or graded unfairly.

   The problem is how to determine when jobs are of equal value. This assessment is usually done by means of a job grading exercise. The aim of a job grading exercise is to establish a rational, reliable and fair system for allocating value to work. Most grading focuses on job content as opposed to performance (and, to some extent, includes factors such as job requirements or qualifications). Existing job grading systems are controversial, because it is felt that they are biased in the value they accord certain categories or criteria. In Louw's case, the differential between his salary and Ben's salary rose exponentially because pay increases were based on an individual's starting rate. The fact that Ben was paid more because he asked for more is not an adequate reason for perpetuating (and increasing, indirectly) a disproportionate wage differential ad infinitum. The company has a duty to reduce, over time, a market related differential that crept in at the commencement of Ben's employment. Moreover, Ben's starting wage was not linked to objective criteria such as skills, qualifications, experience etc – he was simply paid more because he would not have accepted the job for less pay.

2. Possible difficulties with the timing of the dispute: during the period 1990-1994 Louw and Ben did the same job. If the claim brought before the Labour Court had related to this period, Louw's case would have been much easier to substantiate, as the principle "equal pay for equal work" would have applied. In this case, Louw's case was brought in terms of the provisions of the 1995 LRA – which only came into force in November 1996. At this stage Louw and Ben were not performing the same work – they were in different jobs, namely buyer and warehouse supervisor, respectively. Louw accordingly is obliged to rely on the principle of "equal pay for work of equal value". In this case, the focus is not on

the same job, but rather on jobs which have the same worth. This is a more difficult allegation to substantiate.
The second possible difficulty (which is linked to the first) that might be raised by the company is the fact that the alleged discrimination occurred at the point that Louw and Ben were first paid differently – ie before 11 November 1996. Accordingly, the company might want to argue that the Labour Court does not have jurisdiction to hear the matter.

In the matter of *Louw v Golden Arrow Bus Services (Pty) Ltd* [2000] BLLR 311 (LC), on which the facts of this case study are based, the court, in settling the jurisdictional point raised by the company, held that it had the jurisdiction to hear the matter because the alleged discrimination concerning an unfair labour practice, was still being perpetuated. Each month that Louw and Ben are paid differently potentially constitutes a "new" unfair labour practice for the purpose of determining when the ULP commenced.

3. What the union will have to prove: in order to fall within the ambit of schedule 7, an unfair act or omission must involve unfair discrimination. (Because the dispute arose before the commencement of the Employment Equity Act, the union will be bringing the case in terms of the LRA – schedule 7). Whether or not the employer intended to discriminate is irrelevant. The inquiry to establish discrimination in terms of schedule 7 follows the test set out by the Constitutional Court in the *Harksen* judgement, namely: the first step is to establish whether the omission (in this case – the failure to pay equal wages) constitutes differentiation between people or categories of people. If the answer to this inquiry is "yes" in this case, the second step is to establish whether the differentiation amounts to discrimination, either on a ground specified in the schedule, or on another arbitrary ground. If the differentiation is based on a ground listed in the schedule (in this case, race), discrimination will have been established. But the inquiry does not stop there. If discrimination is established in terms of the above test, it must also be established that the discrimination was unfair before the complainant would be entitled to relief. If the discrimination is found to have been on a listed ground, then unfairness is presumed.

Fairness requires that people be paid equally for equal work and that work of equal value should be remunerated equally. Having said this, however, it is also accepted that disparate treatment I itself does not necessarily amount to unfair discrimination. Disparate treatment (that is, to pay different wages for equal work or work of equal value) would only constitute an unfair labour practice if the reason for the different treatment is arbitrary/not rational or objective.

In terms of schedule 7, the union has to prove that the reason for the payment of different wages to Louw and Ben (Louw being paid less than Ben) was because of Louw's race. In an ULP claim, the onus of proving unfair discrimination on a balance of probabilities rests on the applicant. Here Louw would need to prove first that the jobs were, indeed, of equal value. Should he succeed in doing this,

he would then need to prove that the reason for the different payment was because of his race. The question of the onus/who needs to prove what might well have been treated differently if the case had been brought under the Employment Equity Act (EEA). In terms of section 11 of the EEA, the employer bears the burden of proving that the discrimination was fair, should an allegation of unfair discrimination be leveled against him/her. This makes it much easier (theoretically) for an applicant to make out a case of unfair discrimination – although the courts are likely to find that a bald allegation of unfair discrimination is insufficient to activate the employer's onus requirement. It is likely that an applicant bringing a case under the EEA is going to be required to make out a prima facie case – a case that on the face of it appears to be unfair discrimination – before the employer's onus is activated. The rationale for this is that an employer must have a case to answer.

The courts are unlikely to infer race discrimination from a high wage differential. Louw would be required to present technical evidence that the differential/extent of the differential was not justified in terms of a job grading exercise.

4. What the company is likely to argue: the company is likely to argue that while there is a difference in pay between what Louw receives and what Ben receives, such difference does not amount to unfair discrimination. The basis for this argument is the fact that the two men perform different jobs, and that these jobs are not of equal value. The difference in pay accordingly has nothing to do with Mr Louw's race.

   As far as the second part of the union's argument is concerned, the company is likely to argue that the reason for the wage differential is partly as a result of the jobs being accorded different value (in terms of objective, rational criteria), and that such a differential is proportionate in light of the different tasks required of each person. Secondly, that the differential was established when Mr Ben joined the company as a result of market forces: they could only get Ben to work for them if they paid him a certain amount. Market forces, then, are also partly responsible for the differential.

Worksheet 8. - *Solution sheet*

Affirmative action measures

1. Designated employers are under a duty to achieve employment equity by implementing affirmative action measures for people from designated groups. Designated employers are also under a duty to consult with employees (s16); conduct an analysis (s19); prepare an employment equity plan (s20); and report to the Director-General of Labour (s21).

2. Affirmative action measures must include measures to identify and eliminate employment barriers, including unfair discrimination; measures to further diversity in the workplace; measures which make reasonable accommodation for people from designated groups, to ensure that they are equitably represented in the worplace; measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce (including preferential treatment and numerical goals, but excluding quotas); and measures to retain and develop people from designated groups and to implement appropriate training measures for skills development. (s15)

3. Any one, or a combination of, that person's formal qualifications, prior learning, relevant experience, or capacity to acquire, within a reasonable time, the ability to do the job. (s20(3))

4. To create space for new recruits from designated groups, an employer can implement voluntary retrenchment or early retirement processes. An employer can also train/develop capacity in members of designated groups in order to "fast track" or promote such employees to certain occupational categories and levels in which there is under-representation. Labour turnover also creates space for new recruits.

5. No, such a dismissal will be automatically unfair in terms of section 187. The defence of affirmative action to an allegation of unfair discrimination applies to recruitment primarily. The EEA does not deal with dismissals, only the LRA deals with dismissals. Read s15(4).

6. Introducing flexible working hours for female employees who care for young children; introducing physical changes to the working environment to make the workplace accessible for disabled employees; acquiring or modifying equipment.

Worksheet 9. – *Solution Sheet*

CASE STUDY: Drafting an employment equity plan

To calculate the numerical goals that need to be achieved for the 'senior manager' category:

STEP 1:

Total number of senior managers = 22

STEP 2:

20% of the senior managers should be white:
20% of 22 = 4.4
Therefore, 4 managers should be white.

STEP 3:

45% of the white managers should be male:
45% of 4.4 = 2
Therefore, two white men should be in the senior manager category.

STEP 4:

55% of the white managers should be female:
55% of 4.4 = 2
Therefore, two white women should be in the senior manager category.

The same steps should be followed to obtain the numerical goals that need to be achieved for African, Indian and coloured persons.

STEP 5

WHITE		AFRICAN		INDIAN		COLOURED	
MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
2	2	6	7	1	2	1	1

WHAT IS THE PROBLEM?	HOW WILL IT BE FIXED?	WHEN WILL IT BE FIXED?	WHO IS RESPONSIBLE?
UNDERREPRESENTATION: African men African women Indian women Disabled persons	- Increasing the size of the workforce - Ensuring that all vacancies that arise are filled by a suitably qualified person from underrepresented groups - Shadowing/mentorship programmes - Bursaries or scholarships to increase the size of the pool of suitably qualified persons - Fast tracking	Ongoing	HR manager
OVERREPESENTATION: White males	- Voluntary severance packages	Year 1	Financial manager + HR manager
PERCEPTIONS: 'tokenism'	- Training/workshops	Year 1	HR manager
WORK ENVIRONMENT: physically disabled persons	- Build ramps so that all facilities are accessible by wheelchair - Install a lift	Year 1-2 Year 3	HR manager
TERMS AND CONDITIONS OF EMPLOYMENT	- Internal audit of all policies and practices - Review and amend to eliminate unfair discrimination	3 months 6 months	HR manager
CULTURE 'white male culture'	- Workshops/training - Social gatherings that expose employees to different cultures	Year 1 Ongoing	HR manager

BACKGROUND AND INTRODUCTION

1. WHAT IS EMPLOYMENT EQUITY?

Employment Equity aims to ensure that all job applicants and employees have a fair chance in the workplace. Equity is achieved when no person is denied employment opportunities or benefits for reasons unrelated to their abilities. Employment equity may, in certain cases require that people are treated the same despite their differences, or it could require that people are treated as equals by accommodating their differences.

The apartheid regime was based on discriminatory laws which entrenched racial discrimination, in particular, in all spheres of political and social life – including the workplace[1]. Certain categories of people were denied access to jobs, promotions or training by policies or practices in the workplace based on their race.

The State now intends to promote and achieve employment equity by ensuring that the skills of all employees are fully utilised. It intends to do this by providing equal opportunities for all employees. It has been argued by some that workplace equality should be left to market forces. The Canadian Royal Commission on Equality in Employment, however, had the following to say about achieving employment equity:

> *It is not that individuals in the designated groups are inherently unable to achieve equality on their own, it is that the obstacles in their way are so formidable and self-perpetuating that they cannot be overcome without intervention. It is both intolerable and insensitive if we simply wait and hope that the barriers will disappear with time. Equality in employment will not happen unless we make it happen.*

This approach to achieving workplace equity has been promoted in the Green Paper: Policy Proposals for a New Employment and Occupational Equity Statute. The Green Paper stated that the repeal of discriminatory laws in themselves would not end disadvantage, and supported the notion of state intervention to end inequality in the workplace.

The **purpose of employment equity** as envisaged by the Employment Equity Act (EEA) is two-fold:

i. the elimination of unfair discrimination of any kind in hiring, promotion, training, pay benefits and retrenchment, in line with constitutional requirements so as to promote equal opportunity and fair treatment in employment;

ii. the introduction of measures to encourage employers to undertake organisational

[1] Employment and Occupational Equity: Policy Proposals, p10.

transformation to remove unjustified barriers to employment for all South Africans, and to accelerate training and promotion for individuals from historically disadvantaged groups in order to ensure their equitable representation in all occupational categories and levels in the workforce.

In addition to the above, employment equity seeks to encourage measures to improve the overall distribution of income, while at the same time fostering a productive economy. The disparity in income distribution in South Africa is amongst the highest in the world. A small percentage of the national income goes to the majority of people in the country - black employees are at the lowest end of this distribution.

Employment equity forms part of a broader spectrum of measures that are designed to enhance overall social and economic equality, and in doing so, support democracy and diversity.

Before discussing equality and, more particularly, the Employment Equity Act it is necessary to examine some fundamental concepts which are central to a discussion about employment equality.

2. BASIC CONCEPTS IN EMPLOYMENT EQUITY LAW

2.1 Formal and substantive equality

Equality is a difficult legal concept. Two approaches to understanding the concept of 'equality' have developed.

The classical liberal concept of equality, known as **formal equality**, places emphasis on the right to equal treatment of those who compete for resources. This formulation of equality focuses on people being treated the same, irrespective of any actual social and economic disparities between groups and individuals. Any measure that advantages one party over another is considered to result in greater inequality. For example, a provision of a contract of employment provides that all employees are entitled to three weeks leave per annum. The problem arises when a female employee falls pregnant. In terms of formal equality principles, she would only be entitled to three weeks leave and would not qualify for maternity leave on the basis that all employees, male and female, should be treated the same.

Substantive equality takes actual social and economic disparities into account. The aim of substantive equality is to achieve greater equality between groups in a given society. Preferential treatment given to one group can be consistent with that objective if the result of that treatment would be greater equality between the groups concerned. Using the above example of the pregnant employee, substantive equality dictates that gender

differences should be accommodated, by providing maternity leave for women. This would not be unfair on male employees who do not qualify for maternity leave.

2.2 Discrimination

The term "discrimination" generally has a negative connotation, although there are instances where it can have a neutral meaning. In a legal context, one can say that to discriminate is to fail to treat human beings as individuals. Another way of putting it is to say that, to discriminate is to differentiate between people on the basis of characteristics, which are generalised assumptions about groups of people. For example, the general assumption that all women with small children are unreliable. The consequence of the assumption is that an employer might decide not to employ women because their child-care responsibilities make them unreliable. Women are therefore treated differently (to their disadvantage) to men (by that employer) because of their sex.

The import of this example is not that employers should recruit women irrespective of their reliability, rather, employers should assess all candidates on the grounds of their own potential reliability. The relevant factor is reliability, not sex or motherhood.

2.3 Direct and indirect discrimination

Direct discrimination occurs when a person is treated less favourably on one or another arbitrary or irrelevant ground. It is not necessary to show an intention to discriminate for direct discrimination to be established. An example of direct discrimination is where a black worker is paid less than a white worker for doing the same work, and the reason for the different treatment is based on the race of the worker who is earning less.

Case: James v Eastleigh Borough Council

In *James v Eastleigh Borough Council* [2], the Council charged Mr James, a 61-year-old male, 75 pence to swim in the council swimming pool. Although his wife was the same age as he was, she did not have to pay as she had already attained the pensionable age for women, which was fixed at 60 years. The pensionable age for men, on the other hand, was 65 years. Mr James argued that this policy discriminated against him on the basis of his sex.

Although the Council's intention of allowing pensioners to swim for free was entirely without malicious intent, the Court held that the Council' s motive and intention were entirely irrelevant. The differentiation in pensionable age was found to be directly discriminatory as it was clear that Mr James would have received the same treatment as his wife from the Council but for his sex/gender.

Indirect discrimination relates to hidden and more structural forms of unfair discrimination. It refers to measures and classifications which are, at first glance, neutral but which have a disproportionate effect on a particular group. Indirect discrimination has been described as acts or omissions which are fair in form but discriminatory in operation

[2] [1990] IRLR 288.

or effect. Neither motive nor intention plays a role in determining whether a particular provision or policy is indirectly discriminatory in effect.

To establish whether or not indirect discrimination exists, is difficult. The key principle is whether it has a disproportionate effect on a particular group. In other words, it is the impact of the treatment rather than the criterion applied which is discriminatory.

For example, a workplace policy which stipulates that certain benefits will accrue only to full-time workers, and not part-time employees, may be considered to be a form of indirect discrimination. Although this policy appears to be gender neutral, such treatment will generally affect more women than men, as more women are employed in part-time employment. Similarly, if an employer demands certain language standards, educational qualifications or work experience which may not be necessary for the effective performance of the job, he/she may well be guilty of indirect discrimination if he/she cannot justify those requirements. The requirements themselves may be neutral, but when applied, especially in a South African context, they may have the effect of excluding a disproportionate number of black employees, for example.

2.4 Fair and unfair discrimination

The EEA prohibits "unfair" discrimination. This raises the question of whether there can be such a thing as "fair" discrimination. The Constitution and the EEA recognises that "discriminate" has both a negative and a neutral meaning. In other words, where a differentiation is made in circumstances in which it is justifiable, the act concerned does not constitute an act of discrimination in the negative sense. The EEA provides two justification grounds to an act of discrimination:

i. the inherent requirements of a job can justify an act of discrimination; and
ii. the appointment of an employee in line with a company's affirmative action policy can similarly justify an act of discrimination.

An employer who is unable to prove justification on the basis of the above two grounds may be able to persuade a court that for some other reason, the act of discrimination forming the basis of the complaint is not unfair.

The effect of a justification ground is to render that which would otherwise amount to an act of unfair discrimination, not unfair. Only unfair discrimination is prohibited by the EEA.

2.5 Affirmative action measures

Affirmative action measures are pro-active, positive measures designed to redress the disadvantages in employment experienced by people from designated groups. These measures include specific plans and efforts to give preferential treatment in appointments and promotions to persons from designated groups, as well as accelerate their development and advancement in the workplace. In practice, giving preferential treatment to employees from certain race groups, or employees of a certain gender, would

amount to unfair discrimination - were it not for the existence in our law of 1) a substantive approach to equality, and 2) affirmative action policies as an explicit justification ground to unfair discrimination.

3. THE CONSTITUTION

Section 9 (1) of the South African Constitution provides that "everyone is equal before the law and has the right to equal protection and benefit of the law".

The constitutional concept of equality embraces a substantive notion of equality, and supports the implementation of affirmative action programmes. Section 9(2) states that "equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken". This provision was inserted to ensure that corrective or affirmative action measures are not struck out by the courts on the basis that they constitute unfair discrimination. Without such a provision, the courts may have struck down affirmative action measures as unconstitutional in terms of the equality clause.

Section 9(3) deals with the prohibition of discrimination: "the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth".
Section 9 (4) provides for the horizontal application of the Bill of Rights within certain circumstances and states that national legislation must be enacted to prevent or prohibit unfair discrimination.

(Suffice it to say that the Bill of Rights provides a framework for affirmative action initiatives but that such initiatives will have to be designed in such a way that they do not unduly interfere with other rights. The balancing and limitation of constitutional rights must be done in accordance with the limitation clause).

The Constitutional Court has handed down a series of judgements which dealt with the interpretation of the equality clause in the Interim Constitution. Although none of these cases specifically dealt with employment, the conceptual considerations of a right to equality are relevant[3].

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[3] For a discussion of these cases see, Van Niekerk A.,"Employment Equity", *Current Labour Law*, Juta, 1997.

THE EMPLOYMENT EQUITY ACT: INTRODUCTION

The EEA was promulgated on 19 October 1998. The EEA repeals and replaces certain provisions of the LRA[4], which had temporarily dealt with unfair discrimination, and still deal with other unfair conduct, in the workplace. These provisions are found in item 2 of schedule 7 to the LRA. They are contained in a schedule to the Act because they were designed to be temporary measures pending the finalisation of the EEA.

Item 2 of the LRA contains the residual unfair labour practice definition, and item 2(1)(a), in particular, prohibits unfair discrimination. The reason why these sections of the LRA are still important, given that they have been replaced by the EEA, is that chapter II of the EEA only came into operation on 9 August 1999. Accordingly all unfair discrimination disputes which arose before 9 August 1999 will be dealt with under schedule 7 of the LRA.

1. AIMS OF THE EEA

Employment equity aims to ensure that all employees, and in some cases, job applicants, have a fair chance in the workplace. Equity will be achieved when no person is denied employment opportunities or benefits for reasons unrelated to his/her abilities.

The aim of the EEA is to achieve employment equity through the promotion of equal opportunities and the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups, and by ensuring the equitable representation of workers in all occupational categories and levels in the workforce. Thus, substantive equality will be attained by:

- eliminating and prohibiting unfair discrimination
  AND
- implementing affirmative action measures to redress disadvantages in employment experienced by black employees, female employees and disabled employees.

The EEA must be interpreted so as to comply with, and give effect to, the Constitution. Furthermore, any relevant Code of Good Practice issued in terms of the Act or any other employment law must be considered. Finally, international law obligations of the Republic must be adhered to.

2. CHAPTER II

[4] The following items of schedule 7 have been repealed by the EEA: item 2 (1)(a); item 2(2) – in its entirety; and item 3 (4)(a).

PROHIBITION OF UNFAIR DISCRIMINATION: CHAPTER II

1. APPLICATION OF CHAPTER II

Chapter II of the EEA applies to all employees and employers with the exception of members of the:

- National Intelligence Agency;
- South African Secret Service;
- National Defence Force.

Persons falling within the excluded categories are not defined as employees. Such persons could, if necessary, pursue unfair discrimination claims in the Constitutional Court or lodge complaints with the Human Rights Commission.

Point to note

"Employee" is defined in section 1 of the EEA. An employee means any person other than an independent contractor who works for another person, or for the State, and who receives, or is entitled to receive, any remuneration; and in any manner assists in carrying on or conducting the business of an employer.

2. IMPLEMENTATION

Chapter II of the Act came into operation on the 9 August 1999. This means that any dispute involving an alleged unfair discrimination which occurred on or after 9 August 1999, will be dealt with in terms of the EEA.

3. ELIMINATION OF UNFAIR DISCRIMINATION

Every employer must take steps to promote equal opportunities in the workplace by eliminating unfair discrimination in any **employment policy or practice** (s 5).
Employment policies or practices refer, amongst others, to:

- recruitment procedures
- advertising and selection criteria
- job classification and grading
- remuneration
- employment benefits
- terms and conditions of employment
- job assignments
- the working environment and facilities
- training and development

Chapter II of the EEA applies to ALL employers and employees (including applicants for employment), with the exception of members of the National Intelligence Agency, the South African Secret Service and the South African National Defence Force, and deals with unfair discrimination. This chapter came into operation on 9 August 1999. Section 6 expressly prohibits unfair discrimination and section 10 provides that all disputes in respect of chapter II be referred to the CCMA within 6 months of the dispute arising, for attempted conciliation. In the event that the dispute is not conciliated, it can thereafter be referred to the Labour Court for adjudication.

3. CHAPTER III

Chapter III of the EEA, on the other hand, applies only to designated employers and deals with affirmative action measures which must be implemented by designated employers to achieve an equitably representative workforce. In the context of chapter II, affirmative action can be used by an employer as a defence to a claim of unfair discrimination. In the context of chapter III, a positive duty is placed on employers to implement affirmative action measures to achieve workplace equity.

Chapter III came into operation on 1 December 1999, and the Department of Labour is responsible for enforcing its relevant sections.

- performance evaluation systems
- promotion
- transfer
- demotion
- disciplinary measures short of dismissal
- dismissal.

It may also be implied from this section that it is not enough for an employer simply to take steps to eliminate unfair discrimination in the workplace. There is a further obligation, where instances of unfair discrimination are alleged, on an employer to investigate such complaints. The implication of this is that an employer can be held liable for instances of unfair discrimination where he/she should reasonably have been aware of the discrimination, but failed to take reasonable steps to prevent the discrimination from taking place.

Section 5 places a positive duty on an employer to ensure that the workplace is free from unfair discrimination. For this section to become operative, there does not have to be individual complaints upon which the employer has to act. An employer is under a general duty to provide workplaces free from discrimination irrespective of whether or not individual complaints are received.

It is generally understood that discrimination takes place where one person is treated less favourably than another person. However, caution should be exercised when applying this understanding of discrimination in an employment context because it assumes, in making a comparison between employees, that they belong to the same occupational category. Unfair discrimination would not arise if employees belonging to different occupational categories received different benefits, or wages, for example. The EEA makes a distinction between fair and unfair discrimination. Discrimination is fair if the reason for the differentiation is rational and reasonable in terms of the requirements of the job, or pertains to affirmative action measures consistent with the purposes of the Act.

Discrimination is unfair if it can be shown that the reason for the different treatment was based on any of the grounds listed in section 6(1) [see below]. It is important to note that the grounds listed in section 6 are not exhaustive, and any form of discrimination that could be considered unfair is also prohibited.

4. PROHIBITION OF UNFAIR DISCRIMINATION

Section 6(1) provides that no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice on one or more grounds, 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.

4.1 Scope and application

Section 6 is not restricted in its application to employers and employees only, but includes co-workers, clients of the business and so on. For example, an employer may be held liable for failing to take appropriate action in instances of unfair discrimination between co-employees, provided that it can be shown that the employer either allowed such discrimination, or should reasonably have been aware of, and failed to take reasonable steps to prevent, the discrimination.

4.2 Justification grounds

Discrimination will not be unfair if:

- it takes place in the framework of affirmative action measures consistent with the purpose of the EEA;

  OR

- the distinction, preference or exclusion is based on the inherent requirement of the job.

Inherent requirement of a job

This defence implies that an employer admits that discrimination has taken place, but argues that it is justified because a ground of discrimination, for example, sex, is an essential requirement, or a bona fide occupational requirement, of a particular job.

Examples of the inherent requirement defence:

- jobs which require performance by a man or a woman purely for **biological reasons**. This will be the case where the essential nature of the job calls for a man for reasons of physiology;
- **authenticity**. For example, dramatic performances where a director needs a woman to play the part of Ophelia, or a Japanese restaurant which employs only Japanese waiters or chefs; and
- **privacy or decency**. For example, jobs which need to be performed by a person of a specific sex because it involves the fitting of clothes for that sex.

The difficulty of this defence is that it could be used by employers to permit socialized constructions of appropriate "male" and "female" jobs – ie. Sexual stereotyping in employment.

It is recommended that the application of this defence should be allowed in limited circumstances only: it should correspond to a real need on the part of the undertaking, and it should be appropriate and necessary for achieving the objectives pursued. A useful way to determine the inherent requirements of a particular job is to establish what the essential functions of that job are. This would involve taking into account, the capacity or skills that a person must have to do the job. It also relates to the basic requirements of the job - ie. the focus is on the work to be done. The requirements must be functional and essential for the proper running of the business. The test to be applied is, thus, based on the principles of business necessity (such as good eyesight for an airline pilot) or social policy.

The defence has been narrowly interpreted in the UK. In one case, a man applied for a job as a sales assistant in a dress shop and was refused on the basis that considerations of decency and privacy prevented the employment of a male shop assistant because the nature of the work could involve work in fitting rooms. The matter was decided on the basis that a refusal to employ a male in these circumstances was discriminatory because it would have been possible to ensure that the aspects of the job which involved fittings were performed by one of the female staff members.

In the United States this defence is known as "bona fide occupational qualifications", and has also been narrowly applied. The Court of Appeals rejected an employer's insistence on employing only women as flight attendants. The employer claimed that this employment policy served its legitimate business objective of "*providing psychological support for male passengers involved in the stressful experience of the flight*". The Court rejected this statement and stated that discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.

A case in which the defence of bona fide occupational qualifications has been admitted is one involving the employment of women registered nurses who were required to care for obstetrical patients. Here the court held that "*giving respect to deep-seated feelings of personal privacy involving one's own genital area is quite a different matter from catering to the desire of some male airline passenger to have...an attractive stewardess*".

In South Africa the defence of "inherent requirement of the job" was dealt with in the case of *CWIU v Johnson & Johnson (Pty) Ltd*[5]. In this matter, the company had retrenched 20 female staff members, and the union argued that this dismissal was automatically unfair – because the reason for the dismissal was based on the gender of the workers (see below). The union argued that the selection criteria used by the company was based on the assumption that the female workers who were retrenched could not perform the jobs which the male workers with shorter service periods than themselves were doing.

The company denied any discriminatory conduct and contended that the female workers could not perform those jobs which it regarded as "male jobs" because the jobs were too physically demanding for women. The court noted that, implicit in the company's argument, was the assumption that there were jobs for which every male person was suitable, and jobs for which every female person was physically unsuitable: "*linked to that assumption was the (erroneous) belief on the (company's) part that all women are physically weaker than all men and that all men are physically stronger than all women.... Quite frankly I have serious difficulty in thinking what job exists under the sun which can be said inherently to require a worker to be a male or female in order to perform.*"

It appears from this judgement that South African courts are likely to interpret this defence narrowly and will avoid sexual stereotyping.

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[5] (1997) BLLR 1186 (LC).

4.3 Harassment

The EEA states that the harassment of an employee is a form of unfair discrimination and is prohibited on any one ground, or a combination of grounds, for unfair discrimination listed above. The Act recognises that employees may be harassed in many different ways and that harassment is not restricted to sexual harassment. Examples of behaviour constituting harassment include racial taunts, and harassment on grounds of religion and sexual orientation, to name but a few.

Point to note

Harassment is defined in the Oxford Dictionary as "vex by repeated acts, trouble, worry".

5. MEDICAL AND PSYCHOLOGICAL TESTING

5.1 Medical testing

Section 7 of the EEA specifically prohibits the medical testing of an employee or applicant for employment unless:

- legislation permits or requires the testing;
  OR
- it is justifiable in the light of
  - ♦ medical facts
  - ♦ employment conditions
  - ♦ social policy
  - ♦ the fair distribution of employee benefits, or
  - ♦ the inherent requirements of the job.

Point to note

Medical testing is defined in section 1 of the EEA. It includes any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition.

The testing of an employee to determine his/her HIV status is prohibited unless it is found to be justifiable by the Labour Court. If the Labour Court declares that the medical testing of employees is justified it may make any order it considers appropriate in the circumstances, including imposing conditions relating to:

- the provision of counseling;
- the maintenance of confidentiality;
- the period during which the authorisation for any testing applies; and
- the category or categories of jobs or employees in respect of which the authorisation applies.

It must be remembered that discrimination on the basis of HIV status is expressly prohibited in section 6. Workers who are HIV positive may, nevertheless, lead productive lives. To allow indiscriminate testing on the basis of an employee's HIV status would amount to an invasion of his/her constitutional right to privacy. In most cases, HIV positive workers constitute no threat to fellow employees. Where HIV screening is necessary, it is appropriately left to the Labour Court to determine the parameters of such testing.

5.2 Psychological testing

Section 8 of the Act prohibits psychological testing, or similar methods of assessment, of employees or applicants of employment, unless the test or assessment used:

- has been scientifically shown to be valid and reliable;
- can be applied fairly to all employees;
- is not biased against any employee or group.

Permitted grounds for medical and psychological testing:

→ *Medical facts and employment conditions*. These could refer to hazards or problems associated with specific medical conditions, either in general or in particular working environments. Testing may be justified to identify risks to other employees - for example, contagious diseases, or to the employee himself/ herself - for example, epilepsy.

→ *Fair distribution of employee benefits* would be applicable to tests in order to establish the needs and risk profile of employees for purposes such as medical funds or other benefits where the employee's medical condition is relevant.

→ *Inherent requirements of the job* could, in this context, justify tests to determine the presence of particular medical conditions which are essential to, or incompatible with, particular kinds of work - for example colour blindness on the part of an interior designer, or poor eyesight on the part of an airline pilot.

→ *Scientifically shown to be valid and reliable* in respect of psychological tests could refer to an analysis of results achieved by using it. Endorsement by a relevant professional organisation would be a powerful argument in favour of a particular method of testing.

→ *Can be applied fairly, is not biased* are criteria intended to ensure that the test is appropriate to the employee to whom it is applied, given his/her personal or cultural background. It would exclude, for example, the use of a highly Eurocentric model in assessing workers from a rural area. It would also exclude the use of language and terminology that is unfamiliar to some employees but not to others.

The general principle is that every test must relate to the actual and reasonable requirements of the job.

Guidelines in testing:

- bear in mind that the aim of the EEA is to prevent unfair or discriminatory testing
- apply a test only if it necessary

- make sure that every test has been validated
- make sure that the person conducting the test is properly qualified to do so, knows what the job requirements are and what demands it will make on employees
- apply physical tests only if the job requires physical activity
- keep the results of the tests confidential[6].

6. APPLICANTS FOR EMPLOYMENT

For the purposes unfair discrimination (s6), harassment (s6(3)) and pre-employment testing (s7 & s8), the definition of an employee includes an **applicant for employment**.

7. BURDEN OF PROOF

The employer against whom an allegation of unfair discrimination is made must establish that the alleged discrimination was fair.

8. DISPUTE RESOLUTION

STEP 1

Any party to a dispute concerning an alleged unfair discrimination may refer the dispute to the CCMA, in writing, **within 6 months** of the act or omission allegedly giving rise to the unfair discrimination. Condonation for a late referral will only be granted if the referring party has a good reason for the delay.

Requirements specified by the CCMA

The referring party must ensure that a copy of the referral was served on the other side. The party referring the dispute must also satisfy the CCMA that a reasonable attempt to resolve the dispute was made. The employer must investigate the matter and try and resolve the matter internally. If the employer does not make a serious attempt to resolve the matter internally, the conduct of the employer could amount to bad faith.

STEP 2

The CCMA must then attempt to resolve the dispute through conciliation.

What is conciliation?

Conciliation is a process that involves the parties in dispute meeting with an independent third party known as a conciliator. The conciliator does not decide who is right or wrong, but merely attempts to assist the parties to reach agreement. The LRA states that conciliation may include mediation, fact-finding or the making of a recommendation to the parties, which may take the form of an advisory arbitration award. It is up to the

[6] Du Toit, D, *A complete Guide to the Employment Equity Act*, Andrew Levy & Associates, 1999.

conciliator to decide which of these processes is appropriate for each matter that he/she conciliates.

STEP 3

In the normal course, if conciliation fails, the dispute will go to the Labour Court for resolution. However, if all parties agree that they would prefer the dispute to be resolved by arbitration, they can refer the matter to arbitration.

In the case of unfair discrimination, the Labour Court is empowered to make an appropriate order which is just and equitable in the circumstances. In addition to awarding compensation and damages to the employee, it may also order that:

- the employer should take steps to avoid the same or similar unfair discrimination recurring in the future;
- a non-designated employer should comply with the duties set out in Chapter III for designated employers;
- the name of the employer be removed from the register of designated employers submitting annual reports; or
- the publication of the court's order.

AFFIRMATIVE ACTION MEASURES: CHAPTER III

Chapter III of the EEA deals with affirmative action measures, and the duties of employers in implementing affirmative action measures in their respective workplaces. It is important to note that chapter III applies only to *designated employers*, except where otherwise provided for. This chapter came into operation on 1 December 1999.

1. WHO IS A DESIGNATED EMPLOYER?

A 'designated employer' is defined in the EEA as:

- an employer who employs 50 or more employees;
- an employer who employs fewer than 50 employees, but who has a total annual turnover that is equal to, or more than, the following applicable annual turnovers of small businesses in terms of Schedule 4 of the EEA:

2 m	Agriculture
5 m	Construction Catering accommodation and other trades Community, social and personal services
7.5 m	Mining and quarrying
10 m	Manufacturing Electricity, gas and water Transport, storage and communications Finances and business services
15 m	Retail and Motor Trade and Repair Services
25 m	Wholesale Trade, Commercial Agents and allied services

- a municipality as referred to in Chapter 7 of the Constitution;
- an **organ of state** as defined in S239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
- an employer bound by a collective agreement in terms of s23 or s31 of the LRA, which appoints it as designated employer in terms of the EEA, to the extent provided for in the agreement.

Point of clarification

Section 239 of the Constitution defines an **organ of state** as:

(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution -

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution;

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

An employer who does not fall within the definition of a designated employer may, nevertheless, voluntarily notify the Director-General of Labour that s/he intends to comply with the duties set out in chapter III of the EEA (s14).

What if employee numbers vary from time to time and only occasionally reach the 50 mark?

An employer will fall within the definition of a "designated employer" if it has 50 or more employees at the date on which its report is due.

Should employers try and avoid reporting requirements by manipulating employee numbers on the dates when a report is due, they may find themselves subject to review by the Director-General.

2. WHAT ARE THE DUTIES OF DESIGNATED EMPLOYERS?

In order to achieve employment equity, every designated employer must **implement affirmative action measures** for people from designated groups.

In addition, a designated employer must:

- **consult** with employees as required by s16;
- **conduct** an analysis as required by s19;
- **prepare** an employment equity plan as required by s20; and
- **report** to the Director-General on the progress made in implementing its employment equity plan, as required by s21.

2.1 Affirmative action measures

S 15(1) of the EEA describes affirmative action measures are measures designed 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.

Affirmative action measures implemented by a designated employer must include:

i. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
ii. measures to further diversity in the workplace, based on equal dignity and respect of all people;
iii. making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workplace;
iv. measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce;
v. measures to retain, develop and train people from designated groups (s15(2)).

Points iv and v include preferential treatment and numerical goals, but exclude quotas. Despite the provision for affirmative action measures to be implemented in the workplace, a designated employer is not required to create absolute barriers to the prospective or continued employment or advancement of people who are not from designated groups.

Point to Note:
In view of the disparities in access to training and the consequent lack of skills, accelerated **training programmes** are a paramount constituent of employment equity plans. While employers are not under a duty to employ new employees, they do have a duty to train and develop existing employees as part of a process of advancement. Consultation processes should identify the nature of the training required and provide the measures required to implement accelerated training and human resource development of members of disadvantaged groups.

Points of clarification:
Reasonable accommodation requires an employer to recognise the abilities of an applicant for employment, or an incumbent employee, so that the employer can allow for, or provide, special services or facilities which enable a disabled worker, for example, to perform the essential functions his/her job satisfactorily. It concerns the modification or adjustment of a job or the working environment to enable a person from a designated group to have access to, or participate or advance in employment. The most usual forms of accommodation practised by employers involves (I) acquiring or modifying equipment, (ii) modifying instructions or reference manuals, (iii) modifying procedures for testing of assessment, providing a reader or interpreter or providing additional supervision, (iv) providing accessible working areas, and (v) allowing flexible working hours where these can be accommodated.

There is a big difference between **numerical goals** and **quotas**. Quotas impose the requirement to hire or promote a fixed number of persons in a given time period.
A goal setting process is more flexible due to the fact that employers are asked to set realistic numerical goals in conjunction with workers. These goals ought to be based on projected vacancies and the availability of qualified designated group members living in the relevant recruitment area.

Quota	Numerical goal
mandatory	all reasonable efforts should be made
rigid	flexible planning tool
imposed	self-imposed

However, the requirement of setting numerical goals rather than quotas is also problematic. For example, it can be perceived that employers can achieve their numerical goals by employing white women only, and the true purpose of the EEA could therefore be avoided by the exclusion of other designated groups. There is some merit in the argument that a quota system is necessary to ensure that employers comply with the Act. The implementation of a quota system would not necessarily amount to tokenism provided that requirement of "suitably qualified" is still applicable.

2.1.1 Numerical goals and equitable representation

There is no definition of "equitably represented" in the EEA. However, in determining whether or not suitably qualified persons from designated groups are equitably represented, s42 offers a number of guidelines. Guidelines regarding the factors to be taken into account in determining numerical goals have also been included in the *Code of Good Practice: Preparation, implementation and monitoring of Employment Equity Plans* (item 8.4).

To establish numerical goals consideration will have to be given to the extent of the ' equitable representation' of people from designated groups in each occupational category and level of the workforce in relation to:

- the demographic profile of the national and regional economically active population;
- the pool of suitably qualified people from the designated groups from which the employer may reasonably be expected to promote or appoint employees;
- economic and financial factors relevant to the sector in question;
- present and anticipated financial circumstances of the employer; and
- the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover.

2.1.2 Designated groups

Designated groups are defined to include black employees, female employees and employees with disabilities. "Black people", in terms of the EEA, is a generic term to describe Africans, Coloureds and Indians.

2.1.3 Suitably qualified

The EEA provides that a person may be suitably qualified for a job as a result of any one of, or any combination of that person's: formal qualifications;

- prior learning;
- relevant experience[5];

[5] Previously, black workers were excluded from certain jobs in terms of job reservation. This prevented many people from acquiring the relevant experience in a field although, given a chance, they could perform

- capacity to acquire, within a reasonable time, the ability to do the job. Reasonableness in this context will depend on the nature of the job and the circumstances. In essence, any shortcoming that an applicant or employee might have in terms of the job must be remedied without any significant obstacle to the employer, either through on-the-job training or normal training procedures.

When determining whether or not an employee is suitably qualified, an employer must review all the above factors and determine whether that person has the ability to do the job in terms or any one or any combination of those factors.

2.2 Consultation

Consultation should start as early as possible in the process and should be done through a consultative forum established for this purpose, or through an appropriate existing forum. The frequency with which the consultative forum should meet, will vary from employer to employer depending on its size and sophistication, existing levels of diversity and what has already been accomplished in the workplace with regards to employment equity. Suffice it to say that meetings should take place regularly and employers should allow time off for these meetings.

2.2.1 Consultation with whom?

An employer must take reasonable steps to consult and attempt to reach agreement on various matters (listed below):

- with a representative trade union representing members at the workplace, and its employees or representatives nominated by them; or
- if there is no representative trade union at the workplace, its employees or representatives nominated by them (s16(1)).

Section 16(2) requires that the "interests" of all employees must be taken into account during the consultation process. This means that the consultative process must reflect the interests of:

- employees from across all occupational categories and levels of employer's workforce;
- employees from designated groups;
- employees who are not from designated groups.

Section 16 does not affect any obligation that an employer might have to consult and reach consensus with a workplace forum on any matter referred to below.

Point to note:

Representative trade union is defined in section 11 of the Labour Relations Act as a:

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the job. Lack of relevant experience may not be used as the sole reason for rejecting an applicant (s20(3) & (4)).

"registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace."

2.2.2 Consultation in respect of which topics?

Section 17 lists a number of matters for consultation. These include:

- the conduct of the analysis;
- the preparation and implementation of an employment equity plan;
- the employer's report.

The success of the implementation of employment equity policies in different workplaces will depend on whether the consultation process with employees and their representatives is meaningful, as this would lead to a joint commitment to workplace transformation. In the long term, proper consultation fosters workplace democracy and productivity.

2.2.3 What is "proper consultation"?

Proper consultation includes

- the opportunity to meet and report back to employees and management;
- reasonable opportunity for employee representatives to meet with the employer;
- the request, receipt and consideration of relevant information; and
- adequate time allowed for each of the above processes.

Ongoing consultation is essential to the successful implementation of employment equity in the workplace. Employees should understand the importance of their participation in the process and be made aware of the need for the participation of all stakeholders.

2.2.4 Disclosure of information

A designated employer engaging in consultation is under a duty to disclose to the consulting parties all relevant information that will allow the parties to consult effectively (s18(1)). The provisions of s16 of the LRA apply to disclosure of information under the EEA.

"Relevant information" could include information relating to

- the particular business environment and circumstances of the employer;
- the relevant economic sector or industry;
- the relevant local, regional and national demographic profile of the economically active population;
- the anticipated growth or reduction of the employer's workforce;
- the turnover of employees in the employer's workforce;
- the internal and external availability for appointment or promotion of suitably qualified people from designated groups;
- the degree of representation of designated employees in each occupational category and level in the workforce; and
- the employment policies and practices of the employer.

It should be remembered that "relevant information" is not limited to information supplied by an employer. Employees may also be in a position to provide an employer with valuable information.

2.3 Workplace analysis

The aim of a workplace analysis is to review employment practices, procedures and the working environment to identify employment barriers which adversely affect employees from designated groups. This analysis must also include a profile of the designated employer's workforce within each occupational category and level in order to determine the degree of under-representation of people from designated groups in various occupational categories and levels in the employer's workforce(s 19). The Minister has issued regulations concerning the conducting of an analysis.

2.3.1 Review of policies, practices and working conditions

The employment policies and practices mentioned below indicate the potential areas of direct and indirect discrimination that should be reviewed. These include:

- recruitment procedures
- advertising and selection criteria
- job classification and grading
- remuneration structures
- employment benefits
- terms and conditions of employment
- working facilities
- training and development
- performance evaluation systems
- promotion, transfer, demotion
- disciplinary practices
- the number and nature of dismissals, voluntary terminations and retrenchments
- corporate culture.

2.3.2 Establishing a workforce profile

Step 1 is to establish which employees are members of designated groups. This can be done by asking employees to complete a statutory form, or by obtaining the necessary information from employees' application forms.

Step 2 is to compare the number of employees from designated groups with relevant demographics. At a more general level employers can look at the distribution of the economically active population in the regions in which they operate and compare this to the distribution of their workforce overall, as well as by occupational category and level. Regulations have been published by the Department of Labour containing information relating to the distribution of the economically active population per province. Information is also provided regarding occupational levels and categories.

When it comes to making comparisons, there are a number of bases on which employers can benchmark their diversity profiles. These include

- comparing a workforce with those of organisations of a similar size;
- comparing a workforce with those of organisations within the same sector or industry; and
- comparing a workforce with those of organisations which are structurally similar and whose activities are spread over a similar geographic area.

In addition to demographics, both the availability of suitably qualified people from designated groups in the relevant recruitment area, as well as the internal skills profile of designated employees, should be taken into account. The "relevant recruitment area" is that geographic area from which the employer would reasonably be expected to draw or recruit employees. Recruitment areas may vary depending on the level of responsibility the degree of specialisation of the occupation. Usually the higher the degree of responsibility or specialisation required for the job, the broader the recruitment area.

2.4 Employment equity plan

A designated employer must **prepare and implement an employment equity plan,** including affirmative action measures, which will achieve reasonable progress towards employment equity (s 20). He/she is also required to prepare a subsequent employment equity plan before the end of the current plan (s 23).

2.4.1 Preparation and implementation of an employment equity plan

The underlying aim of an employment equity plan is that affirmative action measures must be implemented to ensure that people from designated groups have equal employment opportunities, and are equally represented in all occupational categories and levels in the workforce. A designated employer must prepare and implement an employment equity plan which will achieve **reasonable progress** towards employment equity in that employer's workforce.

Point to note:
The EEA does not expect employers to implement change overnight. Reasonable progress is required and the rest of the provisions of the Act clarify the action required of the employer to show that reasonable progress is being made.

In terms of section 20, an employment equity plan should contain the following information:

- objectives to be achieved for each year of the plan;
- affirmative action measures which will be implemented;
- if the analysis has shown under-representation of suitably qualified people from designated groups, the employment equity plan should be aimed at achieving the equitable representation of those persons in each occupational category and level in the workforce. In particular, the plan should specify :

  numerical goals to achieve equitable representation,
  timetables within which this is to be achieved,
  strategies to achieve the goals;

- the timetable for each year of the plan;
- the duration of the plan (it should between 1 and 5 years);
- monitoring and evaluation procedures;
- internal dispute procedures to resolve any dispute about the interpretation or implementation of the plan;
- persons responsible for monitoring and implementation of plan;
- any other matters that may be prescribed or that are consistent with the purpose of the EEA.

Point to Note:
The process of implementing employment equity requires planning. Employment equity should form an integral part of good human resource management. It should lead to planned organisational change. For this purpose it might be useful to think in terms of strategies for change which are normally associated with the successful introduction of any new policy, programme or practice in an organisation. Three phases are of critical importance here:
- organisational readiness
- management of change
- maintenance of change

2.5 Report

In terms of s21 of the EEA, a designated employer is required to submit a report to the Director General of labour on the progress made towards achieving 'equitable representation' in its workplace.

A designated employer employing less than 150 employees must:
- submit its first report to the Director General **within 12 months** of the commencement of the EEA (in other words, by 1 December 2000) or, if later, within12 months of the date that the employer became a designated employer; and
- thereafter submit a report to the Director-General **once every two years** on the first working day of October.

A designated employer employing 150 or more employees must:
- submit its first report to the Director General **within 6 months** of the commencement of the EEA (in other words, by 1 June 2000)or, if later, **within 6 months** of the date on which that employer became a designated employer; and
- thereafter, a report must be submitted once **every year** on the first working day of October.

A designated employer must report for the duration of its current employment equity plan and notify the Director General in writing if it is unable to report, and give reasons why it is unable to report.

The reports must contain the prescribed information and must be signed by the chief executive officer of the designated employer. The reports prepared in term of section 21 are public documents. This does not imply that the employer is under a duty to make

copies of the report for distribution but suggests that the report is not private and confidential and cannot be withheld from a person with bona fide interest who requests to see it.

Every designated employer that is a public company must publish a summary of its report in its annual financial report. A report produced by a designated employer within any organ of state, must be tabled in Parliament by the Minister responsible for that employer.

The reports must be displayed in a prominent place in the workplace which is accessible to all employees. (s25(2)(a)).

2.6 Other miscellaneous duties

2.6.1 Assigning a responsible manager

Every designate employer must

- assign one or more senior manager to take responsibility for monitoring and implementing an employment equity plan;
- provide the manager with the necessary authority and means to perform his/her functions; and
- take reasonable steps to ensure that the manager performs his/her functions.

Employers, however, are not relieved of their duties in terms of the EEA once the responsible manager is appointed (s24(2)). An employer retains an overall responsibility of ensuring that the employment equity plan is implemented.

The manager appointed should be a permanent employee, have the necessary power to perform the functions expected of him or her; the appropriate experience to drive this process; and, as this process involves consultation with all stakeholders, the appointed manager should have good inter-personal skills. It may be necessary for employers to provide the necessary training in diversity management for managers who are responsible for implementing employment equity in the workplace. Other reasonable steps which an employer can take to ensure that the manager(s) performs his/her functions effectively, is to

- allocate an appropriate budget to perform necessary tasks; and
- incorporate key employment equity outcomes in performance contracts of the responsible manager(s), as well as the line managers throughout the organisation.

2.6.2 Duty to inform

A notice must be displayed in the workplace informing employees about:

- the provisions of the EEA;
- its most recent report submitted to the Director-General; and
- any other document concerning the EEA that may be prescribed, for example, a compliance order, arbitration award or order made by the Labour Court (s25).

Employees should also be sensitized with regard to employment equity and anti-discrimination issues. This can be done through workshops and training sessions.

An employer who has an employment equity plan must make a copy of that plan available to its employees for copying and consultation.

2.6.3 Duty to keep records

Every designated employer is under a duty to maintain records in respect of its workforce, its employment equity plan and any other records relevant to its compliance with the EEA.

2.6.4 Income differentials

Every designated employer, when reporting in terms of s21, must, in addition, submit a statement to the Employment Conditions Commission on the remuneration and benefits received in each occupational category and level of that employer's workforce.

Where disproportionate income differentials are reflected in the statement, the designated employer must take measures progressively to reduce such differentials, subject to guidance which may be given by the Minister on advice from the Employment Conditions Commission. The Employment Conditions Commission is under a duty to research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportionate differentials.

Measures that an employer must take to reduce disproportionate income differentials may include:

- collective bargaining;
- compliance with sectoral determinations made by the Minister in terms of section 51 of the BCEA;
- applying the norms and benchmarks set by the Employment Conditions Commission;
- relevant measures contained in skills development legislation;
  other measures that are appropriate in the circumstances.

3. COMMISSION FOR EMPLOYMENT EQUITY

The Commission for Employment Equity was established in terms of section 28 of the Employment Equity Act.

The Commission consists of a Chairperson and eight other members appointed by the Minister to hold office on a part-time basis. The members of the Commission include representatives from organised labour, organised business, the State and organisations of community and development interests in the Development Chamber in NEDLAC.

The **functions** of the Commission include advising the Minister on:

- codes of good practice issued by the Minister in terms of section 54 of the EEA;
- regulations made by the Minister in terms of section 55; and
- policy and any other matters concerning the EEA.

Additional functions of the Commission include:

- making awards recognising achievements of employers in furthering the purpose of the EEA;
- researching and reporting to the Minister on the application of the Act, including appropriate and well-researched norms and benchmarks for the setting of numerical goals in various sectors; and
- performing any other prescribed function.

4. MONITORING AND ENFORCEMENT

4.1 Monitoring

It is envisaged that the provisions of the EEA will be monitored by workers and trade union representatives. Any worker or trade union representative may bring an alleged contravention of the EEA to the attention of:

- another worker;
- an employer;
- a trade union;
- a workplace forum;
- a labour inspector;
- the Director-General of Labour; or
- the Commission.

4.2. Enforcement

In order to ensure effective compliance with the Act, a labour inspector is vested with the authority to enter, question and inspect a workplace as provided for in section 65 & 66 of the BCEA.

Point to note

Section 65 of the BCEA grants inspectors the power to enter a workplace in order to monitor and enforce compliance. An inspector may not enter a private home without the consent of the owner, or without written authorisation by the Labour Court.

Section 66 of the BCEA grants inspectors powers to question and inspect, to monitor and enforce compliance with any employment law. These powers include:

- requiring the disclosure of information on any matter to which an employment law relates;
- inspecting and questioning any person about any record or document to which an employment law relates;
- copying any record or document or removing them to make copies or extracts;
- requiring a person to deliver or produce to place specified by an inspector any record or document for inspection;
- inspecting and questioning any person about, and if necessary, removing any article or machinery present at a place referred to in section 65;

- inspecting and questioning any person about any work performed.

4.2.1 Securing an undertaking

If it appears that a designated employer has failed to comply with its duties as set out in the EEA, a labour inspector must request and obtain a written undertaking from the designated employer to comply with these duties within a specified period (s36).

The duties that an employer must comply with in terms of the EEA include:

- consulting with employees (s16);
- conducting an analysis (s19);
- preparing and implementing an employment equity plan (s20);
- submitting and publishing a report (s21 & s 22);
- preparing a successive employment equity plan (s23);
- assigning responsibility to one or more senior managers (s24);
- informing employees (s25); or
- keeping records.

4.2.2 Issuing a compliance order

If a designated employer refuses to give such a written undertaking, or refuses to comply with a written undertaking, the labour inspector may issue a compliance order to the employer.

The compliance order must contain the following information:

- the name of the employer and the workplace to which the order applies;
- the provisions of the Act that the employer has failed to comply with, and the details of the conduct constituting non-compliance;
- any written undertaking given by the employer and any failure to comply with such an undertaking;
- any steps that the employer must take to comply with the EEA and the time period within which such steps must be taken;
- the maximum fine, if any, which may be imposed on the employer for failing to comply with the order (a table of maximum fines is included in schedule 1 to the EEA);
- any other prescribed information.

The labour inspector must ensure that a copy of the compliance order is served on the employer concerned. The employer is then under a duty to:

- display a copy of the order at a place accessible to the affected workers at each workplace named in it;
- comply with the order within the time period stated in it.

If an employer fails to comply with an order within the period stated, or fails to object to the order, the Director-General may apply to the Labour Court to make the compliance order an order of the Labour Court.

4.2.3 Objections against a compliance order

Objections to a compliance order by an employer may be made by making written representations to the Director-General within 21 days of receipt of the order. The Director-General may upon consideration of the designated employer's representations:

- confirm the order;
- vary the order;
- cancel all or any part of the compliance order to which the employer objected.

The time period within which the employer must comply with any part of the order that is confirmed or varied must be specified.

The designated employer may challenge the Director-General's order by lodging an appeal to the Labour Court within 21 days of receiving it (section 39). The order would then be suspended until final determination of the appeal to the Labour Court.

4.2.4 Director General's review

The Director General may conduct a review to determine whether or not an employer is complying with the EEA. In order to conduct the review, the Director General may request any relevant information, or request a meeting with any relevant person. Subsequent to the review, the Director General may either approve the designated employer's employment equity plan or make a recommendation outlining specified steps which must be taken, and a timetable within which those steps must be taken (s44).

If an employer does not comply with any request made in terms of s43 (2), or with the recommendation made by the Director General, the Director General may refer the non-compliance to the Labour Court (s45).

5. LEGAL PROCEEDINGS

The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of the Act, except where otherwise provided (Section 49). Unless otherwise provided, the Labour Court may make any appropriate order including:

- making a compliance order an order of the Labour Court;
- condoning the late filing of any document or late referral of any dispute to the Labour Court;
- requiring the CCMA to conduct an investigation to assist the court, as well as submit a report;
- awarding compensation;
- awarding damages;
- ordering compliance with Act;

- imposing fines;
- reviewing performance, or purported performance, of any function provided for in the Act including any act or omission by any person in terms of this Act;
- in an appeal: confirming, setting aside or varying all or part of an order;
- dealing with any matter necessary or incidental to performing its functions in terms of the EEA.
- an order requiring an employer, other than a designated employer, to comply with Chapter III (Affirmative Action) as if it were a designated employer;
- the removal of the employer's name from the register of designated employers;
- the publication of the Court's order (section 50).

Point to note
Schedule 1 refers to the maximum permissible fines that may be imposed for contravention of *certain provisions* of the Act

Previous contravention	**Contravention of any provision of Section 16, 19, 20, 21, 22 and 23**
No previous contravention	R500 000
A previous contravention in respect of the same provision	R600 000
A previous contravention within the previous 12 months or two previous contraventions in respect of the same provision within three years	R700 000
Three previous contraventions in respect of the same provision within three years	R800 000
Four previous contraventions in respect of the same provision within three years	R900 000

The Act also includes sanctions for breach of confidentiality, obstruction, undue influence and fraud. A maximum fine of R10 000 may be imposed on persons who:
- disclose any confidential information acquired in the performance of a function;
- attempt improperly to influence persons who perform a function in terms of the EEA
  OR
- knowingly give false information to a labour inspector or Director General (s259 read in conjunction with s61).

6. STATE CONTRACTS

A strong incentive for employers to comply with the EEA is the fact that compliance is a prerequisite for engaging state contracts.

Section 53 provides that an employer who makes an offer to conclude an agreement with any organ of state for the furnishing of supplies or services to the state, or for the hiring and letting of anything, must comply with the Act. This requirement is extended to both

designated employers and employers who are not designated employers in terms of the Act.

The employer concerned must attach to the offer either a certificate which is conclusive evidence that the employer complies with the Act, or a declaration by the employer that it complies with the relevant sections of the Act. A certificate confirming compliance may be obtained from the Minister.

Failure to comply with the Act is sufficient grounds for rejection of any offer to conclude an agreement, or for cancellation of the agreement.

7. PROTECTION OF EMPLOYEE RIGHTS

Section 51 of the Act safeguards the rights of employees. An employee may not be discriminated against for exercising any right conferred by the EEA. Section 51 further provides that no person may threaten to do, or do, any of the following:

- prevent an employee from exercising any right conferred by the Act or participating in any proceeding in terms of the Act;
- prejudice an employee for past, present or anticipated: disclosure of information that the employee is lawfully entitled to give another person; exercising any right conferred by the Act; or participating in any proceedings in terms of the Act.

PAY EQUITY

1. INTRODUCTION

One of the purposes of the EEA is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination.

As a result of the past implementation of discriminatory apartheid laws there are inequalities in employment, occupation and income in the South African labour market. Inequalities in pay are one example of the types of workplace inequalities caused by apartheid. Inequalities in what workers are paid occur on two levels:

(I) *Horizontal pay inequalities*
Horizontal pay inequalities occur where, for example, two workers in the same job grade in a company are paid differently, and the differentiation is based on race or gender (or any of the prohibited grounds contained in section 6 of the Act).

(ii) *Vertical pay inequalities*
Vertical pay inequalities occur where differences in pay between the highest occupational level and the lowest occupational level are disproportionately high.

Pay inequalities in South Africa are based mainly on race and gender.

2. PROHIBITION ON UNFAIR DISCRIMINATION

Unlike the UK, South Africa does not have a separate piece of legislation governing pay equity, nor does the Act expressly contain provisions dealing with pay equity. What we do have is the following:
Chapter 2 (section 6) of the EEA prohibits unfair discrimination and stipulates that an employer is not permitted to treat one worker differently from another if the basis for the differentiation is based on a worker's race or gender (in the context of pay discrimination).

Chapter 2 of the EEA also places a duty on every employer (section 5) to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Employment policy or practice is defined in section 1 and includes:
- job classification and grading;
- remuneration;
- employment benefits; and
- terms and conditions of employment (amongst other things).

These provisions do not necessarily mean that all workers should be paid the same, or even that all workers in the same job grade should be paid the same, but rather that where there are differences in pay, the reason for the differences should be based on objective criteria. So, for example, it would be notionally permissible for an employer to pay different wages on the basis of experience, length of service or the level of responsibility associated with the job in question. It is not permissible for differences in pay to be based on subjective criteria linked to "who the worker is".

Many job grading schemes, although they have the potential of being used to assist with establishing objective and fair pay structures, perpetuate unfair pay practices because they tend to accord higher value to skills which are typically categorised as male. Section 5 places a duty on employers to re-structure discriminatory job grading systems.

The amount that an employee receives as remuneration is inherently related to the value that is attached to the work that that employee does. Value is established by an employer or, more broadly, by the labour market. It is accepted that lower value is attached to work that women do, as opposed to work that men do. Similarly, lower value is attached to work that black employees do, as opposed to work that white employees do; and lower value is attached to manual labour than is attached to administrative work, and so on. Subjective assessments of value are instrumental in setting wages for different categories of work and different groups of workers. Inequalities arise because it is generally as a result of the subjective assessments of (white) men that value is attached to work.

There are numerous reasons why women are paid less than men: some of the reasons pertain to the value attached to the work that women do (greater value is attached to qualities such as physical strength than to organisational skills or communication skills), and other reasons pertain to the fact that proportionately more women are employed in part-time or temporary work (as a result of family responsibilities), and part-time work is generally paid at a lower rate than full-time work.

3. WHAT CONSTITUTES "PAY" FOR THE PURPOSES OF BRINGING EQUAL PAY CLAIMS?

Apart from basic salary, all benefits which make up a worker's monthly remuneration package constitute "pay" in terms of the definition of remuneration in the Act.

"Remuneration means any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State".

This definition is broad enough to incorporate all benefits paid to workers as part of their packages. In other words, salary packages should be equal. In the UK, the courts have gone further and held that term for term the contracts of employment of workers should match each other - that it is not good enough merely for contracts as a whole to be equal.

4. THE COMPARATOR

In order to bring a claim based on pay discrimination, an applicant needs to show that
- he/she is being paid differently to another employee employed by the same employer; and
- that the differentiation is based on arbitrary / subjective grounds such as race or gender.

In other words, pay discrimination claims can only be brought in respect of a comparator employed by the same employer, and the applicant is required to show that there is no objective reason for the difference such as different job descriptions, different levels of experience, different levels of responsibility or different qualifications.

Where there are discrepancies in wages paid to female employees or to black employees in an industry, it is the role of trade unions to address as far as possible, the wage disparities by means of collective bargaining, and, by means of collective bargaining, to standardise wages. Minimum wage fixing in a sector, such as the issuing of sectoral determinations in terms of the Basic Conditions of Employment Act, will also go some way towards getting all employees to the same "starting blocks".

Neither English nor American law limit comparison with an actual male engaged in the same employment; the non-contemporaneous male is a legitimate basis of comparison in the sense that a woman may seek comparison with a male predecessor.

5. BASIS OF THE COMPARISON: EQUAL PAY FOR EQUAL WORK

Generally the courts in South Africa, and elsewhere, have had little problem with the concept that workers who do the same work or have the same job description should be paid the same. The problem arises, however, when it comes to removing wage discrimination against women in "women only" occupations, or against black employees in occupations where they predominate. In such situations there may simply be no male comparator, or white comparator, against whom to prove wage discrimination. Therefore, women who are employed in the type of work where they are unlikely to find a male comparator in the same company, because the nature of the job is stereotypically associated with women (only women are ever employed in that type of work) are precluded from bringing an equal pay claim in terms of an "equal pay for equal work " paradigm. This, in turn, serves to limit the extent to which equity can be achieved in a workplace.

6. BASIS OF THE COMPARISON: EQUAL PAY FOR WORK OF EQUAL VALUE

We cannot escape from the reality that there is, in fact, such a thing as "women's work". Job segregation means that one generally finds proportionately more women in jobs and professions which accord with the stereotypes that are associated with "female" qualities. For example, greater numbers of women, than men, are concentrated in "caring professions", such as teaching, nursing, social work, or administrative jobs.

Equal value claims afford a remedy to employees who regard their work as undervalued in comparison to others in circumstances where the jobs compared are different in the sense that they do not amount to the "same work" - and even where the jobs compared are rated equal by a job grading scheme. The rationale for equal value claims is that job segregation makes it difficult to find a male comparator engaged in the same work.

In order to rely on equal value as a ground for bringing a claim, reliance will need to be placed on comprehensive and accurate job evaluations. In order to attach value to a job, the job will need to be assessed on the basis of certain common criteria. Work of equal value can be defined as work which, in terms of the demands made on the applicant (for example, skill, effort, responsibility) is of equal value to that of the comparator, employed by the same employer. In so doing, the scope of equal pay protection can be broadened. The challenge is to establish criteria for assessing value of a particular occupation. Comparatively, value has been assessed from the point of view of work content, training and experience, complexity and responsibility, effort and skill.

Ultimately equal pay legislation challenges commonly held assumptions about the kinds of jobs which are predominantly done by women or other groups of people.

7. DISPUTE RESOLUTION

The EEA provides that all unequal pay disputes/pay discrimination disputes in terms of chapter 2, must be referred to the CCMA within 6 months of the conduct which gave rise to the dispute, occurring. The CCMA is authorised to attempt to conciliate the dispute. If the dispute is not settled at conciliation, either party can refer the dispute to the Labour Court for adjudication.

The question arises, in the context of equal pay claims, whether one can argue that every month that a worker gets paid less than another worker, constitutes new "conduct" for the purposes of establishing the time limit within which a claim must be brought. Alternatively, is the practice of wage discrimination established once off once it happens for the first time? The latter approach might be problematic in the context of pay discrimination, because unequal pay structures are systemic, and it is therefore often difficult to place a commencement date on the practice of paying workers unequally.

8. DEFENCES

In the UK, employers who can show that the difference in pay relates to a genuine material factor which is not the difference in sex, will successfully defend a pay discrimination claim. But the question arises: what amounts to a "genuinely material factor"? The European Court of Justice has held that some form of objective justification is required. For example, difference in pay can be justified only where it relates to a real business need of the employer. In the US, differentiation based on seniority, a merit system of pay awards and productivity differences are permitted.

The external labour market defence:

Example 1: "I paid him more than her because he asked for more" or "I paid her less because she was prepared to work for less". In the UK this defence was rejected on the basis that if it were accepted, the whole purpose of equal pay legislation would be defeated.

Example 2: "I paid him more because he would not agree to work for me unless I paid him the salary which he demanded". This defence has been accepted by the courts in the UK on the basis that a difference which is connected to economic factors affecting the efficient carrying on of the employer's business or other activity, may be relevant. Employers relying on the external labour market factor as a defence must demonstrate some form of necessity. Mere convenience is not sufficient.

9. INCOME DIFFERENTIALS (VERTICAL PAY DISCRIMINATION)

Chapter 2 of the Act applies to horizontal pay discrimination only, and accordingly the dispute procedures contained in section 10 of the EEA apply only to disputes concerning horizontal pay discrimination. The only reference to vertical pay discrimination contained in the EEA is section 27 (chapter 3).

Section 27 places an obligation on every **designated employer** (not all employers) to submit a statement to the Employment Conditions Commission, established by the Basic Conditions of Employment Act, on the remuneration and benefits received in each occupational category and level of that employer's workforce. Where disproportionate income differentials are reflected in such a statement, the employer must take measures progressively to reduce such differentials subject to such guidance as may be given by the Minister of Labour on the advice of the Employment Conditions Commission.

The report forms no part of an employer's reporting duty in respect of the implementation of its employment equity plan, and is not normally considered to be an aspect of employment equity, even though section 27 places a duty on employers to eliminate disproportionate income differentials. This aspect of the Act formed one of COSATU's primary criticisms of what was then, the Employment Equity Bill. In its written submission on the Bill for presentation to the Portfolio Committee: Labour, COSATU noted that the legislature had addressed the problem of wage inequality purely in terms of the horizontal application of the unfair discrimination provisions of chapter 2, and had not paid sufficient attention in the proposed legislation to vertical wage inequality. "*The issue of closing the massive gaps between the various strata of the workforce, between management and low paid workers, men and women, black and white, blue collar and white collar, needs to be a central element of any meaningful employment equity strategy in South Africa. This is needed to ensure that employment equity does not just remain a formality, but is achieved in a substantive way. In particular, the Act should not be confined to a degree of "horizontal equity", where there is racial and gender representivity within a particular strata of the labour market, while there continues to be a huge "vertical inequity" - between those at the bottom and those at the top. Failure to do this would tend merely to change the complexion of inequality, without fundamentally altering its structure.*

The employment equity plan envisaged in the legislation should be broadened to include commitment by the company to reorganisation of the occupational structures, flattening of hierarchies, taking a new approach to grading and training and reduction of the wage gap within specific time frames. The plan, to be submitted by each company ...should set out targets for wage equity over a period of years, in accordance with guidelines set out at national and sectoral level. The organisational audit would need to contain an "organisational map": information about the ratio between, and the income of, all layers of the workforce up to the directors and management, including all perks, benefits, share options etc. Targets would need to be set for the reduction of these ratios, within specified time frames."

These submissions were not eventually incorporated into the final Act, and hence COSATU'S concerns remain relevant. Income distribution in South Africa is among the most unequal in the world - in order to achieve employment equity in a real sense, the unequal distribution of wages needs to be addressed urgently.

No enforcement mechanism is provided for in the Act other than the general power of the Labour Court to order compliance with any provision of the Act in terms of section 50. A number of measures constituting compliance with s27 are stipulated in a permissive rather than a peremptory terms. These include -
- collective bargaining;
- compliance with sectoral determinations made by the Minister in terms of section 51 of the BCEA; and
- applying the norms and benchmarks set by the Employment Conditions Commission.

Parties engaged in collective bargaining may request disclosure of information contained in the employer's statement on remuneration and benefits for the purposes of collective bargaining in terms of this section.

No procedure is laid down for resolving disputes in connection with disclosure of information apart from the power of the Labour Court to order compliance with any provision of the Act in terms of section 50.

The most obvious question left unanswered by section 27 is the meaning of "disproportionate" income differentials. Light is likely to be shed on this question from two sources: firstly, while it is left to the Minister's discretion whether or not to issue "guidance" in terms of section 27, the Employment Conditions Commission is under a duty to research and investigate norms and benchmarks for proportionate income differentials, and advise the Minister on appropriate measures for reducing disproportionate differentials. If this information is publicised, such information will indicate the parameters of the proportionality contemplated by the Act. Secondly, compliance with section 27(2) can be achieved by complying with a sectoral determination made by the Minister in terms of section 51 of the BCEA. Such determinations may only be made following an investigation of the relevant sector and area by the Director-General of Labour and on the advice of the Employment Conditions

Commission. In framing its advice, the Commission is directed to consider an extensive range of factors, including economic factors such as the ability of the employers to carry on their businesses successfully" and "the likely impact of any proposed condition of employment on current employment and the creation of employment". The implication is that sectoral determinations will take market realities into account and that the range of income differentials determined on this basis will be deemed "proportionate" for the purposes of section 27 of the Act.

In terms of reducing disproportionate income differentials, trade unions have an important role to play - both in terms of collective bargaining and being a "watchdog" in respect of designated employers reporting statements of remuneration and benefits to the Employment Conditions Commission.

Trade unions tend to bargain wages in respect of certain job grades which make up the bargaining unit, in terms of the previous year's wages. A bargaining strategy should ensure that wages are bargained with a view to wages across all grades, and not just in respect of the grades which make up the bargaining unit. This will ensure that trade unions are able to tackle the issue of wages and income differentials in a company as a whole - with a view to reducing the gap in respect of the grades which make up their bargaining unit.

EMPLOYMENT EQUITY WORKSHOP

Programme: Day 3

Time	*Item*	*Activity*
9 - 9.30am	14. Summary and discussion of previous day's actvities and conclusions.	Facilitator's summary and plenary discussion
9.30 - 10.30am	15. Assessing the value of the Employment Equity Act for eliminating discrimination at the Workplace.	Worksheet 10.
10.30 - 11am	TEA BREAK	
11am – 12pm	15. Assessing the value of the Employment Equity Act for eliminating discrimination at the Workplace.	Plenary session.
12 – 1pm	16. Way forward with the Employment Equity Act.	Role Play and Plenary Discussion. Worksheet 11.
1 – 2pm	LUNCH	
2 – 3.30pm	17. Developing our Union response to the Employment Equity Act.	Worksheet 12. & Plenary session
3.30 – 4.15pm	18. Evaluation & Way Forward for Workshops in our Unions.	

WORKSHEET 10.

Assessing the value of the Employment Equity Act for eliminating discrimination at the Workplace

Tasks:

1. As a group, read the letter written by the then General Secretary of NUM, Cyril Ramaphosa, to the Chamber of Mines.

2. List the all the discriminatory practices highlighted in the letter that you think have been eliminated.

3. List all the discriminatory practices that will be eradicated with the implementation of the Employment Equity Act. Provide reasons for your answers.

4. List all the discriminatory practices highlighted in the letter that you think are likely to remain, despite the Employment Equity Act. Motivate fully.

5. Reflect on the above exercise and the South African realities of discrimination along race, class, gender and other lines at the workplace. ***Discuss to what extent the Employment Equity Act will eliminate discrimination at the workplace?*** Motivate fully.

6. Prepare for report-back to the plenary session.

Time: 8*0 minutes*

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Our Ref: 2A\LCHAMB.SMO

7 June 1990

The Chief Executive
Chamber of Mines of South Africa
5 Hollard Street
JOHANNESBURG
2001

Dear Sir

RACIAL DISCRIMINATION ON THE MINES

We wish to raise with you yet again the issue of racial discrimination in the mines. In the past when it was raised, you responded by denying that it existed. We rejected that reply then and we are not prepared to accept it now. The evidence of racial discrimination is so extensive and obvious that to deny it exists suggests either that you are out of touch with work-place reality or are not prepared to eliminate it.

We are impelled to put this matter to you in the strongest possible terms and as a matter of urgency because of the intense feelings which our members have expressed about it. Racial discrimination as it concerns them is simply apartheid in the work-place. It is a situation in which they are undermined, underrated, humiliated, insulted, degraded and demeaned on a day by day, hour by hour and minute by minute basis.

In August, 1989, our union embarked on a Defiance Campaign which highlighted many cases of racial discrimination. We were not impressed with the responses of your Chamber and its member mines. For simply asserting their equality with white workers by queuing with them for cages and using common toilets and dining facilities, for example, our members were harassed, assaulted, disciplined, dismissed and, in one sad case, murdered. There was no understanding on your Chamber's or mine management's part that a real problem exists. All that our members and union were told was that the discrimination we alleged existed was differentiation based on the status of workers in terms of their seniority.

Our demand is that the Chamber and its member mines initiates practices which will ensure that a Defiance Campaign and the incidents it provoked will be unnecessary in the future. We believe that the Campaign gave you the opportunity to prove that your publicly asserted dislike of apartheid was sincere. Unfortunately you have done nothing of a practical nature. In an earlier letter we stated that your attitude was hypocritical. Unfortunately, that still has to be our view.

After the Defiance Campaign, the NUM decided that it was futile to engage in a polemic with the Chamber over whether or not there was racial discrimination in the mines. It was degenerating into a sort of game. The final proof that racial discrimination is endemic to mining was provided by the deliberations of our Central Committee in April 1990. The delegates to the Committee were asked to describe from their own personal experiences how apartheid was practised. In graphic terms, they listed several different forms of discrimination. We are not suggesting that the list is comprehensive, only that it is long enough to convince any reasonable person that discrimination not only exists but is rampant in the mines. It is clear that apartheid practices are institutionalised, that they occur irrespective of whether your Chamber or your managements believe they do or not. They exist as if they are the natural order of things and this to us is the greatest offence.

It should be made clear to you that our members can recognise racial discimination, no matter how it is disguised. The effect of racism on our members is akin to a situation where a person applies a naked flame of fire to another person's finger; it is not the one who applies the flame who feels the pain; it is the one whose finger is being burned. And the burning hurts no matter how eloquent and plausible is the reason for doing it. Our members feel that you are disguising racism. Indeed they see only one change since some laws that enforced discrimination were removed, and that is in the way discrimination is justified. They see this as an excuse for carrying on as before and they reject it.

We remain adamant that all practices that are and have always been racially discriminatory must be stopped forthwith. We cannot -compromise on this matter as it involves our members' human dignity and involves the question of human rights which are universal and cannot be proscribed in the mining industry to preserve privileges that are racially based.

Our member's experience is that racial discrimination continues to be manifested in one or more of the following areas on your member mines:

1. **WORKING CONDITIONS**

1.1 The wage structure is racially applied;

1.2 Bonuses are paid on a racial basis;

1.3 There are separate cages for black and white workers;

1.4 Black workers are compelled to queue for cages and white workers not;

1.5 Acclimatisation of workers for underground work is applied in a discriminatory manner;

1.6 The allocation of working clothes is discriminatory;

1.7 There are separate pay offices and administration points for black and white workers;

1.8 Black workers are compelled to act as the personal servants of white workers in the work situation through the "picannin system";

1.9 Black workers are subjected to abuse, humiliation, insults and assaults by white supervisors and management personnel, mainly because of the colour of their skin.

1.10 White workers are allowed to rest and eat underground while this is denied to black workers.

2. **CONTROL MEASURES**

2.1 Black workers are made to wear armbands as though they are cattle, whereas white workers don't;

2.2 The searching of workers is racially applied;

2.3 Only black workers are finger-printed.

3. **FACILITIES**

3.1 Facilities such as toilets, change-houses and sports are racially segregated;

3.2 Medical facilities such as clinics, ambulances and hospitals and medical schemes are racially segregated.

4. **TRAINING AND JOB MOBILITY**

4.1 Job grading is racially applied.

4.2 Opportunities to upgrade skills are more available to whites than black workers;

4.3 The fact that all workers are not recruited through a single agency is racial;

4.4 Promotion opportunities are less available to black workers.

5. **LIVING CONDITIONS**

5.1 Only black workers are subjected to the migrant labour system;

5.2 Mines provide better houses for white workers than for black workers

5.3 The transportation of workers to and from work is racial;

5.4 There are racially segregated living areas and schools in living areas administered by the mines;

5.5 White workers accommodated in single quarters share better facilities than black workers.

We are instructed to demand from you, as we hereby do, that your Chamber and your member mines eliminate all racial discriminatory practices in all of the above areas where such practices exist. We are prepared to concede that there are isolated cases where progress has been made. It is no answer, therefore, to say that our demand is unrealistic or impracticable. What is possible in one mine, is possible in all mines.

We are further instructed to demand that you eliminate such practices by not later than the 25 June 1990.

Yours faithfully

M C Ramaphosa
GENERAL SECRETARY

MCR/sm

WORKSHEET 11.

Role Play on taking forward Employment Equity at the Workplace

The role-play takes place in a factory, Tellumat, in post Apartheid South Africa in a factory that is still structured along race and sex. White, mostly male, managers, "Coloured" and Indian artisans, African men workers and African women cleaners. Owing to the introduction of EEQ in the new South Africa the company's management is forced to begin a consultative process as the first step in drawing up EE plans and targets for the company. Years into the new South Africa the workers are impatient as they have seen no substantial change in their working conditions. A number of Artisans fear that they will lose out in the EE process.

Management has called the workers and artisan representatives to a consultation meeting as part of a process of drawing up EE plans. The management has prepared some proposals. The union believes that they are being called to the first round of negotiations on the implementation of EE in the company.

Characters in the role play

1.Management

The Chief Executive Officer (CEO)

60 years old, Afrikaner who has spent his entire working life in the company having worked himself up from the shop-floor to CEO. He is interested in stalling on EE until he has retired. He sees this meeting as the first step of a consultation process which is little more than window dressing. He is intent upon saying the right things but not committing himself to anything. He has a serious dislike for the union and ***is quick to point out the union's lack of employment equity in its own organisation.***

Industrial relations manager

40 years old, trained at Stellenbosch University and served time in the SADF on the border. He has accepted the new South Africa and supports the DP. He fears EE and thinks he will be replaced soon . He knows the union is not supporting the workers on the issue and sees a chance to confuse and thus stall the issue. His strategy is to use long and technical explanations for issues. Also, when talking to workers he raises concerns about the union's lack of representivity within its own organisation (particularly regarding the role of women in the union's employ, i.e. with women in admin roles and the lack of women in senior positions and leadership within the union).

Minutes secretary / Personal assistant to CEO

25 years old, into making money, as much and as quickly as possible. She is into IT with laptops and cell-phones.
She supports the ANC and sees her advancement as linked to the success of ANC government. She is the company's first "senior" black employee and the white managers cast her in the role of a token appointment. She finds it difficult to know how to position herself in the situation and hence tends not to take a stand on critical issues.

Workers – Represented by:

5 shopstewards, none of whom really understand the Employment Equity Act in detail as they have not had any training about it.

2 shopstewards are veterans of many union and political struggles. They support the ANC government and are active in their local branches. They are the leaders of the delegation. They are interested in negotiation on EEQ but fear that it will not benefit all workers only a select few who are young, educated and skilled and the wage gap would remain. They have received much information from the union head office most of which is written in English and difficult to understand.

They are attending the meeting not to consult but to negotiate EE across the board and not only for a few select black faces. They see EE as a way to restructure wages at the factory and reduce the Apartheid wage gap

3 shopstewards are younger and represent a new generation of workers who entered the factories in the 90s.

One of these is responsible for gender issues. She supports EE but fears that black women will get left out of EE and sees a need to fight hard for women's rights.

One is interested in advancing into management or improving her financial and social status and moving into the suburbs. She sees EE as a perfect opportunity for this.

One is a member of the PAC and critical of the failure of the new government to deliver to African people. He thinks that EE is a plan to continue colonising Africans ensuring the continued dependency of Africans on whites for their advancement. He calls for wealth sharing to enable Africans to buy land stolen from them and return to the land as farmers in their own right.

The 3 young workers all want a stake in developing the plan and accept that change will be uneven and incremental.

Artisans

3 representatives of the artisan union in the factory

One white Afrikaner who is very unhappy with the new South Africa and bitter at having lost his privileged position. He is very anti EE. He sits around cross and disruptive.

"Coloured" or Indian artisans who want to be part of the new South Africa but have doubts about EE and its impact on their careers. They fear that the possible outcome of EEQ could lead to conflict between workers and artisans leaving them in a vulnerable situation. They express concern about the abilities of those workers likely to be promoted to do the work.

Facilitators Notes

Role Play on taking forward Employment Equity at the Workplace

INTRODUCTION to the Role Play:

Explain to participants what a role-play is and its educational value. The following notes can be copied onto and presented on OHP slide.

What is Role-play?

* Role-play is about playing at being different people in different situations so that we can learn from the experience

Why do we use it?

* It offers an exciting, action based way to learn about ourselves and the world through acting out different characters we can understand and experience different view points on the same issue

When do we use it ?

When we want to develop a theme we are working on through experiential learning and help learners understand a topic at deeper level of feeling and meaning

Playing at equity

An exercise in exploring the complexity of political, social and personal / people issues underlying the introduction of affirmative action practices in South Africa through the Employment Equity Act.

Aim

- To provide a fun an entertaining way to examine key issues underlying Employment Equity
- To provide an opportunity to examine :

-Management's likely approach to EEQ
-Union strengths + weaknesses in dealing with EEQ
-The possibility of EEQ leading to conflict amongst workers along race and gender lines
- The impact of EEQ on the apartheid wage gap

Method

Setting the scene

Background information

This information should be shared with participants as a way of introducing the role play – *Explain or read together with participants from the workshop file:*

The role play takes place in a factory in post Apartheid South Africa in a factory that is still structured along race and sex. White, mostly male, managers, "Coloured" and Indian artisans, African men workers and African women cleaners and domestic workers. Owing to the introduction of EEQ in the new South Africa the company's management is forced to begin a consultative process as the first step in drawing up EE plans and targets for the company. Years into the new South Africa the workers are impatient as they have seen no substantial change in their working conditions. A number of Artisans fear that they will loose out in the EEQ process.

Management has called the workers and artisan representatives to a consultation meeting as part of a process of drawing up EEQ plans. The union believes that they are being called to the first round of negotiations on the implementation of EE in the company.

Draw the attention of participants in the role play (both sides) to the information contained in pages 7 – 11 of the Tellumat Employment Equity Plan as this would form the basis for consultation/negotiation. Worth noting is the information that the company does not disclose directly, i.e. statistics for White males in the table on page 8. of the document. It has to be worked out. Also the table on page 9. listing the numerical goals of the company, does not detail the occupational categories for the groups.

Slide 16.1.

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Characters in the role-play

Information for role cards

- You should prepare one role card for each role on separate cards or A4 sheets as per information in Worksheet 11.

Playing

a) Give each group [management, workers, artisans] 10 – 15 minutes to prepare themselves by reading their role cards and by caucusing amongst each other.

b) Explain to participants that the role-play will last for 20 minutes

c) Re-arrange the room to be set for a meeting.

d) Ask participants to leave the room and re - enter in their roles in the following order:

Artisans first, management second and workers last. Allow a pause of 1 minute between each group entering the room. This will help make roles real and build up tension

e) Try to ensure that workers and management are on opposite sides of the table.

f) Allow the role-play to begin and stop it after 20 minutes

g) Management having called the consultation is allowed to speak first

h) After the role-play is finished ask the participants to leave the room and re-enter after a short break of 5 minutes as themselves

Making sense of the play:

The group should then go through a debriefing and analyse the session to make sense of the role play

Guidelines for debriefing: In plenary session

1. Allow participants to comment on their personal experiences of playing a role / of being someone else.

2. Summarise the comments regarding the perceived positions of each delegation at the meeting.

3. Analyse these positions to understand what interest each person at the meeting had in regard to EE and why this was so? Was it linked to gender? class? race? identity/culture?

4. What do the issues arising from the role-play imply for us taking forward EE?

Preparatory tasks of the facilitator:

The facilitator should:

1. Prepare role cards beforehand

2.Set the backround, assists with choosing role-players, organises the room and monitors the role-play.

3 Facilitator should run the debriefing / evaluation session

It is recommended that the choosing of role-players takes place on the second day of the workshop to allow more time for the participants to prepare for their roles.

WORKSHEET 12.

Developing our Union Response to the Employment Equity Act

Tasks: ***Time:*** *60 minutes*

1. In groups, discuss the following:

a) As a union, should we involve ourselves in affirmative action initiatives through the Employment Equity Act? Motivate fully.

b) Due to the requirements of the Employment Equity Act, irrespective of your position on 1. above, employers will be pressing ahead with implementing the Act. The union, particularly shop-stewards will be pressurised to involve themselves in implementing the Act.

Analyse what our weaknesses are as unions in terms of participating in implementing the Act.

c) Discuss how the union could overcome these weaknesses to ensure that affirmative action is in keeping with trade union objectives and benefit the majority of workers.

2. Based on your discussions of the above, ***draft a resolution for your union*** that will guide its role and that of shop-stewards and members in relation to implementing the Employment Equity Act at the workplace.

Write up your resolution on OHP transparency slide in line with the guidelines and prepare to report-back to the plenary session.