



# Taking Employment Equity Forward at the Workplace

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fair employment box  
Employment Equity box  
IO 14078

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TRADE UNION LIBRARY AND  
EDUCATION CENTRE

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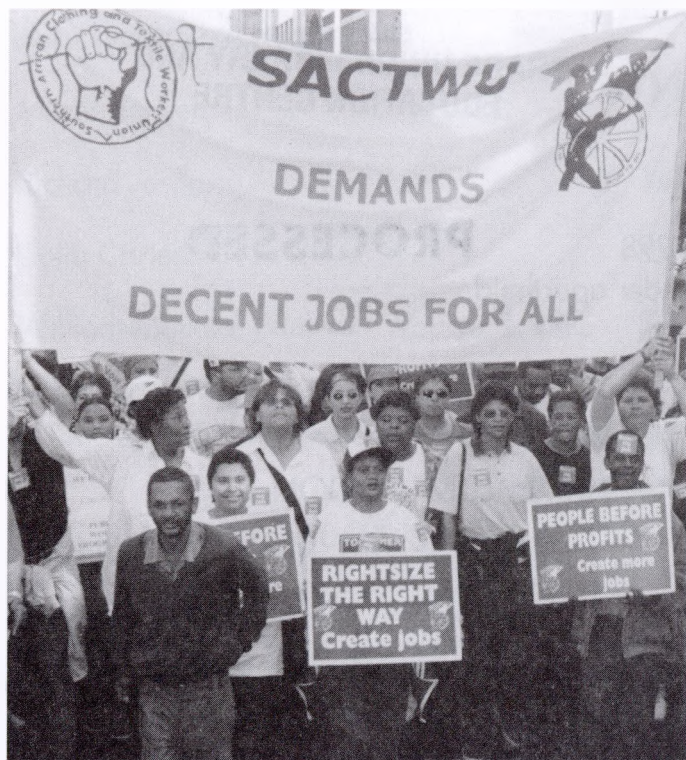
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Affirmative action must be part of an overall programme of addressing inequality.

## INTRODUCTION:

### (1) A booklet on the Employment Equity Act of 1998

In 1998 the South African Parliament passed the Employment Equity Act. This law seeks to help establish equity in the workplace. It prohibits unfair discrimination in employment and requires employers to practice affirmative action. Employers who are designated by the Act must promote the employment of blacks, women, and disabled people in order to correct the discrimination of apartheid employment practices.

The idea of producing an education booklet on *Taking Employment Equity Forward at the Workplace* came out of a series of workshops that were run in Gauteng, Kwazulu-Natal, and the Western Cape in September and October 2000. The workshop programme was designed by the Labour Research Service and run together with Khanya College and the Workers' College (Kwazulu-Natal). Affiliates of the trade union federations COSATU, NACTU, and FEDUSA were represented at the workshops, as were some unaffiliated trade unions. Of the 70 participants, 80% were shop-stewards and 26% were women.

The main task of the workshops was to help participants gain some understanding of the Employment

Equity Act so that they could help their trade unions to develop policies and practices around this legislation. This also meant that the workshops needed to explore workers' experiences of discrimination in the workplace and the broader legacy of inequality left by apartheid capitalism. Experiences of affirmative action practices in other countries were also discussed in the workshops.

One of the aims of the workshops was to encourage participants to take their discussions back into their trade unions and run similar workshops. In this way the knowledge and awareness can spread amongst workers, especially shop-stewards. But time and resources for workers to do this are always limited. Because of this the Labour Research Service committed itself to encouraging education work at workplace level and to providing follow up support for these activities.

This booklet, *Taking up Employment Equity at the Workplace*, is intended to serve as one way of encouraging and supporting communication and education amongst workers around the Employment Equity Act. We hope that this booklet will reach a wide audience in the unions (amongst both leadership and members). We hope that it will assist trade unions to develop policies and practices around employment equity at the workplace that promote the interests of the majority of workers.

### (2) The legacy of discrimination in employment under apartheid

Capitalism rests on a foundation of inequality. In order for a minority to harvest wealth, the majority of society suffers disadvantage. Between rich and poor in capitalist society there is always unequal access to basic social services such as health, education, and housing; unequal payment for labour; discrimination in employment and other life opportunities; and deep inequalities in access to the resources needed for social well being. There are always racial, cultural, religious, and gender discriminations of one kind or another that are woven into class exploitation and oppression. This discrimination helps to concentrate power and wealth in the hands of a minority. In South Africa, apartheid-capitalism developed an extremely brutal form of discrimination that has kept the black majority of the population locked in oppression and poverty.

Capitalism in South Africa grew up in the mines and on the farms where black workers were forced into cheap labour in order to produce profits for the white minority of capitalists. Apartheid trapped the black



population in unskilled manual labour, while a range of laws and practices reserved skilled work, civil service and professional employment, and management positions for whites. This discrimination in employment formed one part of a whole culture of oppression and exploitation. Not surprisingly, conservative white racism also discriminated against women and the disabled and this was also expressed in employment practices. Black women in particular suffered most with the least job opportunities, access to education and social marginalisation. After the wave of black worker strikes in 1973 and the youth uprising of 1976, capitalists saw the need to develop a layer of middle class blacks who would support the system. They saw that discrimination needed to be softened in order to protect profits. Led by the multinationals and the Urban Foundation, liberal capitalists developed "black advancement" programmes. This was not aimed at removing the exploitation facing black workers, but at opening the doors of management to middle class blacks. It was a window dressing that was mainly designed to please foreign investors who were getting embarrassed about apartheid brutalities.

The impact of these "black advancement" programmes was very small. White management culture and racism stood in the way and apartheid policies were still in place to make such promotion meaningless. Black suspicion and resistance to co-option was deep. In 1985 1% of corporate management was black. In 1991 it had only risen to 5%.

Following South Africa's first democratic elections in 1994, a new constitution empowered the government to pass legislation that would prevent unfair discrimination on the grounds of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language, and birth." The Employment Equity Act of 1998 seeks to implement this commitment in the workplace and the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 seeks to promote equity in all areas of social activity.

Inequality in employment opportunity must be seen as an aspect of wider social and economic inequality. The roots of disadvantage in employment stretch deep into the soil of poverty and oppression that the black majority has faced for more than a century in South Africa. ***Legislation that seeks to promote equity in employment practices can only have a deep effect if it is part of a wider process of redistribution of resources and social and economic transformation. This is where the challenge lies!***

## POVERTY AND INEQUITY IN SOUTH AFRICA TODAY

This booklet is about the deep inequalities created by apartheid-capitalism in the workplace and about a part of our struggle against that legacy. You know about that inequality from your own experience. You feel it daily. To help you put your own knowledge into a bigger picture we present you with the following information:

- In South Africa today 65% of Africans are poor and 41% are unemployed
- The gap between rich and poor in South Africa has got wider in recent years.
- The poorest 40% of African households saw a 20% drop in their living standards between 1991 and 1996.
- Between 500 thousand and 1 million jobs were lost between 1994 and 2000.
- There were 15% fewer jobs in the formal sector in 2000 than in 1990.
- African share of the national income has grown from 29,9% in 1991 to 35,7% in 1996.
- In 1975 Africans made up 2% of the richest people in South Africa. By 1996 they made up 22%.
- Only 3% of top management is African.
- Top black management has grown by 2,3% and middle black management by 1,6% since 1994.
- Men still occupy over 70% of managerial, professional and technical jobs.
- In 1999 white men and women made up 84% of management positions and 83% were held by men of all races.

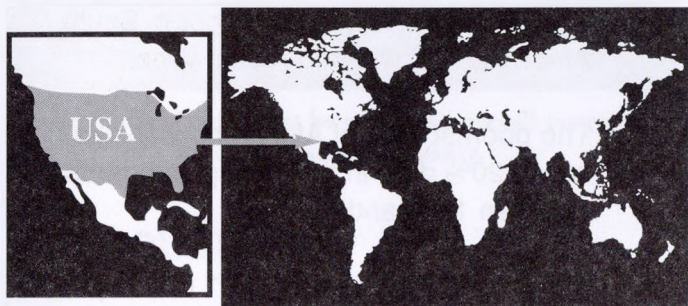


# CHAPTER ONE

## INTERNATIONAL EXPERIENCES OF AFFIRMATIVE ACTION

It is useful for us to look at international experiences of the legislation and practice of affirmative action. Throughout the history of capitalism, workers and their trade unions in countries across the world have learned important lessons by looking at the economic, political, and social struggles across their borders. In this section we will look at some of the important features of affirmative action policies, practices, and experiences in the United States of America, Malaysia, Sri Lanka, Namibia, and Zimbabwe.

### AFFIRMATIVE ACTION IN THE USA



The term “affirmative action” was first used in the United States of America about forty years ago during the early 1960's. Under pressure from the growing civil rights movement led by African Americans, the American government passed the Civil Rights Act. This legislation sought to prevent discrimination in employment on the basis of race. Amongst other things, the Civil Rights Act set out to force employers to compensate oppressed groups for discriminatory practices of the past.

In 1965 the president issued an Executive Order which required any company taking on a government contract to practice affirmative action by employing significant numbers of blacks and women. These companies were forced to establish numerical targets and timetables, which were to be monitored by the Office of Federal Contract Compliance Programs (OFCCP). Their workforce had to reflect the racial composition of the population of the country.



The emergence of mass protest in the South placed the Democratic Party in an untenable position, as it tried to accommodate both white segregationists and civil rights advocates.



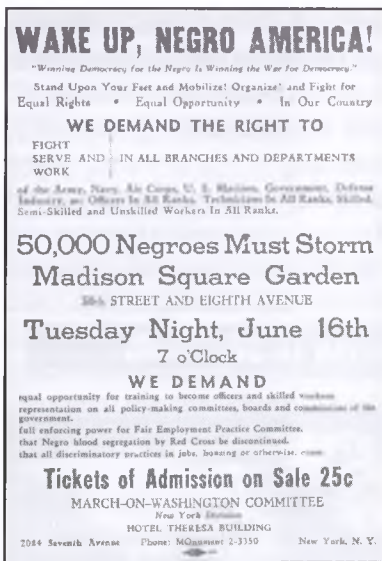
Welfare mothers demanding winter clothing for their children are arrested in Ann Arbor, September 1968.

In the early 1970's quotas for certain minority groups were established. These targets were to be monitored by the Equal Opportunities Employment Commission. This Commission was empowered to sue any public or private company that employed more than fifteen people for discrimination if it did not practice fair employment of minority groups and women.

There are important differences between South Africa and the United States in their experiences of oppression and discrimination. Unlike in South Africa where black people constitute the huge majority of the population, African Americans (the largest “minority” in the USA) only make up 12% of the population in the United States. Also, although racism runs very deep in American history, discrimination has never been written into government policy and legislation in the way that it was in apartheid.

There are however, still important lessons to learn. The first lesson is to see that the government's affirmative action laws and policies are first and foremost a response to the struggles of oppressed people for justice and opportunity. In our experience we must also recognise that any attempt to correct the injustice of the past





African American civil rights struggle poster.

is a victory born of struggle.

The second lesson is to see that even with almost forty years of affirmative action legislation and policy, the lives of the majority of African Americans, and especially working class black Americans, has not really improved. Why is this? Mainly because affirmative action policies do not abolish the deep social and economic divisions of class inequality.

The affirmative action policy in the United States was designed and driven by the ruling capitalist class as a response to popular anger and protest. It aimed to draw the educated middle class members of oppressed minority groups and women into the “mainstream” middle class way of life that had been historically defined and dominated by wealthy white men. Institutions and companies have become more representative and more non-racial, and affirmative action has created a significant African American elite. But class divisions in American society remain the same and a large proportion of African Americans are born into the working class.



A March on Washington during World War II targets job discrimination in the defence industries.

Affirmative action in the United States was therefore an opportunity for a minority of middle class blacks to be incorporated into white management culture. The black middle class has been co-opted into a cul-

ture which still discriminates against African American culture and traditions and which still silently undermines equal opportunity. This kind of co-option does not really affect class inequality. Affirmative action in the USA has brought change on the surface but not deep transformation. Conservatives who opposed affirmative action argued that the 96 billion dollars that have been spent on affirmative action since the 1960's have produced “very little returns” and the policies should therefore be abolished. The growth of right-wing politics in the United States since Reagan was president in the 1980's, led to many of the affirmative action regulations and guidelines being challenged. Many companies resisted this because they knew that to be racist would be economic suicide and because affirmative action had not threatened capitalist profits.

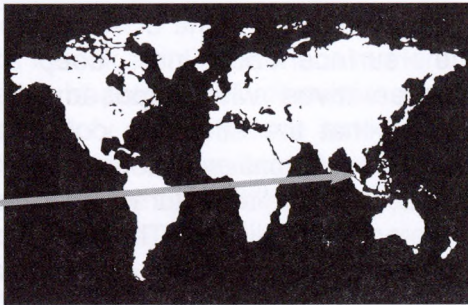


Police dogs failed to quell demonstrators in Birmingham, May 1963.

Clearly, the experience in the United States shows that government legislation is necessary to force companies to change racist and discriminatory practices. Equally clear however, is the fact that an affirmative action policy that is designed and carried out by the ruling class in its own interests will never really challenge the customs and practices of discrimination that have long been part of that society's culture.



## AFFIRMATION ACTION IN MALAYSIA



When Malaysia became independent from British colonial rule in 1957, most of the Malay population was engaged in subsistence agriculture and the extraction of rubber for export. Discriminatory employment practices had kept them out of involvement in the more modern and urban sector of the economy. The more privileged Chinese, who made up about 40% of the population, dominated trade and business activity and had a higher standard of living than the majority Malay people.

Affirmative action policies were built into the new constitution of Malaysia. Positions in the civil service were reserved for Malays and they were given priority in the allocation of study scholarships and trading permits. These measures were intended to correct the social and economic differences between Malays and other ethnic groups. Alongside this affirmative action, the government set out to improve the quality of life in rural areas through rural development projects, land improvement schemes, and the provision of schools and clinics in rural areas. At the same time the constitution required that the government protect the interests of other communities that were not benefiting from affirmative action policies.

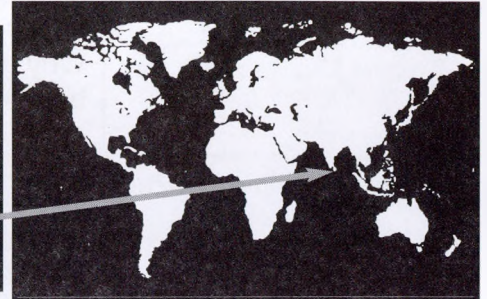
In 1969 these measures became integrated into the government's New Economic Policy. The government's aim was to establish an ethnic balance in all sectors of the economy and at all levels of employment. Ethnic quotas were set up in education, employment, and in the corporate sector.

Over the last 40 years these affirmative action policies have had some success in Malaysia. There is a greater ethnic balance in all public and private institutions and ethnic inequalities were reduced without imposing severe discrimination or hardship on groups that were not targeted. Because of high economic growth rates employment opportunities grew and rural poverty was reduced significantly.

However, the main beneficiaries were the Malay middle class. Because the disadvantaged were

defined in ethnic terms and not class terms, inequality within all ethnic groups between the middle class and the poor has grown. As in the United States of America, affirmative action was directed at drawing an oppressed middle class into a system that rests on inequality. Affirmative action was not directed at eradicating class divisions.

## AFFIRMATIVE ACTION IN SRI LANKA



In 1948, British colonial rule in Ceylon ended and an independent Sri Lanka was born. The Buddhist Sinhalese, who made up 74% of the population, called for affirmative action policies to reverse the discrimination that they had historically experienced. The minority Hindu Tamils had better access to education under colonial rule and had come to dominate most professional and administrative positions.

Affirmative action measures were gradually adopted. In 1956 Sinhala became the official language. This made state jobs more accessible to Sinhalese because Tamils were required to pass a Sinhala language test to qualify for government employment. By the mid-1960's the Tamil's share of jobs in the civil service dropped to 15%.

Affirmative action was also carried out in the education system. Privileged education at private schools was abolished and the facilities at many rural schools were improved.

In 1970, admission to university became regulated in order to implement affirmative action. Admission was no longer based on merit since the Sinhalese had a long legacy of disadvantage in education. The student population now had to reflect the composition of the population as a whole. This led to a drop in the number of Tamil students and an increase in Sinhalese training in fields such as medicine and engineering.

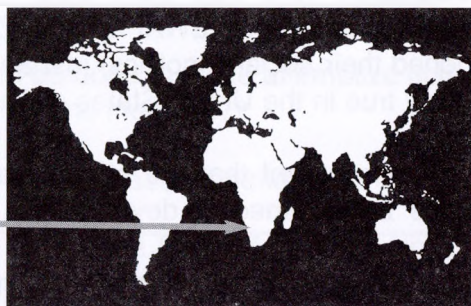
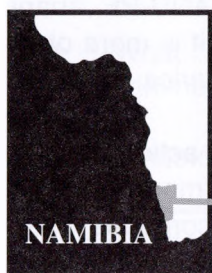
Affirmative action in education mainly benefited the middle class youth who were able to attend the better secondary schools. The implementation of affirmative action in university admissions led to a drop in academic standards because of the need for sup-



port programmes for students who had a weak educational background.

Slow economic development in Sri Lanka has made jobs scarce. Inequalities between the wealthy and the workers and the poor of all ethnic groups have increased. In this climate, Tamils grew bitter about the opportunities that were closed to them. Although the state has softened its affirmative action policies, they are regarded as discriminatory by the majority of Tamils, and especially by the youth. This alienation has driven many Tamils into a bloody armed struggle for the establishment of a separate Tamil state in the north of Sri Lanka.

### AFFIRMATIVE ACTION IN NAMIBIA



When Namibia became independent in 1990, economic power and the top positions in the civil service were in the hands of the white settler minority. SWAPO turned away from its socialist politics and pursued a policy of reconciliation and the development of a “mixed economy”. Affirmative action was seen as an important strategy to overcome some of the injustices and discrimination of colonial rule.

Article 23 of the constitution gave the new Namibian government a broad mandate for affirmative action. It allowed parliament to pass laws aimed at redressing “social, economic or educational imbalances.” The Public Service Commission implemented affirmative action by giving preference in public service employment to applicants who were not white males. By the end of 1994, 70% of the management of the civil service were from previously oppressed groups. Women occupied only 16% of these positions. Although a Bill that aimed to enforce affirmative action in the private sector was drafted it never reached parliament. Up until today affirmative action has not been regulated in any significant way for the private sector, or for any institution or employment outside of the civil service. Affirmative action in the allocation of fishing quotas has benefited only a few business people but not broader disadvantaged communities. Likewise, the affirmative loan scheme established in 1992 has only enabled a small number of business people to purchase commercial

farms. While educational reforms have abolished racial discrimination, they have not closed the gap between urban and rural schools.

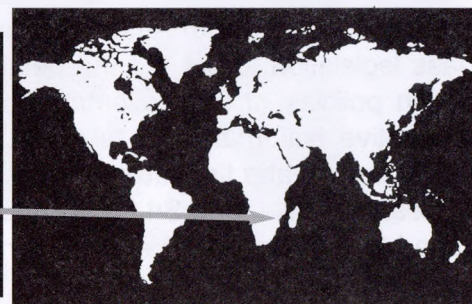
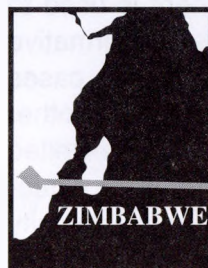
Affirmative action in Namibia has replaced the old white civil service elite with a new black elite and has changed the culture of the state in some important ways. The black majority of Namibia now has



Namibian President,  
Sam Nujoma.

clear majority representation in state institutions. However, the social structure remains much the same because affirmative action has not led to a redistribution that could remedy poverty and class inequalities. The main beneficiaries of affirmative action have been men and little progress has been made in advancing black women, even from the middle class.

### AFFIRMATIVE ACTION IN ZIMBABWE



As in Namibia, the black majority in Zimbabwe had little representation in the civil service when the country won its independence in 1980. In order to remedy a long history of racial discrimination and dominance by white minority rule, Zimbabwe also adopted affirmative action policies.

At independence the Zimbabwean Public Service Commission was empowered to establish a representative civil service by giving employment preference to black Zimbabweans with the necessary qualifications. By 1984, 95% of senior posts in the civil service were occupied by blacks while the number of whites dropped from 37% in 1981 to 1,3% in 1989. This shift was made easier by the high number of well-qualified black Zimbabweans, by the



expansion of the civil service jobs, and by the huge exodus of whites after 1980. No affirmative action legislation was implemented in the private sector where the reversal of discrimination has happened much more slowly.

Affirmative action in Zimbabwe has certainly addressed the legacy of racism and has created a large black middle class. At the same time however, class divisions in the country have widened.

More recently the Zimbabwean government has implemented a far-reaching land reclamation programme. Through legislation and with the use of the armed forces it has taken away land owned by white farmers and re-distributed it to land hungry black Zimbabweans.

At the time of publishing this booklet it is unclear to the extent of how this policy will benefit the majority of Zimbabweans.

### **WHAT LESSONS DO THESE INTERNATIONAL EXPERIENCES OFFER US IN SOUTH AFRICA?**

The countries that we have looked at have used various instruments to regulate, implement, and monitor affirmative action policies. In Namibia, Zimbabwe, and Malaysia the constitution guides the government in redressing past discrimination. In many countries, as in South Africa, parliament is used to pass legislation to set out the details of affirmative action policies of the government. In some cases affirmative action acts as a loose guide. In other cases targets and timetables were set. In the United States, Malaysia, and Sri Lanka quotas were established for private sector employment and university admission.

In looking at the experiences of affirmative action policy and practice internationally we can see strengths and weaknesses.

Affirmative action policies and practices are clearly important in order to correct the discriminatory practices of racism, ethnic oppression, and gender inequality. An important part of the building of democracy in countries that have suffered colonial and racist rule is to positively advance the interests and opportunities of those who have been oppressed.

But the impact has been narrow and shallow. It has been often narrowly applied to a specific sector of

employment, such as in the civil service in Namibia and Zimbabwe. In the case of Namibia, doors of opportunity have not yet really been opened to black women. Even if affirmative action is applied in employment practices, this has little benefit on any mass scale if it is not part of a wider redistribution of resources. Affirmative action needs to apply to all social services, to education, and to access to resources, in order to bring about a meaningful redress of past discrimination.

Because affirmative action has been applied within capitalist systems of class inequality it has remained shallow. Affirmative action policies have been designed, formulated, and implemented by governments supportive of the capitalist system of class inequality. This has been true in Namibia and Zimbabwe (where SWAPO and ZANU-PF abandoned their socialist politics) just as it is more obviously true in the United States of America.

This has meant that the affirmative action policies have been aimed at developing a more inclusive middle class in the civil service, in corporate management, and in the professions. This has no doubt brought an improved life to large numbers of people and has removed many legal, political, and cultural obstacles to their development. But in all cases, the majority of the population has remained oppressed, discriminated against, and impoverished by their economic and social class position. Outside of a wider and deeper process of economic redistribution and social transformation, affirmative action can only offer a route for progress to a middle class into a system that rests on inequality.



Women farm workers.



## QUESTIONS FOR DISCUSSION

In seeking to learn lessons from the experiences of affirmative action in other countries it is important that you explore some further questions:

- What similarities and differences can you see between our situation in South Africa and the experiences of other countries where affirmative action has been applied?
- What additional lessons can you draw out of the experiences in other countries that are important for us in South Africa?
- What can be done to avoid some of the problems that other countries have experienced with affirmative action?
- Can you find out what attitudes and policies trade unions in these countries adopted on affirmative action?
- What can be done to make affirmative action part of a wider and deeper process of correcting discrimination and inequality?
- What kinds of measures need to be taken to implement affirmative action for workers?



Can the Employment Equity Act end the marginalisation of disabled workers in the labour market?



# CHAPTER TWO

## A SUMMARY OF THE EMPLOYMENT EQUITY ACT OF 1998

In October 1998 the President signed the Employment Equity Act and the provisions of the Act came into effect at the end of 1999. The Act was published in Government Gazette No. 19370 of 19 October 1998.

### The Employment Equity Act contains six Chapters and four Schedules.

- Chapter 1: Definitions, Purpose, Interpretation and Application
  - Chapter 2: Prohibition of Unfair Dismissal
  - Chapter 3: Affirmative Action
  - Chapter 4: Commission for Employment Equity
  - Chapter 5: Monitoring, Enforcement and Legal Proceedings
  - Chapter 6: General Provisions
- 
- Schedule 1: Maximum permissible fines that may be imposed for contravening this Act
  - Schedule 2: Laws repealed
  - Schedule 3: Transitional arrangements
  - Schedule 4: Turnover threshold applicable to designated employers

Following Section 54 of the Employment Equity Act, the Minister of Labour has published a **Code of Good Practice** on the Preparation, Implementation, and Monitoring of Employment Equity Plans.

*Note: In what follows we provide a summary of the Employment Equity Act. This summary allows you to get to know the Employment Equity Act in some detail without having to read the law itself. The Act, as it is published in the Government Gazette, is longer, more detailed, and sometimes difficult to read. Once you have read this summary you should also study the Act itself so that you can make use of it in your workplace and in your union.*

### 1. THE PURPOSE AND APPLICATION OF THE EMPLOYMENT EQUITY ACT

The Employment Equity Act (EEA) seeks to help establish equity in the workplace. Equity in the workplace exists when no person is denied employment opportunities or benefits for any reasons that are not related to their abilities.

To achieve equity, the EEA has two objectives:

- **to eliminate unfair discrimination** at the workplace; and
- to provide for the **implementation of affirmative action measures** that can redress the disadvantages experienced in employment by certain social groups under apartheid. The EEA refers to these groups as **designated groups**. Affirmative action measures should ensure equitable representation of all population groups in the workplace.

**Designated groups of employees** are those who experienced unfair discrimination under apartheid employment practices:

- Black people – referring to Africans, Coloureds, and Indians
- Women of all races
- People with disabilities

While the provisions of the EEA that prohibit unfair discrimination apply to all employers, the affirmative action measures are only compulsory for certain designated employers. When we look at the affirmative action measures we will identify who these employers are.

### 2. ELIMINATING UNFAIR DISCRIMINATION

#### Prohibition of unfair discrimination

The EEA provides that **every employer** must take positive steps to make sure that the workplace is free from unfair discrimination.

The EEA prohibits direct or indirect discrimination in any employment policy or practice against an employee, or against an applicant for employment, on



any of the following grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, or birth.

To ensure that unfair discrimination is eliminated from the workplace, every employer has to make sure that their employment policies and practices do not discriminate unfairly against any group of people. Such **employment policies and practices** include:

- Advertising of posts
- Selection criteria
- Job grading systems
- Access to training at the workplace
- Payment of employees
- Benefits available to employees
- Promotion opportunities and procedures

The EEA seeks to eliminate **direct and indirect unfair discrimination**. Direct discrimination is when a policy or practice openly disadvantages a group of employees. For example if women workers are paid a lower wage for doing the same work as men do then that is direct discrimination against those women employees.

Indirect discrimination is not always easy to see. It happens when what appears to be a neutral condition has a significant negative impact on a group of employees and where that condition is not really necessary for the job or the workplace.

#### **An example of indirect unfair discrimination**

An advertisement for a tractor driver on a farm requires the applicant to have at least 5 years driving experience. "5 years experience" appears to be a neutral criterion, but in agriculture, very few women have had the opportunity to learn to drive, and many of those who can drive have only recently acquired the skill. This condition therefore has a negative impact on women who could apply for the job. This is indirect discrimination if the successful performance of the job does not actually require that the applicant have this length of experience.

The EEA also prohibits two other forms of unfair discrimination at the workplace:

- If an employee (or employees) acts in a discriminatory way towards another employee, or group of employees, in a way that contravenes this Act, then the employer must take appropriate action towards this misconduct. The EEA requires that employers take measures to prevent or correct incidents **where some employees act in a discriminatory way towards other employees**.
- **Harassment** of an employee because of race, gender, sexual orientation, religion or any of the grounds prohibited by this Act, is regarded as unfair discrimination. For example to taunt someone for their religious beliefs or to tease them because of their sexual orientation is prohibited.

#### **Fair discrimination is permitted**

The discrimination that the EEA seeks to eliminate is unfair discrimination. There are however cases where discrimination is permitted because it is regarded as fair discrimination. This happens in two kinds of situations:

- where discrimination happens in order to promote employment equity
- where discrimination happens because of an obvious, or inherent, requirement of a job

Unlike unfair discrimination which is based on prejudice, fair discrimination must always have a reasonable justification. If a discrimination can be shown to be consistent with promoting employment equity, or if it is reasonable in terms of the requirement of a job then it is regarded as fair.

#### **Examples of fair discrimination which are permitted**

- An employer would be entitled to specify that only Afrikaans and Xhosa speaking people should apply for a job supervising workers who speak these languages. This is discrimination based on language (which the law prohibits), but it is acceptable because it is reasonable given the requirements of the job.
- An airline can insist that applicants for training as pilots must have good eye sight. This is an inherent requirement for the job. Even though it discriminates against people with bad eyesight it is a reasonable and fair discrimination.



## Medical testing of employees

**Medical testing** of an employee or applicants for a job is prohibited, unless:

- this medical testing is permitted by other legislation
- it is justifiable in the light of employment conditions
- it is reasonable because of the inherent requirements of the job
- it is required to ensure a fair distribution of employee benefits.

**Psychological testing** of an employee or applicants for a job is prohibited, unless:

- the test has been shown to be valid and reliable, and
- it can be fairly applied to all employees, and
- it is not biased against any employee or group of persons.

**HIV testing** is prohibited unless it is found to be justifiable by the Labour Court. The Labour Court can specify the conditions under which such testing takes place. Concerning HIV testing, it is also useful to consult the Code of Good Practice on Key Aspects of HIV/AIDS issued by the Minister of Labour and appended to the Labour Relations Act.

## Taking action against unfair discrimination

In a case of alleged unfair discrimination, an employer and employee (or employees) must first try to resolve the issue internally. If this is not possible or successful then any party can refer the dispute to the Commission for Conciliation, Mediation, and Arbitration (**CCMA**). This must happen within 6 months of the incident of discrimination. The CCMA will try to resolve the issue through **conciliation**. If this fails to make the parties agree, then either party can take the case to the **Labour Court**, or both parties can agree to resolve the dispute through **arbitration**.

In cases of alleged unfair discrimination, the **burden of proof** lies with the employer. This means that when an employee brings a charge of unfair discrimination against an employer, the employer must disprove this in order to show that the action or omission was fair.

In determining that unfair discrimination has occurred, the Labour Court can order:

- the payment of damages to the employee;

- that the employer take steps to avoid a similar incident from occurring in the future;
- that a non-designated employer should comply with the affirmative action provisions set out in the Act for designated employers;



For how long will women be confined to jobs in their “traditional sectors” such as the clothing and service sectors?

## Some common areas of unfair discrimination

### Equal pay for equal work

Unequal pay for equal work was a common feature of workplace discrimination under apartheid. Black workers in particular experienced this, but so have women of all races. Inequalities in what workers are paid occur on two levels. **Horizontal pay inequalities** occur where two workers in the same job grade in a company are paid different amounts. This difference is acceptable if the reason for it is because of different experience, length of service, or responsibility or any other neutral reason. But where a worker's lower wage is due to her being a woman or a black or a Muslim then it is a case of unfair, and illegal, discrimination.

**“Pay” must be understood here to mean the total wage or salary package. This includes both the cash wage and benefits. For example, if a woman employee receives the same cash wage as a man doing the same job but is not given access to a housing benefit that the man receives then this would be unfair discrimination.**



Vertical pay inequalities exist where differences in pay between the highest occupational level and the lowest occupational level are disproportionately high. Often this difference in level coincides with race or gender discrimination. For example, many job grading schemes which might seem to be neutral, give a higher value to men's jobs simply because they are men's jobs. The EEA states that designated employers (see below for a definition of "designated employers") must remove such discriminatory grading systems.

*Both horizontal and vertical pay inequalities remain common in South Africa today. Trade unions should consider using the prohibition of unfair discrimination provisions of the EEA together with their collective bargaining power to address this inequality in the workplace.*



African women, especially in the rural areas of South Africa were and still are amongst the most marginalised and oppressed of the "designated groups."

### Recruitment and selection

Before the EEA came into effect, employers had free choice in who they employed. In the context of racism, sexism, and a wide culture of prejudice, employers would readily exclude people from certain groups from certain jobs and from promotion opportunities. Clearly this discrimination was strongly reinforced by the inequality in people's education and training under apartheid. Unfair discrimination in recruitment and selection has done much to strengthen inequality in the workplace.

The EEA now prohibits employers from discriminating against an applicant for a job for any reason that is not related to the performance of the job. An employer can only differentiate where the needs of the job justify this. For example, if one candidate does not have the required skills for the job, or if that candidate cannot offer the same package of skills and abilities that another applicant can offer.

### Pregnancy

The EEA prohibits discrimination against women employees who are pregnant. This prohibition also applies to pregnant women who apply for jobs. In taking up a case of unfair discrimination, it is important also to make use of the provisions in the Labour Relations Act that seeks to protect pregnant women from discrimination. Section 187 (1) (e) of the LRA states that a dismissal is automatically unfair if "the reason for the dismissal is the employee's pregnancy, intended pregnancy or any reason related to her pregnancy." A further protection is contained in Section 186 (c) which provides that the meaning of dismissal extends to a situation where an employer refuses to allow an employee to resume work after she takes maternity leave in terms of any law, collective agreement or her contract of employment.

### Sexual Harassment

The EEA identifies harassment of an employee because of an aspect of their identity such as their gender, sexual orientation, or religion, as a form of unfair discrimination. It is therefore illegal. The most common form of harassment is the sexual harassment experienced by women. Sexual harassment is sexual behaviour towards someone that is not welcome but is unwanted. This behaviour can be physical, verbal, or non-verbal.

In terms of Section 54 of the EEA, the Minister of Labour has issued a **Code of Good Practice on the handling of sexual harassment cases in the workplace**. The underlying principle of the Code is to "create and maintain a working environment in which the dignity of employees is respected." The aim of the Code is to eliminate sexual harassment, to provide appropriate procedures to deal with sexual harassment and prevent its recurrence, and to develop and promote policies, which will lead to workplaces free of sexual harassment.

***It is important to obtain and read the Code of Good Practice on the Handling of Sexual Harassment. It will inform you of:***

- ***how sexual harassment is defined;***
- ***the different forms of sexual harassment;***
- ***the procedures that the employer is supposed to follow in cases of sexual harassment;***
- ***the legal avenues that are available to employees who have been sexually harassed.***



### 3. AFFIRMATIVE ACTION MEASURES TO PROMOTE EMPLOYMENT EQUITY

The EEA makes it the duty of “**designated employers**” to implement affirmative action measures in order to promote employment equity in the workplace.

The EEA states that these designated employers must take active steps to promote employment equity at all levels in the workplace. The affirmative action measures that designated employers should take are identified by the Act as:

- measures to identify and remove barriers which obstruct people from the designated groups from gaining employment;
- measures to increase the diversity of people in the workplace;
- measures to ensure that people from designated groups enjoy equal opportunities in their employment;
- measures to retain, develop, and train employees from designated groups;
- measures to ensure that suitably qualified people from designated groups are fairly represented in all occupational levels in the workplace.

#### Implementing affirmative action

The EEA obliges all designated employers to develop an Employment Equity Plan as a programme, which will achieve reasonable progress towards employment equity in a workplace. This plan must reflect the statutory requirement outlined in Section 20 of the EEA. As long as it is accessible and easy to understand it can be presented and structured in various ways.

##### Step 1:

##### Assignment of a senior manager

One or more senior managers should be given responsibility for the planning, development, implementation, and monitoring of the Employment equity plan. They must be permanent employees. Appropriate funds should be allocated to their work and they must report directly to the Chief Executive Officer of the company.

##### Step 2:

##### Preparation of an analysis of the working environment

The first task is to review all employment policies, practices, procedures, and the working environment in order to:

- identify barriers that may contribute to the under-representation or under-employment of employees from designated groups;
- identify barriers to a lack of diversity in the workplace;
- identify any conditions that negatively affect employees in designated groups;
- identify positive practices that promote employment equity and diversity in the workplace

The kinds of policies, practices, procedures and conditions that the analysis should review include:

- recruitment and advertising procedures
- selection criteria
- pre-employment testing
- job classification and grading
- remuneration structures
- employment benefits
- terms and conditions of employment
- working facilities
- training and development
- performance evaluation systems
- practices relating to management of HIV/AIDS in the workplace
- promotion, transfer, demotion
- disciplinary procedures and practices
- patterns of dismissals, voluntary terminations, and retrenchments
- corporate culture
- subtle forms of discrimination and stereotyping

This analysis must include a **profile of the workforce** in each occupational category. This will enable them to see the extent to which designated groups of people are under-represented in the workforce.

##### Step 3:

##### Preparation of a statement of income differentials

All designated employers must submit a statement of remuneration and benefits received in each occupational category to the **Employment Conditions Commission**. Where there are unreasonably large differences in income that amount to unfair discrimination, a designated employer must take steps to correct this.



#### Step 4:

#### Consultation with employees about the analysis and an employment equity plan

*In preparing the analysis and the employment equity plan the employer is required to consult with, and attempt to reach agreement with, a representative trade union. If no union represents the employees then the employer should consult with elected employees who represent workers from all occupational levels. Employees from both designated and undesignated groups should be involved in this process.*

The consultation process must allow for meetings between the employer and employee representatives, for report-backs to employees, and for the provision of relevant information to employee representatives.

#### Step 5:

#### Drafting the employment equity plan

Once the analysis of the workplace has been completed and consultation has taken place, a designated employer must design an employment equity plan that will achieve reasonable progress toward employment equity in the workplace. This plan must contain:

- required affirmative action measures that will be taken;
- the duration of the programme (which must be between 1 and 5 years);
- objectives to be achieved for each year of the plan;
- numerical goals to achieve more equitable representation of designated groups;
- monitoring procedures to determine the progress and success of the plan.

#### Step 6:

#### Submission of Reports to the Department of Labour

Designated employers are required to submit the employment equity plan as well as a report on the level of consultation and the development of the plan, to the Department of Labour. Thereafter, employers are required to submit reports to the Department of Labour on progress in the achievement of the objectives in their plans.

- A designated employer with less than 150 employees must submit its first report with in 12 months of commencement of the EEA (or within 12 months of becoming a designated employer). Progress reports must be submitted once every two years on the first working day of October.
- A designated employer with more than 150 employees must submit its first report within 6 months of the commencement of

the EEA (or within 6 months of becoming a designated employer). Progress reports must be submitted annually on the first working day of October.

#### Step 7:

#### Ensure that employees are informed about progress in implementing the equity plan

*A designated employer must make a copy of its employment equity plan available to its employees. The employer must also display the most recent report to the Department of Labour in an accessible place in the workplace. Public companies are required to publish a summary of the report in their annual financial report.*

#### Step 8:

#### Monitoring and evaluation

Designated employers are required to monitor and evaluate the implementation of their employment equity plan. Employers should:

- Keep records of the plan so that they can review their starting position and track progress over the duration of the plan.
- Implement one or more mechanisms to monitor and evaluate the implementation of the plan.
- Evaluate progress at structured and regular intervals.
- Report on progress to employees through their representatives.
- Where progress is unsatisfactory or flaws emerge in the plan, changes should be made through the consultation process.

#### Regulations

Section 55 of the EEA allows for the Minister of Labour to issue regulations related to the Act. Most important are the regulations providing for the procedures to be followed by employers regarding their obligations under the Act. Regulations have been issued concerning the employer's duties to conduct an analysis of the workforce, to prepare and implement an employment equity plan, to submit reports to the Department of Labour, to inform employees of the provisions of the EEA, and to *submit a statement of income differentials. These regulations, and the forms that accompany them, can be found in the Department of Labour's "Preparing and Employment Equity Plan – A User's Guide."*

An important example of such regulation concerns demographic information. In drawing up a workforce profile, and in setting numerical targets for affirmative action, a designated employer must take into account national and provincial demographics. The weight of a suitably qualified economically active



people in a specific designated group (eg. African women) in a province must be reflected in the targets of an employment equity plan. Regulation 8 provides demographic information that a designated employer can make use of in conducting a workforce analysis and in drawing up affirmative action plans.

#### 4. ENFORCEMENT AND LEGAL PROCEEDINGS

Any employee or trade union representative can report an infringement of the EEA to the Department of Labour. If a labour inspector believes that the employer has contravened the Act, he or she must obtain a written undertaking from the employer to comply with the EEA. If the employer fails to do this then the labour inspector can issue a compliance order.

If an employer fails to comply with the compliance order the Director General of the Department of Labour may apply to the Labour Court to issue the order. An employer may lodge an objection against the compliance order with the Director General and can appeal against the Director General's decisions in the Labour Court.

An employer who fails to prepare an employment equity plan after a compliance order has been issued, may be fined up to R500 000 by the Labour Court for a first offence. Subsequent contraventions of the Act can lead to fines of R900 000.

The EEA gives employees the right to exercise the rights granted to them under the Act. It prohibits discrimination against employees for exercising these rights. It also prohibits any offer of favours to employees in order to stop them exercising their rights under this Act.

#### 5. THE COMMISSION FOR EMPLOYMENT EQUITY

The EEA establishes the Employment Equity Commission that consists of representatives nominated by the labour, business, government, and community components of NEDLAC. The purpose of the Employment Equity Commission is to advise the Minister of Labour on policy concerning the EEA, as well as codes of good practice, and regulations. It is also tasked with offering recognition to employers who excel in furthering the purpose of the EEA, and with researching the application and impact of the legislation.

***Appendix 3 contains the Code of Good Practice for the Preparation, Implementation and Monitoring of Employment Equity Plans. This code provides a lot more detail than the Act itself on the process that the employer is expected to follow in developing and implementing an employment equity plan.***

For this summary we made use of the following publications:

- The Employment Equity Act No. 55 of 1998. Government Gazette No. 19370, 19 October 1998.
- A briefing paper on the Employment Equity Act No 55 of 1998 and its implications for agriculture. Written by Nicky Taylor and published by the Centre for Rural Legal Studies, July 1999.
- Preparing an Employment Equity Plan – A User's Guide. Department of Labour publication.



## UNDERSTANDING THE EMPLOYMENT EQUITY ACT

*Use the following questions to make yourself familiar with some of the details of the Employment Equity Act*

- What are the two objectives of the EEA?
- Who are “designated groups” in terms of the EEA?

### **Discrimination**

- What kinds of discrimination are prohibited by the EEA?
- In what kinds of employment policies and practices are employers supposed to eliminate discrimination?
- What is the difference between direct and indirect unfair discrimination? Can you think of examples from your own work experience?
- What examples of harassment have you seen at work?
- Not all discrimination is regarded as unfair. Can you give examples of fair discrimination.
- Does the EEA allow medical tests to be carried out on employees? What about HIV testing?
- What are the first steps that you should take if you want to take up a case of unfair discrimination? How long have you got to refer the incident to the CCMA if you need to?
- What are the most common areas of unfair discrimination in your workplace?
- What is sexual harassment? What examples have you seen at work?

### **Affirmative Action**

- Which employers are “designated employers”? Is your employer a designated employer?
- What are the affirmative action measures that designated employers are required to take?
- What is a “suitably qualified” person in terms of the EEA?
- Designated employers are required to draw up an analysis of the workplace. What are the policies, practices and procedures that they should review in this analysis? What are the problems that they are supposed to identify?
- In what ways is the employer supposed to consult with employees around employment equity plans?
- What must an employment equity plan contain?
- How are employers required to monitor the implementation of their employment equity plans?
- What can employees do if their employer is not complying with the requirements of the EEA?

## CRITICAL THINKING ON THE EMPLOYMENT EQUITY ACT

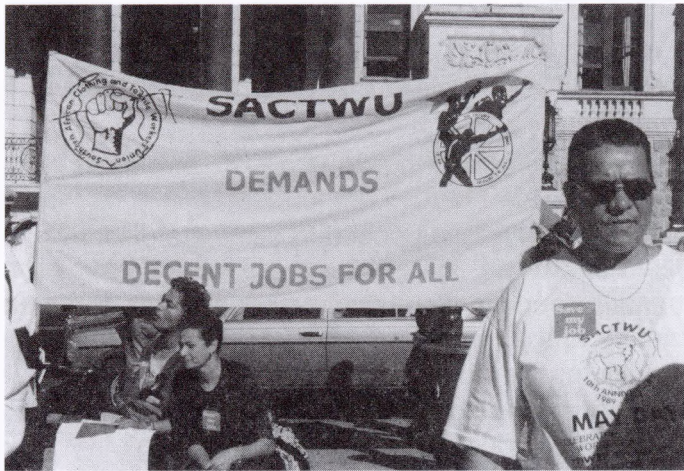
*Discuss the following critical questions about the Employment Equity Act.  
These questions will be explored further in Chapter 3*

- The EEA makes employers legally liable for taking steps to prevent discrimination and for developing affirmative action measures as part of an employment equity plan. Go through the EEA and try to identify all the steps that the Act requires employers to follow.
- What does the EEA require or expect trade unions to do?
- What opportunities does the EEA present to workers and trade unions?
- What pitfalls and weaknesses are there in the EEA from the point of view of your trade union?
- What weaknesses are there in your trade union that may make it difficult to turn the EEA to workers' advantage?
- In what ways can your trade union take the initiative to play an active role in developing and implementing employment equity in your workplace?
- What measures can you take to make sure that affirmative action does not just result in more black faces in management positions?



## CHAPTER THREE

### DEVELOPING TRADE UNION POLICY FOR IMPLEMENTING EMPLOYMENT EQUITY IN THE WORKPLACE



Trade Unions are given rights by the Employment Equity Act.

The Employment Equity Act has two main aims:

- to eliminate unfair discrimination in employment, and;
- to ensure the implementation of affirmative action to redress the effects of past discriminatory policies and practices.

**The Act places the responsibility for promoting workplace equity in the hands of employers.**

Employers are required to eliminate unfair discriminatory employment practices and are given the task of developing and implementing plans of affirmative action.

Putting employers in the driving seat of planning and implementing employment equity is a problem for a few reasons:

- If employers truly embraced the struggle against unfair discrimination then there would be no need for legislation forcing them to develop employment equity. There are a very few employers who have developed employment equity plans with out having been forced to by law.
- Even with the law in place many employers are dragging their feet. There are many reasons for them to resist what they see as an invasion of their personal right to decide who works for them. **Some examples of resistance that employers are putting up are given in Appendix 1.**
- The implementation of the Employment Equity Act can have different kinds of results. A liberal employer may make efforts to apply affirmative action at the level of management but do little about

narrowing the wage gap between management and unskilled workers.

***If employers drive the process of building employment equity then we will see minimal change. If workers and their trade unions take the initiative to lead the development of employment equity plans then a deeper transformation can become possible.***

**What role does the EEA give workers and their trade unions in the development of employment equity?**

Workers and their trade unions are given rights by the EEA. These rights are as follows:

- to take up cases of unfair discrimination
- to be consulted by the employer when the employer develops an analysis of the workplace and an employment equity plan
- to receive all information from the employer that is needed for effective consultation
- to monitor employers in order to make sure that they follow the provisions of the EEA and its regulations
- to report non-compliance by an employer to the Department of Labour
- to be protected against discrimination if they exercise these rights

But **rights** can only be fully brought to life if workers are organised and mobilised around their own vision of employment equity. While the EEA offers rights to workers and their trade unions it does not **empower** them to play a leading role. In fact in some ways the EEA encourages a weak trade union response.

In this chapter we explore how trade unions need to play a more proactive role than what is suggested by the EEA in the building of equity in employment. To do so we focus on six areas where unions need to move beyond the rights offered by the EEA into a role where they can lead the process of building employment equity.

#### **(1) “Consultation” – An active or passive role for trade unions?**

Section 16 of the EEA requires that employers consult with workers, through their trade union or elected representatives, in the development of an



employment equity plan for the workplace. Recommendations as to how this process of consultation be carried out are detailed in the Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans (This Code is reproduced in Appendix 3).

***Extracts from the Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans on the consultation process:***

- Employers are expected to make employees aware of the importance of employment equity and discrimination issues, the advantages of participating in the process, and the need for their involvement to ensure positive outcomes.
- Employers are required to consult with employees with regard to conducting an analysis of the work place and its employment policies and practices, the preparation and implementation of the plan, and the submission of employment equity reports to the Department of Labour.
- Consultation with employees should commence as early as possible in the process.
- To ensure an informed and constructive consultation process, structured and regular meetings of the consultative forum or forums should be held.
- Consultation must include: the opportunity for report-back meetings, reasonable opportunity for employee representatives to meet with the employer; that employees and their representatives be provided with relevant information.

**“Consultation”** can mean different things. Where employers are conservative and want to do the minimum that the law requires, and where trade unions are not strong, employers are likely to simply inform employees about their employment equity plans. This is what consultation could mean. Even where trade unions have a strong presence, if they do not turn consultation into hard bargaining, then employers will stay in the driving seat.

The EEA and the Code of Good Practice do not give a strong definition of what consultation should mean. This will be determined on the ground. **Trade unions need to determine that “consultation” means the negotiation of an employment equity**

**agreement.** To do this, trade unions need to take a programme to their members that seeks to develop union policy on employment equity. The following elements can be a useful part of that process.

- develop a critical understanding of the opportunities and weaknesses in the EEA;
- explore and bring to light workers’ experiences of discrimination and inequity in the workplace;
- use these experiences as the basis for developing affirmative action proposals;
- integrate opportunities offered by the Skills Development Act and the Promotion of Equality and Prevention of Unfair Discrimination Act into employment equity plans (***See Section 5 below***);
- develop an employment equity plan that can be taken into negotiations for an employment equity and skills development agreement with employers at sector, company, and workplace level.

**(2) Where should trade unions negotiate employment equity agreements with employers?**

The EEA does not empower workers and the trade unions in its approach to consultation. Unions are often at their weakest in the kind of process that the EEA recommends for employers to consult employee representatives on employment equity plans.

The location provided for by the EEA for employers to develop their employment equity plans is the workplace. The EEA does not point to company or sectoral level centralised bargaining as suitable forums for this process. For trade unions and their members, to negotiate employment equity plans purely at workplace level produces a number of problems:

- union strength may be unequal at different workplaces belonging to the same company with the result that very different employment equity plans may emerge;
- unions do not have the capacity to negotiate agreements at every workplace – such negotiations could better be done through a more centralised forum.

The focus on the workplace is not wrong. Experiences of discrimination may be quite specific and conditions may vary. But centralised bargaining can always take the different levels of input and implementation into account. Alongside purely workplace level “consultation” around employment equity plans, trade unions must seek to develop and nego-



tiate employment equity policy, plans, and agreements at broader levels. In this way union capacity is better harnessed and there can be a more consistent programme of building employment equity across a variety of workplaces.

Similarly, the EEA emphasis on the consultation process happening through consultative (non-union) forums opens the way for diluting an organised union impact on the process. In this regard the Department of Labour's Code of Good Practice suggests:

***"A consultative forum should be established or an existing forum utilised. The forum should include employee representatives reflecting the interests of employees from designated and non-designated groups and across all occupational categories and levels of the workforce. Representative trade unions, where these exist, or representatives nominated by such trade unions must be included in the consultation process."***

By bypassing union-based negotiating forums, employers have the opportunity to play one forum off against another. Employment equity plans need to deal with wages and conditions of employment – these are the substantive issues of discrimination and equity in the workplace. Employers may seek to sideline these issues and refer them to normal bargaining processes while keeping employment equity discussions within the consultative forum. This splitting will remove the real issues from equity plans. It is not in the interests of trade unions, with their limited resources and capacity, to spread equity and wage issues into different forums.

To ensure the effective involvement of organised workers in the development of employment equity plans, trade unions need to:

1. Drive this initiative from within their organising and collective bargaining units.
2. Develop policy and model agreements on employment equity at a national level in the trade unions.
3. Build the capacity of shop stewards to negotiate at a company and plant level.

### **(3) Challenging discrimination: Employers are liable but trade unions must be responsible!**

The EEA requires that employers take positive steps to eliminate unfair discrimination from the workplace. This includes employment policies and practices of the employer, harassment of any form, as well as acts of discrimination between employees. The EEA therefore makes the employer **legally liable** for any act of unfair discrimination. Employees and their trade unions have the right to take up cases of discrimination. But this cannot be the end of the story. Workers and their trade unions cannot give employers responsibility for the struggle against discrimination. Employers will only follow the law and scratch the surface. Trade unions can develop a much deeper response.

Since workers bear the brunt of discrimination – be it racial, religious, gender-based, or as workers – they need to collectively be **responsible** for challenging discrimination in all its forms in the workplace. For a union to empower workers in the struggle for employment equity, it needs to develop a critical exploration of the experience of discrimination amongst its members. This can provide a foundation for putting forward affirmative action measures and an employment equity plan that carries the experiences, interests, and needs of workers. A union-led programme on discrimination in the workplace needs to:

- Conduct educational programmes with workers on the issue of discrimination so that they can understand the kinds of discrimination that the EEA is seeking to challenge.
- Uncover workers' experiences of discrimination and explore the deep culture of discrimination that penetrates their lives.

It is not difficult for workers to identify obvious unfair discrimination in their employment experience. White employees occupying more skilled positions than black workers, women workers being paid less than men for the same work, and the huge gap between the salaries of white management and black low-skilled workers, are common experiences of discrimination. But unions need to help workers uncover the more hidden experiences of discrimination in the workplace. Maybe they are just accepted as a normal part of life. For example: What languages are used and encouraged in the workplace? What kind of facilities do workers have compared to those of management? How are different religions



given space to express themselves at the workplace? Discrimination has a deep legacy in South Africa. It has become a culture where people very easily fall into certain roles. Unions need to facilitate the uncovering of workers' hidden experiences of discrimination.

### General weaknesses of the EEA that need to be highlighted:

- 1 The Act does not require employers to give a breakdown of black and disabled employees **according to gender**. Thus, it is difficult to assess the position and advancement of black, specifically African women, who are the most marginalized and vulnerable in these groups.
- 2 **Enforcement of the Act** – the Act imposes a duty on employers to carry out certain administrative duties, e.g. up to R900 000 for repeated failure to carry out administrative duties (Schedule 1), however employers are not penalized for repeated failure to achieve employment equity targets.
- 3 **The Act still gives employers some leeway in terms of their employment equity targets.** For example, the Act identifies certain conditions that must be taken into consideration when assessing a particular company's compliance with employment equity legislation. These include for example, *“the present and anticipated economic and financial circumstances of the employer, the number of present and planned vacancies that exist in the various categories and levels, the employer's labour turnover, progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector.”* (Section 42 - Assessment of Companies)

### Challenging prejudices amongst workers

This kind of exploration of workers' experiences of discrimination should not only focus on the discrimination that they face from employers, managers, and supervisors. It is also important that workers challenge their own prejudices and discriminatory attitudes.

Racism is not just the white employer discriminating against all black workers. It is also the hostility and mistrust that Coloured, or Indian, or African workers might have for each other. It is not good enough for workers to challenge racism, if male workers in the union hold prejudices against women workers. Sexual harassment of women by men workers is a

common form of discrimination and needs to be challenged as part of the struggle for equity in the workplace

### Challenging discrimination in the union

The struggle against discrimination also needs to be taken into the trade union. There is a long tradition of developing gender awareness and affirmative action in workers' organisations. This must be brought to life again as trade unions seek to mobilise their members against discrimination in the workplace. It is no good targeting the discrimination of employers if we still practice prejudice in our own backyards. Some trade unions have developed policy that seeks to integrate the struggle for equity in the workplace with struggles against discrimination in the union itself. (See NUM 1998 Discussion Paper *“Towards a Gender Perspective”* on the National Union of Mineworkers website [www.num.org.za](http://www.num.org.za))

An indication of gender patterns of discrimination in trade union employment can be seen in the following table. Women tend to dominate in administrative positions, but only make up a small percentage of organisers, secretaries, and legal, research, education, and media officers (taken from *Union Officials Survey in Agenda 40, 1999, p82*).



To what extent can we use the Act to ensure jobs are not allocated on the basis of any form of discrimination.



## Occupations in trade unions according to gender

Current position	Male	Female	Total	Female %
Local administrator	2	32	34	94
Branch administrator	1	24	25	96
Regional administrator	3	48	51	94
Head office administrator	5	53	58	91
Local organiser	79	7	86	8
Branch organiser	33	8	41	20
Regional organiser	46	6	50	12
National organiser	24	3	27	11
Branch secretary	17	4	21	19
Regional secretary	23	1	24	4
General secretary	10	0	10	0
Research officer	6	3	9	33
Regional legal officer	14	3	17	18
National legal officer	2	3	5	60
Branch education officer	4	0	4	0
Regional education officer	12	0	12	0
National education officer	11	3	14	21
Media officer	0	0	5	0
Other	43	40	83	48
<b>Total</b>	<b>340</b>	<b>238</b>	<b>578</b>	<b>41</b>

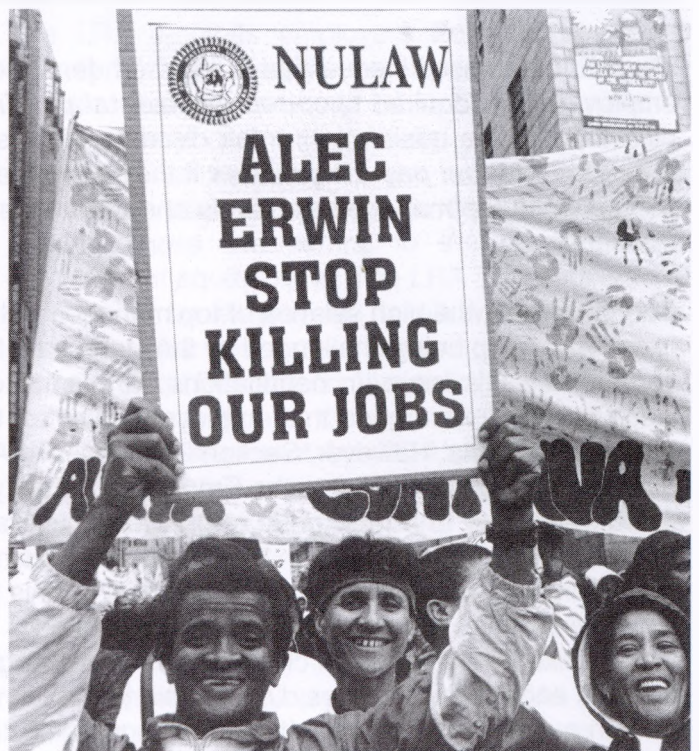


## EXPLORING WORKERS' EXPERIENCES OF DISCRIMINATION

*The following questions can be used to encourage discussion of discrimination in the workplace*

- What are your experiences of discrimination at the workplace, including:
  - Does your employer practice unfair discrimination in the selection and recruitment practices at your work?
  - Are some groups of people discriminated against with the wages and benefits that they receive?
  - Are there other conditions of employment where you have seen discrimination?
  - Do different groups of workers have access to different facilities in the workplace? Is the working environment the same for all employees?
  - Are some workers discriminated against in getting opportunities for advancement or promotion?
  - Are some workers discriminated against in getting opportunities for education and training? Do some employees get a chance to develop their skills while others do not?
  - What is the attitude and behaviour of management towards different groups of workers?
  - How do different groups of workers behave towards each other? Is there language or attitudes or actions which harm the dignity of any group of workers?
  - Do women workers experience harassment from management or from men workers?
- Where you see and experience discrimination and prejudice and unequal treatment, what do you think is the reason? Is it race, gender, class, religion, disability, language, educational qualifications, or anything else that you can recognise?
- What kind of positive affirmative action measures could be taken to stop these experiences of discrimination and which could give equality to those who have suffered discrimination?
- What are the best ways of getting rid of prejudice and discrimination amongst workers? How can the union help them to change their attitudes and behaviours?
- What examples of discrimination can we see in our trade union? What positive steps and affirmative action measures can we take to correct this?

In a shrinking job market can the law ensure equal opportunities for women in traditionally male jobs?



#### (4) Challenging class inequity – narrow the wage gap!

Much of the discrimination that workers experience – be it around their colour, culture, language, or lack of skill – is a class discrimination. Class inequalities in South Africa are wide and deep and they extend beyond the workplace into all aspects of social and economic life. As a class, workers suffer most from increasing job insecurity, from rising prices, and from declining public services.

In Chapter 2 we read about experiences of affirmative action policies in a number of countries. The biggest weakness of those programmes was that they did not challenge class inequalities. They brought about an integration of races and cultures within the skilled middle class, but this often happened alongside a deep gulf between the middle class and the working class. It is not enough to promote racial equality in the workplace or to promote skills development if the **wage gap** remains high, jobs are not being created, and if employment becomes increasingly insecure.

For affirmative action and employment equity plans to have a deep meaning in South Africa they must be part of a broader redistribution of wealth and transformation of society. This process clearly goes far beyond the aims of the EEA. But the EEA itself needs to confront class inequalities in the workplace. One of the most glaring features of class inequality in South African workplaces is the huge “wage gap” that is part of the legacy of apartheid capitalism.

At one end of the wide wage gap in South Africa is a concentration of low wages, low skill employment, job insecurity, and high unemployment, especially among Africans and women workers. At the other end are the highly paid, secure job opportunities of managerial and executive positions. These are monopolised by white men. The following table illustrates how wide the wage gap created by apartheid capitalism still is in South Africa:

(This table is adapted from a table on page 7 of *The Labour Research Service Report, Bargaining Indicators, LRS Vol 7, 2002, Directors Fees Survey and Economic Review*).

Sector:	Retail	Retail	Food and Beverages	Food and Beverages
Year:	2000	2001	2000	2001
Executive director:	R 1,471,732	R 1,674,915	R 965,667	R 1,262,194
Average minimum wage:	R 16,679	R 16,204	R 7,938	R 24,225
Ratio:	88	103	122	52

The EEA addresses inequalities in “pay” (understood as the total wage or salary package) in two ways. Firstly, employers are required to correct **horizontal pay inequalities** where workers doing the same work are paid differently on the basis of an unfair discrimination (such as race or gender). Secondly, employers are obliged to reduce **vertical pay inequalities** if they are based on unfair discrimination. However the gap in remuneration between top management levels and workers is enormous and needs to be challenged as a foundation of class inequity.

For employers, the high salaries of top management are felt as a personal affair and they are strongly resistant to the wage gap being challenged by the state or by trade unions. Even the original Employment Equity Bill was very soft on this issue. In negotiations on this issue, organised labour fought for a tougher challenge to the wage gap. Unions argued that employers must set targets for the narrowing of the wage gap in their employment equity plans. However, Section 27 of the final Act only requires designated employers to disclose income differentials (confidentially) to the Employment Equity Commission. Where these differences are determined by the Commission to be too great, employers must take measures to reduce the gap. The Act also allows the Minister of Labour and the Employment Equity Commission to make sectoral wage determinations and to set norms and guidelines for income differentials. This has not happened yet.

Trade unions face a major challenge in attempting to transform the huge inequity between top managerial salaries and workers’ wages. Unless this foundation of class discrimination is tackled, employment equity will remain superficial. Central to this challenge is the task of forcing employers to disclose information about all



levels of remuneration and to bring these to the table for collective bargaining.

### **(5) Linking the Employment Equity Act with other laws.**

In developing policy and plans for employment equity, trade unions need to take account of other legislation that links closely with the EEA. The EEA arises directly out of the rights established in the 1996 Constitution's Bill of Rights. It also connects closely with the basic rights offered to workers by the 1997 Basic Conditions of Employment Act (BCEA) and the 1995 Labour Relations Act (LRA). The Skills Development Act (SDA) of 1998 and the Promotion of Equality and Prohibition of Unfair Discrimination Act (PEPUDA) of 2000 have a direct relation to the EEA and need to be drawn on in negotiations for employment equity. In this section we point out the links between the EEA, the Constitution, the BCEA, and the LRA. We also present more depth on the SDA and PEPUDA so that unions can start to explore the links.



What access to the rights contained in the Employment Equity Act will women working in the informal sector be entitled to?

### **The EEA and the South African Constitution of 1996**

The 1996 Constitution contains a Bill of Rights which establishes the basic human rights of all South Africans. These rights include:

- The right to equality and human dignity
- The right to be free from discrimination and exploitation
- The right to earn a living
- The right to fair labour practices in the workplace

The equality provision of the Bill of Rights prohibits the state or any person from discriminating unfairly, directly or indirectly, against anyone on the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Subsection 2 of the equality provision also provides the foundation for affirmative action measures by permitting laws to be passed which will protect or advance people who have been discriminated against in the past.

### **The EEA and the Basic Conditions of Employment Act (BCEA) of 1997**

The BCEA sets minimum conditions of employment which are equal for all workers in all sectors, regardless of race, gender, disability or any other difference. This means that all workers share the same minimum basic rights in the workplace.

### **The EEA and the Labour Relations Act (LRA) of 1995**

The LRA prohibits employers from discriminating unfairly between employees. It prohibits unfair dismissals. Dismissals based on unfair discrimination or pregnancy are automatically unfair. Collective bargaining frameworks are also established by the LRA as are trade union rights to disclosure of information. These are central to the negotiation of employment equity plans. The LRA also outlines the procedures for employees to follow in taking up a case of unfair dismissal. Following the LRA is a Code of Good Practice on eliminating sexual harassment as a form of unfair discrimination. *The EEA and the Skills Development Act (SDA) of 1998.*

### **The struggle for Employment Equity requires skills development**

Discrimination and inequity in employment have historically been directly linked to the education and training (skills development) available to different social groups in South Africa. Not only have blacks



and women been denied access to education and training that would allow them wide employment opportunities, but there has also been no recognition of the knowledge that workers have gained in their life and work experience. The “skills crisis” in South Africa is the result of policies of exclusion and discrimination. It is estimated today that 45% of adult Africans cannot read or write. Skills development and the recognition of prior learning is central to the struggle for employment equity.

The development of the skills of South Africa’s workforce is an important part of the transformation of the apartheid labour market. As part of this challenge, the Skills Development Act (SDA) of 1998 is designed to remedy the legacy of de-skilling and racial access to education, training, and recognition of learning. As legislation, it is an important companion to the Employment Equity Act.

The SDA establishes learnerships which combine structured learning and work experience that allow for nationally recognised qualifications. These qualifications are intended to give workers wider job opportunities. The aim of learnerships is to bridge the gap between education and training in a way which promotes life-long learning. In order to finance skills development in the labour market, the SDA requires that employers pay a skills levy of 1% of their wage bill into a National Skills Fund. In debates around the Skills Development Bill, organised labour argued for a levy of 4%.

Historically the private sector in South Africa has spent very little on the development of employees’ skills. Workplace training that workers received usually did not result in any useful qualification. This made it extremely difficult for workers to move beyond the job or workplace that they were in. Workers have also been given very limited time off to attend education and training programmes outside of the workplace.

In order to develop and implement a National Skills Development Strategy, the SDA established a National Skills Authority (NSA) and twenty five Sector Education and Training Authorities (SETA’s).

*To give you a more in-depth picture of the challenge of skills development we present below an extract from the Skills Development Act of 1998 and an extract from the 2001 National Skills Development Strategy. Read these extracts and identify issues of skills development that your trade union could incorporate into affirmative action measures and an employment equity plan.*

## Extract from: The Skills Development Act of 1998

### 1) The purposes of this Act are-

- (a) to develop the skills of the South African workforce-
    - i. to improve the quality of life of workers, their prospects of work and labour mobility;
    - ii. to improve productivity in the workplace and the competitiveness of employers;
    - iii. to promote self-employment; and
    - iv. to improve the delivery of social services;
  - (b) to increase the levels of investment in education and training in the labour market and to improve the return on that investment;
  - (c) to encourage employers-
    - i. to use the workplace as an active learning environment;
    - ii. to provide employees with the opportunities to acquire new skills;
    - iii. to provide opportunities for new entrants to the labour market to gain work experience; and
    - iv. to employ persons who find it difficult to be employed;
  - (d) to encourage workers to participate in learnership and other training programmes;
  - (e) to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education;
  - ( f ) to ensure the quality of education and training in and for the workplace;
  - (g) to assist-
    - i. work-seekers to find work;
    - ii. retrenched workers to re-enter the labour market;
    - iii. employers to find qualified employees; and
  - (h) to provide and regulate employment services.
- (2) Those purposes are to be achieved by-
- (a) establishing an institutional and financial framework comprising-
    - i. the National Skills Authority;
    - ii. the National Skills Fund;
    - iii. a skills development levy-grant scheme as contemplated in the Skills Development Levies Act;
    - iv. Sector Education Training Authorities
    - v. labour centres; and
    - vi. the Skills Development Planning Unit;



- (b) encouraging partnerships between the public and private sectors of the economy to provide education and training in and for the workplace; and
- (c) co-operating with the South African Qualifications Authority.

*Extracts from: The National Skills Development Strategy, Feb 2001*

The vision of skills development is underpinned by **six guiding principles**:

**Lifelong learning:** communities and workplaces are changing continuously. If individuals are to shape these changes and take advantage of them to improve the quality of their lives, they need to upgrade and improve their skills continuously

**The promotion of equity:** there are not only legacies to be erased but positive interventions are demanded if we are to build an inclusive society and widen opportunities.

**Demand-led:** for too long skills development has been pursued in the absence of a realistic assessment of how the skills are to be employed. The emphasis will be on the skills and competencies required to support productivity, international competitiveness, the mobility of workers, self-employment and meeting defined and articulated community needs.

**Flexibility and decentralisation:** the role of Government and the National Skills Authority is to provide the framework, direction and coordination for the skills strategy and to monitor its implementation. Public and private employers and workers are best placed to make judgments about priorities and to determine the most effective providers to meet those needs.

**Partnership and cooperation:** at national, sector, provincial, community and workplace levels the definition and implementation of the skills development strategy should be based on partnerships between and amongst the social constituencies

**Efficiency and effectiveness:** the delivery of skills development programmes and initiatives must be characterised by cost-efficiency and should lead to positive outcomes for all those who invest in training and skills development.

The Minister of Labour has adopted five objectives for the National Skills Development Strategy. For each objective, targets or success indicators have been set. Central to the achievement of objectives and targets is the pursuit of equity. The social cohesion and elimination of poverty for which our society yearns will not be achieved without tackling endemic problems of racial and gender inequalities and negative discrimination. The following national targets are therefore adopted for the beneficiaries of learning programmes across the five objectives: 85 per cent to be black; 54 per cent to be female; 4 per cent to be people with disabilities.

The first two of the five objectives of the National Skills Development Strategy are immediately important for employed workers. The others relate to small businesses, social projects, and new entrants to employment.

### **Objective 1: Developing a culture of high quality life-long learning**

1.1 By March 2005, 70 per cent of all workers have at least a Level One qualification on the National Qualifications Framework

1.2 By March 2005, a minimum of 15 per cent of workers to have embarked on a structured skills learning programme, of whom at least 50 per cent have completed their programme satisfactorily

1.3 By March 2005, an average of 20 enterprises per sector (to include large, medium and small enterprises), and at least five national government departments, to be committed to, or have achieved, an agreed national standard for enterprise-based, people development.

### **Objective 2: Fostering skills development in the formal economy for productivity and employment growth**

2.1 By March 2005, 75 per cent of enterprises with more than 150 workers are receiving skills development grants and the contributions towards productivity and employer and employee benefits are measured

2.2 By March 2005, at least 40 per cent of enterprises employing between 50 and 150 workers are receiving skills development grants, and the contributions towards productivity and employer and employee benefits are measured

2.4 By March 2005, learnerships are available to workers in every sector (Precise targets will be agreed with each SETA).

2.5 By March 2005, all government departments assess and report on budgeted expenditure for skills development relevant to Public Service, Sector and Departmental priorities

### **The EEA and the Promotion of Equality and Prohibition of Unfair Discrimination Act of 2000**

The Promotion of Equality Act gives workers a weapon to combat unfair discrimination, both in the workplace and society at large. It can be used alongside the Employment Equity Act. The Promotion of Equality Act requires the state to take certain measures to promote equality. This includes the drawing up by all ministers of equality plans to combat unfair discrimination and inequality, and where necessary to introduce legislation.

The Act prohibits unfair discrimination based on various grounds. Special emphasis is placed on measures to com-



but unfair discrimination and promote equality on the grounds of race, gender and disability.

The Act applies to the state and all people, including private bodies. *Workers experiencing discrimination in the workplace who are not covered by the EEA are covered by the Promotion of Equality Act. This includes members of the Defence Force. It also includes workers who are employed by businesses that are not “designated employers” in terms of the EEA. Employers who are not designated employers are those who employ less than 50 employees and whose annual turnover is less than that specified in Schedule 4 of the EEA. Those employers do not have to draw up employment equity plans, but they must follow the Promotion of Equality Act.*

Section 27 of the Promotion of Equality Act establishes a general duty on all people to promote equality. It goes further to mandate the Minister of Justice and the relevant Minister to develop regulations which may require any company, closed corporation, partnership etc. to develop equity plans. The Minister of Labour therefore has a responsibility to develop regulations for small businesses that are not covered by the EEA.

Anyone who believes they have been discriminated against may approach one of the equality courts set up under this Act. They can make a case provided they are able to set out the facts showing that an act of discrimination took place. The case may also be brought by people or organisations (such as trade unions) acting in the interest of an individual or a group of people. In the court, it is the person or body that allegedly acted in a discriminatory way who has to prove that the action was not unfair.

In terms of section 21 of the Promotion of Equality Act, the court is empowered to make a wide range of orders if it finds in favour of the complainant. This can include an order to end unfair discriminatory practices or the awarding of damages to the person or people who suffered discrimination.

The schedule to this Act lists examples of unfair practices in certain 'sectors' to illustrate the type of unfair discrimination the Act is intended to combat. The sectors listed include labour and employment, education, health services, housing and land, insurance, pensions and provision of services.

The Promotion of Equality Act prohibits hate speech as a form of unfair discrimination. Hate speech is where speech (or written words) is based on any of the prohibited grounds of discrimination and is intended to be hurtful or intended to encourage hatred.

## **(6) Developing a trade union initiative on the EEA**

To develop policy on employment equity trade unions need to take a process of education, discussion, and policy development to their members. Unions will have different ways of approaching this. What is important is that workers are empowered to see the struggle against discrimination and for employment equity as a process that they can shape. The EEA gives responsibility for this to the employers. Unions need to facilitate a process where they can develop a working class perspective on affirmative action and mobilise workers to engage employers on the development of employment equity plans.

***In this section we present three exercises. It is important that you progress through the three exercises in order because each one will help you with the next.***

***These exercises are best done in groups.***

### **EXERCISE ONE: AFFIRMATIVE ACTION MEASURES**

#### **IN THE EMPLOYMENT EQUITY ACT**

*Read through Sections 12 to 20, and Section 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 the workforce.



## EXERCISE TWO: DEVELOPING AN EMPLOYMENT EQUITY PLAN FOR YOUR WORKPLACE

*When you do this exercise you do not need to stick to the requirements of the EEA concerning employment equity plans. Be creative and use your imagination. Imagine that you have a free hand to design the programme that you think best suits the needs of workers in your workplace. Also see if you can incorporate what you know about the opportunities offered by the Skills Development Act.*

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 of your programme. In doing this consider the following questions:

- How would you set about achieving equity in your workplace?
- How would you combat common experiences of discrimination?
- What affirmative action measures would you include in your programme?
- Who are the people who would benefit?
- What goals would you establish?
- What time periods would you allow for these measures to be implemented and the goals to be reached?
- Who would implement these measures?
- Who would monitor progress?
- What role would the employer play?
- What role would your trade union play?

## EXERCISE THREE: DEVELOPING YOUR UNION RESPONSE TO THE EMPLOYMENT EQUITY ACT

*The Employment Equity Act requires that designated employers develop affirmative action measures and employment equity plans. The union, and shop stewards in particular, will be pressurised to get involved.*

1. What opportunities does the EEA open up for workers?
2. As a union, should we get involved in affirmative action initiatives through the EEA?  
Mentor fully.
3. What are the main pitfalls in the EEA from the point of view of workers and our trade union?
4. What are our weaknesses in the union in terms of participating in implementing the EEA?
5. In what ways can we overcome these problems and weaknesses to ensure that affirmative action and employment equity plans are in keeping with the interests of the majority of workers and in keeping with trade union objectives?
6. Based on your discussion of the above questions, draft a resolution for your trade union that will guide its role and that of shop-stewards and members in relation to implementing the Employment Equity Act at the workplace.



# APPENDIX ONE

## EMPLOYER RESISTANCE TO THE IMPLEMENTATION OF THE EMPLOYMENT EQUITY ACT



### (a) FEDUSA: Employment Equity – South Africa's challenge. FEDUSA "Debate" No 1, 2001

An analysis of employment equity plans shows that there has been no significant improvement in the status quo in the workplace since 1998. In terms of senior management positions, white males still dominate, with only 24 percent women being found at these levels. Black entries have increased by only 0,2 percent and disabled entries have decreased by 0,6 percent.

These statistics were released by the Minister of Labour, Membathisi Mdladlana, and the Director General, Advocate Rams Ramashia at a meeting called to launch the Employment Equity Registry.

*"The non-commitment of employers (to employment equity) is illustrated by the fact that only 60 percent of companies, employing over 150 people, met the 1 June deadline for the submission of their employment equity reports," the minister said. Although a statutory requirement, 23 percent of the reports submitted were not signed by CEOs.*

*"The non-commitment of executive officers to equity can be attributed to two things: either the absence of the belief that equity in the workplace is good business sense or the lack of political will to embark upon the painful and traumatic processes that change always brings," the minister said.*

The director general also said that without the visible participation of CEOs in the process to achieve equity, there could be no **"employee buy-in and participation, nor the integration of employment equity planning into the core business of a company."**

Best practice affirmative action measures are not add-on measures aimed only at designated groups. They aim to enhance good management and human resource development for all staff.

The minister urged employees to use the rights bestowed on them by the Employment Equity Act and constitution to get involved in the employment equity process and to speak out against discrimination and barriers to progress



### (b) Some of the negative attitudes of employers towards the Employment Equity Act.

**Extracts from COSATU'S booklet: "Employment Equity: An introductory workshop for trade unionists"**

- Employers often see their employment policies as their own private affair. They do not want to be accountable over their recruitment, selection, promotion, discipline, training and firing of their workforce.

- Employers are likely to try a variety of strategies like outsourcing, labour brokers, and creative accounting in relation to turnover, in order to avoid being classified as "designated employers".
- Only a minority of employers see the economic and human resource potential of affirmative action and skills development.
- Employers were initially scared of being forced into affirmative action. They spoke of the dangers of "dropping standards". They are happier now that the EEA only requires them to apply affirmative action towards those who are "suitably qualified". The EEA gives employers a good deal of authority to decide who is "suitably qualified."
- Employers are relieved that the EEA focuses on "reasonable progress" to "equitable representation" of "suitably qualified" people in relation to the applicable "labour pool".
- Employers were concerned that they will not be "worldclass" if they have to compromise performance standards in the name of affirmative action. Now they are likely to get tougher on poor performance, using the potential dismissal route in the Labour Relations Act.
- Employers have not been happy with the administrative burden placed on them by the EEA and are feeling pressurised by the timetable for developing measures to prevent unfair discrimination cases, for drawing up a profile of their workforce, and for development of an employment equity plan.
- Employers are likely to resist negotiations with trade unions on their employment equity plans. They are more likely to interpret "consultation" to mean that they drive the process and keep the unions informed.
- Employers are not happy with the fines for non-compliance with the EEA as set out in Schedule 1 of the Act. But they do not think that the government is capable of very effective monitoring. They are more likely to see union activism around employment equity issues as a threat to their autonomy in work places.
- Employers are likely to define the size and location of the labour pool that they draw from quite narrowly so that they do not have to alter their employment practices too much.
- Employers are likely to hold on to existing deep discriminatory attitudes in society. For example, they could argue that because of the relative lack of women employed in the mining sector they are not obliged to seek out suitably qualified women.
- Employers have strongly opposed pressure to report on wage levels and income differentials. They say this information should not be part of the employment equity plan and is a private matter between employers and the Department of Labour. They are likely to try to limit trade union access to this information.

### (c) COSATU submission on the Employment Equity Act to the Portfolio Committee on Labour – 11 April 2000

**From: Assessment of Progress in Implementing the EEA**

#### Hostility to the EEA

1. The survey reveals a number of positive and negative trends. There is entrenched hostility towards employment equity by employers and conservative trade unions in some sectors. The role of opposition parties in fuelling such hostile attitudes should also be taken into account. SACCABU and NUMSA (particularly in the motor retail sector) indicate that some employers are either totally hostile to employment equity or do not involve unions and workers in the assessment of the workplace as required by the EEA. In one instance, SACCABU has declared



a dispute with an employer on this issue. The hostility is to be expected given the fact that the Act directly challenges inherited privileges. This underlines the need for systematic programme to implement the legislation. While it is important to address legitimate fears and suspicion through a process of education and training. This should not result in further delay in the implementation of the law.

2. Despite the fact that Public Service has an affirmative action policy in addition to the EEA, employment equity has not received the necessary attention in the Public Service Co-ordinating Bargaining Council (PSCBC). In some cases, such as the Motor Retail sector employers have indicated that they will act once the law is in place when the union demanded discussions on affirmative action. This argument indicates the employer's fundamental opposition to employment equity and absence of legislation is used as a scapegoat. The need for legislative interventions to address past imbalance is vindicated by obstructive actions.

#### **(d) COSATU's response to the Employment Equity Act Report.**

##### **COSATU Communications Department. Media Release – 3 October 2000**

COSATU's response to the failure of employers to comply with the Employment Equity Act (EEA)

COSATU is very disappointed with the report, released by the Minister of Labour yesterday, that 1 700 large employers have not submitted reports on their plans to comply with the Employment Equity Act 1998.

The reports, which include progress made by the employer in dealing with the issue of equity at the workplace, were supposed to be submitted by 1 June 2000. According to the Unemployment Insurance fund database, about 3 000 employers submitted reports, though only 2 000 were correctly filled in and on time.

This failure by big employers to meet the deadline calls for rigorous intervention by the Department of Labour. It also signals failure by big employers to take the necessary steps to address inequalities in the workplace.

It is now incumbent upon the department of labour to ensure that all employers meet the 1 December deadline. Further the Department must put in place mechanisms to ensure compliance, including invoking the sanctions contained in the EEA.

The rule of law needs to be respected by all in the country. Employers cannot be allowed to make a mockery of the law by not complying. First it was the Skills Development Act. Now it is the EEA. This is a symptom of a general problem of employers refusing to comply with labour laws.

These pieces of legislation came into being as a result of a hard-fought struggle by the entire working class of our country. COSATU will not tolerate non-compliance in any form by employers.



#### **(e) NUMSA press release – 500 Denel workers to protest over employment equity.**

##### **COSATU Communications Department. NUMSA media statement – 16 May 2001**

Today, close to 500 workers from Denel division Vektor –arms making company are to protest over the employment equity, transformation and re-alignment. The protest action will start at 12h00 at the company gates (Centurion, Selborne Avenue – Littleton). In the main, the concerns of workers are on the following issues:

- Failure of the company to implement what was agreed in the Restructuring Transformation Team, that black workers will also be promoted to better positions as per the Employment Equity Act.
- Failure of the company to train black workers as per the agreement and the Skills Development Act. The company has deliberately promoted and transferred white workers in higher positions. White workers are deployed and transferred in protected divisions as to avoid retrenchments as per the restructuring plans of the workers.
- That black workers are forcefully removed from protected jobs. Better jobs are only reserved for whites. The company has been reluctant to comply with the Skills Development Act and Employment Equity Act.
- That the management of the company has colluded with the white unions to marginalise other unions.

The majority of the workers have vowed to continue with the protest the rest of the week until management accedes to their concerns. They will also mobilise the other workers in the Denel plants to join the protest. The union is highly disappointed because it is a state company that is supposed to comply with all the Acts. They do not have to be selective in complying with the Acts. The company must empower all workers and widen choices of jobs available. They must give confidence to all agreements and stop discrimination of workers.

NUMSA believes that the company should not attempt to implement the policy of enforced segregation and white supremacy on the workers because that is an immoral and inhuman act. The union has recognised with regret that, at times, some managers deviated from the company good principles of promoting employment equity. This is done with the acquiescence of the white unions. Such activities undermine the company integrity and do not inspire a high morale amongst workers. We appeal for a sense of commitment to agreements and the Acts.

#### **(f) NUMSA declares "war" on 2001 wage bargaining negotiations**

The union has noted with regrets and disappointment that the wages and working conditions of Engineering, Automobile, Motor and Tyre sectors have not improved drastically. Most of the lower earning workers continuously receive meagre and exploitative wages. The employers have not been prepared to close the apartheid wage gap.

Employers have continued to dismiss workers through restructuring, outsourcing, mergers, fraudulent liquidation's and sub-contracting. Some employers have not taken the HIV/AIDS issue as priority. Employers have been reluctant to invest in training and education, including basic skills training, in spite of the existence of the legislation on skills development plan. Health and Safety has not improved tremendously. Many employers are still reluctant to comply with the Employment Equity Plans.

Bargaining is going to be tough this year. Employers, especially in engineering, are preparing themselves for a continued downturn in the economy. Already warning lights are sounding in the USA and other economies that a recession is coming.



# APPENDIX TWO

## THE FIRST ANNUAL REPORT OF THE COMMISSION FOR EMPLOYMENT EQUITY - AUGUST 2001

Section 28 of the Employment Equity Act of 1998 established a Commission for Employment Equity (CEE) which is responsible for advising the Minister of Labour on policy and practice in employment equity. Monitoring the implementation of the EEA and ensuring employers' compliance is one of the key functions of the CEE.

In August 2001 the CEE published its first report following the submission of employment equity plans (according to Section 21 of the EEA) by employers. By March 2001 the CEE had received reports from 12 980 employers employing over 3 million workers. The CEE report covered two areas:

- the activities of the Commission since it was established in 1999, and
- an analysis of the information provided by designated employers in their analyses of their workplaces and in their reports on progress made towards employment equity.

In addition, the Department of Labour has developed an Employment Equity Register. It is a database which contains information on employer details, worker numbers and a workplace profile of how designated groups of employers are represented. This Register is made public through publication in the Government Gazette, so that the compliance and progress of employers can be publicly monitored.

*A complete database of analysis tables and graphs containing information from employer reports can be found on the Department of Labour website: [www.labour.gov.za](http://www.labour.gov.za). This information allows unions to compare the profiles and plans provided by employers according to company size, industry, sector, and geographical location.*

### The main activities of the Commission for Employment Equity between May 1999 and April 2001

- The development of employment equity regulations according to Section 55 of the EEA.
- The publication of a Public Register of all employers who submitted reports following the deadlines set out in Section 21 of the EEA.
- The development of three Codes of Good Practice:
  - \* A Code of Good Practice on the Preparation, Implementation and Monitoring of Employment Equity Plans
  - \* A Code of Good Practice on Key Aspects of HIV/AIDS and Employment
  - \* A Code of Good Practice on Key Aspects of Disability at the Workplace
- The publication of various accessible summaries and user guides to the EEA.

*The Codes of Good Practice and Regulations developed by the Commission for Employment Equity, as well as a range of other documents relating to the Employment Equity Act, can be found on the Department of Labour website: [www.labour.gov.za](http://www.labour.gov.za)*

### The state of employment equity in 2001

*(The following information was taken from the reports submitted by the more than 8 thousand employers across all sectors of the economy who reported correctly to the Department of Labour.)*

### The representation of blacks, women, and people with disabilities in employment

#### (a) In management level and professional jobs:

- Men hold 87% of all top management jobs and 80% of senior management jobs.
- Women only hold 12,5% of top management jobs.
- African women only hold 1,2% of top management jobs.
- Women occupy 37,6% of all management and professional jobs.
- Blacks only hold 12,6% of top management positions – 6,2% are African, 3,7% are Indian, and 2,7% are Coloured.
- Below top management, at senior management level, Whites hold 81,6% of positions, Africans 8,7%, Coloureds 4,9%, and Indians 4,8%.
- Combining all levels of management and professional employment, Africans hold 27,3% of all jobs, Coloureds 5%, Indians 5,5%, and Whites 62%.

#### (b) In skilled technical, junior management, and supervisory jobs:

- 60% of all skilled positions are held by men.
- African women hold 11,3% of all skilled jobs, Coloured women 6,7%, and Indian women 5,6%.
- Africans hold 58,9% of skilled jobs, Whites 18%, Coloureds 17,7%, and Indians 5,6%.

#### (c) In semi-skilled and unskilled jobs:

- Men hold 61% of all semi-skilled jobs and 71% of all unskilled jobs.
- African women hold 15% of all semi-skilled jobs.
- Africans hold 58% of all semi-skilled jobs.
- African workers make up 83% of all semi and unskilled jobs.
- Black workers make up 82% of all semi-skilled jobs.
- Black workers make up 98% of all unskilled jobs.

**Note:** People with disabilities made up about 1% of jobs in all occupations.

### Trends in recruitment, promotion, and jobs loss and gain

- Recruitment to all jobs in 2000: 60% were men; 73% were black.
- Recruitment to management jobs in 2000: 63% were men; 33% were black.
- 65% of all promotions went to men; 47% went to Africans.
- 65% of promotions in management jobs went to men.
- 38% of promotions in skilled jobs went to Africans.
- 89% of promotions in professional jobs went to Whites.
- 91% of promotions in top and senior management went to Whites (17% were white women).
- Of all jobs lost in 2000, 68% were men.
- Africans made up 53,2% of lost jobs, Coloureds 13,8%, Indians 4,1%, and Whites 29%.
- In the sample, a total of 28 213 jobs were lost in 2000. Over half of these were African workers.



For more detailed information coming from the reports by employers and for an analysis of sector and provincial trends, consult the *Commission of Employment Equity Full Report of 2001*, and the *Executive Summary on the Department of Labour Website: [www.labour.gov.za](http://www.labour.gov.za)*

## **Conclusions of the Commission for Employment Equity**

- Many employers have responded positively to the challenge of complying with the EEA as an effort to end inequality in the workplace.
- The employer reports show that many employers do not fully understand their legal obligations nor have they fully embraced the spirit of the legislation. Although they did well to provide a picture of their workplace, they offered little in the way of creative plans or goal setting.
- Some companies have however, clearly integrated the challenge of employment equity into their strategies for increasing productivity, human resource development, and global economic competitiveness.
- The reports indicate that a legacy of racial and gender stratification still exists strongly in the work place. Generally, black people and women are grossly under-represented in top and senior management. Workplace segregation along racial and gender lines persists. Also women and blacks are over-represented in bottom level occupations that have historically been undervalued and underpaid. Even where progress is evident, such as in professional occupations, it is likely that most of the black and women advancement is at the lower levels of professions.
- The information provided by employer reports on employees with disabilities was limited and inconsistent.



# APPENDIX THREE

## CODE OF GOOD PRACTICE: PREPARATION, IMPLEMENTATION AND MONITORING OF EMPLOYMENT EQUITY PLANS

### CONTENTS

1. Objective
2. Legal Framework
3. Scope
4. Purpose and rationale for the plan
5. Structure of the plan
6. Process for constructing a plan
7. Planning phase
8. Developing the plan
9. Monitoring and evaluating the plan

### 1. OBJECTIVE

The objective of this code is to provide guidelines of good practice, in terms of the requirements of the Employment Equity Act, 1998 (Act No 55 of 1998) (hereafter referred to as "the Act"), for the preparation and implementation of an employment equity plan (hereafter referred to as "the plan").

### 2. LEGAL FRAMEWORK

- 2.1 This code is issued in terms of Section 54 of the Employment Equity Act, No. 55 of 1998 and relates to Section 20.
- 2.2 This code does not impose any legal obligations in addition to those in the Act and the failure to observe it does not, by itself, render a designated employer liable in any proceedings, except where the code refers to obligations that are required by the Act
- 2.3 When interpreting the Act, any relevant code of good practice must be taken into account.<sup>1</sup>

### 3. SCOPE

- 3.1 This code is relevant to all employers that are regarded as designated employers in the Act.<sup>2</sup>
- 3.2 Designated employers and the employees of designated employers should apply the guidelines set out in this code to develop their employment equity plans, taking into account the specific circumstances of their own organisations.
- 3.3 This code may be read in conjunction with other codes of good practice that may be issued by the Minister of Labour.

### 4. PURPOSE AND RATIONALE FOR THE PLAN

- 4.1 The plan reflects a designated employer's employment equity implementation programme.
- 4.2 The plan represents the critical link between the current workforce profile and possible barriers in employment policies and procedures, and the implementation of remedial steps to ultimately result in employment equity in the workplace.

### 5. STRUCTURE OF THE PLAN

- 5.1 The plan may be a separate document or a component of a broader document such as a business plan.
- 5.2 In terms of the manner in which it is set out, the plan may closely follow the sections of the Act and the relevant items of the Code, or may be organised differently, as long as the statutory requirements in Section 20 of the Act are reflected in the plan.
- 5.3 The plan should be accessible and structured in such a way that it is easy to understand.

### 6. PROCESS FOR CONSTRUCTING A PLAN

- 6.1 The development of a plan should be undertaken as an inclusive process that will result in a documented plan.
- 6.2 The process of developing a plan has three sequential phases: planning, development, and implementation and monitoring.
- 6.3 The planning phase of the process should include –
  - assignment of responsibility and accountability to one or more senior managers;
  - a communication, awareness and training programme;
  - consultation with relevant stakeholders;
  - an analysis of existing employment policies, procedures, and practices;
  - an analysis of the existing workforce profile;
  - an analysis of relevant demographic information such as that contained in form EEA 8, and
  - an appropriate benchmarking exercise, such as comparing the organisation's workforce profile with those of other organisations with in the same sector, or the development of other meaningful comparisons.
- 6.4 In the development phase, in consultation with the identified role players, should include –
  - objectives set;
  - corrective measures formulated;
  - time frames established;
  - the plan drawn up;
  - resources identified and allocated for the implementation of the plan, and
  - the plan communicated.
- 6.5 Implementation and monitoring is an ongoing process and should continue to include components of the earlier phases, such as consultation, communication, awareness and training. This phase should include –
  - implementation
  - monitoring and evaluating progress;
  - reviewing the plan, and
  - reporting on progress.

### 7. PLANNING PHASE

- 7.1 Assignment of senior manager<sup>3</sup>
- 7.1.1 The planning phase should commence with the assignment of one or more senior managers who should have the responsibility for the development, implementation and monitoring of the plan. They should:
  - be permanent employees, and
  - report directly to the Chief Executive Officer.
- 7.1.2 The assignment of one or more senior managers implies that –
  - the employer should also provide the assigned managers with the necessary authority and means, such as an appropriate budget, to perform their allocated functions;
  - the employer is not relieved of any duty imposed by this Act or any other law, and
  - the employer should take reasonable steps to ensure that these managers perform their allocated functions. This could be done through the incorporation of key employment equity outcomes in performance contracts of the responsible managers as well as line managers throughout the organisation.
- 7.2 **Communication, Awareness and Consultation**<sup>4</sup>
- 7.2.1 All employees should be made aware and informed of –



- the content and application of the Act as preparation for their participation and consultation;
  - employment equity and anti-discrimination issues;
  - the proposed process to be followed by the employer;
  - the advantages to employees of participation in the process, and
  - the need for the involvement of all stake holders in order to promote positive outcomes.
- 7.2.2 Employers are required to consult with regard to conducting an analysis, the preparation and implementation of the plan, and the submission of employment equity reports to the Department of Labour.
- 7.2.3 To ensure the successful implementation of a plan, employers should make every effort to include employee representatives in all aspects of the plan, especially the planning and development phases.
- 7.2.4 Managers should be informed of their obligations in terms of the Act, and training should be provided to them where particular skills do not exist. Examples of required training could include diversity management, coaching and mentoring programmes.
- 7.2.5 The communication of an employment equity strategy should focus on positive outcomes, such as the better utilisation of all of the employer's human resources and the creation of a diverse and more productive workforce.
- 7.2.6 Communication should also include employees from non-designated groups <sup>5</sup> and focus on the contribution that can be made by them.
- 7.2.7 Consultation with employees should commence as early as possible in the process.
- 7.2.8 A consultative forum should be established or an existing forum utilised. The forum should include employee representatives reflecting the interests of employees from both designated and non-designated groups and across all occupational categories and levels of the workforce. Representative trade unions, where these exist, or representatives nominated by such trade unions must be included in the consultation process.
- 7.2.9 The employer should be represented by one or more members of senior management.
- 7.2.10 Consultation would include –
- 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 these steps.
- 7.2.11 To ensure an informed and constructive consultation process, structured and regular meetings of the consultative forum or forums should be held.
- 7.2.12 The disclosure of relevant information by designated employers is vital for the successful implementation of the plan. Such information could include –
- the particular business environment and circumstances of the employer;
  - information relating to the relevant economic sector or industry;
  - relevant local, regional, and national demographic information relating to 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 the designated groups;
  - the degree of representation of designated employees in each occupational category and level in the employer's workforce, and
  - employment policies and practices of the employer.
- 7.2.13 All parties should, in all good faith, keep an open mind throughout the process and seriously consider proposals put forward.
- 7.2.14 Where a representative body or trade union refuses to take part in the consultation process, the employer should record the circumstances, in writing, including those steps that the employer has taken to communicate and initiate the consultation process. A copy of this document should be provided to the representative body or trade union concerned.
- ### 7.3 Conducting an analysis <sup>6</sup>
- The purpose of the analysis is –
- a. to assess all employment policies, practices, procedures, and the working environment so as to –
    - identify any barriers that may contribute to the under-representation or underutilisation of employees from the designated groups;
    - identify any barriers or factors that may contribute to the lack of affirmation of diversity in the workplace;
    - identify other employment conditions that may adversely affect designated groups;
    - identify practices or factors that positively promote employment equity and diversity in the workplace; and
  - b. to determine the extent of under-representation of employees from the designated groups in the different occupational categories and levels of the employer's workforce. While the first type of analysis is of a more qualitative and legal nature, the second is mainly a statistical and data processing exercise.
- 7.3.1 Review of employment policies, practices, procedures, and working environment. A review of all employment policies, practices, procedures, and of the working environment should be undertaken in order to identify any barriers that may be responsible for the under-representation or under-utilisation of employees from designated groups.
- a. The review should include a critical examination of all established policies, practices, procedures and working environment. These would include –
    - employment policy or practices, such as recruitment, selection, pre-employment testing, and induction that could be biased, inappropriate, or unaffirming;
    - practices related to succession and experience planning, and related promotions and transfers to establish whether designated groups are excluded or adversely impacted;
    - utilisation and job assignments to establish whether designated groups are able to meaningfully participate and contribute;
    - current training and development methodologies and strategies, including access to training for designated groups;
    - remuneration structures and practices such as equal remuneration for work of equal value;
    - employee benefits related to retirement, risk, and medical aid to establish whether designated groups have equal access;
    - disciplinary practices that may have a disproportionately adverse effect on designated groups and that may not be justified;
    - working conditions that may not accommodate cultural or religious differences, such as the use of traditional healers and observance of religious holidays;
    - the number and nature of dismissals, voluntary terminations and retrenchments of employees from designated groups that may indicate internal or external equity-related factors contributing to such terminations;



- corporate culture, which may be characterised by exclusionary social and other practices;
- practices relating to the management of HIV/AIDS in the workplace, to ensure that people living with HIV/AIDS are not discriminated against, and
- any other practices or conditions that are tabled arising out of the consultative process.

b. All practices should be assessed in terms of cross-cultural and gender fairness.

c. The review should take into account more subtle or indirect forms of discrimination and stereo-typing which could result in certain groups of people not being employed in particular jobs, or which could preclude people from being promoted. Examples would include pregnancy, family responsibility <sup>7</sup>, exclusionary social practices, sexual harassment, and religious or cultural beliefs and practices.

### 7.3.2 Workforce profile

a. The first step in conducting an analysis of the workforce profile is to establish which employees are members of designated groups. This information should be obtained from employees themselves, either from a declaration as provided for in Regulation 2(1) or from existing and dependable sources. An example of an existing and dependable source would be an employer's database that contains the information required on employment application forms. If such existing records are utilised for this purpose, each employee should have the opportunity to verify or request changes to this information.

b. An analysis of the workforce profile should provide a comparison of designated groups by occupational categories and levels to relevant demographic data. Form EEA 8 contains some demographic data for this purpose, but there are many other sources of information that could be utilised and might be more relevant.

c. In addition to the 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.

d. Recruitment areas may vary depending upon the level of responsibility and 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.

e. The standard occupational classification as defined in form EEA 10 should form the basis for determining occupational categories. Occupational levels could be determined by any of the professional job grading systems (Paterson, Peromnes, Hay, etc.) or their equivalents as detailed in form EEA 9. In the absence of a formal job grading system, designated employers may use equivalent occupational levels as the basis for the workforce analysis.

f. Sections B and C of the Employment Equity Report as defined by form EEA 2 should guide employers in establishing information requirements to develop a plan, and provide the basis for developing a workforce profile.

## 8. DEVELOPING THE PLAN

### 8.1 Duration of the plan <sup>8</sup>

The duration of the plan should be for a period that will allow the employer to make reasonable progress towards achieving employment equity. This period should be no shorter than one year and no longer than five years, as specified in the Act.

### 8.2 Broad objectives of the plan

The broad objectives of the plan should be specified and a timetable developed for the fulfilment of each objective.

These objectives should -

- take into account the output of the planning phase;
- the particular circumstances of the employer, and
- be aligned with and included in the broader business strategy of the employer.

### 8.3 Affirmative action measures <sup>9</sup>

8.3.1 Affirmative action measures, to address the barriers identified during the analysis, should be developed to improve the under-representation of designated group members.

Such measures relate to, but are not limited to the following:

#### • **Appointment of members from designated groups**

This would include transparent recruitment strategies such as appropriate and unbiased selection criteria and selection panels, and targeted advertising.

#### • **Increasing the pool of available candidates**

Community investment and bridging programmes can increase the number of potential candidates.

#### • **Training and development of people from designated groups**

These measures include access to training by members of designated groups, structured training and development programmes like learnerships and internships; on the job mentoring and coaching, and accelerated training for new recruits. Where required, diversity training should be provided to responsible managers as well as training in coaching and mentoring skills.

#### • **Promotion of people from designated groups**

This could form part of structured succession and experience planning and would include appropriate and accelerated training.

#### • **Retention of people from designated groups**

Retention strategies would include the promotion of a more diverse organisational culture; an interactive communication and feedback strategy; and ongoing labour turnover analysis.

#### • **Reasonable accommodation<sup>10</sup> for people from designated groups**

These measures include providing an enabling environment for disabled workers and workers with family responsibilities so that they may participate fully and, in so doing, improve productivity.

Examples of reasonable accommodation are accessible working areas, modifications to buildings and facilities, and flexible working hours where these can be accommodated.

#### • **Steps to ensure that members of designated groups are appointed in such positions that they are able to meaningfully participate in corporate decision making processes**

A conscious effort should be made to avoid all forms of tokenism. Candidates must be appointed with commensurate degrees of authority.

#### • **Steps to ensure that the corporate culture of the past is transformed in a way that affirms diversity in the workplace and harnesses the potential of all employees**

Such steps could include programmes for all staff, including management, contextualising employment equity and sensitising employees with regard to the grounds of discrimination such as race, diversity, gender, disability, and religious accommodation.

#### • **Any other measures arising out of the consultative process**

8.3.2 All corrective measures to eliminate any barriers identified during the analysis should be specified in the plan.

8.3.3 The employer is under no obligation to introduce an absolute barrier relating to people who are not from design-



nated groups, for example having a policy of not considering white males at all for promotion or excluding them from applying for vacant positions.

#### 8.4 Numerical goals <sup>11</sup>

8.4.1 Numerical goals should be developed for the appointment and promotion of people from designated groups. The purpose of these goals would be to increase the representation of people from designated groups in each occupational category and level in the employer's workforce, where underrepresentation has been identified and to make the workforce reflective of the relevant demographics as provided for in form EEA 8.

8.4.2 In developing the numerical goals, the following factors should be taken into consideration –

- The degree of under-representation of employees from designated groups in each occupational category and level in the employer's workforce;
- present and planned vacancies;
- the provincial and national economically active population as presented in form EEA 8;
- the pool of suitably qualified persons from designated groups, from which the employer may be reasonably expected to draw for recruitment purposes;
- present and anticipated economic and financial factors relevant to the industry in which the employer operates;
- economic and financial circumstances of the employer;
- the anticipated growth or reduction in the employer's workforce during the time period for the goals;
- the expected turnover of employees in the employer's workforce during the time period for the goals, and
- labour turnover trends and underlying reasons, specifically for employees from designated groups.

#### 8.5 Consensus

In setting objectives and developing corrective measures, parties to the consultative processes should attempt to reach consensus on what would constitute reasonable progress over the duration of the plan.

#### 8.6 Resources

Resources, including budgets, should be appropriately allocated in order to implement the agreed components of the plan.

#### 8.7 Assignment of responsibility

Responsibility for implementation and monitoring of the plan, as assigned during the planning phase, should be confirmed and noted.

#### 8.8 Dispute Resolution

8.8.1 Internal procedures for resolving any dispute about the interpretation and implementation of the plan should be agreed and specified.

8.8.2 The use of existing dispute resolution procedures should be encouraged provided that they are appropriate, and if necessary adapted to the needs of employment equity.

8.8.3 Alternatively, a mechanism with appropriate representation from employer and employees may be established in order to address and resolve such disputes.

#### 8.9 Communication

8.9.1 The plan should be appropriately and comprehensively communicated to employees.

This communication mechanism should indicate the parties responsible for the implementation of the plan and the agreed dispute resolution procedures.

Information about the plan should be easily accessible to all levels of employees.

### 9. MONITORING AND EVALUATING THE PLAN

9.1 Records should be kept to effectively monitor and evaluate the plan.

9.2 Mechanisms to monitor and evaluate the implementation of the plan should be agreed and include benchmarks that would permit assessment of reasonable progress. \*

9.3 The plan should be evaluated at regular intervals to ensure that reasonable progress is made. This evaluation should be integrated into mechanisms that the employer normally utilises to monitor its operations.

9.4 The consultative forum(s) should continue to meet on a regular basis, and should receive progress reports.

Progress should be recorded and communicated to employees. Such meetings should take place at reasonable intervals to ensure feedback and inform the ongoing implementation process.

9.5 The plan should be reviewed and revised, as necessary, through consultation.

#### 9.6 Reporting <sup>12</sup>

9.6.1 Larger employers, with 150 or more employees, will be required to submit first reports by 1 June 2000 and thereafter annually on the first working day of October, starting in 2001.

9.6.2 Smaller employers, with fewer than 150 employees, will be required to submit their first reports by 1 December 2000 and thereafter every second year, on the first working day of October, starting in 2002.

9.6.3 The reporting format for employers is contained in the Employment Equity Report as defined in form EEA2.

9.6.4 Designated employers whose operations extend across different geographical areas, functional units, workplaces or industry sectors may elect to submit either a consolidated or a separate report for each of these. This decision should be made by employers after consultation with the relevant stakeholders.

#### Footnotes

1. Section 3(c) of the Act
2. See the definition of "designated employer" in the Act.
3. See section 24 of the Act.
4. See sections 16 and 17 of the Act.
5. See the definition of "designated groups" in the Act.
6. See section 19 of the Act.
7. See the definition of "family responsibility" in the Act.
8. See section 20(2)(e) of the Act.
9. See sections 15 and 20(2)(b) of the Act.
10. See the definition of "reasonable accommodation" in the Act.
11. See section 20(2)(e) of the Act.
12. See section 21 of the Act.



# APPENDIX FOUR

## NATIONAL UNION OF MINEWORKERS MODEL AGREEMENT ON AFFIRMATIVE ACTION AND HUMAN RESOURCES DEVELOPMENT

### Preamble

The parties to the agreement accept the need to negotiate and implement an Affirmative Action (AA) and a Human Resource Development (HRD) Programme. This arises from the need to eradicate the legacy of apartheid policies and practices in all walks of life and engage in a process towards the transformation of our industry and country in line with the Reconstruction and Development Programme (RDP) and the new constitution of the Republic of South Africa.

### 1. The effects and legacy of apartheid have included:

- 1.1 A social system based on racial discrimination in access to land and resources and basic means to life and health.
- 1.2 Differential access to employment based on race and gender.
- 1.3 A racially discriminatory system and funding of education and training with the aim of securing cheap, unskilled migratory labour for the mining and energy industry in particular and the needs of capital in general.

### 2. The objectives of this agreement

- 2.1 To eliminate all forms of discrimination in the employment structure of the company whether based on race, creed, gender or any other forms outlawed by the Constitution of the RSA.
- 2.2 To establish procedures and joint union/management structures through which AA and HRD strategies could be implemented and monitored.
- 2.3 To provide facilities to empower union representatives to play an equal role in the implementation and monitoring of AA and HRD programmes.
- 2.4 To provide for mechanisms to resolve disputes that may arise out of implementing this agreement and for sanctions in the event of any breach of this agreement.

### 3. Definitions

#### 3.1 Affirmative action shall mean

- 3.1.1 A set of positive measures and strategies aimed at redressing past discrimination, disadvantage and imbalances. It is a total organisational development intervention, not merely an additional policy which will evaluate, and if necessary, change the way in which people are recruited, selected, trained, developed, promoted and retrained.
- 3.1.2 Practices that ensure that access to particular occupations and promotional opportunities are governed in such a manner so as not to discriminate against any person on the basis of race, gender or disability.
- 3.1.3 Practices that have as their objective the achievement of a management and workforce that reflects the racial composition of the population of the country as a whole.
- 3.1.4 Practices that have as their objective the early creation of vacancies in the management administration to allow for the advancement of previously discriminated against groups.
- 3.1.5 Practices that give recognition to prior learning and experience and actively aim to enable employees to acquire a range of additional skills, including skills apart from their current employment specifications, and to open up promotional paths and skill enhancement opportunities.
- 3.1.6 Putting in place jointly-agreed Adult Basic Education and Training (ABET) Programmes designed to enhance the foundation skills quality of the workforce; in addition access to further training opportunities for advancement must be put in place.

- 3.1.7 Programmes to educate and re-orientate management and workers in relation to unacceptable discriminatory attitudes based on race, gender, disability or any other stereotyping.
- 3.1.8 Strategies and training to establish capacity in the management of affirmative action policies and practices.
- 3.1.9 Any statutory measure which is enacted with the objective of achieving affirmative action.

#### 3.2 Disadvantaged

- 3.2.1 Shall refer to any person or persons who have been deprived of rights, afforded inadequate schooling or training opportunities, or have been subjected to past discrimination on the basis of race, gender or disability.
- 3.2.2 Shall refer to any person or persons who have received less advantageous conditions of service and wages and less advantageous social and community services on grounds of race, gender or disability which have in turn impacted on their opportunity for advancement.

#### 3.3 Disability

- 3.3.1 Shall refer to any person who whether by virtue of genetic or accidental causes suffers from any physical limitation or disability.
- 3.3.2 Shall refer to any person who has suffered from any mental illness or classification which is treatable and subject to stabilisation.

#### 3.4 Discrimination

- 3.4.1 Shall refer to any form or treatment, restriction of opportunity or differentiation based on race, ethnicity, language, religious conviction, disability or disadvantaged background or any other stereotype or generalisation.
- 3.4.2 Shall refer to any special provisions or limitations in service conditions which are not based on the intrinsic requirements and value of the job.
- 3.4.3 Discriminatory practice shall refer to any action or behaviour which implicitly or explicitly displays prejudice or stereotyping in relation to any other person or persons.

#### 3.5 Equal opportunity

- 3.5.1 Shall mean the right of every individual to be treated in employment on the basis of personal merit, ability and potential to do a job or to be advanced to a higher job without favour or discrimination.
- 3.5.2 To be protected against any discrimination, exclusion or lost opportunity in terms of conditions of employment on grounds of race, gender, religion or national origin.
- 3.5.3 To be protected against discrimination on inequitable terms and conditions of employment and job security on the basis of gender, pregnancy and child rearing.
- 3.5.4 An equal opportunity programme shall be any programme which has as its objective the establishment of equity in employment.

#### 3.6 Sexual harassment

- 3.6.1 Any unwelcome and unsolicited sexual advance, request for sexual favours or verbal or physical behaviour which explicitly interfere with that person's personal space.
- 3.6.2 Any practice or behaviour which implicitly or explicitly determines employment, advancement or job requirements on the basis of submission to or rejection of sexual advances.



- 3.6.3 Any sexual advance which has the effect of interfering with another person's work performance or of creating a hostile or offensive work environment.

#### 4. Agreement on joint process

- 4.1 The union acknowledges that in the final instance management has the right to manage its affairs and management acknowledges the right of the union to negotiate on any matter affecting the interests of their members.
- 4.2 Management acknowledges that for the effective implementation of AA and HRD programmes, their monitoring, evaluation and adjustment, it is necessary that there be joint control by both parties.
- 4.3 The parties agree to the establishment of an AFFIRMATIVE ACTION AND HUMAN RESOURCES DEVELOPMENT TASK TEAM (hereinafter "the task team") to be composed of an equal number of representatives of management and the union.
- 4.4 The process of developing a AA and HRD policy shall include:
- workshops aimed at discussions on these issues;
  - research into the workforce;
  - scrutiny of all company policies and practices;
  - formulation of policy and strategy through negotiations;
  - a means of regular communication to workers and line management;
  - training line management in roles and responsibilities and people management.
- 4.4 It shall be the responsibility of the task team to:
- 4.4.1 Appoint through selection from within the company employment or through recruitment an Affirmative Action Officer employed on the company's payroll. The main tasks of the officer will be to facilitate the work of the task team and implement its decisions.
- 4.4.2 Examine and decide upon specific programmes and projects proposed and to make recommendations on their implementation. Such programmes or projects shall amongst other include:
- Adult Basic Education and Training (ABET) and further training programmes;
  - bridging courses;
  - career guidance counselling for workers;
  - recruitment and selection policies;
  - proper facilities for the union to operate and represent members;
  - joint decision making structures and workplace democracy.
- 4.4.3 Monitor and evaluate all programmes or projects being implemented and to amend, adjust or terminate such programmes.
- 4.4.4 To establish such sub-committees or evaluate procedures as may be necessary for the effective implementation of specific programmes or projects.
- 4.4.5 To determine the allocation of the Budget set aside by management for purposes of affirmative action and human resources training and investment.
- 4.4.6 In reaching any decision the task team shall make every endeavour to achieve such decision through consensus. Provided that where consensus cannot be reached, a vote of a majority of two-thirds of the task team shall be a binding decision.

#### 5. Capacity building for representatives

- 5.1 Management acknowledges that for representatives to the task team and to other negotiating bodies to effectively fulfill their task, training and capacity building in the evaluation and management of AA and HRD programmes is necessary.
- 5.2 To this end management agrees to allow each task team member in its employment up to 20 days paid leave to attend

bona fide courses, seminars, workshops and conferences relating to Affirmative Action and Human Resources Development.

- 5.3 Management agrees that union stewards and task team members shall be allowed reasonable arrangements and facilities to effectively discharge their responsibilities in terms of this agreement. (To further facilitate through ad-hoc arrangements and by subsidiary agreement from time to time the access of union shop-stewards and task team members to attend specifically agreed training programmes on a residential or part-time basis.)
- 5.4 The management shall provide such facilities and administrative support systems as are necessary for the effective conduct of the work of the Officer and business of the task team.

#### 6. Financial provision for affirmative action and human resources development

- 6.1 Management acknowledges the principle that expenditure on Human Resources Development and AA is an investment and not merely a cost.
- 6.2 The management shall accordingly set aside from its Annual Budget the following percentage of its overall Budget for these purposes:

Year	% of annual budget	Cash value
2002		
2003		
2004		
2005		
2006		
2007		

#### 7. Audit of existing staff and needs assessment

- 7.1 Management agrees to provide to the union within one month a full audit of all of its employees on the following basis: name, job, job grade, qualification, service, training by company etc.
- 7.2 The management agrees to place a moratorium on all retrenchments for a minimum period of two years or such longer period as is sufficient to cover the period of amalgamation and reorganisation of management administrations.
- 7.3 Management agrees not to fill any post which becomes vacant without consulting with the task team.
- 7.4 Management agrees that it will consult with the unions and as a jointly managed process implement a needs assessment investigation to evaluate literacy levels, acquired prior learning and on the job experience and skills and the perceived training needs of its staff.

#### 8. Elimination of discriminatory provisions in conditions of service

- 8.1 The parties undertake to review all terms and conditions to employment and service regulations in order to eliminate any provisions which are discriminatory.
- 8.2 To this end management undertakes to review all conditions of service on the basis of an evaluation of all differential conditions between different categories of employment and to set out its view as to why such differential conditions or provisions are not a discriminatory or inequitable provision or condition. Such base document shall be provided to the union within 2 months.
- 8.3 The terms and conditions for review will include amongst others:
- recruitment procedures;
  - selection standards;
  - education and training provisions;
  - working conditions eg health and safety, hours of work;



wages, job grading and wage differentials;  
disciplinary procedures and practices;  
retirement funds and packages;  
retrenchment procedures and practices;  
facilities eg canteen, medical care, parking, recreation,  
training, meetings, etc.

## 9. Grievances, negotiations and disputes

- 9.1 Any employee having a grievance which relates to issues of discrimination, disadvantage, failure to be appointed or any other grievance concerning training and the potential for advancement shall lodge such grievance through the normal grievance procedure.
- 9.2 It shall be the responsibility of line management as to whether they are able to resolve such grievance/s or to inform the AA Officer thereof. The AA Officer may investigate such case and make any such recommendations as s/he sees fit. Final resolution shall be through the normal grievance procedure.
- 9.3 The union shall remain free to make demands and to negotiate on any such issue or matter relating to AA or to HRD on which it has a disagreement with the task team or where a recommendation of the task team is not sanctioned by management.
- 9.4 Any such dispute or disagreement arising in the Board shall be referred to the normal Negotiating Forum which shall meet within 7 days. If no agreement can be reached in such Forum the matter may be perused in terms of agreed and statutory disputes mechanisms.



Affirmative action and skills development for women are undermined by the absence of social support such as child-care and decent housing.



## TULEC ORGANISERS' MANUAL

A comprehensive guide for trade union organisers and leaders involved in trade union work and collective bargaining. It includes all the most recent labour laws and codes of conduct. Regular updates are posted to all those who purchase the manual.

***"This manual ... represents a very important step in the provision of back-up for organisers."***

*- Chris Bonner, Ditsela Director*

The TULEC Manual is a comprehensive guide for trade union organisers and leaders involved in trade union work and collective bargaining. Its contents are derived from decades of experience of the South African and international labour movement. The latest edition includes all the most recent labour laws and codes of conduct. Regular updates are posted to all those who subscribe to the service. In nine chapters the manual covers the following aspects of trade union organisation.

- History and principles of trade unionism
- Organising skills
- Model collective agreements on education, health and safety, restructuring, HIV/AIDS, parental rights, affirmative action
- Labour Law: LRA, BCOE, COIDA, OHSA, UIF. The latest edition includes all the LRA and BCEA Guidelines and Codes of Conduct and the 2002 amendments
- Codes of Conduct, including sexual Harrassment and leadership
- Challenges facing trade unions - including GEAR, casualisation, privatisation, globalisation, EPZs, workplace restructuring and world class manufacturing
- Institutions important to labour - the ILO, CCMA, NEDLAC, Parliament
- Useful Contacts
- Additional Resources Available at the Trade Union Library

## BARGAINING MONITOR

*"The bulletin for trade union officials and shopstewards."*

You can keep up-to-date with the latest bargaining information by subscribing to Bargaining Monitor. It is published bi-monthly and already goes to most of South Africa's trade union negotiators. A bulletin for union wage negotiators, produced since 1987, currently issued every second month.

### Regular features include:

- Inflation figures
- Poverty datum lines
- Company profits
- Directors' pay and wage reviews
- An in-depth "company profile" of a leading company
- "Spotlight on economics" - discussions of current issues

*Bargaining Monitor also analyses management tactics and looks ahead to future trends in industrial relations. No union negotiator can afford to be without a subscription.*

## BARGAINING INDICATORS

This annual omnibus provides up-to-date information to support trade unions in their collective bargaining negotiations.

***"An essential resource for collective bargaining"***

### The following topics are covered:

- A macro-economic overview
- A review of wage settlements in the past year, based on the AWARD database of the LRS
- A review of company and industry performance (Industry Outlook)
- A review of fees paid to directors of companies
- A review of social programmes of companies (Social Benchmarks)

The Labour Research Service has supplied bargaining information to trade unions since 1986. The Bargaining Indicators Omnibus started as a bi-annual report and later became an annual publication to respond to the needs of trade unions for up-to-date information to support their negotiations. Bargaining Indicators is released in February every year.

The Labour Research Service (incorporating the Trade Union Library) is a trade union controlled, non-governmental organisation that provides support for trade unions and allied organisations in South Africa. Its mission is to promote and enhance the full active participation of workers in the political and socio-economic activities of South Africa. This is achieved by providing information, education, research and consultation services to trade unions, federations and any other labour organizations

## **TRADE UNION LIBRARY**

Trade unionists and workers in South Africa need access to a wide range of information that will help them to effectively protect the rights of individual workers and further the aims of the trade union movement. The Trade Union Library was established in 1983 with the aim of providing information and education to strengthen the organisational capacity of trade unions. It has grown to be the largest trade union library in the country, and is used extensively by trade unions, academics, students and labour support NGOs.

The Trade Union Library Unit is also responsible for a number of projects such as, The Readers Club, The Workers' Bookshop, The Workers' Communication Centre and The Labour History Archive.

## **ECONOMIC RESEARCH UNIT**

The Economic Research Unit develops and pursues specific research projects to advance the strategic objectives of the LRS. It plays an important part in all publications of and training by the LRS.

### ***Activities:***

- Conduct research towards developing an informed trade union constituency
- Strengthen trade union policy formulation and strategies
- Audit and analyse policies and practices of business and government for labour organisations
- Assist trade unions in the development of economic proficiency
- Promote the development of women workers and/or women trade unions

### ***Research Outputs:***

- The Actual Wage Rate Database (AWARD)
- Bargaining Review
- Industry Outlook; Directors Fees
- Company Analysis; Inflation and its effects on the poor
- The Effects of Multilateral Institutions and National Macro-Economic Policies on Labour
- Wine Farms Directory
- Labour Market Issues

## **EDUCATION AND MEDIA UNIT**

The Education and Media Unit conducts Seminars, Training Courses, Study circle programmes (union-based and international) with the intent to strengthen unions as vital organs of civil society. It also produces publications for trade unions.