

DEGREE

LLM (COURSE WORK)

TOPIC

**AN ANALYSIS OF PROMOTIONS AND UNFAIR
DISCRIMINATION IN APPLICATIONS FOR
EMPLOYMENT/APPOINTMENTS WITHIN THE
AMBIT OF THE LABOUR LAWS OF SOUTH
AFRICA.**

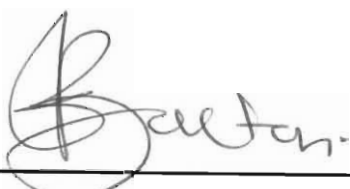
NAME

SHARMAINE RENUKA BALTON

STUDENT NUMBER

981208245

I certify that this thesis, unless specifically indicated to the contrary in the text, is my own work and has not been submitted for a degree to any other university. It is submitted as the dissertation component in partial fulfilment of the requirements for the degree of Masters of Law in the Faculty of Law, University of Natal in the year 2003.



S. R. BALTON

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INTRODUCTION

This dissertation will analyse the development of law in respect of promotions and unfair discrimination in applications for employment and/or appointments within the context of South African Labour Law.

Under the Labour Relations Act 28 of 1956 (the 1956 Act) the courts, acting under the general unfair labour practice jurisdiction, identified a variety of employment practices, apart from dismissals which they pronounced 'unfair'. The Labour Relations Act 66 of 1995 (the Labour Relations Act) contained no general 'open-textured' definition of an unfair labour practice, but instead substituted for it specific statutory provisions which describe impermissible employer actions. The 'residual unfair labour practice' was added in Schedule 7 to catch unfair actions which could not be pigeonholed in the Act itself.¹ The Labour Relations Amendment Act 12 of 2002 (Act 12 of 2002) incorporates the unfair labour practices into the body of the Act.²

Item 2(1)(b) of Schedule 7 to the Labour Relations Act provided protection against unfair employer decisions relating to promotions. South Africa is one of the few countries in the world that provide protection in this regard.³

Item 2(1)(b) has been replaced by Section 186 in Act 12 of 2002. It in effect provides that unfair conduct relating to the promotion of an employee can constitute an unfair labour practice.

While other constitutions contain various rights to freedom of association, collective bargaining and the right to strike, it is rare to find a constitution that includes the broad and vague right to a fair labour practice. The motivation for the constitutionalising of this right was to protect the position of public sector employees during the transition to a new dispensation by giving them access to

1 John Grogan, *Workplace Law* 6th ed (2002) 218.

2 Sections 185 and 186.

3 C. Garbers 'Promotion: keeping abreast with ambition' *Contemporary Labour Law* Vol 9 No 3, October 1999, 21.

the unfair labour practice law developed by the Industrial Court under the 1956 Act.⁴

Professor Halton Cheadle states that the right to fair labour practices was inserted in the interim Constitution as part of the package of provisions to secure the support of the public service for the new constitutional dispensation and in particular for the restructuring and transformation of the public service into a single public service that is broadly representative of the South African community.⁵

The public service sector is the largest employer in South Africa and as will be seen most of the case law surrounding promotions and discrimination disputes emanate from within the public service sector.

It is in accordance with human nature that 'in the race for employment there must indeed, be few job seekers who do not in their own minds, either with or without encouragement of others, form expectations as to their suitability.'⁶ This has led to numerous disputes being referred to the CCMA, Bargaining Councils and the Labour Court.

In chapter one I will analyse the development of law in this regard. It will be seen that any one or more of four issues may arise. These are jurisdiction, whether the post is a promotion or an appointment, fairness and the appropriate remedy.

In the second chapter I will analyse the development of unfair discrimination within the context of applications for employment and appointments, the burden of proof and the grounds on which discrimination is allowed, namely, affirmative action and the inherent requirement of a job.

4 M. Brassey and C. Cooper 'Labour Relations' in Chaskalson *Constitutional Law of South Africa*, Service 5 (1999) 30 -15.

5 H. Cheadle in Davis D (ed) *Fundamental Rights in the New Constitution* 2 ed (1997) 209.

6 *Swanepoel v Western Region District Council and Another* (1998) 19 ILJ 1418 (SE) 1423.

In this regard the Employment Equity Act 58 of 1998 (the Employment Equity Act) and items 2(1)(a) and (b) of the Labour Relations Act will be considered. The Employment Equity Act provides for the prohibition of unfair discrimination and the institution of affirmative action by means of employment equity plans.

Chapter 3 of the Employment Equity Act emphasises employment equity in a group context with its aim to eliminate disparities and inequalities caused by the discriminatory work practices and laws of the past and to ensure that suitably qualified employees falling within the 'designated groups' as defined in the Employment Equity Act⁷ will have equal opportunities and will be equitably represented in all occupational categories and levels within a designated employer's⁸ work force. Here the emphasis⁸ is on the representivity of the designated groups within the workforce.

Chapter 2 of the Employment Equity Act protects the interests of individual employees who do not fall within the designated groups by prohibiting discrimination against an employee in any employment policy and practice on the basis of a wide range of grounds, including race, sex, gender and disability.

It is inevitable that the interests of the individual will clash with the aims and objectives of Chapter 3 of the Employment Equity Act.

7 That is, black people, women and people with disabilities.

8. Chapter 1 -Section 1. Definition

"Designated employer" means –

- a) *a person who employs 50 or more employees;*
- b) *a person who employs fewer than 50 employees but has a total annual turnover that is equal to and above the applicable annual turnover of a small business, in terms of Schedule 4 of this Act;*
- c) *a municipality as referred to in Chapter 7 of the constitution;*
- d) *an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence force, the National Intelligence Agency and the South African Secret Service;*
- e) *an employer bound by collective agreements in terms of Section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement..*

It will also be noted that the Constitution of the Republic of South Africa, Act 200 of 1993 (the interim Constitution) and the Constitution of the Republic of South Africa, Act 108 of 1996 (the 1996 Constitution) have played a pivotal role in the development of the concept of discrimination within the context of the Labour Relations Act and the Employment Equity Act. The analysis in Chapter 2 will indicate the impact of both in the developing jurisprudence on promotions and appointment law.

CHAPTER 1

PROMOTIONS

'Promotion' was defined in *Mashegoane and another v University of the North*¹ as being evaluated or appointed to a position that carries greater authority and status than the current position an employee is in. The Labour Relations Act,² the amended Labour Relations Act 12 of 2002³ and the Employment Equity Act⁴ provide protection to employees against unfair employer decisions relating to promotions.

Act 12 of 2002 deleted item 2 of Schedule 7⁵ and inserted it into Chapter VIII. In terms of the amended Section 185 of the Act every employee has the right not to be subjected to an unfair labour practice. The amended Section 186(2) defines an unfair labour practice as

any unfair act or omission that arises between an employer and employee involving

- (a) unfair conduct by the employer relating to the promotion, demotion, probation...or training of an employee or relating to the provision of benefits to an employee.

An analysis of the case law reveals that any one or more of the following issues may arise in promotion disputes.

1. Jurisdiction
2. Whether an application by an existing employee for a post which has been advertised internally and externally is a promotion or an appointment.
3. The criteria used to determine the fairness of a promotion.

1 (1998) 1 BLLR 73 (LC).

2 Item 2(1)(b) of Schedule 7.

3 Section 186.

4 Sections 5 and 6.

5 which read as follows:

Item 2 *Residual unfair labour practices*

(1) *For the purposes of this item, an unfair practice means any act or omission that arises between an employer and employee involving...*

(b) *the unfair conduct of the employer relating to the promotion, demotion or training of an employee. .*

This chapter endeavors to explore the above. In addition the appropriate remedy in promotion disputes will be briefly considered. Most employers use one or a combination of the following two systems through which employees may advance in an organisation. One, being a system of level progression where employees are evaluated on a regular basis and dependent on the outcome of such evaluation, progress from one grade level to the next. The other being a system where vacancies are advertised and current employees are also invited to apply for such posts.

In practice, in the first of these the CCMA and Bargaining Councils have assumed jurisdiction and decide on the fairness or otherwise of an employer's conduct. The problematic aspect however has been the application for vacancies as will be seen in the section dealing with whether such applications are appointments or promotions. The development of the unfair labour practice within the context of promotions will be explored in detail later. The following cases briefly highlight the concept.

In *George v Liberty Life Association of South Africa*,⁶ a case decided under the 1956 Act, Landsman J held that "as a general rule, an employer commits an unfair labour practice if that employer decides not to promote an employee on the grounds of his or her race, gender or for some other arbitrary reason."⁷

In *Cullen v Distel (Pty) Ltd*⁸ Commissioner Grogan held

That the unfair labour practice jurisdiction is so divided between the Labour Court and the CCMA indicates that the legislature did not intend commissioners to concern themselves when deciding disputes relating to promotion with the reasons why the employer declined to promote the

6 (1996) 17 ILJ 571 (IC).

7 Ibid 589 I – J.

8 (2001) 10 CCMA 6.9.3.

applicant employee, but rather with the process which led to the decision not to promote the employee. The reasons for the decision to overlook an employee when selecting a candidate for promotion are relevant only insofar as they shed light on the fairness of the process.⁹

It was stressed in *National Union of Metal Workers of SA v Vetsak Co-operative Limited and others*¹⁰ that the underlying concept of the definition of an unfair labour practice is fairness and that “the fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either.”¹¹

I am a commissioner with the Safety and Security Sectoral Bargaining Council (SSSBC), the General Public Services Bargaining Council, the Public Health and Welfare Bargaining Council, the Education Labour Relations Council and the Public Service Co-ordinating Bargaining Council and during the period October 2000 to August 2003 presided at 280 cases. During this period it has become evident that most of the disputes at the SSSBC dealt with promotions. I completed 70 arbitrations at the SSSBC and 68 of which related to promotions. The same statistics in respect of promotion disputes also apply to other SSSBC commissioners within the Kwa Zulu Natal province. Unfortunately the SSSBC was unable to give me any details of how many promotion disputes it has dealt with to date as no data-base has been drawn up. Some of the cases dealt with will be incorporated into this dissertation.

It is inevitable in any employment relationship that employees aspire towards improving their carrier path and promotion is one important way of doing so. The unsuccessful candidate usually feels that he/she is the best candidate, the best qualified, the most experienced etc. In most cases this is a subjective analysis by the employee. In analysing the case law it will be seen that much more than this subjective view is required to succeed in a promotion grievance. In general, an

9 Ibid 4.

10 1996 (4) SA 577 (A).

11 Ibid 593 G-H.

employer has the right to appoint or promote employees whom it considers the best or most suitable and arbitrators are reluctant to interfere with the employer's choice in the absence of unfairness.¹²

It is interesting to see how the ambit of the unfair labour practice has developed to deal with grievances in respect of promotions.

12 M. Fouche 'Schedule 7, Transitional arrangements' in D. Du Toit (ed) *Labour Law through the Cases*, Issue 1 (2003) Sch 7 – 3.

a) Jurisdiction

Depending on the nature of the dispute either the Labour Relations Act or the Employment Equity Act will be the governing legislation. If the unfair conduct of the employer relating to the promotion of the employee is classified as an unfair labour practice the dispute must be referred to the CCMA or appropriate Bargaining Council for conciliation. If the dispute remains unresolved, any party to the dispute may request that it be resolved through arbitration.¹ The Labour Court has no jurisdiction to adjudicate these disputes.² If the dispute concerns an alleged act of discrimination then it must be referred to the CCMA for conciliation and if unresolved to the Labour Court for adjudication. The parties may however consent to the matter being arbitrated.³

In practice I have found, particularly within the Public Service Sector that when the jurisdiction of the Bargaining Council is raised by the employer, being the government department, they are very seldom, if ever prepared to resort to arbitration. Arbitration is usually a cost-effective way of resolving the dispute whereas referral to the Labour Court is more expensive. In such instances employees are compelled to seriously consider the cost implications especially if they may not be successful in their claims.

Very often in promotion disputes which are referred as unfair labour practices in terms of the Labour Relations Act by employees, employers raise the issue of jurisdiction on the basis that the failure to promote the employee is on one of the acceptable grounds of discrimination in terms of the Employment Equity Act. In such instances, commissioners are bound to consider argument and, if necessary, evidence to make a ruling in respect of jurisdiction.

1 Section 115 of the Labour Relations Act.

2 See: *Marnitz v Transnet t/a Portnet* (1998) ILJ 1501 (LC).

3 Section 10 of the Employment Equity Act 55 of 1988.

Prior to the Labour Court dealing extensively with the issue of jurisdiction in *Department of Justice v CCMA*⁴ some guidelines developed in determining jurisdiction, namely,

- (a) The onus is on the CCMA commissioner to establish the “real issue” in a dispute when determining jurisdiction. The *ipse dixit* of the applicant would not suffice to confer jurisdiction on the CCMA, rather, the Commissioner should establish the validity of the reasons given for the alleged unfair dismissal.⁵
- (b) The employee’s application is decisive and not the allegations of the employer.⁶
- (c) The manner in which the employee frames his or her dispute when there is no agreement between the parties to the dispute.⁷

In *Vereeniging van Staatsamptenare on behalf of Badenhorst v Department of Justice*⁸ an objection was raised that the Applicant’s claim was based on discrimination. The Commissioner considered the language in which the Applicant couched the referral as decisive. As the Applicant did not allege discrimination it was held that her reliance on item 2(1)(b) was competent.

However, in *Department of Justice v CCMA and others*⁹ the characterisation of the Applicant was not regarded as the decisive factor. The Court noted that it was obliged to look at the real cause of the dispute. Applying the test of causation it came to the conclusion that despite the *ipse dixit* (characterisation) of the employees, the real issue was one of unfair discrimination, they were not

4 (2001) 22 ILJ 2439 (LC).

5 *Future Mining v CCMA and others* (1998) 1 BLLR 1127 (LC).

6 *Nehawu v Pressing Metal Industries* (1998) 10 BLLR 1435 (LC).

7 *Van Heerden v Spes Bona Financial Administrators* (1999) 20 ILJ 2127 (LC).

8 (1999) 20 ILJ 253 (CCMA).

9 (2001) 22 ILJ 2439 (LC).

appointed because they were white. The Court found for the Department on this jurisdictional point. In doing so, the Court formulated the following general principles applicable in situations where two possible causes of action are present, and each would lead to a different forum having jurisdiction.¹⁰

- a) The applicant is the master of the dispute and has the right to choose the cause of action and the grounds upon which he relies;
- b) The commissioner must determine what the main issue to be decided is and whether the matter is one to be determined by arbitration in the CCMA. Although the *ipse dixit* of the applicant may be the decisive factor where the wording of the statute is clear on this point, the Commissioner may, in certain circumstances, be required to look at the objective situation to determine what the “real issue” before the CCMA is.
- c) The mere presence of issues that usually fall to be determined by the Labour Court does not automatically preclude the CCMA jurisdiction. The CCMA may be required to decide issues usually reserved for the Labour Court where it is peripheral or incidental to the main dispute before it.
- d) Where there are elements of both classes of dispute, that is those that fall to be determined by the Labour Court and those over which the CCMA has jurisdiction, jurisdiction will be determined with reference to the usual twofold test for causation (factual and legal causation).
- e) In determining the extent of the CCMA’s jurisdiction, the wording of the empowering statutes must be given effect to.¹¹

The test of factual and legal causation was described by the Labour Appeal Court as an approach requiring firstly an enquiry into whether the alleged conduct or state of affairs was in fact a cause without which the resultant harm or complaint could not have arisen. If factual causation is satisfied, the second question then arises which is whether this factual cause was also the “main”, “dominant”, “proximate” or “most likely” cause of the complaint in question.¹²

This case (*Department of Justice v CCMA*) highlights the need for a careful consideration of the issues giving rise to the dispute before one embarks on litigation. In this case two white males who were employed as Assistant State

10 S Milo 'The ups and downs of promotion and demotion' *Current Labour Law* Vol 11 No 4, November 2001, 33.

11 Note 8 above, 2446 I – 2447 D.

12 *Saccawu v Afrox Ltd* (1999) BLLR 1005 (LAC).

Attorneys applied to fill two positions of Senior Assistant State Attorney. They were unsuccessful in their applications despite being recommended by the selection committee. Instead the Minister of Justice appointed a black male and a black female to the two positions. The two employees alleged that the Department's actions in not appointing them amounted to an unfair labour practice regarding their promotions.

They argued that they had not been unfairly discriminated against on an arbitrary ground such as race but that the department had treated them unfairly in not promoting them. The complaint related to the process surrounding their non-promotion and not to the merits of the employment policies of their employer. They further contended that the Department had acted in conflict with its own policies and that it had not followed proper procedure prior to making a decision not to promote.

The Court held that

The legislature has established a division of issues between arbitration in the CCMA and adjudication in the Labour Court. The conceptual basis of this division is to allow relatively low key, every day disputes to be resolved swiftly and informally through the CCMA, while potentially more complex disputes grounded on broader, social issues and collective rights are reserved for the Labour Court's adjudication. However, the split of functions in the LRA and other legislation is not absolute. In the interest of efficiency and swift resolution of disputes envisaged by the legislation, it is necessary that the CCMA has the authority to determine peripheral issues which effect the determination of the main issue before it.¹³

I have found that initially with the public service sector cases the issue of jurisdiction in respect of employment equity was frequently raised however with the passage of time and the development of case law this seems to be decreasing. Parties now appear to be more certain about issues of discrimination and which issues are arbitrable and that the mere mention of "employment equity" or "representativity" does not necessarily mean discrimination. This is a welcome improvement as it facilitates a speedier resolution of disputes.

An interesting and slightly different case on jurisdiction arose in *Shabalala v South*

13 Note 9 above, par 15, 1236.

*African Police Services*¹⁴ wherein the issue was whether the failure to integrate an ex-Umkonto We Sizwe member at the correct rank constituted a promotion within the ambit of the unfair labour practice framework of the Labour Relations Act. In this case the applicant had been a member of VIP Services of Umkonto We Sizwe and upon the election of the democratic government in 1994 an agreement with the South African Police Services was reached to integrate members of Umkonto We Sizwe who rendered such services into the VIP Protection Services of the SAPS. Criteria for such integration were drawn up. The applicant had 10 years experience and qualified to be integrated at the rank of captain in 1995 but was instead integrated at the rank of constable which was at least four ranks below that of a captain.

The applicant referred the dispute to the SSSBC and the SAPS raised a jurisdictional point in limine alleging that the matter did not relate to a promotion. The commissioner stated that “the applicant did not apply for the job but was integrated into the services of the South African Police Services. The problem arises with regard to the rank at which he was integrated. At that stage he was not an employee who had applied to be promoted to a particular post”¹⁵ and held that the SSSBC did not have jurisdiction to deal with the matter.

The question arises as to what remedy would be available to an applicant in such circumstances as the ambit of the unfair labour practice is clearly defined. The applicant had been integrated at the incorrect rank. The applicant would be able to refer the dispute to the High Court which has concurrent jurisdiction with the Labour Court and whose interpretation of the unfair labour practice would not be limited to that contained in the Labour Relations Act.¹⁶ This view is supported

14 *T. Shabalala v SAPS* PSSS 1708, 30 April 2003.

15 *Ibid* 6.

16 Section 157(2) of the Labour Relations Act preserves the High Court's jurisdiction, concurrently with that of the Labour Court, in respect of any alleged violation or threatened violation, by the State in its capacity as employer, of any fundamental right entrenched in Chapter 3 of the Constitution; and ... any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as employer.

by the decision in *Mzimni and another v Municipality of Umtata*.¹⁷ In this case the issue in dispute was the employer's failure to upgrade the applicant's post levels after a task team had made a recommendation to this effect. The court found that the upgrading of posts did not relate to a promotion or other form of unfair labour practice contained in item 2 of Schedule 7 and that the High Court retained jurisdiction to entertain unfair labour practice disputes falling beyond the ambit of Schedule 7.

In *Fredericks and others v MEC for Education and Training, Eastern Cape and others*¹⁸ the Constitutional Court concluded that the provisions of the Labour Relations Act do not oust the jurisdiction of the High Court in respect of disputes arising from the employment relationship.

17 (1998) 7 BLLR 780 (TK).

18 (2002) 23 ILJ 81 (CC).

1. Is an application by an existing employee for a post which has been advertised internally and externally, a promotion or an appointment?

Item 2(1)(b) of Schedule 7 of the Labour Relations Act applied only to employers and employees and did not include applicants for employment. Clearly there is a distinction in the nature of an application between an existing employee and an outsider. Where an outsider applies for a post and fails he/she has no recourse under the unfair labour practice jurisdiction. If he/she can prove discrimination then the matter will be dealt with in terms of the Employment Equity Act.¹

In *George v Liberty Life Association*² the Industrial Court stated that although it had been held by the civil courts that an applicant for promotion was in the same position as an applicant for employment, under the unfair labour practice jurisdiction the question is rather whether an application for promotion is to be regarded as an activity falling outside the employment relationship. It was held that such an application falls within the employment relationship. The applicant could therefore be considered *qua* employee.³

Where an existing employee is unsuccessful the issue arises as to whether the dispute can be categorised as an unfair labour practice. However different views have arisen in this regard. It would appear that the differences have arisen because of the view, originating in the common law expressed as follows in *Public Servants Association v Northern Cape Provincial Administration*.⁴

I am also of the opinion that as the employee had applied for a post, duly advertised in a newspaper, such application, should it be successful, could not be a promotion. Although the appointment would have been made within the same department, it would not constitute a promotion as a promotion is usually an internal matter. Thus the employee is in fact a job applicant and item 2(1)(b) of Schedule 7 of the Act could not be of assistance, as job applicants are not eligible for promotion [or] demotion.⁵

1 Section 9 of the Employment Equity Act extends the meaning of "employee" to include applicants for employment.

2 (1996) 17 ILJ 571 (IC).

3 S Milo 'The up and downs of promotion and demotion' *Current Labour Law* Vol 11 No 4, November 2001, 32.

4 (1996) 18 ILJ 114 (CCMA),

5 Ibid 1141 B - D.

From a number of subsequent cases however, it becomes clear that one should focus on two issues in order to determine whether one is dealing with a promotion. The first question is whether there is an existing employment relationship between the applicant–employee and the employer and, secondly, whether there is a difference in substance between the two jobs.⁶

In *Vereeniging van Staatstamptenare on behalf of Badenhorst v Department of Justice*⁷ the Commissioner, in deciding whether the applicant had correctly referred the dispute regarding promotion in terms of item 2 (1) (b) of Schedule 7 found that the applicant had done so on the simple basis that the applicant had applied for a post at a more senior level than that which she had occupied previously and as a consequence of this, the success of the application would result in a promotion.

The aggrieved employee was denied appointment to a post against the background of a restructuring of the Department of Justice. This restructuring entailed that all employees in the “old” Department were invited to apply for one or more of the thousands of newly created posts in the “new” Department. Existing employees were, however, guaranteed a job in the new structure on at least the same level of pay they had occupied in terms of the old structure. The employer argued that the employee should be treated as a job applicant and that the dispute did not involve a promotion. The Commissioner answered this argument as follows:

It appears that the applicant applied for a post which would have resulted in a promotion for her to a more senior level if her application had been successful. ... While I accept that this was not a promotion in the ordinary sense of the word, I do believe that the peculiar nature of the rationalisation process can allow semantics to change the essential nature of the dispute. No evidence suggested that the applicant’s years of service would not be transferred to the new structure, nor was it suggested that her employee benefits would be interrupted by such transfer. A new post would still essentially be with the same employer, the Department of Justice, but in a remodelled structure in conformity with the rationalisation. It is specious to suggest that the applicant was a job applicant, in the sense of being an outside job seeker.⁸

6 C Garbers 'Promotion: keeping abreast with ambition' *Current Labour Law* Vol 9, October 1999, 22.

7 (1999) 20 ILJ 253 (CCMA).

8 Ibid 256 G – I.

The view expressed in *Public Service Servants Association v Northern Cape Provincial Administration*⁹ was endorsed by the Labour Court in *Department of Justice v CCMA and others*¹⁰ wherein Counsel for the respondents argued that since there was an existing relationship between the applicant-employee and employer and there was to be some advancement, elevation in rank or rise in status, the matter amounted to a promotion. The applicant did not dispute that but objected on the basis that the positions could have been filled by outsiders and that it is illogical to speak of the positions as being promotional posts. Wagley J held that “this objection is well founded. I cannot accept respondents’ suggestion that in respect of certain candidates an advertised position constitutes a promotion and in respect of others an appointment.”¹¹

A different approach was followed in *Department of Justice v CCMA and others*¹² wherein the Deputy State Law Advisor, Mr Bruwer, applied for the post of Chief State Law Advisor with his existing employer. The post was advertised internally and externally. His application was unsuccessful and he referred the dispute as an unfair labour practice relating to promotion. The Department of Justice argued that since the post was open to outsiders, the dispute related to an appointment and not a promotion and accordingly was a dispute of interest. Revelas J rejected this argument and stated that it is necessary to have a factual enquiry to determine the jurisdictional facts.

In terms of the natural progression of a career, the position of Chief State Law Advisor was a promotion for Bruwer even though he had to apply for the position like anyone else had to. Revelas J held that

In this particular case, the employee and the employer concluded a contract of employment. If Mr Bruwer successfully applied for the position, would the existing contract be amended or will a new contract be concluded as would be the case if another Applicant was successful? The same question may be posed when the employee is demoted. Only existing

9 Note 4 above.

10 (2001) 22 ILJ 2439 (LC).

11 Ibid 2449 A.

12 Case No. C440/99, June 2001.

employees can be demoted or promoted that may bring changes in their working conditions which may or may not have far reaching consequences. For purposes of determining jurisdiction, the facts in this matter do not support the argument that Mr Bruwer did not apply for a promotion. He did, and that is what the dispute is about. Therefore its determination falls squarely within the jurisdiction of the CCMA."¹³

Judge Revelas' view is consistent with that expressed in *George v Liberty Life*¹⁴ which held that an existing employee who applies for a post does so qua employee and not qua applicant because such an application falls within the employment relationship and therefore the applicant could be considered qua employee. This view was summarised as follows in *Van Rooyen v Kwa Zulu Natal Department of Health*.¹⁵

If the law is to be responsive to real life, then it must rest on the footing that employment predominantly takes the form of a career rather than a casual relationship. It would therefore stand to reason that during the contractual relationship or the wider concept of an employment relationship any issues relating to the career path would be legitimate subjects of the existing employment relationship.¹⁶

In *Mashegoane and Another v University of the North*¹⁷ the Labour Court had to decide whether the refusal to appoint a lecturer as Dean of a Faculty dealt with a failure to promote. In terms of the applicable legislation, the Senate of the University appointed deans after receiving a recommendation from the Faculty Board. Thus, it was argued on behalf of the University that the Deanship was not a post applied for, nor a promotion, but a nomination. The court ignored this argument by looking at the substance of the two jobs and held that

Had Mashegoane been appointed, his salary would have remained the same but he would have received a Dean's allowance and would have had a car at his disposal. These are the only mentioned benefits he would receive. I would however also assume that once appointed as Dean his status would be considerably elevated. He would also become chairperson of the Faculty Board. It goes without saying that he would be clothed with certain powers and authority to be able to manage and control the Faculty. To me, at least this indicates that the position of Dean is not a token position, it has real meaning and power attached to it. It is a position that is of higher status with more responsibilities than a person who is, for

13 Ibid paragraphs 24-27.

14 Note 2 above.

15 Unreported case: PSHS 523, 23 April 2002.

16 Ibid 4.

17 (1998) 1 BLLR 73 (LC).

instance, a lecturer in the same Faculty. I am therefore of the view that the appointment to the position of Dean amounts to a promotion.¹⁸

In this case the court failed to consider the argument that the Deanship is a nomination and not a post applied for. The Deanship is for a determined period of time. Generally Deans are appointed for a period of five years and upon termination of which the person returns to his/her original position unless re-appointed. This clearly is not a promotion as it is not a post applied for but one into which the person is nominated. The court's reasoning that he would be 'clothed with certain powers and authority' does not take into account the fixed term period of this position.

In contrast the decision in *Nawa v Department of Trade and Industry*¹⁹ provides an example of where a decentralisation process was not seen as involving a promotion.²⁰ Here the Court held that

There is no intention to disturb the existing terms and conditions of employment; there is an intention to alter the way in which the activities are performed; there is an intention to restructure, to a degree, the reporting functions or the chain of command to a slight degree, but all this falls within the managerial prerogative of an employer, including the State in its capacity as employer.²¹

The view of Revelas J was followed in *R van Rooyen v Kwa Zulu Natal Department of Health*²² wherein the commissioner held that if the contract of employment is not terminated but continues with adjustments to duties, status and remuneration then in practice it is a promotion. In *Hospersa on behalf of Bees v Department of Health*²³ and *Hospersa on behalf of Jordaan v Department of Health*²⁴ the commissioner was persuaded by the judgment of Revelas J and held that the applications by the employees were for progression in their career paths and were promotions and not appointments.

18 Ibid 77 G –I.

19 (1998) 7 BLLR 701 (LC).

20 Note 6 above, 23

21 Note 19 above, 702 J – 703 A.

22 PSHS 523, 23 April 2002.

23 PSHS 649, 21 May 2002.

24 PSHS 648, 21 May 2002.

However in *Jele v Department of Transport (KZN)*²⁵ the commissioner followed the judgment of Wagley J and held that the applicant was not an employee at the time he applied for the post and the filling of the post accordingly amounted to an appointment and not a promotion.

The matter was taken on review²⁶ and Pillay J disagreed with the decision of Wagley J in *Department of Justice v CCMA and others*²⁷ and held that the position applied for was a promotion as the applicant met the criteria of a pre-existing employment relationship and an advancement or elevation in status. Pillay J further held that

Additional to any other remedies they might have, public servant candidates may have recourse to item 2(1)(b) of Schedule 7 to the LRA if they are not promoted. The new recruits cannot prosecute a similar claim because there is not a pre-existing employment relationship with the State. That provides a rational and factual basis for differentiating between public servant and non-public servant candidates who vie for the same post. The differentiation flows from a literal interpretation of item 2(1)(b) of Schedule 7 to the LRA. Contextually, it is also consistent with the provisions relating to promotion in the Constitution, the PSA and its Regulations discussed above. If non-public servant candidates are disadvantaged by not having the same remedy, it is not unfair."²⁸

I am unable to agree with the view expressed by Judge Wagley. The distinction must be drawn between an existing employee and an outsider. Revelas J and Pillay J's view that an application by an existing employee would be a promotion is more persuasive. The decision of Wagley J was argued in the Labour Appeal Court in December 2002 and judgment has not yet been handed down. It is hoped that the Labour Appeal Court will resolve this issue.

25 PSGA 569, 17 October 2001.

26 *Jele v Premier of the Province of Kwa Zulu Natal and others* (2003) 7 BLLR 723 (LC).

27 Note 10 above.

28 Note 26 above, par 41.

(c) When is a failure to promote unfair?

Once it is determined that a matter relates to promotion it is then necessary to establish whether the conduct of the employer is fair. Professor J. Murphy in *SACCAWU v Garden Route Chalets*¹ in attempting to define the concept of “unfairness” stated that “unfair implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended... The words ‘unreasonable’, ‘erratic’ and ‘prejudicial’ could be included amongst the terms that describe unfairness.”²

The residual unfair labour practice definition expressly included unfair conduct by an employer relating to the promotion of an employee. It is significant that this aspect was not limited to discriminatory treatment. It is difficult to imagine that employees will have any basis of relief in this regard unless they can show that they are being overlooked for promotion on the basis of some unacceptable, irrelevant or invidious comparison, or that the employer is not following its own agreed promotion policies or procedures³ and it is submitted that the onus in this regard rests on the employee.⁴

In considering the concept of fairness in promotions it is not possible to adopt any hard and fast rules. It is a concept that is determined according to the facts on hand. Some guidelines have however developed.

From the above we can see that the conduct of the employer must

- i) not be arbitrary, capricious or inconsistent;
- ii) not fail to meet an objective standard;
- iii) not be unreasonable; erratic; prejudicial; or unacceptable;
- iv) not result in an irrelevant or invidious comparison;
- v) follow policy and procedure.

1 (1997) 3 BLLR 325 (CCMA).

2 Ibid 332 H.

3 See *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 760 (IC).

4 J. Grogan *Workplace Law* 6th ed (2002) 217.

The list is not exhaustive. The emphasis is placed on the conduct of the employer. This however places an onus on the employee to show that the employer has by its conduct caused the unfairness.

In *Ndlovu v CCMA*⁵ the Labour Court held that

It can never suffice in relation to any such questions for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed. The next hurdle is of equal if not greater importance. It is to show that the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational. It seems to me that no question of unfairness can arise.⁶

We can thus see that *Ndlovu's* case creates a two-pronged test. If the employee succeeds in showing that the conduct was unfair for whatever reason, the employee still has to show that he was the best candidate for the post in terms of experience, ability, qualifications, etc. This will involve the employee proving by comparison that he is more qualified in terms of experience, training, education, qualifications etc, than the successful candidate.

In order to establish unfairness it is not sufficient for the employee to say that he/she is qualified for the post. It must also be shown that the decision to appoint someone else was unfair in the sense that the employer's actions were frivolous or arbitrary. An employer's actions will be arbitrary if it acts unreasonably or fails to properly consider the applications for promotion. Employees alleging an unfair failure to promote will be required to demonstrate that they merit promotion. This is so even where a fellow-employee is promoted to a higher salary level than his co-workers despite the fact that they perform the same functions. It has been held that while the promotion of the fellow-employee in these circumstances may be unwarranted and unreasonable, the others must show that they merit promotion. If

5 (2000) 21 ILJ 1653 (LC).

6 *Ibid* par 11.

they are unable to do so, the employer will not be guilty of an unfair labour practice.⁷

In an attempt to consider what constitutes unfair conduct I have categorised the cases into various categories. The list is not exhaustive. As stated earlier each case will depend on the facts at hand. The categorisation only assists to trace the development of the concept of unfairness in respect of promotions.

i) Failure to short-list and / or interview

Where an employer fails to shortlist and interview an employee for promotion to a post for which he/she is qualified this may constitute an unfair labour practice for which compensation is payable. In most instances the failure to grant an interview does not mean that the employer's conduct caused the loss of promotion, as it is not a given fact that the employee would have beaten the other interviewees to the post. If it is established that the employee would have achieved the promotion had he/she been interviewed and because his/her experience or qualifications are superior to those of the successful incumbent, the failure to consider such an employee will constitute an unfair labour practice.⁸

This was clearly the case in *Lutze v Department of Health*.⁹ Here the employee applied for a post but was not short-listed or interviewed. The employer erroneously advised her that she did not qualify for the post. Another employee who was less qualified and who had less experience was promoted to the post. It was common cause that the employee would have achieved the promotion had she been interviewed because her experience and qualifications were superior to those of the successful incumbent. The actions of the employer were found to constitute an unfair labour practice and the employer was ordered to compensate the employee.

7 S Milo 'The ups and downs of promotion and demotion' *Current Labour Law* Vol 11 No 4, November 2001, 33; See further *Salstaff v Transnet Ltd – Spoomet* (1998) 191 ILJ 423 (CCMA).

8 S Milo 'The ups and downs of promotion and demotion', *Contemporary Labour Law*, Vol 11 No 4, November 2001, 33.

9 (2000) 21 ILJ 1014 (CCMA).

In *Govender v Department of Health*¹⁰ the applicant was not short-listed on the basis that he did not have the requisite qualifications. At the arbitration it was discovered that he did in fact possess the necessary qualifications. The arbitrator concluded that the applicant had been unfairly excluded and that the Department of Health was unable to show that the short-listing selection committee acted in accordance with reasonable standards and was unable to explain the exclusion of the applicant. The arbitrator further concluded that the department was negligent in excluding the applicant. A member of the panel testified that if the applicant had been included on the short-list he would have been included on the interview list. He would have 'had a chance' to convince the committee that he was the best person for the post. The department was ordered to compensate the applicant as he had been subsequently promoted to another position.

It would have been interesting to see what the decision of the arbitrator would have been if the applicant had not been subsequently promoted to another post. The most reasonable award in such circumstances would have been to order the employer to revisit the short-listing process without interfering with the appointment of the successful candidate. If on the other hand the successful candidate had been joined to the proceedings and given an opportunity to present his side of the story then perhaps a decision on his appointment could have been made. However, arbitrators need to be cautious in interfering in this regard as there are several remedies open to the successful candidate.

In this regard I would assume that in the absence of it being shown that the successful candidate was a party to the decision to appoint or that there is such alarming irregularity in the appointment involving his own personal involvement, it will be very difficult for arbitrators to interfere with the decision made.

In *NUMSA on behalf of Cook v Delta Motor Corporation*¹¹, the applicant applied for a post within the company but was not short-listed on the basis that she lacked the requisite tertiary qualifications and supervisory experience. The arbitrator found that the employer applied different standards in the short-listing procedure; for

10 (2000) 9 CCMA 6.9.7 KN 35683.

11 (2000) 9 CCMA 6.9.6 EC 20404.

example, one candidate was short-listed on the basis that she had the potential to develop but the applicant was not given this opportunity. The arbitrator found that there were irregularities in the appointment of the successful candidate but the issue on hand was not the unfair promotion of the successful candidate but the unfair non-promotion of the applicant. The employer was ordered to restart the process of recruitment for the post by giving all employees an equal opportunity. It is important to note that the arbitrator did not set aside the appointment of the successful candidate. To do so, without the person having been a party to the proceedings would have constituted unfairness or a gross irregularity. Furthermore the successful candidate would have legal recourse in this regard. In my view the arbitrator correctly ordered that the recruitment process be revisited so that all the applicant employees be given the same opportunity.

In *Lagadien v University of Cape Town*¹² the court held that it was not unfair not to short-list or interview an applicant who had previously applied for the post and who had been given comprehensive reasons for the unsuccessful initial application.

In *Barfield v Department of Public Works*¹³ and *Dalton v Department of Public Works*,¹⁴ commissioner Grogan found that there must be a causal connection between the unfair conduct proved and the failure or refusal to promote the employee. Whilst he found that the failure of the employer to interview the applicants before the post for which they were invited to apply were filled constituted unfair conduct within the meaning of item 2(1)(b) of Schedule 7, he was unable to conclude from the evidence that had the applicants been interviewed prior to the appointment to the new positions that they would have been promoted.

12 (2000) 21 ILJ 2469 (LC).

13 ECSS 22.

14 (1998) 9 BLLR 1177 (CCMA).

Here we can see the two-fold test as set out in *Ndlovu*¹⁵ being applied. The employee must in addition show that he/she would have been the best candidate.

In *Vereening Van Staatsamptenare on behalf of Badenhorst v Department of Justice*¹⁶ the applicant employee applied for promotion and was unsuccessful. She believed that she was better qualified than the successful candidate and if she had been granted an interview she might have persuaded the employer to appoint her to the post. She challenged the procedure adopted and argued that the committee had failed to apply its mind.

The commissioner agreed that the method used by the employer's selection committee had been unusual, but it had to be seen in the light of unusual circumstances. The employer had to deal with some 12 000 applications. The action plan adopted by the selection committee was expedient having regard to the department's self-imposed time constraints, but was not inherently unfair. There was nothing in the evidence or argument to suggest that the selection committee had not adopted a consistent approach with the filling of all the new posts. Further, there was no obvious or overt unfairness in the selection committee's decision to recommend the appointment of the successful candidate rather than the applicant. The applicant had confirmed that the committee did not select the successful candidate as a result of prejudice against the applicant or favouritism for the successful candidate.

ii) The best candidate for the post

In *Maharaj v South African Police Services*¹⁷ the applicant challenged her non-promotion to a post. The evidence showed that the successful candidate was rejected for the post but his application was revisited upon the recommendation of one of the panelists. The applicant had also been rejected for the post. The arbitrator found that the process was unfair in that the other applicants who were rejected were not given the opportunity to be reconsidered for the post. However it was necessary to consider whether the applicant would have been successful if

15 Note 5 above.

16 (1999) 20 ILJ 253 (CCMA).

17 PSSS 322, 5 December 2001.

her application was re-considered. The applicant was unable to show that she had the experience necessary for the post or that she was the best candidate for the post.

Once again, it can be seen that the test set out in *Ndlovu*¹⁸ is being applied. The onus is on the employee to show that in addition to the conduct being unfair, the employee must be the best candidate for the post.

iii) Proof of bad faith or irregularities

In *SAPSAWU on behalf of Kalashe and another v Department of Finance*¹⁹ the two applicants who were assistant directors unsuccessfully applied for the position of deputy director. They were short-listed, interviewed and their names put forward for consideration. The applicants rested their case on the fact that they received the highest scores at the interviews and that their scores were not placed before the authority that took the final decision. The commissioner held that in the absence of proof of irregularities or bad faith in the selection process an unfair labour practice had not been committed.

Here it is clear that even though the employees had the highest scores at the interviews they were unable to show that the conduct of the employer was unfair.

iv) Failure to comply with policies, procedures or criteria for the post

An employer is required to follow any applicable procedures, whether they derive from legislation, a collective agreement, company policy or an established practice.

Perhaps the most often encountered (and sometimes fatal) mistake by employers is not to follow their own policies and procedures in deciding on promotions. The source of such procedures may vary from legislation to collective agreements to an established policy and practice. The most glaring example of this is to be found in *NUTESA v Technikon Northern Transvaal*.²⁰ Here, against the background of a

18 *Ndlovu v CCMA*, note 4 above.

19 (2000) 21 ILJ 2543 (CCMA).

20 (1997) 4 BLLR 467 (CCMA).

policy and practice at the Technikon that posts be advertised, 5 posts were created with the appointment of specific employees in mind. This was done secretly with the other employees presented with a *fait accompli*. Most often, however, a failure to adhere to procedures will not manifest in a complete failure as in the *NUTESA* case, but in a failure regarding one, or perhaps more, of the steps in agreed guidelines. Often, defects in procedure can be cured only through a fresh procedure. It may well happen that an employer will be alive, or alerted to, the fact that it possibly treated employees unfairly in the promotion process. In such cases, the defect may well be fatal, in the sense that the application of the process to the aggrieved employees will be either too little, or too late, or both.²¹

In *Public Servants Association obo Dalton and another v Department of Public Works*²² all positions were advertised (as part of a restructuring exercise) and employees were invited to apply for their old positions, or any other positions for which they wished to be considered. Following applications, an independent panel interviewed employees. The two employees in question, who applied for higher posts, were never invited to an interview. Following complaints, interviews for these two employees by newly appointed officials of the department were arranged, who, according to the evidence, asked only a few desultory questions during the interviews. Accepting the evidence of the employees, the commissioner stated that

By the time the interviews were conducted, the posts for which the applicants made themselves available had in fact been filled. This is patently unfair, as the applicants were effectively denied the opportunity of being considered for the posts which they, together with other employees in the department, had been invited to apply.²³

Similarly, it sometimes happens that an employer advertises a position, states certain requirements for that position, but nobody who applies meets those requirements. The question now is whether the employer may relax those requirements and exercise its discretion to appoint someone from the pool of applicants only. This is what happened *inter alia* in *NUTESA v Technikon Northern*

21 C Garbers 'Promotion: keeping abreast with ambition' *Current Labour Law* Vol 9 No 3, October 1999, 24.

22 (1998) 9 BALR 1177 (CCMA).

23 *Ibid* 1180 C – D.

Transvaal.²⁴ In a curious award, the conduct of the employer was found to constitute discrimination under the old item 2(1)(a) of Schedule 7 to the Labour Relations Act. It is submitted that where a current employee is prejudiced in the sense that the employee decided not to apply because he or she did not meet the stated requirements, a failure to re-advertise stating the amended requirements may well constitute unfair conduct relating to a promotion.²⁵

In *PSA on behalf of Badenhorst v Department of Justice*²⁶ it was held that time constraints or other valid grounds may necessitate a deviation from a procedure but that, in such an event, the employer must ensure that all candidates are offered a reasonable opportunity to promote their candidature.

In *POPCRU on behalf of KUKKUK v South African Police Services*²⁷ the applicant, a white male was short-listed but a black male who had not applied for the post was placed on the short-list and promoted to the position. This was in contravention of a directive by the National Commissioner of South African Police Services (SAPS) which provided that officers who did not apply for a post could not be placed in it if there were other candidates who applied for it. The arbitrator was of the view that the failure of the SAPS to adhere to the directive was not unfair when viewed against the need to promote representativity. He further found that it was not arbitrary or indefensible to procure a suitable candidate who did not apply for the post. I am unable to agree with the arbitrator in this case. The SAPS was bound to act within the constraints of its own policies.

In *Page v South African Police Services*²⁸ the employee had been short-listed and had the highest score. In terms of 'profile suitability and class division' he was not promoted to the post but a person who had not applied for the post was appointed. This was despite a directive by the Deputy National Commissioner that

24 Note 20 above.

25 Note 21 above, 24 – 25.

26 (2002) 23 ILJ 1111 (ARB).

27 (1999) 20 ILJ 253 (CCMA).

28 (2002) 23 ILJ 1111 (ARB).

a person who had not applied for a post could not be placed in that specific post if other persons had applied for it.

The arbitrator found that the SAPS had acted unfairly in not appointing the employee to the post and although they had the right to appoint any suitable candidate to any post, it remained bound to act within the constraints of its own internal policies, procedures and directives. It was therefore unacceptable for the South African Police Services to deviate from the directive without good and sufficient reason and without bringing such reason to the attention of the employee. The arbitrator ordered that the employee be promoted.

This decision differed from the one in *POPCRU obo KUKKUK*²⁹ and I am of the view that if there is to be uniformity in this regard then directives by governing bodies or those in charge should be applied or adhered to.

In the SAPS the decision to promote is taken upon the documentation presented to the panel. These include the applicants scoring by an evaluation panel prior to the post being advertised and a description of their courses, training, qualifications, knowledge, skills and experience. No interviews are held and this process is referred to as a 'paperboard' exercise.

In *Maharaj v South African Police Services*³⁰ the applicant challenged her non-promotion to three different posts. In respect of one of the posts, the minutes reflected that during the selection process personal considerations in terms of the applicant and the successful candidate, De Wet, were taken into account. A member of the panel remarked in respect of the successful candidate that "Her personality is conducive to command and control of the post." The chairperson of the panel confirmed that personal knowledge of the successful candidate was considered. The arbitrator found that the above indicated that the panel acted subjectively by taking personal knowledge of De Wet into account and was

29 Note 27 above.

30 Note 17 above.

satisfied that in so doing the panel acted contrary to the criteria for the post. The arbitrator stated that

I am accordingly satisfied that the procedure in evaluating the candidates for the post was flawed and accordingly unfair. This process had to be completed on an analysis of application forms but instead the evidence undoubtedly established that personal knowledge of the successful candidate was taken into account. The reasons for her appointment such as personality are not evident from her application form. This is the subjective view of the panel. Whilst I accept that sometimes it may not be possible to be entirely objective, the panel should have borne in mind that the comments which influenced their decision clearly prejudiced the other applicants for the post. By taking into account personal knowledge of De Wet automatically placed the other candidates in a less favourable position.³¹

The applicant was further able to establish that she was more qualified and had more experience and training for the post than De Wet. The arbitrator found the conduct of the SAPS to constitute an unfair labour practice and promoted the applicant. The two-pronged test of *Ndlovu*³² was applied.

In *Meyer v South African Police Services*³³ the arbitrator held that

It has been held repeatedly in similar arbitration's, following the decision of the Labour Court in *Van Rensburg v Northern Cape Provincial Administration* (1997) 18 ILJ 1421 (CCMA) and others, that arbitrators should not second-guess a selection panel and should not likely interfere with decisions regarding appointments. However, where a decision to overlook an applicant, on the face of it, tends to raise eyebrows, it is incumbent on the South African Police Services at least to advance some cogent reasons for the decision.³⁴

The arbitrator found that the SAPS had not adhered to its employment equity plan and that the applicant had proved that the successful candidate had been unfairly promoted above him.

In *S A Transport and Allied Workers Union (UTATU) on behalf of Fourie and another v Transnet Limited*³⁵ the parties had a Collective Agreement providing that

31 Ibid 31.

32 Note 5 above.

33 (2002) 23 ILJ 974 (BCA).

34 Ibid 978 E – F.

35 (2002) 23 ILJ 1117 (ARB).

when promotional posts became vacant, employment equity candidates had preference over candidates from the former advantaged population group. A policy was adopted in terms the Agreement that the employer would compile a “black list” and a “white list” of candidates. If no suitable candidate could be found from the “black list” to fill the particular vacancy, the interviewing panel could then refer to the “white list” and recommend candidates from that list for appointment. In casu, two vacancies had arisen and one had been filled by an employment equity candidate but the other remained unfilled. The two applicant employees enquired whether the employer was seriously considering the appointment of a white candidate and were assured that this was so. No appointments were made and the post was not re-advertised. The arbitrator found that

An employer who held out to an employee that that person could apply for promotion and that a fair procedure and practice would be followed before filling a vacancy, would be held, in the absence of any necessary justification, to that contract or promise. The employer had created reasonable expectations of promotion and, by not following the normal practice of re-advertising the post, had made itself guilty of unfair conduct relating to promotion.³⁶

The employer was ordered to promote one of the two employees with retrospective effect. Here it is clear that the employer failed to adhere to its policy and created an expectation that the employees would be promoted.

An employer will be guilty of unfair conduct relating to promotion if it held out to an employee a reasonable expectation that he/she would be advanced and then, without adequate reason frustrated it. So, too, has it been held to be unfair for an employer to advertise a position setting a prescribed minimum qualification and then to appoint a person who did not possess it or to create a position for a specific person without advertising it internally in accordance with agreed procedures.³⁷

(v) Prerogative of the employer

Where disputes arise in the context of the process and are submitted to arbitration, the arbitrator is in a similar position to that of an adjudicator vested with

36 Ibid 1124 I – J.

37 J. Grogan *Workplace Law* 6th edition (2002) 217.

wide statutory discretion. This analogy was illustrated in *Goliath v Medscheme (Pty) Ltd*³⁸

Inevitably, in evaluating various potential candidates for a certain position, the management of an organisation must exercise a discretion and form an impression of those candidates. Unavoidably this process is not a mechanical or a mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness which leads the court to draw an inference of *mala fides*, this court should be hesitant to interfere with the exercise of management's discretion.

Likewise in *George v Liberty Life Association of Africa Ltd*³⁹ the Industrial Court held that an employer has a prerogative or wide discretion as to whom it will promote or transfer to another position. The court further held that courts should be careful not to interfere too readily in disputes regarding promotion and should regard this as an area where managerial prerogative should be respected unless bad faith or improper motive such as discrimination are present.

In *Van Rensburg v Northern Cape Provincial Administration*⁴⁰ it was held that interference in the employers decision is only justified where the conduct of the employer is "so grossly unreasonable as to warrant an inference that they failed to apply their mind."

In practice this means that an employer will be allowed a margin of latitude in coming to its decision. This is subject, of course, to legislation (such as the Employment Equity Act) and the fact that employers often forfeit this discretion, at least partially, through, for example, a collective agreement.⁴¹

At the very least an employer has to be in a position to provide reasons.⁴² The CCMA has shown a willingness to scrutinise those reasons (as typically manifested by the "deliberation process" of the selection panel) to ensure that with

38 (1996) 17 ILJ 760 (IC) 768.

39 (1996)17 ILJ 571 (IC).

40 (1997) 18 ILJ 1421 (CCMA) 1426 F-G.

41 C Garbers 'Promotion: Keeping abreast with ambition' *Contemporary Labour Law* Vol 9 No 3 October 1999, 27.

42 See: *Mashegoane & another v University of the North* (1998) 1 BLLR 73 (LC); and *Public Servants Association of SA obo Petzer v Department of Home Affairs* (1998) 19 ILJ 412 (CCMA).

due deference to the employer's prerogative there is a "logical connection between the real reasons and the decision taken"⁴³

In *Herbert v Department of Home Affairs*⁴⁴ the issue was whether the Respondent's conduct in not promoting the applicant to the position of Assistant Director in the Department of Home Affairs amounted to an unfair labour practice. The Commissioner stated that in his view the decision to promote is a prerogative of management and that

The Labour Relations Act 1995 entitles an employee who is aggrieved because he was not promoted to challenge this in view of the unfair labour practice provisions of the Act. The question then is: if the decision to promote is management's decision, when can an employee challenge this decision? *Goliath v Medscheme (Pty) Ltd* (1996) 5 BLLR 603 (IC) in my view provides the correct answer when dealing with decisions to promote where discrimination on prohibited grounds is not alleged, as in this case. In this case it was stated that "in the absence of gross unreasonableness which leads the court to draw an inference of *mala fides*. This court should be hesitant to interfere with the exercise of management's discretion.

The commissioner found that the advert in this case had stated that the purpose was to promote representivity and that the decision of the employer to abide by this policy was not unreasonable. In this case although the successful incumbent possessed less qualifications than the applicant, the policy of representivity to address the inequities in the racial demographics of the department was the determining criteria. This policy was also enshrined in a collective agreement. The prerogative of the employer prevailed.

In *South African Municipal Workers Union on behalf of Damon v Cape Town Metropolitan Council*⁴⁵ the employer advertised vacant posts within the council. The applicant was short-listed, interviewed and tested but was unsuccessful. The commissioner found that the onus was on the union to make a case of unfair labour practice and to do so it needed to examine the reasons why its member was not appointed and identify defective reasoning on part of the appointing authority.

Unless the appointing authority was shown to not have applied its mind in the selection of the successful candidate, the CCMA could not interfere with

43 See: *Vereniging van Staatsamptenare obo Badenhorst v Department of Justice* (1999) 20 ILJ 253 (CCMA).

44 (1998) CCMA KN 10413.

45 (1999) 20 ILJ 714 (CCMA).

the prerogative of the employer to appoint whom it considered to be the best candidate.⁴⁶

In *Public Servants Association on behalf of Botes and another v Department of Justice*⁴⁷ the four applicant employees brought an application to the CCMA that they be compensated/promoted from the date that they were instructed to act as Deputy State attorneys. The department explained that the delay in the filling of the post was caused by the constitutional imperative to transform the Public Service and the amalgamation of the Department of Justice with the former TBVC states. The commissioner considered whether the department had acted unfairly towards the applicants and held that:

Fairness must not only be considered from the point of view of the applicants and the manner in which they had been affected. One must also consider the reasons for the actions of the employer, and whether it had acted frivolously or capriciously or unreasonably. It was common cause that no appointment had actually been made in any of the available posts. It was therefore entirely within the so-called managerial prerogative to decide whether or not an appointment would be made, or whether or not any person should be promoted.⁴⁸

In this case there were special circumstances which resulted in the extra-ordinary duration of the acting appointments, and they remained “temporary” for as long as the circumstances prevailed. The commissioner could not find that the department had committed an unfair act or omission relating to the promotion of the applicant employees. However, this managerial prerogative of the employer to promote whom it deems fit must be viewed within the concept of fairness that the decision to promote is both procedurally and substantively fair.

In *Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani and others*⁴⁹ the Court further entrenched the view that

There is considerable judicial authority supporting the principle that courts and adjudicators will be reluctant, in the absence of good cause clearly shown, to interfere with the managerial prerogative of employers in the employment selection and appointment process.

46 Ibid 718 B.

47 (2000) 21 ILJ 690 (CCMA).

48 Ibid 698 G – H.

49 (2002) 23 ILJ 761 (LC) 771.

(vi) Failure to appoint the candidate with the highest score

In both *Van Rensburg v Northern Cape Provincial Administration*⁵⁰ and *Public Servants Association obo Dalton and Another v Department of Public Works*⁵¹ the aggrieved employees received higher marks at the interview than the other candidates who were ultimately preferred. This defect is not fatal, provided the employer has good reasons for doing so and unless, for example, the employer is bound in terms of its policy to the ratings achieved at the interview.⁵² Similarly in *SAPSWU obo Kalashe and another v Department of Finance*⁵³ the applicants rested their case solely on the fact that they received the highest scores at the interviews. The arbitrator did not find this to constitute an unfair labour practice.

This approach was followed in *National Education Health and Allied Workers Union on behalf of Thomas v Department of Justice*⁵⁴ where the arbitrator held that the fact that the grievant had achieved the highest score at the interview did not automatically guarantee appointment to the post. The arbitrator found that the appointment of the successful candidate on the basis of representivity and employment equity in terms of an equity plan was acceptable.

vii) Unfair discrimination

This section will be dealt with extensively in chapter 2 dealing specifically with unfair discrimination.

However, the case of *Stoman v Minister of Safety and Security*⁵⁵ falls to be mentioned within this chapter. In this case a white employee who was short-listed and achieved the highest mark of all the candidates contested the post to which a black policeman had been promoted. The Respondent alleged that the appointment was in terms of its employment equity plan to give effect to representivity and affirmative action. The court found that

50 (1997) 18 ILJ 1421 (CCMA).

51 (1998) 9 BLLR 1177 (CCMA).

52 See note 41 above.

53 (2000) ILJ 2543 (CCMA).

54 (2001) 22 ILJ 306 (BCA).

55 (2002) 23 ILJ 1020 (T).

It is generally accepted that an applicant who alleges discrimination must show on a balance of probabilities that discrimination did take place, and that the discrimination was unfair. In this case discrimination based on race is alleged. Therefore the applicant has to show that discrimination took place, after which it would then be assumed that the discrimination was unfair, unless the respondent can show that the discrimination was indeed fair.⁵⁶

The court held that the appointment of a black candidate over a white one after consideration of a race issue was not itself unjustifiable in view of the constitutional recognition of affirmative action measures. The applicant did not produce any evidence indicating that the relevant policies and guidelines in force in the South African Police Services did not comply with the constitutional requirements of Section 9(2). The court found that the applicant did not make out a case for the relief sought.

viii) Acting in a higher post

One interesting development has been in relation to the protection afforded to employees who are acting in positions. There is little doubt that an employer may expect employees to act in certain positions.⁵⁷ Furthermore, the mere fact of acting in a higher position does not entitle an employee to be appointed to such a post, even if one could say that a legitimate expectation for promotion exists.⁵⁸

The problem, of course, is that given the convenience of making use of the acting appointments, employers tend to forget about employees so appointed. This is where the employer starts running the risk of unfair conduct if it does not promote the acting employee to the position in question permanently or, at least, does not afford the employee the remuneration and benefits of the higher post.⁵⁹

Bearing this in mind, some employees in acting positions have successfully challenged the conduct of employers in not promoting them. However, it immediately has to be said that these cases were rather extreme. In the

56 Ibid 1028 G.

57 See: *Public Servants Association and others v Department of Correctional Services* (1998)19 ILJ 1655 (CCMA)1673 A.

58 A legitimate expectation only entitles an employee to be heard before a decision is made, not to be actually appointed; See: *IMATU obo Coetzer v Stad Tygerberg* (1999) 20 ILJ 971 (CCMA) 976.

*Department of Correctional Services*⁶⁰ case, one of the applicants had been acting in a higher position for a period of 12 years, and most for periods of two years or longer.

In analysing all the above cases it is clear that a trend has developed whereby it is not sufficient for an employee to allege that he/she is the best candidate for the post. In terms of the two-pronged test in *Ndlovu*⁶¹ that is only the first hurdle. The second aspect is that there must be unfairness. We have seen from the cases dealt with above that the onus is on the employee to prove both aspects of the test. In cases where it was found that the employer has committed an unfair labour practice it can be seen that it was either in regard to procedure or that the aggrieved employee was able to show that he/she was the best candidate for the post. Invariably in most promotion disputes the aggrieved employee always feel that he/she is the best candidate for the job. This is usually the subjective view of the employee and is not the determining criterion. When the facts are looked at objectively then a different picture often emerges.

Although it may not always be easy to justify the preference of one candidate over another⁶² the employer should at very the least be able to provide reasons for its decision.⁶³ An employer is entitled to take subjective considerations into account

such as performances at an interview⁶⁴ or life skills.⁶⁵ Similarly, it was accepted in *Rafferty v Department of the Premier*⁶⁶ than an employer may attach more weight to one selection criterion than to others.

59 See: *Public Servants Association and others v Department of Correctional Services* (1998) 19 ILJ 1655 (CCMA) 1671 A.

60 Note 57 above and *Claasen and Another v Department of Labour* (1998) 10 BALR 1262 (CCMA).

61 Note 5 above.

62 *PSA on behalf of Dalton and another v Department of Public Works* (1998) 9 BALR 1177 (CCMA) 1180G.

63 *Mashegoane and Another v University of the North* (1998) 1 BALR 73 (LC); *PSA on behalf of Petzer v Department of Home Affairs* (1998) 19 ILJ 412 (CCMA).

64 *PSA on behalf of Dalton and another v Department of Public Works* (1998) 9 BALR 1177 (CCMA).

65 *PSA on behalf of Badenhorst v Department of Justice* (1999) 20 ILJ 253 (CCMA).

66 (1998) 8 BALR 1077 (CCMA).

d) Remedies

The Labour Relations Act merely says that disputes about promotions (provided unfairness is proved) must be determined on terms deemed 'reasonable' by the arbitrator.¹ In practice this has led to a range of remedies being fashioned by commissioners, including:

- a) a declaratory order – where a decision was taken not to fill the post and no evidence was available about any other appropriate remedy.²
- b) Remittal to an employer for consideration of employees for promotions.³
- c) Protective promotion.⁴
- d) Actual promotion.⁵
- e) Compensation.⁶

A claim for an acting allowance or back-pay cannot be sustained on its own but in some cases commissioners have been prepared to award "back-pay" in conjunction with a finding of unfair conduct relating to a failure to promote.⁷ In *PSA obo Department of Correctional Services*⁸ the employees were promoted but the issue of back-pay was referred for negotiation coupled with an order that failure to reach agreement within three months would result in an appropriate award by the CCMA.

1 Item 4 of Schedule 7 of the Labour Relations Act and Section 193 (4) of the Amended Labour Relations Act 12 of 2002.

2 *IMATU obo Coetzer v Stad Tygerberg* (1999) 20 ILJ 971 (CCMA).

3 *Public Servants Association obo Dalton and Another v Department of Public Works* (1998) 9 BLLR 1177 (CCMA); *Public Servants Association of SA obo Petzer v Department of Home Affairs* (1998) 19 ILJ 412 (CCMA).

4 *Rafferty v Department of the Premier* (1998) 8 BALR 1077 (CCMA).

5 *Public Servants Association and others v Department of Correctional Services* (1998) 19 ILJ 1655 (CCMA).

6 *Lutze v Department of Health* (2000) 21 ILJ 1014 CCMA; *Govender v Department of Health* (2000) 9 CCMA 6.9.7 KN 35683. In this case compensation was awarded because the applicant had subsequently been promoted to another position.

7 *Public Servants Association and others v Department of Correctional Services* (1998) 19 ILJ 1655 (CCMA); *Claasen and another v Department of Labour* (1998) 10 BALR 1262 (CCMA).

8 (1998) 19 ILJ 1655 (CCMA).

In *NUTESA v Technikon Northern Natal*,⁹ the CCMA set aside defective promotions and remitted the matter to the employer with an express stipulation that no person who was involved in the initial (flawed) promotion process was to play a role in the second procedure. Likewise in *NUMSA obo Cook v Delta Motor Corporation*¹⁰ the employer was ordered to restart the process of recruitment by giving all employees an equal opportunity. The appointment of the successful candidate was not set aside.

Some arbitrators have considered protective promotion as an option in awarding relief.¹¹ Protective promotion is a form of promotion set out in terms of the Public Service Staff Code. Part B/VI/III item 9 of the Staff Code states that

- 1) Protective promotions are affected on the recommendation of a [public service or provincial service] commission to protect the position of officers or employees -
 - d) who are found to have been prejudiced in the filling of a promotional post after such post has been filled.

Protective promotion, in this context, essentially amounts to an undertaking by the employer to promote the employee, who is nevertheless retained in the post of a lower grading pending a post of suitable grading becoming available. The recommendation to grant an employee protective promotion may only be made if the commission

Without any doubt establishes that the officer or employee concerned is indeed the most suitable candidate for the particular promotional post. Only one candidate can be the most suitable candidate at any specific moment and the protective promotion of only one candidate can be considered at a time.¹²

In *PSA obo Dalton and Another v Department of Public Works*¹³ the arbitrator held that the employees should be re-interviewed to consider whether they were worthy of protective promotion.

9 (1997) 4 BALR 467 (CCMA).

10 (2000) 9 CCMA 6.9.6 EC 204404.

11 *Maharaj v SAPS* PSSS 322, 5 December 2001 - however in this case it was one of the options.

12 *Department of Justice v CCMA and others* (2001) 22 ILJ 2439 (LC) 2454 E.

13 (1998) 9 BLLR 1177 (CCMA).

In *Department of Justice v CCMA and others*¹⁴ the court held that since the Public Service Commissioner was not joined as a party to the proceedings the arbitrator did not have the power to order or recommend protective promotion. The court further held that only the Public Service Commissioner has the power to make a recommendation of protective promotion and the Public Service Commission may only make such a recommendation where it is satisfied beyond doubt that the employee concerned is the most suitable candidate for the job. The court stated that

At best, it is inappropriate and unreasonable to usurp the entire selection process and effectively invoke the unorthodox procedure of protective promotion, drawing an external body (the PSC) into the fray.¹⁵

The Court further held that

Protective promotion only takes place under certain controlled circumstances, and that exceptional provisions and conditions apply to its operation. The applicant is not entitled to make the decision to afford an employee protective promotion of its own accord. The function lies with the Public Service Commission (PSC), which may only exercise this power once it has established beyond doubt that 'the officer or employee concerned is indeed the most suitable candidate for the particular promotional post.'¹⁶

The above case was referred to in *Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani and others*¹⁷ wherein the court held that the arbitrator's decision to award protective promotion constituted a gross irregularity.

It can thus be seen from the above that arbitrators do not have the power to award protective promotion in the absence of the Public Service Commissioner being a party to the dispute. It is highly unlikely that applicants in promotion disputes will consider joining the Public Service Commissioner as a party to the dispute. The trend by arbitrators in promotion disputes within the Public Service where the

14 (2001) 22 ILJ 2439 (LC).

15 Ibid 2455 H.

16 Ibid 2454 G – I.

17 (2002) 23 ILJ 761 (LC).

arbitrator is satisfied that an unfair labour practice has been committed is to promote the person in rank and remuneration.¹⁸

In most instances the post would already had been filled by the successful candidate. In the absence of the successful candidate being joined as a party to the proceedings and having been shown to have acted mala fide, the arbitrator does not have the power to set aside the appointment. This is clearly a practical difficulty which must be considered by arbitrators.

The Labour Relations Act gives commissioners a discretion to award remedies which must be deemed "reasonable". From the above we can see that this has led to various types of remedies being awarded depending on the facts of the case. It is not really possible to categorise the types of remedies as each case will depend on the facts and what the arbitrator deems reasonable in the circumstances.

18 *Page v SAPS* (2002) 23 ILJ 1111 (ARB).

CHAPTER 2

UNFAIR DISCRIMINATION

This chapter endeavors to analyse unfair discrimination in applications for employment and/or appointments. The relevant legislation is item 2(1)(a) of Schedule 7 of the Labour Relations Act, now section 186 of the Amended Labour Relations Act of 2002 and the Employment Equity Act. It will also be seen that section 8 of the interim Constitution which was replaced by section 9 of the 1996 Constitution has played a pivotal role in the development and interpretation of discrimination.

The starting point is item 2(1)(a) of Schedule 7 of the Labour Relations Act which reads as follows

For purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving

- a) the unfair discrimination, whether directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

For purpose of item 2(1)(a) “employee” included applicants for employment.¹

Item 2(1)(a) and 2(2)(a) were repealed and replaced by section 6 of the Employment Equity Act with effect from 9 August 1999.

Section 6 of the Employment Equity Act 55 of 1998 reads as follows:

Prohibition of unfair discrimination

6. (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including 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.
- (2) It is not unfair discrimination to-
 - a) take affirmative action measures consistent with the purpose of this Act; or
 - b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

¹ Item 2(2)(a) of Shedule 7 of the Labour Relations Act.

- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

Section 9 of the Employment Equity Act extends the meaning of “employee” for purposes of sections 6, 7 and 8 to include applicants for employment. Section 1 defines an employment policy and practice to include: recruitment procedures; appointments and the appointment process; advertising and selection criteria; promotions and dismissals.

The basic protection of employees and work-seekers against unfair discrimination is defined in the Employment Equity Act in terms very similar to those of item 2(1)(a), but with three main differences relating to its implementation. The first is that whilst the prohibition contained in item 2(1)(a) relates only to employers, section 6(1) of the Employment Equity Act prohibits all persons from discriminating unfairly against employees and applicants for employment. Secondly, section 11 of the Employment Equity Act reserves the onus of proving unfairness and requires the employer against whom unfair discrimination is alleged to establish that such conduct was fair. Thirdly, in terms of section 5 employers are now under a duty to eliminate unfair discrimination in any employment policy or practice. Designated employers are furthermore required in terms of section 15(2)(a) to include in their employment equity plan measures to eliminate forms of unfair discrimination which adversely affect persons from designated groups.²

This chapter will analyse the following:

1. Discrimination
 - a) The concept of unfair discrimination;
 - b) The determination as to:
 - i) whether there is discrimination; and if so,
 - ii) whether it is unfair;
 - c) Case law;
 - d) The burden of proof;

2 D. du Toit *Labour Relations Law* 3rd edition (2000) 431.

2. The defences:
 - a) Affirmative action
 - i) the Labour Relations Act 28 of 1958
 - ii) the Labour relations Act 66 of 1995
 - iii) the Employment Equity Act.
 - b) Inherent requirements of the job in the following situations:
 - i) pregnancy;
 - ii) commercial rationale;
 - iii) HIV positive status;
 - iv) academic qualifications and age.

Most of the grounds of discrimination specified in section 6(1) are not applicable to job applicants, for example, unfair conduct relating to promotion, demotion training or benefits and unfair suspension. The most common ground on which such applicants have instituted proceedings is the failure to appoint or consider them for appointment because of unfair discrimination.

There is no duty on an employer to employ any particular applicant for employment. While the employer may not discriminate, it still has a wide discretion to decide whom to employ which the courts will not readily interfere with unless manifest irregularity is shown. As Landman J held in *Abbot v Bargaining Council for the Motor Industry (Western Cape)*³ it is not the function of the court to ensure that the best man or woman for the job is selected. It is the function of the Court to strike down discrimination.

In this case it was alleged that a job advertisement preferring persons with experience as an agent or inspector in the Department of Labour discriminated indirectly against black persons because, for historical reasons, few black persons had gained such experience. Landman J doubted whether this was so, given that there was “an intention to afford preference and not to exclude those without this experience” but declined to decide the question in the absence of further evidence.

3 (1999) 20 ILJ 330 (LC).

Sections 6 and 9 of the Employment Equity Act do however, entitle the courts to scrutinise the procedures followed by employers in recruiting and selecting applicants for employment as well as the manner in which such procedures are applied. "Because the Labour Court is not simply a Court of law but a Court of law and equity it is entitled not only to look at the justification for the actions of the parties before it but also the reasonableness thereof."⁴

1. **Discrimination**

(a) The concept of 'unfair discrimination'

The concept "unfair discrimination" is central to both item 2(1)(a) of the Labour Relations Act and section 6 of the Employment Equity Act. In *Hoffman v South African Airways*⁵ the Constitutional Court applied the characterisation of unfair discrimination that was enunciated in *President of the Republic of South Africa and another v Hugo*⁶ that

At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against.

Unfair discrimination was for the first time proscribed in comprehensive terms by section 8 of the interim Constitution⁷ which was superseded in very similar terms by section 9 (3) and (4) of the 1996 Constitution. Section 9(2)⁸ extends the concept of equality beyond the prohibition of formally unequal treatment to the goal of ensuring substantively equal outcomes and specifically permits affirmative action

4 *Whitehead v Woolworths (Pty) Ltd* (1999) 4 BLLR 401 (LC) par 22.

5 (2000) 12 BLLR 1365 (CC).

6 1997 (4) SA 1 (CC) par 41.

7 Section 8(2) read as follows: "no person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. It can be seen that item 2(1)(a) of the Labour Relations Act and section 6 of the Employment Equity Act are very similar in terms to section 8(2) of the Interim Constitution .

8 Section 9(2) reads as follows: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

measures as a means of bringing this about. The Labour Relations Act sets out to incorporate the prohibition contained in the interim Constitution and the principles developed by the Industrial Court into a broad framework which proscribed certain prevalent forms of employment discrimination that could be used to strike down unfair discrimination in any form. The Employment Equity Act has now taken over this function, replacing the relevant parts of the Labour Relations Act and placing a duty on employers to 'take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'. It can be seen that section 6(1) of the Employment Equity Act prohibits unfair discrimination within the scope of an employment policy or practice and section 1 sets out the instances in which it could be applicable and includes recruitment procedures, advertising and selection criteria, appointments and the appointment process. No further definition of unfair discrimination is given and it is left to the courts to determine in each case whether the conduct complained of falls within the scope of the prohibition.⁹

appl

The test laid down by the Constitutional Court in *Harksen v Lane NO and others*¹⁰ for identifying unfair discrimination in respect of legislation and executive conduct has also been used as a touchstone for defining unfair discrimination against employees.¹¹ Essentially the test consists of three questions. The first is whether the act or omission in question differentiates between people or categories of people. If it does two further questions must be asked

The determination as to whether differentiation amounts to unfair discrimination under section 8 (2) requires a two-stage analysis. Firstly, the question arises whether the discrimination amounts to "discrimination" and, if it does, whether, secondly, it amount to "unfair discrimination". It is as well to keep these two stages of the enquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in section 8 (2), which by virtue of section 8 (4) are presumed to constitute unfair discrimination, it is not possible to rebut the presumption and establish that a discrimination is not unfair.¹²

9 Note 2 above, 431.

10 1998 (1) SA 300 (CC).

11 D. Du Toit 'Employment Equity Act No 55 of 1998' *Labour Law Through the Cases* (2003) EEA 7.

12 *Harksen v Lane* note 10 above, par 46.

(b)(i) Is there discrimination?

The first step is to establish whether 'discrimination' has taken place. To 'discriminate' in general means no more than 'to differentiate' or 'to treat differently'. Differentiation in this sense is not necessarily unfair or discriminatory. The duty not to discriminate unfairly itself enjoins differential treatment in circumstances where formally equal treatment would be unfair.¹³

Discrimination is more than mere differential treatment. It was pointed out in *Germishuys v Upington Municipality*¹⁴ that

Any employer which chooses one candidate amongst a group of several for a position of employment, of necessity 'discriminates' against the unsuccessful candidates ... More properly, it would be correct to say that the employer 'differentiated' rather than 'discriminated.'

Discrimination may take place on any of the grounds specified in item 2 (1)(a) or section 6 of the Employment Equity Act as well as on unspecified grounds. If the discrimination is on a specified ground, the Constitutional Court held in *Harksen v Lane NO and others*¹⁵ that

Discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether objectively, the ground is based on attributes and characteristics which have the potential to impair fundamental human dignity of persons as human beings or affect them adversely in a comparably serious manner.

Such unlisted grounds should be "analogous" to the listed grounds. In *Kadiaka v Amalgamated Beverage Industries*¹⁶ the Labour Court held with regard to the phrase "any arbitrary ground" that "the common denominator of the specific instances may not, for the legislature says this clearly, delimit [ie restrict] the primary grounds i.e. arbitrary grounds." With the omission of the quoted phrase from section 6 of the Employment Equity Act it is submitted that this view no longer holds good.¹⁷

13 Note 2 above, 434.

14 (2001) 3 BLLR 345 (LC) par 81.

15 Note 10 above, par 53.

16 (1999) 20 ILJ 373 (LC) par 38.

17 Note 11 above, EEA 7.

In *Prinsloo v Van der Linde and Another*¹⁸ the Constitutional Court held that

Given the history of this country we are of the view that “discrimination” has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them ... (U)nfair discrimination, when used in this second form in s8(2), in the context of s8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity.

Where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of s8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of s8(2) as well.

In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*¹⁹ discrimination was defined by Seady AJ in the following terms

Direct race discrimination occurs where a person is treated differently because of their race or on the basis of some characteristics specific to members of that race. It is incorrect to equate discrimination with actual prejudice. Discrimination occurs when people are not treated as individuals. To discriminate is to assign to them characteristics which are generalised assumptions about groups of people (*R v Birmingham City Council Ex-parte Equal Opportunity Commission* 1 all ER 769 HL) and *James v Eastleigh Burrough Council* ICR (554 HL).

It is not necessary to show any intention to discriminate for direct discrimination to be established. Intention or motive of the respondent may however be relevant to what remedy the court should impose. If a black receives less favourable treatment than a white employee, the black employee has been discriminated against on the grounds of race. Whether the discrimination is unfair is a separate enquiry.²⁰

It may now be considered settled that the prohibition of unfair discrimination does not exclude, and may indeed require, formally unequal or differential treatment of employees and applicants for employment in order to achieve substantive equality among them.²¹

18 1997 (3) SA 1012 (CC) pars 28 –31.

19 (1998) 19 ILJ 285 (LC).

20 Ibid 442 H – J.

21 Note 2 above, 435.

(ii) Is the act of discrimination unfair?

The second step is to establish whether an act of discrimination is unfair.

Du Toit²² states that for practical purposes the test of unfair discrimination in the employment context may be reduced to the following question, that is, has there been differential treatment of the employees or work seekers in question? And if so, whether such differential treatment was of a pejorative nature? 'Discrimination' is established if both questions are answered in the affirmative, and if so, a third question arises as to whether any reason has been offered to show that it was justified or fair? This is the crux of the inquiry. A critical distinction lies between discrimination on one of the grounds specified in section 6(1) and discrimination on any other ground. Discrimination on any of the specified grounds is *prima facie* pejorative and unfair.²³

In *President of the Republic of South Africa v Hugo*²⁴ Goldstone J expounded the concept of substantive fairness as follows

In s8(3), the Interim Constitution contains an express recognition that there is a need for measures to seek to alleviate the disadvantage which is the product of past discrimination. We need, therefore, to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

A similar approach was adopted by the Industrial Court in *George v Liberty Life Association of Africa Ltd*²⁵ and was endorsed by the Labour Court in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*²⁶ where Seady J held that

The prohibition of unfair discrimination contained in item (2)(1)(a) of Schedule 7 sorts permissible discrimination from impermissible

22 Note 2 above, 437.

23 Note 2 above, 437 – 8.

24 (1997) 6 BLLR 708 (CC) 729 F – H.

25 (1996) 17 ILJ 571 (IC).

26 (1998) 19 ILJ 285 (LC) 294.

discrimination. By this mechanism the legislature recognises that discriminatory measures are not always unfair. What is less clear is where to draw the line between permissible and impermissible discrimination. The notion of permissible discrimination is in keeping with a substantive, rather than formal approach to equality that permeates the Constitution and from which item 2(1)(a) draws its inspiration.

Whether or not society will tolerate discrimination depends on the object of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.²⁷ If the object is permissible, it follows, that the discrimination is not unfair. Considerable difficulty may be encountered in defending which objects are permissible.

“An enquiry as to fairness”, Willis J found in *Woolworths (Pty) Ltd v Whitehead*²⁸ “involves a moral or value judgment taking into account all the circumstances.” It is submitted²⁹ that the circumstances taken into account by Willis JA in this matter demonstrate the difficulties of overtly incorporating subjective values or notions of morality into a legal norm of fairness.³⁰

The wording of item 2(1)(a) as well as section 6 makes it clear that the listed grounds are not exhaustive. The words “one or more” of the listed grounds enable a complainant to complain about a discriminatory practice or policy that is based on, for example, sex and race.³¹ Departing from the wording of the Constitution, item 2(1)(a) moreover included discrimination on “any arbitrary ground” in its prohibition of unfair discrimination.³²

27 *Leonard Dingler Employee Representative Council and others v Leonard Dingler Pty) Ltd* (1997) 11 BLLR 1438 (LC) 1448. Or, as was held in *Harksen v Lane* (note 10 above), unfair discrimination amounts to ‘invasions which impair human dignity or which affect people adversely in a comparably serious manner’ (par 51).

28 (2000) 6 BLLR 640 (LAC) par 135.

29 Note 11 above, EEA 11.

30 Inter-alia, Willis JA relied on perceived requirements of economic growth, the perceived nature of motherhood in non-Western cultures and the perceivedly excessive birthrate in South Africa in concluding that the employer was justified in taking a woman’s pregnancy into account when deciding not to employ her (pars 136 – 149).

31 See: *Association of Professional Teachers and another v Minister of Education and others* (1995) 9 BLLR 29 (IC) 68.

32 Note 11 above, EEA 13.

In *Kadiaka v Amalgamated Beverage Industries*³³ the court distinguished the listed grounds from what was termed “the general or primary ground” of unfair discrimination, referred to in item 2(1)(a) as “any arbitrary ground.” The Act according to Landman J, is bent on eliminating hiring practices which discriminate against an applicant for a job on arbitrary grounds and the specific grounds listed in paragraph (a) of item 2(1). An arbitrary ground means a ground which is capricious or proceeding merely from will and not based on reason or principle... where the discrimination is for no reason or is purposeless [or] even if there is a reason ... [where] the reason is not a commercial reason of sufficient magnitude that it outweighs the rights of the job seeker and is not morally offensive.³⁴

Thus, excluding weekly-paid staff from a benefit fund in the absence of financial or business reasons was held to be arbitrary³⁵ whereas a refusal to employ a workseeker who had been employed by a rival company in a situation where acrimonious competition had prevailed was held to “[make] commercial sense” and was therefore justifiable.³⁶

Section 6 of the Employment Equity Act, does not mention “arbitrary” grounds. The question therefore arises whether the test for ‘arbitrary’ discrimination in terms of item 2(1)(a) should continue to inform the test for unfair discrimination on a non-listed ground in terms of section 6. In the absence of a clear ruling to the effect that the purpose of the Employment Equity Act was to narrow down the scope of unfairness, it is submitted that discrimination on an “arbitrary” ground should be regarded as “unfair” also in terms of section 6 of the Employment Equity Act.³⁷

When relying on an unlisted ground of discrimination, however, it is not enough merely to allege that the employer’s action was “arbitrary”, the alleged

33 (1999) 20 ILJ 373 (LC).

34 Ibid, pars 37 – 43.

35 *Leonard Dingler*, note 19 above.

36 *Kadiaka*, note 33 above.

37 Note 11 above, EEA 14.

discriminatory ground for such action should be specified. In *Ntai and others v South African Breweries Ltd*³⁸ it was held that

In the absence of an identified unlisted ground it is impossible to determine whether the ground that is relied upon is comparable to the listed grounds (such as race) and that it is based upon attributes and characteristics which have the potential to impair the fundamental human dignity of the applicants as human beings.

(c) Case Law

I will now consider some cases on the aspect of discrimination and although most of them have been decided in terms of the now repealed item 2(1)(a) of Schedule 7 to the Labour Relations Act, they may still be relevant to interpreting section 6 of the Employment Equity Act to the extent that the provisions in the two statutes are similar.

*TGWU and Another v Bayette Security Holding*³⁹ illustrates that there must first be discrimination before an enquiry into its fairness can be made. The applicant a security guard was promoted to a marketing position and earned R1 500.00 per month plus commission. A white man was later appointed at a salary of R4 500.00 per month. The applicant claimed that he (the applicant) was the victim of unfair racial discrimination in terms of item 2(1)(a). The Court held that the applicant was obliged to prove that he had, in fact, been discriminated against, and only then would the onus “shift” to the employer to prove that the discrimination was not unfair. The Court indicated that the payment of different wages to employees did not in itself amount to unfair discrimination, unless it was based on an arbitrary ground. Since the applicant admitted that he was unaware what work the white employee performed, what his educational qualifications were or what previous experience he had, the Court concluded that the applicant failed to prove that the pay differential existed merely because he was black and the other employee white.⁴⁰

38 (1999) 2 BLLR 186 (LC) par 72.

39 (1999) 4 BLLR 401 (LC).

40 S Milo 'The ups and downs of promotion and demotion' *Contemporary Labour Law* Vol 11 No 4, November 2001,35.

Similarly in *Mahlanyana v Cadbury (Pty) Ltd*⁴¹ it was found that the employer was not guilty of unfair racial discrimination in failing to promote the employee to a senior post.

The court held that

There can be little doubt that notwithstanding the emotional groundswell of genuine commitment, following the advent of the new South African democratic era some six years ago, to the eradication of historical prejudices and discrimination based on race, residual pockets of racism remain manifestly in existence in this country. The bitterness and sensitivity of persons historically and, directly or indirectly, still subjected to those prejudices is therefore understandable. Where perceptions of their existence are shown to have been justified, it is right and proper that, wherever and whenever they are established, mechanisms should exist to address them remedially, therapeutically, and where appropriate in the context of their social and legal unacceptability, even punitively. Correlative to that concept, however, is the necessity for responsible avoidance of a hypersensitive inclination or tendency in adverse circumstances, to classify as racial discrimination otherwise unimpeachable conduct by members of one race towards those of another where no rational basis for doing so exists.⁴²

The court found that the formal selection process followed by the company was unimpeachable and was of the view that the employee's attempt to base her challenge on purported racial criteria, was perhaps understandable in an emotional context, but unjustified and unfounded on the evidence. Moreover, at no stage in the history of her relationship with the company had the employee ever raised the issue of racial discrimination or indicated any grievance in that context. She was still in the company's employ, thereby maintaining for her own volition a relationship which, if her contention that she was the victim of racial discrimination were valid, one would expect she would find untenable. The court concluded that the employee had failed to establish the discrimination she alleged.

The same approach was taken by the High Court under the common law in *Swanepoel v Western Region District Council and Another*.⁴³ wherein the Court held that

41 (2000) 21 ILJ 2274 (LC).

42 Ibid 2279.

43 (1998) 19 ILJ 1418 (SE) 1423 – 4.

In the race for employment there must indeed be few job seekers who do not in their own minds, either with or without the encouragement of others, form expectations as to their suitability. These expectations are, however, not 'legitimate expectations' upon which applicant could conceivably rely for relief and indeed, such legitimate expectations as applicant may have had were adequately met as I have said, by giving applicant access to procedurally fair administrative procedure, ie, the selection process, untainted by discrimination or bias of any description and regular and proper in all respects.

In this case the applicant unsuccessfully applied for a position which had been advertised internally and externally. She was short-listed, interviewed and unsuccessful. The applicant alleged that she had been unfairly discriminated against, was the victim of an unfair affirmative action policy and her constitutional right to procedurally fair administrative action had been infringed by virtue of her legitimate expectation to be appointed to the post. The court held that the onus was on the applicant to show that there had been unfair discrimination in any form, whether based on gender, race, political belief or otherwise. As regards legitimate expectation, the doctrine gave rise to nothing more than a procedural as opposed to a substantive right.

This approach was further taken by the Labour Appeal Court in *Woolworths Ltd v Whitehead*.⁴⁴ Thus, 'something more is required of applicants than for them simply to show that they are black, female or pregnant.' The cases outlined above indicate that the Court will only come to the aid of an applicant if he or she can show that the reason for the differentiation is on the basis of sex, race or any other arbitrary ground.

(d) Onus of proof

Prior to the enactment of section 11 of the Employment Equity Act the two-stage test laid down in *Harksen v Lane and others*⁴⁵ required the Applicant to show that "discrimination" had taken place. To do so it was necessary to establish on a balance of probabilities a causal connection between the prejudicial treatment in question and the alleged ground for such treatment (whether listed or unlisted). In the case of listed grounds the establishment of a link was sufficient to create a

44 (2000) 21 ILJ 571 (LAC).

45 1997 (11) BCLR 1489 (CC) par 46.

presumption of unfairness; in the case of unlisted grounds it was necessary to show, in addition, that the discrimination was prima facie unfair. Once this was done the onus shifted to the employer to show on a balance of probabilities⁴⁶ that the discrimination was justified or fair.⁴⁷

The employer must show that the discrimination had as its aim a legitimate object, and that the means used to achieve the object were rational and proportional. In evaluating the reason for the discrimination and the means used, fairness between the employer and the employee must be considered.⁴⁸

In *Public Servants' Association of South Africa and another v Minister of Justice and others*⁴⁹ it was held that whoever seeks to rebut the presumption needs to prove on a balance of probabilities that the discrimination was not unfair. In the case of differential treatment on any other ground, the discriminatory and unfair nature of such treatment remains to be proven by the applicant.

In *Leonard Dingler*⁵⁰ Seady AJ found that the court could rely on section 8(4) of the interim Constitution in determining the onus which is applicable in discrimination cases in terms of item 2 and held that

Applicants in discrimination cases will be faced with serious and possibly insurmountable difficulties if they are to prove that the discrimination is unfair. This will seriously undermine the constitutional commitment to eradicate inequality and the objects of the Act. It is doubtful that the legislature intended this. Given that considerations of legitimacy and rationality must be measured in testing fairness, it is the employer or some other respondent party who can and should provide this explanation. The employer must show that the object of the practice or policy is legitimate and that the means used to achieve it are rational and proportional.

In conclusion, I am of the view that once the applicant established that there was discrimination, the evidentiary burden shifted to the respondents to show that it was not unfair discrimination.

46 *Abbot v Bargaining Council for the Motor Industry (Western Cape)* (1999) 2 BLLR 115 (LC) par 9; *Ntai and others v South African Breweries Ltd* (2001) 2 BLLR 186 (LC) par 11.

47 Note 11 above, EEA 30.

48 See the judgment of Willis JA in *Woolworths v Whitehead* (2000) 21 ILJ 571 (LAC).

49 (1997) 5 BCLR 577 (T) 637.

50 (1998) 19 ILJ 285 (LC) par 44.

In a number of cases decided in terms of the Labour Relations Act the hurdle of proving a causal link between differential treatment and a listed ground of discrimination proved insurmountable. Thus, in *Woolworths (Pty) Ltd v Whitehead Zondo JP* found that discrimination on the grounds of pregnancy was absent in that the applicant was

Unable to show that, but for her pregnancy, she would have been appointed to the position despite the appellant having another candidate who was better suited for the job than herself. The result of this is that, in my view, there is no causal connection between her not being appointed and her pregnancy.⁵¹

Similarly, in *Swanepoel v Western Region District Council and another*⁵² the court found no *prima facie* proof “let alone a serious suggestion that the applicant had been discriminated against, unfairly or otherwise” on the grounds of sex, race or political opinion as alleged. Also in *Walters v Transitional Local Council of Port Elizabeth and another*⁵³ the court found no evidence of discrimination on the grounds of political opinion in as much as the applicant failed to prove the political opinion of the alleged beneficiary. In *TGWU and another v Bayette Security Holdings*⁵⁴ the applicant likewise

Failed to place before this Court any facts that justify the conclusion that he was paid less than Louw merely because he is black, and Louw white, or that the difference in their incomes was for any other arbitrary reason. There is accordingly no basis from which to draw the inference that the applicant was discriminated against in the sense contemplated by item 2(1)(a), or at all.

In *Germishuys v Upington Municipality*⁵⁵ the applicant placed certain facts and inferences before the court in support of his claim of racial discrimination. The court however found that he had failed to make out a case in that his claim was based on speculation, unjustified inferences and inability to accept that he was not the most suitable candidate.

51 (2000) 6 BLLR 640 (LAC) par 24.

52 (1998) 9 BLLR 987 (SE).

53 (2001) 1 BLLR 98 (LC) par 35.

54 (1999) 4 BLLR 401 (LC) par 8.

55 (2001) 3 BLLR 345 (LC) pars 75-76.

We can thus see that the courts have held that the applicant bear the onus of establishing that he or she has been discriminated against in terms of the Labour Relations Act.⁵⁶

The Employment Equity Act places the onus of proof on the employee or applicant for a job to prove that discrimination has taken place. However, the grievant has the benefit of section 11 of the Employment Equity Act which places a burden on the employer whenever unfair discrimination is alleged. In terms of section 11 the employer against whom the allegation is made must establish that it is fair.

The application of section 11 is apparently limited to the listed grounds of discrimination.⁵⁷ Its importance lies in its use of the words “alleged” and “allegation” to describe the evidentiary burden placed on the applicant to establish a prima facie case of unfair discrimination. While it is unlikely that the mere allegation of unfair discrimination will suffice in the absence of any evidence to that effect, it does suggest that the evidentiary burden has been significantly reduced. A possible interpretation is that the applicant must allege sufficient facts from which an inference of unfair discrimination can be drawn.⁵⁸

This seems to have been the approach adopted in *Mineworkers Union obo Snyman and another v Eskom (Distribution)*,⁵⁹ where it was found that

The applicants could do no more than allege that the effect of Eskom’s application of its affirmative action policy appeared to have resulted in an act of unfair discrimination. I needed to hear the evidence of Eskom to ascertain how and why its affirmative action policy had been applied in a particular manner, and I accordingly ruled that Eskom had the duty to begin.

56 In addition to the cases cited see the following: *Abbot v Bargaining Council for the Motor Industry Western Cape* (1999) 20 ILJ 330 (LC) 333 F - G; *Louw v Golden Bus Arrows (Pty)* (2000) 21 ILJ 188 (LC); *Public Servants Association of SA and others v Minister of Justice and others* (1997) 18 ILJ 241 (T).

57 Section 6(1) lists the following as prohibited grounds of discrimination: “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.”

58 Note 11, EEA 32.

59 (2000) 11 BALR 1314 (IMSSA) 1317.

If this interpretation is correct, the “first stage” of the inquiry as laid down in *Harksen v Lane*⁶⁰ has been significantly altered and the existing case law remains applicable largely in respect of alleged unfair discrimination on unlisted grounds. The nature of the “second stage” (the burden placed on the employer in answering a prima facie case of unfair discrimination on listed or unlisted grounds), however, appears to be unchanged and the case law developed in the context of item 2(1)(a) should remain applicable.⁶¹

In *Ntai and others v South African Breweries Ltd*⁶² it was held that, once the applicants had made out a *prima facie* case, “[a]n explanation by the respondent was...called for.” “Explanation”, it is submitted, should be taken to mean refutation on a balance of probabilities, in *Louw v Golden Arrow Bus Services (Pty) Ltd*⁶³ it was made clear that

Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he or she is regarded quo ad that defence as being the claimant and for the defence to be upheld he or she must satisfy the court that he or she is entitled to succeed on it.

In *Whitehead v Woolworths (Pty) Ltd*⁶⁴ it was observed that the court is not bound to accept a decision by an employer as to the need for discrimination but must determine whether it was justifiable and reasonable. The Labour Appeal Court, while upholding an appeal against the order made by the Labour Court, implicitly endorsed its approach by considering the employer’s decision in detail.

A distinction had been drawn between evidence submitted by the employer in the context of the inquiry whether or not discrimination has taken place (the “first stage” of the enquiry) and evidence submitted to prove a fair reason for

60 Note 10 above.

61 Note 11 above, EEA 32.

62 (2001) 2 BLLR 186 (LC) par 21.

63 (2000) 3 BLLR 311 (LC) par 47.

64 (1999) 8 BLLR 862 (LC) par 22. The reason, according to Waglay J, is that “the Labour Court is not simply a court of law but a court of law and equity and, as such, is entitled not only to look at the justification for the action of the parties before it, but also the reasonableness thereof.”

discrimination that is *prima facie* unfair (the “second stage”). In *Ntai and others v South African Breweries Ltd*⁶⁵ Basson J found it

Of the utmost importance to note that the respondent did not proffer these grounds of justification in order to justify a practice of racial discrimination. Operational requirements of this kind can namely never justify racial discrimination. [In] fact ... the difference in pay was not caused by race.

Evidence of this nature pertains to the applicant’s onus of proving discrimination rather than the respondent’s onus of proving the fairness of such discrimination. As such, the distinction is in future likely to present itself principally in the context of alleged unfair discrimination on unlisted grounds.⁶⁶

65 (2001) 2 BLLR 186 (LC) par 61.

66 Note 11 above, EEA 32 – 3.

2. The Defences

The Employment Equity Act recognises two complete defences against a claim of unfair discrimination, namely, that it is not unfair to take affirmative action measures consistent with the purposes of the Employment Equity Act or to 'distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.'¹

It has been suggested that discrimination may be permissible for reasons other than the two specific defences laid down in item 2(2)(b) of Schedule 7 and section 6(2) of the Employment Equity Act. In examining whether the differential treatment complained of was pejorative or unfair, possible grounds of justification will present themselves as part of the same exercise. It is submitted that the range of potential defences in such an inquiry will not be limited to the two grounds stated in section 6(2) but could include any reason demonstrating an absence of pejorative or discriminatory effect, for example, commercial rationale, provided it is reasonable in terms of law and public policy.²

a) Affirmative Action

The Labour Relations Act, the Employment Equity Act and the Constitution outlaw discrimination. However, employers, more particularly in the public service are empowered to adopt employment practices that are designed to achieve the adequate advancement of persons or groups previously disadvantaged by unfair discrimination. One such policy is affirmative action.

The *raison d'être* for affirmative action is that formal equality, in the shape of a prohibition of future unfair discrimination, would not go far enough to redress the inequities of the past in a country such as South Africa due to the country's long constitutional history of unfair discrimination.³

1 Section 6(2)(a) and (b) of the Employment Equity Act.

2 D. du Toit 'Employment Equity Act No 55 of 1998' *Labour Law through the cases* (2003) EEA 12.

3 D. du Toit *Labour Relations Law* 3rd ed (2000) 456 – 6; see further Cachalia et al *Fundamental Rights the New Constitution* 28.

Prior to the coming into force of the Employment Equity Act various decisions on the issue of affirmative action were made by the Industrial Court, the High Court, the Labour Court and the CCMA and will be considered herein.

i) The Labour Relations Act 28 of 1958

The first decision specifically dealing with affirmative action in terms of the Labour Relations Act 28 of 1958 was that of the Industrial Court in *George v Liberty Life Association of Africa Ltd.*⁴ In this case an employee applied for a post advertised by the employer and his application was turned down in favour of an affirmative action appointment. He approached the Industrial Court alleging that the employer had committed an unfair labour practice. The court found the affirmative action applied by the employer to be justified and held that although the application of the affirmative action policy amounted to discrimination the discrimination was not unfair. The court further expressed the view that affirmative action measures provided a defence to employers against a claim alleging discrimination it did not provide employees with a right to preferential treatment.⁵

In this case the Industrial Court identified two further limitations on the scope of affirmative action measures in terms of the interim Constitution. Firstly, it was held that the beneficiaries of affirmative action should be limited to those members of disadvantaged groups who have 'personally been historically unfairly discriminated against.' It is doubtful whether this finding remains applicable in terms of the Employment Equity Act. Section 15(1) of the Employment Equity Act identifies the beneficiaries of affirmative action measures as "suitably qualified people from designated groups", without reference to "disadvantage." Secondly, the court found that affirmative action is "an interim measure" rather than "a universal value" and, as such, "temporary in nature." Being intended to bring about the "fair representation of all sectors of South African society at all levels and in all fields" it will become impermissible once this goal has been achieved. While such a stage may seem remote at present, the criterion of representivity adopted by the

4 (1996) 17 ILJ 571 (IC).

5 PAK Le Roux 'Affirmative action and the individual employee' *Current Labour Law* Vol 9 No 4, November 1999, 32.

Employment Equity Act may arguably have the effect of removing the legal basis for affirmative action in workplaces or occupational categories where “fair representation” has been achieved.⁶

ii) The Labour Relations Act 66 of 1995

The Labour Relations Act contained various provisions in the context of which affirmative action may be relevant. Items 2(1)(a) and 2(2)(b) of Schedule 7 were the most important of these provisions.

Item 2(1)(a) has now been repealed and replaced by section 6 of the Employment Equity Act. It provided that any unfair discrimination by an employer based on a range of prohibited grounds constituted an unfair labour practice. However, item 2(2)(b) (which has also been repealed) stated that an employer was not prevented from adopting or implementing employment policies and practices that were

...designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

The first reported decision on affirmative action in terms of the Labour Relations Act is that of *Public Servants Association of South Africa and another v Minister of Justice and others*.⁷ In this case the applicants, Senior State Attorneys, challenged the decision of the Department of Justice to reserve certain posts for affirmative action candidates by failing to consider them for the post of Deputy State Attorney. The applicants succeeded in making out a *prima facie* case of racial discrimination and the respondents relied on a defence of affirmative action. Swart J held that in terms of the interim Constitution, affirmative action forms an exception to the prohibition on unfair discrimination and is permissible only within limits permitted by item 2(2)(b). The court concluded that the measures taken by the respondent failed to pass the test. The Minister’s decision was struck down on the grounds that it failed to meet the requirements which the court read into Section 8(3)(a) of the interim Constitution. The Court formulated the following principles with regard to affirmative action measures:

6 Note 2 above, EEA 21.

7 (1997) 18 ILJ 241 (T).

- a) The affirmative action measure must be specifically designed to achieve the goal of the adequate protection and advancement of persons subject to past unfair discrimination. The action taken must not be haphazard or random.
- b) There must be a causal connection between the affirmative action measures that have been designed and their objectives.
- c) Although the affirmative action measures must be designed to provide adequate protection and advancement, the rights of others and the interests of the community should be taken into account.
- d) The requirement that the Public Service must ensure an efficient public administration should not be compromised.⁸

This, being the first reported decision on affirmative action in the High Court, caused much debate.

An important aspect of this case and by implication the Applicants' success was the apparent failure of the Respondent to comply with the requirements of administrative justice entrenched in the Constitution and their failure to consider the applicants at all. It is important to note that in terms of the Labour Relations Act, affirmative action policies must be designed to achieve the adequate protection and advancement of persons or groups or categories disadvantaged by unfair discrimination in order to enable their full and equal enjoyment of all rights and freedoms.⁹ This should be done as fairly as possible without affecting the constitutional rights of others, and where any such constitutional right is adversely affected, such limitation must be reasonable and justifiable in an open and democratic society and must take into account all relevant factors including the nature of the right; the importance of the purpose and the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve its purpose.¹⁰

The then Minister of Justice Dullah Omar, in commenting on the court's decision made it clear that whites will have to make some sacrifices under the new

8 Note 5 above, 33.

9 Item 2 (2)(b) of Schedule 7.

10 Kelly Labour Law News, Edition No 2, Sunday Times archives, www.suntimes.co.za.

dispensation. “There is no way that we are going to allow white domination to continue in any of these institutions.”¹¹ At the time the Respondent indicated that it would appeal against the decision but six years down the line has still not done so. Whilst the Applicants hailed the ruling as a success they were pessimistic about the long-term value of the decision. One of the Applicant’s stated “We realise we have no future here. We might win this case and we might even be promoted, but it is the end of our careers.”¹² This view clearly echoes the concerns of most white male South Africans who see the imposition of affirmative action as a sword of democles above their heads.

Given the replacement item 2(2)(b) by section 6(2)(a) of the Employment Equity Act, it is uncertain to what extent *Public Servants Association and another v Minister of Justice*¹³ will continue to be followed. The omission of the words “designed to” leaves less scope for insistence on a formal affirmative action policy or plan and it is doubtful whether the Employment Equity Act’s requirement of an employment equity plan to be drawn up by designated employers¹⁴ can be interpreted as an absolute requirement for valid affirmative action measures.¹⁵ A policy or plan may, however, be essential where an employer has committed itself to implementing affirmative action within the framework of a particular policy or plan.¹⁶

The reasoning of the court in *Public Servants Association and another v Minister of Justice and others*¹⁷ however, is likely to remain persuasive in at least three respects. First, given that section 6(2)(a) read with section 2 of the Employment Equity Act (like item 2(2)(b)) lays down objectives towards which affirmative action measures must be directed, the courts may continue to insist on “a causal

11 ‘South Africa’s struggle on Affirmative Action’, Andrew Maykuth on line, www.maykuth.com.

12 Ibid 2.

13 Note 7 above.

14 In terms of chapter 3 of the Employment Equity Act.

15 Note 2 above, EEA 19.

16 As in *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC); and *Walters v Transitional Local Council of Port Elizabeth and another* (2001) 1 BLLR 98 (LC).

17 Note 7 above.

connection between the...measures and the objectives.”¹⁸ Secondly, the interpretation given to the word “equal” may well be applied to the word “equitable” as used in section 2(b) of the Employment Equity Act, Swart J held that

Equal does not mean that the interests of the targeted persons or groups are taken into consideration in vacuo, but also with regard to the rights of others and the interest of the community and the possible disadvantages that the targeted persons or groups may suffer.¹⁹

Lastly, Swart J noted that the duty placed on the state is to promote a public administration that is not only “broadly representative of the South African community” but also one that is “efficient.” The courts are likely to remain mindful of obligations resting on employers other than its duty to implement affirmative action, which may in practice circumscribe the extent of the latter as a defence as well as a duty.²⁰

However even though affirmative action must be seen in the context of South African apartheid history as a necessity to address the inequities of the past, the case law that has developed in this regard to date have almost without doubt fully considered the effects of the constitution, the limitations and developed some guidelines.

In *Public Servants Association v Minister of Correctional Services*²¹ the Labour Court formulated the following principles:

- a) An affirmative action policy or measure must be designed to achieve the objective of protection and advancement. The means selected must also be capable of achieving this purpose.
- b) The policy must not be applied blindly or arbitrarily. It must be applied with due regard to the particular circumstances within which it is applied.
- c) The measures adopted must be adequate to provide the protection and advancement required. However, they must not be “overbroad”.

18 Ibid 649.

19 Ibid 649.

20 Note 2 above, EEA 19 – 20.

21 Labour Court, (unreported decision) 25 July 1997.

- d) It must be shown that the beneficiaries of the affirmative action measures were in fact disadvantaged by past discrimination.²²

The Court found that the above requirements had been met and that the policy adopted by the Department of Correctional Services was lawful. The Court held that

It is clear that the Constitution aims to redress historical inequities and imbalances. It requires as a constitutional imperative that the public service be broadly representative of the South African community. The attainment of this constitutional objective, in particular, in the public service would be impossible without a programme of affirmative action.²³

In *NUTESA v Technikon Northern Transvaal*²⁴ it was found that the employer had breached its affirmative action policy by appointing persons from targeted groups to posts that had not been advertised. It was held that

To disregard all established procedures and appoint whomsoever it pleases without others being given an opportunity to apply does not fall into the scope of management's prerogative.²⁵

In *Abbott v Bargaining Council for the Motor Industry (Western Cape)*²⁶ the Applicant, a black office bearer of NUMSA, unsuccessfully applied for employment with the Respondent Bargaining Council as a designated agent. He alleged in the Labour Court that he had been discriminated against on the grounds of his race and trade union affiliation. The successful candidate was a white male with no union affiliations but with previous experience as an Inspector of the Department of Labour.

The Court was of the view that although the council was honour bound to apply its affirmative action policy before making its final selection, this did not avail the applicant. He was not a serious contender and not even his own union supported him. He was too remote from the action to have been a victim of racial

22 Note 5 above, 33.

23 Ibid par 16.

24 (1997) 4 BLLR 467 (CCMA) par 66.

25 Ibid par 66.

26 (1999) 20 ILJ 330 (LC).

discrimination and too far removed from the benefits of the affirmative action policy. The Court found that there had been no discrimination on a prohibited ground. It was held that affirmative action is a “shield” or defence for an employer rather than a “sword for a disadvantaged person.” That is, it does not confer any right to be employed on an applicant for employment who has no existing contractual relationship with the employer.²⁷

In *MWU obo Van Coller v Eskom*²⁸ a white male employee applied to be promoted into a post in which he had been acting for some time. The selection committee assessed him as the best candidate. They recommended his appointment but this was overruled by management and another person was appointed in terms of an affirmative action policy. He challenged this decision and the dispute was referred to arbitration. The employer raised the defence that the appointment was in terms of an affirmative action policy. The arbitrator accepted that such a defence was available to an employer, provided that the policy met the requirements formulated in the *Public Servants Association of SA v Minister of Justice*.²⁹ The arbitrator found that the requirements had not been met by Eskom and the failure to promote the employee was held to constitute unfair discrimination.

In *Eskom v Hiemstra NO and others*³⁰ the employee, a white woman, was recommended for the post of vending controller by a selection committee of the employer. The financial manager, charged with making the final decision having regard to the employer’s affirmative action policy, disregarded the committee’s recommendation and decided to appoint another applicant for the job, a Coloured woman. The matter was referred to arbitration. The arbitrator held that the employer had committed an unfair labour practice in terms of Item 2(1)(a). The employer took the matter on review. It was argued that the (private) arbitrator hearing a dispute involving affirmative action should have done so in two stages: first, to consider whether racial discrimination had been established and, if so, to

27 note 2 above, EEA 21.

28 (1999) BALR 1089 (IMSSA).

29 note 7 above.

30 (1999) 10 BLLR 1041 (LC).

consider whether discrimination was justified and fair. The court disagreed, finding that the arbitrator had paid “considerable attention to Eskom’s affirmative action stance” and that the “new definition of an unfair labour practice [in item 2] together with its defences or justifications must be interpreted as a whole.”³¹

In practice, no consistent approach has thus far emerged. In *Walters v Transitional Local Council of Port Elizabeth and another*³² the same judge ruled that the applicant had prima facie suffered discrimination on the grounds of race and went on to test the respondent’s defence of affirmative action, which was found to be deficient. While such an approach may have been enjoined by the scheme of item 2, it remains to be seen which approach will be adopted to the interpretation of section 6.³³

In *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council*³⁴ the Local Council advertised the post of Town Treasurer, found no suitable candidate and re-advertised the post. The candidates were subjected to an internal test and the Executive Committee placed a short-list of three candidates before the full council for a decision. Two candidates were white males and the other a black male. The Council, decided to apply affirmative action and offered the post to the black male.

Mlambo J found that “[i]n the absence of an affirmative action programme specifically designed in terms of the collective agreement any appointment on purported affirmative action grounds is illegitimate. It is illegitimate because it is not in terms of any formulated policy against which it can be tested.”³⁵

The council had adopted an affirmative action program but had not yet carried out or implemented it. The court considered that the council could not even begin to consider affirmative action in making appointments before it had complied with the agreement. It followed that the appointment of the black male could not be justified

31 Note 2 above, EEA 20.

32 (2001) 1 BLLR 98 (LC).

33 Note 2 above, EEA 20 – 21.

34 (2000) 21 ILJ 1119 (LC).

35 Ibid par 25.

on affirmative action grounds. Further, in the case of the black male it was not clear what criteria was considered save that he was black. Others had scored better than him on the internal test. There was no justification for his appointment. It was an appointment that discriminated unfairly and in an arbitrary manner against other candidates. The appointment was reviewed and set aside.

In *Mclnnes v Technikon Natal*³⁶ the applicant was employed by the Technikon Natal as a marketing manager. She was later employed on a one year contract as a locum. Her contract was renewed from time to time. A temporary post was made into a permanent one and she and two others were short-listed for an interview. The majority of the interviewing committee recommended that she be appointed. The Vice Principle referred the recommendation back to the committee to reconsider its recommendation in the light of the Technikon's affirmative action policy. The committee affirmed its preference for the applicant but recommended another candidate. The applicant's contract came to an end. The successful appointee was paid more than the normal remuneration in order to induce him to accept the post. It was common cause that the applicant as an applicant for employment was discriminated against on the basis of her race.

The court, after scrutinising the affirmative action policy, found that it did not contemplate "a policy of blatant racial discrimination in favour of Africans amongst all others." What the policy had in mind, Penzhorn AJ found, was "the need to critically address all the relevant factors and if a reasoned and balanced decision results in the selected candidate not being from the targeted group reasons must be given."³⁷ Appointing a black person who did not meet the requirements of the advertised position could not be justified in terms of the policy, which committed the respondent to providing the "highest standard of tertiary education" to its students. Likewise, an agreement to pay such person more than the advertised salary was found to be a clear breach of policy. The court found that the Technikon had unfairly discriminated against the applicant and she was reinstated as the other candidate had left.

36 (2000) 6 BLLR 701 (LC).

37 *Ibid* par 41.

In *Germishuys v Upington Municipality*³⁸ when the position of assistant town treasurer at the respondent municipality became vacant, it advertised and interviewed four short-listed candidates. The applicant, a white male, was one of the candidates. After the municipality's executive committee conducted the interviews, it recommended to the full council that it appoint Mr Mohutsiwa, a black male. In proceedings before the Labour Court the applicant alleged that the municipality had discriminated against him unfairly on the basis of race.

It was clear to the court that the applicant had simply over-estimated his experience and suitability for the job and had held himself in far higher regard than the circumstances warranted. The court concluded that the applicant had not established that he was in any way a more superior or competent candidate for the job than Mohutsiwa. Moreover, it appeared that Mohutsiwa had been the most outstanding candidate, and that it had therefore not been necessary for the municipality to apply any affirmative action procedure. The court was satisfied on the facts that the applicant had failed to establish any act of discrimination on the part of the municipality which would afford him relief under the residual unfair labour practice provision.

In *University of Cape Town v Auf der Heyde*³⁹ the employee Auf der Heyde was appointed as a senior lecturer in the Department of Chemistry on a three-year contract. When the contract expired the university did not renew it. Two other contract lecturers, Dr Chibale and Dr Naidoo, both black, were appointed permanently. The employee alleged that the university dismissed him unfairly, alternatively that the university's action constituted an unfair labour practice. The Labour Court held that the dismissal was procedurally unfair and awarded compensation. The university appealed to the Labour Appeal Court. On the question of whether the university had committed an unfair labour practice, the court held that Dr Chabile was appointed on merit and Dr Naidoo was an affirmative action appointment, albeit one not made regularly in accordance with the university's policy.

38 (2000) 21 ILJ 2439 (LC).

39 (2000) 22 ILJ 2647 (LC).

There was no evidence that had Dr Naidoo not been appointed, a post would have been advertised to which the employee could have been appointed. The court held that an unfair labour practice had not been committed. Little attention was given to the fact that the appointments of Chibale as well as Dr Naidoo were not in accordance with the university's policy and the question whether an irregular action can provide justification for not performing an action that might otherwise have been mandatory went unanswered. In essence, both the Labour Court and the Labour Appeal Court confined themselves to the fact that the positions to which Naidoo and Chabile were appointed were not positions for which Auf der Heyde had applied and thus the question of unfair discrimination did not arise.

Professor D. du Toit⁴⁰ submits that on closer examination there are inconsistencies in this seemingly symmetrical reasoning and that the Labour Appeal Court made very little reference to the copious body of case law on the subject. One cannot help but wonder if a different finding might not have been arrived at had the court followed the approach enjoined by the Constitutional Court in *Harksen v Lane NO*.⁴¹

Professor du Toit further submits that the following two findings create particular uncertainty: firstly, an irregular appointment (not in accordance with the employer's affirmative action policy) was considered an affirmative action appointment and, hence, a permissible form of differentiation on the grounds of race. On the face of it this reverses a consistent line of High Court and Labour Court decisions requiring affirmative action measures to be in accordance with a policy or plan as a condition for their validity. While it is questionable in the light of the Employment Equity Act whether a pre-existing policy or plan can still be said to be a requirement, it had thus far been accepted that, where such a policy does exist, measures in conflict therewith do not qualify as affirmative action measures. This approach is captured in the Employment Equity Act, requiring employment equity plans that embody consensus seeking between employers, union and employees in the workplace in the shape of enforceable right and duties. The

40 'New Light on Old Questions' (2002) 23 ILJ 658 ff.

41 1998 (1) SA 300 (CC) par 46.

contrary ruling of the Labour Appeal Court in this matter threatens to open the door to ex post facto ratification of ad hoc measures by employers which violate employees' rights to equal treatment. Secondly, prima facie unfair discrimination in the form of irregular appointments on grounds of race was accepted as fair in circumstances where the appointee possessed 'conspicuous merit' and where there was no evidence that the complainant would have been appointed to any other position but for the irregular appointment. While it is debatable whether the two statutory defences to complaints of unfair discrimination are exhaustive, the two additional grounds accepted in the present matter are so broad and undefined as to severely undermine the constitutional right to equality.⁴²

The decision in this case leaves the law of unfair discrimination in a state of less certainty than before and introduces elements that are potentially deeply problematical. The ostensible effect is to uphold appointments which, though irregular, were intended as affirmative measures. The agreed policy was disregarded. Whatever sense of common purpose may have been invested in it can only have been weakened. The Labour Appeal Court, rather than upholding the policy, effectively sanctioned its breach. Any precedent, which this may have set, should be corrected. In *Shoprite Checkers (Pty) Ltd v Ramdass and others*⁴³ Wallis AJ concluded that he was not obliged to follow a Labour Appeal

Court ruling because it rested on a finding which had been rejected by the Constitutional Court to the prohibition of unfair discrimination. To this extent the Labour Court may be at large to consider the issues afresh.⁴⁴

iii) The Employment Equity Act

Let us consider the case of an unsuccessful candidate, a white male who is refused employment and the person who is employed is from within one of the designated groups. The unsuccessful applicant's argument will clearly have to be that he was not given the job because he was white or a male and that the employer's decision therefore contravenes section 6(1). An employer faced with

42 Note 40 above, 658 ff.

43 (2001) 22 ILJ 1603 (LAC).

44 Note 40 above, 669.

such a claim may argue that there was no discrimination on this basis and that the person who was employed was simply the better candidate on merit. The fact that the successful applicant was a member of a designated group was irrelevant in the selection process. If this can be established there will be no discrimination on a prohibited ground. However, the employer could also admit that the successful candidate was appointed on the basis of the fact that he or she is black, a woman or a person who is disabled, (and that the applicant was not considered because he was a white male) and argue that this was done as an affirmative action measure and the failure to appoint the white male was not unfair. The employer can rely on section 6(2) of the Employment Equity Act which states that it is not unfair to “take affirmative action measures consistent with the purposes of the Act.”⁴⁵

On the face of it this categorises affirmative action as conduct excluded from the ambit of unfair discrimination, thus lending credence to the view that it amounts to discrimination which would otherwise have been unfair and should be viewed as a limited exception to the rule of formal equality. Section 9(2) of the Constitution, however, defines ‘equality’ in a clearly substantive sense and legitimises affirmative action as a means towards this end. The implication is that, in addition to the specific provision for affirmative action in section 6(2)(a), the prohibition of unfair discrimination itself obliges an employer to take account of differences among employees or groups of employees and to treat them differently in so far as may be necessary to place them on a footing of actual equality. From this perspective affirmative action, far from constituting an exception to the right to equality, is an integral part of that right in that it constitutes ‘a fair means to achieve the end of substantive equality.’⁴⁶

In asking the question as to what constitutes affirmative action measures as referred to in section 6(2) of the Employment Equity Act, section 15 of the Employment Equity Act states that:

- (1) Affirmative action measures are measures designed to ensure that suitably

45 Note 5 above, 34.

46 D. du Toit *Labour Relations Law* 3rd edition (2000) 457.

qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace of a designated employer.

- (2) Affirmative action measures implemented by a designated employer must include –
- a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
 - b) measures designed to further diversity in the workplace based on equal dignity and respect of all people.
 - c) Making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.
 - d) Subject to subsection (3), measures to –
 - i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and
 - ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.
- (3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.
- (4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.’

The assumption underlying the above provisions appears to be that the decision to employ a person from a designated group (instead of, for example, a white male) merely because that person falls within the designated group amounts to discrimination. However, if this decision is taken as an affirmative action measure, such discrimination is not unfair. It appears that the Employment Equity Act supports the “formal” view of equality and sees affirmative action measures as exceptions to the rule that discrimination is prohibited.⁴⁷

In *Coetzer and others v Minister of Safety and Security and another*⁴⁸ the Labour Court scrutinised the affirmative action measures to ascertain whether they met

47 Note 5 above, 35.

48 (2003) 24 ILJ 163 (LC).

the requirements of section 15 and whether they were consistent with the purposes of the Employment Equity Act. The Court held that the provisions of the Employment Equity Act must be interpreted to be in compliance with the constitution.

PAK Le Roux⁴⁹ states that the defence of affirmative action envisaged by the Employment Equity Act appears to be fairly wide and comments on the following three scenarios. Firstly, an employer's decision to appoint a female into a job category where females are already equitably represented (or over represented) at the expense of a male applicant may be difficult to justify on the basis of affirmative action. The measure is not designed to achieve equitable representation. However, the employer may be able to argue that the appointment of persons from designated groups into this job category is a necessary first step to ensure that they acquire experience or skills so as to qualify them for employment in jobs higher up the ladder.

Secondly, the Employment Equity Act states that an affirmative action measure must be aimed at ensuring the equitable representation of suitably qualified persons within the designated groups within the workforce. If the person appointed at the expense of an applicant not falling within a designated group is not suitably qualified, the employer will not be able to rely on the affirmative action defence. The concept of "suitably qualified" was the subject of much controversy during the drafting of the Employment Equity Act. It is dealt with in sections 20(3)(4) and (5) which read as follows:

- (3) For the purposes of this Act a person may be suitably qualified for a job as a result of any one of, or any combination of that person's
 - a) formal qualifications;
 - b) prior learning;
 - c) relevant experience; or
 - d) capacity to acquire, within a reasonable time, the ability to do the job.
- (4) When determining whether a person is suitably qualified for a job, an employer must –
 - a) review all the factors listed in subsection (3); and
 - b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.

49 PAK Le Roux "Affirmative action and the individual employee" *Current Labour Law* Vol 9 No4, November 1999, 31,

- (5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience.

Thirdly, subsection 20(3)(d) is especially wide and permits employers to appoint employees from designated groups who do not have the necessary ability to do the job at the time of appointment but who can acquire the ability to do the job within a reasonable time. It is unlikely that, in most cases at least, an aggrieved applicant will be able to challenge successfully an employer's judgment as to whether an employee will be able to acquire the necessary ability to do the job within a reasonable time.

It is also important to note that for an affirmative action defence to succeed all that need be established is that the successful candidate from the designated category is "suitably qualified" not necessarily the "best qualified". It will therefore not be open for the unsuccessful candidate from outside the designated group to argue that he was "on merit" the best candidate. As long as the person from the designated group can do the job, or will be able to do it within a reasonable time, the defence will apply, even if there were "better" candidates from outside the group. The view expressed by the arbitrator in *MWU obo van Coller v ESKOM*⁵⁰ that the failure to employ the best candidate on merit and simply to appoint a person with the minimum qualifications undermined efficiency, and therefore laid the affirmative action measure open to challenge, must be subject to some doubt in the context of the Employment Equity Act. This is not to say that business efficiency is no longer a consideration. It can, for example, be addressed in the employer's definition of what constitutes a suitable qualification. The employer can also decide to appoint the "best" candidate, even if that candidate does not fall within the designated group. The point should be made that the stated purpose of an affirmative action measure is no longer to protect and advance the interest of previously disadvantaged persons, but rather to ensure the equitable representation of designated groups within the workforce. An enquiry into whether

50 (1999) 9 BALR 1089 (IMSSA).

the person who was appointed in terms of such a measure was actually disadvantaged appears to be unnecessary.⁵¹

In *Crotz v Worcester Transitional Local Council*,⁵² one of the first cases to be decided in terms of section 6 of the Employment Equity Act, the position was less clear-cut in that the employer had acted within the scope of a national framework agreement on employment equity but had failed to formulate a detailed local agreement as contemplated by the national agreement. No reference was made to the existence of an employment equity plan. The parties did, however, apply a ratio for setting numerical goals as between white, coloured and African employees in accordance with the purpose of the Employment Equity Act. It is submitted⁵³ that the commissioner erred in following the case law interpreting item 2(2)(b) of the Labour Relations Act and, on this basis, concluding that “[a]bsent a detailed plan ... the [employer] could not implement any measures under the banner of affirmative action.”⁵⁴

In *Stoman v Minister of Safety and Security*⁵⁵ an employee contested his promotion to which a black policeman had been appointed by review application to the High Court. It appeared that he had been on the short-list and achieved the highest percentage mark of all the candidates. The respondent's view was that the SAPS employment equity plan was drawn up in the context of the Employment Equity Act that gave effect to the ideals of representivity and affirmative action in deciding whom to appoint.

The court held that the important question was whether an alleged affirmative action policy or practice was justifiable and acceptable within the context and wording of the Constitution. There had to be a rational connection between the measures and the aim they were designed to achieve. The court held that the view expressed in *Public Servants Association of South Africa and others v*

51 Note 5 above, 36.

52 (2001) 8 BALR 824 (CCMA).

53 Note 2 above, EEA 19.

54 Note 52 above, 831.

55 (2002) 23 ILJ 1020 (T).

*Minister of Justice*⁵⁶ that representivity in the Public Service could not be pursued in vacuo but had to be balanced against efficiency and that the appointment of a candidate from one race group above a candidate from another race group was acceptable only where the candidates all had broadly the same qualifications and merits.

The court further held that

Efficiency and representivity, or equality should not be viewed as separate competing or even opposing aims. They are linked and often inter-dependent. To allow equality or affirmative action measures to play a role where candidates otherwise have the same qualifications and merits, where there is virtually nothing to choose between them, will not advance the ideal of equality in a situation where a society emerges from a history of unfair discrimination.⁵⁷

The court further held that although the advancement of equality was such an integral part of the consideration of merits in the selection of candidates, the requirement of rationality remained, and the appointment of wholly unqualified or less than suitably qualified or incapable people in responsible positions could never be justified. The court held that the appointment of a black candidate over a white one after consideration of a race issue was not itself unjustifiable at all in view of the constitutional recognition of affirmative action measures. The applicant did not produce any evidence indicating that the relevant policies and guidelines in force in the South African Police Services did not comply with the constitutional requirements of section 9(2). The court found that the applicant did not make out a case for the relief sought.

The Labour Court has recently pronounced on section 6 of the Employment Equity Act in *Coetzer and others v Minister of Safety and Security and another*⁵⁸ and held that the provisions of the Employment Equity Act must be interpreted in compliance with the constitution generally, and in particular with the constitutional requirements that national legislation must enable the police service to discharge

56 (1997) 18 ILJ 241 (T).

57 Note 55 above, 1034 B - D.

58 (2003) 24 ILJ 163 (LC).

its responsibilities effectively. The Court held that the Constitution envisages a balance between the affirmative action imperative and the requirement of efficiency.

In this case the applicants were inspectors in the explosives unit (the bomb squad) of the SAPS. They were all highly trained white males in this specialised unit. In terms of the general SAPS Employment Equity Plan (EEP), they belonged to the non-designated group for whom there were limited promotional posts in the explosives unit. Once all the non-designated posts had been filled, the applicants applied for posts in the designated group. Although no applications were received for these posts from members of the designated group, the applicants were refused promotion. The applicants called upon the Labour Court to determine in terms of section 6 of the Employment Equity Act whether the SAPS had unfairly discriminated against them on a racial basis by not promoting them to posts retained for the designated group. The South African Police Services contended that its discrimination was not unfair as it was in accordance with its affirmative action plan contained in the EEP.

Landman J held that the Constitution is the source of the Employment Equity Act and envisages a balance between the affirmative action imperative and other imperatives including, for present purposes, the need for the police service 'to discharge its responsibilities effectively.'⁵⁹ The Constitution does not prescribe how the two imperatives are to be balanced but the balance must be a rational one. The relationship between the need for affirmative action and the need for an efficient public service including a police service was debated in *Public Servants Association of SA and others v Minister of Justice*⁶⁰ and *Stoman v Minister of Safety and Security and others*.⁶¹ In the latter judgment, Van der Westhuiszen J stated that

As far as efficiency is concerned, I am respectfully of the view that the requirement of representivity is often linked to the ideal of efficiency. A

59 This reasoning prioritising the efficacy of the appointee is similar to that of Penzhorn AJ in *McInnes v Technikon Natal* (2000) 6 BLLR 701(LC) wherein he held that the respondent's affirmative action policy committed it to providing 'the highest standard of tertiary education to its students.'

60 Note 56 above.

61 Note 55 above, 1033 I - J

police service, for example, could hardly be efficient if its composition is not at all representative of the population or community it is supposed to serve. This view may depend on how one perceives efficiency, of course... Efficiency and representivity, or equality, should, however, not be viewed as separate competing or even opposing aims.

Landman J was further of the view that where a complaint is made, as in this matter, in terms of section 6 of the Employment Equity Act, a defence based on section 6(2) must not only be adjudicated within the compass of the section but the state employer must also show that the affirmative action measures are in harmony with other constitutional provisions, in this matter section 205 of the Constitution. This is chiefly so because the Constitution requires the common law and Acts of parliament giving expression to the Constitution to enhance the values and ideals set out in the Constitution. The Constitution envisages one whole integrated system of law and government.

In the court's opinion the SAPS' justification of its conduct vis-à-vis the applicants failed in two respects: firstly, there was no specific affirmative action plan for the unit and secondly and equally important, the National Commissioner's refusal to promote the applicants was based purely on the imperatives contained in the EEP to promote representivity. His decision overlooked a consideration of the constitutional imperative that the service maintains its efficiency. On an overall conspectus the National Commissioner should have been alert to the fact that extensive affirmative actions measures, which had been implemented, were insufficient at this stage to address the vacancies and operational needs of the explosives unit.

The SAPS application for leave to appeal the above judgement was refused. The Unions viewed this as a major victory. In response the Minister of Labour issued a media statement wherein he stated that the Department of Labour would intensify the implementation of the Employment Equity Act during 2003. He warned political detractors that their claim that this ruling on the implementation of affirmative action policies in the SAPS are a defeat for the Government are irresponsible and likely to fuel tension. The Minister emphasised that the judgement contains

nothing new in relation to either the principles or the manner in which affirmative action policies are to be interpreted in law.

The Minister further stated that

The point that has been missed by Solidarity [the Union] is that the Employment Equity Act is not about numbers or targets, but that it is an enabling piece of legislation that encourages workplace dialogue through forums and the like to achieve demographically representative workplaces. It needs to be emphasised, that the Employment Equity Act is a sound piece of legislation aimed at contributing to the development of an equitable society, to rectify past discrimination and create a skilled, balanced and economically active population.⁶²

The importance of this case lays in the recognition of the Constitution as a basis for the Employment Equity Act and in particular the defence of affirmative action. Most of the case law that developed in terms of the Labour Relations Act and the Constitution has clearly defined the path to be followed. Through all of this the purpose of the Constitution is fundamental in achieving the society envisaged in the Constitution. However, during this process it will not be possible to satisfy all parties. Whilst there is nothing new in Landsman J's judgment, it can be applauded for upholding the values enshrined in the Constitution. Another important aspect of the judgment is that employers, whether Government, private or non-governmental organisations should have properly designed affirmative action plans. This too is in line with cases decided in terms of the Labour Relations Act.

b) Inherent requirements of the job

Section 6(2)(b) of the Employment Equity Act states that it is not unfair discrimination to 'distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.' Item 2(2)(c) of Schedule 7 of the Labour Relations Act provided likewise.

This is consistent with the general rule that incapacity on the part of an employee, which may take the form of inability to meet a 'required performance standard',⁶³

62 Media statement by The Department of Labour, 'Judge Landsman's ruling is in line with Government's EEA plan' 19 March 2003, Dr Snuki Zikalala.

63 Item 9 of Schedule 7 of the Labour Relations Act 66 of 1995.

can constitute a fair reason for dismissal.⁶⁴ By the same token, a refusal to appoint or promote a person who does not measure up to an inherent requirement of the job is justifiable. If such a combination of factors can be shown, it is a complete defence to a claim of unfair discrimination. Departure from the principle of equity under this head, however, is only permissible to the extent that it is appropriate. The harm which is caused to those who are disqualified must be proportionate or fair. This means that the nature and degree of the discrimination must be weighed up against its intended purpose. Where an employer asserts disability as a reason for not employing a workseeker, for example, it would need to be established that the work in question is inherently unsuitable for a person suffering from that particular disability. Thus, while a person with extremely poor eyesight could not be employed as an airline pilot, he or she may well be suited to a range of other occupations.⁶⁵

I will now consider various grounds upon which the courts have dealt with exclusion on the basis of an inherent requirement of the job.

i) Pregnancy

Pregnancy was omitted from item 2(1)(a) of Schedule 7 to the Labour Relations Act as a listed ground of discrimination. In *Woolworths (Pty) Ltd v Whitehead*⁶⁶ decided in terms of the Labour Relations Act, Willis JA remarked in a minority judgment that

There is nothing arbitrary in the employer taking into account the applicant's pregnancy in deciding whether or not to offer her a contract of permanent employment.

Given the inclusion of pregnancy as a listed prima facie unfair ground of discrimination in section 9(1) of the Employment Equity Act it is submitted that the above finding should no longer be persuasive.⁶⁷

64 Section 188(1)(a) of the Labour Relations Act.

65 Note 46 above, 460 – 61.

66 (2000) 6 BLLR 640 (LAC) par 129.

67 Note 2 above, EEA 17.

The facts of the case are that the appellant, Woolworths, required the services of a human resource generalist. Ms Whitehead was considered but declined the post because she was unable to relocate to Cape Town. The post was re-advertised a while later. Ms Whitehead was contacted. She was interested and able to relocate. She was interviewed for the post and told Mr Inskip, who conducted the interview that she was pregnant. Other applicants were to be interviewed. A telephone conversation took place and she understood that she would be appointed to the post after certain formalities were finalised. She was subsequently offered a fixed term post and advised that she could not be offered a permanent post by reason of her pregnancy. Ms Whitehead referred the dispute to the Labour Court alleging that an unfair labour practice had been committed in terms of item 2(1)(a) in that she had been unfairly discriminated against on the grounds of her pregnancy. The Labour Court found in her favour. Woolworths appealed to the Labour Appeal Court. The majority of the court upheld the appeal and held for the company for different reasons. The bench was divided about the inferences to be drawn from the facts. The majority (per Zondo AJP and Willis JA) found that the pregnancy was not the cause of the employee's non-appointment, whereas Conradie JA inferred that it was. Whereas the former found that continuity of employment was an inherent requirement for the job and was rationally connected to the reason for her non-appointment, the latter, including Waglay J in the court a quo, found that continuity of employment, although an important consideration, was not an inherent requirement.

In Ms Whitehead's case, considerations of profit were relevant because she was in a highly paid position that required constant attention to the details of the job. At any rate, the consideration of continuity of employment was compelling enough to prove that Woolworths' overriding consideration was not an aversion to appointing pregnant women. It was accordingly not possible to make a finding that Ms Whitehead's pregnancy was the dominant reason for the decision not to offer her a permanent position.

Judge Dhaya Pillay comments that the judgment remains controversial not only because of the conflicting assessment of the evidence, which some argue manifests the world view of the judges concerned, but also because of the

comments about motherhood not being secondary to the greater glories of job satisfaction. She further submits that these comments are gratuitous and less dispassionate. Willis JA's opening remarks that the court did not imagine that it occupied 'a plane of etiolated sanctity' do not inspire confidence.⁶⁸

ii) Commercial rationale

It is unclear to what extent "commercial rationale" (which presupposes a lesser degree of necessity than the "inherent requirements" of a job) can justify discrimination that is *prima facie* unfair. In general, Waglay J found in *Whitehead v Woolworths (Pty) Ltd*,⁶⁹ that

If profitability is to dictate whether or not discrimination is unfair, it would negate the very essence.... of a Bill of Rights; ... the fairness or unfairness of the discrimination cannot be measured against the profitability or, for that matter, efficiency of a business enterprise.

Contra, Willis J found in *Woolworths (Pty) Ltd v Whitehead*⁷⁰ that, while

profitability is not to dictate whether or not discrimination is unfair... [n]evertheless, profitability is a relevant consideration.

The Constitutional Court subsequently found in *Hoffman v South African Airways*⁷¹ that, while

[I]llegitimate commercial requirements arean important consideration in determining whether to employ an individual ...we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. Fear and ignorance, may affect public perceptions of an enterprise but cannot justify the denial to employees of the fundamental right to be treated on their merits.

On the strength of existing authority, in particular the judgment of the Constitutional Court in *Hoffman v South African Airways*⁷², it may be concluded that commercial rationale cannot in itself justify discrimination that is *prima facie*

68 Judge Dhaya Pillay 'Giving meaning to Workplace Equity: The role of the Courts', ILJ (2003) 24, 64.

69 (1999) 8 BLLR 862 (LC) pars 28 – 30.

70 Note 62 above, par 134.

71 (2000) 21 ILJ 2357 (CC) pars 34 – 35.

72 Note 72 above.

unfair but also cannot be excluded from the factors that need to be taken into account.⁷³

In *Kadiaka v Amalgamated Beverage Industries*,⁷⁴ when ABI took over New Age Beverages the board of ABI took a decision not to employ any ex-New Age employees. The applicant, a sales representative employed by New Age, applied for employment in a similar capacity with ABI. ABI refused to employ him. The applicant alleged that this constituted unfair discrimination in terms of items 2 (1) (a) of Schedule 7. The court was satisfied, on the facts that ABI had made out a case that the refusal to hire ex-New Age employees made commercial sense. This was so because the ban was not vindictive. It was done to preserve the morale of ABI's work force, to discourage turncoats, to reward loyalty, to ensure commitment to the brand, to ensure customers that ABI employees believed in Coke and that all it stood for and to avoid the taint of corruption. It was also for a limited period.

The court therefore found that the refusal by ABI to employ former New Age employees for a mere limited duration did not constitute an unfair practice as contemplated by item 2(1)(a). It was not an arbitrary refusal, for there was a bona fide commercial or operational reason for it being in place. The labour practice, although contrary to the interests of the Applicant was not grossly unfair towards him. He was a casualty of the commercial war.

iii) HIV status

HIV status, though not referred to in item 2(1)(a) or in section 9(3) of the Constitution, has been included as a listed and therefore prima facie unfair ground of discrimination in section 6(1) of the Employment Equity Act. In cases where an otherwise suitable applicant has been turned down for reasons that would otherwise amount to unfair discrimination, it is vital that the employer be able to

73 Note 2 above, EEA 13.

74 (1999) 20 ILJ 373 (LC).

prove that the person was indeed incapable of performing the work for which he or she had applied.⁷⁵ This is well illustrated by *Hoffman v South African Airways*.⁷⁶

In this case, Hoffman applied to South African Airways (SAA) for employment as a cabin attendant and was found to be a suitable candidate for employment. This decision was subject to a pre-employment medical examination which included a blood test for HIV/Aids. He was found to be clinically fit but his blood test showed that he was HIV positive. SAA regarded him as unsuitable for employment as a cabin attendant. He challenged the constitutionality of the refusal to employ him in the High Court. The High Court found for SAA and dismissed the application. The judgment of Hussain J is clearly not within the precincts of sound labour or constitutional policy.⁷⁷ Hoffman appealed to the Constitutional Court.

The Constitutional Court held that

The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendant did not justify the exclusion for employment as cabin attendants of all people living with HIV.⁷⁸

The court noted that legitimate commercial requirements are an important consideration in determining whether to employ an individual, but stereotyping and prejudice must not be allowed to creep in under the guise of commercial interest.

The court also appreciated the need for SAA to promote the health and safety of passengers and crew and the consequences if SAA was not perceived as doing so and held that

Yet the devastating effects of HIV infection and the widespread lack of knowledge about it have produced a deep anxiety and considerable hysteria. Fear and ignorance can never justify the denial to all persons who

75 J. Grogan *Workplace Law* 6th edition (2002) 228.

76 (2000) 21 ILJ 2357 (CC)

77 For a critical analysis of Hussain J's judgment see: Professor A. Rycroft and R. Louw in 'Discrimination on the basis of HIV' (2000) 21 ILJ 856 wherein they submit that the judgment of Hussain J appears to rest on at least seven hidden assumptions about HIV which are latent in the judgment and which are explored in the article to show that they are not endorsed in Labour Law policy and are constitutionally unsound. The authors further submit that the judgment fails to provide a proper constitutional analysis.

78 Note 77 above, par 32.

are HIV positive of the fundamental right to be judged on their merits... Prejudice can never justify discrimination. People living with HIV...must not be condemned to “economic death” by the denial of equal opportunity in employment.”⁷⁹

South African Airways was ordered to employ Hoffman. This clearly is a constitutional victory for people suffering with HIV/AIDS and who would continually be discriminated against in the workplace arena.

iv) Academic qualifications and age

In *Lagadien v University of Cape Town*⁸⁰ the applicant alleged unfair discrimination on the basis of her lack of academic and tertiary qualifications. Jammy AJ considered that the ability to “work with the academic sector and support departments to allow students and staff with disabilities to reach their full potential” could legitimately be described as an “indispensable requirement” of the job in question that provided a basis for “justifiable discrimination within the ambit of Section 6(2)(b) of the Employment Equity Act.”⁸¹

In *POPCRU obo Baadjies and South African Police Services*⁸² the applicant was appointed as an auxiliary officer for the SAPS in 1991 in terms of the Public Service Act. He applied for translation to the South African Police Services Act 68 of 1995 to facilitate his permanent appointment as a detective, but his application was refused as he did not meet the minimum requirements, namely, a matric certificate and being between the ages of 18 and 30 years.

The commissioner distinguished between listed and unlisted grounds of discrimination in the Employment Equity Act and found that the discrimination on the basis of age was unjustified and unfair. The qualification requirement was on an unlisted ground, and there was no presumption that discrimination on this ground was unfair. The arbitrator noted that there were circumstances in which a minimum educational qualification was a relevant factor but the employer had offered no explanation for the requirement of a matric certificate. The employee’s

79 Note 77 above, par 35.

80 (2000) 21 ILJ 2469 (LC).

81 Note 2 above, EEA 23 – 4.

82 (2003) 24 ILJ 254 (CCMA).

ability to do the job was established, and there was no evidence that because he did not have a matric certificate his ability was in any way impaired. In fact, the contrary was true and the employee was recognised for his abilities as a detective. The arbitrator accordingly found that the employer's refusal to appoint the employee as a detective constituted unfair discrimination on the basis of age and educational qualifications.

Judge Dhaya Pillay⁸³ comments that the inherent requirement of the job qualification is prefaced by the protection against discrimination. Equity in the form of the right to equality is therefore built into the legislation. Whether age or pregnancy is a valid ground for differentiating on the grounds of the inherent requirements of the job is a factual enquiry determined objectively and dispassionately from all the evidence which must be assessed on the basis of the values of a democratic society, based on human dignity, equality and freedom. This however, she says is easier said than done. I agree with this approach.

33 Note 68 above, 64.

CONCLUSION

The Labour Relations Act does not define 'unfairness'. From the cases analysed in this dissertation it is apparent that it is not sufficient for an employee in promotion disputes to show that the conduct of the employer was unfair, the employee must also prove that he/she is the most suitable candidate for the post. Invariably in most promotion disputes the aggrieved employee always feels that he or she is the best candidate for the post. It is in accordance with human nature that 'in the race for employment there must indeed be few job seekers who do not in their own minds either with or without encouragement from others form expectations as to their suitability.'¹ This is usually the subjective view of the employee and is not the determining criterion. When the facts are looked at objectively, a different picture often emerges. I have found that this subjective view of aggrieved employees has often resulted in unnecessary or unmeritorious litigation, especially within the Public Service Sector. In South Africa the government is the largest employer in the country and the costs of the various departments resisting unmeritorious litigation are borne by the taxpayers. "There are far more pressing needs on which to spend money raised by taxation" as Wallis AJ stated.² Having done promotion arbitration disputes I agree with this statement.

The Labour Relations Act is broad and all encompassing on the concept of unfairness as I have shown in Chapter 1. Arbitrators are bound to categorise the dispute and make a decision. However if the law was more defined a lot of unnecessary litigation could be avoided.

My recommendation is that a definition of the word "unfair" in section 186(2) of the Labour Relations Act 12 of 2002 in relation to promotions should be included in the Act. A possible addition to section 186(2) could read as follows

A promotion will be deemed to be unfair if the conduct of the employer was unreasonable, or the employer acted in bad faith or discriminated against

1 *Swanepoel v Western Region District Council and another* (1998) 19 ILJ 1418 (SE) 1423.

2 *Ndlovu v CCMA* (2000) 21 ILJ 1653 (LC) par 21.

an employee, provided that the employee was the most suitable candidate for the post.

Such a definition will merely codify the law that has developed and will probably decrease the number of unmeritorious disputes in this regard.

A further important step is the selection process. In this regard a proper defined procedure by the employer prior to the promotion process will alleviate unnecessary disputes. Such a process which is in fact the procedural aspect of a promotion, should include the following criteria:³

1. The prior articulation of attributes or competencies sought in the applicant which would include the person's:
 - i) formal qualifications;
 - ii) prior learning; and
 - iii) relevant experience.
2. The weight to be given to each attribute or competency.
3. The preparation of specific questions which relate directly to the chosen attributes and competencies and which are to be put to each applicant.
4. The private evaluation of each candidate by each member of the selection committee according to the agreed weighting.
5. The totalling of scores to arrive at a rating or ranking of applicants.
6. The extent to which subjective views or knowledge of applicants will be taken into account, if necessary.
7. For posts requiring specific skills and knowledge, the weight to be attached to a specialist panelist's view, which may also be subjective, on the applicant.

I strongly recommend that the procedures relating to a particular promotion process should be made known to employees prior to the process being embarked upon. I have found in at least ten arbitrations that I conducted that employees have vehemently challenged their non-promotion only to concede

³ In articulating these guidelines I have referred to those set out by Professor Rycroft in 'Obstacles to Employment Equity' (1999) 20 ILJ 1416.

during cross-examination that they were not aware of the procedure relating to the promotion. In such instances they withdrew the disputes, alleging that if they were aware of the procedure beforehand they would not have instituted action.

Another important step which is often ignored or not given sufficient weight, is the recording of minutes of the selection panels. Preferably this should be mechanically recorded and hand written notes of the panelists should not be destroyed. In the event of the process not being mechanically recorded detailed verbatim notes should be kept, specifically regarding comments on each applicant for the post. This will greatly assist adjudicators in the determination of procedural fairness.

In some cases, as seen in Chapter 1, the conduct or procedural defect is so glaring as to “raise eyebrows”. Clearly in such circumstances the employee still has to show that he/she was the most suitable candidate for the post. It is inevitable that in any selection process the employer will have to choose a candidate for the post which will invariably involve discriminating against the other applicants for the post but as long as there is fairness in the procedure the managerial prerogative should prevail.

It is hoped that if the recommendations above are considered and applied the number of unmeritorious disputes will decrease. If the definition of an unfair labour practice is more specific employees may realise that the onus is two-pronged and that a mere allegation of being the best or most suitable candidate is not sufficient. The law should be slow to interfere in promotion disputes where the procedure has been complied with and it is submitted that the managerial prerogative should be respected in this regard.

Chapter 2 of my dissertation shows that both the interim Constitution and the 1996 Constitution have played a pivotal role in the development of the concept of unfair discrimination within the context of the Labour Relations Act and the Employment Equity Act. The Employment Equity Act extends the protection against discrimination to applicants for employment as well as employers. There is no duty on an employer to employ any particular applicant for employment. While the

employer may not discriminate it still has a wide discretion to decide whom to employ, which discretion the Courts will not readily interfere with unless irregularity is shown. "It is not the function of the Court to ensure that the best man or woman for the job is chosen, it is the function of the Court to strike down discrimination."⁴ However sections 6 and 9 of the Employment Equity Act entitles the Court to scrutinize the procedure followed by employers in recruiting and selecting applicants for employment as well as the manner in which such procedures are applied.

The Employment Equity Act places a duty on employers to 'take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.' Section 6(1) prohibits unfair discrimination within the scope of an employment policy or practice and section 1 sets out the instances in which it could be applicable. No further definition of unfair discrimination is given and it is left to the Courts to determine in each case whether the conduct complained of falls within the scope of the prohibition.

As shown in Chapter 2 the Courts have defined the path to be followed in discrimination matters in terms of the Labour Relations Act, the Employment Equity Act and the Constitution. The purpose of the Employment Equity Act in conjunction with the Constitution is to achieve socio-economic transformation in South Africa. The Employment Equity Act further places a duty on designated employers to address the inequities of the past. However during the adjudicative process it will not be possible to satisfy all parties and it is inevitable that perceptions of unfairness will arise in the implementation of employment equity policies. Whilst it is undoubtedly necessary to discriminate to achieve the society envisaged by the Constitution it is also necessary for adjudicators to interpret the law to be in compliance with the Constitution.

Thus far the development of the law in terms of the Employment Equity Act has been in respect of white males who have challenged their non-promotion to posts applied for. The Labour Court in *Coetzer v Minister of Safety and Security and*

4 As per Landman J in *Abbot v Bargaining Council for the Motor Industry (Western Cape)*(1999) 20 ILJ 333 (LC).

*another*⁵ in interpreting section 6(1) of the Employment Equity Act held that the Constitution envisages a balance between the affirmative action imperative and the requirement of efficiency. This interpretation that the Employment Equity Act must be interpreted to be in compliance with the Constitution is correct, however when we look at the broader purpose of the Employment Equity Act the impression gained is that the Courts are protecting individual rights. This is so because employers, in particular, Government departments are failing to draw up employment equity plans in compliance with the Employment Equity Act.

There is an obligation on employers to draw up detailed specific employment equity policies or plans and such plans or policies must be able to stand up to judicial scrutiny because if the decisions already handed down is anything to go by, then the Courts will balance efficiency with the affirmative action imperative. The absence of proper employment equity plans will clearly not assist in achieving the broad purpose of socio-economic transformation. South Africa is a fledgling democracy and the role of the employer in achieving socio-economic transformation and equitable representation in the work arena is equally important as that of the adjudicators tasked with interpreting the law.

I have found in at least 20 of the cases that I have done within the SSSBC concerning promotion disputes where the defence of an affirmative action policy was raised, that the South African Police Services was unable to rely on such a defence as it had no employment equity plans for specific areas in place. A broad plan or memorandum which states that there should be representivity in terms of race is insufficient, particularly where the complainants fall within the designated group. I accept that there has to be an equitable representation of all race groups and that a balance is necessary in light of our past discriminatory history, however where employers, particularly within the public service, are failing to heed the requirements of the Employment Equity Act, then adjudicators are obliged to interpret the law in favour of individual rights.

5 (2003) 24 ILJ 163 (LC)

Whilst it is clearly not going to be an easy task for adjudicators in the years ahead to interpret the provisions of the Employment Equity Act it is hoped that the intentions and purpose of the Employment Equity Act and the Constitution will not be diluted in the process. The onus on employers in particular Government departments to ensure that they have proper employment equity plans will go a long way towards achieving the goals which are enshrined in the Constitution.

In conclusion I endorse the following comment

Transformation is a veritable quagmire of emotions and beliefs. The responsibility of anybody tasked with achieving equity is profoundly onerous. It has to adroitly balance demographics, the aspirations of employees, the need to retain skills, knowledge and experience and the exigency of redressing past injustice.⁶

6 *SA Police Union obo Venter v SAPS* (2002) 23 ILJ 454 (BCA) 456 D – E.

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