

What are unions doing about employment equity?

Union participation and involvement in the formulation of employment equity (EE) plans is critical if disadvantaged workers are to benefit from the Employment Equity Act. Are unions participating in these processes and are they being consulted? A study embarked upon by **Harish C Jain, Loyiso Mbabane** and **Frank Horwitz** found that unions/ employee representatives are not being sufficiently consulted on EE plans.

In the 1990s, South Africa enacted some progressive legislative measures, including the Employment Equity Act (EEA) which seeks to redress historical workplace discrimination against blacks (Africans, Coloureds and Indians), as well as women and people with disabilities (all collectively referred to as the designated groups).

The Act seeks to achieve equality in the workplace by the elimination of unfair discrimination and the promotion of equal opportunity through the implementation of positive and proactive measures (termed affirmative action measures) to advance members of the designated groups.

Employers with 50 or more employees, or those who have certain specified financial turnovers, must undertake affirmative action measures. The measures are aimed at ensuring that the designated groups have equitable representation, *and are consulted through their representative(s) or union in respect of such representation*, in all occupational categories and levels in an employer's workforce, consistent with their availability in the external labour market and their demographic representation within the economically active population.

An employer must consult with a recognised union(s) on these decisions and on the equity plan as a whole. A growing number of organisations have introduced voluntary structures to involve employees in aspects of decision-making in order to enhance cooperation between labour and management and to promote, according to Anstey, 'employee stakeholding and involvement in the wealth creation process'.

Much of the debate regarding employee participation involves issues of power sharing in the workplace. Employers often view this as restricting their managerial prerogative and flexibility in decision-

making. Unions feel that it threatens to undermine them by blurring the distinction between management and employee interests.

In practice the spectrum of participation ranges from those that are extensions of management to those that are fully accountable to employees. While union consultation is ostensibly a component of the various laws, white papers and regulations governing employment equity (and human resource management in the public service), this process is not being properly utilised.

CONSULTING ON EMPLOYMENT EQUITY

Employers covered by the EEA are required to enter into consultation about the formulation and implementation of an employment equity (EE) plan with union/employee representatives in their company. However, the Act does not define the content of the duty to consult, unlike the LRA, which requires the following:

- putting forward proposals rather than finished decisions to unions/employees;
- disclosing all relevant information;
- allowing the union/employee representatives to respond to these proposals; and
- responding to alternative proposals, and, if not acceptable by the employer, explaining the reasons for rejection.

The EEA has significant provisions on employer consultations with union and employee representatives:

- Section 16 requires a designated employer to take reasonable steps to consult, and attempt to reach agreement with, nominated union/employee representatives. The nominated representatives must reflect the interest of employees from all occupational

on the shopfloor



categories and levels of the employer's workforce; employees from the designated groups; and employees from non-designated groups.

- Section 18 requires an employer to disclose to the consulting parties all relevant information that will allow the parties to consult effectively. In addition, the Code of Good Practice published in 1999, also provides suggestions regarding consultation.
- Section 34 allows any employee or union representative to monitor and bring an alleged violation of the Act. The protective role of unions is one of its prime reasons for existence; this extends in concept to protection against unfair discrimination and potential involvement of unions in policy determination and practices aimed

at removing such discrimination. In terms of consultation, the Act makes provision for unions and employee representatives to be provided with sufficient information in order to understand the proposed plans and actions; appropriate contributions to the consultation process; a free and open discussion, and a clear indication that the employer gave careful consideration to the feedback provided by unions/employees. The Act also requires the formation of a consultative forum, and where workplace forums exist, employers are required to consult and reach consensus with such a forum. Worker representatives should reflect all categories and levels of the workforce and employees from both designated and non-designated group employees.

RESEARCH PROCESS

The research was based on both interviews (unions, department of labour (DoL) inspectors) and documentary analysis of Qualitative Assessment Reports filed by employers regarding union consultation. Unions and federations involved in the research included: The Congress of South African Trade Unions (Cosatu) and its affiliate the SA Municipal Workers Union (Samwu) and the Fedusa affiliate, the Hospital Personnel Trade Union of SA (Hospersa) and the Public Servants Association (PSA).

TRADE UNION PERSPECTIVES

Consultation strategies

Unions, in their consultation with employers, used different strategies. A common feature

was either the setting up of a consultative committee, the using a bargaining council for this purpose, or at times the setting up of a smaller group by unions such as Samwu in its dealings with the City of Cape Town. In Johannesburg, Cosatu set up task forces to deal with certain large employers. However, these working groups or task forces did not have any decision-making powers. Decisions were subject to the ratification of the bargaining council (in the case of Samwu) and the national negotiating committee (in the case of Cosatu), which came from four different provinces.

Degree of union participation

Unions argued that in most cases employers unilaterally drafted EE plans. Cosatu found that in very few cases the shop stewards were actually involved in the drafting of plans which were shown to unions for them to counter-sign. It was the general feeling that employers only did this in order to comply with the provisions of the Act and to be seen in a good light. Samwu and Cosatu felt that employers were more concerned with compliance in respect of plan submission to the DoL than implementation of these plans. Hospersa indicated that employers thought that they did not have to consult the union at establishment level, and that it was sufficient for them to consult only their employees.

Different interpretations

Many problems around EE planning and implementation appear to be of an interpretative nature. A common problem appeared to be that employers and unions had different understandings of certain pertinent terms. This hindered the consultation process.

For example, some employers' conception of 'consultation' was that it was enough to simply inform the union, and that 'consultation did not entail reaching agreement or consensus'. Union respondents generally did not consider that this was sufficient.

Samwu also found that employment equity was understood in a limited way to only entail appointments whereas it should

have encompassed sexual harassment, gender discrimination and even abuse and HIV/AIDS. Similarly, Cosatu respondents found that equal representation on the committee was construed by the employer as having primarily racial representation on the committee. Gender appears to be a lower priority.

Another interpretative problem arose concerning what was meant by the term 'black' in terms of representation of various groups and their demographic representation based on regional demographic variations. It was understood by unions in a broad sense to include African, Coloured, and Indian people while Samwu found that certain employers focused their plans and associated human resource practices such as recruitment and selection only on Africans. Hospersa argued that race is a sensitive issue in consultations. Employers it argued tend to automatically employ an African person.

Consultative structures

Cosatu unions have encountered problems concerning membership of consultative committees with employers loading the committee with non-union members, thus undermining the influence of the union. According to the unions interviewed, this was a form of window-dressing, where an employer might prefer to talk with 'tame' representatives rather than independent union representatives. Cosatu also found that the employers refused entry to those unionists perceived to be 'trouble makers'. In addition, the employer treated the union as though it was just there to share the information, rather than to make inputs and contributions to the EE planning process. Hence the level of employee participation appeared to be one of information giving rather than joint consultation or joint planning and problem solving.

Unions experienced a similar problem in getting access to employment equity information. Samwu submitted, for example, that it did not have the capacity to do so and this hindered progress. Cosatu found that employers were reluctant to disclose information such as wage differentials. Therefore, it experienced difficulties in identifying selection and recruitment policies

and discriminatory practices within companies and in closing the wage gap.

Certain employers did not have EE plans available on the website, nor on the company bulletin boards, even though this is a legal requirement. The employers argued that this information might be misinterpreted and create hostility, and only published non-contentious things such as mission statements and health and safety policies.

Relating to the role of shop stewards, Cosatu indicated that shop stewards were reluctant to raise concerns in respect of the EE plan because the employer would know who had raised the concern, and the next day that shop steward would be victimised.

Consultation agenda

During consultation, Hospersa felt that all issues including skills development and training, EE and gender issues, tended to be lumped together. In addition, these issues, especially EE tended to be relegated to a sub-committee where it was inadequately dealt with.

Funding of union participation

Cosatu indicated that its affiliates experienced problems with funding for shop stewards and workers' development. Yet resources appeared to be dispersed elsewhere towards building capacity amongst managers. It was a commonly held view in Cosatu and Hospersa that government should have done more to educate ordinary people when the EEA was promulgated.

Other consultative interests

The unions raised some concern around the use of consultants who come up with very similar EE plans for the companies they service. The process has arguably been commoditised and compliance oriented rather than on deep-rooted attitudinal and work culture change.

Dealing with consultation difficulties

It emerged that when an employer needed the union to sign off on an EE plan, the union would use this as leverage to get

something that it wanted. For example, Hospersa refused to sign a document concerning the rebate that the employer would receive under the Skills Levies Act until the employer had developed a plan that included empowerment of and skills development for black people. There is a need, according to Hospersa, to develop workplace committees and capacitate them and link them up at regional and national levels. Cosatu suggested that where the employer treated the union as though it was just there to share information, it should refuse to countersign anything.

ROLE OF DEPARTMENT

Inspectors interviewed felt that their training by the department was too short and dealt with procedural (such as whether consultation took place, whether EE forums were in place) rather than substantive matters. The inspectors felt that the DoL wanted them to play an advocacy rather than an enforcement role of the EEA. Regarding enforcement, inspectors felt that clear guidelines should be provided on what enforcement meant at a practical level. For example, if an employer did not have an EE plan, what powers were inspectors permitted to use to get employers to comply?

The inspectors also felt there were too few of them (120), especially in a large province like Gauteng. They submitted that not all of them could carry out EE inspections to the extent and frequency that was needed to make it a meaningful process. Inspectors also thought that there ought to be a separate EE inspectorate. They asserted that shop stewards need to be trained by unions and should only become involved in EE committees once they had been properly trained. It was clear that EE enforcement was limited by a lack of clarity as to the role played by inspectors and overall resource and capacity problems.

CONCLUSION

The general flurry of activity following President Thabo Mbeki's 2003 State of the Nation address offers a significant policy basis for improving access to capital, skills and economic empowerment for the majority

of South Africans. It is argued that these overall measures, along with the progress in implementing employment equity and attendant workplace practices, will greatly improve the chances of the black majority getting their just share in the SA economy. In this regard, employment equity must be viewed from both a macro- and micro-perspective.

However, it is becoming clear that legislative compliance alone (in relation to EE and black economic empowerment) cannot create the necessary mindset changes, organisational commitment and cultural transformation, in what is a deep and profound change management process.

On a macro-level, employment equity needs to be supported by prioritising human resource development and education in skills and competencies needed in a society in transition. And at a micro-level more involvement by unions and employee representatives in EE is needed.

The research has found that unions are not being properly consulted by employers on EE planning and associated human resource practices important for implementation. Generally the level of union participation in EE planning appears to be at the information giving or that of basic consultation level, whereby the union may be asked for its inputs and the employer then decides. There is a low level of union influence and use of power in EE planning.

Secondly, employers often appear to separate the areas of EE and human resource development, failing to see the key interrelationship for human capital development and planning. It also emerged that unions themselves do not place EE as high on their employment relations agenda as traditional collective bargaining matters and disputing unfair dismissal cases. This may in part be explained by a tendency to rely on government to address the need for discriminatory redress, including expecting a more aggressive role of DoL inspectors, and on employers on whom there is a legislative onus to develop plans, with targets and timetables. These interpretations are supported by the paucity of union disputes on unfair discrimination, which have reached

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the labour court.

There is a need for unions to re-prioritise their engagement in the EE process, notwithstanding their concern that employers are tardy in this regard. As mentioned by several union respondents in this study, the extension of the employment relations agenda to focus beyond remuneration related collective bargaining items and conditions of employment to EE and human resource development, could put unions on a more strategic path in their relationship with employers.

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