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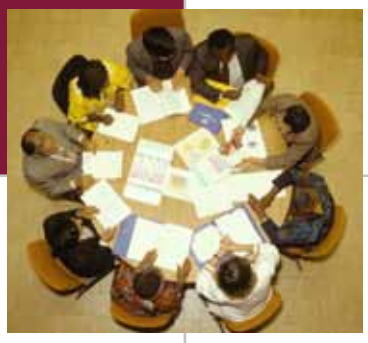
Gender equality and social dialogue in South Africa



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Bureau for Gender Equality

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Acronyms and abbreviations

BCEA	Basic Conditions of Employment Act
BUSA	Business Unity South Africa
CCE	Commission for Employment Equity
CCMA	Commission for Conciliation, Mediation and Arbitration
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CGE	Commission on Gender Equality
COSATU	Congress of South African Trade Unions
ECC	Employment Conditions Commission
FEDUSA	Federation of Unions of South Africa
ILO	International Labour Office
LRA	Labour Relations Act
NACTU	National Council of Trade Unions
NEDLAC	National Economic Development and Labour Council
PSCBC	Public Service Coordinating Bargaining Council
QLFS	Quarterly Labour Force Survey
SACCAWU	South African Commercial, Catering and Allied Workers Union

Foreword

Gender equality and social dialogue are both fundamental values and cross-cutting issues for the International Labour Organisation. In 2009 the International Labour Conference concluded its discussion on "Gender equality at the heart of decent work" by reaffirming that social dialogue and tripartism are essential policy tools to advance gender equality in the world of work.

This paper is a part of a comparative research project whose objective is to demonstrate that gender equality and social dialogue are mutually beneficial and their promotion should go hand-in-hand. Despite several studies on each topic separately, there is a knowledge gap worldwide on how gender equality at work is advanced through social dialogue. This topic is examined both from qualitative and quantitative aspects:

- participation on an equal footing of men and women in social dialogue, in particular in the national tripartite bodies, as well as within government units, trade unions and employers' organisations, and
- gender equality issues on the agenda of social dialogue, including collective bargaining.

This study provides valuable information on legal and institutional frameworks for promotion of social dialogue and gender equality in South Africa. Despite the impressive legislative basis, gender-based inequalities still exist in the society and at the workplace. Most women, making up nearly half the labour force, remain in poorly paid jobs, particularly domestic workers. While trade unions and business associations have undertaken some actions to promote gender equality, the top level of social dialogue bodies is male-dominated. In the NEDLAC, three out of the eighteen principals are women, with all the women coming from the community constituency. Trade unions are slightly more likely than employers to choose female representatives. In addition to the analysis of existing South African research, the author conducted a survey among bargaining councils. When some collective agreements are related to gender issues, mainly such as maternity protection, paternity leave and sexual harassment, they are often not going further than the legal requirements. An interesting focus is done in the study on the need to recognise that different categories of women face different challenges.

The study was discussed at the tripartite national workshop, which took place in South Africa in 2010. This meeting concluded that the social partners in South Africa should take active initiatives to promote more balanced participation of men and women in tripartite social dialogue forums, as well as to include gender equality issues in national discussions concerning the labour market and collective agreements.

The paper is the result of collaboration between the Industrial and Employment Relations Department and the Bureau for Gender Equality. Debbie Budlender, Community Agency for Social Inquiry, South Africa, prepared the national study. Angelika Muller coordinated the comparative research project and national studies. Particular thanks for comments and assistance are expressed to Line Begby, Mwila Chigaga, Susan Hayter and Joseph Motsepe. This paper was developed with support from the Government of Sweden.

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1. Introduction

This report constitutes the South African report for a comparative research project on social dialogue and gender equality being coordinated by the Industrial and Employment Relations Departments (DIALOGUE) of the International Labour Office (ILO). The research project aims to deepen knowledge on how gender equality issues are promoted through social dialogue at the national level. The research project is being undertaken as a follow-up of the Conclusions of the Committee on Gender Equality adopted at the 98th Sessions of the International Labour Conference in June 2009 (International Labour Conference, 2009).

The term "social dialogue" is understood to mean all types of negotiations, consultations or exchange of information between representatives of governments, employers and workers on economic and social issues. The national studies are intended to provide both an overview of the current context and analysis of recent developments on how:

- social partners promote gender equality at work;
- tripartite social dialogue bodies mainstream gender equality in their activity;
- issues of gender equality at work are dealt with in collective agreements.

The main body of the report consists of five sections. The first of these describes the legal and institutional frameworks; the second sets out the South African context of social dialogue and gender equality through a brief review of socio-economic and political developments and labour market indicators; the third describes the key social partners and, in particular, their initiatives in relation to gender equality and representation of women; the fourth outlines the role of tripartite social dialogue bodies; and the fifth gives examples of how gender equality has been dealt with in collective bargaining. Given the size of South Africa and the complexity and diversity of its labour market, the paper does not attempt to cover any of these issues in any detail.

2. Legal and institutional frameworks

Ratification of international instruments

South Africa ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) on 15 December 1995, in the year after the first democratic elections. CEDAW is generally regarded as the international bill of rights for women. However, in addition to this general instrument, there are further more specific international relations that are important from the perspective of gender equality and social dialogue. The table below lists the ten most relevant ILO conventions and indicates for those ratified by South Africa the year in which ratification occurred. The table reveals that South African has ratified only five of these ten conventions. All five were ratified after the end of apartheid although all the conventions except one were drawn up much earlier than this.

Table 1.
ILO Conventions ratified by South Africa

No.	Name	Year
87	Freedom of Association and Protection of the Right to Organise Convention, 1948	1996
98	Right to Organise and Collective Bargaining Convention, 1948	1996
100	Equal Remuneration Convention, 1951	2000
111	Discrimination (Employment and Occupation) Convention, 1958	1997
135	Workers' Representatives Convention, 1971	-
144	Tripartite Consultation (International Labour Standards) Convention, 1976	2003
151	Labour Relations (Public Service) Convention, 1978	-
154	Collective Bargaining Convention, 1981	-
156	Workers with Family Responsibilities Convention, 1981	-
183	Maternity Protection Convention, 2000	-

The national legal framework

In terms of South African legislation, Benjamin (2007) identifies the Constitution of 1994, Basic Conditions of Employment Act (BCEA); Labour Relations Act (LRA); Occupational Health and Safety Act; Unemployment Insurance Act and Compensation for Occupational Injuries and Diseases Act as having sections that address inequalities in the workplace in some way.

The Constitution is a key instrument. The Bill of Rights, which is probably the best-known part of the Constitution, prohibits discrimination on the grounds of marital status, sexual orientation, gender, sex, pregnancy, age, disability, ethnic or social origin, language, culture and religion, conscience and belief. The prohibition is not confined to the state's actions. The Constitution is based on the notion of substantive rather than formal equality i.e. on equality of outcome rather than equality of opportunity. It thus recognises that equality might require that different groups be treated differently. In line with this, it prohibits indirect as well as direct discrimination. This means, for example, that one cannot specify any attributes in a job advert that are likely to be held by women more than men unless these attributes are a definite requirement of the job. Further, the Constitution explicitly allows for affirmative action. Also important for women is the right to freedom and security, including the right to decide what they want to do with their bodies.

There are no laws that talk explicitly about gender equality and social dialogue "in the same breath". However, the LRA of 1995 is the key law providing for social dialogue in the workplace. It also contains some other clauses of importance from a gender perspective. These include the clause which states that dismissal of a worker on account of pregnancy, intended pregnancy, or any reason related to her pregnancy, is automatically unfair.

In terms of promotion of social dialogue, the LRA provides for registration of trade unions and employer organisations, and federations of these two types of organisation, with the Department of Labour. There are several benefits to registering. In particular, registered unions are guaranteed organisational rights if they can prove that they are "representative" and collective agreements between registered trade unions and registered employers organisations are binding on members. The relatively simple requirements for registration resulted in a large number of unions and employer organisations registering after the promulgation of the Act.

The LRA does not explicitly afford a right to collective bargaining but probably effectively accords enough related rights to satisfy the ILO definition and convention. The Act does not oblige employers to bargain. As Todd (2004: 42) explains, the Act instead encourages "process voluntarism". The LRA also does not prescribe at what level bargaining should occur. However, only registered unions and registered employer organisations can establish bargaining councils. The bargaining councils, which replace the industrial councils of the apartheid era, bring together employers or employer organisations and unions within a particular sector. The parties do not need to represent the majority of workers or employers within the sector to establish a bargaining council. The LRA allows for extension of agreements to non-members if the union/s who sign the agreement represent a majority of all employees in the workplace. The LRA does not prescribe what issues can be covered by collective bargaining. However, Todd (2004: 55) notes that wages have tended to dominate, while other "important non-distributive matters" tend to get neglected.

While for most sectors it is up to the employers and unions concerned to establish a bargaining council, the LRA itself established the Public Service Coordinating Bargaining Council (PSCBC), and further allowed for the establishment of separate councils for sectors within the public service. The PSCBC covers national and provincial government, but not municipal government as municipal employees are not considered to be public servants. The LRA does not explicitly provide for a separate bargaining council for local government, but such a council has been established.

The 1995 LRA also provided for workplace forums, which were intended to provide a non-adversarial workplace-based forum where employers and workers could discuss non-distributive issues. Very few of these were established.

There are a number of other laws which do not deal as directly with collective bargaining as the LRA, but which affect the context in which unions and employer organisations operate and collective bargaining occurs. The primary aim of the BCEA is to set a floor of minimum conditions for all workers. Bargaining under the LRA then serves to improve those conditions where workers and employers are sufficiently organised to bargain. While there is some provision for "variation" of the minima specified in the BCEA outside of certain "core" rights, these variations should not result in a situation where the employees are worse off than they would be without variation.

There are several clauses of the BCEA which are particularly important from a gender perspective. Firstly, the Act provides that every female employee who works for more than 24 hours per month for an employer has the right to four consecutive months of unpaid maternity leave as well as job security i.e. she is guaranteed the right to return to her job in the same workplace. This "core" right cannot be varied by a bargaining council agreement. The BCEA does not provide for payment of wages while on maternity leave. However, the Unemployment Insurance Act provides that a certain proportion of the wage will be paid for all those who have contributed to the Fund – and contributions are required in respect of the majority of private sector employees. An amendment to the Unemployment Insurance Act introduced graduated payments, so that the lowest-paid workers receive 60 per cent of their wage while on maternity leave, while higher-paid workers receive a smaller proportion. A further favourable aspect is that male and female contributions are calculated by the same formula and are all paid into the same "pot", yet claims for maternity payments do not affect the length of time for which the female worker concerned is eligible for unemployment benefits. Instead, she can claim both maternity and full unemployment benefits.

The BCEA provides further maternity-related protection by requiring that a pregnant employee or one who is breastfeeding may not be required or allowed by her employer to do work hazardous to herself or the baby. The BCEA does not provide explicitly for paternity leave. However, it provides for three days' family responsibility leave in every

twelve months. This leave is an entitlement when the worker's child is born, their child is ill, or their spouse, life partner or other close relative dies.

The Employment Equity Act of 1998 has as its main aim to promote proportionate representation of all groups at all levels of the workshop. The Act outlaws, as discrimination, any form of harassment based on race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

The National Economic Development and Labour Council (NEDLAC) Act of 1994 provides for the establishment of a forum which brings together government, employer and labour representatives and – to a lesser extent – community representatives to discuss economic and development policy which extends beyond a particular sector or workplace. NEDLAC is thus South Africa's foremost "social dialogue" forum for the traditional social partners.

Specialised bodies

There are no programmes specifically targeting social dialogue and gender equality. South Africa does, however, have a range of bodies which together constitute the "national machinery" on promoting gender equality. The Constitution provides for the Commission on Gender Equality (CGE). This is an independent body that is appointed by the President on the basis of parliamentary recommendations based on a public call for nominations. Unfortunately, after a promising start the body has been plagued by internal divisions. There is a widespread view, including in an official parliamentary review (Parliament of the Republic of South Africa, 2007), that the Commission needs to be reformed or even, perhaps, combined with the South African Human Rights Commission.

Within the national parliament a standing committee on Improvement of the Quality of Life and Status of Women was established. The committee was established as an ad hoc committee in 1996, but subsequently became a permanent committee. The committee performed well for a time, but subsequently became less vocal. During its peak period, it focused on poverty, violence against women, and HIV and Aids and it did not engage much on labour issues.

Within government there was initially an Office of the Status of Women located in the Office of the Deputy President, and then the President. This was meant to be supported by gender focal points in all line ministries, with similar people at provincial level. The bodies were fairly effective in a few departments, but not in Labour. More recently, after the Zuma administration came into power in 2009, this Office was replaced by a Ministry of Women, Children and People with Disabilities. The budget of the department with the same name contains the allocation for the CGE but, besides that, provides only for basic administration. To date this Ministry and department have not been active players in the gender field, never mind on labour issues.

The Women's National Coalition represents the civil society arm of civil society. The Coalition played a strong role at the time the interim constitution of the democratic country was being drawn up in 1993 and 1994, but lost momentum in subsequent years as many of the leaders moved into government and other roles. Unfortunately, currently the body currently has very little presence, although it occupies a seat at NEDLAC.

The Commission for Employment Equity (CEE) is established in terms of the Employment Equity Act and is serviced by the Department of Labour. Commissioners, who have part-time appointments and are not government appointees, are appointed by the Minister of Labour. The Commission's main mandate is to promote representativity in the labour force. Its focus is on employees, and on promoting increased representation of three

"designated groups", namely black people (defined to include all those not classified as white under apartheid), women and people with disabilities. Commissioners are chosen from across different sectors and interest groups but are not, in strict terms, meant to be there as "representatives" of these groups.

The Employment Conditions Commission (ECC) is established in terms of the Basic Conditions of Employment Act and it, too, is serviced by the Department of Labour. One of its main functions is to advise the Minister of Labour on the minimum wages and conditions that should be incorporated in sectoral determinations for "vulnerable workers". There are five commissioners – one each nominated by labour and business respectively, and three chosen by the Minister on the basis of their expert knowledge. As with the CEE, the commissioners are not, in theory, meant to act as "representatives" of constituencies. Further, the main focus of this commission is on "vulnerable" workers, which is interpreted to mean, among others, those who are not well organised. This reduces the extent to which this body is relevant in a discussion of social dialogue. However the ECC does have as a core principle of its work that it will encourage social dialogue, and would thus prefer, in as many sectors as possible, to work itself out of a job.

Dispute resolution bodies

The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 is intended "to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination" among others. The preamble to the Act notes that the social and economic inequalities which the Act aims to address were generated, among others, by patriarchy, and further refers to the Conventional of All Forms of Discrimination Against Women when discussing international obligations. The Act does not cover employment-related issues already covered by the Employment Equity Act, which has a specific focus on representation of black people, women and people with disabilities in the workplace, although like that Act the Promotion of Equality Act's main focus is on race, gender and disability. In line with this, the clause describing grounds of unfair discrimination on the basis of gender does not specifically name employee-related issues. However, it does prohibit discrimination on the basis of maternity as well as on the basis of inequality of access to opportunities resulting from the sexual division of labour. The Promotion of Equality and Prevention of Unfair Discrimination Act provides that every magistrates' and high court can serve as an equality court.

The LRA also provides for the establishment, powers and functions of the Commission for Conciliation, Mediation and Arbitration (CCMA). The law states that parties "may" refer disputes on matters of mutual interest to the Commission, and many of the cases dealt with by the CCMA involve unfair dismissal. A Labour Court, with High Court status, deals with matters that do not fall under the CCMA. A Specialised Labour Appeal Court exists for appeals. In approximately 2008 two of the four permanent labour court judges were women, but none of the seven permanent judges on the labour appeal court were women.[1] None of these courts operate with assessors. Beyond these specialised institutions, there are a number of cases that establish that both the Supreme Court of Appeal and Constitutional Court are able to hear appeals from the Labour Appeal Court. While these institutions are not forums for social dialogue, they have dealt with important gender-related issues. For example, Ally (2010: 76) notes that nine cases of sexual harassment had come before the CCMA by 2004.

[1] Information provided by Shaamela Seedat of Institute for Democracy in South Africa.

3. National context of social dialogue and gender equality

Key socio-economic and political developments

1994 stands out as a key date for South Africa in respect of gender equality alongside many other aspects of development. Although racial discrimination is generally considered the defining feature of apartheid, the common call in 1994 was for the establishment of a "non-racist and non-sexist South Africa". Thus gender inequality was widely recognised as analogous to racial inequality and also requiring urgent attention.

The discussion of legislation above highlights the fact that most current legislation was developed after 1994. This implies not only new content of legislation, but also new processes for developing it. In particular, the labour legislation was extensively debated in NEDLAC and beyond before being tabled in parliament. In terms of scope, the new legislation was extended to all parts of South Africa, whereas previously the "homelands" had not been covered by all standard legislation, and sometimes had their own less favourable provisions. Of particular importance for the topic of this study were the restrictions placed on unionisation (see Budlender, 1991).

There were further aspects of the new legislation that were of particular benefit to women. Firstly, influx control provisions, epitomised by the notorious "pass" laws, had as a main purpose to ensure that (white-owned) mines, farms and other businesses had access to cheap black labour while avoiding these areas having to provide for the dependants of these workers. As a result, far more restrictions were placed on the movement of women into white areas. These gender-biased restrictions resulted in the adult population of the homelands being more female-dominated than the population of the "white cities". Those living in these areas were not, prior to the new legislation, covered by the full range of the standard South African labour law. The disproportionally female population of the homeland areas meant that the post-1994 extension of labour legislation and related instruments to these areas was of particular benefit to women. Secondly, the new laws covered previously excluded categories of workers. Particularly important in this respect from a gender perspective were the approximately one million domestic workers, as well as agricultural employees. The post-1994 flurry of policy and legislative development subsequently slowed down, but amendments to legislation continued into the early 2000s.

The election of a new South African President in 2009 is also of interest for the purposes of this study. The new government, although still led by the majority African National Congress, refers to itself as the "new administration". The election of President Zuma was supported by the Congress of South African Trade Unions (COSATU), the largest union federation, as well as the South African Communist Party, and thus might have been expected to open the way for more labour-supportive policies. However, the new period has seen serious splits within the ruling party and alliance, and the eventual outcome is at this point unclear. Meanwhile, an ongoing challenge faced in respect of improvements in the labour dispensation is the high levels of unemployment among both women and men.

Labour market indicators

The Quarterly Labour Force Survey (QLFS) for the third quarter of 2009 estimated the population aged 15 years and above in South Africa to be 33.5 million, of whom 53 per cent were female and 77 per cent were African, 9 per cent coloured, 3 per cent Indian and 11 per cent white when using the racial classification used during the apartheid years. As seen in Table 2, 39 per cent of people in this age group were employed, with the

percentage being 46 per cent for men and 33 per cent for women. The overall official unemployment rate (which excludes discouraged workers) stood at 24 per cent with a higher rate for women (26 per cent) than men (23 per cent).

Table 2.
Employment status of population 15+ by sex, Sep. 2009

Gender	Male	Female	Total
Employed	7186443	5834047	13020490
Unemployed	2113703	2082797	4196501
Discouraged workers	708408	925774	1634182
Other not economically active	5775834	8893142	14668976
Total	15784389	17735760	33520149
Official unemployment	22.7%	26.3%	24.4%
Employment rate	45.5%	32.9%	38.8%

Table 3 reveals that three-quarters (75 per cent per cent) of all employed people were recorded as working in the formal sector, but the percentage was only 68 per cent per cent for women as opposed to 80 per cent per cent for men. The gender difference is primarily explained by the large number of women working as domestic workers in private households. These workers accounted for 16 per cent per cent of all employed women. The overwhelming majority (85 per cent per cent) of employed people work as employees, and are thus of direct interest for this study. The percentage is 85 per cent per cent for men and 86 per cent per cent for women. A further 7 per cent per cent of employed men and 2 per cent per cent of employed women are employers (giving 5 per cent per cent for both combined) and thus also potentially engaged in social dialogue.

Table 3.
Employed aged 15+ by sector and sex

Sector of work	Male	Female	Total
Formal sector	80.4%	67.8%	74.7%
Informal sector	16.1%	16.3%	16.2%
Private households	3.5%	15.9%	9.1%
Total	100.0%	100.0%	100.0%

Of the employees, 78 per cent of men and 69 per cent of women work for private enterprises, with a further 5 per cent and 19 per cent respectively recorded as working for private households. The other major group consists of the 14 per cent of male employees and 19 per cent of female employees who work for national, provincial or local government.

Unfortunately, the QLFS data do not currently include information on earnings. We are thus forced to use data from the September 2007 Labour Force Survey. A further unfortunate fact is that the definition of the formal sector changed between the LFS and QLFS, with the change primarily affecting employees. Nevertheless, the estimates presented here are suggestive. Among formal sector employees, the 2007 data suggest that 16 per cent of women employees compared to 12 per cent of men employees earned R1 000 or less per month, while 4 per cent of men and 3 per cent of women earned R16000

or more.[2] These differences are less stark than those found in many other countries, but do suggest the existence of a gender pay gap given that female formal sector employees in South Africa are, on average, more educated than male employees. The absence of a bigger gender gap can be partly explained by the large number of women employed by government, as well as large numbers working in professional and associate professional jobs. Thus in the third quarter of 2009, 27 per cent of female non-agricultural formal sector employees were in the professional or technical and associate professional categories, as opposed to 17 per cent of men. The comparison is also misleading to the extent that it does not include the large numbers of domestic workers in the informal sector.

Impact of financial and employment crisis of 2009

As elsewhere, the global financial crisis had a noticeable impact on employment in South Africa. The QLFS recorded a drop in the employment rate from 42 per cent to 39 per cent between the third quarters of 2008 and 2009. The drop was sharper for men than women, in that the employment rate fell four percentage points (50 per cent to 46 per cent) for men compared to two points (35 per cent to 33 per cent) for women. This resulted in the female share of employment increasing from 43 per cent to 45 per cent. In absolute terms, employment dropped from 13.8 million to 13.0 million, with male employment falling from 7.7 million to 7.2 million and female employment from 6.09 million to 5.83 million. Contrary to expectations, the share of the informal sector in employment also dropped, from 26 per cent to 25 per cent. Here the drop was two percentage points for men, but less than one percentage point for women.

4. Key social partners

Profile of the key partners

In 2007 the Department of Labour's database recorded a total of 261 registered unions, with a combined membership of 3.2 million, alongside 201 registered employer organisations. In addition, in late October 2008, the Department had 21 union federations on its database. Of these, the more active were the Federation of Unions of South Africa (FEDUSA), National Council of Trade Unions (NACTU), COSATU, the Movement for Social Justice, Confederation of South Africa Workers Union, International Federation of Building and Wood Workers, Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied workers Union, and International Textile Garment and Leather Workers Federation Africa. The first three of these enjoy representation on NEDLAC. FEDUSA brings together unions that traditionally organised white, skilled workers. NACTU's history is aligned with the Africanist and black consciousness tradition, in contrast to COSATU's close alignment with the ANC.

The Department of Labour had nine registered federations of employer organisations, of which two are more active, namely the Steel and Engineering Industries Federation of South Africa and Confederation of Employers of Southern Africa. The website of the latter[3] describes it as an employers' organisation rather than federation (i.e. grouping of more than one employers' organisations), although its members straddle a range of sectors. The description of services offered suggest that it focuses on providing advice and other support through a country-wide system of advisors rather than in building organisation among employers.

[2] It is difficult to give a US dollar equivalent as the South African rand is among the most volatile currencies internationally. As at 16 June 2010, the exchange rate was 7.688 South African rand to one US dollar.
[3] www.cofesa.org.za

Business Unity South Africa, which represents employers on NEDLAC, is not registered as an employer federation under the LRA. Business Unity South Africa was formed in 2003 through the merger of the Black Business Council and white-dominated Business South Africa. On its website[4] the organisation states that it "represents South African business on macro-economic and high-level issues that affect it at the national and international levels."

Addressing gender equality concerns and representation of women

NEDLAC's annual report for 2008/09 has pictures of the eighteen NEDLAC "principals". Government is represented by two men, business by two men, and labour by three men. The community constituency is represented by two women and one man, while the overall convenors consist of one woman (who is the community convenor) and three men. Overall then, only three of the eighteen principals are women, with all the women coming from the community constituency.

COSATU is the largest of the three labour organisations represented on NEDLAC. Two of its six current national office bearers are women. At its founding conference in 1985, COSATU passed a resolution on the need to promote women's rights. Currently this federation has a draft gender policy which was drawn up in 2000 and tabled at the 2009 annual conference. The policy statement is composed of two sections. The first deals with gender equality in union structures and staffing. The second deals with gender equality in the labour market and discusses parental rights and childcare, equal pay for equal work and work of equal value, employment equity agreements, health and safety, participation of women in collective bargaining, fighting discrimination on the basis of sexual orientation, and gender equity in the broader society. The document includes an implementation framework. Under the section on participation of women in collective bargaining, the draft policy notes the need for inclusion of women in bargaining teams, clarification of the role of gender co-ordinators and structures in collective bargaining, and development of a strategy to involve women in collecting collective bargaining demands.

The Federation of Unions of South Africa (FEDUSA) and the National Council of Trade Unions (NACTU) are the other labour organisations represented on NEDLAC. Only one of the six members of FEDUSA's leadership shown on their website is a woman. FEDUSA has an Equity Forum which "stands for freedom, dignity and equality in the workplace" (www.fedusa.org). The Forum has six key objectives, three of which are more or less explicitly related to gender. The first is to recognise the contribution of women in the workplace, the second to educate employees and employers concerning gender and gender-related issues, and the third to raise awareness of and eradicate sexual harassment in the workplace.

In terms of trade union membership more generally, unfortunately the QLFS does not currently include a question on trade union membership. We thus once again revert to data from the September 2007 Labour Force Survey. This gives a slightly higher membership of trade unions, at 39 per cent, for female formal sector employees than for male, at 38 per cent. This unexpected pattern as resulting from the differences in the profile of women and men union members in South Africa and, in particular, the large proportion of women union members who are in the public service. Thus, in September 2007 the labour force survey recorded 43 per cent of female formal sector unionised employees as working for provincial or national government as compared to 20 per cent of their male counterparts. In line with this (but using data from 2003), Casale & Posel (2009: 17-18) find that female union members have an average of 11.1 years of schooling while male union members

[4] www.busa.org.za

have an average of 8.9 years. Further, 9 per cent of female union members are in professional occupations (such as nursing and teaching) compared to 3 per cent of male union members.

Business Unity South Africa (BUSA) represents business on NEDLAC. The organisation until recently had six office-bearers, of whom one – one of the four vice-presidents – was a woman. Women also headed two of the four standing committees, namely those on trade and social policy. During May 2010 this situation changed when Futhi Mtoba became the first black female president of BUSA. Astonishingly, her election to this position was said to be a backward step for transformation by the Black Management Forum on the grounds that she comes from big rather than small business.

Training services

The Ditsela Workers' Education Institute was created by COSATU and FEDUSA to serve the training needs of the federations and their affiliates. It is supported, among others, by the Department of Labour's Civil Society Fund. Ditsela places some emphasis on gender in its activities. Thus the 2010 training programme reveals that one of the twelve two-day national education short courses offered by Ditsela focuses on gender. The Western Cape branch of DITSELA, which is the only provincial branch, has for some years offered a two-year modular course to shop stewards who are nominated by their unions. One of the ten modules of this course focuses on gender in trade unions. Within the organisational development activities of Ditsela, Ditsela is also developing "herstory", in the form of short biographies of South African women labour leaders. Finally, the application instructions for courses notes that Ditsela's commitment to having a wide spread of unions represented as well as an "appropriate gender balance" will influence who is accepted.

5. Role of tripartite social dialogue bodies

The National Economic Development and Labour Council

As noted above, the NEDLAC Act established NEDLAC as a forum for social dialogue between the social partners. NEDLAC played a major role in the development of the LRA and BCEA, and was also involved in the development of other labour-related legislation. Perhaps inevitably, once the excitement of developing the major new laws was over, its role has become less prominent. An alternative, or supplementary, interpretation of the relative quietness compared to earlier years is that the South African government of the twenty-first century is somewhat less concerned about consultation than it was in the first years after 1994.

Godfrey et al note that while the LRA provides for bargaining councils to make submissions to NEDLAC, for example on industrial policy, they know of no examples of where this has occurred. Similarly, Harisch et al (2005) point out that although the Employment Equity Act specifies that employers must consult "designated groups" (i.e. black people, women and people with disabilities) through their representatives or union, employment equity has seldom become part of collective bargaining. In some cases employers create separate bodies for consulting on this issue, but these are often used for information sharing rather than involving workers in drawing up the plans. Nevertheless, the authors found some examples of unions using the fact that the employer needed their signature on the employment equity plan to extract some concessions.

Promoting gender equality at work

Over the course of years NEDLAC has, through negotiation, drawn up several codes of good practice that are relevant for our purpose. There is, for example, a BCEA code of good practice on the protection of employees during pregnancy and after the birth of a child which was drawn up in 1998. This codes states, among others, that two 30-minute breaks should be allowed per day for breast-feeding or expressing milk during the first six months of the child's life. The code of good practice on the handling of sexual harassment cases (first drawn up in 1998 and amended in 2007) aims both to promote workplaces that are free of sexual harassment, and provide procedures to be followed when it occurs.

In addition to gender-related initiatives such as the above at central level, there has been ongoing engagement at the individual union level. Already in the mid-80s several of the unions which came together to form COSATU started focusing on gender issues (see Budlender, 1991). The South African Commercial, Catering & Allied Workers Union (SACCAWU) and its predecessors were in the forefront of the battle for parental rights already at that point. They won their first agreement with a major employee at OK Bazaars in 1983. The agreement provided for a year's unpaid maternity leave with guaranteed reemployment. Agreements with Metro Cash and Carry and Pick 'n Pay were entered into over the following years. This same union is still pursuing better maternity benefits more than two decades later (see Budlender, 2009). The union has gender structures that have spearheaded the work on parental rights through campaigns, educational programmes and policies, and development of a parental rights model proposal which is used as the basis for negotiations. The proposal includes paid maternity and paternity leave, paid leave for ante- and postnatal care, social security provisions and adoption leave, stillbirth, miscarriage and abortion leave. Many of these provisions have already been achieved at various big and small companies. SACCAWU has elected company-based (female) gender co-ordinators who sit on the national negotiating teams to ensure that gender demands are included in the list of demands submitted to management.

SACCAWU was, however, not the only union to focus on this issue in the 1980s. Other important players were the male-dominated Metal and Allied Workers Union and female-dominated National Union of Textile Workers. By the end of 1989 the Chemical Workers Industrial Union had negotiated between one and four days paternity leave at over sixty factories. These and other unions also took up other issues beyond parental rights, such as equal pay for work of equal value, job opportunities, health and safety, child care and sexual harassment. These issues have remained the focus on gender-related union demands in later years. Further, many of today's unions have gender forums, although the members of these forums are not necessarily represented on negotiation teams. One collective bargaining challenge, quoted in Budlender (2009), is that male-dominated negotiating teams do not always see the gender issues as a priority. Further, some employers feel that issues such as maternity, child care and even sexual harassment are private issues that should not be addressed through the workplace.

6. Gender equality in collective bargaining

Forms of collective bargaining

Godfrey et al (2007) describes in some detail the wide range of different contexts and forms in which collective bargaining occurs in South Africa. At one end of the spectrum, there are the bargaining councils established in terms of the LRA, which in some cases span national industries, while in other cases they encompass only a small number of workers in a particular industry in a particular locality. In addition to the registered councils, there are non-statutory bargaining forums established in several industries,

including a major forum in the important mining industry. Another important form of collective bargaining is firm-level bargaining that can span many different plants of the same company, or may be confined to a single workplace. The picture is further complicated by the fact that in some industries the same companies and unions are involved in several different levels of bargaining simultaneously. In particular, they may be part of a sectoral council but also engage in company- or workplace-level bargaining. The Labour Research Services (2008) observes that the best agreements from the worker perspective are generally found at the decentralised level in respect of larger national companies.

Coverage of the workforce

The number of bargaining councils decreased from 87 in 1995 to just over 50 in 2007. Part of this decrease is explained by mergers of regional and sub-sectoral councils into single, larger, national councils. Despite the decrease in the number of councils, the number of employees covered has increased over the same period. Godfrey et al (2007) estimate that private sector councils covered 1,282,043 employees in 2004 as compared to 823,823 in 1995. If public sector workers are included, coverage in 2004 was estimated at 2,358,012. In terms of sectors covered, the range is wide. Firstly, bargaining councils are present in both public and private sectors. Secondly, they are found in primary, secondary and tertiary sectors. For example, there are several regional building councils, regional hairdressing councils, regional furniture manufacturing councils, large national metal and engineering council and motor industry councils, smaller national councils in areas such as road freight, fishing and wheat cooperatives, as well as smaller location-specific councils such as that for the meat trade in Gauteng.

Godfrey et al (2006) estimate that, of the approximately 9,5 million employees covered by the LRA and BCEA, about 25 per cent are covered by bargaining council agreements. This estimate includes those covered because of extension of agreements to non-parties. Bargaining council coverage increases to just under a third of employees if the calculation is restricted to employees in occupational categories 4-9, namely clerks, service and shop workers, skilled agriculture and fishery workers, craft and related trades workers, plant and machine operators and assemblers, and elementary (unskilled) workers.

Gender equality issues in collective agreements

Bargaining councils, enterprise-level agreements and the BCEA

Benjamin's (2007) excellent study examines the gendered outcomes of collective bargaining as found in bargaining council agreements as well as selected enterprise-level agreements. Her sample included 31 bargaining council agreements, 361 enterprise level agreements and seven sectoral determinations. (The latter are not discussed in this paper as they do not represent examples of collective bargaining or social dialogue). Four themes are highlighted in examining the instruments, namely (a) promotion of equity and equality in the workplace; (b) job security and the creation of safe conditions in the workplace; (c) family rights; and (d) reproductive, sexual and health rights.

Benjamin also discusses the gendered outcomes of the BCEA itself arguing that this was the result of tripartite negotiations at national level. Her findings are primarily based on detailed examination of the agreements concerned, but are also informed by a survey of (predominantly male) trade union representatives who attended a negotiator's conference and a workshop with predominantly female representatives from 17 trade unions, three quarters of whom were on a negotiation team.

Benjamin finds that only one of the agreements – that for the Tearoom, Restaurant and Catering Trade, Pretoria – explicitly outlawed discrimination on grounds of race, colour, sex or religion in respect of pay and promotion. None specifically referred to the gender wage gap.

Only one agreement – for the government Safety and Security Bargaining Council – provided for a transformation fund that included measures for training female police officials in operational posts. The clauses relating to the same fund provide for sexual harassment training that spans the spectrum from awareness raising to reporting, investigating and conducting hearings. No other agreement studied was found to refer to sexual harassment. However, as noted below in respect of Metal and Engineering, sexual harassment may be covered in another agreement as - especially among the bargaining councils – there are often multiple agreements covering different issues.

Five percent of the bargaining council agreements and 3 per cent of enterprise level agreements provided that the employer would pay at least a portion of the wages while the worker was on maternity leave. The percentage of pay was set at between 25 per cent and 33 per cent. At least some of these agreements are probably legacies of the earlier period when the Unemployment Insurance payout was set at 45 per cent, and the amount paid by the Fund was reduced proportionately if the employer paid more than 33 per cent. Some other agreements providing for maternity pay related to government employees, who are not covered by Unemployment Insurance. Five percent of bargaining council agreements and 2 per cent of enterprise-level specified that the worker would retain full benefits in terms of bonuses, pension and provident funds while on maternity leave. One agreement stated that the worker would retain benefits in respect of the funeral fund which operates in that particular industry. Two agreements – one enterprise-level and the other for the Automobile Manufacturing Industry Forum – stated that the employer would provide assistance with the worker's application for UIF maternity benefits. At least two agreements – one for metal and engineering, and the other for a major hotel group – while stating that the worker who has taken maternity leave will be regarded as having unbroken service, state that this period will not be included when calculating accrued annual leave i.e. the time on maternity leave will not be regarded as time in employment.

Elsley (2007), based on an examination of 31 bargaining council agreements plus 361 agreements arising from decentralised bargaining, finds that collective agreements provide for four days family responsibility leave on average, about three and a half days paternity leave and five days compassionate leave. However, the agreements adopt different approaches. Some provide a total number of days which can be used for different purposes, while other provide separately for paternity and compassionate leave. Elsley suggests that the latter is preferable, whereas in reality it seems that the former would provide more flexibility to the work in meeting the needs that arise in a given year.

In the sample analysed by Benjamin, paternity or compassionate leave were generally provided for under family responsibility leave. The PSCBC provided for a total of five days family responsibility leave, but limited the number of days that can be taken in respect of birth of a child or caring for a sick child or partner to three days within the total of five. Several other agreements, mostly covering major sectors, also provided for more than the three days of the BCEA. The South African Local Government Bargaining Council agreement stipulated five days paid family responsibility leave without further restrictions; the National Bargaining Council for the Chemical Industry (Glass Sector) allowed for three days paid and a further two days unpaid paternity and/or childcare leave; the Petroleum Sector provided for eight days leave – six paid and two unpaid – in respect of compassionate, special, paternity and child care leave; and the National Bargaining Council for the Chemical Industry (Pharmaceutical Sector) provided for five days paid paternity leave as well as five days paid compassionate leave.

Very few agreements referred to child care beyond the issue of family responsibility leave. One interesting finding was that the Metal and Engineering Industries Bargaining Council agreement noted a planned investigation into the possible implementation of a joint pilot project involving provision of child care facilities. Unfortunately, there has been little progress on this idea subsequently.

Benjamin notes that a "significant number" of agreements extended maternity leave beyond the four months provided in the BCEA, but that this was generally accompanied by a qualifying period of a certain length of employment before the worker was entitled to this extended leave. The examples provided, all of which were for enterprise-level agreements, all extended leave to six months. The Metal and Engineering Bargaining Council agreement stipulated that the qualifying period only applied to leave beyond the four months specified in the BCEA. Requiring a qualifying period in respect of the initial four months is illegal as maternity leave is a "core" right and can thus not be "varied" through agreements. The Footwear section of the National Bargaining Council of the Leather Industry of South Africa stated that a worker would only be entitled to re-engagement after maternity leave if she had worked for a year before going on maternity leave (Labour Research Service, 2008).

Three percent of bargaining council and 2 per cent of enterprise level agreements mentioned ante- and postnatal care. The McCain Foods agreement encouraged workers to use the free company clinics but did not force them to do so. The agreement specified the points at which visits were recommended. It stated further that time spent on visits would be unpaid but will not be counted against sick leave. In contrast, Enterprise Foods stated that six days paid leave would be provided for antenatal visits, while the National Bargaining Council of the Leather Industry of South Africa - General Goods and Handbags – provided for three half-days of paid leave during the last three months of pregnancy, and the Footwear Section of the same industry provided for five occasions of 4.2 hours paid leave for the duration of the pregnancy.

In terms of general health, two agreements – one in the tyre industry and the other in automobile manufacturing – made provision for pap smears, and the Automobile Manufacturing agreement also provided for prostate tests. The National Bargaining Council for the Clothing Manufacturing Industry - Western Cape Region – Knitting provided that approved seats with suitable backrests should be provided for all female employees.

The clauses described above illustrate the way in which basic conditions prescribed in the law can be expanded on through negotiation. However, the examples are few and far between. The finding of very small percentages with gender equality-related clauses reported by Benjamin is supported by a later study by the Labour Research Services of 30 of the 48 bargaining council agreements plus a further substantial number of other agreements. The later study did not have gender as the primary focus, but did examine gender issues alongside other general issues. The report notes that examination of these and "hundreds" of other agreements "leaves one with the overwhelming impression that the Basic Conditions of Employment Act (BCEA) is operating more as a benchmark than a floor" (Labour Research Service, 2008:3).

2010 survey update on bargaining councils

In a small attempt to update Benjamin's research, the section of the Department of Labour responsible for registration of unions, employer associations and bargaining councils agreed to disseminate a short questionnaire to all registered bargaining councils. The request was sent to a total of 47 bargaining councils and two statutory councils. Seventeen responses were received, including one from each of the statutory councils. One of the latter explained that he would not complete the form as the council did not provide for

collective bargaining. Analysis is thus based on 16 completed questionnaires. In response to the more content-oriented questions, the Wood and Paper council noted that all the issues were "under negotiation". For these questions, the analysis is thus based on 15 questionnaires.

Between them, the 16 councils covered more than 420 000 employees. The percentage of employees who were female ranged from zero (for the Squid and Related Fisheries Statutory Council) and 1 per cent or less for Building Kimberley and the South African Road Passenger Transport Council, to 80 per cent or higher for the two hairdressing councils that responded. The hairdressing councils were the only two in which more than half of employees were said to be female. Two councils could not provide an estimate of the female percentage of the workforce covered.

Councils were asked for the gender breakdown of employer and employee representatives on the top decision-making body. Eight of the councils had no female employer representatives and eight had no female employee representatives. In all except the two hairdressing councils, the number of male representatives outnumbered female representatives for both parties – usually by a wide margin. In total, for those that gave information, there were 181 male and 18 female employer representatives, and 150 male compared to 17 female employee representatives. Workers were thus slightly more likely than employers to choose female representatives.

Councils were asked whether their agreements covered a range of specified gender-related issues. Maternity was the issue most commonly covered. For this issue three councils said it was not covered, while another six described clauses that seemed to mimic the BCEA. Two furniture councils provided for six months (unpaid) maternity leave rather than the four weeks provided for in the BCEA. Three of the councils included provisions for employment of temporary replacements at the same rate of pay. Four councils provided for some paid leave. In Metal and Engineering, full pay is available for 26 weeks through the council's Sick Pay Fund. In Road Passenger Transport and Textiles a third of the wage is paid for about four months, with a further two months unpaid available in Textiles. For Hairdressing Pretoria full pay is available to workers with five or more years of service

Paternity leave was the second most common area to get positive responses. However, generally the responses replicated the family responsibility leave provisions of the BCEA. Building Southern and Eastern Cape noted that workers could apply for ex gratia payments from the benefit fund if they exceeded their family responsibility leave, while Furniture Western Cape provides two days unpaid in addition to the three days paid family responsibility leave. Hairdressing Pretoria provides for seven days family responsibility leave per year for those with five or more years of service.

When asked whether there were provisions in respect of pregnant and/or breastfeeding women, for example in relation to breastfeeding and antenatal and postnatal visits, Furniture Western Cape was the only council to give a positive response. The council indicated that workers could use family responsibility leave for this purpose. When asked whether there were provisions in respect of child care, five councils said that workers could use family responsibility leave. Most others responded negatively, which is somewhat surprising given that the BCEA specifically mentions child care in describing family responsibility leave.

Metal and Engineering was the only council to have provisions in respect of sexual harassment. Cases are dealt with under the dispute resolution agreement of this council at the Centre for Dispute Resolution. Hairdressing and Cosmetology KwaZulu-Natal had reportedly considered making provisions in respect of sexual harassment but abandoned this idea because of the challenges of enforcement.

None of the councils said that they had provisions in respect of any other gender-related issue.

The analysis confirms some of Benjamin's findings, such as the focus on maternity and paternity leave, with little attention to other areas; the tendency for paternity leave to be treated as part of family responsibility leave; and the limited number of agreements which provide for payment during maternity leave beyond that provided by the Unemployment Insurance Fund. What is interesting is that the more progressive clauses are not necessarily restricted to the more female-dominated industries. Metal and Engineering, in particular, stands out as being more progressive than other councils. This could, in part, reflect the advocacy done by the National Union of Metalworkers of South Africa and its predecessors from the 1980s onwards. Of course, one could also argue that progressive clauses are less costly in industries that have a lower percentage of women workers.

One final point is that collective bargaining agreements in South Africa generally do not cover skills training, as this is covered by a separate Act, the Skills Development Act, with associated structures and processes. The Labour Research Act (2008) notes that this is a problem insofar skills are tightly linked to pay and occupational progression.

Training on negotiation skills

The Labour Research Service provides support services to trade unions which have, as a central aim, supporting collective bargaining negotiators. In addition to regular publications and analysis of its extensive database of agreements, the organisation also provides workshops for negotiators. In these events it often introduces an element of research which is then reported on in its publication. The annual Bargaining Indicators of 2008 (Labour Research Service, 2008) reports on responses provided by 47 negotiators when they were asked what key non-wage demands were to be raised in that year's round of bargaining. Family responsibility leave and medical aid emerged as the most common demands, followed by demands related to the length of maternity leave or level of maternity pay. Paternity leave demands were in fourth place. For family responsibility leave, common demands related to extension of days, unbundling of this leave into different components, and extending the leave to death of in-laws.

The National Labour and Economic Development Institute is a research organisation that provides support services to trade unions, and COSATU in particular. In 2007 they held the first of planned annual national collective bargaining workshops. The second such workshop, held in May 2008, included a session on gender which was addressed by the gender coordinator of SACCAWU (National Labour and Economic Development Institute, 2008). The coordinator's talk pointed to the fact that collective bargaining can help secure "basic preconditions such as equal access to work, promotion, training and establish the parameters for equality such as equal pay for equal work and value. And the sharing of the load, such as the balancing of work and family life." She went on to point out that efforts needed to extend beyond the workplace, to the home and community, as well as the union. The subsequent responses from participants were heated, but focused more on gender issues within the union and personal relationships than on collective bargaining issues.

7. Gender equality at work – challenges in practice

Gender equality challenges in the workplace

In this section we summarise gender equality problems existing in enterprises by drawing on participatory research conducted by Nina Benjamin of the Labour Research Service (Benjamin, 2008). Benjamin's research was intended to identify strategies for addressing

the conditions women workers face. Information was gathered, among others, through a survey of 116 women workers predominantly from the chemical, clothing, textile and retail sectors, eight focus group discussions held with women workers in the retail and chemical sectors, and 19 strategising workshops held with women workers, women trade union officials and women worker leaders from the construction, health, chemical, municipal, retail and agriculture sectors. The latter workshops involved a total of 285 women.

The majority of women who participated felt that despite laws prohibiting discrimination, they experienced inequality in respect of pay, job grading, job descriptions, promotions, treatment of women by male management and involvement in decision-making structures. In the survey, 72 per cent of women workers reported that they experienced inequality in terms of promotion, 66 per cent in respect of pay, 68 per cent in terms of job grade, 60 per cent on job description, 55 per cent in terms of unequal treatment by male management, and 53 per cent in terms of unequal involvement in decision-making structures. Nearly 7 in ten (69 per cent) said that women were seen as a cheap form of labour with little bargaining power, while 73 per cent said that they were not taken seriously by male colleagues (Southern Hemisphere, 2008). Women participants described ways in which discrimination happened, for example by labelling women doing a particular job as packers while men doing a similar job were labelled machine operators. This is similar to experiences reported by Budlender (1991) close on twenty years ago.

Many of the women said that their caregiving roles were one of the main factors that made their situation different to that of men workers. Child care was named in particular, although less often by the older women. Some participants stated that pregnancy emphasised their status as "second class citizens", and caused management to view them as "irresponsible, unreliable" and a "nuisance".

At least 40 per cent of all the participating women reported that they had experienced some form of sexual harassment. This experience was more common in larger male-dominated companies although these same companies were more likely to have formal sexual harassment companies (Southern Hemisphere, 2008). Within their unions, women also felt undermined and unheard. In the words of a focus group participant: "Your ideas are dismissed and if you are building gender structures, your programmes are suppressed, your budgets are not approved."

Benjamin notes a tendency to generalise about women's problems at work, without recognising that different categories of women face different challenges. She records the surprise of other participants when older women raised problems such as menopause or leg problems and younger women complained that they were bored and frustrated by routine work. She suggests that the "one-size-fits-all" approach results in a focus on issues such as maternity leave, and neglect of other important concerns. She observes that the emphasis on maternity leave is particularly odd given that many union members are beyond child-bearing age. In the focus group discussions, many were personally more interested in issues such as access to bursaries for themselves or their dependents. Older women also feared being overlooked where there were promotion or training opportunities.

Benjamin's research does not provide quantitative evidence of the gender pay gap. Recent information on this is not available as the question on income was dropped when the QLFS replaced the earlier labour force survey of Statistics South Africa in 2007. The question is reportedly being re-introduced, but data for the intervening period will remain unavailable. Crude analysis of data from the September 2007 labour force survey i.e. without controlling for factors such as level of education and government or non-government, finds 12 per cent of male formal sector employees reporting earnings of R1,000 or less per month, as compared to 16 per cent of female formal sector employees. At the other end of the spectrum, 3 per cent of the men earn more than R8,000 per month compared to 4 per cent of the women. If this analysis were extended to include domestic workers, the inequalities would be more marked. Casale & Posel's (2009) more

sophisticated analysis confirms a marked wage gap and finds that, after controlling for relevant factors, the gap is slightly larger among unionised than among non-unionised workers.

Organising around gender equality

Benjamin (2008) highlights two examples of what could be considered good practice in organising around gender and in a gender-sensitive way. The case of Sikhula Sonke, a woman-led union that organises agricultural workers in the Western Cape, was described in an earlier South African report on collective bargaining (Budlender, 2009). This small union, which at that time had 3,644 members, and represented the majority of workers on 116 farms, had 57 recognition agreements with employers, all of which entitled shop stewards to paid time off for union activities, and all of which covered health and safety in the workplace. Within a twelve-month period the union had entered into 20 collective bargaining agreements. All provided for collective bargaining, three-quarters stipulated that toilets must be provided in the vineyards, half provided for an annual bonus, half provided for paid maternity leave, and three provided for day-care facilities for children. The workers covered by these agreements would also have been covered by the sectoral determination for agriculture. However, the local Department of Labour reportedly lacked capacity to enforce its provisions.

Benjamin's other example of good practice relates to the mall committees created by SACCAWU in shopping malls where their members are employed. These committees provide opportunities for workers to collaborate across the companies operating in the mall, as well as to work with young women workers in vulnerable forms of employment, such as doing casual work in restaurants. The committee is also able to engage with mall management instead of, or alongside, the management of their specific companies. Further, while women often find it difficult to attend union meetings after hours, mall meetings held during lunch time are more convenient. Benjamin documents one of the achievements of a mall committee as having conducted a survey of childcare requirements of casual workers, after which the mall management offered to provide meals for the children as well as entertainment such as art. In terms of collective bargaining, Benjamin suggests that mall committees allow workers from different companies to compare their conditions and negotiate for removal of disparities.

Mechanisms of protection

During the apartheid years women were prohibited from working as underground miners. This prohibition no longer exists. The BCEA does still provide some protection in respect of pregnant and breastfeeding women, as described above, but this is done in general terms rather than prohibiting specific jobs. In earlier times women were prohibited from working night shifts. This protected women from this work but made them less attractive to employers. The prohibition no longer exists, but the BCEA provides that night work may only be done (whether by men or women) if transport is available between the worker's place of residence and workplace at the beginning and end of the shift. This is particularly important for women given high levels of gender-based violence in South Africa as well as often long distances between work and home because of spatial patterns inherited from apartheid.

Explicit gender discrimination in respect of pay was outlawed in 1981, when the Wage Act (precursor of BCEA) and Industrial Conciliation Act (precursor of LRA) were amended to prohibit specification of different wages for men and women doing the same job in agreements and determinations. Before this time, minima for women tended to be about 80 per cent of the equivalent male wage rate. In 1988 the definition of an unfair

labour practice in the then Labour Relations Act was amended to include "unfair discrimination on the grounds of ... sex" (Budlender, 1991) However, a survey conducted by the National Union of Metalworkers of South Africa in the mid-1980s found that factories employing proportionately more women had lower minimum wages than those with more men. As elsewhere in the world, gender segregation in terms of industries and occupations continue to bring disparities. Indeed, after controlling for factors such as education and whether the worker is employed in the public or private sector, Casale & Posel (2009) find that – unlike elsewhere in the world – the gender wage gap is slightly larger in South Africa for unionised than for non-unionised workers. They attribute this finding, at least in part, to gendered occupational segregation among union members in that, for example, while more unionised women than men are in professional occupations that one would expect to have higher earnings but that, in South Africa, these occupations do not seem to result for women in the level of returns expected. They attribute these lower-than-expected returns to the fact that the female professional workers are predominantly teachers and nurses, both of which are professions that have historically been relatively underpaid.

Tackling gender equality through the courts

The court system is not essentially a locus of collective bargaining or social dialogue. Nevertheless, it is an important part of an integrated system that provides an avenue for workers and employers when collective bargaining gets "stuck" or when the parties are not well organised enough to engage in collective bargaining. It can also establish principles that then inform collective bargaining.

The fact that the courts and related institutions provide an avenue for unorganised workers is evidenced by the large number of domestic worker cases, and particularly those relating to unfair dismissal, that are brought before the CCMA. The Women's Legal Centre, an organisation which takes on public interest cases, has also used the courts to take up issues of sexual harassment in the workplace. In the Kheswa case, the Centre assisted a senior female police officer who was subjected to both harassment and racial insults by her supervisor. This case was initially taken up in the Equality Court, but subsequently referred to the Labour Court given that it related to employment-related issues.[5] In the case of Radebe, the Centre took up the case of a metropolitan police officer who was raped by her supervisor and subsequently victimised by colleagues to the extent that continued employment became impossible. The CCMA found in the complainant's favour and awarded compensation of 12 months' salary. In the Kylie case the Centre took a case of unfair dismissal of a sex worker to the CCMA, which rejected the claim on the basis that the work was illegal. The Centre subsequently took the case to the Labour Court, where the previous judgment was upheld (Women's Legal Centre, 2008a; 2008b). A recent Labour Appeal Court judgement overturned these judgments. In a judgment thought to be the first of its kind internationally, the judgment declared that "the fact that prostitution is rendered illegally does not … destroy all the constitutional protection which may be enjoyed by someone as an appellant, were they not to be a sex worker." Thus the constitutional protection extends to all those in an employment relationship, whether or not the work is illegal (Mail & Guardian, June 4-10 2010: page 18).

[5] Information provided by Jody-Lee Fredericks of Women's Legal Centre.

8. Conclusions

Benjamin (2007) notes that union-based research participants reported handling grievances relating to a range of legally prohibited practices. She observes that this finding highlights the difference between having rights in principle or theory (i.e. gender-responsive legislation), and enjoying rights in practice (i.e. legislation that is fully implemented and enforced). Post-1994 South Africa has put in place a relatively solid legislative framework, with the Constitution and its emphasis on non-discrimination as the base. Yet gender-based inequalities continue. Indeed, in research commissioned by the Labour Research Service, only half of the women workers interviewed felt that women had more rights in the workplace today than they had ten years ago. Further, older women were less likely to believe this than younger ones (Southern Hemisphere, 2008).

Some of the ongoing inequalities relate to unenforced legislation, and to lack of awareness on the part of both employers and workers (and perhaps sometimes government) as to the true nature of the rights that exist. Many of the inequalities relate to gender patterns in society. In particular, the fact that women bear the main burden of unpaid caregiving has direct consequences for rights and conditions within paid work. This issue is perhaps even more important in South Africa than elsewhere given that a six-country study of developing countries revealed that South African men spend, on average, only seven minutes of their day on unpaid care of persons, less than men in any of the other countries studied (see Budlender, 2008: 15). The stark patterns in South Africa can be at least partly explained by lower rates of marriage, and lower rates of fathers living with their children than in most other countries. These patterns can, in turn, be partly attributed to our apartheid history, which saw large number of black men forced by influx control and related restrictions to live apart from their partners and families for most of the year. However, the pass laws were abolished in 1986, yet the patterns live on. Maternity benefits are of some assistance to women when children are born, but do not help with the work burden that ensues for many years after.

The post-1994 period has seen marked changes in the profile of people at the upper end of South African society. In both political and economic spheres, it is no longer something work remarking on when black people and women occupy the top spaces. At lower levels, however, the race and gender patterns remain strong. Within the workplace there are probably more opportunities for women to do jobs that would previously have been reserved for men. However, overall women are concentrated in particular occupations and sectors, and these tend to have lower pay than male-dominated occupations and sectors. Further, even at the top end the private sector lags behind the public sector and public enterprises in terms of representation of women.

The Employment Equity Act was meant to help address these problems. It has no doubt assisted in accelerating change. But those responsible for the Act have tended to focus on the upper end of the spectrum, placing emphasis on the numbers of women (and black people) in managerial and professional positions rather than on ensuring equity for the women and men lower down in the occupational structure.

South Africa has spaces for social dialogue. The description above suggests that the top bodies in this social dialogue remain male-dominated. Within some of the bodies this has been acknowledged for many years, but without real progress. And while men can take up gender issues, women are more likely to do so. Often it seems that it is bodies allied with the trade unions – such as Ditsela and Labour Research Service – as much as the social partners themselves that are playing a key role in supporting workers to take up gender issues within their unions and workplaces.

The paper has focused for the most part on workers in the formal sector. While in theory informal employees are also covered by labour legislation, in practice this is seldom

the case. Similarly, while there is nothing that prevents unions from organising informal employees, and COSATU and some unions have made some attempts to do so, the overwhelming bulk of membership is in the formal sector. Even if they were to extend their scope, it would not encompass self-employed workers who generally have worse conditions and earnings than those who are employees. Further, as pointed out by the SACCAWU gender coordinator (National Labour and Economic Development Institute, 2008), legislation, agreements and union organisation often do not cover non-permanent workers. The NEDLAC Act attempts to address this to some extent by providing for representation of a "community constituency", but these representatives are not part of all the deliberations in which the key social partners – government, employers' organisations and unions – participate. There is a danger in expanding the notion of social dialogue so far that it loses its meaning. And there is a need for spaces in which actors with specific related interests can meet and discuss and negotiate. However, the exclusion of those on the interface between employee and self-employed status might be worth discussion insofar casualisation, externalisation and other processes are converting what would formally have been employees into other categories.

A further danger of a focus on the formal sector is the large number of domestic workers in South Africa. By some definitions, those who are now covered in terms of various forms of social security and have written contracts will no longer be considered as informal workers. Nevertheless, domestic work remains a sector in which it is exceptionally difficult to organise. This makes it difficult to find representatives who can participate in social dialogue. The issue is especially important in South Africa given the large number of women working as domestic workers.

Bibliography

Ally, S. 2010. *From servants to workers: South African domestic workers and the democratic state* (Durban, University of KwaZulu-Natal Press).

Benjamin, N. 2007. "Mainstreaming gender standards in collective bargaining: Raising gender standards for low wage women workers", *Bargaining Indicators* (Cape Town Labour Research Service).

——. 2008. "An empirical assessment of responses to HIV/AIDS in the workplace", *Bargaining Indicators*, Vol. 12, July (Cape Town, Labour Research Service).

Budlender, D. 1991. *Women and the economy* (Johannesburg, Community Agency for Social Enquiry).

——. 2008. "The statistical evidence on care and non-care work across six countries", Gender and Development Programme Paper Number 4 (Geneva, United Nations Research Institution for Social Development).

——. 2009. "Comparative study on industrial relations and collective bargaining: South Africa", report prepared for International Labour Office, Geneva.

Casale, D.; Posel, D. 2009. "Unions and the gender wage gap in South Africa", ERSA Working Paper No. 113.

Congress of South African Trade Unions. 2008. Draft COSATU Gender Policy. (Johannesburg).

Ditsela. 2010. Towards Vision 2016: 2010 Programme (Johannesburg).

Godfrey, S.; Theron, J.; Visser, M. 2007. "The state of collective bargaining in South Africa: An empirical and conceptual study of collective bargaining", Working Paper 07/130 (Cape Town, University of Cape Town, Development Policy Research Unit).

International Labour Conference. June 2009. Report and Conclusions of the Gender Equality Committee of the 98th Sessions of the International Labour Conference. Geneva.

Jain, H.; Mbabane, L.; Horwitz, F. 2005. "Trade union consultation by employers under Employment Equity legislation", paper prepared for 4th Regional African Congress of the International Industrial Relations Association, Mauritius.

Labour Research Service. 2008. "Collective bargaining indicators 2007/2008", *Bargaining Indicators 2008*, Vol. 12, July.

National Economic Development and Labour Council. 2009. "Building bridges that hold the nation together", *NEDLAC Annual Report 2008/09* (Johannesburg).

National Labour and Economic Development Institute. 2008. Report on the Second Annual National Collective Bargaining Workshop, 29-30 May 2008 (Johannesburg).

Parliament of the Republic of South Africa. 2007. "Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions", report to the National Assembly of the Parliament of South Africa, Cape Town, South Africa.

Southern Hemisphere. 2008. "Mainstreaming gender standards at work", Executive Summary.

Todd, C. 2004. *Collective Bargaining Law* (Cape Town, SiberInk).

Trenton, E. 2007. “Outcomes of collective bargaining in South Africa. The quality of low wage employment in the formal economy in South Africa”, *Bargaining Indicators 2007* (Cape Town).

Women’s Legal Centre. 2008a. *The Women’s Legal Centre*, Vol. 1 (Cape Town).

——. 2008b. *The Women’s Legal Centre*, Vol. 2 (Cape Town).

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