Affirmative action
on the mat for carpet capers

Has affirmative action been effective in redressing racial imbalances given the controversy that has surrounded it since its inception? ***Nathaniel Ndala*** *attempts to answer this by conducting a research study in a parastatal which historically recruited white Afrikaans speaking workers.*

Although the law requires an employer to have an affirmative action policy in place before implementing affirmative action in its workplace, managers interviewed in this research study did not seem to be bothered by the fact that such a policy did not exist.

A total of ten senior managers from different parastatal departments, ranging from technical to human resources, were interviewed to try to establish whether they understood affirmative action and whether the same procedure was followed by all when implementing this policy.

One claimed that a policy had been in existence since 1992. But, the transformation manager (whose responsibility also includes developing an affirmative action policy) contradicted his claim. She argued that the company was still in the process of producing its own affirmative action policy. In the meantime affirmative action is being implemented without a policy. The manager said: 'We follow the Employment Equity Act (the Act) to implement affirmative action.' For this manager affirmative action could be implemented without any formulated policy being in place.

Contrary to the managers' belief and practice, the court in *Independent and Allied Workers Union v Greater Louis Trichardt Transitional Local Council*, ruled that for 'affirmative action to survive "judicial scrutiny" there must be a policy or programme through which affirmative action is to be effected, and that the policy or programme must be designed to achieve adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination'.

In order to show the importance of a fixed policy the court declared that a proposed appointment by the Transitional Local Council on affirmative action grounds was illegal since it was not done in terms of any formulated policy against which it could be tested. It follows therefore, that the absence of any formulated policy or programme at the parastatal violates one of the prerequisites of the law.

This violation might not only jeopardise the success of the policy but it reveals that some employers are still battling to understand what the law actually requires of them. This difficulty can be blamed on two conflicting values – namely the right not to be discriminated against on the grounds of race and the right to be advantaged because of previous disadvantage caused by the institutional system of racial discrimination.

In *JHA Coetzer & 11 others v The Minister of Safety and Security and National Commissioner of SAPS* the employer found itself unfairly discriminating against other employees while trying to advance one value which is the right to equality. Again in *McInnes v Technikon Natal (2000) 21 ILJ 1138 (LC)*, it became apparent that employer's decision of 'adopting or implementing employment policies that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms',

may result in unfair discrimination.

In this case the court argued that 'affirmative action discrimination' could not constitute a fair basis for dismissing, as opposed to appointing, an employee. Therefore, the failure to appoint the applicant in this case was found to be illegal as it had some element of discrimination.

When employers try to advance the value of the right to equality they find themselves at times unknowingly violating the other value, the right not to be discriminated against, thus making their task of implementing affirmative action in the workplace difficult and complicated. In their attempt to meet the requirement of ensuring that previously disadvantaged groups are equitably represented in all job categories and levels in the workplace they find themselves constantly violating the right not to be discriminated against. This constant violation of the value of the right not to be discriminated against shows poor understanding of the requirements of the Act and also how complicated affirmative action is.

Unconscious discrimination

The other instance where employers exposed their weak understanding of the Act is their unconsciously discriminating against members of the non-designated groups, as was discovered in this study. None of the managers seemed to be consciously or proactively discriminating against members of these groups. The main concern of the managers was to meet their annual racial targets.

Recruitment procedures or practices in the parastatal reflected this form of discrimination. For instance, when a position is advertised two lists are compiled, one for non-designated groups and another for designated groups. In the absence of a suitable candidate from the designated group the manager concerned is not allowed to consider any candidate from the non-designated group without the consent of the transformation manager. Managers find themselves working under pressure to advance candidates from the previously disadvantaged groups. This procedure or practice, however, is unlawful on two grounds – moral and legal.

On moral grounds it is wrong because it views all managers who could not find suitable candidates from the designated groups with suspicion. It portrays them as people who are totally opposed to the implementation of affirmative action (although such possibility cannot be ruled out) hence consent required from the transformation manager. It also puts some managers under pressure and they end up appointing unsuitable candidates to senior positions in order to avoid being labelled as 'obstacles' or 'anti-affirmative action'.

On legal grounds this practice or procedure is incorrect because it unfairly discriminates against members of the non-designated group. The refusal by the employer to appoint suitable candidates from the non-designated group, when they cannot find a suitable candidate from the designated groups, is tantamount to racial discrimination.

The protection of the members of the non-designated group against unfair discrimination in the workplace is raised in the McInnes case. The court found that although the employer's policy on affirmative action met the requirements of the Act, it did not advocate what it termed 'blunt racial discrimination' in favour of Africans against all others, and while seeking to promote the advancement of previously disadvantaged communities, the policy sought to balance this against various other factors, including the needs of the institution and its students. That is, employers should not use affirmative action to discriminate against other groups such as white males in this case. The economic interests of the organisation must be taken into account when the decision to appoint is made.

In the preceding case the court's argument demonstrates that the right not to be discriminated against is as important as the right to equality. Neither of these rights should be achieved at the expense of the other.

It is the above paradox that makes affirmative action complicated and leaves its implementers frustrated. Employers on their journey to enforce the right to equality, often find themselves in collision with the right not to discriminate.

Unconscious discrimination not only invites unnecessary lawsuits but can undermine the success of affirmative action as it has the potential of creating serious tension between the beneficiaries of this policy and those previously advantaged. For this reason therefore, the implementation of this policy could become delayed and derailed and thus extending its time of existence in the workplace. It becomes a permanent phenomenon instead of being a temporary one.

The study also found that the following factors pose serious challenges to the success of affirmative action in the workplace:

Insufficient skills among members of the designated groups

According to the managers in the

parastatal most of the people from the designated groups are not adequately developed to advance to senior positions. One of the managers cited a lack of black specialist engineers as one example of a shortage of skills among members of the designated groups. Given the age and the level of education of employees, it will take time to develop and train them. Their training will cost but 'also it would not be easy for them to learn the job within a reasonable time', argued one of the respondents. Other instances have revealed that suitable candidates have been identified but they were close to retirement.

The company is then faced with two options, namely, recruit from the non-designated group or recruit from outside. This creates frustration and anger amongst the internal candidates who feel 'insulted' for being bypassed. If the position is given to a non-designated candidate they perceive their managers as people who are opposed to the affirmative action.

Loss of skills

Affirmative action is not only undermined by the failure of the company to develop skills but the loss of skills as highly experienced people leave. This has occurred mainly amongst white males who feel insecure because of affirmative action, and others due to retirement. The absence of experienced and qualified people to mentor newly appointed affirmative action candidates can result in poor performance and can therefore, undermine the Act as poor performance is often associated with affirmative action.

Carpet interviews

Males have historically dominated many senior positions. This can make females vulnerable to sexual exploitation by some males in senior positions. The fact that females form part of the designated groups makes their exploitation more intense. It has been alleged that some managers target females who know that their chances of promotion are very limited and promise them promotion on condition that they undertake 'carpet interviews' (sexual favours).

If these candidates agree to sleep with them they get promoted on the ticket of 'affirmative action' without having undergone an interview. Where actual interviews are a prerequisite they are conducted merely as part of a formality since the appointment has already been made 'on the carpet'.

This practice is not only legally problematic but it also brings a danger of appointing or promoting incompetent people to senior positions. Those who do not know the background of these appointments will correctly blame this on the affirmative action thus putting the success of this strategy in jeopardy. People begin to lose confidence in all affirmative action candidates, especially women.

Budget hampers skills development

As already argued above, lack of skills among members of the designated groups is widespread. It is important for a company therefore to develop and train their employees in order to prepare them for more senior positions when they become available. However, budgetary constraints appear to be a problem in this parastatal. Budget constraints does not only frustrate ordinary employees but also managers who are expected to meet affirmative action targets in their respective departments.

Managers also forfeit incentives bonuses that go hand in hand with their commitment to the course of affirmative action. This commitment is measured in terms of how many candidates managers have promoted from the designated groups in the previous year.

Lack of commitment

With or without the incentives some managers seem to be dragging their feet when it comes to the implementation of affirmative action. Some of the senior managers expressed concern about the lack of commitment on the part of other junior managers and supervisors. 'The problem lies with junior managers and supervisors who are not identifying suitably qualified candidates from their workforce,' one respondent said.

The role of the junior managers and supervisors seem to be crucial since they have direct contact with employees from whom appointment for senior positions could be made. Their failure, or refusal, to identify employees with potential from their subordinates makes it difficult for senior managers to make relevant appointments as they assume that there are no appointable candidates from the designated groups thus putting the success of affirmative action at risk.

Conclusion

Implementing affirmative action is unavoidable because it is required by law. Some employers, as in this case study, have attempted to implement affirmative action without a policy being in place. Others have not yet given up on implementing affirmative action in the workplace. However, what is of concern, as revealed in this parastatal, is the confusion and lack of understanding of what the law actually says and how it is being interpreted.

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