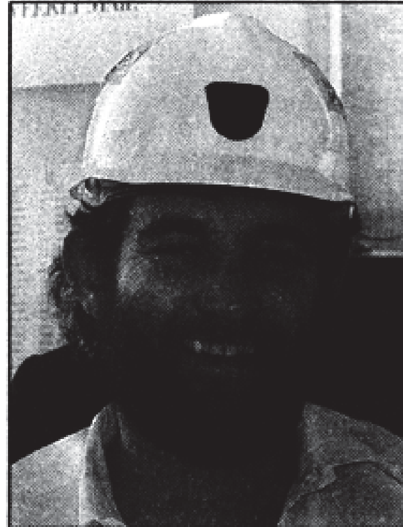
Discrimination

It would be hard to find a society in the world in which race plays a greater role than South Africa. This is true both of society at large and the workplace. It is therefore surprising that there have been very few cases in the Industrial Court dealing with racial discrimination. In fact most of the cases have been brought by whites-only unions trying to perpetrate discrimination and inequality. There have been equally few cases dealing with gender discrimination.

Unfair discrimination on the basis of race or gender is an unfair labour practice. This is true even if separate but equal facilities are provided for different racial groups. The Industrial Court has held that the provision of separate toilet facilities on a racial basis is an unfair labour practice. It also said that an attempt by whites-only unions in the mining industry to exclude black workers from a pension fund was unfair; rejecting a proposal by the unions that there be a separate but equal pension fund for black workers in the affected job categories as discriminatory, unequal and unfair.

But these are the easy cases. The identification of



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discrimination becomes more difficult particularly as those who are in privileged positions use increasingly subtle techniques to avoid legal prohibitions on discrimination and exclude other groups from improving their position.

Job requirements

Generally, discrimination is unfair unless it involves a characteristic necessary for the job. To use an easy example: it is not unfair for a film director to interview only black actors to play the role of Malcolm X in a film; nor is it unfair to recruit only white actors to play the role of Eugene Terreblanche. Likewise, hiring a female to model women's clothes is not considered discrimination. Another recognised ground in which recruiting from only one group is fair is the requirement of the need for privacy; it would be inappropriate to hire male security guards to perform body searches of female employees and therefore the recruitment of female employees for this purpose (or vice versa) is not unfair. These are what are called bona fide occupational qualifications. Courts internationally say that the onus is on the employer to prove this.

In the past, attributing characteristics to particular groups was common. For this reason, for example, women were not allowed to perform certain types of manual work. Today, it is less acceptable to speak of group characteristics in this way; there are strong women who can do heavy manual work and weak men who cannot. However, this trend has yet to arrive in South Africa. The law still prevents women from working underground in mines.

Recruiting

The examples discussed show that much of the

discrimination, and the opportunity for discrimination, occurs in the process of recruiting. Presently, it is very difficult, if not impossible, to challenge unfair recruiting because it is only employees, and not applicants for employment, who are able to bring unfair labour practice cases. It is possible, but very difficult, for a trade union to challenge a discriminatory hiring policy. However, there is a need for the unfair labour practice definition to be expanded to allow job applicants to challenge the prejudice they suffer as a result of discriminatory recruiting practices. Some American states have dealt with this problem by prohibiting companies from requiring photographs of applicants for jobs or even information such as their height and their weight.

Discrimination and pay

Wage rates are one of the most widespread forms of racial discrimination in South Africa. Many companies still have two wage curves: one for manual workers who are predominantly black workers and another for semi-skilled and skilled workers who are predominantly white. There is frequently a large gap between the top of the one wage curve and the bottom of the other wage curve. If the gap is disproportionate to the difference in skill levels, it will be discrimination. But it will not always be unfair. The Industrial Court has accepted that there are circumstances where this differentiation may not be the result of race alone. Other factors such as the supply of workers on the labour market and collective bargaining may also influence wage rates. This argument can be used to justify a wage gap of this type.

Another common employer practice is to grade workers doing similar jobs into different categories and pay them at different rates. The general rule is that workers must be paid the same rate for work of equal worth. Therefore workers doing the same type of work must be paid the same wage rate. An employer cannot artificially create two job categories and pay them different rates. It is more difficult to show that the gap between different wage rates is not in proportion to the differences in worth between the two categories. Firstly this requires a complex assessment of the "work" or value of a job. This raises very difficult issues: how, for instance, do you compare the value of experience with that of training. A further difficulty is that employers will generally use market factors as a basis for justifying racial discrimination. But perhaps the most significant obstacle is the difficulty of obtaining the necessary information to bring this type of case, since company's tend to treat it as confidential.

The rules against discrimination do not mean that all employees doing the same work must get the same pay. A company is entitled to reward performance by giving merit increases. Merit increases are not allowed if they are the result of individual bargaining with workers behind the back of the union. This is prohibited by the *NUM v Ergo* judgment. But this will not be the case where a union approves of a merit increase system. A merit system will be discriminatory if it is applied in an arbitrary fashion. But where the company can justify the differential between wages on objective grounds, such as production levels or attendance records, the court will find it acceptable.

The two groups who have suffered most as a result of discrimination in South Africa are blacks and women. At the beginning of the year the government produced an Equal Opportunities Bill aimed at outlawing discrimination against women. This has been rejected by women's organisations, unions and others. One of its mistakes is that it prohibits discrimination only in cases where a woman can prove that she has been discriminated against *solely* because she was a woman. This is a mistaken view of discrimination. Black women are not discriminated against in one way because they are women and in another way

because they are black. Discrimination has a cumulative effect. The discrimination that black workers and women suffer is a result of the inequality of society as a whole.

Indirect discrimination

The above examples are all cases of direct discrimination. More widespread is what is called 'indirect discrimination'. This occurs if a practice has the effect of putting a particular group (be it racial or gender) at a disadvantage because of past discrimination or present social circumstances. At first glance, the practice may not appear to be discriminatory. This only emerges when you look at its effect on different groups in society.

Take the toilet example. A company has better toilets for white workers than black workers. It pulls down the racial signs and puts up new ones reserving the better toilets for skilled and semi-skilled workers and the worse ones for manual workers. In most South African companies this would be unfair indirect discrimination because a far higher proportion of blacks than whites are manual labourers and therefore the effect of the practice is that the majority of black workers have access to poorer facilities. Another well known case of indirect discrimination is the English company which, some years ago, refused to hire workers from the city of Liverpool. At that time, approximately half the residents of Liverpool were black, while the proportion of blacks in England was much lower. The courts said that this practice was unfair and arbitrary discrimination. Will our courts be so bold or our unions so imaginative?

Sometimes practices that are generally considered acceptable in the collective bargaining arena will have an unfair discriminatory effect. Take a company that only had white managers. As a result of an affirmative action policy it begins to recruit black managers. Then business drops off and it needs to retrench some of its managers. It proposes the approach of LIFO (last in, first out) and says that this is fair because the unions accept it. But it is not fair. Using LIFO in this case means that a far higher proportion of black managers (who only recently got their jobs) will be retrenched than white managers. The American courts would order the company to apply a retrenchment policy that does not unfairly discriminate against black managers in this way.

Once we enter the realm of indirect discrimination, the line between a genuine requirement for the job and discrimination becomes much more important as well as more difficult to define. Perhaps the most important source of this type of discrimination is educational qualifications. In America the use of an educational qualification as a requirement for obtaining a job is considered racial discrimination unless the employer can show that it is necessary for workers performing that job to have the educational qualification. The reason for this is that black Americans, for social, political and economic reasons, have less access to education and the educational qualification will therefore exclude proportionally more black Americans than white Americans from applying for the job.

This will be a particularly important issue in South Africa. Many workers will not be able to advance up the company structure because of a lack of formal education. Jobs will be offered to younger, more qualified workers who do not have the same experience. The only way of attacking this process is to show that the formal educational qualifications are not needed for the job. To do this unions will have to challenge both recruiting policies and management job evaluations. Presently, the unions do not have the skills to contest job evaluations and management assessments are usually accepted.

Conclusion

Simply outlawing racial discrimination will not create

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