

THE DEVELOPING LAW
OF PROMOTION
OF EMPLOYEES IN SOUTH AFRICA

By

Sean Molony

Submitted in fulfilment of the requirements for the degree of

Master of Law [LLM]

In the Faculty of Law, University of KwaZulu Natal

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1.1 Introduction

This dissertation investigates, applies and interprets one phrase contained section 186(2)(a) of the Labour Relations Act, 66 of 1995 which is

“Unfair labour practice’ means any unfair act or omission that arises between an employer and employee involving unfair conduct by the employer relating to the promotion of an employee”.

It seems extraordinary that such an apparently simple phrase could generate such a relatively vast yet diverse jurisprudence as that covered in this dissertation. Yet that has been the challenge of what has developed in time into what is intended to be a thorough discussion and analysis of the law relating to promotion of employees in South Africa.

1.2 Objectives of the dissertation

The principal objective of this dissertation is to investigate the developing law of promotion in South Africa.

Other objectives are-

- To investigate, explain, sift and criticise relevant case law;
- To clarify and distinguish case law which is helpful from that which is not;
- To find and follow the threads of jurisprudence from one case to another;
- To draw out of such case law the best practice in a particular area.

1.3 Relevance of the dissertation

The relevance of the dissertation arises from three prime sources. The first is my own experience. As an arbitrator appointed to dispute resolution panels bargaining councils –principally the Safety and Security Sectoral Bargaining Council, and as a commissioner of the Commission for Conciliation, Mediation and Arbitration, it has been necessary for me to write numerous awards in disputes in which I have been appointed arbitrator. To some extent this dissertation is a reflection of the research undertaken in that capacity. It was while researching for this practical purpose that I became aware of the diversity of views of other arbitrators and of judges, and realised that they, just as I was, were floundering around in uncharted waters sometimes getting it right but in many instances getting it wrong. It became a challenge to sift through these cases to find the gems which this dissertation hopefully succeeds in bringing to light, with the aim of providing other arbitrators, judges, human resources practitioners and union representatives clarity in the many issues faced.

The second reason why this dissertation is relevant is apparent if one looks at the numbers and profiles of persons promoted in South Africa as revealed by the reports of the Commission for Employment Equity 2002-2003¹.

¹ Table 15: Total number of employees promoted by occupational level, race and gender (Large employers)

Occupational levels	Male				Female				Total
	African	Coloured	Indian	White	African	Coloured	Indian	White	
Top management	557	67	68	517	113	26	19	149	1516
	36.7%	4.4%	4.5%	34.1%	7.5%	1.7%	1.3%	9.8%	100%
Senior Management	300	113	175	1459	103	46	48	477	2721
	11.0%	4.2%	6.4%	53.6%	3.8%	1.7%	1.8%	17.5%	100%
Professionals and middle management	1690	755	754	5245	796	391	364	2804	12799
	13.2%	5.9%	5.9%	41.0%	6.2%	3.1%	2.8%	21.9%	100%
Skilled technical and management	9434	2840	1968	8194	4365	2330	1537	7710	38378
	24.6%	7.4%	5.1%	21.4%	11.4%	6.1%	4.0%	20.1%	100%
Semi-skilled	32458	4517	1569	3471	8433	3715	1645	8690	64498
	50.3%	7.0%	2.4%	5.4%	13.1%	5.8%	2.6%	13.5%	100%
Unskilled	12287	618	213	279	1603	544	52	144	15740
	78.1%	3.9%	1.4%	1.8%	10.2%	3.5%	0.3%	0.9%	100%
Total	56464	8788	4716	19035	15444	7031	3655	19938	135071
	41.8%	6.5%	3.5%	14.1%	11.4%	5.2%	2.7%	14.8%	100%

A number of conclusions can be drawn from this above information which is the latest available and is derived from employment equity reports for the period September 2002 to September 2003. The first is the number of employees in total promoted -135 071, the second is that 14.1% of those are white males. This latter fact is reflected in the fact that 49.3% of large employers have implemented affirmative action measures². This highlights the potentially contentious nature of the promotions in South Africa.

1.4 Overview

The legislative context in which unfair labour practice in the form of promotions has arisen and developed is discussed in Chapter 2, while Chapter 3 deals with the question of what promotion means with reference to other human resources practices such as appointment, grading, and translation. A definition of promotion is then suggested, which forms the basis for the balance of the discussion. In Chapter 4 the question of parties to the promotion dispute is covered. The nature of the

² Table 27 page 49 of the same report.

promotion dispute is analysed in Chapter 5, as well as the procedural requirements for the referral of such a dispute.

It became evident during the research that there was a process which a promotion usually followed, and while the process is not the same in every organisation or in every promotion, best practice is suggested and then discussed at some length and detail in Chapter 6. This places the unfair labour practice in the form of promotion in its context and provides an introduction to Chapter 7, where questions such as the onus, the nature of the arbitration over a promotion dispute and the substantive and procedural fairness of the dispute are discussed.

Employees are often requested or required to act in a post, which subsequently becomes a promotion post. The invidious position in which both the employee and the employer then find themselves is the subject of Chapter 8.

Discrimination during the promotion process is then discussed in Chapter 9.

1.5 Conclusion

It is suggested that many of the difficult questions faced by the parties, arbitrators and judges have now become settled law. This dissertation would have achieved its purpose if it assists in explaining how the law relating to the unfair labour practice in the form of promotion has developed and what that law now is in South Africa.

Chapter 2: The legislative background

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2.1 Introduction

This chapter briefly describes the historical background and development of the unfair labour practice in South African law, with particular emphasis on the impact of the Constitution.

It is suggested that it is also necessary from the outset to understand what is meant by the term unfair labour practice. Many attempts have been made to define the concept of "unfairness". Prof J Murphy, in *SACCAWU v Garden Route Chalets (Pty) Ltd*. [1997] 3 BLLR 325 (CCMA) said: "Unfair' implies 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'."

A 'labour practice' has been interpreted to mean "an action adopted in the labour field"³, or any act or omission in execution of policy⁴ and does not need to be a continuing or repeated activity but could be a single act⁵.

2.2 The development of the unfair labour practice jurisprudence.

The categorisation of certain forms of workplace practices as an "unfair labour practice" was imported from the United States of America⁶ where it was used to describe a form of legislated tort which could be used against employers who wished

³ *Chamber of Mines v Mineworkers Union* (1989) 10 ILJ 133 (IC).

⁴ *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court & others* (1986) 7 ILJ 285 (N).

⁵ *Trident Steel (Pty) Ltd v John NO & others* (1987) 8 ILJ 27 (W); *Natal Die Casting Company (Pty) Ltd v President Industrial Court & others* (1987) 8 ILJ 245 (D).

⁶ Landman A 'Fair Labour Practices - The Wiehahn Legacy' (2004) 25 ILJ 805.

to prevent unions from organising their employees⁷. The Wiehahn Commission recommended that the unfair labour practice be incorporated into the Industrial Conciliation Act 28 of 1956, and this was effected by an amendment to that Act in 1979.

Both the meaning of the term 'unfair labour practice' and the legislation itself underwent a number of further changes⁸ until the present, by which time the Labour Relations Act No 66 of 1995 and the unfair labour practice had been amended six times.

The concept of a fair labour practice has been said to 'recognize the rightful place of equity and fairness in the workplace; it recognizes that what is lawful may be unfair'⁹. The nature of the concept has been described¹⁰ as

"..... an expression of the consciousness of modern society of the value for the rights, welfare, security and dignity of the individual and groups of individuals in labour practices. The protection envisaged by the legislature in prohibiting unfair labour practices underpins the reality that human conduct cannot be legislated for in precise terms. The law cannot anticipate the boundaries for fairness or unfairness of labour practices. The complex nature of labour practices does not allow for such rigid regulation of what is fair or unfair in any particular circumstance.

Labour practices draw their strength from the inherent flexibility of the concept 'fair'. This flexibility provides a means of giving effect to the demands of modern industrial society for the development of an equitable, systematized body of labour law. The flexibility of 'fairness' will amplify existing labour law in satisfying the needs for which the law itself is too rigid.'

2.3 The unfair labour practice in terms of the Labour Relations Act, 1995

Section 186(2) of the Act states

'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving-

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

⁷ Selznick R *Law, Society and Industrial Justice* (1969) at 140.

⁸ Op cit.

⁹ *National Entitled Workers Union v Commission For Conciliation, Mediation & Arbitration & Others* (2003) 24 ILJ 2335 (LC).

¹⁰ Poolman T *Principles of Unfair Labour Practice* (Juta) at 11.

- (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
- (c) a failure or refusal by an employer to re-instate or re-employ a former employee in terms of any agreement; and
- (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

Disputes concerning unfair labour practice disputes are disputes of right which have been held ¹¹ to arise either *ex lege* or *ex contractu* and are subject either to arbitration or to adjudication in the Labour Courts.

The question has arisen as to whether the above limits an 'unfair labour practice' to the meanings or forms provided for in section 186(2) or not. This was discussed by the Constitutional Court in *National Education Health & Allied Workers Union v University of Cape Town & Others* (2003) 24 ILJ 95 (CC) where Ngcobo J stated

[14] The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution'. In doing so the LRA gives content to s23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. Therefore the proper interpretation and application of the LRA will raise a constitutional issue. This is because the legislature is under an obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. In many cases, constitutional rights can only effectively be honoured if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. In this way, the courts and legislature act in partnership to give life to constitutional rights.

Ngcobo J continued further and stated

[33] The relevant constitutional provision is s 23(1) which provides that: 'Everyone has the right to fair labour practices.' Our Constitution is unique in constitutionalizing the right to fair labour practice. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends

¹¹ In *Hospersa v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LC).

upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.

[34] The concept of fair labour practice must be given content by the legislature and thereafter left to gather meaning, in the first instance, from the decisions of the specialist tribunals including the LAC and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the LRA, a statute which was enacted to give effect to s 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. [My underlining]

It is submitted that the concept of an unfair labour practice is therefore not limited to only those meanings or forms contained in section 186(2). The Labour Appeal Court has found that a dispute about a unilateral change to terms and conditions of employment may, as a dispute of right, fall within the ambit of an unfair labour practice¹². Furthermore short time, while not specifically included in section 186(2) as an unfair labour practice, has also been held to constitute an unfair labour practice¹³.

The question arises as to whether an unfair labour practice, as conceptualised by section 186(2) is limited to a practice by an employer only. Du Toit et al state 'the current definition of 'unfair labour practice' is effectively confined to employer conduct and no longer offers a remedy to employers against employees or trade unions'¹⁴. For that reason the application by an employer to declare an employee's desertion an unfair labour practice was refused¹⁵.

In a decision under the 1956 Act, the court held

'Fairness comprehends that regard must be had not only to the position and interests of the workers, but also those to the employer, in order to make a balanced and equitable assessment.' [as per Smalberger JA]

Nienaber JA, in a minority judgement, agreed and stated

¹² See *Martime Industries Trade Union & others v Transnet & others* (2002) 23 ILJ 2213 (LAC).

¹³ In KN DB 8646-04 *Govender v Dennis Port (Pty) Ltd*, an arbitration before the CCMA in which the writer was the arbitrator.

¹⁴ D Du Toit, B Woolfrey, J Murphy, S Godfrey, D Bosch, S Christie *Labour Relations Law: A Comprehensive Guide* 6th Edition Lexis Nexis page 461.

¹⁵ See *Maseko v Entitlement Experts* [1997] 3 BLLR 317 (CCMA).

'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. In the eyes of the LRA of 1956, contrary to what counsel for the appellant suggested, there are no underdogs

The Constitutional Court has found that an unfair labour practice may be committed by both an employer and an employee. In *National Education Health & Allied Workers Union v University of Cape Town & Others*. (2003) 24 ILJ 95 (CC) Ngcobo J said

[39] If the rights in s 23(1) were to be guaranteed to workers only, the Constitution would have said so.....

[40] In my view the focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed. [My editing]

The same question was raised in *National Entitled Workers Union v Commission For Conciliation, Mediation & Arbitration & Others* (2003) 24 ILJ 2335 (LC). In that case the Deputy President of NEWU resigned from the union. In response the union referred a dispute to the CCMA alleging that the resignation amounted to an unfair labour practice. When the CCMA refused to accept the dispute on the ground that the dispute does not constitute an unfair labour practice in terms of the Act, the union sought to review the decision. One of the questions before the court was whether an employer could allege that an employee had committed an unfair labour practice. At the time of the review application the unfair labour practice was contained in item 2 of schedule 7 of the Act. The court stated that

"The concept of an unfair labour practice contemplated by item 2 does not embrace a labour practice committed by an employee vis-à-vis an employer."

However the court then noted that Section 23(1) of the Constitution provides that: 'Everyone has the right to fair labour practices', and considered what a fair labour practice as contemplated by the Constitution is. The court then stated

"The notion of parity between the rights of employers and employees is not an absolute one. But it has an important place in labour law. An employee may, in limited circumstances, commit conduct vis-à-vis an employer that may be lawful but unfair. An employer has the right to expect that in certain

circumstances an employee will not merely comply with his or her rights in regard to the employer but will also act fairly. This conduct may, in my view, qualify as an unfair labour practice, ie a practice that is contrary to that contemplated by s 23 of the Constitution. A lawful resignation that is also, in the circumstances, unfair may constitute an unfair labour practice. Cf *Penrose Holdings (Pty) Ltd v Clark* (1993) 14 ILJ 1558 (LC) which dealt with the definition of an unfair labour practice contained in s 1(1) of the Labour Relations Act 28 of 1956.

The court noted that the LRA does not give effect to section 23 of the Constitution, and was of the view that

“The LRA is not intended to regulate exhaustively the entire concept of a fair labour practice as contemplated in the Constitution 1993 nor the present Constitution. The field is far too wide to be contemplated by a single statute.”

As the union had a number of other remedies available to it – it could have sued the employee for three months' salary in lieu of notice, or sought an interdict - the court held that it ‘did not need to rely on the broad, flexible, equity basis of an unfair labour discussed above’ and dismissed the application.

In *Simela & others v MEC for Education, Province of the Eastern Cape & another* (2001) 22 ILJ 1688 (LC) (per Francis AJ, as he then was) where the court said:

“[an] employee is not precluded from relying directly on the Constitution to enforce his or her right not to be subjected to unfair labour practice.”

2.4 Promotion as an unfair labour practice

The human resource practice of promotion is a labour practice which may now in terms of Section 186(2) constitute an ‘unfair labour practice’. In *George v Liberty Life Association of Africa Ltd* [1996] 4 BLLR 494 (IC)¹⁶ the court had this to say

“The modern day employment relationship envisages a continuous relationship between employer and employee (although there are signs of a shift to a less stable position in occupations in some countries). During the course of this relationship most employees would aspire to promotion and progress within the ranks of the organisation run by the employer. Paul C Weiler *Governing the Workplace – The Future of Labour and Employment Law* says at page 64:

‘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 subsistence of the contractual relationship or the wider concept of an employment relationship issues regarding promotion or a lateral transfer to

¹⁶ at 503 -504.

another job with the “employer” would be considered legitimate subjects of the existing employment relationship.

Section 186(2)(a) of the Act refers to unfair conduct by the employer relating to the promotion ... of an employee”. Grogan points out, correctly it is submitted, that “Unfair conduct is a wider concept than unfair discrimination, because conduct may be unfair without being discriminatory”¹⁷. It is this ‘wide concept’ which forms the substance of this analysis.

2.5 Conclusion

It is within this uncertain and complex context that the question of promotion as an unfair labour practice is discussed in what follows.

¹⁷ Grogan *Workplace Law* 7th Edition Lexis Nexis page 229.

Chapter 3: What Does 'Promotion' Mean?

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3.1 Introduction

In this chapter the distinction between a promotion and an appointment is discussed, and thereafter various attempts to define promotion by the Court and arbitrators are set out. There is presently a debate between those who view the position of the candidate as the overriding consideration when determining if there was a promotion, and those who view the nature of the post as the point of reference.

This chapter discusses the attempts to define promotion in terms of the status of the candidate [i.e. whether the applicant is an employee or not], whether the post was advertised internally or externally [i.e. advertised within the organisation or to the general public], whether the post was a new or vacant post or not.

The prime objective of this chapter is to suggest a definition of promotion. This definition is central to the discussion which follows.

Finally, the question of the effect of a promotion on the contract of employment is discussed.

3.2 The distinction between promotion and appointment

There is a distinction between a promotion and an appointment. The relevance of the distinction is that the former is an unfair labour practice while the latter is not, leaving

arbitrators with no jurisdiction over this form of conduct by the employer. Grogan notes that

“The difference between appointments and promotions has long perplexed arbitrators. Some have taken the view that a complaint by a disappointed applicant for an externally advertised post is a dispute concerning appointment, even if the disappointed applicant is on the staff of the employer concerned”.¹⁸

The distinction, while a real one, has however unfortunately been blurred because courts and arbitrators have used the terms “promotion” and “appointment” interchangeably¹⁹ and because the processes followed overlap each other.

Prior to the introduction of the Act, the court held that if the candidate for promotion is not an employee²⁰ he is not entitled to a remedy even if the court is of the view that the conduct of the employer was unfair²¹. However, courts have gone further and held that a candidate²² who is an employee is nevertheless an applicant in respect of the post and that the court therefore has no jurisdiction over the dispute as it concerns his appointment and not promotion.

For example, in *Wellington Municipality v Deputy Minister of Labour and Another* 1963 (4) SA 353 (C) the court noted that although there was an employer/employee relationship in existence between the Municipality and its employee, the point in dispute did not arise out of that relationship as it was for purposes of the dispute “purely fortuitous” that the applicant had happened to be an employee of the Municipality. The court held that the applicant was really in no better position than an outside applicant for the vacant post. In *Port Elizabeth Municipality v Minister of Labour and another* 1975 (4) SA 278 (E) Kannemeyer J said “the applicant may be an employee but if he applies for the vacant post he does so qua applicant and not qua employee”.

¹⁸ J Grogan ‘Justice prevails: Pitfalls in promotion disputes’ *Employment Law Journal* 20 (3) at page 4.

¹⁹ See for example *Spoornet and United Transport and Allied Trade Union obo Holtzhausen* (2003) 24 *ILJ* 267 (BCA).

²⁰ *Borg Warner SA (Pty) Ltd v NUMSA* (1991) 12 *ILJ* 549 (LAC) (Eastern Cape Division); *Fourie v The Director-General of the North West Province* [1997] 3 *BLLR* 275 (IC), where the phrase “prospective employee” was used.

²¹ See the comments of the court in the *Fourie* case *supra*.

²² The term candidate is used for ease of understanding in this discussion to mean a person who applies to be promoted, and is used in preference to the term ‘applicant’ due to the confusion which may arise – an ‘applicant’ is a person who applied to a court for relief.

In *Fourie v The Director-General of the North West Province* [1997] 3 BLLR 275 (IC) the applicant had acted as hospital secretary at Vryburg Hospital for just over a year before the position was advertised. He applied to be promoted to the post he was acting in, was interviewed together with two other candidates, and was recommended by the interviewing committee who also informed the applicant of its recommendation and congratulated him before the MEC made his decision. A month later he was informed that he was appointed to the position of deputy hospital secretary and that another candidate, who had no practical experience in hospital administration, had been appointed secretary. Fourie then referred a dispute to the Industrial Court and alleged that the respondent's conduct amounted to an unfair labour practice in that it had unfairly demoted him. The court held however that "The Applicant's complaint relates to his unfair treatment as an applicant for a position and not to any treatment accorded to him in his capacity as an employee. It has been said that "an applicant for a position will have no standing to declare a dispute with an employer on grounds of unfair discrimination and pursue an unfair labour practice case, even though a victim of unfair discrimination. This follows from the fact that the Act provides remedies for employees, not prospective employees", see the *New Labour Relations Act* by Cameron, Cheadle and Thompson at page 162. A prospective employee is not an "employee" as defined in the act and contemplated in the definition of unfair labour practice, see *Borg Warner SA (Pty) Ltd v NUMSA* (1991) 12 ILJ 549 (LAC) (Eastern Cape Division).

.....

The Applicant's case is that he was unfairly treated in regard to his efforts to be appointed Hospital Secretary ie as an applicant and not as the acting Hospital Secretary, as an employee. He said he was not appointed as Hospital Secretary. This is an act of employment and is not performed by an employer towards an employee. Such an act is therefore not a labour practice. The result of this reasoning is that this is not really a matter that falls within the jurisdiction of this court. [My editing]

This line of reasoning was followed in the case of *Department of Justice v CCMA & Others*. [2001] 11 BLLR 1229 (LC) where two white males who were employed by the Department of Justice as Assistant State Attorneys responded to an advertisement to fill two vacant positions of Senior Assistant State Attorney in the Department's Cape Town Office. The Department raised the point that the dispute did not concern the promotion of the employees as the positions to which they sought promotion were advertised externally and that the Minister of Justice used the word "appointment" and not "promotion" in the advertisement. As they had to apply for the positions and attend interviews the issue, said the Department, was not their

promotion but rather their appointment. The court upheld this argument, and stated that -

“The objection of [the Department] stems from the fact that the positions could have been filled by outsiders and hence it is illogical to speak of the positions as being promotional posts. 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.”²³

In *NEHAWU obo Diseko - MV Mahlatsi and Dept of Agriculture FS12736*²⁴, the facts were that the employee was employed in the Department of Education in the post of Assistant Director. She then applied to the Department of Agriculture, where a post was advertised as “Assistant Development Expert/Development Expert/Senior Development Expert/Chief Development Expert”. She was interviewed and told that she had been successful. She transferred from her previous department to the Department of Agriculture where she worked for some time before receiving her letter of appointment from which it appeared that she had only been appointed as Principal Development Expert and not Chief Development Expert. She then referred a dispute to the CCMA in which she alleged that the employer had committed an unfair labour practice and wanted to be appointed to the post of Chief Development Expert. The arbitrator held that the question was whether the dispute concerned the promotion of the employee or her appointment. The arbitrator reviewed the case law and said that while the distinction between an appointment and a promotion is difficult to define clearly, a distinction should be made because

Sound policy and practical considerations seem to me to dictate that an employer's prerogative of appointment should be clearly distinguished from its power to promote, which could generally be governed by contract, conditions of employment, statute, regulation or similar instruments.

The real distinction between a promotion and an appointment said the arbitrator is that

“....a promotion cannot simply be judged for what it is by the result that it has produced, namely greater status, more money, more substantial benefits or more power. The term promotion also connotes a procedural aspect or a process.”

The arbitrator then held, correctly it is submitted, that the employee's dispute concerned her non-appointment and was not a promotion dispute.

²³ This line of reasoning was followed in *IMATU obo Harmse and City of Cape Town* (2003) 12 CCMA 1.1.5.

²⁴ An unreported award issued by the CCMA dated 23 February 2000.

In a private arbitration in which an employee had been acting in a position for a number of years, had undergone training to formally assume the position in which he has been acting and where there was an agreement that, on attainment of the necessary qualification he would be appointed, the arbitrator held that the employee must be appointed to the post even though the employer had placed a moratorium on promotions and appointments until such time as its equity plan was finalised²⁵. The arbitrator seems to have ignored the distinction between promotion and an appointment.

The above line of reasoning was finally questioned in *Jele v Premier of the Province of Kwazulu-Natal & Others*. (2003) 24 ILJ 1392 (LC) which was similar to the *Department of Justice* case as the applicant was also a public servant, and in which the employer argued that the *Department of Justice* case was correct. The court, correctly in my opinion, did not agree with the conclusion in the *Department of Justice* case and said -

“[40] I do not see why a position should not be a promotion for a candidate who is already in the public service and an appointment for one who is not.

[41] 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.

[42] The applicant in this case meets the criteria of a pre-existing employment relationship and an advancement or elevation in status. Accordingly, the dispute was about the refusal to promote the applicant.”

The question was settled in the Labour Appeal Court matter of *Department of Justice v Commission For Conciliation, Mediation & Arbitration & Others* (2004) 25 ILJ 248 (LAC) where once again the employer raised the same argument as in the *Department of Justice* matter - that a dispute could not be said to relate to promotion in regard to one candidate and to an appointment in regard to another. The case was

²⁵ *Pretorius and Portnet* [2000] 10 BALR 1212 (IMSSA).

brought before the court in terms of item 2(1)(b) of Schedule 7 of the Act. Zondo JP noted that whereas with respect to item 2(1)(a) [i.e. unfair discrimination] disputes an employee includes an applicant for employment, this is not the case with item 2(1)(b), which the court said

“...is a clear indication that the word 'employee' in item 2(1)(b) was not intended to include an applicant for employment. Accordingly, the right which item 2(1)(b) confers not to be subjected to an unfair labour practice taking the form of conduct relating to promotion is not conferred on an applicant for employment. It is only conferred on an existing employee.”

The distinction between an applicant for employment and an employee who applies for promotion is that there is an employment relationship between the latter, whereas there is no employment relationship between a job applicant and the employer.

This distinction has been properly understood and applied in a number of cases. For example, in *Vereeniging Van Staatsamptenare on Behalf of Badenhorst v Department of Justice* (1999) 20 ILJ 253 (CCMA) 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. The employer raised a point *in limine* to the effect that the dispute concerned the ‘appointment’ of the applicant and not her ‘promotion’, and that the matter should therefore be dismissed. The arbitrator held that

I am satisfied that her complaint that she was not appointed can properly be described as an allegation of unfair conduct by the employer relating to a promotion. While I accept that this was not a promotion in the ordinary sense of the word, I do not believe the peculiar nature of the rationalization 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 post in 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 re-modelled structure in conformity with the rationalization. It is specious to suggest that the applicant was a job applicant, in the sense of being an outside job-seeker.

The arbitrators in both *Lamana and SA Police Service* [2002] 8 BALR 802 (BC) and *Chauke and SA Reserve Bank*. [2004] 10 BALR 1216 (CCMA) stated that the first point to establish is whether there is an employment relationship between the applicant and the employer.

However, the case of *Public Service Association of SA obo Jordaan and Gauteng Department of Transport & Public Works* [2004] 2 BALR 173 (GPSSBC) suggests that some arbitrators are not aware of the distinction and rely instead on the [incorrect] findings of cases such as *Public Servants Association v Northern Cape Provincial Administration*. (1997) 18 ILJ 1137 (CCMA) and the Labour Court decision in *Department of Justice*. The post in that matter was advertised in a newspaper, a fact that the arbitrator for some reason described 'problematic', and was for another position in another department and offered a higher package than the applicant currently received. The arbitrator was of the view, incorrectly it is submitted, that

Any person who applies for the vacant position advertised in the newspaper is a prospective applicant for the position and not an employee. Section 186(2)(a) applies only to employers and employees and does not include applicants for employment. By responding to this advertisement in the newspaper qua applicant, the applicant is competing with others and is no different from any other person who responded to the same advertisement and therefore does not in terms of section 186(2)(a) qualify for special treatment in terms of his status as an existing employee. This dispute about whether the respondent should act on the recommendations and provide reasons for the failure to act on the recommendations and the issue of managers informing the applicant that he was successful has nothing to do with promotion in the employment environment. If the applicant is aggrieved by the conduct of the respondent, then his remedy lies elsewhere, and definitely not in terms of section 186(2)(a).

An application for promotion is an internal matter that falls within the boundaries of the employment relationship. If the applicant had been successfully appointed to the position, it would not be a promotion but an appointment to another department on a higher salary scale. The applicant in this instance was a job applicant and not an employee, and job applicants do not qualify for promotion, demotion, training or any other benefits.

Some cases have attempted to avoid the question completely. For example, the award in *PSA obo le Roux and Department of Home Affairs* [1999] 5 BALR 577 (CCMA) also does not make it clear if the dispute before the arbitrator was one of promotion or appointment; the award refers only to the latter yet at the same time the question of whether the dispute was one of appointment or promotion was not raised or ruled upon. The arbitrator, Grogan, nevertheless dealt with the matter as a promotion dispute.

It is suggested²⁶ that a promotion and an appointment can be properly distinguished by determining the status of the candidate: in the former the candidate is an employee while in the latter the candidate is not an employee.

3.3 The distinction between promotion and grading

It is suggested that there is also a distinction between promotion and grading. However, how the distinction is determined and whether such a distinction can properly be made has been the subject of a number of cases.

In *Marra v Telkom SA Ltd* (1999) 20 ILJ 1964 (CCMA) the dispute concerned the evaluation and grading of the employee, which was alleged to have been unfair. The arbitrator assumed –incorrectly it is submitted, that she had jurisdiction over the dispute, and did not define the dispute as a promotion dispute although some arbitrators have discussed the case as if it concerned promotion²⁷. In fact it is clear from the award that the employee was aggrieved by the result of the performance assessment conducted on him. In *Mazibuko and Vista University & Another* [2001] 8 BALR 883 (CCMA), the arbitrator dealt with a dispute over grading as an unfair labour practice relating to a benefit.

In *Mzimni & another v Municipality of Umtata* [1998] 7 BLLR 780 (Tk) the High Court held that that the upgrading of posts did not relate to promotion or any other form of unfair labour practice.

In *National Commissioner of the SA Police Service v Potterill No & others* [1997] 7 BLLR 780 (Tk) the facts were that the employees' posts had been re-graded to a higher grade, but this was not accompanied by being remunerated on the higher grade. On the question of whether this was a promotion, the court held that

"Where the incumbent employee is permitted to continue to occupy the re-graded post and is afforded the appropriate higher salary, the employee is, in my view, 'promoted'. In my view such a situation falls within the first meaning given for the word 'promote' in *The Concise Oxford Dictionary* (9 ed), namely:

²⁶ This suggestion is made with the arbitration process, which is essentially a fact finding process, in mind.

²⁷ See *Blignaut and South African Police Service* [2003] 7 BALR 736 (SSSBC); *CWU obo Joyi & Another / South African Post Office* [2003] 5 BALR 552 (CCMA).

"V.tr.1 (often foll. by to) advance or raise (a person) to a higher office, rank, etc (was promoted to captain)."

In *National Commissioner of the SA Police Service v SA Police Union & Others* (2003) 24 ILJ 1984 (LC) the court had occasion to deal with grading in the police service, and the effect of up-grading of posts as well. The court was of the view that when a post is upgraded, this "creates, notionally at least, a new vacant post, for which the applicant is free to compete together with other suitably qualified candidates". Once a post has been upgraded the occupant does not have a right to remain in the upgraded post. Furthermore,

"The retention, with increased benefits, of an incumbent on a newly upgraded post, has as its consequence the same substantive outcome as a promotion".

The fact that a post has been upgraded in the SA Police Service does not mean that the incumbent has a right to the newly designed post.

"... to confer upon an incumbent a right, to the exclusion of others, to the redesigned post, even if it bears little resemblance to the post previously occupied by her/him, is untenable. Such an approach equates, erroneously so, incumbency in a particular post with the right of employment in the police service. It bears noting that a member of the SAPS, although employed in the public service is deployed to a particular post. For the duration of the member's employment, s/he may be deployed to a varying number of different posts in the police service".

The court quoted and relied on the finding in the *Poterill* case as to what a promotion meant to support its view.

In *Basson and South African Police Services*. [2004] 5 BALR 537 (SSSBC) the arbitrator stated that "a request by an employee to have his post re-graded does not constitute a dispute concerning promotion". Noting, however, that the applicant does not request the re-grading of his post but contends that his post has been re-graded to a higher level, and that his case is that by not appointing him in the higher post level the SAPS committed an unfair labour practice, the arbitrator concluded that it is clear from the evidence that the applicant's case deals with promotion and not with the re-grading of his post. The arbitrator therefore held that the applicant's dispute relates to promotion and that the Council therefore had jurisdiction to determine the issue in dispute by way of arbitration. Turning to the facts of the matter, the arbitrator concluded that the post had been upgraded, but that – with reference to the case of

National Commissioner of the SA Police Service v SA Police Union & Others (2004) 25 ILJ 203 (T) the applicant would not be entitled to an automatic promotion. The arbitrator then came to the conclusion that the applicant had been treated unfairly by the SAPS and ordered that the applicant be promoted²⁸.

In *Jacobs and another v SA Revenue Service* KN 8984-03²⁹, the facts were that the organisation introduced a new grading system, and all the employees were then regarded. The applicants who were part of a team working in the VAT section were placed on a level 3 B grade while others in the same section who did the same work and some of whom had less experience than the applicants were placed on a grade 3A grade. The arbitrator held that

“The dispute is a promotion issue, as the applicants seek to be promoted to the upper grade of the 3 band, and the difference affects their benefits as well.”

Where the applicant claimed promotion to another post, and there was no difference between the salary of the post she currently occupied and the one she sought to be promoted to, but it is common cause that “it is a matter of status as to which post you occupy and that future advancement would depend on one being in the higher post”, the dispute was held to be a promotion dispute – see *Health & Other Service Personnel Trade Union of SA on behalf of Klaasen and Paarl Hospital* (2003) 24 ILJ 1631 (BCA).

In *Basson and South African Police Services* [2004] 5 BALR 537 (SSSBC) the arbitrator stated that “In terms of Section 186(2)(a) of the LRA a request by an employee to have his post re-graded does not constitute a dispute concerning promotion”. On the facts of the matter the arbitrator found that the dispute before him did not concern the regarding of his post as it had already been regarded, but his desire to be promoted into the now regarded post.

²⁸ It is submitted with respect that this award is incorrect; in *Stolterfoht and SA Police Service* (2002) 23 ILJ 2160 (BCA), the arbitrator stated “The task does not fall on me to start making placements....To interfere with the merits of an appointment is to usurp the prerogative of management”.

²⁹ An unreported arbitration held at the CCMA in which the writer was the arbitrator.

In *Mulder and Telkom SA Ltd* (2002) 23 ILJ 214 (CCMA)³⁰, the employee alleged that the failure of the employer to grade him at a higher level amounted to an unfair labour practice in the form of promotion. The employer raised a point *in limine* that the dispute did not concern a promotion. The arbitrator stated

The first question is whether the upgrading of a position can be regarded as a promotion. In general a promotion presupposes an employee moving to a new position at a higher level. This is not the position in this case; the applicant sought only that his grading be changed, not his job. It was common cause that all the internal liaison officers' job descriptions were identical, and grading was related to experience and performance. If the applicant were to be upgraded to a grade 8, he would in fact have continued doing the same job..... I am therefore of the opinion that the upgrading of the applicant from grade 9 to grade 8, without a change in job content or responsibility, cannot per se be regarded as a promotion.

The distinction between promotion and grading is that the latter involves a reassessment of the job itself, while a promotion is an assessment of an employee's experience, skills, competencies and so on and the ability to perform a particular job. It is suggested that while the outcome in terms of increased responsibilities may well be the same, the focus and purpose of the processes are fundamentally different. Furthermore, a grading exercise usually involves and impacts on a group or occupational class of employees, while promotion usually involves a single employee³¹.

3.4 The distinction between promotion and translation

It has been accepted that the process of translation in the Public Service is the same as a promotion, and that a translation is a promotion – see *De Villiers v SA Police Service* (2002) 11 SSSBC 16.4.1³².

In *Pillay and SAPS* PSSS 1843³³ the arbitrator noted that

³⁰. The arbitrator also relied on the unreported Labour Court case of *North West Tourism Council v CCMA & others* (J525/98) in which it was held that the mere upgrading of a position does not constitute a promotion.

³¹ The case of *Coetzer & others v Minister of Safety & Security & another* [2003] 2 BLLR 173 (LC) may at first glance appear to be an exception. However, on a proper examination of the case it is clear that while a group of captains were promoted as a 'school' their promotion depended on their individual experience, qualifications, skills and competencies.

³². In *Moodley and SAPS*, PSSS 1844, an unreported arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council in which the writer was the arbitrator, it was held that a translation was not the same as a promotion. It should be noted however, that the reason for this finding was that the Applicant's own witnesses testified that a translation was not a promotion.

“...while translation and promotion are the same in that they result in an increase in remuneration, status and benefits, the process by which this result is reached is very different. A promotion results from the selection of the most suitably qualified candidate from a pool of candidates; there is a competition for a post based on the assessment of the candidates against criteria laid down for the post. In a translation process the candidates are required to have attained some formal qualification, and make an application for translation”.

3.5 Promotion in the context of a merger or restructuring

Defining whether a promotion has taken place is more difficult in the context of restructuring or a merger. With regard to the latter, the arbitrator in the case of *Cullen v Distell (Pty) Ltd* (2001) 10 CCMA 6.9.3 stated

It is questionable ... whether employees who apply for positions created as a result of a merger between the company by which they were formerly employed and another company are in fact applicants for promotion, as opposed to applicants for new positions. While in such situations successful applicants may be said to be "promoted" in the broad sense of that word, the legislature appears to have had a narrower sense in mind when it used the term in item 2(1)(b). Employees are promoted, in the narrower sense, when they are moved up the ranks of the organisation in which they work, but not when new positions are created by changes in the organisation. If I am wrong, the strange result would be that employees like the applicant can seek relief under item 2(1)(b) because they applied for higher positions, while the former incumbents of similar positions in the merged companies would have been denied relief under the LRA if they had been unfairly overlooked, because the positions for which they applied were at the same level as the posts they had previously occupied. This anomaly leads me to believe that all applicants for positions created by a merger should be treated as applicants for employment, rather than as applicants for promotion. Their relief is accordingly limited to the grounds set out in section 6 of the Employment Equity Act 55 of 1998 ("the EEA")."

The facts in *Fisher and Sylko Paper Company* [1998] 10 BALR 1339 (IMSSA). concerned the retrenchment of a manager of a department. The company embarked on a cost-cutting exercise during which the applicant was requested to make suggestions on how the employer could improve savings and efficiency in his department, and was warned that if costs could not be cut, he might be retrenched which is what ultimately took place. The company was restructured about a month after the applicant left the company, but was planned before the effective date of the applicant's retrenchment. During the arbitration the applicant's retrenchment was

³³ An unreported arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council in which the writer was the arbitrator.

alleged to be unfair as he was not offered the alternative of a newly created post at a lower wage which his subordinate was promoted to. The arbitrator viewed the question before him as whether the company acted in an unfair manner in not considering the applicant for the position into which the subordinate was promoted. On the facts the arbitrator found that the new position was not created for the subordinate, and the restructuring amounted to the subordinate's old job with some additional department responsibilities and, whilst this justified a new job title and an increase, it did not justify the same grade or benefits as had been enjoyed by the applicant. The subordinate was not therefore promoted, as the "new" post was an existing post in another department to which was added additional responsibilities.

In *NEHAWU obo Jobela & Others and Department of Social Services & Poverty Alleviation* [2004] 8 BALR 984 (PHWSBC) a restructuring process resulted in the rationalization of the district offices into 16 posts at the level of deputy director. The applicants were all employed on the level of assistant director, managed the respondent's various district offices and applied together with 300 others to be appointed to the new deputy director posts but were unsuccessful. As a result they were relieved of their duties and claimed that they had been demoted unfairly. The arbitrator found that the deputy director posts were new posts and not just upgraded posts, and that there were bona fide reasons for this. He was not persuaded that there has been a material reduction in remuneration, status, responsibilities or seniority and found that the applicants had not been demoted.

In *Grieg and Afrox Ltd* [2001] 8 BALR 799 (P) the company decided to restructure by declaring all jobs – from the CEO downwards redundant. The arbitrator commented that

"It is difficult not to see the device of making all positions redundant as more than a mechanism to avoid the basic purpose of retrenchment law, namely the protection of employees from dismissal over which they have no control and for which they are not at fault. The mechanism is open to abuse because jobs can be redefined in a way that deliberately excludes existing employees, whilst in reality the functions performed by those employees are not redundant but simply allocated to another position. This mechanism all too easily lends itself to retrenching employees who are perceived to be

“dead wood” or “difficult” but who would be difficult to dismiss by means of an ordinary disciplinary hearing.

To avoid such conclusions, at the very least the company must show that its eventual selections are objectively justifiable, just as if it had conducted a “pure” retrenchment and retained the persons it now employs. It will have to justify the criteria used to keep them over those who are no longer there. In choosing to restructure in this particular way and declaring all jobs redundant, it is my belief that fairness requires the employer actively to go out of its way to link employees to jobs similar to which they functioned in before the restructuring. Fairness also requires, I believe, that only justifiable “pre-requisites” for a job are used to avoid the random exclusion of employees.

The method of appointment was to look for “corporate fit”, and while no specific criteria were laid down it is probable that the applicants prior performance was relied on, and as such the real reason why the applicant was not appointed was based on his past performance.

It is suggested that the real question is: who is the employer? The fact that the promotion has taken place as a result of a merger, or after the restructuring exercise is not the point, and nor is the question of whether the job is a newly created one or not. The crucial aspect to be established by the employee is that there was an employment relationship between an employee and an employer at the time of the promotion. For example in *Tlou-Msiza and University of South Africa*[2005] 3 BALR 370 (CCMA) the facts were that Vista University and the Technikon RSA were merged with University of South Africa. The applicant was employed as Acting Head of the Department of Post Graduate Student Affairs at UNISA, and another employee occupied the post of Acting Head of Undergraduate Student Affairs. These two posts were abolished and amalgamated into a newly created post of Acting Head of Department of Student Administration, and the applicant was not appointed to the new post. The employer raised a point *in limine* to the effect that the non-appointment of the applicant related to an appointment rather than a promotion and that the CCMA did not have jurisdiction to entertain this matter, and relied on the *Cullen* case as authority for this proposition. The arbitrator ruled, correctly it is submitted, that “the CCMA has jurisdiction to hear matters of non-appointment to posts that would result in an elevated rank to the particular employee concerned as a promotional dispute”.

3.6 What does “promotion” mean? An overview of case law

Numerous arbitrators and judges have attempted to define what promotion means. The relevance of this question is that in order for the arbitrator or judge to have jurisdiction over the dispute, the applicant must show that the dispute concerns promotion. In this section those cases are discussed.

When reading case law on what has been considered to be a 'promotion' of an employee, it is apparent that the terminology used by editors, arbitrators and judges has led to confusion; words like "upgraded" have been used when promotion was what was meant³⁴.

Some cases have suggested that a distinguishing feature of promotion, and in particular vis-a-vis an appointment, is whether the post was advertised "externally"³⁵. This apparent distinction has been applied in arbitration awards as well on the basis of the above authority. For example in the case of *De Villiers v SA Police Service* (2002) 11 SSSBC 16.4.1 the arbitrator stated

[13] Case law generally seems to support the contention that the appointment of an employee to a higher post, where this post was advertised by his or her employer and the employee applied for such post, is not to be considered promotion. Any dispute regarding such matter must be dealt with as a dispute regarding *appointment*.

The question of whether the advertisement for the post was 'internal', 'external' or both arose in *NUMSA obo Motsiri and Technology Services International (A Division of Eskom Enterprises)*. (2003) 24 ILJ 282(ARB). Presumably on the authority of the cases discussed in *De Villiers*, the Respondent argued that "The arbitrator does not have jurisdiction as the post was advertised externally...".

In *Public Servants Association v Northern Cape Provincial Administration* (1997) 18 ILJ 1137 (CCMA) the arbitrator ruled that

³⁴ In *Misra v Telkom* [1997] 6 BLLR 794 (CCMA), the arbitrator writes "The applicant employee was evaluated in terms of a fixed procedure which had been agreed to between the employer and a number of trade unions to determine whether he should be *upgraded*".

³⁵ See for example *Wellington Municipality v Deputy Minister of Labour & Another* 1963(4) SA 353 (C); *Port Elizabeth Municipality v Minister of Labour & Another* 1975 (4) SA 278 (E); *Fourie v The Director-General of the North West Province* [1997] 3 BLLR 275 (IC); *Department of Justice v CCMA & Others* (2001) 22 ILJ 2439 (LC); [2001] 11 BLLR 1229 (LC) per Wagley J.

“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, demotion, training or benefits.”

However, in *Lamana and SA Police Service* [2002] 8 BALR 802 (BC) where the employer argued that, because the advert was advertised both internally and externally, and because outside candidates could also apply for the post, the dispute did not concern the promotion of the applicant. The arbitrator reviewed the case law and stated, correctly it is submitted, that

“In my view the mere fact that the post was advertised internally and externally does not necessarily mean that the filling of the post was an appointment and not promotion..... In my view the mere fact that an outsider is allowed to compete does not and should not be seen as a limitation of the rights of an applicant-employee envisaged in item 2(1)(b) of Part B of Schedule 7 to the LRA to challenge the actions of his employer during the process of filling a higher post in his organisation.”
[My editing]

In *SALSTAFF obo Van Staden and SAA (Pty) Ltd* [2002] 11 BALR 1194 (CCMA) the employer promoted an outside candidate despite its policy of promoting internal candidates. This was held not to be unfair as the outside candidate’s application was in terms of a settlement agreement between the employer and the outside candidate reached at the CCMA.

It is not at all clear why the question of where the advert was placed should be a determinant of whether there was a promotion or not; it is submitted that there is no nexus between the two questions.

Several arbitrators have held that promotion is a “system of level progression” on the basis of what was stated in *Misra v Telkom* [1997] 6 BLLR 794 (CCMA). However, on a proper reading of the case it is clear that dispute in that matter actually concerned the employer’s appraisal system, and how the system was applied. The arbitrator noted that

“The purpose of the evaluation system is to evaluate employees within the operational level in order to determine their proven competence; to be fair to both employee and Telkom; to place employees in positions relevant to their counterparts in the same work phase; to identify top performance with the view to further evaluation for promotion to C3 level; and to identify shortcomings in their make-up and to take the necessary remedial steps..... In evaluating an employee the Patterson system is used as this is the system which was negotiated with the unions. The evaluation is based on assessment points made in the field of productivity, personal qualities and qualifications.”

In *SATA obo van der Mescht v Telkom SA (Pty) Ltd* [1998] 6 BALR 732 (CCMA) the arbitrator noted that there were two methods by which an employee could be promoted, one of which is a system of “level progression”, which he described as

“a system of regular staff evaluations, performed at the initiative of management, by which Telkom staff can progress from one grade level to another. This system does not apply to all posts within the organization.....The system of “level progression” is clearly a system of promotion and a dispute in that regard would fall within the jurisdiction of the CCMA to arbitrate. (An example of this is contained in *Misra v Telkom* [1997] 6 BLLR 794 (CCMA)). The question then arises as to whether the appointment to the post of Technical Supervisor, which was not effected via “level progression” but by means of application and selection, falls within the definition of “promotion”. In my opinion, it is not necessary here to decide this question, and the reasons for this will be set out below.”

In *CWU obo Joyi & Another and South African Post Office* [2003] 5 BALR 552 (CCMA) the arbitrator stated that it “is trite in our law that the system of level progression is considered to be a system of promotion”.

From the evidence in these matters it is clear that the ‘promotion’ arose after a satisfactory performance appraisal, was dependent upon the result of this appraisal, and was not “automatic” [see the *Joyi* matter page 551]. All of these cases also arose in the context of the public service, where this form of promotion no longer exists, and new promotion policies are now in place.

The meaning of promotion was central to the court’s finding in the case of *Mashegoane v University of the North*³⁶ where the court, in an attempt to define

³⁶(1997) 2 LC 1.1.93 The court noted that section 33 of the Statute of the University of the North published on 11 December 1992 under Government Notice No 32623 provides that: “33. Subject to the provisions of the Act, the senate shall have the power to: (c) appoint the Dean ...”

promotion, had reference to the *New Shorter Oxford English Dictionary* in which "promote" is defined as "advance" or "raise to a higher rank or position", and stated

"It is common cause that there is an employment relationship between Mashegoane and the University. It is also apparent that the position of Dean is of a higher status. It carries with it the benefits of a car and a Dean's allowance. By virtue of being Dean of a Faculty certain powers accrue to the incumbent.

Had Mashegoane been appointed his salary would have remained the same but he would have received a Dean's allowance and would have 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 further have responsibilities relating to the management and control of the Faculty. 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 a higher status with more responsibilities than a person who is, for 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."

The arbitrator in the *De Villiers* case attempted to define promotion and suggested that-

"[14] Considering these decisions, it seems that a *promotion* is involved where each of the following criteria are met:

- (a) Where there was an existing relationship between the employee and the employer.
- (b) Where, after a comparison between the employee's previous job and the job for which the employee has applied or for which he or she is considered, there has been a significant advancement, elevation in his or her rank or rise in his or her status. This comparison includes an examination of the position of the employee to establish whether appointment to the new post will improve his or her status, salary, benefits, powers or responsibilities, or a combination of these.
- (c) Where the potential advancement, elevation in rank or rise in status:
 - is not related to a post advertised generally by the employer, unless promotion is usually dealt with as such by an employer;
 - falls within the scope of logical career-advancement for the relevant employee; and
 - is significant enough to justify the use of the term "promotion", something that enjoys specific legal protection by virtue of the provisions on unfair labour practices."

Garbers³⁷ suggests that a promotion involves an existing employment relationship between the candidate and the employer or essentially the same employer, and there is a difference in substance between the two jobs.

For the arbitrator in *Lamana and SA Police Service* [2002] 8 BALR 802 (BC)

“once it has been established that there is an existing employment relationship between the applicant and the employer, one has to compare the employee’s current job with the job or post applied for to determine whether a promotion is involved. From the judgment of the Labour Court in *Mashegoane* (supra) the following factors should be taken into account:

- differences in remuneration levels
- differences in fringe benefits
- difference in status
- differences in levels of responsibility
- differences in levels of authority and power
- differences in the level of job security.”

In *Hartley and SA Revenue Services* (1999) 8 CCMA 6.9.9 the arbitrator suggested that

“[T]he words of the Act should be widely interpreted to give effect as far as possible to the constitutional right to fair labour practices which the Act embodies, there are limits to the discretion of a Court or arbitrator to ignore the plain meaning of words.”

and went on to say that

“In short, the applicant requested that she be placed on a higher grade. The employer failed to comply with that request. In my opinion, this amounts to a dispute concerning conduct relating to promotion.”

In *IMATU obo Harmse and City of Cape Town* [2003] 5 BALR 569 (CCMA)

“The applicant was given the opportunity to submit evidence to show that the new posts to which he applied were a promotion, or an advancement or elevation in rank and status. This would entail a comparison between the applicant’s current job and the job to which he as applied, including an examination of whether the position of the applicant / employee will improve as regards status, powers, salary, benefits and responsibilities. Apart from an allegation that the new positions represented “a higher employment status and better prospects”, no evidence was presented to substantiate this. The applicant was unsure of the remuneration and benefits of the new posts, and no evidence was led on how this position would differ from his current position of head of community services within the Oostenberg municipality. It is therefore not possible for me to determine to what extent, if any, the posts for which the applicant applied are in fact an advancement in rank and status

³⁷ ‘Promotions: keeping abreast with ambition’ *Contemporary Labour Law* Vol 9 no 3 October 1999, page 23.

or a promotion from the position he currently holds. On this basis alone, the applicant has failed to discharge the onus required of him in showing that the CCMA has the jurisdiction to determine this dispute.”

In *National Union of Metalworkers of SA on behalf of Motsiri And Technology Services International (A Division of Eskom Enterprises) (2003) 24 ILJ 282 (Arb)* the arbitrator referred to Garbers' article and noted that two questions that must be answered in determining whether the dispute in fact arises from an issue concerning promotion. These were-

“Firstly, is the employer in the existing job and the job that is applied for, essentially the same? (The respondent is the employer for both jobs.) Secondly, does a comparison of the existing job and the applied for job, lead one to conclude that a promotion is involved? (The applied for job was allocated a higher grade than the applicant's current position, with a resultant improvement in benefits.)”

In *NEHAWU obo Diseko - MV Mahlatsi and Dept of Agriculture FS12736*,³⁸, the arbitrator suggested that

The word promotion should not be given a meaning never contemplated by the legislature, such as "advancement" in its widest sense. Thus it would be erroneous to argue that every single conceivable (unfair) act that hampers or interferes with the "advancement" of the employee would be an unfair labour practice relating to promotion.....

In *CWU obo Joyi & Another and South African Post Office [2003] 5 BALR 552 (CCMA)* the arbitrator was of the view that the system of level progression is considered to be a system of promotion, and relied on *Misra v Telkom [1997] 6 BLLR 794 (CCMA)*. It appears that the “phrase system of level progression” means a progression upwards through grades, or notches which is related to years of service and which results in increased remuneration. It is unclear from the facts of the matter if this progression also entailed increased levels of authority, responsibility or status.

In *NEHAWU obo Diseko - MV Mahlatsi and Dept of Agriculture FS12736*.³⁹, the arbitrator noted that

“ the Advanced Learners (Oxford) Dictionary defines promotion as "the process of raising somebody or of being raised to a higher position or more important job (See also how the word

³⁸ An unreported arbitration award dated 23 February 2000.

³⁹ An unreported CCMA award.

"demotion" is contrasted with promotion" in the same dictionary). Such process or procedure could be informal but could also be highly formalized in conditions of service, rules, regulations or even agreement. The process of raising an employee according to any of these instruments or procedures to a higher position or rank would then qualify as promotion proper.

In *Public Service Association of SA obo Jordaan and Gauteng Department of Transport & Public Works* [2004] 2 BALR 173 (GPSSBC) the arbitrator stated that "Promotion' is generally regarded as a system designed for the progress of employees from one level to the next".

In *Jele v Premier of the Province of Kwazulu-Natal & Others* (2003) 24 ILJ 1392 (LC) the court was of the view that "the two requirements that distinguished appointments from promotion are that there must be an existing employment relationship between the parties and that there must be some advancement, elevation in rank or rise in status" and that "these two requirements may be the only two remaining features that distinguish promotions from appointments."

3.7 A suggested definition of promotion

The following definition is suggested-

Promotion is the process of selection of the most suitably qualified employee from a pool of candidates and the appointment of that employee to a position of greater status, responsibility, authority and remuneration than previously enjoyed by the employee in the organisation.

Promotion is a *process*; this implies that the entire process from the job analysis, the determination of the inherent requirements of the job, to the appointment of the selected employee and the terms on which the appointment is made i.e. greater remuneration and benefits form part and parcel of promotion. If the organisation has a promotion policy, it involves the proper application of the policy and procedures.

Promotion involves *selection*, that is the decision and the process which resulted in the decision of whom to select.

Promotion involves the selection of *the most suitable employee from a pool of candidates*. The person promoted should, in all instances, be the most suitably qualified candidate. The question is which candidate is the most suitably qualified, and why.

The candidate must be an *employee*, that is not a job applicant; there must be an employment relationship between the employer and the employee at the time the process commences.

There must be a *pool of candidates* who have indicated their desire to be promoted, and the successful candidate must be drawn from that pool. This distinguishes promotion from secondment, or placement.

Promotion involves the selection of *an employee*; that is the process involves a decision regarding an employee rather than a group or class of employee. This distinguishes promotion from grading.

In order for there to be a promotion, the promoted employee's *status, responsibility or authority* in the organisation must be greater or higher than that enjoyed by that employee prior to the promotion. There may well, and usually is, an increase in remuneration and benefits as well, although it is suggested that this is not a *sine qua non* of promotion. Promotion results primarily in an increased status, responsibility and authority, and if promotion in an organisation also results in greater remuneration and/or benefits because of the organisation's policy or practice or because of an promise or agreement between the employer and the promoted employee, then these should be granted by the employer, and if they are not could be part of, or central to, the unfair labour practice allegation. This distinguishes promotion, and a dispute regarding promotion, from a claim for higher remuneration which is the distinguishing feature of a mutual interest dispute. If no candidate has been promoted as a result of the process embarked upon by the employer, for example the employer decides not to select any candidate, no promotion has taken place.

Finally, the definition implies that there was an employment relationship at the time of the promotion. This means that the fact that there was a merger between two or more companies or organisations, or a restructuring exercise took place does not effect the fact that a promotion took place if the employer remains the same legal persona.

3.8 The legal effect of a promotion on the contract of employment

If a promotion is the employment of an employee in terms of different terms and conditions i.e. on a higher level of remuneration, with increased responsibilities and a higher status, the question needs to be asked whether a promotion results in a new contract of employment entirely from what the parties originally agreed.

McCarrie⁴⁰ raised the question whether promotion is a re-engagement and notional termination of the previous engagement. He argues as follows:

'Surely in the public sector, if nowhere else, the original contract or engagement entered into by the parties contemplates that the worker is entering into a career service with the prospect of competing for and, if selected, obtaining promotion from time to time in accordance with the relevant statutes. If promotion, or at least the opportunity to compete for promotion, is something agreed to in the beginning, the later attainment of the contemplated promotion is surely part of what was contracted for and so would not even be a variation of the original contract, let alone a novation or re-engagement.'

It is suggested that a promotion is a variation by agreement of the original contract of employment.

In the Industrial Court judgment of *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC); [1996] BLLR 494 (IC) it was accepted that an employer may be held to a contractual term or practice to the effect that the employee will be promoted or transferred and/or that a certain procedure will be followed prior to the filling of the post. The presiding officer stated that:

'It would therefore stand to reason that during the subsistence of the contractual relationship or the wider concept of an employment relationship issues regarding promotion or a lateral transfer to another job with the "employer" would be considered legitimate subjects of the existing employment relationship. An employer who held out to a person in his or her employ that that person could apply

⁴⁰ McCarrie G J in *Aspects of Public Sector Employment Law* at 74 referred to by Pillay J in *Jele Premier Of The Province Of Kwazulu-Natal & Others* (2003) 24 ILJ 1392 (LC) at 1396.

for promotion and that a certain procedure and practice I would be followed before filling a vacancy would be held by this court, in the absence of any necessary justification, to that contract or promise .'

3.9 Conclusion

It has been seen that arbitrators and judges have suggested a number of meanings of promotion, and that a number of them are either inaccurate or incomplete.

A definition of promotion has now been suggested.

In what follows the elements of this definition are further explained and expanded.

Chapter 4: The Parties to the Promotion Dispute

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- 4.1 Introduction
- 4.2 The employee party
- 4.3 The employer party
- 4.4 The job applicant
- 4.5 Other candidates
- 4.6 The employee's union
- 4.7 Conclusion

4.1 Introduction

The question of who the parties are to or in a promotion dispute would, on the face of it, appear to be clear – the dispute is between an employer and an employee. So long as the Applicant is an “employee” as defined by section 213, and the Respondent is an “employer” of that “employee”, the arbitrator or judge would have jurisdiction over the dispute. Indeed this is what has happened in all of the arbitrations cited, as well as the review applications before the Labour Court.

However, the question of who the parties to the dispute are is more complicated than at first appears and forms the subject matter of this chapter.

For a start, not only an employee may refer the dispute, an applicant for a job may do so as well. Furthermore, a number of court decisions have found that an employee is in fact an applicant for a job and not an employee. Secondly, the Labour Appeal Court has ruled that the person who was found to be a successful candidate in the promotion process should be “joined in proceedings if he is shown to have a direct and substantial interest in a matter and has not consented or undertaken to be bound by any judgment that may be given in the matter” ⁴¹. The right of a union to represent a member in a promotion dispute is also subject to debate.

4.2 The employee party

⁴¹ *PSA v Department of Justice & others* (2003) 12 LAC 1.11.44.

Where the allegation is that the employer has committed an unfair labour practice in terms of section 186(2)(a), there must be an existing employment relationship between the employee and the employer at the time the dispute arose⁴². Authority for this proposition is found in *Member of the Executive Council For Transport: Kwazulu-Natal & Others v Jele* (2004) 25 ILJ 2179 (LAC) where Zondo JP stated

“[8] There can be no doubt that in an unfair labour practice promotion dispute provided for in item 2(1)(b) the applicant must be in the employ of the employer referred to in item 2(1)(b) before he can rely thereon. In other words there cannot be a dispute relating to promotion unless there is an employment relationship between the parties concerned.”

In *Beukes v South African Post Office* (2002) 11 CCMA 6.9.5 the Applicant referred a dispute alleging an unfair labour practice on the ground of promotion and was subsequently dismissed for misconduct. The employer raised a point *in limine* to the effect that the CCMA had no jurisdiction over the dispute as the Applicant was no longer an employee, which was dismissed on the basis that the unfair labour practice issue occurred whilst the applicant was an employee.

Where the employee alleges that the employer's failure to promote him was because the employer unfairly discriminated against him there must likewise be an existing employment relationship between the employee and his employer at the time the dispute arose.

4.3 The employer party

The unfair labour practice must have been committed by the employer of the employee. While the question of who is the employer is outside the ambit of this discussion, it may form part of the dispute; if the applicant has cited the incorrect party as employer the CCMA, council or Court will not have jurisdiction over the dispute.

This question arises particularly where the employee is employed by a temporary employment service, where the employer is part of a group of companies, or where

⁴² The question of whether a person is an employee or an independent contractor is a complex one. For further discussion see P Benjamin 'An Accident of History: Who Is (And Who Should Be) An Employee Under South African Labour Law' (2004) 25 ILJ 787.

the employer cited by the employee alleges that he was not in fact and in law the real employer but some other person was the employer.

Where the employer is a temporary employment service

A person who is provided by the temporary employment service to a client renders service, not to the temporary employment service, but to the client (although he or she is remunerated by the temporary employment service – see section 198(1) of the LRA. The relationship is unique in that there are three parties.

The employee may in fact qualify to be the employee of both the client and the temporary employment service in terms of the definition of “employee” in section 213 of the Labour Relations Act, 1995 as amended. It therefore appears to be one of the main objects of the provisions of section 198(1) and (2) of the LRA to provide that such person is designated (for the purposes of the LRA) as the employee of the temporary employment agency, and not of the client, even though he or she would qualify to be the employee of both in terms of definition of “employee” in section 213 of the Act.

The type of relationship between the employee whose services are hired and the client of temporary employment service were held to be an important indication of nature of relationship between the employee and the temporary employment service.

In the case of *Mandla v LAD Brokers (Pty) Ltd* [2000] 9 BLLR 1047 (LC) the court held that Mandla was an employee of the labour broker and not an independent contractor despite being referred to as an independent contract in the contract because

“In fact, such ‘independent contractors’ were clearly under the control and supervision of the respondent to a degree that one could expect to find in an employer/employee relationship. In other words, they were subordinate to the will of the respondent and obliged to obey the lawful commands, orders or instructions of the respondent that clearly had the right of supervising and controlling the “independent contractor” (see point 4 of the characteristics of an employment contract identified in the judgment of *SA Broadcasting Corporation v McKenzie*.)”

The case of *Van Wyk v Mndeni Meats* (2003) 24 ILJ 1033 (CCMA) the facts of the matter were that the employee, Van Wyk, was employed by a butchery as a cashier.

She was then told to sign a contract of employment between herself and a temporary employment service called Moneyline which she did. When her subsequent dismissal was found to be fair, the question arose as to who was her employer – the butchery or the labour broker – as the compensation was payable by the employer. The arbitrator held that no reliance could be placed on the contract of employment signed between Van Wyk and the labour broker because

The contract was cynically signed by Ryan, for the “employer” i.e. Moneyline, even though he was not employed by Moneyline at the time. This amongst other factors [such as that the Applicant worked only for the second Respondent, was subject to the control and management of Ryan, rendered no service at all to the first Respondent], points to the contract being a matter of convenience, a sham, and possibly a fraud perpetuated by the Respondents one of the effects of which was to change the Applicant from a permanent employee of Mndeni Meats to an “employee” of Moneyline for a period of only six months. In the case of *Motor Industry Bargaining Council v Mac Rites Panel Beaters (Pty) Ltd* (2001) 22 ILJ 1077 (N) the court found that the contract, which purported to designate the workers as independent contractors, was a ‘bizarre subterfuge designed to strip workers of the protection they were entitled to according to law and fair labour practice’. The court found that the workers were employees as defined by section 213 of the Act.

In my view the Applicant was employed at all material times by Mndeni Meats.”

Where the employee works for a group of companies

In this situation it is necessary for the arbitrator or court to determine which company in a particular group of companies is the “employer” of the applicant “employee” who has referred the unfair labour practice. An example of this is the case of *Board of Executors Ltd v McCafferty* [1997] 7 BLLR 835 (LAC) which was heard before the present Act. The facts were that each of four companies in the ‘BOE’ group was a separate legal entity. McCafferty was transferred from one company to another and then subsequently retrenched. The court applied the definition of employer contained in the Labour Relations Act, 1956, and held that the term “any” in statutory definition of “employer” indicates that an employee can have more than one employer. Where independent entities of a group of companies each had elements of employment relationship with employee, a contract with one not determinative of an employment relationship with only that employer.

In the case of *Weller and Group 6 Security Services (Pty) Ltd and another* [2001] 5 BALR 529 (CCMA) the employer transferred the assets of one company to another

with the result that the employer was a shell company i.e. had no assets and would not therefore be able to meet its liability of the payment of compensation to the employee. The arbitrator held that these circumstances justified 'piercing the corporate veil' and disregarding a company's separate personality in order to fix liability elsewhere, and ordered both the company and the owner to be jointly and severally liable for the payment of the compensation to the employee.

The State as an employer

In the matter of *Jele v Premier of the Province of Kwazulu-Natal & Others* (2003) 24 ILJ 1392 (LC) the Applicant worked in the Department of Health and applied to be promoted to a post in the Department of Transport. As only employees can challenge their employer's refusal to promote them by alleging an unfair labour practice, the question arose as to who his employer was – if his employer was the Department of Health then his legal status when applying for the post was as applicant, and not an employee. The Court dealt with complicated law by simply finding that

"[9] The LRA definition of 'employee' embraces the definition of employees and officers in the PSA [Public Services Act]. That is the definition I intend to apply, not only because a provision of the LRA is being interpreted but also because s 210 [which deals with the conflict between the LRA and other statutes] of the LRA requires it.

...

[11] By applying the definition of 'employee' in the LRA, I infer that the state is the employer of anyone who works for it. The primary reason for defining 'employee' thus was clearly to eliminate difficulties in identifying the employer, especially in the public service.

....

[24 a person is an employee of the state, irrespective of where in the public service he or she renders services. Secondly, the state, as employer, is represented by that organ of state, functionary or institution where the authority to perform the particular act is vested."

This decision was taken on appeal. In *Member of the Executive Council For Transport: Kwazulu-Natal & Others v Jele* (2004) 25 ILJ 2179 (LAC) Zondo JP stated

[17] From the definition of the word 'employee' in s 213 of the Act, there can be no doubt that the state is an employer. The respondent was employed in a provincial government department. A provincial government is part of the state. Accordingly, unless there is a statutory provision which suggests strongly that there is another entity other than the state which was the respondent's employer, it should be accepted, on the basis of the definition of 'employee' in s 213 of the Act and the

fact that it is common cause that the respondent worked in a provincial government department, that his employer was the state and that, if he had been appointed to the post, his employer would have continued to be the state. Accordingly, the definition of the word 'employee' does not assist counsel for the first and second appellants."

Piercing the corporate veil

The determination of the true employer has arisen in some cases where the employee alleges that he was employed by employer or company 'A', which is then alleged by that employer or company no longer to be operational. Where this is done in order to avoid liability for unfair dismissal, the courts and arbitrators have invoked the notion of 'piercing the corporate veil'.

The phrase 'lifting the corporate veil' was held in the matter of *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd & others* 1995 (4) SA 790 (A) the Appellate Division, as it then was, to mean disregarding the dichotomy between a company and the natural person behind it (or in control of its activities) and attributing liability to that person where he had misused or abused the principle of corporate personality (at 802F-H). The Court held that it has come to be accepted that fraud, dishonesty or improper conduct could provide grounds for piercing the corporate veil (at 802H-803B and 803D). In the employment context the court has pierced the corporate veil where an employer attempts to use that veil to escape his legal obligations towards his employees⁴³.

The concept has been applied in arbitration awards as well. For example in *Marillier and G7 Technologies CC & Another* r[2004] 4 BALR 480 (CCMA) the employee alleged that he had been unfairly retrenched from G7 Technologies ['G7'], a close corporation where he had worked as a production supervisor. The arbitrator found that G7 had been closed down by its members, not for operational reasons as claimed by the members but because it suited the two members to do so, and that

⁴³ See for example the decisions of *Media Workers Association of SA & others v Facts Investors Guide (Pty) Ltd & another* (1986) 7 ILJ 313 (IC) at 315C-D; *SA Allied Workers Union v Contract Installations (Pty) Ltd* (1988) 9 ILJ 112 (IC) at 115H-116C; *Paper Printing & Allied Workers Union v G Kaycraft (Pty) Ltd & another* (1989) 10 ILJ 272 (IC); and *Wooll v Locomotion Foods t/a The Home of the Chicken Pie* [1994] 11 BLLR 117 (IC). In *Airlink Pilots Association SA v SA Airlines (Pty) Ltd & Another* (2001) 22 ILJ 1359 (LC), the concept was applied, not to the determination of the true employer but who the real decision maker was with regard to the abandoning of the seniority system and the amendments to the other terms and conditions relating to the training bond periods and the extended notice period which formed the subject of the dispute.

they had decided to run the business of G7 under the name of “DSB Concepts CC”. After analysing the evidence the arbitrator concluded that “the two CC’s functioned virtually interchangeably”. The arbitrator held that in order to be able to pierce the corporate veil in terms of the *Cape Pacific Ltd* case it must be shown that there was fraud, dishonesty or improper conduct. In this regard the arbitrator held that the fact that Marillier was not considered for the position of operations manager in the business of DSB Concepts cc is “improper conduct on behalf of the members of the two CCs”, and that therefore it was appropriate that “there should be piercing of the corporate veil in regard to this matter and that both the CC’s involved should be jointly and severally liable for any award that is made in regard to this matter.”

In *Mahlinza and Patel t/a Kas Cellular* KN DB 8934-04⁴⁴, the employer alleged that he was no longer in business, and that the business for which the employee worked had been closed down and was no longer operating as it was in debt. The employee alleged that the business was still operating and that he had been unfairly dismissed. The arbitrator conducted an inspection in loco during which it was observed that the ‘corner shop’ where the employee alleged he in fact worked from at the time of his dismissal was still operating and was run by Patel’s wife. The premises from which Patel alleged the employee worked was 20 meters further up the road from the corner shop, and was now occupied by a pharmacy. The arbitrator concluded that he was satisfied that employer still conducted a business, and that it was probable that the employee worked at the corner shop, and that this attempt to be dishonest was sufficient to allow him to pierce the corporate veil. The dismissal of the employee was held to be unfair, and employer was ordered to pay him compensation.

4.4 The job applicant

Section 186(2)(a) of the Act refers to unfair conduct by the employer relating to the promotion ... of an employee”. The question arises as to whether an applicant for a job may be a party to a promotion dispute.

Section 9 of the Employment Equity Act No 55 of 1998 provides that for the purposes of sections 6 [which deals with the prohibition of unfair discrimination], section 7 [which deals with medical testing] and section 8 [which deals with

⁴⁴ An unreported arbitration in which the writer was the arbitrator.

psychological testing and other similar assessments, 'employee' includes an applicant for employment.

It is suggested that in order for a promotion dispute to arise, there must be an existing employment relationship between an employee and employer at the time the dispute arose. For this reason job applicants can not be a party to a promotion dispute; a job applicant can not be promoted nor can a job applicant be a candidate for promotion. Although the EEA protects job applicants from discrimination, the Labour Court would have no jurisdiction if the applicant is not an employee.

4.5 Other candidate/s

In *PSA v Department of Justice & others* (2004) 25 ILJ 692 (LAC), the court stated “.....that the commissioner could, and the CCMA can, in an arbitration of a dispute such as this one, make findings that could be very damaging to third parties. To make it worse, some of the arbitration awards issued by the CCMA are published in the *Industrial Law Journal*, which is read widely within legal circles. As it turned out in this case the commissioner made a finding that is very detrimental to the two appointees, namely, that “as an objective fact” they are not suitable for the positions to which the Minister appointed them. It goes without saying that the commissioner was saying that they should not have been appointed to those positions. In conducting the arbitration proceedings to finality and making such a damaging finding against the appointees without affording them any opportunity to be heard or joined in the arbitration proceedings, the commissioner committed a gross irregularity which vitiates the entire arbitration proceedings over which he presided. The parties before him must also bear some blame for not drawing his attention to the need to join or hear the appointees.

The court noted that “a finding that they were unsuitable for appointment to such positions could no doubt detrimentally affect their existing rights and interests” [at para 40].

Joinder of other candidates

For this reason, it is submitted that is it necessary to join all candidates who were given a score higher than that given to the promoted employee during the selection process, at least. At most and in some situations it may be necessary to join all short listed candidates.

This can have dire consequences for all concerned. For example, in one case⁴⁵ the arbitrator, acting in accordance with the *PSA v Department of Justice & others* case ordered the two successful candidates to be joined. There were 28 candidates for the two posts which were the subject of the dispute, and 8 candidates who were short listed. The evidence was that the selection panel had based their assessment of the relative merits of the candidates on criteria listed on an evaluation form which was not in compliance with the promotion policy of the respondent; in fact it was entirely the incorrect form. The arbitrator found that the entire promotion process was flawed and ordered that the process be started de novo. This meant in effect that the two successful candidates would now have to apply once again for the posts they had been promoted to.

Another consequence of the *PSA v Department of Justice & others* case is that an arbitration, intended to be quick and fair in terms of section 138(1) of the Act, may become encumbered with numerous respondents, all of whom will be entitled to legal representation. It is submitted that while the *PSA v Department of Justice & others* case is technically and legally correct, it has the potential effect of complicating an already lengthy process.

There is in addition a further potential problem. Rule 26 of the Rules for the Conduct of Proceedings before the CCMA states

26 How to join or substitute parties to proceedings

(1) The Commission or a commissioner may join any number of persons as parties in proceedings if their right to relief depends on substantially the same question of law or fact.

(2) A commissioner may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.

(3) A commissioner may make an order in terms of subrule (2)-

(a) of its own accord;

(b) on application by a party; or

(c) if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a party.

(4) An application in terms of this rule must be made in terms of rule 31.

(5) When making an order in terms of subrule (2), a commissioner may-

(a) give appropriate directions as to the further procedure in the proceedings; and

⁴⁵ *Titus and South African Police Services* PSSS 116-03/04, an arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council, in which the writer was the arbitrator.

(b) make an order of costs in accordance with these Rules

(6)

(7) An application to join any person as a party to proceedings or to be substituted for an existing party must be accompanied by copies of all documents previously delivered, unless the person concerned or that person's representative is already in possession of the documents.

(8) Subject to any order made in terms of subrules (5) and (6), a joinder or substitution in terms of this rule does not affect any steps already taken in the proceedings.

The question arises whether the joinder must take place at the conciliation phase or whether it can take place in the arbitration stage. If the latter, it would mean that the joined parties have not participated in the conciliation, a fundamental requirement and jurisdiction pre-condition⁴⁶ to an arbitration by the CCMA or council. It is submitted that Bosch⁴⁷ et al's suggestion that Rule 26(8) is "too broad, and in this respect *ultra vires*" is correct.

Joinder of the Public Service Commission

It is necessary in some promotion disputes in the public service to join parties, other than candidates to the promotion dispute, as well - for example the Public Service Commission [PSC] where the applicant seeks the remedy of 'protective promotion'. This form of remedy was a form of promotion set out in terms of the Public Service Staff Code. Part B/VI/III item 9 of these procedures states that:

'(1) Protective promotions are effected 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.' [My editing]

The question arose in *PSA on behalf of Dalton & another v Department of Public Works* [1998] 9 BLLR 1177 (CCMA) where the arbitrator considered the remedy and stated-

'In my view the only reasonable determination I can make in the circumstances is to order the employer to reinterview the applicants with a view to considering whether they are worthy of protective promotion in terms of clause 9 of the code. The problem, however, is that such promotions can only be made on the recommendation of the Public Service Commission. I cannot make an order binding on any such commission as none was joined in this application. The most I can do, therefore, is to

⁴⁶ See section 191(4) LRA.

⁴⁷ D Bosch, E Molahlehi, W Everett *The Conciliation and Arbitration Handbook*, Lexis Nexis 2004 page 252 at note 46.

order the employer to refer the matter to the relevant commission with the request that Messrs Bradfield and Dalton be considered for protective promotion. A copy of this award must also be furnished to the said commission.' (Emphasis added.)

In *Lutze v Department of Health* (2000) 21 ILJ 1014 (CCMA) in which the PSC was not joined as a party, the arbitrator was nevertheless of the view that he could “grant by way of relief 'protective promotion' under the rubric of reasonable relief as provided by schedule 7 item 4(2)”.

In *Department of Justice v Commission For Conciliation, Mediation & Arbitration & Others* (2001) 22 ILJ 2439 (LC), Waglay J stated that

“Protective promotion essentially amounts to an undertaking by the employer to promote the employee, who is nevertheless retained in the post of lower grading pending a post of suitable grading becoming available.” [My editing]

In that case the arbitrator, whose award was the subject of the review application before the court, had ordered the Department of Justice to grant the remedy of protective promotion to the two applicants. The court stated that the Department was not entitled to make the decision to afford an employee protective promotion of its own accord, because this was the function of 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'. As the PSC was not joined as a party to the proceedings the arbitrator did not have the power to order or to recommend protective promotion and the award was set aside.

Best practice when referring to other candidates to a promotion dispute

It is a feature of promotion disputes, particularly those which arise in the public service, that astounding numbers of persons apply for promotion to one post. The reason is that promotion has become one of a few channels through which employees may gain an expedited increase in remuneration and benefits. Why these candidates for the post may not be parties to the promotion dispute in the same way in which the successful candidate is, a practice has developed with regard to them which needs to be noted.

In *Department of Justice v Commission for Conciliation, Mediation & Arbitration & Others* (2004) 25 ILJ 248 (LAC), four candidates were short listed for the post. Zondo JP stated

“I do not propose to refer to them by their full names or surnames” and then referred to them as “Mr R, Mr V Z, and Ms S N” [at paragraph 6].

The reason for doing so is similar to that for the successful candidate; it is because the nature of a promotion dispute is to compare the relative strength of one, or more, candidates for the post against that of the Applicant and the successful candidate. In doing so the arbitrator or judge may well come to a finding as to their relative merits, and such a finding may well detrimentally affect their existing rights and interests.

As other candidates for the post may be dragged into the dispute, or referred to in evidence simply because they also applied for the post now claimed by the Applicant, it is suggested that the best practice is to follow Zondo J’s lead and refer to them by their initials - as “Mr A”, “Ms VB” and so on.

4.6 The employee’s union

It is trite law that a union has *locus standi* to institute legal proceedings on behalf of its members⁴⁸. The question arises whether a union has the right to represent an employee who was not a member of the union at the time of the unfair labour practice.

It was decided as long ago as 1991, in the matter of *General Industries Workers Union of SA & others v L C van Aardt (Tvl) (Pty) Ltd* (1991) 12 ILJ 122 (LAC) that “The employee represented by the union does not have to have been a member of the union at the date of his dismissal. An employee may with a view to enforcing his legal remedies join a union after his dismissal as long as he joins before the statutory conciliation process is embarked upon. If the employer denies that an employee was a member at the time the conciliation procedures were set in

⁴⁸ *NUM v Marievale Consolidated Mines Ltd* (1986) 7 ILJ 123 (IC) 125A-134A; *Marievale Consolidated Mines Ltd v The President of the Industrial Court & others* (1986) 7 ILJ 152 (T); *NUM v Buffelsfontein Gold Mining Co Ltd (Beatrix Mines Division)* (1988) 9 ILJ 341 (IC) at 345I-346D; *Western Platinum Ltd t/a Western Platinum Mine v Maytham NO & others* (1995) 16 ILJ 1529 (IC) at 1528F-G; *SA Workers Union v Sasol Industries (Pty) Ltd & another (1)* (1989) 10 ILJ 1017 (IC) at 1022H-1025C. *General Industries Workers Union of SA & others v L C van Aardt (Tvl) (Pty) Ltd* (1991) 12 ILJ 122 (LAC) at 125A-C.

motion, this dispute is normally easily resolved by reference to stop-order forms or union membership cards"⁴⁹.

It is submitted that the same principle applies to promotion disputes as both concern disputes of right, and should be permitted on policy grounds as well. With regard to the latter, Kahanovitz argues that

"Without the assistance of trade unions in bringing the cases of their members to court much of what has become the South African system of labour law would simply not have taken place. Resolution of labour disputes by unions assisting members to bring matters to court is to be encouraged. As a matter of policy there is no good reason for standing to be too readily denied on technical grounds in cases where the union members are clearly seeking the assistance of the court in the resolution of a live dispute".⁵⁰

Section 200 of the LRA provides as follows-

200 Representation of employees or employers

(1) A registered trade union or registered employers' organisation may act in any one or more of the following capacities in any dispute to which any of its members is a party-

- (a) in its own interest;
- (b) on behalf of any of its members;
- (c) in the interest of any of its members.

(2) A registered trade union or a registered employers' organisation is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings.

4.7 Conclusion

This chapter has discussed the question of who may be a party to a promotion dispute. It is suggested that the parties to a promotion dispute may be

- the employee,
- a union of which the employee is a member,
- the employer of the employee,
- unsuccessful candidates, and
- parties against whom a remedy may be sought, such as the Public Service Commission.

⁴⁹ Kahanovitz, 'The Standing of Unions to Litigate on behalf of their Members' (1999) 20 *ILJ* 856.

⁵⁰ *Op cit* 860

Chapter 5: The Promotion Dispute

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5.1 Introduction

In this chapter the question of whether a promotion dispute is one of interest or of right is discussed, and show how the dispute was developed by the Industrial Court under the unfair labour practice jurisdiction of the Labour Relations Act 1956. Thereafter the issue in dispute is explained, covering the substantive and procedural fairness of the dispute. The question of when a promotion dispute arises and the referral of the dispute are then discussed.

5.2 The nature of the promotion dispute: dispute of interest or of right?

The question has arisen, and continues to arise, as to whether a dispute concerning the failure or refusal of an employer to promote an employee is a dispute of interest or of right. The reason why this question needs to be determined is that a dispute of interest is not one over which the Industrial Court, Labour Court, CCMA or Bargaining Council has jurisdiction. The problem is that promotion also usually results in an increase in remuneration, and if the claim is only for an increase in remuneration or if the dispute is determined as being solely one concerning remuneration, the CCMA, council or Labour Court does not have jurisdiction over what is then seen as being a dispute of interest.

The following explanation has been approved in numerous cases, including *Hospersa & Another v Northern Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC)⁵¹

'Broadly speaking, disputes of right concern the infringement, application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, while disputes of interest (or "economic disputes") concern the creation of fresh rights, such as higher wages, modification of existing collective agreements, etc. Collective bargaining, mediation and, as a last resort, peaceful industrial action, are generally regarded as the most appropriate avenues for the settlement of conflicts of interests, while adjudication is normally regarded as an appropriate method of resolving disputes of right.⁵²

In *Hospersa* the court also explained the policy behind the distinction. Disputes of interest are to be dealt with through collective bargaining, and are therefore not arbitrable; an applicant should not be permitted to cloak what is in fact and law a dispute of interest as a dispute of right as if an individual employee could legitimately insist on his or her particular case being separately adjudicated, whether through arbitration or otherwise, as the result would inevitably be a fundamental subversion of the collective bargaining process.

In *Mineworkers Union & another v AECI Explosives & Chemicals Ltd, Modderfontein Factory* [1995] 3 BLLR 58 (IC), in which the Applicant alleged that the Respondent had committed an unfair labour practice in terms of the LRA 1956 as it had failed to promote him, the Industrial Court held that "what is sought by the Second Applicant is a pure economic interest namely to be promoted. That falls squarely in the area of a "dispute of interest" and as such this court does not have jurisdiction over the matter". However, in *Weyers v Regshulpraad* [1996] 6 BLLR 813 (IC) which was also heard in terms of the previous Labour Relations Act, the court dismissed the employer's point *in limine* to the effect that a dispute concerning the promotion of an employee was an interest dispute.

A dispute concerning the employee's entitlement to an acting allowance while acting in higher post, was held not be a dispute over 'benefit', and therefore a dispute of

⁵¹ Followed in *Transnet Ltd v Commission For Conciliation, Mediation & Arbitration & Others* (2001) 22 ILJ 1193 (LC).

⁵² Rycroft & Jordaan, *A Guide to SA Labour Law* (Juta 1992) at 169.

interest⁵³. A dispute concerning the employer's refusal to backdate the employee's promotion was held not to be a dispute concerning failure or refusal to promote the employee but was 'merely a ruse for claiming unpaid wages' and as such the dispute was one of mutual interest⁵⁴.

In *National Commissioner of the SA Police Service v Potterill No & Others* (2003) 24 ILJ 1984 (LC).⁵⁵ the dispute was referred by the employees for arbitration on the basis that the employer was alleged to have committed an unfair labour practice in terms of item 2(1)(b) of the Act. In the referral documents the employees made no mention of the term 'promotion' and did not indicate that promotion was the desired outcome; they merely claimed an increase in salary. On review of the arbitrator's award the employer alleged that the dispute referred was one of interest, that a claim for salary is an 'interest dispute' and that the dispute did not concern an alleged unfair labour practice. Furthermore, whether or not the employer had acted unfairly, its conduct was not conduct 'relating to the promotion' of the employees. The court was of the view that there is no merit in the employer's averments because-

"[16] The substance of the dispute pertained to the employees' complaint that their posts had been regraded but, despite the fact that they had continued to be employed in the same posts and despite the requirements of regulation 24, their salaries had not been increased. In my view this is a complaint about alleged unfair conduct 'relating to the promotion' of the employees.

....

[18] The employees' complaint that regulation 24(6) had not been applied with regard to their posts and their request that their salaries be increased to the salary level of directors must, in my view, be construed as a complaint that they were entitled to be, but had not been, promoted. By alleging that their employer was guilty of an unfair labour practice they impliedly alleged unfair conduct on its part 'relating to' its failure to promote them. Having regard to the substance of the dispute as the parties understood it I am satisfied that this was a dispute about alleged unfair conduct relating to promotion.

...

[20]The employees' case was that they were the victims of an unfair labour practice and that, as a matter of law, they were entitled to salary increases. This was a 'dispute of rights'. The fact that the remedy sought was an increase in salary does not change the character of the dispute. A claim for a higher salary as a matter of right is not an 'interests dispute'." [My editing]

⁵³ *SALSTAFF and Spoornet* (2002) 23 ILJ 1956 (BCA).

⁵⁴ *PSA obo Wiese and Department of Public Works* (2000) 9 CCMA 6.9.3.

⁵⁵ (2003) 24 ILJ 1984 (LC).

In the recent case of *Department of Justice v CCMA & others* [2004] 4 BLLR 297 (LAC) which concerned an allegation of an unfair labour practice in terms of item 2 of schedule 7 of the Labour Relations Act 66 of 1995, the employer argued that a promotion dispute was a dispute of interest and not a dispute of right, that item 2(1)(b) contemplated disputes of right and not disputes of interest, and that an unfair labour practice is confined to disputes of right created *ex contractu* or *ex lege*. The Court dealt with this argument as follows-

[53] The answer to this argument is simply that item 2 of Schedule 7 is one of the statutory provisions that seek to give content to the constitutional right to fair labour practices which is entrenched in the Constitution. It creates a statutory right not to be subjected to an unfair labour practice that takes the form of conduct spelt out therein..... Item 2(1)(b) confers on an existing employee a right not to be subjected to an unfair labour practice that takes the form of conduct relating to promotion, demotion, training of an employee, disciplinary action short of dismissal and the provision of benefits to an employee.

[54] The obligation that item 2(1)(b) places on an employer is not to act unfairly towards an existing employee in relation to promotion, demotion, disciplinary action short of dismissal, the training of an employee and the provision of benefits to an employee. The right that an applicant for employment and an employee have underitem 2(1)(b) are rights conferred on them *ex lege*. For that reason a dispute concerning whether the conduct of an employer relating to promotion is an unfair labour practice is a dispute of right and not a dispute of interest." [My editing]

It is therefore now settled that a promotion dispute is a dispute of right.

5.3 Disputes about 'conduct relating to promotion'

In the *Department of Justice v CCMA & others* [2004] 4 BLLR 297 (LAC) matter the employer also alleged that a dispute about whether a decision not to appoint a candidate to a post is an unfair labour practice is not a dispute that falls within the ambit of item 2(1)(b), as what item 2(1)(b) labels as an unfair labour practice in relation to promotion is "conduct relating to promotion" and not promotion itself. The argument was that, based on this interpretation of item 2(1)(b) if the dispute concerned promotion itself then the court did not have jurisdiction over the dispute.

The court responded to this technical point by agreeing that there was a problem with the way item (2)(1)(b) was drafted, stating that it was "too loose and imprecise", but was of the view that "[T]here is no reason why the Act should not have simply referred to an employer's decision to promote or not to promote as opposed to "conduct relating to promotion." It also would not make much sense for the Act to

cater for conduct relating to promotion without catering for the actual promotion or non-promotion”.

The Court then adopted a what it called a ‘pragmatic construction’ of item 2(1)(b), and held that the item includes both actual promotion or non-promotion of an employee.

The definition of promotion suggested previously is based on an understanding of promotion as a process, rather than a single fact.

5.4 The issue in dispute: unfair labour practice or discrimination?

An employee who alleges that his employer has failed to promote him unfairly has two potential causes of action. Firstly he can allege that the employer’s failure to promote him amounted to an unfair labour practice. Secondly, he can allege that the employer’s decision not to promote him unfairly discriminated against him.

These causes of action – the unfair labour practice and unfair discrimination, are not mutually exclusive and may be averred in the alternative if the dispute is referred to the Labour Court. It is apparent however, that there are two possible causes of action each of which would lead to a different forum – the CCMA or bargaining council, and the Labour Court, and therefore a question of jurisdiction may arise.

For example in the case of *Samuels and SA Police Service* (2003) 24 ILJ 1189 (BCA) the employee alleged that the SAPS had committed an unfair labour practice in that it had failed to promote him. The SAPS alleged that the reason why the employee had not been promoted was because he had been fairly discriminated against, and argued that therefore the bargaining council had no jurisdiction over the dispute. The arbitrator noted that the employee had referred the dispute as an unfair labour practice and had not averred that he was discriminated against. Furthermore, neither the opening statement of the employee’s representative in the arbitration nor his statement of case contained an averment that the employee had been discriminated against. The arbitrator concluded on the basis of the authority of *City of Johannesburg v Bean NO & others* (2002) 23 ILJ 717 (LC), and *Department of Justice v CCMA & others* (2001) 22 ILJ 2439 (LC) that “The applicant is the master

of the dispute and has the right to choose the cause of action and grounds upon which it relies”.

Where there are two causes of action available to an employee as there are elements of discrimination in the employee’s claim, the arbitrator has the duty to determine what the main issue to be decided is and whether the dispute is one to be determined by arbitration in the CCMA. The arbitrator may, in certain circumstances, be required to look at the objective situation to determine what the "real issue" before him is. For example in *City of Johannesburg v Bean NO & others* (2002) 23 ILJ 717 (LC), the parties to the dispute entered into an arbitration agreement which stipulated her powers and her terms of reference as follows:

'1 The respondent's failure to appoint (our member) Mr I D Bezuidenhout to the position of project manager as the selected successful candidate by the interview panel, without valid and substantiated reasons; and

2 the respondent's actions undermine sound labour practices within the local government [sic].'

The arbitrator then determined that the dispute “does not relate to an unfair dismissal. Therefore, it would have to be "classified" as an unfair labour practice dispute in terms of schedule 7 of the Act”. On review this determination was alleged by the employer to be incorrect and fatal as the arbitrator failed to appreciate the true nature of the dispute and therefore exceeded her powers in pursuing the matter, as the dispute “may have been one of unfair discrimination and in that context capable of determination not by arbitration but only by this court”. The court [per Jammy AJ] disagreed and held that the arbitrator’s classification of the dispute as one falling within the ambit of schedule 7 to the Act is not open to question.

In *Department of Finance v Commission For Conciliation, Mediation & Arbitration & Others* (2003) 24 ILJ 1969 (LC), in a review of an arbitrator’s award, the representative for the applicant department contended that the essence of the employee’s complaint was that she was unfairly discriminated against on the basis of race and/or gender because she was an Indian female and that, therefore, the dispute fell under item 2(1)(a) of part B of schedule 7 to the Act. The court referred to some what it called “pertinent allegations” in her 'statement of case' that

'This dispute is one in which the applicant trade union alleges on behalf of its member, [Ms P], that the [Department of Finance] has committed an unfair labour practice, in that the [department] has

engaged in unfair conduct in relation to the promotion of [Ms P] concerning the post of deputy director: salaries (hereinafter referred to as "the post") within the [department's] establishment.' [my editing]

The Court concluded that her pleading was "clear and straightforward. There was not the slightest ambiguity thereabout. The dispute that she referred to the CCMA from the outset appears to have been based on alleged unfair labour practice."

The court continued

[19] The mere fact that in the applicant's so-called 'announced policy' mention or reference was made to race and/or gender did not, in my view, in the context in which those words were used, detract from the dispute as being one of an unfair labour practice. If anything, reference to race and gender could only be regarded as merely peripheral, which I do not think detracts from the crux of Miss Pillay's complaint, namely, that of alleged unfair conduct on the part of the applicant relating to her promotion, which is a dispute arbitrable by the CCMA in terms of item 2(1)(b) of schedule 7.

[20] If it does happen, incidentally, that this peripheral issue has a bearing in the determination of the main issue, which main issue is that of alleged unfair conduct on the part of the employer relating to Miss Pillay's promotion then, in my C view, the CCMA would be competent to deal with it.

[21] In this regard, the CCMA would not have usurped the powers not conferred on it, but it would be acting appropriately and competently.

The court then referred to the matter of *Department of Justice v Commission for Conciliation, Mediation & Arbitration & others* (2001) 22 ILJ 2439 (LC). discussed below, and concluded that

[22]the 'core issue' is the unfair labour practice dispute, which falls within the jurisdiction of the CCMA, and that reference to race and gender in the context of the 'announced policy' on appointments by the applicant would be a peripheral issue, which the CCMA could deal with in its arbitration procedures.

In the matter of *Department of Justice v CCMA & others* (2001) 22 ILJ 2439 (LC) the Court, said-

"[14] [T]he following principles are applicable in situations where two possible causes of action are present, and each would lead to a different forum having jurisdiction:

- The applicant is the master of the dispute and has the right to choose the cause of action and grounds upon which it relies;
- 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.

- 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.
- 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).
- In determining the extent of the CCMA's jurisdiction, the wording of the empowering statutes should be given effect to."

In *Schoeman and SAPS PSSS 1807*⁵⁶, the arbitrator said

An arbitrator has a duty to determine the real dispute. This is the case because there are no pleadings as such filed by the parties. In determining the real dispute before me I am reliant on the opening statements and the documents filled by the parties. In my view the Applicant must show at the outset a prima facie case of unfair labour practice on the part of the Respondent. The Applicant does so in that she alleges a number of grounds which individually or collectively could amount to an unfair labour practice. These are [at page 24]: that she was not informed of the round of promotions in 2002; she was told her file was lost; candidates whose evaluation mark was far lower than hers were promoted; she had more experience than some candidates. [The employee's representative] repeats and expands the Applicant's version of event. He repeats again and again that the 'dispute is not about discrimination'.

While it is correct that there may be two causes of action available to the Applicant as there are elements of discrimination in the Applicant's claim, this does not make the real dispute before me one of discrimination. It is therefore not correct that the moment the employer argues affirmative action as justification for a decision about promotion, the real dispute is about discrimination. [see Garbers C, "Promotions: keeping abreast with ambition" in Contemporary Labour Law, volume 9 No 3 October 1999, on the basis of the case of *SATA obo Van Der Mescht v Telkom SA (Pty) Ltd* [1998] 6 BALR 732 (CCMA)].

If the promotion process is the subject of a collective agreement in the form of an employment equity plan, the real dispute between the parties has been held not to concern the application and interpretation of the collective agreement⁵⁷.

⁵⁶ An unreported arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council in which the writer was the arbitrator.

⁵⁷ *SALSTAFF and SA Port Operations* (2003) 24 ILJ 263 (BCA).

If the dispute concerns only an allegation of unfair labour practice, the labour court has no jurisdiction over the matter. In response to the suggestion that the court should hear the unfair labour practice case of the applicant, Landman J in *Marnitz v Transnet Limited t/a Portnet* (1998) 19 ILJ 1501 (LC), stated that 'It is perfectly clear that this court has no jurisdiction to adjudicate on a matter referred to in item 2(1)(b) ...', and noted the limitation of the court's jurisdiction in s 157 of the LRA and to the fact that the respondent had not consented to arbitration, and then commented

[94 From a practical point of view that submission has a number of attractive features. However, it is a result that requires legislative amendment. Given the present statutory framework, an outcome of that sort lies beyond the power of this court. This follows from: the exclusive assignment of unfair labour practice disputes to the CCMA; the provisions of s 157(5) of the LRA; the prerequisite of consent in s 158(2)(b) for such dispute to be dealt with by the Labour Court; the anomalous position that would arise if this court were at one and the same time to adjudicate an unfair discrimination action as a court and conduct an unfair labour practice determination as an arbitrator.

In *Coetzer & others v Minister of Safety & Security* (2003) 24 ILJ 163 (LC); [2003] 2 BLLR 173 (LC) the court stated

"[13] I might add that the applicants' reliance, in their statement of case, on item 2(1)(b) of schedule 7 to the Labour Relations Act 66 of 1995, ie a complaint relating to an employer's unfair conduct regarding promotion, is misconceived. This court has no jurisdiction to entertain such an application. It falls within the jurisdiction of a bargaining council or the CCMA, as the case may be."

In *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC) the court stated as follows-

[91] I am unable to agree with the submission that an action based on unfair discrimination is essentially congruent with one brought on grounds of an unfair labour practice. Although each may pursue the same result, being a particular appointment, they are conceptually and procedurally distinct.

5.5 When does a promotion dispute arise?

The question is whether the dispute arises when the grievance is lodged, or on the date when the grievant was informed that he was not promoted? It is necessary to know when the dispute arises because a promotion dispute must be referred within a reasonable time, or within "90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence"⁵⁸.

⁵⁸ See Section 191(1)(b)(ii) of the LRA, which was introduced by the Labour Relations Amendment Act No. 12 of 2002, and was effective from 1 August 2002.

The meaning of 'dispute': This question has been debated in many forums over the years. In *Durban City Council v Minister of Labour & another* 1953 (3) SA 708⁵⁹ Silke J stated:

'I think it is unnecessary - and it certainly would be unwise - to attempt a comprehensive definition of the word "dispute" as used in section 35(1) of the Industrial Conciliation Act. But, whatever other notions the word may comprehend, it seems to me that it must, as a minimum, so to speak, postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions.'

This approach was followed in *Estate Bodasing v Additional Magistrate, Durban & another* 1957 (3) SA 176 (D). where Caney, J said the following:

'The word dispute must, I think, be taken to have been used by the rulemaking body to denote at least the positive state of the parties having disagreed, a state of affairs which would not necessarily arise on the making of an application....'

In *Escom v The Regional Director, Department of Manpower & others* (1990) 11 ILJ 1251 (C) Scott J also agreed with the approach in the Durban City Council matter and stated:

'I am satisfied that an unequivocal rejection by an employer of a demand made on behalf of an employee that he be taken back into employment after being dismissed and communicated to the employee would give rise to a dispute....'

Furthermore in *SACCAWU v Edgars Stores Ltd & another* (1997) 18 ILJ 1064 (LC) Zondo J (as he then was) followed the above approach and added the following:

'Although I think not every disagreement or difference of opinion which arises between two parties constitutes a dispute or should be elevated to a dispute ... there is no basis for the departing from Silke J's minimum requirements of when a dispute can be said to exist in any given situation.'

In *Public Servants Association & others v Department of Correctional Services* (1998) 19 ILJ 1655 (CCMA) the arbitrator relied on the *Durban City Council* case and was of the view that a dispute about an unfair labour practice cannot be said to arise until in 'deed or words the employee or his agent has, at the very least, shown that he disputes the fairness of the employer's conduct or has demanded that the employer promote him. It only arises once the employer has in word or by conduct

⁵⁹ At 712A.

rejected the employee's intimation that the conduct is unfair or until the employer has rejected the employee's demand'.

In *Zondi & others v The President of the Industrial Court & another* [1997] 8 BLLR 984 (LAC) the court stated as follows-

A court has the power to refuse to entertain a review initiated after undue and unreasonable delay. There are two main reasons for the rule. The first is that unreasonable delay may cause prejudice to other parties. The second is that it is desirable that finality should be reached within a reasonable time in respect of judicial and administrative decisions. Where it is in issue whether the review was brought within a reasonable time, the Court must decide: (a) if the proceedings were brought within a reasonable time, and (b) if not, whether the unreasonable delay should be condoned. As far as (a) is concerned, the Court does not exercise a discretion; it examines the facts in order to determine whether the period that has elapsed was, in the light of all the circumstances, reasonable or unreasonable. The Court must make a value judgment in the sense of the Court's view of the reasonableness of the period that has elapsed in the light of all the circumstances. To equate such a value judgment with a discretion is, however, not justifiable legally or logically. As regards (b), the Court exercises a discretion. The discretion must be exercised judicially, taking into account all relevant considerations. See *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (AD) at 39C–D; 41A–F; *Se-tsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie en 'n ander* 1986 (2) SA 57 (AD) at 86C–G; *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and others* 1993 (2) SA 245 (C) at 250F–J; *Radebe v Government of the Republic of South Africa and others* 1995 (3) SA 787 (N) at 798A–799B. Among the considerations the Court should take into account are the extent of the delay, the explanation for the delay, prejudice to other parties and the degree of the prejudice: *Jeffery v President, South African Medical and Dental Council* 1987 (1) SA 387 (C) at 390C–E; *Unicorn Lines (Pty) Ltd v Chairman, Local Road Transportation Board, Cape Town and others* 1988 (1) SA 665 (C) at 668E–F; *Sedgefield Ratepayers' and Voters' Association and others v Government of the Republic of South Africa and others* 1989 (2) SA 685 (C) at 696C–F. Another factor to be taken into account is the prospect of the applicants succeeding in the review application, unless the delay is so great and the explanation for the delay so inadequate that the Court may be moved to refuse condonation, regardless of the prospects of success: *Ferreira v Ntshingila* 1990 (4) SA 271 (AD) at 281J–282A; *NUMSA v Jumbo Products CC* 1996 (4) SA 735 (AD) at 741E–I.

In *Clarke and SA Police Service* (2002) 23 ILJ 234 (BCA) the arbitrator was called upon to answer this question and concluded that fact that the applicant became aware of the respondent's failure to promote him in 1997 did not create a dispute as there was no evidence before him to show that the Applicant did not accept the Respondent's decision not to promote him. The dispute was held to have arisen on the date on which the Applicant was informed that the respondent refused to

promote him which was some three years later. As the Applicant had referred his dispute within 30 days, the time laid down by the council, of this date the council had jurisdiction to arbitrate the dispute.

5.6 The referral of a promotion dispute

Where must a promotion dispute be referred?

Section 191 of the Act states

191 Disputes about unfair dismissals and unfair labour practices

(1) (a) If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice, the dismissed employee or the employee alleging the unfair labour practice may refer the dispute in writing to-

- (i) a council, if the parties to the dispute fall within the registered scope of that council; or
- (ii) the Commission, if no council has jurisdiction. [My underlining]

The time period before which an employee must refer a promotion dispute

Prior to 1 August 2002 a promotion dispute must have been referred within a reasonable time, and after that date the dispute must be referred within 90 days of the date of the unfair labour practice or within 90 days of the date on which the employee became aware of the unfair labour practice⁶⁰.

The dispute must be referred within a reasonable time: In the *Clarke* case the facts were that in 1997 the applicant applied for the post of senior superintendent in the SAPS, was assessed and received the second highest score. The selection committee recommended him for the post, but the national commissioner appointed the candidate with the highest score. The Applicant was informed of this decision on or about 13 November 1997. In September 2000 the applicant requested certain information from the office of the national commissioner and discovered that he was the candidate recommended by the selection committee, and he then lodged a grievance on 21 January 2001 and referred a dispute to the council on 18 May 2001. The employer raised a point *in limine* at the arbitration to the effect that the Applicant, by waiting for more than three years after becoming aware of the national commissioner's decision not to promote him, had failed to refer the dispute within a reasonable time and had failed to apply for condonation for the delay in the referral.

⁶⁰ In terms of section 191(1)(b) of the Act.

The arbitrator considered the case law on the subject. He noted that in *Sithole v Nogwaza NO & others* (1999) 20 ILJ 2710 (LC); [1999] 12 BLLR 1348 (LC) that even where the dispute is one over the CCMA has jurisdiction to arbitrate, there is no obligation to deal with the dispute where there has been unreasonable delay. The basis on which such a denial can be justified, is postulated in the maxim 'vigilantibus non dormientibus lex subvenit'. This maxim is analysed clearly in the case of *Pathescope Union of SA Ltd v Mallinik* 1927 AD 305 where Stratford AJA, said the following about the doctrine:

'That the plaintiff may, in certain circumstances, be debarred from obtaining relief to which he would ordinarily be entitled because of unjustifiable delay in seeking it is a doctrine well recognised in English Law and adopted in our own Courts. It is an application of the maxim vigilantibus non dormientibus lex subvenit. The very nature of the doctrine necessitates its being stated in general terms.

Justice Stratford went on to say the following

'Where there has been undue delay in seeking relief the Court will not grant it when in its opinion it would be inequitable to do so after the lapse of time constituting the delay. And in forming an opinion as to the justice of granting the relief in face of the delay, the Court can rest its refusal upon potential prejudice, and that prejudice need not be to the defendant in the action but to third parties.' [at 306]:

In *National Union of Mineworkers v Minesa Mining (Pty) Ltd t/a Rustplaas Colliery* (1992) 13 ILJ 1021 (IC) and the cases cited therein⁶¹, De Kock SM correctly pointed out that the Industrial Court differs from the ordinary courts in that the Industrial Court was a court of equity as it based its decisions on whether parties have exercised such rights as they have in law, fairly. He also stated that the court was called upon to have regard to the interests, not only of employees, but also of employers.

In the *Clarke* case the constitution of the bargaining council required an unfair labour practice dispute to be referred within 30 days from the date on which the internal procedures have been exhausted, which the Applicant did. The arbitrator then stated that

"But, I am not convinced that it was the intention of the legislature (the LRA) and those who agreed to the constitution of this council that the council is obliged to accept and arbitrate disputes if there is an

⁶¹ (1992) 13 ILJ 1021 (IC). See also *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court & others* (1986) 7 ILJ 489 (A) at 495E.).

unreasonable delay between the date on which an employer takes a decision, as in this case, not to promote an employee and the date of the referral of a dispute based on such decision to the council.....The LRA, which is the cornerstone of the unfair dispute resolutions in this country, certainly places a premium on expedition. Therefore, to allow a potential grievant or for that matter, a person who is aware that his application for promotion has been turned down to sit back for more than three years and then refer an unfair labour practice dispute, would certainly undermine one of the primary objects of the LRA.”

In *Paul and South African Police Service* PSSS 187-03/04⁶² the Applicant had initiated the grievance procedure in November 2000 but had only referred her dispute in October 2003. The arbitrator held that the delay was unreasonable and that as the Applicant had failed to apply for condonation, the council had no jurisdiction over the application which was dismissed.

In *Vista University v Jones & Another* (1999) 20 ILJ 939 the question as to the date of Applicant’s promotion arose. The arbitrator had concluded that the date of the dispute was September 1997. On review the court applied the *Edgars* case and concluded that the dispute arose in October 1996, that is before the Labour Relations Act, 1995 came into operation, and that the CCMA therefore had no jurisdiction to hear the matter.

How must the dispute be referred?

In terms of section 191(1)(a) the promotion dispute must be referred “in writing”. However, if the parties to the promotion dispute are not members of a council, the dispute is referred to the CCMA by using LRA form 7.11. This is required by Rule 10⁶³. A letter, or statement of case will not amount to a proper a referral to the CCMA. Most councils have also drafted a form similar to LRA 7.11, and this should be used when referring the dispute to the relevant council.

5.7 The promotion dispute

The term ‘promotion dispute’ is therefore a dispute of right in which one or more of the following are in dispute between the parties

- Whether the dispute concerns the “promotion’ of the applicant employee.

⁶² An unreported arbitration award in which the author was the arbitrator.

⁶³ See Regulation 7 of the LRA published in GN R 1442 Government Gazette 25515 of 10 October 2003 read with CCMA Rule 10.

- Whether the process of the promotion was fair or discriminatory. This will be discussed in detail in the next chapters.
- Whether the candidate selected was the most suitable candidate.
- Whether the decision not to promote the applicant employee amounted
 - to an unfair labour practice or
 - unfair discrimination.
- The reasonable remedy.

The term 'promotion dispute' is used to include all of the above.

5.8 Conclusion

It is evident from the above discussion that a promotion dispute is one of right which must be referred within 90 days from the date on which the employer made the decision not to promote him or within 90 days of the date on which the employee became aware of the decision not to promote him.

The promotion dispute may be founded on two possible causes of action:

- that the employer's failure or refusal to promote the employee amounted to an unfair labour practice, and/ or
- that by failing or refusing to promote the employee the employer unfairly discriminated against the employee.

Chapter 6: The Process of Promotion

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6.1 Introduction

"To select is to discriminate, be it the selection of a candidate for appointment to the organisation from a group of applicants, the selection for promotion from a group of employees, the choice of whom to allocate a specific task to, or whom to select for retrenchment"⁶⁴.

In this chapter the process of promotion is discussed within the shadow of the provisions of the Employment Equity Act⁶⁵, section 6(1) of which states "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice...". Section 1 of that Act defines employment policy or practice' to include recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, as well as promotion.

⁶⁴ M Van Wyk *Employment Equity, Part 1: Fairness in the selection process*, South African Journal of Labour Relations, Vol 17 No 4 December 1993.

⁶⁵ No 55 of 1998, referred to as the 'EEA'.

That promotion involves a process is well documented. According to Van Wyk⁶⁶ it is similar to, and overlaps with the procurement process (which is also referred to as the recruitment process), and appointment process⁶⁷ (sometimes referred to as the selection process).

The selection process is not identical in all cases, but may be specific to the needs of the organisation. For example in *Portnet v SALSTAFF obo Lagrange*[1998] 7 BALR 963 (IMSSA) the process was described by the arbitrator as-

“advertising
 short listing by panellists
 interviewing by panel comprising 2 members
 individual scoring and consensus scoring
 selection based on
 affirmative action criteria or
 on merit
 appointment
 direct appointment based on the decision of the panel for affirmative action appointments
 approval and ratification by Turn Strategy Council for non-affirmative action appointments.

In *Walters v Transitional Local Council of Port Elizabeth & another* [2001] 1 BLLR 98 (LC), the court described the process of the promotion as follows-

“The applicants were interviewed by a selection panel consisting of three councillors who were entitled to make the decision and who were advised by Mr Shand, the personnel manager and by Mr Le Roux, the previous incumbent of the vacant post. Union representatives from SAMWU and IMATU were in attendance as observers. Mr Niehaus of IMATU subsequently represented Ms Walters in this matter as her attorney.A questionnaire, to which there was a model answer, was used at the interviews in an attempt to keep the questioning consistent. After the interview the union observers withdrew. The Council officials in attendance made their recommendations and the two councillors, who were left, decided that Mr Sohena was the most suitable candidate. He was subsequently offered and later appointed to the post.”

The “unusual and out of the ordinary circumstances” in which the promotion took place in 1996 when the Minister of Justice abolished the old departments of Justice and created a new department which would be an amalgamation of the previous

⁶⁶ M Van Wyk *Employment Equity, Part 1: Fairness in the Selection Process* South African Journal of Labour Relations Vol 17 No 4 December 1993.

⁶⁷ According to JL Pretorius, ME Klinck, and CG Ngwena, *Employment Equity Law*, Butterworths, August 2001, referred to as ‘Pretorius et al’ hereafter, “Appointment refers to the process of selecting from the pool of recruited candidates the person(s) most suited for the job(s) in question.” [page 8-17]

departments into one national Department of Justice, were discussed in *Vereniging Van Staatsamptenare on Behalf of Badenhorst v Department of Justice* (1999) 20 ILJ 253 (CCMA) The fact that the selection committee was tasked with the logistics of staffing the new establishment, and that it was in the public interest to do so speedily, that there were 12 000 jobs, that candidates could and did apply for multiple positions meant that the selection was done on the basis of the computer printouts of employee profiles and, when necessary, the actual CV's of the applicants. Only candidates identified for senior positions were interviewed. The arbitrator ruled that the procedure adopted by the selection committee was expedient but it was not inherently unfair.

Each of these 'steps' in the promotion process will be discussed.

6.2 The inherent requirements of the job

In order to ensure that the employer selects the most suitable candidate for the position, the process of promotion should begin with a job analysis in order to determine what the minimum requirements are for the job to be performed effectively⁶⁸. According to Lewis⁶⁹, in order to complete a job analysis a job description must be drawn up listing the nature of the job, as well as the specific duties and responsibilities. From this a 'person specification' is compiled which sets out the characteristics of the person who would be suitable for the job. The job description and the person specification are then both used in order to select the most suitable candidate for the promotion post.

This information is then used to create an advertisement which includes "only the most specific and relevant functions of and qualifications for the job"⁷⁰, or what is referred to in the EEA as "inherent requirements"⁷¹ for the job.

An inherent requirement of the job has been said in *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC) to imply an "indispensable attribute" of the job which

⁶⁸ Pretorius et al page 8-7.

⁶⁹ C Lewis *Employee selection* (1992) Stanley Thornes Cheltenham.

⁷⁰ Pretorius et al at page 8-8.

⁷¹ The question of how an inherent requirement is a defence to discrimination is discussed in Chapter 9.

must “relate in an inescapable way to the performing of the job required”⁷². The term “inherent” implies a job requirement that is part of the ‘essential features or ‘defining characteristics’ of the position in question⁷³. According to Pretorius et al the “term ‘inherent’ suggests that the requirement in question must be necessary because of the very nature of the job”⁷⁴.

The Code of Good Practice: The Employment of People with Disabilities⁷⁵ states that the ‘inherent requirements of the job’ are those requirements the employer stipulates as necessary for a person to be appointed to the job, and are necessary in order to enable an employee to perform the essential functions of the job. Furthermore, employers may not include criteria that are not necessary to perform the essential functions of the job because selection based on non-essential functions may unfairly exclude people with disabilities.

The concept of an inherent requirement arises in the Employment Equity Act, 55 of 1998 both as a justification for unfair discrimination⁷⁶, and as the building block from which the key performance areas of a particular job are put together. It is not a simple task to correctly establish what the inherent requirements of a job in fact are. As can be seen from the discussion below, the task is a vital one as practically everything in the process of promotion stems from this analysis. For example, the contents of the advertisement based on the inherent requirements of the job, as are the selection criteria, the short listing process, the interview and the final decision as to which candidate is the most suitable candidate. One way to determine what the inherent requirements of a job are- ex post facto so to speak, is to look at what the advertisement says⁷⁷.

There is presently a lack of case law which may be of assistance to the practitioner in this regard, and these rule on what is or is not an inherent requirement of the job in a particular matter; they do not explain how to determine what the inherent

⁷² While this decision was overturned by the Labour Appeal Court in *Woolworths (Pty) Ltd and Whitehead* [2000] 6 BLLR 640 (LAC), this statement was not overturned by the appeal.

⁷³ Pretorius et al page 5-15.

⁷⁴ Pretorius et al page 5-12.

⁷⁵ As published in GN 1064 in GG 23718 of 19 August 2002.

⁷⁶ Inherent requirements in this context is discussed in Chapter 9.

⁷⁷ In *Whitehead v Woolworths (Pty Ltd)* [1999] 8 BLLR 862 (LC), one of the reasons why the court did not accept that uninterrupted job continuity was an inherent requirement was because the advertisement did not say so. See the discussion of this case below.

requirements of a job are. Nevertheless, an overview of case law in this regard may be of some assistance. In *Hoffman and SA Airways* (2000) 21 ILJ 891 (W) the court controversially stated “[I]t is an inherent requirement for a flight attendant, at least for the moment, to be HIV-negative”. In *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood & Allied Workers Union & Others* (2003) 24 ILJ 974 (LC) Pillay J said there may, however, be “exceptional circumstances” when an HIV – free status is an inherent requirement of the job. In *Lagadien v University of Cape Town* [2001] 1 BLLR 76 (LAC) the court was required to determine what the inherent requirements of the job were. The court stated-

“Of relevance to that examination in the present case is the wording of both the first and second advertisements for the post in question. In neither case was a tertiary-level education stated to be anything other than an advantage. No suggestion or indication is made that it is an inherent requirement of the position or that persons, otherwise suitably appointable, would be disqualified for the lack of it. What are however in’ each advertisement, unequivocally stated as being immutable requirements for the position are “proven skills, experience and knowledge” in specified areas, defined, inter alia, in the first advertisement as:

- working with individual students with disabilities, with their lecturers and with support departments to optimise equal opportunities for the students;

and in the second advertisement as:

- work with the academic sector and support departments to allow students and staff with disabilities to reach their full potential.”

In the matter of *Whitehead v Woolworths (Pty Ltd)* [1999] 8 BLLR 862 (LC) Ms Whitehead applied for the permanent position of “Human Relations Generalist” at Woolworths who accepted that she was a suitable candidate. However, when the fact that she was pregnant came to the attention of management a few days after it had lead to Ms Whitehead to believe that she would be offered the position, she was offered a five-month fixed-term contract instead. Ms Whitehead alleged she had been unfairly dismissed, and in the alternative, that she had been unfairly discriminated against on the ground of her pregnancy as the real reason she was not permanently appointed was that she was pregnant. The employer denied that Ms Whitehead was an employee, which argument was upheld by the court.

However, when dealing with the question of whether she had been unfairly discriminated against, the court took note that the position had been created because of a proposed merger between one of its divisions and an external

company, which had resulted in about 100 new employees' being absorbed into the division. This had created problems which needed to be addressed urgently and for this reason the company had imposed a general requirement that the incumbent should be able to remain in the post for at least a year.

The company's case was that Ms Whitehead could not guarantee that she would be able to remain in the post for least a year, and that as the requirement of "uninterrupted job continuity" applied to all applicants for the position and was "rationally and commercially supportable", and was therefore not had not unfairly discriminated against Ms Whitehead. The court found that there were a number of problems with this argument, one of which was that this requirement, now couched as an inherent requirement, had not been specified as a requirement in the advertisement for the job. The central problem was that the requirement of continuous employment can be reasonable only if the incumbent would, "no matter what fate befalls him or her continue with his/her employment uninterrupted for at least 12 months". The problem, said the Court, was that "[n]o employer can receive a guarantee that an incumbent will remain in its employ for an uninterrupted period of time. In the absence of such guarantee, I am satisfied that to place such a requirement can be no more than a decision based on an arbitrary ground." The court held further that

"In any event the concept of inherent job requirement implies that an indispensable attribute must be job related. To suggest that the requirement as in this case, of uninterrupted job continuity is an inherent job requirement is to distort the very concept. If the job can be performed without the requirement, as it can in this case, then it cannot be said that the requirement is inherent and therefore protected under item 2(2)(c) of Schedule 7 to the Act."

In *Swart v Mr Video* (1998) 19 ILJ 1315 (CCMA) the employer contended that it was an inherent requirement of the job of a shop assistant in a video store to be under 25 years old because the salary was low, because it was necessary for the successful candidate to be compatible with the other young employees in the store, and an older person might be reluctant to accept instructions from a younger person. The arbitrator held that

"I do not agree with the employer's argument that age must be considered when determining compatibility among a group of employees or between a supervisor and an employee. Discrimination may be justified if it is based on inherent requirements of the job and I can find none here. If a person is prepared to work for the salary offered by the employer and is not averse to accepting instructions

from a younger person, there is no reason why that person should not be able to perform the work. If the employer considers compatibility to be an important criterion in selection of staff, it should use other methods to test this”.

Case law from other jurisdictions is also helpful. In the American case of *Diaz v Pan American World Airways Inc* 442 F2d 385 (5th Cir 1971), the employer’s contention that being a female was a *bona fide* occupational qualification [the equivalent notion to that of an inherent requirement] for being a cabin attendant on an aeroplane. In *Dothard v Rawlinson* 433 US 321 (1997) the rule that prison guards must be the same sex as the prisoners they guarded was upheld because a high proportion of the prisoners were sex offenders. However, in *Gunther v Iowa State Men’s Reformatory* 612 F2d 1079 (8th Cir 1980) the requirement that the correctional officers in the reformatory be male was held not to be a *bona fide* occupational qualification.

In the Australian case of *Quantas Airways Limited v Christie* [1998] HCA 18 the court suggested in order to determine whether a particular requirement is an inherent requirement one should ask if the position would be essentially the same if that requirement was removed. Applying this test, it concluded that being under the age of 60 was an inherent requirement for an international pilot as pilots over the age of 60 were prohibited from entering the airspace of most countries in terms of the law of those countries. In *Cramer v Smith Kline Beecham* an unreported case heard in the Federal Court of Australia and referred to in the *Quantas* case, the court held that penicillin tolerance was an inherent requirement for workers in a chemical manufacturing plant.

6.3 The advertisement

Legal provisions relating to advertisements

Section 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 states that

- 12 Prohibition of dissemination and publication of information that unfairly discriminates
- No person may-
- (a) disseminate or broadcast any information;
 - (b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.⁷⁸

The Code of Good Practice: The Employment of People with Disabilities⁷⁹ states that advertisements should be “accessible to persons with disabilities and, where reasonable and practical, circulated to organizations that represent the interests of people with disabilities” and should “include sufficient detail about the inherent requirements of the job so that potential applicants with disabilities can make an informed decision”. Notices and advertisements should be provided in a format appropriate to persons with disabilities, such as large print, Braille, or audiotape on request, and if reasonable in the circumstances.

The purpose of the advert is to attract candidates for the post. It has been suggested that adverts should be placed at prominent locations on notice boards which are accessible to all employees⁸⁰. However, employees can also be informed of vacant posts through email or in notices placed in wage or salary slips. In *NUTESA v Technikon Transvaal* (1998) 7 CCMA 6.14.1 the practice of creating a position secretly with the appointments of specific employees in mind with the result that other employees were presented with a *fait accompli*, was held to fall squarely within the unfair labour practice provision of “unfair conduct of the employer relating to the promotion,..... of an employee.....”.

In the public service no advertisement of the post was required as promotion was a result of the length of service of the employee and depended on the employee's performance. This situation was changed when by notice dated 1 July 1999 Government Gazette 20271 the Minister withdrew the Public Service Staff Code and other prescripts, subject to the provisions of the Public Service Regulations. Since the promulgation of those regulations in Government Gazette 20117 of 1 July 1999, regulation F of chapter 1 of part 7 provides as follows:

⁷⁸ In terms of section 5(3) the Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies.

⁷⁹ As published in GN 1064 in GG 23718 of 19 August 2002.

⁸⁰ J Campanella “Beyond Discrimination” (1993) People Dynamics page 20.

'F1 An executing authority may promote an employee to a vacant post on the approved establishment of the department if -

(a) sufficiently budgeted funds, including funds for the remaining period of the relevant medium-term expenditure framework are available for filling the vacancy, and,

(b) the vacancy has been advertised and the candidate selected in accordance with the regulations VII C and D

F2....

F3 No employee has any right to promotion to a vacant post until the promotion has been approved in writing by the executing authority.' [My underlining]

Regulations VII C and D deal with recruitment and selection respectively, which also apply to the filling of posts by appointment. These regulations were discussed in *Jele v Premier of the Province of Kwazulu-Natal & Others* (2003) 24 ILJ 1392 (LC), in which the court noted the change and commented that

"This procedural shift of requiring all vacant posts to be advertised is conceptually underpinned by the mandate to transform the public services enshrined in s 195 of the Constitution. More specifically, that section provides:

'(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: ...

(h) Good human resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'

The situation in the Public Service is that all appointment and promotion posts have to be filled after advertising so 'as to reach, as efficiently and effective as possible, the entire pool of potential applicants, especially persons historically disadvantaged' (regulation C2(1) chapter 1 part 7). It follows that the posts may be filled by new recruits to the public service or serving public employees. In the former instance, the filling of the post would be an appointment. In the latter case it would be a promotion if it also amounts to an advancement or elevation in status.

*The contents of the advertisement*⁸¹

Pretorius et al suggest that in order for the advert not to fall foul of the Employment Equity Act, 55 of 1998 they must be

⁸¹ While much of what is contained in this section relates to recruitment for new jobs as opposed to adverts for promotion posts, it is suggested that the same principles apply.

“devoid of any discriminatory statement, or statements, which expressly or by implication indicate a limitation, specification or preference based on any prohibited ground of discrimination. The formulations used may directly or indirectly exclude or discourage candidates from applying on the basis of a prohibited ground. The terms or phrases may create the impression amongst certain groups that applying for positions would be fruitless.”

An employer cannot be expected to include in an advertisement all “background motivation” for the job such as the fact that a new product was to be launched⁸².

Where regulations have been published in a sector⁸³, the regulations should be complied with; if the organisation has a policy on advertisements it must comply with the policy. Typically such regulations or policy will require the advert to contain the minimum requirements for the post, the procedure to be followed for application, the names and telephone numbers of contact persons, the preferable date of appointment, and the closing date for the receipt of applications⁸⁴.

With respect to the requirement that the advertisement should contain the minimum requirements for the post, in *IMATU obo Gounden and eThekweni Municipality: Metro Electricity* (2003) 12 SALGBC 6.9.8 the Respondent had placed the following advertisement for a ‘Storekeeper (Level 1)’. The advertisement described as “essential” a Forklift Operator Competency Certificate. On the evidence however, it was not in fact essential for the candidates to have such a certificate. The arbitrator was critical of this failure and stated -

Why this certificate was, in the first place, described as “essential” when it would not be treated as such beats me. It is troubling that an employer would either design advertisements in such a cavalier manner or otherwise lay its own process open to an almost certainly fatal challenge by any grievant who failed to apply simply because they, like [the successful candidate], did not have the certificate but could, like him, easily have obtained one later.

In the matter of *Durban City Council Physical Environment Service Unit) and Durban Municipal Employees’ Society (DMES)* (1995) 4 ARB 6.9.14 the advert stated that the minimum scale for the position was the sum of R3 404,75 and the maximum

⁸² *Dlamini and Toyota SA Manufacturing* (2004) 25 ILJ 1513.

⁸³ Employment of Educators Act 76 of 1998 Regulations published in GN 222 of 18 February 1999: Terms and conditions of employment of educators determined in terms of section 4 of the Employment of Educators Act, 1998.

⁸⁴ See Basic Employment law notes in www.irnetwork.co.za headed ‘How to hire an employee’ which repeats the above regulations.

scale was the sum of R4 002,25. The requirements for the position were that a person must have served an apprenticeship as a motor mechanic or a motor cycle mechanic and must be in a position to produce the relevant apprenticeship papers. However, in "exceptional cases" where an applicant was unable to produce the apprenticeship papers, satisfactory proof of at least five continuous years of appropriate artisan experience will be accepted subject to passing of a Departmental Trade Test. Furthermore the advertisement stated that the applicants must be able to carry out repairs and maintenance to two and four stroke petrol engines and grass cutting equipment in use by the department. However, the organisation's policy required that "All advertisements shall clearly state all relevant job requirements, application procedures, together with time limits and confirmation that the Council subscribes to an Affirmative Action programme which is non-racist, non-sexist, non-discriminatory and based on merit". The arbitrator held that the advertisement, which was placed by the company, was in breach of the provisions of the policy and went further to find that

"As a result, this defect affects the selection process in the sense that an omission of the requisite paragraph from the advertisement tends to indicate that management did not fully apply their minds to the considerations mentioned above. Therefore this defect points to unreasonableness".

This case is then authority for the proposition that an advertisement which materially fails to comply with regulations or policy may result in the entire promotion process being unfair.

In *Coetzee and South African Police Services* [2004] 2 BALR 139 (SSSBC), evidence was tendered by the employer that the successful candidate was promoted because one of the functions of the post was the formulation of policy, and because the successful candidate was deemed suitable because he had worked in an environment where policy was formulated. However, the evidence was that the successful candidate had no actual experience of formulating policy and was preferred over the applicant on account of his alleged superior language and writing skills. However, such skills were not advertised as a requirement for the post. In the arbitrator's view the fact that the successful candidate had no actual experience in the formulation of policy, the selection committee's purported main concern, rendered the committee's decision completely irrational.

The contents of two advertisements were material in the matter of *Lagadien v University of Cape Town* [2001] 1 BLLR 76 (LAC) in which the Applicant alleged that she had been discriminated against on the ground of her lack of tertiary education.

The court held as follows-

“Of relevance to that examination in the present case is the wording of both the first and second advertisements for the post in question. In neither case was a tertiary-level education stated to be anything other than an advantage. No suggestion or indication is made that it is an inherent requirement of the position or that persons, otherwise suitably appointable, would be disqualified for the lack of it.”

In *Benjamin v University of Cape Town* [2003] 12 BLLR 1209 (LC) the word ‘music’ played a crucial role in the court’s finding. Part of the advertisement for the post stated that a requirement was-

“A university degree (preferably in Music, or if not, other musical training) and a post-graduate diploma in library and information science or an equivalent qualification..”

Central to the dispute was whether, based on the wording of the advertisement, a degree in music was an inherent requirement for the post or not.

In *Metrorail (Pretoria) and TWU* (1998) 7 ARB 6.9.17 the arbitrator was of the view that

“An advertisement should be based on a job specification that sets out the minimum requirements a candidate should possess in order to be considered for appointment to a position. The advertisement serves as an invitation to prospective employees to apply for the job in question but it also serves to inform them what minimum requirements they should possess in order to meet the threshold requirements for the job. As such the advertisement serves as an initial selection device in that it acts to discourage persons not possessing these minimum requirements from applying for the position.”

The question before the court in *National Commissioner of the SA Police Service v SA Police Union & Others* (2004) 25 ILJ 203 (T) was whether the National Commissioner was required to advertise posts which had been re-graded. The court considered the applicable regulations and concluded that the National Commissioner had a discretion to advertise the post, but noted that the regulations provided that with respect to promotions the post was required to be advertised. In its view, the National Commissioner was required to also advertise re-graded posts, because

“A procedure which carries with it an elevation in the status of a member of the SAPS but lacks transparency and openness would be inimical to that interest.

[23] Within the framework of the regulations, promotions are made only after the post in question is advertised. If the retention of an incumbent in a post with an increased salary was in each instance intended to occur absent the process of advertising, the use of the word 'may' by the drafter is irreconcilable with that intent.

[24] If the result intended was automatic promotion exempt from competition in the usual way, to borrow from Mr Sutherland, 'the choice of language by the drafter is an object lesson in concealing that effect through obfuscation'.

The reason why a promotion post, or a post which has been upgraded, must be advertised is therefore firstly a matter of principle – 'transparency and openness', and secondly to create competition for the post in question.

Accessibility of the advertising medium

In order for the advert not to discriminate directly or indirectly against persons of a particular race, culture, language or social class it needs to be accessible to the appropriate pool of applicants. When assessing if an advert may be discriminatory in this manner, the following considerations should be taken note of-

- The nature of the position. If the position is a professional one, publications with a restricted professional readership may be appropriate, while if the position is for a clerical or semiskilled person a widely accessible medium is more appropriate.
- The language medium. In *NEHAWU v Council for Geoscience* (1997) 6 ARB 6.12.2 a position was advertised externally to the organisation in one Afrikaans medium newspaper only. The arbitrator stated that "...in order to display fairness in the procedure adopted in calling for applications, different language newspapers should be used".
- Geographical limitations. The fact that an applicant for promotion was 'out of area' i.e. did not live in the area in which the position was advertised was considered in *Bester and South African Police Services PSSS 1570*⁸⁵. The SAPS is organised into different areas, based on geographic location. Inspector Bester applied for promotion to a Captain's post in Margate on the south coast and part of the Umzimkulu area while falling under the Midlands area. The selection panel did not short list him because he did not live in the same area as that in which post was located. The arbitrator held

⁸⁵ An unreported arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council, case number PSSS 1570.

“The criteria of requiring a candidate to be one from within the area is an arbitrary one which is potentially discriminatory, and certainly unfair, as it does not amount to a justifiable reason not to select a candidate”.

Organisations may have a policy which requires promotional posts to be advertised ‘internally’ first⁸⁶. In terms of this policy the employer agrees to restrict its search to current employees and only once it is satisfied that there are no suitable candidates who are employees may the organisation look outside the organisation. For example in *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC), the failure to comply with such a policy was held by Landman J to be procedurally unfair. In *SALSTAFF on behalf of Isaacs and Heritage Foundation (A Division of TRANSNET)* (2002) 23 ILJ 2398 (ARB) the organisation’s policy stated that “Internal candidates are given prior consideration for job appointments and only where it is considered that a suitable internal candidate is not available will an external candidate be appointed”, and further that ‘External recruitment procedures may only be initiated once the internal recruitment procedure is complete and no suitable candidates have been identified internally’. As in the *Liberty Life* case, the employer argued that the policy was just a guideline. The arbitrator disagreed finding instead that “the failure of the company to consider the internal applicants and determine that no candidate was suitable before starting to recruit externally is against its policy and thus irregular” because on the evidence the policy was “followed as a matter of course and very seldom deviated from”. The organisation was ordered to pay the Applicant four months compensation.

Campanella points out that surveys are conducted by all newspapers, magazine houses, radio and television stations which establish the profile of the listeners, viewers or readers⁸⁷ which means that the advertiser can use this information to decide which publication or medium which achieve the objective of accessibility. Where the employer failed to make a promotion opportunity known to an eligible female employee as the post was never advertised, the employer was held to have discriminated against the female employee on the ground of her sex⁸⁸.

⁸⁶ In *Lagadien v University of Cape Town* [2001] 1 BLLR 76 (LAC) the post was advertised internally within the University by email.

⁸⁷ J Campanella “Beyond Discrimination” (1993) People Dynamics page 20.

⁸⁸ *Schofield v Double Two Ltd*.

Targeted advertising: The practice of placing advertisements which are targeted at a particular pool of applicants with the purpose of generating a pool of applicants from which specific groups are excluded to some degree is indicative of at least and indirectly discriminatory practice. The employer will have to show good cause for targeting the specific group, for example that there was an affirmative action objective to the advertisement, a bona fide qualification requirement, or a necessary business justification⁸⁹. The practice of stating in the advertisement that the position is a “designated post”, or an affirmative action position, or that the employer is “an equal opportunity employer”, or a statement that “[t]he objects of s 195(1)(i) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) and the departmental personnel policy will be considered in the filling of these vacant posts”⁹⁰ would satisfy this requirement.

An example of where the employer did not use targeted selection but should have is *IMATU obo Gounden and eThekweni Municipality: Metro Electricity* (2003) 12 SALGBC 6.9.8 in which the advertisement failed to mention what the arbitrator called “a very real essential requirement”, namely that is that no member of a demographic group whose representivity in the particular stores department was excessive, would be considered. The arbitrator concluded that “for any requirement of such importance not to be stipulated in an advertisement when it is going to be applied, is a serious irregularity and is [procedurally] unfair”.

Where a post is advertised while the incumbent is still employed in the post, an interdict may be issued and the employee is entitled to remain in his office – see *Bensch v Phalaborwa Transitional local Council* (1997) 2 LC 6.10.1.

Once advertised the employer may not change the requirements for the post. In *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA) the arbitrator held

An arbitrator may not interfere in how an employer defines its post requirements and how these are published any more than he or she may usurp the employer's authority to compare candidates who respond to the notice [i.e. advertisement]. But if an employer announces a vacancy and advertises a post, it may not change the terms of recruitment by redefining the post during the recruitment process. It may certainly not do so in a way that gives the impression that it has deferred to one of its

⁸⁹ Pretorius et al page 8-12.

⁹⁰ *Department of Justice v Commission For Conciliation, Mediation & Arbitration & Others* (2004) 25 ILJ 248 (LAC).

candidates and thereby creates an impression that a candidate has been preferentially treated..... the notice [i.e. advertisement] remained valid the SAPS was in my view bound by its terms and it was not entitled to amend it informally and privately through one-on-one discussion between an applicant and the chairperson of the selection committee. The proper way of doing so would have been to withdraw the notice altogether and open a new competition on terms that better matched its actual job requirements.

6.4 Information gathering

The employer may require an employee who is applying for a promotion post to provide information which will be used by the employer during the selection process to determine that most suitable candidate for the post. This information is used provided by way of one or a combination of a curriculum vitae, references or an application form.

Perrot ⁹¹ notes that

“At the heart of our developing employment laws is the increased protection of personal information through the restatement of fundamental rights, especially those covering discrimination and personal information. Our legal development will accordingly place increasing constraints upon the manner in which we collect personal information, what information we collect and what we retain, and how, to whom and in what circumstances we may communicate such information. Whilst the legislative and constitutional parameters of protection are now in place, the relative novelty of these measures dictates, for the moment at least, a paucity of authoritative case law to provide clear guidance for employers. In the absence of any material precedent, legal advice will in the main be dictated by the common law principles measured against the statutory and constitutional rights, international jurisprudence and other sources”.

The prime international source is the International Labour Organisation's Code Of Practice on the Protection of Workers' Personal Data ⁹², the purpose of which is to provide guidance on the protection of workers' personal data. This code is of no binding force, nor does it replace national laws, regulations, international labour standards or other accepted standards. The code may however be used in the development of legislation, regulations, collective agreements, work rules, policies and practical measures at enterprise level.

⁹¹ R Perrot 'The role of references in recruitment', Contemporary Labour Law, Vol 9 No 10 May 2000 page 94.

⁹² See (1997) 18 *ILJ* 26.

The code notes that employers collect personal data on job applicants and employees for a number of reasons, one is which is to assist in selection for promotion, and that “computerized retrieval techniques, automated personnel information systems, electronic monitoring, genetic screening and drug testing illustrate the need to develop data protection provisions which specifically address the use of workers' personal data in order to safeguard the dignity of workers, protect their privacy and guarantee their fundamental right to determine who may use which data for what purposes and under what conditions”.⁹³

Criminal record: The code establishes the general principle that an employer should not collect personal data concerning a worker's sex life, political, religious or other beliefs or criminal convictions, but provides that “in exceptional circumstances”, and where such data are “directly relevant to an employment decision and in conformity with national legislation”⁹⁴.

A number of cases concerning the effect of a criminal record were heard by the Industrial Court under the unfair labour practice jurisdiction of the 1956 Labour Relations Act. In *Kortje v Department Van Korrektiewe Dienste: Wes-Kaap* (1997) 2 LLD 133 (IC) for example, a prison warden was found guilty of culpable homicide and sentenced to a two-year prison term of which one year was suspended. After serving six months he was released on parole. He then applied to be employed once again and in his application form he stated that he had never been found guilty of a criminal offence. The employer later discovered that he had a criminal record dismissed him for intentionally making a false declaration in his application for employment, a decision which the court found to be fair. The court in *Auret v Eskom Pensioen & Voorsorgfonds* (1995) 4 LCD 22 (IC) came to a different conciliation conclusion. When the employee applied for a position as an investment manager he was still to be prosecuted for offences in terms of the Financial Institutions Act which related to irregular share transactions concluded by the employee while in the service of his previous employer, and was subsequently found guilty and given a fine. The court held that there was no reason why a contract of service with an employee who has previous criminal convictions cannot be upheld. In *Mdlalose v I E Laher & Sons (Pty) Ltd* (1985) 6 ILJ 350 (IC) the company's vehicle was hijacked

⁹³ Item 1 of the code.

⁹⁴ Item 6(5) of the code.

and the employer, during the course of its investigation into this incident, learnt that the employee had a criminal record. While there was no evidence that the employee was involved in the robbery, the employer justified its decision to dismiss the employee on the grounds of his criminal record. The court noted that the employer had made no enquiry into the employee's criminal record, and reinstated the employee.

Pretorius et al state "Since conviction records [as compared to arrest records], reflect actual criminal liability, they may be relied upon, in appropriate circumstances, as a selection device to screen out unsuitable candidates"⁹⁵. However because some groups may have a higher rate of conviction than other groups, rejecting a candidate on the basis of his criminal record may constitute prima facie indirect discrimination, and for this reason Pretorius et al state that a complete exclusion of people with criminal records will not be justifiable unless the employer is able to show that the candidate with a criminal record will be unable to meet the inherent requirements of the job, "or that any other legitimate and important operational requirement renders someone with a criminal record unsuitable"⁹⁶.

In *Green v Missouri Pacific Railroad* 523 F2d 1290 (8th Cir 1975) the court said

"We cannot conceive of any business necessity that would automatically place every individual convicted of any offence, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true of blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden".

There is a dearth of cases in point heard under the current Act. However, it is submitted that the court or arbitrator should, when determining the fairness of the exclusion of a candidate because of his prior criminal record, consider the nature and gravity of the criminal offence in the light of the promotion post applied for, the period of time since the employee's conviction, the employee's degree of rehabilitation, as well as the circumstances under which the crime was committed⁹⁷.

⁹⁵ See page 8-32.

⁹⁶ Pretorius et al page 8-32.

⁹⁷ See Pretorius et al page 8-33.

It is now accepted that some jobs, such as that of an attorney, require such a degree of trust that a candidate with a criminal record may justifiably be excluded⁹⁸.

Information regarding an employee's credit rating: The Code of Practice on the Protection of Workers' Personal Data, has no provision applicable to information concerning an employee's credit rating. However, Pretorius et al point out that allegations of indirect discrimination may arise if an employee is not appointed or promoted because of his or her credit rating. They stated that "If the exclusion of candidates has a disproportionate impact on protected groups, it needs to be justified with reference to the job or operational requirements of the employer"⁹⁹.

References: One common way to check the accuracy of information given by a candidate in the application form or curriculum vitae concerning his work experience, qualifications and suitability for the post is for the employer to conduct a reference check. The requirement that the candidate provide references will be justifiable if prior experience is an inherent requirement, or as an operational requirement to verify the identity and qualifications of the candidate.

When private information is given and used, there are implications which arise concerning the rights of privacy of the employee. In terms of section 14 of the Constitution "[E]veryone has the right to privacy". Furthermore, a claim for damages may arise if the employee can prove that the private information given to a third party infringed the employee's right to privacy, that he suffered damages as a result of the publication of the information, and the disclosure of the information was unlawful¹⁰⁰. In *Spring v Guardian Assurance plc and others* (1994) IRLR 460 the House of Lords held that where an employer makes the decision to provide a current for former employee with a reference they are under a duty to that person to take reasonable care in compiling the reference and in verifying the information on which it is based. It is submitted that employers in South Africa bear a similar duty. There is currently

⁹⁸ *Prince v President of the Law Society of the Cape of Good Hope* [2000] 7 BCLR 823 (SCA)

⁹⁹ Pretorius page 8-34.

¹⁰⁰ In *Hawker v Life Offices Association of SA & Another* (1987) 8 ILJ 231 (C), the employee resigned after an investigation into various acts of misconduct committed by the employee. The employer then imposed a form of reference which had the effect of rendering its former employee ineligible for employment in life insurance industry. The court held that this conduct amounted to an interference with another's subjective rights which was unreasonable and unjustifiable and hence unlawful, and that the employer had therefore committed a delict.

a practice in the banking sector of compiling a register of dismissed employees [‘REDS’] who have been dismissed for dishonesty.

The comment of Perrot ¹⁰¹ in this regard is instructive, despite its context being the recruitment of new employees rather than the promotion of incumbent employees.

He states

“The modern employer seeking to conduct a reference check on an applicant can rely on a host of agencies, tools and other means to collect the information he or she needs in order to minimise the risk of any proposed appointment. Besides the input of a previous employer, employers will have access to credit reference bureaux, an array of psychological and similar assessments, and possibly medical records.”

The Code of Practice on the Protection of Workers' Personal Data, provides a useful guideline with respect to references. Item 10(1) states that personal data, which means “any information related to an identified or identifiable worker” ¹⁰², a worker being “any current or former worker or applicant for employment” ¹⁰³ should not be communicated to third parties without the worker's explicit consent unless the communication is necessary to prevent serious and imminent threat to life or health, required or authorized by law, necessary for the conduct of the employment relationship, or required for the enforcement of criminal law. All personal data should, in principle, be obtained from the individual worker ¹⁰⁴, but if it is necessary to collect personal data from third parties, the worker should be informed in advance, and give explicit consent. The employer should indicate the purposes of the processing, the sources and means the employer intends to use, as well as the type of data to be gathered, and the consequences, if any, of refusing consent ¹⁰⁵.

In *Minister for Safety & Security & others v Jansen NO & others* [2004] 2 BLLR 143 (LC) the employee, a white male, applied unsuccessfully for the post of Director: Legal Services. He alleged in an arbitration before the Safety and Security Sectoral Bargaining Council claimed that he should have been promoted to the post as he had achieved the highest rating of the four short-listed candidates (one other white

¹⁰¹ R Perrot ‘The role of references in recruitment’, Contemporary Labour Law, Vol 9 No 10 May 2000 page 91

¹⁰² Item 3.1 of the code.

¹⁰³ Item 3.4 of the code.

¹⁰⁴ Item 6.1 of the code.

¹⁰⁵ Item 6.2 of the code.

male and two black men) at the interview, and alleged that the failure to appoint him therefore amounted to an unfair labour practice because. The only issue in dispute at the arbitration was whether the employer had failed to comply with its procedure, the National Instruction 3/2000. The arbitrator found that the selection committee had failed to follow the National Instruction in a number of respects, one of the grounds being was that the selection panel had failed to verify the references given by the candidates. The court set aside the award on review and commented as follows

[11] Mr Mocwaledi's references were not checked before he was appointed, only after Mr Brits had filed his dispute. The arbitrator rejected Director De Wet's explanation that the background, achievements and managerial abilities of an applicant can be tested through questions asked during the interview. She stated that "an applicant can easily lie". In this regard, it must be borne in mind that probably none of the references, including the third respondent's were investigated for their accuracy. In my experience this was not a fatal flaw in the interview proceedings. I do not believe that, in general, all references given to a panel are meticulously checked to establish whether the applicant in question had lied. Verification of references is a precautionary step to take if the suspicion is aroused that the person has lied, or to shed more light on an aspect which came to light during or after the interview. There was no suggestion that Mr Mocwaledi had given false references or that the third respondent's references were not false.

If an employer obtains information regarding the candidates' political affiliation, marital status or family responsibilities by questioning a referee, this may result in an allegation of discrimination, in the same way as if this information was asked in an application form or interview. Furthermore a requirement that candidates provide references from former employers may adversely affect groups with a higher rate of unemployment, or designated groups and thus also be discriminatory.

Medical information

Employer's sometimes require the candidate to provide information regarding his health to establish his fitness and suitability for the post in question, and may further require the candidate to under take one or more medical tests. This has numerous legal implications. This is discussed further below ¹⁰⁶.

The application form

One of the ways in which an employer may elicit information regarding the suitability of candidates is by way of written application forms. The question arises however

¹⁰⁶ See section 8 of this chapter.

both as to what and how the information may be elicited is, as well as how the information is used.

The Code of Good Practice: The Employment of People with Disabilities¹⁰⁷ states that application forms should “focus on identifying an applicant's ability to perform the inherent requirements of the job”.

It has been suggested¹⁰⁸ that the application form should

- Contain information needed for reference checking purposes (like ID Number), after short-listing of applicants on the basis of competencies.
- Include a section in which the candidate gives permission to check references by for example, requiring that they sign next to the name the person from whom you plan to take the reference.
- Not contain questions which relate 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 should be removed.
- Not ask about home language, but rather pose the question to refer to language proficiencies.
- Health should only be taken into consideration if you are able to relate it to inherent job requirements. Phrase any health questions indirectly, for example: "Are you aware of any working conditions which could be detrimental to your health?"
- Not contain questions about hobbies and clubs.
- Have an "Office Use" category for "Specific Inherent Job Requirements" to use where requirements that would normally be regarded as potentially discriminatory can be justified on the basis of inherent job requirements, will be recorded.
- Ask for a contact address - not specifically for a home address.
- Obtain information on educational institution and ID number from short-listed candidates only.
- Record information on race and gender under "Office Use: Do not complete. Will be discussed during interview" and add the following sentence where

¹⁰⁷ As published in GN 1064 in GG 23718 of 19 August 2002

¹⁰⁸ 'Guard against application form discrimination' in The Citizen dated the 1 September 1998, see www.irnetwork.co.za

you record race and gender: "For legal and/or statistical purposes the following information is required".

Broad statements about what may or may not be asked, such as the above, are however somewhat misleading. Pretorius et al, on the authority of the EEOC Guide to pre-employment inquiries, suggest that "Questions about the date of birth, sex, marital status religion, race etc will render the ultimate appointment [or promotion] decision discriminatory only if the employer uses that information to make the decision to offer employment or not"¹⁰⁹. For example, questions regarding the child care arrangements of a female candidate and which were not asked of male candidates, were held not to be discriminatory where the employer's decision not to employ the grievant was based on other, non discriminatory, reasons in *Roadburg v Lothian Regional Council* [1976] IRLR 283. The suggestion is that the applicant who alleges he was discriminated against because he was asked discriminatory questions will have to prove that, but for the discrimination, he would have been promoted.

In *Sha and South African Police Services* (2003) 12 SSSBC 6.9.6 the employee's application form had reflected his name as "Shange" rather than his real name of "Sha". The employee denied that he had altered his name in this fashion, but admitted that he had completed the block on the form reflecting his gender to show that he was 'African' rather than an Indian male which he was. The arbitrator held that

The onus undoubtedly was on the applicant to complete his [application] correctly and to ensure that the information thereon is correct. The applicant admitted that he filled in the incorrect gender box and stated that he did so in error as he was in a hurry to complete his application forms.

Curriculum vitae

Candidates often provide employers with information by way of a *curriculum vitae*. In addition to the questions surrounding the use of such information by the employer discussed above, further questions arise if a candidate misrepresents his qualifications and/ or work experience in his *curriculum vitae*.

¹⁰⁹ Pretorius et al page 8-18,19.

This is what happened in *Hoch v Mustek Electronics (Pty) Ltd* [1999] 12 BLLR 1287 (LC). The qualifications that Ms Hoch was alleged to have misrepresented appear from her curriculum vitae that she presented at her initial interview for employment with the company in September 1990 – that is some seven years prior to her dismissal, where under “University/College” it was stated “Hamidrash ‘Lminhal (Israel) 1970–1973” and under “degree/diploma” it was stated: “Diploma in Accounting; Teaching Diploma”. In a review of an arbitration award in which her dismissal was confirmed, the court found that Ms Hoch had “dishonestly misrepresented her qualifications when she applied for a job at the respondent that entailed accounting work and where she even rose to the position of acting financial manager. In this sense, her dishonest misrepresentation was relevant in regard to the work that she was employed to perform”. This case is authority for the proposition that the court will adopt a very strict approach to misrepresentation by an employee. The court in *SA Tourism Board v CCMA & others* [2003] 9 BLLR 916 (LC) took a different view. In this case the employee misrepresented his qualifications - that he had a BSc degree, which the arbitrator found to be an error that “ought not to have resulted in his dismissal”. The court, in what is with respect a questionable judgment, despite accepting that the employee had “deliberately distorted his academic qualifications”, and was “willfully dishonest”, and had ignored “the ongoing requests to him by the applicant to produce proof of those qualifications” upheld the arbitrator’s award. In *Evens and Sekulise Adult Education Centre* KN DB 435-04,¹¹⁰ the misrepresentation by the employee of his work experience was found to be a fair reason for his dismissal. In *Baptista and SAPS* [2004] 8 BALR 942 (SSSBC) the employee who applied for a promotional post submitted a certificate purporting to confirm that he had passed Grade 10. He did not in fact have such a qualification, and he was dismissed. The arbitrator held that his dismissal was fair.

The onus to ensure that the information contained in a candidate’s CV is correct lies with the candidate. If the candidate is then promoted on the basis of such information which later turns out to be false, the employee may be fairly dismissed.

6.5 Selection criteria

¹¹⁰ KN DB 435-04, an unreported arbitration in which the writer was the arbitrator.

The selection criteria are the inherent requirements for the job as stated in the advertisement, and, if the employer is a designated employer, the criteria laid down by the section 20 of the Employment Equity Act No 55 of 1998, namely that a person 'may' be suitably qualified for a job as a result of 'any one of, or 'any combination of' the following criteria:

- (a) formal qualifications;
- (b) prior learning;
- (c) relevant experience; or
- (d) capacity to acquire, within a reasonable time, the ability to do the job.

Employers must review all the above factors when considering whether a person is suitably qualified for a job [s 20(4)(a)]. Suitability may be established if a person is qualified in terms of one or more of those factors [s 20(4)(b)].

An employer must apply the selection criteria when selecting candidates. Authority for this proposition is found in *IMATU obo Gounden and eThekweni Municipality:*

Metro Electricity (2003) 12 SALGBC 6.9.8 where the arbitrator stated

"...it is to be noted that it is generally considered a mark of unfairness should an employer set minimum requirements that it, itself, does not apply in selecting candidates for shortlisting".

If a selection criterion is that the most suitable candidate must be a member of a particular designated group, this must be mentioned in the advertisement ¹¹¹.

Furthermore, an employer must apply the correct selection criteria. In *Public Servants Association obo Steenkamp and South African Police Service* [2003] 7 BALR 786 (BC) two selection panels were convened. The arbitrator found that the members of both selection panels had been unsure of the criteria to be applied in making their selection. The fact that the first panel had rated candidates in the light of their general experience, while the advertisement for the post indicated that candidates were required to have experience in syndicate fraud constituted a fatal flaw. The arbitrator held that an employer must abide by its own selection criteria and procedures. In *Titus and South African Police Services* PSSS 116 -03/04 ¹¹², the selection panel assessed the candidates on the basis of criteria which were nothing like those stated in the employer's promotion policy. The effect was to negate the

¹¹¹ *IMATU obo Gounden and eThekweni Municipality: Metro Electricity* (2003) 12 SALGBC 6.9.8.

¹¹² An arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council in which the writer was the arbitrator.

entire promotion process, which the arbitrator ordered be conducted again. In *Coetzee and South African Police Services* [2004] 2 BALR 139 (SSSBC) the arbitrator stated

An employer which lists criteria for promotion but then represented that criteria other than those usually used to evaluate promotions were to be used, together with a special procedure to upgrade the grievant's post was held to have created a legitimate expectation that a procedure would be followed to investigate his application for promotion using other criteria. Furthermore, the employer's conduct with respect to the handling of the special procedure was "unfair in that it was inconsistent with its declared intent, and the manner in which it was pursued was unreasonable and prejudicial to him".^{113]}

In *Metrorail (Pretoria) and TWU* (1998) 7 ARB 6.9.17 the dispute concerned the promotion of the Applicant to the position of a Senior Administrative Officer in the organization. The facts were that the advertisement for the position stated that the incumbent should be in possession of a Code 8 driver's license and should be "prepared to drive such a vehicle", and stated that a "copy of driver's license (Code 8) must accompany application". The successful candidate, Ms B, did not possess a Code 8 driver's licence. The applicant had acted in the position for a period of time. Her evidence that the use of a motor vehicle in the performance of her duties, was necessary was not challenged. The company argued that the possession of a Code 8 license was not a "critical element" [i.e. an inherent requirement] of the post. The arbitrator concluded that the company's view of what was an inherent requirement was not relevant, but

"The proper enquiry should be directed at the impact the advertisement will have on the reasonable prospective applicant (i.e. how the target market at which the advertisement is directed, will interpret the advertisement).....If one considers the wording appended at the end of the advertisement under the heading "NB", the reasonable reader would have concluded that, while she does not have to have "administrative and typing skills", she must have a driver's licence".

In *Benjamin v University of Cape Town* [2003] 12 BLLR 1209 (LC), the selection criteria were based on the contents of the advertisement for the post.

In *Coetzee and South African Police Services* [2004] 2 BALR 139 (SSSBC) one of the criteria for promotion to a post in the Water Wing of the SAPS was a candidate's training, skills, competence and knowledge necessary to meet the inherent

¹¹³ See *Dumisa v University of Durban Westville & Others* [2001] 7 BALR 753 (CCMA).

requirements of the post. The arbitrator analysed the reasons why the successful candidate was promoted. He stated that

“The candidate who was appointed to Post 1937 was the staff officer of the chairperson of the selection committee. He had never occupied a post, or acted in any capacity, in the field of respondent’s Water Wing. He had also not acquired the training, skills, competence and knowledge to take responsibility for the maintenance of uniform standards, the management of training, and research and administration of the Water Wing. I find it inexplicable that the selection committee concluded that he met this criterion.”

The arbitrator ordered that the applicant, who had the necessary training, skills, competence and knowledge, be promoted to the post.

It is usual and logical that the selection criteria are set before the candidates are short listed. However, the fact that the selection criteria are established after candidates have been short listed is not in itself unfair. The applicant would have to show that the criteria were set with a particular candidate in mind, or that the applicant was prejudiced by the incorrect process, or that the criteria were set to advantage one candidate over the other - *Van Zyl and Western Cape Education Department* (2003) 24 ILJ 485 (BCA).

Formal qualifications

The comments of Hepple ¹¹⁴ form a useful background to the discussion in this section.

“A preliminary point is to distinguish between pre-entry discrimination and post-entry discrimination in the labour market. The former occurs when groups experience discrimination in the acquisition of skills and education prior to starting work, and hence cannot compete successfully with those who have not experienced such discrimination. The latter occurs when individuals of the same level of education, ability, work experience, training and the like - what economists would call 'productivity' - are paid different amounts. Reverse discrimination occurs when people who are paid the same amounts do not have the same qualifications. Post-entry discrimination need not be limited to earnings. *Where individuals with similar levels of qualifications are employed in relatively small numbers proportionately to their size in the relevant population, we may presume that discrimination has occurred against the under-represented group. This may be either direct discrimination on grounds such as race or gender, or it may be indirect because of employer practices or policies (eg a requirement to have passed matric) which have a disparate impact on certain groups.* Obviously, the employment and occupational equity statute cannot deal directly with pre-entry discrimination, but only with employers' decisions 'about employees for reasons that are not related to genuine work requirements'. Even opponents of the statute would concede that pre-entry discrimination has to be

¹¹⁴ B Hepple 'Equality Laws and Economic Efficiency' (1997) 18 ILJ 598.

remedied through a variety of other governmental and private programmes for education, training, and reconstruction.” [My emphasis]

Even if a candidate has better or more qualifications than the successful candidate it does not follow that the candidate is the most suitable candidate *Portnet v SALSTAFF obo Lagrange* [1998] 7 BALR 963 (IMSSA).

If formal qualifications are specified the employer will have to ensure that such qualifications are an inherent requirement for the position. The requirement that candidates have a particular level of educational qualification can not be used in order to sift out ‘unsuitable’ candidates. In *Adriaanse and Swartklip Products* [1999] 6 BALR 649 (CCMA) the facts were that an advertisement for a job with the company listed the requirement of a ‘minimum education level of a Standard 8. The Applicant like many of the candidates did not have this educational qualification but nevertheless applied for the job. After the employer did not appoint her she alleged that she had been discriminated against as the prescribed educational qualification was arbitrary. While the arbitrator accepted that the employer's recruitment policy requiring a minimum educational standard was aimed at raising the general educational level of its workforce, he noted that the employer conceded that the possession of a Std 8 was not a necessary qualification for the position i.e. was not an inherent requirement, and was therefore arbitrary and amounted to a form of indirect discrimination.

In *South African Revenue Service v CCMA & Others* (2001) 10 LC 6.9.1 the matter concerned an education qualification which was required in order to be promoted. The dispute concerned what is referred to as an “occupational class” of taxation officers, which comprises three post levels, namely, taxation officers, principal taxation officers and deputy directors. These post levels were divided into appointment and promotion ranks. Prior to 1988 promotion was automatic in that it depended upon the employee serving for a particular time period in one rank and then being promoted to the next higher rank. After 1988 the employee required a three year post matric qualification in order to be promoted to the ranks of a Taxation Officer, and for an employee to be promoted to the rank of either Chief Taxation Officer or Deputy Director, he or she had to have a post matric three year degree or diploma referred to as the ‘RVQ13 qualification’. This change was called a

"qualification barrier", and was phased in over a period of years. In 1995 the qualification barrier applicable to promotions to the ranks of Chief Taxation Officer and Deputy Director was partially relaxed: the RVQ13 qualification was no longer required for promotion to the rank of either Chief Taxation Officer or Deputy Director provided that the employee concerned had been employed prior to 10 June 1994. In 1996 employees who had obtained a Bachelors degree with certain specified subjects were entitled to automatic rank promotions up to the level of Principal Taxation Officer and Chief Taxation Officer, provided that they had passed certain internal courses and had completed the necessary qualifying period. In the case of this category of employees, the "post barrier" or "promotion barrier" as referred to above did not apply. In other words, they did not have to wait for a vacant post and successfully apply for that post. In 1997 this entitlement was extended also to employees with a three-year diploma with certain subjects in order to promote the retention of skills of qualified employees. In order to obtain promotion from the level of Senior Taxation Officer to the next rank of Principal Taxation Officer, the an employee faced the 'promotion (or post) barrier", which meant that any one of them could only obtain promotion if there was a vacant post available, post was advertised and they applied for it and was appointed to it.

The employees who had been employed prior to 1998 and had not obtained any post matric qualification were employed as Senior Taxation Officers and applied to be promoted to Principal Taxation Officers. Their application for promotion was largely based on the grounds that the post barrier did not apply to them. Their application was refused because the employer said they had to comply with the post barrier.

The employees referred a promotion dispute to the CCMA and the arbitrator found in their favour on the basis of his on the basis of the assumption that the obstacle in the way of promotion faced by the individual respondents was the qualification barrier, which in his view was not a valid barrier. On review the court disagreed and held that the arbitrator had misinterpreted the changes. The fact that the qualification barrier was relaxed in respect of those employed prior to 10 June 1994 did not mean that

there was an automatic entitlement to promotion of existing employees such as the employees, who still had overcome the promotion or post barrier.

In *PSA obo Louw and Department of Roads, Transport & Public Works* [2004] 11 BALR 1388 (CCMA), the employee applied to be promoted to a provincial inspector, a post which the employer said required a grade 10 qualification. The employee did not have this qualification but had enrolled for an ABET-4 qualification, which was accepted as being the equivalent of grade 10. When the employee not interviewed, he alleged that his exclusion from the selection process constituted an unfair labour practice on the ground that other candidates had been appointed despite not possessing a code 8 driver's licence, which was also a requirement for inspector's posts. The arbitrator was satisfied that a grade 10 qualification was an inherent requirement of the jobs in question because employees without that qualification could not be admitted to Traffic College. As for the employee's contention that the employer ought to have "accommodated his shortcomings merely because he is a previously disadvantaged individual", this does not mean that the employer "should throw all its standards overboard merely to accommodate previously disadvantaged individuals".

Work experience

Section 2(1)(c)(iii) of the Skills Development Act no 97 of 1998 provides that one of the purposes of the Act are to encourage employers to "provide opportunities for new entrants to the labour market to gain work experience".

In terms of section 20(3)(c) of the EEA 'relevant experience' is one of the factors which an employer who is considering if an employee or applicant for employment is suitably qualified must consider in order to decide if that person has the ability to do the job. When making this determination, an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience in terms of section 20(5).

Du Toit et al ¹¹⁵ state that

¹¹⁵ Du Toit et al, *Labour Relations Law: A Comprehensive Guide*, Butterworths, 4th edition page 595.

The provision is designed to deal with the fact that black people, women and disabled people were practically or legally excluded from certain jobs in the past and thus prevented from gaining 'relevant experience' in these fields. If such experience remains a decisive criterion, they will remain excluded even though they might have the ability to perform the work in question. The prohibition only applies, however, if lack of relevant experience is the only reason for rejecting an applicant. An applicant may still be excluded if, in addition to lacking relevant experience, he/she also lacks formal qualifications, prior learning or capacity to learn to do the job within a reasonable time.

A number of cases have concerned the impact of work experience as a selection criterion. In *Public Servants Association of SA v Minister of Justice* (1997) (3) SA 925 (T); (1997) 18 ILJ 241 (T), the Department of Justice placed advertisements for positions in the office of the state attorney at different ranks. The Department of then sought during 1995 to promote or appoint, amongst others, a candidate with one years experience in the state attorney's office, compared to the applicants in the case some of whom had 20 or 25 years experience. Swart J commented

"The foregoing (with full allowance that further facts and factors may be relevant as well) by itself creates a picture which on the basis of logic, merit, efficiency and sensible administration is astonishing."

While the court did not discuss the question of work experience, or compare the experience of one candidate against another, it is submitted that it was the 'astonishing' difference in comparable experience which formed the unstated reason for the courts conclusion that the applicants had been unfairly discriminated against¹¹⁶.

In *NUTESA and Technikon Northern Transvaal* (1998) 7 CCMA 6.14.1. the position of the Dean of Arts was advertised, which listed the requirement that candidates required a "Minimum 5 years relevant experience plus 3 years employment at Technikon Northern Transvaal. Lecturers at all current positions qualify for consideration..... ". However the person appointed did not have 3 years employment (experience) at Technikon Northern Transvaal, having only joined the Technikon two months prior to his appointment. A dispute was referred to the CCMA which concerned a) the appointment of the successful candidate who did not have 3 years employment (experience) at the Technikon; and b) the fact that other

¹¹⁶ The court concluded that the Department should not have applied affirmative action when coming to its decision as to whom to promote or appoint.

employees at the Technikon who otherwise might have been suitable for the appointment, might not have applied as they did not have the stipulated 3 years experience. The arbitrator found that while the 3 year provision was only one criterion to be considered and was not peremptory, the manner in which the advertisement was couched “must have conveyed to the ordinary reader that this was a requirement for the position”. It was, at the very least, possible that certain potential candidates might not have applied for this reason especially as lecturers at all current positions qualified for consideration, and that therefore the appointment of the successful candidate was improper, and was contrary to the element of transparency which appears to be essential to the process of transformation at the Technikon. This unfair act or omission was held to have “involved unfair discrimination, directly or indirectly on an arbitrary ground”.

In *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC), the advert for the position was framed to indicate a preference for someone with experience as an agent or inspector in the Department of Labour. The employee alleged that the bargaining council was guilty of indirect discrimination against Abbott and other black applicants by the way it framed and advertised the requirements for the post. The court held that while the requirement of some prior experience as an agent or inspector in the Department of Labour is a neutral one “given our history, there would be few experienced black agents or inspectors in the market. Thus the council was preferring whites above blacks. ... This simply means that the council as a whole may have discriminated indirectly against blacks and possibly women.” This case is therefore authority for the proposition that the requirement of work experience may be indirectly discriminatory.

Where the provisions of the organisation’s promotion policy required the organisation to place competent employees in acting positions for a period of time to allow them to gain the necessary experience, and the successful candidate had been exposed to a lengthy acting period while another candidate was not given the opportunity to act at all, the arbitrator in *SA Transport & Allied Workers Union and Metrorail Services* (2002) 23 ILJ 2389 (ARB) held that the organization had breached both its own policy and section 2 of the Skills Development Act. The promotion was held to

be substantively unfair and the organisation was ordered to re-open its selection process, and allow suitable candidates an opportunity to be placed in acting positions to gain the necessary experience.

In *Germishuys v Upington Municipality* (2000) 21 ILJ 2439 (LC) the Applicant alleged that he was the better candidate because of his work experience. The advert for the post stated that a 'requirement' for the post of Assistant Town Treasurer was "nine years' applicable experience". The Applicant who had between three to four years experience applied for the post, but was unsuccessful. The court noted that the successful candidate had 15 years experience in the financial/accounting field, and was of the view that "the applicant simply over-estimated his experience and his suitability for the job".

The applicant in *Lagadien v University of Cape Town* (2000) 21 ILJ 2469 (LC) was unsuccessful because of her lack of work experience in an academic environment and this, as far as the selection committee was concerned, was the critical factor negating her appointment. The applicant's experience had been as an activist and change agent in non-governmental organizations and outside institutions, and when work experience was assessed against that of the successful candidate she was found wanting by the selection committee, a decision which the court held was justified.

In *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) one of the advertised requirements for the post was extensive lecturing experience. One of the candidates who applied for the post and was short-listed despite not meeting this requirement for the post, and then appointed on the basis of the employer's equity plan. The decision to do so was held to have discriminated against the applicant unfairly on the ground of her race as it was contrary to the employer's equity plan in terms of which race was just one factor to be taken into account, and had to be balanced against the need to provide the highest standard of tertiary service to its students which could not be met by a candidate who had no lecturing experience.

In *Vereniging Van Staatsamptenare on Behalf of Badenhorst v Department of Justice* (1999) 20 ILJ 253 (CCMA) the work experience of the applicant was considered as against that of the successful candidate. The applicant alleged that the selection committee had failed to apply its mind when comparing her experience as against that of the successful candidate and stated that she had been informed that only post graduate experience had been considered by the committee, whereas the successful candidate's work experience outside the department had been taken into account. The selection committee had felt that experience both inside and outside the department was valid, as was experience gained prior to the candidate obtaining her legal degree. The arbitrator stated that she "cannot find anything manifestly unfair in this approach to the evaluation of the successful candidate's relevant experience for the purposes of selection for the post, as the committee had considered the previous relevant experience of all the other candidates for the post, including that of the applicant".

The criterion of the ability to coach sport for the post of a principal of a school was held to be justifiable in *SADTU obo Makua and Mpumalanga Education Department* [1999] 5 BALR 638 (IMSSA). The arbitrator took account of evidence that each school has unique characteristics and traditions, and that rugby and athletics not only played a major part in the pupils' activities, but also provided much of the school's funding. The arbitrator then held that just because the selection criterion of sporting knowledge may have a discriminatory effect on certain groups, such as women and the disabled, it could not be inferred that the criterion was included merely to exclude black candidates.

In *IMATU v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC) the Mlambo J made the following obiter remarks regarding experience-

"[31] For affirmative action to succeed and help achieve the desired objective merit and experience would remain relevant insofar as the applicants previously disadvantaged by unfair discrimination are concerned in their own group. In other words the successful candidate should be the best out of the group previously disadvantaged by unfair discrimination. I say this for the simple reason that if the playing field is levelled, ie where all groups are considered, candidates from groups previously disadvantaged by unfair discrimination will always come second especially if one considers experience. Candidates previously advantaged by unfair discrimination invariably possess the

necessary experience which candidates from groups previously disadvantaged by unfair discrimination would not normally possess. In view of this situation it would be prudent therefore in affirmative action appointments to consider the qualification and potential to develop as crucial and that successful candidates from previously disadvantaged groups are the best from those groups.”

Pillay J in *Gordon v Department of Health, Kwazulu-Natal* (2004) 25 ILJ 1431 (LC) agreed with the above remarks, and stated that

[66] If experience is a compelling consideration transformation of the public service could be held to ransom. That is not to say that experience is not a relevant criterion. How important a criterion it is depends on the nature of the job, the risks attendant on it and whether the candidate has the potential for acquiring the experience in a reasonable time.

Pillay then applied these considerations to the facts of the matter. She noted that Mr Gordon, a white male, had an advantage over the successful candidate who was promoted to the post, a black male in so far as experience was concerned because “racial discrimination entrenched over decades, secured for [Mr Gordon] the managerial experience that he acquired in his previous positions since his employment by the respondent on 1 October 1970”. Furthermore, “it cannot be assumed that because [the successful candidate] lacked actual experience comparable to that of the [Mr Gordon] that his appointment would necessarily lead to inefficiency in the public service”.

It is suggested that when considering the criterion of work experience, the fact that a candidate has, or does not have, a particular number of years experience is not in itself an indication that the candidate is suitably qualified for the post. If this criterion is an inherent requirement for the post, the selection panel should investigate what ‘work’ the candidate actually did, and what ‘experience’ was in fact gained, both of which should be relevant to the post in question. It does not follow that because one candidate had more years experience than another candidate, that the former is a more suitable candidate. Nor does it follow that a because a candidate has X number years experience, that the candidate is suitable for the post. Cooper¹¹⁷ states

“The Act specifies that an employer, in making the determination, may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience. This latter

¹¹⁷ ‘The Boundaries Of Equality In Labour Law’ (2004) 25 ILJ 813 at 841.

provision is designed to ensure that a lack of experience does not become a means of denying disadvantaged persons access to jobs. The exclusion of designated persons from jobs in the past would have deprived them of the opportunity to gain relevant experience. Thus to continue to exclude them on this basis will only serve to perpetuate the cycle of deprivation and exclusion. However, the notion of unfair discrimination suggests that there could be circumstances in which it would not be unfair to exclude someone on the basis of a lack of relevant experience. This would probably be the case where the position is a senior one, requiring the kinds of skills that an applicant with little or no experience would be unlikely to have. The prohibition applies only where a lack of relevant experience is the only reason for not granting the person the job. Where other reasons for rejecting a candidate exist as well, the prohibition would not apply.”

In *SAPSAWU on behalf of Kalashe & Another v Department of Finance* (2000) 21 ILJ 2543 (CCMA) the applicants' case was that the MEC for Finance unfairly doubted their capacity to do the job. The arbitrator found that even if the MEC had made an error in this regard, “such an error would not in itself provide a reason for interference by the commission in the exercise of his discretion”, as the applicants had not proved any unfairness or irregularity on the part of the MEC.

Other requirements

The requirement that candidates have transport arose in *Atlantis Foundries (Pty) Ltd and NUMSA & another* [2000] 12 BALR 1441 (IMSSA) the union alleged that the employer's practice of employing only those candidates who lived in an area from which there was public transport to the workplace was discriminatory. The arbitrator noted that section 17 of the BCEA required an employer to satisfy a number of conditions if it needed its employees to perform night work, one of which was that transportation must be available between the employee's place of residence and the workplace at the commencement and conclusion of the employee's shift (subsection 2(b)), which he interpreted as being door-to-door transportation. When dealing with the question of whether the company is within its right to decline employment for prospective employees on the basis that they do not have own or due to non-availability of public transport from their place of residence to the work place, to perform night work, the arbitrator noted that the company intends providing transport to the areas in which 95% of its employees currently reside. The arbitrator stated

In order not to have to extend the transport routes *ad infinitum* the company has decided that it will not employ people outside of these areas, unless they have own transport or public transport is available.

Effectively, the company will not be offering transport to future employees who live outside these areas. If those employees are able to get to work nevertheless, the company will be happy to employ them. If not, it will not.

The union says this is unfair discrimination. I informed the parties during the arbitration that it is almost impossible for me to adjudicate unfair discrimination in the abstract. But the parties requested me to provide guidance to them. My view, on the limited information available to me, is that the employer's proposal does not, in itself, constitute unfair discrimination and, even if it does, there is possibly grounds for justification. [sic]

To sustain a claim of unfair discrimination the union would bear the onus of proving that discrimination against prospective employees living outside the area of the designated transport routes is unfair (place of residence is not a listed ground in the definition of discrimination in the Employment Equity Act). The union has not made out such a case. In fact, given the commercial rationale underlying the employer's proposal, the discrimination appears to be fair. There may be indirect discrimination (disparate impact on a protected group), but this has not been shown. Accordingly, I cannot conclude that the proposal is discriminatory.

The employee was required to be a certain physical size in order to sell and promote the clothes sold by a clothing chain in *Wilmot v Foschini's Ltd* WE 13936 dated 11 December 1998. In a curious award in which the employer admitted that it discriminated on the grounds of size when employing staff in Donna Claire stores for marketing/sales reasons, the rationale being that the employees must be able to wear and promote the garments and presumably because it is felt that customers with fuller figures would prefer to be served by staff of a similar stature. The arbitrator commented

Ultimately the question is whether the job applicant can do the job and ... an employer is entitled to appoint the best person for the job. What has persuaded me that this discrimination is fair, is that the job requirement includes the need to wear and promote the Donna Claire garments, which the Employee could not do.

The capacity to acquire, within a reasonable time, the ability to do the job

Du Toit et al¹¹⁸ suggest that

The provision can only find application where the length of a period of training or on-the-job experience is foreseeable and 'reasonable'. How long such a period might be would depend on the nature of the job and the circumstances.

And that

The term 'ability to do the job' has an objective connotation.

¹¹⁸ Op cit page 596.

The fact that an employee had been trained to perform tasks required of higher position, and that other employees who had been trained had been promoted, did not mean that the employer's refusal to promote the employee was an unfair labour practice. In *FAWU obo Makhubu and Nestlé SA (Pty) Ltd* [2003] 6 BALR 710 (CCMA), the arbitrator held that promotion is the prerogative of the employer and an arbitrator may only intervene if an obvious injustice has been committed. Similarly in *FAWU and Coca Cola Bottling Co* the allegation that the company's refusal to employ truck assistants as drivers after the truck assistants had obtained the necessary qualification was held not to amount to a dispute concerning promotion.

This requirement is often stated as being an assessment of whether the candidate has the potential for the job. In *Gordon v Department of Health, Kwazulu-Natal* (2004) 25 ILJ 1431 (LC), the court noted that one of the reasons why the successful candidate was a suitable candidate for the post was that

"[71] Mr Mkongwa [the successful candidate] had demonstrated his potential. He qualified himself academically whilst employed by the respondent. He had some experience in administration. Professor Ndlovu, who was one of the commissioners who directed that Mr Mkongwa be appointed, also professes in public administration. He testified that Mr Mkongwa's academic qualification equipped him to overcome any practical experience that he had been deprived of."

Cooper¹¹⁹ suggests that

"[A] decision whether or not a person has the capacity to acquire the ability to do the job within a reasonable time should be based on objective criteria of what is reasonable in the particular circumstances, that is, taking into account the requirements of the job, the individual's current capabilities, and the time within which it would be reasonable to expect a person to gain the relevant competency.

6.6 The selection committee

The legal nature of the selection committee

In *Pharmaceutical Manufacturer's Association of SA & others: In re Ex Parte Application of the President of the Republic of South Africa & others* [2000] (3) BCLR 241 (CC) the Constitutional Court made it clear that:

"As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, the Court cannot interfere

¹¹⁹ C Cooper, *The Boundaries Of Equality In Labour Law* (2004) 25 ILJ 813 at 841.

with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision" (at paragraph 90).

In *Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services* (2003) 24 ILJ 803 (LC) the court stated as follows:

"The courts are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public interest. Indeed, the court should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorised executive or administrative decisions must always be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by the law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the state's administrative machinery.

The administrative decisions shall only fall within the purview of judicial review and be set aside, where they are found to be patently arbitrary or capricious, objectively irrational, or actuated by bias or malice, or by other ulterior or improper motive."

The selection committee must apply its mind to the question before it: which candidate is the most suitable candidate. It is not sufficient for the employer to seek to justify its reasons for promoting one person over the other.

In *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA) for example both the Applicant, Crotz and the person appointed by the committee came from the same designated group, 'black'. The arbitrator noted that "there is no evidence that the selection committee or the council ever canvassed the relative disadvantage of the two men with them". There was an attempt to show how disadvantaged incumbent had been at the arbitration, but said the arbitrator "that came too late for the WTLC to have applied its mind to the issue".

Thus the nature of the arbitration is a review of the decision of the selection panel. to this very important extent an arbitration concerning a dispute over the fairness of a promotion is different to that where the issue is the fairness of the dismissal of an employee which is a hearing de novo.

The composition of the selection committee

Qualifications: The question of whether the selection committee should itself be qualified to make the selection decision arose in *Van Rensburg v Northern Cape Provincial Administration* (1997) 18 ILJ 1421 (CCMA) where the arbitrator was of the view that:

'It is unrealistic because the requirement that only persons with exactly the same kind of qualification and experience that the applicant for a particular post held should sit on the panel will put a serious obstacle in the way of the smooth and efficient running of the administration, and could in fact lead to pettiness and bickering concerning the kind of qualification etc that is suitable for a panel. The approach is not juridically sound for the simple reason that the law does not impose such a strict requirement. All that is required is that the persons on the panel should be in a position to make a reasonably informed decision, in other words that they should be reasonably knowledgeable.'

The arbitrator in *Van Zyl and Western Cape Education Department* (2003) 24 ILJ 485 (BCA) agreed with this sentiment, and stated "It is unrealistic to expect that a panel of interviewers will possess the same skills required of a candidate for a position", and noted that collective agreement governing the process did not list such a requirement.

Bias: Members of the selection panel should not be biased towards the candidates. In *Rousseau & Monama and South African Police Services* (2003) 12 SSSBC 6.9.9 the fact that one of the panelists was the investigating officer in a charge of corruption and had given evidence against the employee in a disciplinary hearing lead to the arbitrator concluding that the panelist could not reasonably assess the employee's application¹²⁰.

Representation in terms of race and gender: It is preferable that the selection committee be representative in terms of race and gender. A selection committee which is made up exclusively of white persons may be considered to be *prima facie* evidence of a discriminatory process¹²¹, although in itself is not sufficient evidence that there was in fact discrimination.

The failure to have union representation is not unfair if the company policy does not require it - *NUMSA obo Mzinzi and SAMANCOR* [1999] 3 BALR 336 (IMSSA).

¹²⁰ See also *Sehloho and Department of Education* [2000] 12 BALR 1430 (CCMA).

¹²¹ While there is no South African case law in point, American jurisprudence such as *Payne v Travenol Laboratories* 673 F2d 798 (1982), and *Fisher & Proctor and Gambe Manufacturing* 613 F2d 527 (5th Cir 1980) are authority for this proposition.

The process followed in the selection committee

The process followed by a selection committee may be subjected to scrutiny. For that reason, Rycroft¹²² recommends the following process-

- “(a) the prior articulation of attributes or competencies sought in the applicant;
- (b) the weighting to be given to each attribute or competency;
- (c) the preparation of specific questions which relate directly to the chosen attributes and competencies and which are to be put to each applicant;
- (d) the private evaluation of each candidate by each member of the selection committee according to the agreed weighting; and
- (e) the totalling of scores to arrive at a rating or ranking of applicants.

Rycroft is of the view that if the panel does not follow ‘such a carefully recorded technique’ it may be difficult for a selection committee to justify its decisions in a later arbitration or court case, which is borne out in the following cases.

The question before the arbitrator in *Van Zyl and Western Cape Education Department* (2003) 24 ILJ 485 (BCA), was whether the process adopted by the selection panel was fair when measured objectively against the collective agreement dealing with the process. What had happened is that the panel had used a marking system in terms of which each member gave each candidate a mark out of ten in respect of the candidate’s answers to five set questions. The candidate who obtained at least a ten-point lead over the others was then selected without further discussion. The arbitrator noted a number of concerns with this process. Firstly the weighting given to the questions was the same, when some questions were more important than others. Secondly, while the collective agreement which the process was subject to required the candidates to be ranked at the conclusion of the interviews together with a brief motivation, which had not been done. Instead, the members of the panel had ranked the candidates individually rather than jointly as a panel. The collective agreement required the candidates to be ranked in order of preference, and in order to do so the panel should have consulted with each other. In addition said the arbitrator a discussion would have enabled the panel to review of the candidates’ CVs. Finally, the fact that two panel members had personal knowledge of the applicant was an indication that other candidates had been prejudiced. In conclusion the arbitrator found that the process followed did not meet

¹²² A Rycroft ‘Obstacles to Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies’ (1999) 20 ILJ 1411.

an objective standard, and that the applicant had discharged the onus of proving that the department's conduct amounted to an unfair labour practice.

In *Samuels v South African Police Service* (2003) 24 ILJ 1189 (BCA) in which the writer was the arbitrator, the process followed, or not followed by the selection panel was discussed. The arbitrator said

"In my view procedural fairness would require the respondent to not only determine that the three criteria of training, posts occupied and evaluation report will be scored out of a mark of four, but to determine an objective scale from 0 to 4 which the panel could then apply when assessing the candidates on the criteria. This would mean, for example, that if a candidate acted in the post, he would receive a mark of 4; if the post occupied by him was completely outside of the area of expertise required by the post, he would receive 0, and so on. How such scale is 'tabulated' is the employer's prerogative, but would depend on what competencies it regarded as reasonably necessary for the post in question. Such an objective scale is what is recommended by Rycroft in his article quoted above.

No such scale exists, and for that reason the respondent is not able to justify why the applicant was given a mark of 3, and Ntshingila [the successful candidate] a mark of 4 in respect of the 'posts occupied' criteria. On the face of it therefore the respondent has failed to apply its mind when allocating scores to the candidates in this regard."

6.7 Short listing the candidates

A short listed candidate is one who has been found to have met the requirements for the post as stated in the advertisement¹²³.

The failure to include the union in the short listing process was held not to be unfair or a breach of policy in *SADTU obo Makuva and Mpumalanga Education Department* [1999] 5 BALR 638 (IMSSA). as the union had been informed of the selection meeting and had failed to provide reasons for its non-attendance.

In *Govender and Department of Health* (KZN) [2001] 1 BALR 21 (CCMA)¹²⁴, the employee was one of 31 candidates for the vacant position of assistant director (administration). The question before the arbitrator was whether the failure by the employer to short list the employee was an unfair labour practice. It appeared from

¹²³ *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (L.C).

¹²⁴ The arbitrator seems to have accepted the employee's suggestion, without deciding the point, that the failure of the panel to short list the employee constituted 'unfair conduct relating to promotion'.

the evidence that the reason why Govender was not short-listed for the position was that the selection committee erroneously thought he did not possess a certification which was a requirement for the job, and that he had no hospital experience. The arbitrator was of the view that the committee which drew up the shortlist “is required to apply objective criteria in a uniform manner”, and must be able to “demonstrate by way of reference to specific factors the reasons why certain candidates were selected to be interviewed for promotion”.

Reasons for rejection

In *Durban Metro Council (Consolidated Billing) and IMATU obo Van Zyl & another* [1998] 8 BALR 1049 (IMSSA) Pillemer SC stated that

“...[A]ny of the short-listed candidates was entitled to ask for and to be given an answer as to whether or not he or she was one of the two selected for appointment by the selection committee. In the absence of such information the person concerned simply cannot pursue his or her rights in terms of the non-appointment grievance procedure and seek a ruling from the arbitrator that he or she be appointed. I accordingly find that both the grievants are entitled to be told whether or not they were one of the two candidates recommended for appointment by the selection committee.

In *Govender and Department of Health (KZN)* [2001] 1 BALR 21 (CCMA)., the arbitrator held that an unsuccessful candidate is entitled to be advised as to the reasons that he was not short-listed and to challenge such reasons if they appear to be unjustified and baseless.

In *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA), the arbitrator also stated that an employee who had not been short listed is also entitled to reasons why his candidacy was rejected. The arbitrator said-

To refuse promotion to an employee who has applied for an advertised post is a decision that adversely affects him and mutual trust between the organization and its staff requires that in such circumstances the employee should be told of the decision and some reasons for it. I accept that notification of a refusal of promotion is a delicate matter because it would be perceived as a rebuff and employers are generally (and rightly) cautious about how they notify employees and how much they feedback so as not to harm an unsuccessful candidate's career prospects. But as an employee is entitled to challenge a decision that is adverse to his interests so he is entitled to information that is reasonably necessary for him to do so, with due regard to the operational efficiency of the organization and the privacy of others. Commissioner Morris gave the applicant no reasons; he merely said that Westraat had been considered against certain criteria and Director Joubert volunteered that he was not permitted to communicate with staff individually if they are not appointed

although he felt uncomfortable about this and would have liked to be more informative. Although an employer must be cautious and must protect the privacy of others, I consider that this applicant was entitled to know that he had been up against candidates with higher academic qualifications and that the employer considered these important in the context.

In *Perils and South African Police Services* (2003) 12 PSSSBC 6.9.18 the employee took the point that in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (the Act), a presumption is created that in the event of the employer not providing sufficient reasons for its decision not to promote the employee it should be accepted that the employer's actions were unfair. The presumption referred to is contained in section 5(3) of the Act. Section 5(3) reads as follows:

"If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason."

The question, said the arbitrator, was whether or not the respondent furnished "adequate reasons", and was of the view, that a statement of reasons is adequate when it is intelligible to the person seeking the reasons and is of sufficient precision to give them a clear understanding of why the decision was made; adequacy should therefore be assessed from the requestor's point of view and not from the administrator. The arbitrator also referred to the Australian Administrative Review Council's guidelines on what would constitute adequate reasons which are that:

"The statement must

- a. set out the decision; and
- b. contain the findings on material questions of fact; and
- c. refer to the evidence or other material on which those findings were based; and
- d. give the real reasons for the decision."

In order for the presumption of unfairness to arise the employee must have complied with the procedural requirement of requesting reasons in writing within 90 days of becoming aware of the action or 90 days from the date reasonably expected on which the applicant ought to have become aware of the action. Secondly the employee must show what, if any, information was made available to the employee as the reasons for the decision. The evidence was that the employee was informed

that he was a better candidate than the successful candidate for the post in question, and this said the arbitrator meant that the adequate reasons as required by section 5(3) of the Act were provided for in the decision made by the employer. Even if the reasons provided might not be acceptable to the employee - this does not mean that the requirement to provide reasons in terms of the Act was not complied with.

It therefore appears that there is a general duty on employers to provide adequate reasons why a short listed candidate was not promoted.

The provisions of section 16 of the LRA can be utilised by the employee or his union in order to obtain the reasons why he was not promoted to the post. Authority for this proposition is found in *PSA obo CM Petzer and Department of Home Affairs (1998) 7 CCMA 1.1.2* in which the arbitrator stated that

The PSA, which has taken up his grievance, is entitled in terms of s16(2), read with s14(4)(a), of the LRA to request the disclosure by the Department of the reasons why Mr Petzer's original application, as altered, was unsuccessful. I cannot imagine that any of the grounds foreclosing disclosure, which are enumerated in s16(5), are applicable to the information required. It is also relevant information, within the meaning of s16(10).

However, in order for the union to be entitled to such an order it must first refer a dispute concerning the disclosure of information to the CCMA for conciliation. The employee in the *Petzer* case had not done so and the arbitrator therefore held that he could not grant such an order. The arbitrator pointed out that

A dispute aboutan unfair labour practice concerning promotion, has to be referred to a council. If the resolution of the dispute requires, or might be facilitated by, the disclosure of information which the employer elects to withhold, a parallel referral of the dispute concerning the disclosure of the information to the CCMA is unavoidable.¹²⁵

The fact that the employees in were not informed of the result of their application was one of the grounds on which the arbitrator concluded that they had been treated unfairly in *Claassen & another and Department of Labour (1998) 7 CCMA 6.9.11..*

¹²⁵ In *Public Servants Association on behalf of Strydom v Department of Housing & Local Government (1997) 18 ILJ 1127 (CCMA)*, the employer was ordered to the employee relating a recommendation that she receive merit award or alternatively the reasons why she was not nominated for a merit award.

6.8 Pre-employment testing ¹²⁶

Employers frequently require candidates, and particularly short listed candidates, to undergo a test or a battery of tests the purpose of which are to assist the employer to make the decision as to which candidate is the most suitable for the post. These tests may be medical in nature i.e. to test the physical health and suitability of the candidate, physiological tests such as the polygraph, skills related or knowledge based ¹²⁷.

Sections 7 and 8 of the Act contain provisions relevant to medical, psychological tests and other similar assessments. These sections state-

7 Medical testing

(1) Medical testing of an employee is prohibited, unless-

- (a) legislation permits or requires the testing; or
- (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

(2) Testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50 (4) of this Act.

8 Psychological testing and other similar assessments

Psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used-

- (a) has been scientifically shown to be valid and reliable;
- (b) can be applied fairly to all employees; and
- (c) is not biased against any employee or group.

Medical testing

Section 1 of the EEA defines a medical test as “any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain whether an employee has any medical condition”. Pretorius et al comment that “any medical testing that is conducted by the employer is ultimately subject to

¹²⁶ The ‘Act’ in this section refers to the Employment Equity Act No 55 of 1998 referred to as the ‘EEA’.

¹²⁷ In *SA Transport & Allied Workers Union and Metrorail Services* (2002) 23 ILJ 2389 (ARB), the candidates for a promotion post and were given an ‘in basket’ test in order, according to the arbitrator, to test their “management potential”. The arbitrator also refers states that as a result of the test the applicant “fulfilled at least the basic technical requirements for the job”. No explanation is given of the nature, contents of the test, or how the results were quantified and arrived at.

the rights and freedoms guaranteed to job applicants and employees by the Constitution”¹²⁸, and in particular the right to equality.

Medical tests, and therefore by implication the information gathered as a result of the tests, are prohibited in terms of section 7(1). However, in a highly competitive job market there are inevitably numerous applicants, and in such a competitive environment job applicants, as well as a candidates for promotion, know that “their relative healthiness could be as important as the relative qualifications in getting them their job. Good health, therefore, is a competitive advantage”¹²⁹ For this reason Basson warns that such applicants “may be ‘forced’ by economic considerations ‘voluntarily’ to disclose information about their personal health status in the hope that such information may secure employment”¹³⁰.

Medical information may however be obtained if legislation permits or requires the testing. For example, those who work in hazardous occupations or work with hazardous substances may be lawfully subjected to medical tests in order for the employer to comply with its obligations in terms of the Occupational Health and Safety Act 1993 and the Mine Health and Safety Act 1996 to provide a safe workplace.

Medical tests may also be lawful if obtained as a result of “social policy”¹³¹, a phrase criticised by Pretorius et al as being “both wide and vague”¹³² as it may be interpreted to include subjective considerations such as the candidates HIV status which are not linked to the candidates’ suitability to perform the job¹³³.

Another potentially contentious way in which a candidate’s medical information may be lawfully obtained is where it is justifiable on the ground of “the fair distribution of employee benefits”, although this provision is similar to the approach in the United

¹²⁸ Pretorius et al page 8-35.

¹²⁹ ‘The Second Interim Report on Aspects of the Law Relating to Aids. Pre-employment HIV Testing’ South African Law Commission Project 85 (April 1998).

¹³⁰ Basson ‘Pre-employment testing’ SA Mercantile Law Journal vol 14 No2 2002, page 309.

¹³¹ Section 7(1)(b) of the Employment Equity Act No 55 of 1998.

¹³² Pretorius et al page 8-39.

¹³³ See *Hoffmann v South African Airways* (2000) 11 BCLR 1211.

States¹³⁴. This ground may be used to disguise the real reason why an employee is not promoted and unfairly discriminated against. For this reason Pretorius et al suggest that the job offer be made but dependant upon the employee passing a medical test that is “proximate and proportionately related to the employment position and conditions”¹³⁵.

Testing for Drugs or Alcohol: The definition of medical testing is wide enough to include both drug and alcohol dependence. Both forms of dependency have physical and mental components and are both considered medical conditions¹³⁶. Workplace problems such as absenteeism, reduced levels of efficiency, safety issues and increased medical and insurance costs are ascribed to the misuse of alcohol and drugs. However, unless the employer can show that due to the inherent requirements of the job drug and/or alcohol testing of candidates is necessary for promotion, such tests will contravene section 7(1) of the Act. There are no reported cases in South Africa on the point. In the United States case of *Treasury Employees, Von Raab* 489 US 656 (1989), a drug test was a condition for employment in government jobs which involved the enforcement of drug laws, and required employees to carry firearms. The court held that the interests of government outweighed the privacy concerns of job applicants.

Testing for pregnancy: Discrimination on the ground of pregnancy is specifically prohibited by section 6(1) of the Act, but may be justified on the ground of the inherent requirements of the job, as in *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC). In this case Willis AJ controversially¹³⁷ stated “to hold that an employer cannot take into account a prospective employee’s pregnancy would be widely regarded as being so economically irrational as to be fundamentally harmful to our society”. In *Mashava v Cuzen & Woods Attorneys* (2000) 21 ILJ 402 (LC) the Labour Court held that a employee on probation was not required to inform her employer that she was pregnant. In the United States case of *Norman Bloodsaw v*

¹³⁴ In terms of the Americans with Disabilities Act 1990, medical testing is impliedly permitted if related to access to employment benefits.

¹³⁵ Pretorius et al page 8-42.

¹³⁶ See Fitzpatrick ‘Alcoholism as a handicap under federal and state employment discrimination laws’ (1991) *The Labour Lawyer* 395 referred to by Pretorius et al page 8-54.

¹³⁷ Basson *ibid* 313 who states “I strongly argue that an employer should not be allowed to request a pregnancy test as part of pre-employment medical screening, not even with reference to the inherent requirements of the job, simply because considerations of privacy outweigh the arguments in favour of the inherent requirements of the job”.

Lawrence Berkeley Laboratory 135 F3d 1260 (9th Cir 1998) held that pregnancy test violated the privacy of women in clerical and administrative jobs.

Testing for HIV: Testing undertaken in order to determine an employee's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court¹³⁸.

The Code of Good Practice: Key Aspects of HIV/AIDS and Employment was published on 1 December 2000. Clause 7 deals with HIV testing, confidentiality and disclosure. It reads:

7 HIV Testing, Confidentiality and Disclosure

7.1 HIV Testing

7.1.1 No employer may require an employee, or an applicant for employment to undertake an HIV test in order to ascertain that employee's HIV status. As provided for in the Employment Equity Act, employers may approach the Labour Court to obtain authorisation for testing.

7.1.2 Whether s 7(2) of the Employment Equity Act prevents an employer-provided health service supplying a test to an employee who requests a test, depends on whether the Labour Court would accept that an employee can knowingly agree to waive the protection in the section. This issue has not yet been decided by the courts.

7.1.3 In implementing the sections below, it is recommended that parties take note of the position set out in item 7.1.2.

7.1.4 Authorised testing

Employers must approach the Labour Court for authorisation in, amongst others, the following circumstances:

- (i) during an application for employment;
- (ii) as a condition of employment;
- (iii) during procedures related to termination of employment;
- (iv) as an eligibility requirement for training or staff development programmes; and
- (v) as an access requirement to obtain employee benefits.

7.1.5 Permissible testing

(a) An employer may provide testing to an employee who has requested a test in the following circumstances:

- (i) as part of a health care service provided in the workplace;
- (ii) in the event of an occupational accident carrying a risk of exposure to blood or other body fluids;

¹³⁸ Section 7(2) of the EEA.

(iii) for the purposes of applying for compensation following an occupational accident involving a risk of exposure to blood or other body fluids.

(b) Furthermore, such testing may only take place within the following defined conditions:

- (i) at the initiative of an employee;
- (ii) within a health care worker and employee-patient relationship;
- (iii) with informed consent and pre- and post-test counselling, as defined by the Department of Health's National Policy on Testing for HIV; and
- (iv) with strict procedures relating to confidentiality of an employee's HIV status as described in clause 7.2 of this code.

7.1.6 All testing, including both authorised and permissible testing, should be conducted in accordance with the Department of Health's National Policy on Testing for HIV issued in terms of the National Policy for Health Act 116 of 1990.

7.1.7 Informed consent means that the individual has been provided with information, understands it and based on this has agreed to undertake the HIV test. It implies that the individual understands what the test is, why it is necessary, the benefits, risks, alternatives and any possible social implications of the outcome.

7.1.8 Anonymous, unlinked surveillance or epidemiological HIV testing in the workplace may occur provided it is undertaken in accordance with ethical and legal principles regarding such research. Where such research is done, the information obtained may not be used to unfairly discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the results.'

In Joy Mining Machinery, A Division of Harnischfeger (SA) (Pty) Ltd v National Union of Metalworkers of SA & others (2002) 23 ILJ 391 (LC) Landman J considered a number of factors to be relevant when deciding whether the employer's request to give employees an HIV test including the prohibition on unfair discrimination; the need for HIV testing; the purpose of the test; the medical facts; employment conditions; social policy; the fair distribution of employee benefits; the inherent requirements of the job; and the category or categories of jobs or employees concerned.

In Irvin & Johnson Ltd v Trawler & Line Fishing Union & others (2003) 24 ILJ 565 (LC) the court interpreted section 7(2) of the Act to mean that an HIV test is only prohibited if the employer is thereby enabled to determine the HIV status of a particular employee. Furthermore, section 7 as a whole applies to compulsory testing

but not to voluntary testing, and that so long as testing is truly voluntary, it does not matter whether the initiative comes from the employer or the employees. For that reason the court held that the anonymous and voluntary testing which the company wished to arrange for its employees did not fall within the ambit of s 7(2) and that the company did not require permission from the Labour Court before proceeding to test its employees.

In *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood & Allied Workers Union & others* (2003) 24 ILJ 974 (LC) the court rejected the view expressed in the *Irvin & Johnson* matter that anonymous testing is not discriminatory and therefore not prohibited. Pillay J was of the view that interpretation of the Act must be consistent with the Constitution, and that the interpretation placed on s 7 by *Irvin & Johnson* conflicts with the right of everyone not to be subjected to medical or scientific experiments without their informed consent. Pillay held that the leave of the Labour Court is still required even if the testing is anonymous, and that section 7(2) requires the employer to obtain Labour Court order permitting the tests and the order must be justifiable. The courts discretion to grant an order must be exercised judicially, which means that it must also be constitutional. Pillay gave a declarator to the effect that “Anonymous and voluntary testing does not fall within the ambit of s 7(2) of the Employment Equity Act 55 of 1998 (the Act).”

Disability tests: Even if a medical test – assuming it was permitted despite the general prohibition of tests in section 7(1), showed that a candidate was disabled, the employer may still not discriminate against the candidate unless it can show that the decision not to promote the candidate was based on the inherent requirements of the job.

In *Hadden v South African Police Services* PSSS 1980 ¹³⁹, the employee was a disabled coloured male who applied for promotion. He was recommended by the area selection panel for promotion, but this was reversed by the provincial panel. The employer raised a point *in limine* to the effect that the decision to promote the successful candidate was made on the basis of the Act, the bargaining council had no jurisdiction over the dispute. The arbitrator dismissed the point, and found that the

¹³⁹An unreported arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council dated the 4th October 2003. The writer was the arbitrator.

employer had committed an unfair labour practice by not promoting the Applicant as the decision to change the area panel was unfair as the provincial panel had no equity plan before them, and had given no reasons why the first decision was overturned. In addition,

“The present case does not concern the discrimination of the Applicant by the Respondent, and is distinguishable from the case of *SALSTAFF and SA Port Operations*¹⁴⁰ in which the employer had not included the disabled in the designation of ‘affirmative action applicants’, and which the arbitrator concluded meant that the employer had discriminated against the employee. In this case there is no evidence that the disabled are not considered to be part of the designated group by the Respondent; the Respondent simply ignored the fact that he was part of the designated group.

The ILO report *Time for Equality at Work* states that

“113. People with disabilities face stigmatization and limited understanding of their abilities and aspirations. People can move into a state of disability at different stages in their lives, at birth or later in life, and during further education or while in employment. Disabilities can be acquired in diverse ways, may take different forms and may constitute physical, sensory, intellectual or mental impairment. Because of their heterogeneity, disabilities can affect differently the ability of the people concerned to work and they require different types of accommodation measures. This, in turn, gives rise to diverse forms of discrimination.

114. The most common form of discrimination is the denial of opportunities to the disabled either to work altogether or to build on their abilities and potential.”

In South Africa employees with disabilities are protected from discrimination by the provisions of the Employment Equity Act, 1998. All employees, including those with disabilities are required to be treated fairly in terms of the Labour Relations Act, 1995 a duty which in my view the Respondent has failed to uphold.”

Generic tests: Generic tests could possibly be used by an employer to identify a candidate’s “biological predisposition to an occupationally related disease or to identify genetic disorders that have the potential to drive up the costs associated with employment”¹⁴¹. It is suggested that generic testing is a medical test, and that the provisions of the Act apply. While genetic tests for some medical conditions, such as muscular dystrophy and Huntington’s Disease, have been developed the results of which are reliable, even these can not predict when the disease will strike, or the severity of the condition. The effectiveness of tests for conditions such as heart disease is even more limited. Basson¹⁴² refers to a study conducted in 1996 in the

¹⁴⁰ (2003) 24 *ILJ* 263 (BCA).

¹⁴¹ Befort ‘Pre-employment screening and investigation: navigating between a rock and a hard place’ (1997) *Hofstra Labour Law Journal* 367.

¹⁴² Page 315.

United States and reported by Miller ¹⁴³ which showed that people who had undergone genetic tests and had shown a predisposition to various medical conditions were subjected to forms of discrimination as a result, despite the fact that they were asymptomatic at the time. As a result Pretorius et al state

“In short, significant scientific uncertainty attend much of predictive genetic testing to the extent that it is currently of extremely limited utility in the employment context. The capacity of the job applicant or employee to perform the inherent requirements of the job, or his or her likelihood to pose a risk to health and safety in the workplace, should not be based on speculation, but on scientifically valid evidence. ¹⁴⁴”

Basson further points out that “there is currently no scientific evidence available to support a relationship between unexpressed genetic factors and a person’s ability to do the job” ¹⁴⁵.

Psychological tests: According to Kaplan and Saccazzo ¹⁴⁶, psychological tests include tests which measure intelligence, aptitude, interest and preference, psychomotor ability and personality traits. They distinguish between human ability and personality tests. However, not all forms of tests should be regarded as “tests” or “similar assessment” within the meaning of the Act as in the field of psychology testing is understood to mean standardised and professionally developed measurement devices which are specifically designed to measure particular behavioural characteristics. Furthermore, the Act requires these tests to be shown to be scientifically both “valid” and “reliable”. The former means that they should measure the candidate’s abilities, skills and characteristics accurately and with reference to the job in question. The process of validation of a test has the objective of establishing whether there is a positive correlation between the results of the test and actual job performance. The latter means that the tests must be equally valid for all population groups, and contain no cultural bias. Reliability, as a term used in psychological testing, refers not to the accuracy of evaluation, but rather to the consistency of examiners, either among themselves or an individual examiner over a

¹⁴³ Miller ‘Genetic Discrimination in the Workplace’ (1998) 26 The Journal of Law, Medicine and Ethics 189 at page 190.

¹⁴⁴ See page 8-57.

¹⁴⁵ Basson page 317.

¹⁴⁶ *Psychological testing. Principles, applications and issues* (1993).

period of time¹⁴⁷. The tests must be shown to be capable of being applied fairly to all employees.

A polygraph, which assesses a candidate's truthfulness by measuring his physiological reaction to a set of prepared questions, is a form of psychological testing under the Employment Equity Act, 55 of 1998¹⁴⁸. Applying the provisions of section 8 to such tests means that they must be shown to be 'scientifically valid', which has been a difficult task. In the United States, the Employee Polygraph Protection Act 29 USC (1994) makes it unlawful for private employers to require a job applicant to take or submit to a polygraph test, or to dismiss, discriminate or discipline an employee who refuses to take the test, or to take any action against an employee on the basis of the results of the test. Christianson¹⁴⁹ notes that "South African employers, including the state, are increasingly turning to the lie detector test as a means not only to detect dishonesty in the workplace, but also in the hope that pre-employment screening will prevent, or at least deter, theft, fraud, dishonesty and syndicated crime. The use of polygraphs in pre-employment selection is particularly controversial and most noticeable in those organizations and industries which require high levels of trust or security."

When discussing the validity and reliability of such tests, Christianson¹⁵⁰ states

"In 1986 both the American Medical Association and the American Psychological Association found that polygraphs were 'unreliable and inappropriate' for use in the workplace, as has the HPCSA [Health Professionals Council of South Africa] as recently as August 1999."

The Code of Good Practice: The Employment of People with Disabilities states in item 8 that tests must comply with sections 7 and 8 of the Employment Equity Act 55 of 1998, and must be relevant and appropriate to the kind of work for which the applicant or employee is being tested. The Code recommends that employers establish that tests do not unfairly exclude and are not biased in how or when they are applied, assessed or interpreted. Furthermore, tests to establish the health of an applicant or employee should be distinguished from tests that assess the ability to perform essential job functions or duties. Testing to determine the health status of an

¹⁴⁷ M Christianson 'Polygraph Testing In South African Workplaces: 'Shield And Sword' in the Dishonesty Detection Versus Compromising Privacy Debate' (2000) 21 *ILJ* 16, page 25.

¹⁴⁸ See Pretorius page 8-61. Christianson however states at page 27 that while "a polygraph test may fall short of the requirements for a psychological or psychometric test, it may still come within the definition of 'other similar assessments' in s 8 of the Employment Equity Act No 55 of 1998".

¹⁴⁹ *Ibid* page 18.

¹⁵⁰ *Ibid* page 24.

employee should only be carried out after an employer has established that the person is in fact competent to perform the essential job functions or duties and after a job offer has been made. The same applies to medical testing for admission to membership of an employee benefit scheme.

Psychological tests may be shown to be discriminatory if for example culture based questions are contained in an intelligence test, while written tests may be challenged on the grounds that they are in the candidate's second language, or that the candidate has no or little experience in taking such tests. Aptitude tests were first shown in *Griggs v Duke Power Co* 401 US 424 (1971) to be indirectly discriminatory. A test which was intended to reveal candidates who are emotionally unstable and therefore unsuitable as security personnel was found to contain questions regarding the candidate's sexual orientation which the court held not to be relevant to the objective of the test¹⁵¹.

In South Africa, the question of the use and validity of pre-employment tests arose in *FAWU & others v SA Breweries Ltd* [2004] 11 BLLR 1093 (LC) in which the decision by the employer to retrench employees was held to be unfair. The background to the dispute was a decision by the employer in 1992 to become a world class manufacturer and after much discussion the union, FAWU, undertook in a collective agreement to "work together to make the company a successful world class manufacturer". The company introduced Best Operating Practice 1 and 2, the latter resulting in a re-organisation of the packaging lines into a new hierarchy consisting of "BOP operators", "process operators", "process artisans" and "team leaders". The idea was that each team would perform all functions, including machine operation, maintenance, quality control and data capturing, while individual employees could work their way up the corporate ladder by moving from one function ("building block") to another as they acquired the qualifications ("entry level specifications") for each post. When this was introduced at the Newlands brewery, it was done with the knowledge that it would result in some employee's jobs becoming redundant. The company then re-organised the production lines and created new positions, scrapped all existing posts, and invited the incumbents of the old posts to apply for positions on the re-organised structure if they met the entrance level requirements. Employees who were unable to produce documentary proof of their formal

¹⁵¹ *Soroka v Dayton Hudson Corporation* 235 Cal App 3d 654

educational qualifications, were tested according to establish their Adult Basic Education and Training (“ABET”) levels, and those who fell below specified levels were handed “regret letters”, that is selected for retrenchment. Those who “passed” the original screening, were then subjected to psychometric tests, interviewed and a short list compiled for each post. The final selection was made according to each candidate’s performance at the interview, prior learning, general attributes and the psychometric assessments. Those who were not appointed were selected for retrenchment.

The crux of the case was the selection criteria used by the employer, which was based on a prediction of each employee’s capacity to cope with the functions and responsibility of jobs in the re-organised structure. The union argued that the selection criteria was unfair, because

“Fixed selection criteria were set which would either have the result of leading to the retrenchment of employees with the lowest educational levels (who were more often than not the longest serving employees). This occurred in circumstances where respondent was aware that its conduct not only resulted in the retrenchment of a large number of employees but moreover, that its claim to be a company occupying the ‘high moral ground’ (sic) would be seriously questioned in consequence of its decision to exclude from its business employees who had, to a large extent, been the victims of so-called Bantu education.”

The court examined whether the entry levels set by the company were fair in the circumstances. The court accepted the evidence of an expert witness who testified that the ABET standard was not the appropriate gauge to determining what entry-level tests are meant to determine as ABET ratings were invalid because they had no “predictive value”, that is they simply did not measure what they were designed to measure – namely, the employee’s ability to render satisfactory performance under the new organisational structure.

There appears to be a lack of South African authorities on the question of the “predictive validity” of pre-employment tests. For that reason the court in the *SA Breweries* case, the court relied on the matter of *Albemarle Paper Co v Moody* 422 US 405 (1975) which it held to be “of sufficiently persuasive authority to merit consideration” in that case. The court stated that

“One leg of that case involved an enquiry into what an employer had to show to establish that pre-employment tests (which were admittedly racially discriminatory in effect, though not in intent) were

sufficiently "job related" to withstand challenge under the 1964 Civil Rights Act and the 1972 Equal Employment Opportunity Act. The court's approach was equity based.

Delivering the decision of the majority of the court, Mr Justice Stewart held, *inter alia*, that:

the fact that the employer had approached the case in a bona fide fashion did not preclude a court from finding that the employees were entitled to the equitable relief which they sought;

employment tests should not be used without meaningful study of their relationship to performance ability;

such tests should measure "the person for the job and not the person in the abstract" (emphasis added);

the relevant statutory guidelines under consideration would only permit discriminatory testing if the employer showed, by methods which were professionally acceptable, that such tests were "predictive of or significantly correlated with important elements of work behaviour which compromise or are relevant to the job or jobs for which candidates are being evaluated".

A further retrenchment based case is that of *Oswald v Helpmekaar Kollege* (2001) 22 ILJ 2501 (CCMA) in which the employee was employed as an English teacher by a school. During the retrenchment exercise it was agreed that all employees should reapply for teaching posts in terms of the employer's proposed revised structure, which also involved the testing of candidates and that the unsuccessful candidates were to be retrenched. The employee alleged that her selection for retrenchment had been unfair. The arbitration award records that employee scored the lowest mark of the candidates the post in the restructured school. Unfortunately the award makes no reference to the type of test undertaken, the relevance of the test to the inherent requirements for the post or in fact anything on this vital point.

6.9 The interview

Introduction

A structured interviewing process in terms of which questions are prepared before hand, given an appropriate weighting, and asked of all candidates who are then scored by each member of the panel separately and the totals then added up is preferable. What should be avoided is an interviewing process which relies on the subjective views of the selection committee because it will be difficult to justify such views when challenged in an arbitration or court at a later date. A warning was sounded in *Payne v Travenol Laboratories* 673 F2d 798 (1982) to the effect that "[h]iring processes that rely heavily on subjective interviewing provide an opportunity for the intentional discrimination that lies at the heart of a disparate treatment case".

In addition interviews in which the panel are required to give their perceptions of the candidates regarding vague and subjective criteria such as 'leadership potential', 'strong personality', or the 'ability to fit in' may also result in the panellist unintentionally using racial or gender stereotypes when assessing candidates.

For this reason the Code of Good Practice: The Employment of People with Disabilities ¹⁵² requires selection interviews to be objective and unbiased, and requires members of the panel to avoid assumptions about people with disabilities. Furthermore, if a candidate has disclosed a disability or has a self-evident disability, the selection panel must focus on the applicant's qualifications for the work rather than any actual or presumed disability in order to enquire and assess if the applicant would, but for the disability, be suitably qualified for the post. Panelists should ask such candidates "to indicate how they would perform essential functions and if accommodation is required". Finally, selection panels are required, if necessary to make reasonable accommodation during the interview itself.

In *National Education Health & Allied Workers Union obo Thomas v Department of Justice* (2001) 22 ILJ 306 (ARB), the arbitrator raised his concerns about giving candidates scores during the interview process, noting that

While the practice of scoring applicants on their responses to specific questions appears to be relatively widespread in the public service, it appears to be ill-advised especially where it introduces a somewhat mechanistic mechanism into the assessment of different candidates. In this case the department deviated from a mechanistic application of a scoring system. Nevertheless, this case underlines the view that scoring by itself will often be an inadequate measure for comparing the suitability of one candidate with another.

In *Jones v Western Cape Education Department* [1999] 4 BALR 467 (IMSSA) one of the grounds on which the employee alleged the failure to promote her was unfair was that the chairperson had commented on her answers in the interview which she claimed had the result of unsettling her and was intended to discredit her. The arbitrator held that contention that she was undermined in the interview by the chairperson was not proved.

¹⁵² See paragraph 7.

In some cases no interview need be held. *In Vereniging Van Staatsamptenare on Behalf of Badenhorst v Department of Justice* (1999) 20 ILJ 253 (CCMA). no interview was held due to the constraints on the Department as a result of the numbers of posts, candidates and the limited time in which the process was to be completed. Similarly, in the South African Police Service the promotion policy provided for a 'paper board' which took the place of the interview process. This meant that the panel assessed the written application form of the candidate together with any supplementary information filed ¹⁵³.

In *Jack and Department of Labour* [2000] 4 BALR 373 (CCMA) the Department's Policy stated that "no discriminating" questions may be asked. During the interview the employee was asked by the chairperson of the panel to indicate whether there was any negative information which could affect the panel's decision. The employee's record reflected that she had been absent from work on a number of occasions, and this record was available to the panel. The arbitrator was of the view that the trend of the chairperson's question was aimed at affording the employee the opportunity to explain her record, which she did. The arbitrator held this question was not discriminatory, and that if the chairperson had failed to raise the issue of absenteeism, he could have been criticised for taking into account negative information which the applicant was not given the opportunity to explain.

One of the issues the arbitrator was required to determine in *Provincial Administration Western Cape (Department of Health & Social Services) v Bikwani & Others* (2002) 23 ILJ 761 (LC) was whether a structured questionnaire should have been used by the panel. The evidence was that the selection panel formulated a list of questions which related to the criteria for the post before the interviews. The subject-matter of each question was summarized in a prepared document set out in grid form. In the course of each interview each panel member recorded the candidate's answers to the various questions and allocated points or ratings to each such answer. After each interview the panel members then met, discussed and reached consensus regarding the allocation of points to the candidate in question. The result of this process was that out of a possible 70 points, the successful candidate scored 50, another candidate scored 48, and the employee scored 43,

¹⁵³ See *Sha and South African Police Services* (2003) 12 SSSBC 6.9.6.

while and the remaining candidates had lower scores. The employee's case in the arbitration was that since the provincial administration was obliged to utilize what was referred to as 'structured questionnaires' in the interviewing process, the questions put by the individual panel members should have been identically phrased and that failure to do so would result in prejudice. The employee's evidence was that it was apparent from discussions which he had with other unsuccessful candidates that questions were not presented 'in precisely the same way'. This was unfair, alleged the employee, as different standards were being applied. This argument was upheld by the arbitrator who stated that

A pre-planned questionnaire is meant to take away the subjectivity and introduce objectivity in an interview and logically the absence of such leads to subjectivity creeping.

The employer had "failed to prove that its conduct was fair and objective", and had therefore committed an unfair labour practice. The award was however set aside on review because the arbitrator had ignored the uncontested evidence of an expert called by the employer who testified that 'in the context of the pre-interview consultations between the interviewing panellists and their mutual assessment of the post-interview results before making their recommendations, both the structure of the process, the manner of its implementation and the formulation of its results, were fair and acceptable in all respects'.

In *Metrorail (Pretoria) and TWU* (1998) 7 ARB 6.9.17., it was alleged that the grievant was disadvantaged during the selection interview by being asked to speak English rather than her first language, which is Afrikaans. During the arbitration evidence was led that English is the business language of the company and that the grievant was informed during the interview that should she experience difficulties in expressing herself she may speak Afrikaans. The arbitrator held that

"... the grievant was not disadvantaged relative to other applicants during the selection interview by being required to speak English. It must be remembered that other candidates were similarly disadvantaged in that English would in all likelihood also not have been their first language".

The fact that the grievant's union member was not present during the interviews was held not to be unfair in *SADTU obo Moodley and Western Cape Educational Department* [1999] 6 BALR 754 (IMSSA) as the union had been informed of the meetings but had failed to send a representative.

Is an employer obliged to interview all candidates who meet the requirements as stated in the advertisement? This question was before the arbitrator in *NUTESA v M L Sultan Technikon*¹⁵⁴. The facts of the matter were that only three candidates for each of five executive posts were short-listed. The union argued that all applicants who met the requirements as set out in the advertisement should be interviewed, while employer pointed to an agreement between all parties that the three most suitable applicants would be ranked by the short listing process and then interviewed. The employer further pointed out that as eighty-five persons applied for the five positions the time involved in each interview (about three hours) meant that it was an impossible task to interview the large numbers of applicants. Furthermore, the costs involved in bringing applicants for an interview also justified the decision to shortlist to three per post. The employer's argument was upheld because there was an agreement about choosing the three most suitable applicants, and an employer is not obliged to interview anyone who applies. It was held that as long as the selection was not discriminatory, to shortlist in the manner adopted by the technikon was fair and appropriate.

All candidates who are interviewed must be interviewed by the same panel, and a failure to do so gives rise to a perception of bias. In *Gruenbaum v SA Revenue Service (Customs & Excise)* KN 20090¹⁵⁵, the facts were that the applicant was interviewed in Pretoria by a three-person panel, the successful candidate was interviewed by one member of the panel in Richards Bay. The panel member then reported back to the rest of the panel on the interview. The arbitrator held that 'Whilst it is recognized that selection of applicants is a developing practice in South Africa, it is clear that the failure of the panel to interview [the successful candidate] in the same way as the applicant was irregular, if for no other reason that it gave rise to a perception of bias. As was held in *MAWU & another v BTR Industries (Pty) Ltd & others* (1989) 10 ILJ 615 (N) a reasonable perception of bias renders a procedure reviewable. If the applicant was still employed by the employer, I have no doubt that the correct course of action would be to require the employer to hold the selection procedure again.'

Likewise in *PSA obo Dalton and Department of Public Works* (1998) 7 CCMA 6.9.6 the employees were interviewed by officials from the Department rather than the

¹⁵⁴ An unreported arbitration discussed in A Rycroft 'Obstacles to Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies' (1999) 20 ILJ 1411, in which Rycroft was the arbitrator.

¹⁵⁵ Unreported CCMA arbitration award dated 8 November 1998.

same panel which had interviewed other candidates. In addition the interviews had taken place after the posts were already filled. This was according to the arbitrator “patently unfair as the applicants were effectively denied the opportunity of being considered for posts for which they, together with other employees in the Department, had been invited to apply”.

The interview process was the subject of the dispute in *National Union of Metalworkers of SA on behalf of Motsiri and Technology Services International (A Division of ESKOM Enterprises) (2003) 24 ILJ 282 (ARB)* where eighteen short listed candidates were interviewed by the two member selection panel, but two further candidates were interviewed by one member of the panel only as the other member went to a doctor’s appointment. The successful candidate was one of those interviewed by the single panellist alone. This discrepancy was not however raised as a point of contention during the arbitration. It is submitted that such conduct is a ground on which a candidate can allege an unfair labour practice on the basis of the *Gruenbaum* and *PSA obo Dalton* cases discussed above.

In *Maphisa and Department of Health (Gauteng) [2004] 11 BALR 1348 (PHWSBC)* the employee alleged that the selection panel was improperly constituted in terms of the applicable provisions of the public service recruitment policy and procedures because the CEO was part of the selection panel. The arbitrator noted that Public Service Regulation of 2001 as amended in August 2003 reads:

“...The selection committee shall consist of at least three members who are employees of a grading equal to or higher than the grading of the post to be filled. The chairperson of the selection committee, who shall be an employee, shall be of a grading higher than the post to be filled.”

The arbitrator concluded that as there was nothing to prevent the CEO from sitting on the selection panel, and the other members were all of ranks equal to or superior to the advertised post, the employee had failed to prove that he was the victim of an unfair labour practice.

6.10 The selection of the most suitable candidate

This section deals with the question of the how the decision of which candidate to promote should be arrived at. It is submitted that the panel, committee or responsible person has an obligation to apply his or their mind to the questions of whether-

- The candidate is suitably qualified for the post, and if so

- If the candidate is a disabled person, whether the candidate “needs any accommodation to be able to perform the essential functions of the job”¹⁵⁶,
- Which candidate is the “most suitable” candidate, and
- The reasons why the candidate is the most suitable as well as why the other short listed candidates are not suitable.

When is a candidate a “suitable” candidate for promotion?

In *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC). Landman J made the following point

“A distinction must clearly be drawn between eligibility and suitability. An eligible candidate must meet certain formal requirements. There may even be a number of eligible candidates. A suitable candidate would generally be some one who is acceptable to the employer as the person who should get the job. There could, in my view, within the context of this policy, only be one suitable candidate.” [at 599]

Furthermore, said the court, the decision who is suitable is a decision to be made by the employer; it means that the company must have identified the particular as suitable. That a candidate regards her- or himself as 'suitable' is not decisive; it is the employer's decision.

The question of suitability with respect to the public service is discussed section 11 of the PSA, which provides:

'Appointments and filling of posts

(1) In the making of any appointment or the filling of any post in the public service -

(a) no person who qualifies for the appointment, transfer or promotion concerned shall be favoured or prejudiced;

(b) only the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer in question, and such conditions as may be determined or prescribed or as may be directed or recommended by the Commission for the making of the appointment or the filling of the post, shall be taken into account.'

The Public Service Staff Code elaborates on section 11 as follows:

(iv) Efficiency, refers to the degree to which a candidate's total abilities, attributes, knowledge, skill and potential will ensure optimal performance of the duties of a relevant post.

(v) Suitability, which relates to the total profile of a candidate, weighed against -

- the relevant post and person requirements;

¹⁵⁶ See paragraph 7.2 of the Code of Good Practice: The Employment of People with Disabilities.

- the totality of the work environment which includes aspects such as linguistic requirements and knowledge/understanding of the culture and social values of a specific client group; for purpose of comparison of candidates in order to determine the most suitable candidate.'

In *Gordon v Department of Health, Kwazulu-Natal* (2004) 25 ILJ 1431 (LC) Pillay noted that in terms of section 212 of the interim Constitution and section 11 of the Public Service Act (Proc 103 of 1994) ¹⁵⁷ suitability was a consideration ¹⁵⁸ to be taken into account when making appointments in the public service. In Pillay J's view "[t]he plain meaning of efficiency and suitability is that the candidate must be capable of being effective and appropriate for the job" ¹⁵⁹, and "[m]erit is a requirement distinct from suitability". In the learned judge's view the process of promoting a representative public administration is permitted and required by s 212(2)(b) and 212(4) which requires suitability to be taken into account even if it offends s 8(2).

In *Gordon* the Court's comments concerning the suitability of a candidate are noteworthy. Pillay J said

"[75] The applicant [a white male] was not the most suitable person for the job as effect would not have been given to the constitutional imperatives of promoting equality and transforming the public service. Consequently, his non-appointment is not discriminatory." [My editing]

It is suggested that a candidate is suitable for promotion if the candidate possesses the inherent requirements for the job. In *POPCRU on behalf of Baadjies and SAPS* (2003) 24 ILJ 254 (CCMA) the arbitrator was of the view that the mere failure to possess an academic qualification does not mean that the candidate is not a suitable candidate for promotion, and stated

"There was no evidence that, because he did not have matric, his ability to do the job was in any way impaired. In fact, the contrary is true and Baadjies was recognized for his abilities as a detective."

¹⁵⁷ Section 11 (1)(b) states: "In the making of any appointment or the filling of any post in the public service – (a) no person who qualifies for the appointment, transfer or promotion concerned shall be favoured or prejudiced;

(b) only the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer in question, and such conditions as may be determined or prescribed or as may be directed or recommended by the Commission for the making of the appointment or the filling of the post, shall be taken into account."

¹⁵⁸ Section 212(4) stated "In the making of any appointment or the filling of any post in the public service, the qualifications, level of training, merit, efficiency and suitability of the persons who qualify for the appointment, promotion or transfer concerned, and such conditions as may be determined or prescribed by or under any law, shall be taken into account."

¹⁵⁹ *Gordon v Department of Health, Kwazulu-Natal* (2004) 25 ILJ 1431 (LC), para 54.

What the arbitrator was saying is that the possession of a matric was not an inherent requirement for the job, and therefore the fact that one candidate did not have a matric did not mean that he was not a suitable candidate for promotion.

In *Visser v Minister of Justice & Constitutional Affairs & Others* (2004) 25 ILJ 1417 (T) the appointment of a Sheriff was set aside because he was not suitable primarily because he did not have the necessary finance to set up and run a Sheriff's office.

In *Fagwusa & Another v Hibiscus Coast Municipality & Others* (2003) 24 ILJ 1976 (LC) a black male sought to be appointed to the position of director: corporate services. The court reviewed the process followed by the employer and noted that the criterion of representivity had been accorded a value of 5 while the total value attached to all the criteria – being qualifications, competence, relevant experience, suitability and strength, and added advantages- was 20. The court assessed the employee's suitability for appointment as well as that of the person who was appointed. The employee was given a score of 9 out of 20, of which he was given a mark of 3 out of five as an African male. The court concluded that

"From the above facts and a comparison of the relative competence, qualifications, suitability and experience of the applicant and the second respondent, it is quite obvious that the second respondent was preferred because he was the more suitable candidate of the two of them.I disagree with his submission that because he was an African he ought to have been interviewed or appointed. This is not a proper interpretation of either the collective agreement on which he relies or the Employment Equity Act 55 of 1998."

If the employer decides that a particular candidate is not suitable for the post, the candidate needs to be informed of that decision and the reasons for such decision. Goldstone J as he then was, in *Traub & others v Administrator Transvaal & others* 1989 (1) SA 397 (W) at 400I-J; (1988) 9 ILJ 563 (W) said:

'A decision that a professional person is unsuitable for a post is potentially of the utmost importance and will, if it remains, be a permanent blot on his good name.'

At Goldstone J , went on to say that:

'Where the suitability of a person is the issue, and an adverse decision has serious consequences for that person in relation to his application and in relation to his career, then I have no doubt that in the

absence of a clear provision to the contrary in the statute he must be entitled to be heard before he is made to suffer an adverse decision.’¹⁶⁰

The selection of the most suitable candidate: the panel’s duty to apply its mind

The obligation on an administrative tribunal, such as a promotion panel, to apply its mind arises from administrative law. The obligation is difficult to define precisely, but it means that the panel must be able to justify its decision to recommend one candidate over another. To paraphrase the judgement of Chief Justice in *Hira and another v Booysen and another* 1992 (4) SA 69 (A), the panel must ‘ask the right question’, ‘apply the right test’, or ‘base its decision on some prescribed criteria’, or consider the issue before it in the light of the relevant legal parameters. The issue is not whether the decision made by the panel, chairperson or arbitrator is correct or not, or even if they made a mistake of law or fact; rather it goes to how – the process, and why – the substance of the decision, was made. In *Chetty’s Motor Transport v National Transport* 1972 (1) SA 156 (N)¹⁶¹, Miller AJ stated:

“That they failed to apply their minds to the matter might, depending on the circumstances, be inferred from their failure to take into account at all matters which they were obliged to take into account and from their reliance upon matters which they were not entitled to rely upon.”

An administrative body vested with a discretionary power is, in the exercise of that discretion, obliged to take into account all relevant considerations and ignore those which are not relevant and have no bearing to the proper exercise of its power. Should it be established that the decision-maker has omitted to consider facts material to the enquiry before him and/or has taken into account matters irrelevant to his decision then it may reasonably be inferred that he has not properly applied his mind to the issues before him.

In *Northwest Townships (Pty) Ltd v The Administrator, Transvaal and another* 1975 (4) SA 1 (T)¹⁶², Colman J stated that failure to apply one’s mind has been held

“to include capriciousness, a failure on the part of the person enjoined to make the decision to appreciate the nature and limits of the discretion exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles.”

¹⁶⁰ Op cit at 401C-D.

¹⁶¹ at 159.

¹⁶² at 8.

In *Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another* 1988 (3) SA 132 (A)¹⁶³, Corbett CJ had an opportunity to deal with this ground of review and remarked:

“Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the ‘behest’s of the statute and the tenets of natural justice’ . . . Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforesaid.”¹⁶⁴

In *SA Municipal Workers Union on behalf of Damon v Cape Metropolitan Council* (1999) 20 ILJ 714 (CCMA) the arbitrator held that the applicant party must show that the employer failed to apply its mind in the selection of the successful candidate, and unless it has done so the CCMA could not interfere with the prerogative of the employer to appoint whom it considered to be the best candidate.

In *SADTU & others v Jajbhay & others* [2001] 1 BLLR 92 (LC) the arbitrator was held not to have applied his mind to the question of whether the employees should be promoted as he had not given consideration to the contents of a circular which made it clear that special procedures were required for appointment to promotional posts. This failure on the part of the arbitrator was a serious irregularity with the result that the arbitration held under the Arbitration Act was reviewable. The award was set aside and remitted to another arbitrator.

In *Mkhize and South African Police Service* [2004] 12 BALR 1468 (SSSBC) the arbitrator stated that the employer when considering which candidate is the most suitable candidate it must apply its mind to this decision, and relied on the *Damon*

¹⁶³ at 152A-E.

¹⁶⁴ Some examples of a failure to apply one’s mind in contexts other than promotion are: incorrectly categorising the issue as one of misconduct when in fact the issue concerned operational requirements [see *Gray Security Services (Western Cape) (Pty) Ltd v Cloete NO & another*, or ignoring evidence placed before it [see *SACCAWU v Edgars Stores Limited & another* [1997] 10 BLLR 1342 (LC); *Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transport Board and others* in which court considered a decision made by the National Transport Commission]; a failure to consider all the relevant facts before exercising a discretion [see *Dyani v Director-General for Foreign Affairs & others* in which the Public Service Commission treated the whole of employee’s absence without leave as unpaid when the evidence showed that he had been detained by police].

case as authority for this proposition. The arbitrator held while Mkhize had achieved higher marks than the candidate selected by the panel, this was not grounds to show that the employer had failed to apply its mind. However, the panel had not applied the selection criteria, and had relied on incorrect and irrelevant facts and exterior personal knowledge and experience of its panellists and on extraneous information other than the information that was before it. The arbitrator held that the decision by the panel to recommend Zulu for appointment in preference to applicant was not means “rational and fair”.

In the context of promotion, and in order to apply its mind, the selection panel must

- Ensure that it has all relevant information before it;
- Consider all the relevant facts before making a decision;
- Not be biased towards one candidate;
- Be able to justify its choice of candidate when required to do so;
- Provide short listed candidates with reasons why they were not considered to be the most suitable candidate.

If a selection panel has failed to apply its mind, the employer may be held to have committed an unfair labour practice and the employers' conduct may be found to be substantively unfair in an arbitration concerning a promotion dispute. This is discussed in the following chapter.

6.11 Changing the decision

Introduction

In many organisations, and in particular the Public Service, the selection panel does not have the final say in the selection of the most suitable candidate, it merely makes a recommendation which can be changed by another committee with a higher level of authority.

Case law

In *PSA obo Duncan and Northern Cape Provincial Administration* [1999] 1 BALR 12 (CCMA) the applicant had been interviewed and then recommended by an interviewing panel for an promotion post. Subsequently this recommendation was changed to a recommendation that the post be re-advertised, but this new recommendation was for reasons unknown not sent to the proper higher authority

with the result that his application was not considered. The arbitrator held that by this conduct the panel had committed an unfair labour practice against Duncan.

In *Department of Correctional Services v Van Vuuren* (1999) 8 LAC 1.11.40 the facts were that Van Vuuren, a white woman, applied for the post of control educationist at the St. Albans prison in Port Elizabeth. After interviewing thirty-one applicants the interviewing panel recommended only four applicants for the post. Van Vuuren headed that list, and was strongly recommended by the panel. The final decision to make the appointment rested, however, with the Commissioner of correctional services. He decided not to appoint the respondent; instead he appointed a black man on the grounds of affirmative action. The Industrial Court held that the Commissioner had not unfairly discriminated against the Applicant, but had committed an unfair labour practice because that the precondition for implementation of the affirmative action policy, namely registration, had not occurred by the time the Commissioner made his decision, and this fact was held to have precluded the Commissioner from making a decision based on the guidelines set out in the policy. The court, which after surveying the provisions of the Public Service Act in this case seems, with respect, to have ignored and taken a practical approach to its finding rather than one which is correct in law.

In *Durban Metropolitan Council v IMATU & SAMWU obo Naicker* [1998] 7 BALR 940 (IMSSA) the facts were that the employee had applied for the position, was interviewed and thereafter told verbally that his application had been successful. However, the head of department thereafter informed that the interviewing panel that the requirements of the employer's employment policy had not been satisfied, and the employee's would therefore not be promoted to the post. The question before the arbitrator was whether the head of department was entitled to change the panel's decision. The arbitrator noted that the employer's policy required the head of department to review the panel's decision in order to determine if the employer's affirmative action policy had been complied with. Furthermore, the employer's policy stated that no appointment would be finalised until a written contract of employment had been concluded. The employee was aware of this provision in the policy and the head of department had had the right to interfere in the appointment process because no written contract of employment was signed by the employee.

In *Cowley and South African Police Services* (2003) 12 SSSBC 6.9.3 for example the employee was selected as the preferred candidate but this recommendation was altered by the National Commissioner who appointed the second preferred candidate. The Respondent could produce no evidence as to why the National Commissioner overruled the panel's recommendation. The arbitrator stated that "this is a glaring *lacuna*". The Respondent's case that it was there is no right to promotion, even for the highest scoring candidate, and that the National Commissioner has a discretion to deviate from the panel's recommendation and also to consult or not over such deviation. The arbitrator stated that such discretion or prerogative has to be assessed in the light of the respondent's own policies and procedures and other surrounding circumstances, and then examined those policies and procedures one of which required the National Commissioner, should he not approve a recommendation of a selection committee, to record the reason his decision in writing. The arbitrator was of the view that

"This is not an unimportant procedural oversight in the public sector employment relationship, employees are nowadays constitutionally and statutorily entitled to written reasons see for example section 33(2) of the Constitution of the RSA 1996 and section 5 of the Promotion of Administrative Justice Act 2000.

The respondent's failure to honour this fundamental right and its failure to explain its decision even at this "late" stage of arbitration, is in my view a serious matter. It is an unexplained remiss. In the circumstances a reasonable inference would be that the National Commissioner did not properly apply his mind, or that he did not record his reasons, or that if he did record them, they were probably not lawful or fair. The only reasonable conclusion in the circumstances is that the respondent acted in an arbitrary fashion. i.e. guided by whim or sudden fancy or in a manner unconnected to reason or logic (see Basson and others *Essential Labour Law* (first edition at 238).

The arbitrator accordingly concluded that the National Commissioner had committed an unfair labour practice and promoted the Applicant.

In *PSA obo le Roux and Department of Home Affairs* [1999] 5 BALR 577 (CCMA) there were two promotional posts for which two employees were selected. However, the department then decided not to create a promotional post at the centre the employee had been promoted to. The department's case was that it was not bound to appoint a person on the ground that he had been recommended by a selection panel. The arbitrator was of the view that once candidates entered the selection

process they were entitled to be treated fairly. The panel had not made its recommendation on the assumption that only one appointment would be made. Having then made his decision to make only one appointment, the director-general should have applied his mind to which of the two recommended officials was the more deserving candidate for the remaining post, which he had failed to do with the result that the employee had been denied the opportunity to be considered for existing post, and this conduct amounted to an unfair labour practice. The department was ordered to refer the matter back to the selection panel to determine which of the two candidates should be promoted to the remaining post.

6.12 The employer's right not to promote any candidate, or to re-advertise the post

A number of cases have considered whether the employer, having embarked upon a promotion exercise must promote one of the candidates or whether it can decide not to promote any candidate and re-advertise the post once again.

The employer's right to do so was challenged in *GT Wilemse and Department of Enviromental Affairs* (2004) 13 GPSSBC 6.9.7 In that case the justification for this decision was that the department had to attempt to appoint a competent person from the designated groups. The arbitrator held that

The respondent had decided to not appoint the applicant and rather elected to re-advertise the position as issues of affirmative action were at stake. There is no evidence before me to suggest that the respondents had placed a restriction on the applicant's ability to apply on the re-advertised position. There is also no evidence before me to suggest that had the applicant applied for the second time he would have simply not been appointed.

In *SA Transport & Allied Workers Union (UTATU) on behalf of Fourie & Another and Transnet Ltd* (2002) 23 ILJ 1117 (ARB) the parties had entered into a collective agreement the effect of which was that when promotional posts became vacant employment equity candidates had preference over candidates from the former advantaged population group. The employer adopted a policy whereby a 'black list' and a 'white list' of candidates was compiled and if no suitable candidate could be found from the 'black list' to fill a particular vacancy the interviewing panel could revert to the 'white list' and recommend a candidate from that list for appointment.

Two vacancies had arisen, and while one had been filled by an employment equity candidate 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. However, no appointment was made and the post was not re-advertised. During the arbitration the employer was unable to explain why it had deviated from its policy and procedure by not re-advertising the post. The employees gave evidence that they had an expectation had been created that the posts would be advertised, based on uncontested evidence of statements and assurances made on various occasions by management that the employer was seriously considering the appointment of a white candidate to the promotion post. The arbitrator concluded that the result was that the employees had a reasonable expectation of promotion, and noted that in *Essential Labour Law Basson, Christianson, Garbers et al - vol 1 at 257-8* state

Usually, promises made by superiors in respect of promotion do not, in themselves, entitle an employee to promotion, even though it may lead to an expectation (implying that the employee must be heard before an adverse decision is taken). However, where the promise has a material effect on the outcome of the employer's decision, the situation may be different....

Grogan states that

An employer will be guilty of unfair conduct relating to promotion if it held out to an employee a reasonable expectation that he would be advanced and then, without adequate reason, frustrated it

¹⁶⁵

In the circumstances dispute was held to relate to the non-promotion of either of the two white candidates, and the failure to re-advertise the post was held to be an unfair labour practice.

In *Tlou-Msiza and University of South Africa* [2005] 3 BALR 370 (CCMA) a colleague of the applicant had been appointed to act in the post for three months at the end of which period the post was not advertised. The arbitrator found that this failure, together with the fact that the applicant was the only employee who had lost her position as a result of a merger, meant that the employer's conduct was unfair. In contrast in *SAPSAWU v Department of Finance* (2000) 21 ILJ 2543 (CCMA), the failure by the Department to appoint applicants for posts from a short-list submitted by selection panel, and the re-advertising of these posts was, in the absence of proof

¹⁶⁵ Workplace Law, 6th Edition page 235.

of irregularities or bad faith in selection process, held not to constitute an unfair labour practice.

In *Madlongwane and University of Transkei* [2004] 11 BALR 1333 (P), the arbitrator held that where the employee's case rests on a promise allegedly made long before the commencement of the LRA, neither the CCMA nor the Labour Court would have jurisdiction to entertain this dispute.

The fact that the posts remained vacant after the promotion process was one of the grounds on which the arbitrator concluded that the employees had been treated unfairly in *Claassen & another and Department of Labour* (1998) 7 CCMA 6.9.11. However in *SAPSAWU on behalf of Kalashe & Another v Department of Finance* (2000) 21 ILJ 2543 (CCMA), the applicants applied to be promoted from the rank of assistant director to deputy director. They were short-listed and interviewed, and recommended for promotion. However, when the Department decided not to appoint any of the applicants and to re-advertise the posts, the applicants referred a promotion dispute to the CCMA and sought an order compelling the department to appoint them to the positions. The arbitrator held that the fact that the two applicants had received the highest scores did not assist them as the department was not bound to appoint the candidate with the highest score. The applicant's contention that there was some "undue or secret interference" in the process was unfounded, and in absence of proof of irregularities or *mala fides* in the selection process, the employer had not committed an unfair labour practice. In *PSA obo Leabile and Department of Roads & Public Works* [2004] 11 BALR 1384 (PSCBC) the employee applied for a promotional post, was short listed and interviewed, but was then recommended for appointment by the selection panel to a post for which she had not applied. However, the MEC decided to promote another employee to the latter post, and the employee then alleged that the failure to promote her constituted an unfair labour practice. The arbitrator noted that while the MEC was not obliged to accept the recommendation of the selection committee, the only reason given by the MEC for overruling the selection committee's recommendation was that the selection panel had "split" over who should be appointed to the second post which was an arbitrary and unfair reason not to promote the employee to the post.

The leading case in point is that of *Department of Justice v CCMA and others* [2004] 4 BLLR 297 (LAC) in which the court stated that

The reasons that would make Mr Bruwer's non-promotion unfair would be reasons that tend to show that there was unfairness in the Departments decision to postpone the filling of the post on a permanent basis and to re-advertise it to try and see if better candidates could not be attracted. Any reasons that did not show that conduct to be unfair cannot be the right reasons that would render Mr Bruwer's non-promotion at that time unfair... It is Mr Bruwer who gave no evidence on why the Departments decision to postpone the filling of the post was wrong or unfair. In my view how suitable or ideal a candidate Mr Bruwer was is also, with respect, irrelevant once it is accepted that his candidacy for the post was still going to be considered.

It is clear that the decision by an employer not to promote any candidate could amount to an unfair labour practice regarding promotion.

The arbitrator in *Wilemse and Department of Environmental Affairs* [2004] 8 BALR 1038 (GPSSBC) applied the *Department of Justice* decision to the case before him and refused to order the employer to promote the applicant, stating that "To allow an arbitrator to make a decision on the appointment of a person to a position where the employer has delayed such decision would be improper".

6.13 Conclusion

As can be seen, the process involved in a promotion is both lengthy and complex, with many potential pitfalls. However, case law has now developed to a stage where guidelines have been developed so that the promotion process may be conducted fairly and without discriminating against any candidate.

The question of the fairness of the promotion process is discussed in the next chapter.

Annexure

The following is an extract from the Employment of Educators Act 76 of 1998 Regulations, and is an example of a promotion process in line with much of the case law discussed in this chapter.

GN 222 of 18 February 1999: Terms and conditions of employment of educators determined in terms of section 4 of the Employment of Educators Act, 1998

3. The advertising and filling of educator posts

(1) Advertising

(a) The advertisement of vacant posts for educators must:

(i) be self-explanatory and clear and must include:—

- minimum requirements,
- procedure to be followed for application,
- names and telephone numbers of contact persons,
- preferable date of appointment, and
- closing date for the receipt of applications;

(ii) be accessible to all who may qualify or are interested in applying for such post(s);

(iii) be non discriminatory and in keeping with the provisions of the Constitution of the RSA; and

(iv) clearly state that the State is an affirmative action employer.

(b) All vacancies in public schools are to be advertised in a gazette, bulletin or circular.

The existence of which shall be made public by means of an advertisement in the public media both provincially and nationally. The information to be furnished in the latter advertisement shall include offices and addresses where the gazette, bulletin or circular is obtainable. The gazette, bulletin or circular must be circulated to all educational institutions within the province.

(c) Educator posts outside public schools shall be advertised both in the national and provincial media and by circular to all schools in the relevant province, ensuring that the provisions of paragraph 3(1)(a) above are met.

(d) Educator posts at colleges shall be advertised in the national and provincial media by the employing department, ensuring that the provisions of paragraph 3(1)(a) above are met.

(2) Sifting

(a) The employing department shall acknowledge receipt of all applications by:

(i) informing all applicants in writing of receipt,

(ii) clearly indicating whether the application is complete or not, and

(iii) indicating whether the applicant meets the minimum requirements for the post and that such applications have been referred to the institutions concerned.

(b) The employing department shall handle the initial sifting process to eliminate applications of those candidates who do not comply with the requirements for the post(s) as stated in the advertisement.

(c) In the case of colleges, where applications are received at the institution, the college council shall acknowledge receipt of all applications in terms of paragraph 2(1) above.

(d) Trade Union parties to Council will be given a full report, at a formal meeting, on:—

(i) names of educators who have met the minimum requirements for the post/s in terms of the advertisement;

(ii) names of educators who have not met the minimum requirements for the post/s in terms of the advertisement; and

(iii) other relevant information that are reasonably incidental thereto.

(3) Shortlisting and interviews

(a) Interview Committees shall be established at educational institutions where there are advertised vacancies.

(b) The Interview Committee shall comprise:

(i) In the case of public schools:—

- one departmental representative (who may be the school principal), as an observer and resource person;
- the Principal of the school (if she is not the departmental representative), except in the case where she is an applicant;
- members of the school governing body, excluding educator members who are applicants to the advertised post/s; and
- one union representative per union that is a party to the provincial chamber of the ELRC. The union representatives shall be observers to the process of shortlisting, interviews and the drawing up of a preference list.

(ii) In the case of colleges:—

- one departmental representative, as an observer and resource person;
- the head of the institution, except in the case where she is an applicant;
- members of the college council, excluding educator members who are applicants to the advertised post/s; and
- one union representative per union that is a party to the provincial chamber of the ELRC. The union representatives shall be observers to the process of shortlisting, interviews and the drawing up of a preference list.

(c) Each Interview Committee shall appoint from amongst its members a chairperson and a secretary.

(d) All applications that meet the minimum requirements and provisions of the advertisement shall be handed over to the school governing body responsible for that specific public school.

(e) The school governing body is responsible for the convening of the Interview Committee and they must ensure that all relevant persons/organisations are informed at least 5 working days prior to the date, time and venue of the shortlisting, interviews and the drawing up of the preference list.

Where the Principal is an applicant, a departmental official may assist the school governing body.

(f) The Interview Committee may conduct shortlisting subject to the following guidelines:

(i) The criteria used must be fair, non-discriminatory and in keeping with the Constitution of the country.

(ii) The curricular needs of the school.

(iii) The obligations of the employer towards serving educators.

(iv) The list of shortlisted candidates for interview purposes should not exceed five per post.

(g) The interviews shall be conducted according to agreed upon guidelines. These guidelines are to be jointly agreed upon by the parties to the provincial chamber.

(h) All interviewees must receive similar treatment during the interviews.

(i) At the conclusion of the interviews the interviewing committee shall rank the candidates in order of preference, together with a brief motivation, and submit this to the school governing body for their recommendation to the relevant employing department.

(j) The governing body must submit their recommendation to the provincial education department in their order of preference.

(k) In the case of colleges, the interviewing committee shall submit its ranked, preference list to the college council for their recommendation to the relevant employing department.

(4) Appointment

(a) The employing department must make the final decision subject to:

(i) satisfying itself that agreed upon procedures were followed; and

(ii) that the decision is in compliance with the Employment of Educators Act of 1998, the South African Schools Act, 1996 and the Labour Relations Act, 1995.

(b) The employer will inform all unsuccessful candidates, in writing, within eight weeks of an appointment being made.

(5) Records

The employer must ensure that accurate records are kept of proceedings dealing with the interviews, decisions and motivations relating to the preference list submitted by school governing bodies and other such structures.

Examples of advertisements from case law

In *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC), an internal advert for the job was placed on the office notice-boards, which read:

'Group Benefits

HR Officer

Group Benefits HRD

Hay Grade 6

Corporate only: Variety is the spice of life! Utilize your tertiary qualification in this busy environment. Become involved in all aspects of HR. If you have good communication skills, are able to liaise at all levels and can handle pressure, perhaps this is the opportunity you've been waiting for. Previous training experience and computer literacy would be an advantage. Interested? Call Tanya Southey on X4126'

An advert for the same position subsequently appeared in *The Star* newspaper. It was placed by the recruitment agency appointed by the employer. It was for the post of an HR officer. It did not identify or name the employer. The advert read as follows:

HR Officer.

R5 5000 x 13. Braamfontein. High profile financial services Co. Under 30, degree/IPM, min 2 yrs exp. as a personnel generalist. Your brief includes recruitment, IR, management development, job grading and personnel administration. Computer literate? Joanne 78802030.'

In *Ackerman & Another and United Cricket Board of SA* (2004) 25 ILJ 353 (CCMA) the advertisement stated

'COACH FOR SA 'A' TEAM, PLASCON ACADEMY AND SA UNDER 19 TEAM

The United Cricket Board is seeking to appoint an energetic and dynamic senior coach to take responsibility for preparing the SA 'A' and SA Under 19 teams, as well as running the cricketing programme of the national Plascon Academy.

It is the policy of the UCBSA to close the gap between provincial and senior international cricket with a more active, well prepared SA 'A' team. To this end, the UCB will appoint a full-time coach in this position.

Responsibilities include:

Preparation of the SA 'A' team and taking responsibility for this team's performance

Preparation and responsibility for the SA Under 19 team

Developing and implementing a programme for the national Plascon Academy

Form a strong relationship with the National Head Coach

Liaison with National Selectors and Under 19 selectors

Developing and implementing a strategy for the consistent readiness of young players for international cricket

Attributes

Respect of players

Leadership skills

Proven track record of achievement in coaching

Playing experience at first-class level - preferably test and/or ODI cricket

Good communication and interpersonal skills

Good person management skills

Flexible and adaptable - essential

Ability to facilitate specialised expertise into the team environment

Embrace UCB visions and policies

Organisational skills

Ability to build a strategy - tactical knowledge

Ability to develop and players skills 1

Ability to motivate (part of leadership)

The appointment will be effective from 1 September 2003.'

In *Mackay v Absa Group & Another* (2000) 21 ILJ 2054 (LC) the advertisement stated

'Job Title: Sales Manager

Division/Region: ABSA Investment Management Services

Job Band: M

Physical Location: Gauteng, Bloemfontein, Natal and Cape Town

Job Requirements: Matric essential

Sales management experience in the financial services industry preferably linked products. With good track record. Established relationships with ABSA broker would be an advantage.

In depth knowledge of mechanics and dynamics of financial instruments (eg unit trusts, money market instruments, insurance products etc)

FILPA qualifications a definite advantage, but willingness to acquire the qualification a requirement.

Superior communication skills (written and verbal, Afrikaans and English all levels; outstanding interpersonal skills. Hands-on "let us do it" attitude.

Duties: Plan and control sales activities in area.

Manage team of executive sales consultants.

Ensure that financial objectives are set (new business).

Income and expenditure.'

In *Herbst v Elmar Motors* (1999) 20 ILJ 2465 (CCMA) in which the dispute concerned whether there was an employment relationship, the advertisement was

“Young business person required to run/manage a garage with long term view of partnership or take over. Very urgent. Tel: Johan at 082-893 7007”.

In *Swart v Mr Video (Pty) Ltd* (1998) 19 ILJ 1315 (CCMA) the advertisement read:

'Winkel assistant Brooklyn area ouderdom onder 25 jaar' and included the employer's telephone number.

The arbitrator held that the employer discriminated against the Applicant on the ground of her age and marital status.

Chapter 7: The Unfair Labour Practice

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- 7.2 The question of the onus
- 7.3 The arbitration of a promotion dispute
- 7.4 The 'elements' of the unfair labour practice claim
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- 7.7 Conduct by the employer which is not unfair conduct
- 7.8 Causation
- 7.9 The reasonable remedy
- 7.10 Conclusion

7.1 Introduction

This chapter begins with a discussion of the crucial question of which party to a promotion dispute bears the onus – does the employer have to prove that its conduct was not unfair, or does the employee have to show that the employer's conduct was unfair? As most promotion disputes are referred as an unfair labour practice, the nature of an arbitration of a promotion dispute is then discussed.

Thereafter the elements of a promotion dispute are set out and each is then discussed, and the chapter ends with a discussion of the remedy which may be granted to a successful applicant in a promotion dispute.

7.2 The question of the onus

An employee who alleges that he or she is the victim of an unfair labour practice bears the onus of proving the claim on a balance of probabilities¹⁶⁶. In *Cullen and*

¹⁶⁶ Grogan *Workplace Law*, 7th edition page 229, *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC); [1997] 11 BLLR 1438 (LC); *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC); [2000] 3 BLLR 311 (LC); *SAPSAWU on behalf of Kalashe & Another v Department of Finance* (2000) 21 ILJ 2543 (CCMA); *Marra v Telkom SA Ltd* (1999) 20 ILJ 1964 (CCMA). While some of these cases arose when discrimination was an unfair labour practice – that is prior to the amendments in August 2002, it is submitted that the courts' findings in respect to the onus is nevertheless still correct.

Distell (Pty) Ltd (2001) 10 CCMA 6.9.3, the arbitrator said on the authority of *SAMWU obo Damon v Cape Metropolitan Council* [1999] 3 BALR 259 (CCMA), that “The onus rests on employees who allege that they have been victims of unfair labour practices to prove their case on a balance of probabilities”.

In Westraat and SA Police Service (2003) 24 ILJ 1197 (BCA)., the arbitrator stated “The applicant bears the legal onus of proving that the employer exercised its discretion improperly and the evidence is not enough to discharge the onus of showing that the panel exercised its discretion improperly”

The fact that the employee bears the onus has one particularly significant implication and potential limitation on the employee’s case, namely that the employer is in possession of the information such as other candidates applications, score sheets, minutes of the meetings of the selection panels and so on.

In *Westraat* the employee relied on section 32(1)(2) and s 33(1)(2) of the Constitution, which entitles a person to fair administrative action and to information held by the state, to request a list of all the applicants for the post, the minutes of the meeting when the short-list of eight candidates was compiled; and particulars of applicants and short-listed candidates for the post in dispute. The arbitrator explained why it is necessary

“...as an employee is entitled to challenge a decision that is adverse to his interests so he is entitled to information that is reasonably necessary for him to do so, with due regard to the operational efficiency of the organization and the privacy of others”.

The applicant will be entitled to rely on section 16 of the LRA in order to obtain the information necessary for his case. Section 16(2) provides that an employer must disclose to a trade union representative all relevant information that will allow the representative to perform his functions such as to represent an employee at grievance [i.e. unfair labour practice] proceedings¹⁶⁷.

7.3 The arbitration of a promotion dispute

¹⁶⁷ The question arises whether the same provision would apply to an employee – that is an employee who is not represented by a shop steward. It is submitted that there is no reason to limit the disclosure of relevant information to shop stewards only.

When looking at the arbitration of a promotion dispute, the question arises whether the arbitration is a hearing *de novo* or in the nature of a review of the panel's decision.

An arbitration in which the issue in dispute is the fairness or otherwise of the dismissal of an employee is a hearing *de novo*. Authority for this proposition is found in the judgement of the Labour Appeal Court in *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & another* (1993) 14 ILJ 1449 (LAC) where Joffe J made it clear that a hearing before the Industrial Court was a hearing *de novo*. The court said the following:

'Where the dismissal followed a disciplinary enquiry, the Industrial Court sits neither as a court of appeal nor as a court of review in respect of those disciplinary proceedings. A complete rehearing of the matter takes place before the Industrial Court and it is enjoined to consider the fairness or otherwise of the dismissal on all the facts presented to it and then to determine whether an unfair labour practice was or was not perpetrated.'

The same applied to private arbitration proceedings where the position is no different. Brassey in *Pick 'n Pay Retailers (Pty) Ltd and Commercial Catering & Allied Workers Union of SA* (1990) 11 ILJ 1352 (ARB) said:

'It is the parties who decide my powers as arbitrator and the terms of reference that express their decision. What those terms say is that I must decide whether the dismissal of the grievant was fair or not. This does not direct me to review the company's decision: it directs me to decide for myself. I have to enter the dispute *de novo*, examine the facts - all the facts - placed before me, and reach a decision that is all my own Since I am not reviewing the company's decision, my decision says nothing about reasonableness, still less its correctness. The company based its decision on the facts and arguments before it; I base mine on the facts and arguments before me. The two sets of materials cannot be identical; they must differ to some extent, if not in substance, then certainly in nuance and emphasis.'

Furthermore, Jali AJ in *Gibb v Nedcor Ltd* (1998) 19 ILJ 364 (LC); [1997] 12 BLLR 1580 (LC) held that both the CCMA and the Labour Court are enjoined to adopt the approach previously adopted by both the Industrial Court and private arbitrators. Jali AJ said the following:

'The respondent's counsel submitted, and rightly so, that in terms of the Act, an arbitration connotes a rehearing....There can be no doubt in my mind that as that is the first encounter between the employee, who has been dismissed, with a formal independent body with adjudicators who are qualified to evaluate and decide on the merits and demerits of his dismissal, it would appropriate to

have a hearing de novo The notion of the arbitration and Labour Court hearing being a review, could lead H to an untenable situation in industrial relations.'

This proposition has been accepted in numerous cases, principally by the Labour Appeal Court in *County Fair Foods (Pty) Ltd v CCMA & others* [1999] 11 BLLR 1117 (LAC)¹⁶⁸.

The question however is whether this applies to a promotion dispute. It is submitted that the nature of arbitration process in a promotion dispute is a review of the procedure and decision made by the employer, rather than a hearing *de novo*. Authority for this proposition is found in *SAMWU obo Damon and Cape Metropolitan Council* [1999] 3 BALR 259 (CCMA), where the arbitrator stated

In alleging that an appointment is unfair, the union effectively asks the CCMA to review the decision of the employer. [My underlining]

The arbitrator based his decision on the Labour Appeal Court judgment in the case of *Carephone (Pty) Ltd v Marcus* (1998) 19 ILJ 1425 (LAC), where the court considered the review process and stated [at paras [35]-[37]]:

'When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness and correctness.

In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the merits of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order. . . .It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision maker between the material properly available to him and the conclusion eventually arrived at?'

The arbitrator then applied the above test and concluded that

¹⁶⁸ Some examples of CCMA awards are *CEPPWAWU obo Xaya v Engen* [2001] 1 BALR 1 (CCMA); *Sweeney v Transcash* [2000] 6 BALR 712 (CCMA), *AWAWU v CCMA & others* [1998] 12 BLLR 1268 (LC) at 1270C-D.

“In this dispute the union has failed to indicate where the employer did not apply its mind in not appointing the employee.

The union has provided me with reasons for its claim that the employee should be appointed. This is not sufficient. The test for review is much more exacting. The union needs to show where the employer's reasoning is defective. The union has been unable to do so...”

However, the proposition seems to have been assumed in numerous cases and awards. For example in *Cullen and Distell (Pty) Ltd* [2001] 8 BALR 834 the arbitrator stated

In drafting item 2(1)(b) of Schedule 7, the legislature did not intend to require arbitrating commissioners to assume the roles of employment agencies. A commissioner's function is not to ensure that employers choose the best or most worthy candidates for promotion, but to ensure that, when selecting employees for promotion, employers do not act unfairly towards candidates.

In *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA), the arbitrator asked

“How far can arbitration go in reviewing an appointment made on the strength of a notice of vacancy and a process of selection? An appointment is a discretionary decision and is subject to limited challenge and the arbitral jurisdiction on the merits is no more than a limited review; it is not a substantive re-evaluation on the merits. An employer's exercise of its discretion to appoint, assign or promote may be reviewed only if it shows some very serious flaw. This may include the breach of a rule of form or of procedure, or a material mistake of fact or law, or if some material fact was overlooked, or if there was misuse of authority or an obviously wrong inference from the evidence. But even if there is a defect, the evidence of applicant's own qualifications does not go to show that the employer has committed an unfair labour practice. The ULP jurisdiction does not extend to permitting an arbitrator to replace an employer's determination of the job requirements and its assessment of applicants with the arbitrator's personal assessment.” [My underlining]

The proposition that an arbitration in which the issue concerns a promotion dispute is a review of the panel's decision has the consequence that the reasons for the panel's decision must be in existence at the time the decision was made. This means that the arbitration or court proceedings are not the forum in which the employer ‘discovers’ why one preferred candidate should be promoted. It also means that the arbitrator or judge is not the person who decides who should be promoted. Furthermore, a fair selection process must have been followed prior to the decision of whom to promote. The objective of the arbitration or court proceedings is to review that process.

In an unreported arbitration held under the auspices of the Safety and Security Sectoral Bargain Council, the arbitrator¹⁶⁹ stated-

In my view the nature of an arbitration such as the present one is a review of a decision made by the promotion panel/s of the Respondent. It is not a hearing *de novo* as is the case with an arbitration into the issue is the fairness of the dismissal of an employee. What this means is that once the Applicant has established a prima facie case of unfair conduct on the part of the Respondent, the Respondent then bears the onus to justify the decision made at the time it was made. The Respondent must show why it made the decision it did at the time the decision was made; it can not seek to justify the decision in the arbitration. It must show that on the date the decision or recommendation was made it considered all the relevant facts, took note of all relevant evidence or information, took note of the question it was tasked with asking, asked the right questions and considered the facts in the light of those parameters. The question before me is not whether I agree with the panel's decision, but whether the panel applied its mind.

Some arbitrators have expressed the view 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 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"¹⁷⁰.

This has been understood to mean that the only issue which an arbitrator may consider is whether the failure to promote the employee was procedurally unfair. This is going too far; this comment could be understood to mean that the reasons why the employer promoted another employee are not relevant, which clearly is not the case. While there is no indication that the arbitrator in the *Cullen* case used as authority, two other cases have followed this idea. In *Stolterfoht and SA Police Service* (2002) 23 ILJ 2160 (BCA) the arbitrator said

"The task does not fall on me to start making placements....To interfere with the merits of an appointment is to usurp the prerogative of management",

and noted with approval the statement of the court in the *Department of Justice v CCMA* (2001) 22 ILJ 2439 (LC)¹⁷¹ that

¹⁶⁹ *Joseph and SAPS*. PSSS 226-03/04 The author was the arbitrator.

¹⁷⁰ *Cullen and Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA); *Dlamini and Toyota SA Manufacturing* (2004) 25 ILJ 1513 (CCMA).

¹⁷¹ at [31].

'The role of the commissioner is not to enter the merits of the appointment but rather assess the process that was followed.'

The contrary, and it is submitted preferable, view was expressed in *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA) in which Christie C said-

The concept of the unfair labour practice is not so narrow that it relates only to the outcome of a decision-making process and that unless a complainant can show that he would have been short-listed that he is without relief.

Protection under the unfair labour practice jurisdiction is not necessarily limited only to the outcome of a promotion process. I consider that if there are serious defects in procedures that are ancillary to a promotion process even if the applicant cannot show that but for the unfairness the outcome would have been different. Section 186(2) speaks of 'an unfair act or omission that arises between an employer and an employee' 'relating to a promotion'. I gain support for this view by s 1 relating to purposes. Among the purposes of the Act are 'to advance labour peace and the democratization of the workplace' (s 1) and 'the effective resolution of labour disputes' (s 1(d) (iv)). Section 3 provides that any person applying this Act must interpret its provisions to give effect to its primary objects and to comply with the Constitution. Section 33 of the Constitution provides:

'(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.'

The rights in s 33 have been incorporated into the Promotion of Administrative Justice Act 3 of 2000. I realize that administrative law and employment law are not equivalent sources of legal obligation. However, s 3 of the LRA incorporates the constitutional protections embodied in the administrative justice provision and the general ULP protection in s 23 of the Bill of Rights. The constitutional provision is crafted as a positive 'right to fair labour practices' not merely a protection against unfair labour practices. This is a sufficient basis to conclude that employees have a positive right to due process in promotions.

7.4 The 'elements' of the unfair labour practice claim

In order for the applicant to prove that the employer committed an unfair labour practice relating to promotion he or she would have to prove that -

- The applicant is an employee of the employer: **employment relationship**
- The employer's committed an act or omission relating to the promotion of the employee: **promotion**
- The employer's act or omission was unfair: **unfairness**

- That there was a causal connection between the employer's unfair conduct and the failure to promote the employee: **causation**
- The reasonable remedy by which the unfair conduct could be remedied: the **remedy**

The first two elements have been discussed¹⁷². The question now arises as to firstly when the employer's conduct would be unfair¹⁷³, secondly how that question is determined, and thirdly, the nexus between the unfair conduct and the failure to promote, and finally, the ways in which the employer's unfair conduct can be remedied.

7.5 Substantive unfairness in a promotion dispute

An analysis of the case law shows that applicants have alleged numerous grounds on which it is alleged the failure to promote them was substantively unfair. These are discussed in this section.

However, before discussing these grounds the question of the test to be applied when determining if a decision not to promote was substantively unfair needs to be clarified.

P A K le Roux¹⁷⁴ states

'[T]he Court should be careful not to intervene too readily in disputes regarding promotion, especially to senior management positions, and should regard this as an area where managerial prerogative should be respected unless bad faith or improper motives such as discrimination are present...'

When dealing with the substantive aspects of the Applicant's claim, *Goliath v Medscheme (Pty) Ltd* (1996) 5 BLLR 603 (IC) is authority for the proposition that the Applicant must show that the Respondent's conduct was *mala fides*. The court in this case stated [at page 609]

"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

¹⁷² See Chapter 3: What does promotion mean? and Chapter 4: The parties to the dispute.

¹⁷³ Section 186(2)(a) refers to "unfair conduct"; no mention is made of substantive and procedural fairness¹⁷³. However, the proposition that fairness consists of a fair reason ['substantive fairness'], and fair procedure ['procedural fairness'] is well established in our law.

¹⁷⁴ Cheadle, Landman, Le Roux & Thompson *Current Labour Law* 1991/1992 at 17.

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".

In *Abbott v Bargaining Council for the Motor Industry (Western Cape)* [1999] 2 BLLR 115 (LC); (1999) 20 ILJ 330 (LC) Landman J stated "... it is not the function of the court to ensure directly that the best man or woman for the job is selected. It is the function of this Court to strike down discrimination and that must be the focus of my concentration", which was relied in *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA) where the arbitrator stated that "an employer can employ the best person for the job", and went on to say

"Thus, while the [employer] retains the discretion to appoint the person, who in its opinion is the best for the job, fairness dictates that this be done in terms of objective criteria - the ones laid down for the post. All applicants must be tested against those criteria, and the best one appointed. [My editing]

In *Blignaut and South African Police Service* (2003) 12 SSSBC 6.9.2, the arbitrator stated that

"It is trite law that as far as substance is concerned (i.e. the reason why an employer ultimately decides to prefer one employee to others) that an arbitrator should exercise difference to an employer's discretion. (See in this regard *Marra v Telkom SA Ltd*, (1999) 20 ILJ 1964 (CCMA)). If the employee is suitable for promotion, the employer retains a discretion to appoint whom it considers to be the best appointment to suit the employer's operational needs."

For the arbitrator in the case of *Cullen and Distell (Pty) Ltd* [2001] 8 BALR 834.

"A commissioner's function is not to ensure that employers choose the best or most worthy candidates for promotion, but to ensure that, when selecting employees for promotion, employers do not act unfairly towards candidates..... The Labour Appeal Court has made it clear that it will not interfere with an employer's decision to promote or appoint a particular candidate if the employer considers another to be superior, unless when so doing the employer was influenced by considerations that are expressly prohibited by the legislature, or are akin thereto: see *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC).

In *CWU obo Joyi & Another and South African Post Office* [2003] 5 BALR 552 (CCMA) the arbitrator stated that the test was that

“Arbitrators should tread carefully in interfering with the employer’s prerogative to promote employees, not unless such a prerogative is capriciously applied so as to shock one’s sense of fairness.”

Examples of substantively unfair conduct

The grounds on which the failure or refusal to promote may be substantively unfair are¹⁷⁵: that the selection committee failed to apply its mind to the question of the promotion of the most suitably qualified candidate; that the selection process was conducted in a *mala fide* manner; and that there was a contract, practice or promise to the effect that the employee would be promoted. Each of these will be discussed in turn.

a. Failure to apply their mind

The obligation of the selection panel is to select the most suitably qualified candidate for the post in question. In *Cullen and Distell (Pty) Ltd* (2001) 10 CCMA 6.9.3. the phrase “the most suitable candidate” was held to mean ‘the candidate whom those charged with making the selection consider most suitable’.

The proposition that that the selection committee has a duty to apply its mind has been discussed previously¹⁷⁶. It is submitted that a selection committee may be held not to have applied its mind during the promotion process in the following circumstances-

Inherent requirement

- If no inherent requirements for the post are specified, the selection process may well be arbitrary.
- If requirements are specified as being inherent, when they are not in fact: *IMATU obo Gounden and eTekweni Municipality: Metro Electricity* (2003) 12 SALGBC 6.9.8.

¹⁷⁵ I have categorised substantively unfair conduct in what follows based on my understanding of the reason why the arbitrator or judge came to the finding he or she did in the circumstances of the particular promotion dispute. This is not intended to infer that the arbitrator or judge categorised his or her finding in the same way. Furthermore, some cases cited in under the category of ‘failure to apply their mind’ may also fall into the *mala fides* category, and vice versa.

¹⁷⁶ See Chapter 6.10.

- If the successful candidate does not in fact possess the inherent requirements for the post: *Coetzee and South African Police Services* [2004] 2 BALR 139 (SSSBC)
- If the inherent requirements are changed during the selection process: *Westraat and South African Police Services* (2003) 24 ILJ 1197 (BCA).

Advertisement

- If the promotion post is not advertised: *NUTESA v Techikon Transvaa I* (1998) 7 CCMA 6.14.1.
- If the advertisement does not state what requirements will be regarded as inherent requirements for the post: *Lagadien and University of Cape Town* [2001] 1 BLLR 76 (LAC).
- If the advertisement is not accessible.

Information

- If the employer relies on information contained in a reference it should verify the information¹⁷⁷, and check that the candidate has not misrepresented relevant qualifications.
- If the committee did not both have all the relevant information concerning the relative merits of all candidates for the post before it, and consider all the information properly.

Selection criteria

- Where the wrong selection criteria were applied¹⁷⁸, or the selection criteria were applied incorrectly¹⁷⁹ or not at all¹⁸⁰.
- If the selection criteria were established with a particular candidate in mind: *Van Zyl and Western Cape Education Department* (2003) 24 ILJ 485 (BCA).
- If weight is attached to a particular requirement and that requirement is not an inherent requirement for the post.

¹⁷⁷ *Minister for Safety and Security & others v Jansen NO & others* [2004] 2 BLLR 143 (LC).

¹⁷⁸ *Public Servants Association obo Steenkamp and South African Police Service* [2003] 7 BALR 786 (BC).

¹⁷⁹ *Coetzee and South African Police Services* [2004] 2 BALR 139 (SSSBC).

¹⁸⁰ *IMATU obo Gounden and eThekweni Municipality: Metro Electricity* (2003) 12 SALGBC 6.9.8.

- If vague and subjective criteria are used, such as 'corporate fit', 'strong personality' the criteria may be unfair.

The selection committee

- While a targeted selection process is recommended, if the selection committee scores candidates in a mechanical manner, this may be held to be unfair: *National Education Health & Allied Workers Union obo Thomas v Department of Justice* (2001) 22 ILJ 306 (ARB).
- If a candidate has applied timeously¹⁸¹ for the post, the failure to consider the candidate will be unfair¹⁸².

Short listing

- The failure to short list a suitably qualified candidate: *Govender and Department of Health (KZN)* [2001] 1 BALR 21 (CCMA)¹⁸³, and the failure to provide reasons why a candidate was not short listed: *Durban Metro Council (Consolidated Billing) and IMATU obo Van Zyl & another* [1998] 8 BALR 1049 (IMSSA); *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA)..

Pre-employment testing

- The use of tests in order to assess the skills and/or knowledge of the candidates may be unfair if the test does not assess candidates' skills or knowledge of inherent requirements for the post. The test used should be both valid and reliable. The test used should also be appropriate for the intended goal. For example, a multiple choice type question should not be used to assess a candidate's ability to make a speech, or to write an essay. In *FAWU & others v SA Breweries Ltd* [2004] 11 BLLR 1093 (LC). the court held that a literacy test did not measure a candidate's ability to perform in a new company structure.

The interview

¹⁸¹ *PSA obo CM Petzer and Department of Home Affairs* (1998) 7 CCMA 1.1.2

¹⁸² *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA).

¹⁸³ The arbitrator seems to have accepted the employee's suggestion, without deciding the point, that the failure of the panel to short list the employee constituted unfair conduct relating to promotion.

- The failure to interview the employees by the same panel as other candidates were interviewed by meant that they were not considered for the posts in question and was held to be unfair in *PSA obo Dalton and Department of Public Works* (1998) 7 CCMA 6.9.6.
- The reliance on subjective assessment by the selection panel may be unfair if the panel is not able to justify its decision.
- The failure to use a 'structured interview' technique may be unfair.
- Giving the same weight to all questions, when some are more important and relevant than others: *Van Zyl and Western Cape Education Department* (2003) 24 ILJ 485 (BCA).
- Failing to allocate weight to inherent and other requirements: *Samuels v South African Police Service* (2003) 24 ILJ 1189 (BCA).

The decision

- The reasons given for the promotion of the successful candidate are substantially incorrect or unjustifiable¹⁸⁴.
- If the committee is unable or refuses to supply reasons why the applicant was not appointed to the post, the arbitrator may infer that the reason the selection committee failed or refused to do is because it failed to apply its mind to the selection of the most suitably qualified candidate for the post.

Decision or recommendation is changed

- If the decision made by the selection committee is changed by another person or further selection panel, it must be shown that the person or panel applied their mind to the question of which candidate was the most suitably qualified candidate: *Cowley and South African Police Services* (2003) 12 SSSBC 6.9.3.

*b. Mala fide conduct by the employer*¹⁸⁵

If the promotion process was fundamentally flawed, or conducted in a biased, capricious or in bad faith the failure to promote the applicant may well be held to be substantively unfair. The employer's conduct may be *mala fide* during the promotion process in the following ways-

¹⁸⁴ *Coetzee and South African Police Services* [2004] 2 BALR 139 (SSSBC).

¹⁸⁵ See Chapter 6.4 for additional discussion.

Inherent requirements

- If the inherent requirements are changed during the selection process: *Westraat and South African Police Services* (2003) 24 ILJ 1197 (BCA).

The advertisement

- The conduct of the employer in creating positions for specific persons without advertising these positions as required by an agreed procedure amounted to an unfair labour practice *NUTESA v Technikon Northern Transvaal* [1997] 4 BLLR 467 (CCMA).

Information

- In *Mkhize and South African Police Service* [2004] 12 BALR 1468 (SSSBC) selection committee based its decision on information gleaned from the “grapevine” and not on the documents submitted by the successful candidate. In the light of such conduct, the arbitrator found that the decision to overlook the applicant, who had been given higher rating by the selection committee, was arbitrary and unfair.

Selection criteria

- If no selection criteria are laid down the employer’s conduct may be found to be *mala fide*.
- If the selection criteria are set with one particular candidate in mind ¹⁸⁶, this would also be an indication of *mala fides*.

The selection committee

- Where a candidate who was involved in the selection process was himself a candidate and was appointed, the arbitrator held that the promotion was unfair: *NUMSA obo Cook and Delta Motor Corporation* [2000] 12 BALR 1411 (CCMA).
- Where a selection panel was required to choose between two candidates and was swayed by the head of the department’s preference and that preference

¹⁸⁶ *Van Zyl and Western Cape Education Department* (2003) 24 ILJ (BCA).

was subjective in nature, the panel's reliance on the head of department's preference was an unfair labour practice¹⁸⁷. In *Gerschbach and South African Police Services PSSS 2006*¹⁸⁸ the panel consulted with the head of the unit under which the promotion post fell and took note of his preferences in complete violation of the promotion policy of the SAPS. The arbitrator found that the failure to promote the applicant was unfair and promoted him to the post.

Short listing

- If a candidate who is suitably qualified for the post is not short listed the employer's conduct may be *mala fide*.

The interview

- Conduct by members of the panel may be held to be *mala fide* if it is proved that the panel discredited, undermined or were discourteous to a candidate during the interview – *Jones v Western Cape Education Department* [1999] 4 BALR 467 (IMSSA)..

The decision

- If the selection committee promotes a candidate who did not apply for the post, the employer's conduct may be held to have been *mala fides*: *Stolterfoht and SA Police Service* (2002) 23 ILJ 2160 (BCA).
- If the candidate who is promoted is given a score in the which is significantly lower than another candidate, the employer's conduct may be unfair: *PSA obo Dalton and Department of Public Works* (1998) 7 CCMA 6.9.6..
- In *Botha and South African Police Services PSSS 1797*¹⁸⁹ the applicant, a white female who was a qualified industrial psychologist applied to be promoted to a post in Psychological Services. She was initially recommended for the post by the selection panel, and minutes were produced to that effect. However, thereafter the marks allocated to another candidate, a black male

¹⁸⁷ *Rafferty and Department of the Premier* [1998] 8 BALR 1017.

¹⁸⁸ An unreported arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council in which the writer was the arbitrator.

¹⁸⁹ An unreported arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council in which the writer was the arbitrator.

were altered so that he received the same or higher mark on the selection criteria than the applicant. A new recommendation was then made in terms of which the black male candidate, who did not meet the selection criteria for the post as he was not a psychologist, was promoted. The arbitrator held that the conduct of the selection committee was *mala fides* and set aside its decision, promoting the applicant to the post in question.

Changing the decision

- If the decision to promote a candidate selected by the selection panel is changed, the decision to do so must not be made for no reason. Where the employer fails to provide reasons at all, the decision may be held to be arbitrary - *Cowley and South African Police Services* (2003) 12 SSSBC 6.9.3.

c. Contract, practice or promises

George v Liberty Life Association of Africa Ltd (1996) 17 ILJ 571 (IC); [1996] BLLR 494 (IC). is authority for the proposition that an employer may be held to a contractual term or practice to the effect that the employee will be promoted or transferred and/or that a certain procedure will be followed prior to the filling of the post. The Court held that

An employer who held out to a person in his or her employ that that person could apply for promotion and that a certain procedure and practice would be followed before filling a vacancy would be held by this court, in the absence of any necessary justification, to that contract or promise .¹

This has been applied in *SA Transport & Allied Workers Union (UTATU) on behalf of Fourie & Another and Transnet Ltd* (2002) 23 ILJ 1117 (ARB)., *UTATU and Transnet Limited* [2002] 6 BALR 610 (AMSSA)., and in *Dumisa and University of Durban Westville & Others* [2001] 7 BALR 753 (CCMA) where the arbitrator held that the existence of a regular practice or an express promise can give rise to a legitimate expectation. However, a legitimate expectation does not give rise to a right to be promoted, but does give rise to a legitimate expectation that his application for promotion would be treated fairly.

7.6 Procedural unfairness in promotion disputes

Applicants have alleged numerous grounds on which it is claimed that the employer acted procedurally unfairly. However, in order for the employer to be found to have

acted in a procedurally unfair manner, the procedural unfairness must not be inconsequential. In *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA), the arbitrator stated:

If a claimant is only able to show slight adverse impact or short-lived unfairness, the scope of the ULP jurisdiction should be limited by the *de minimis* principle, even if this leaves some unfairness unchecked.

In the unreported arbitration in *Pillay and SAPS PSSS 1843*¹⁹⁰ the arbitrator stated that

“The fact therefore that the Respondent committed an irregularity, or even a number of irregularities, does not assist the Applicant unless the irregularity was relevant and, I would respectfully add, unfair”.

In that case the panel had made errors like add up the scores of some candidates incorrectly, not complete the assessment form completely, and mix up the initials of some short listed candidates. In *Benjamin v University of Cape Town* [2003] 12 BLLR 1209 (LC), the Court stated that

“[89] A lot was alleged by the applicant and on his behalf about the UCT having committed irregularities by not following its own recruitment and employment policy – during the recruitment and selection process in respect of the said post. It should be pointed out, however, that such irregularities, if they did exist, must have resulted in the non-appointment of the applicant to the said post. In my view, any irregularity, procedural or substantive, committed by the UCT but which had no bearing to the issue of non-appointment of the applicant to the said post, would be irrelevant.”

The relevance of the procedural errors formed the basis of the court’s finding in *Minister for Safety & Security & others v Jansen NO & others* [2004] 2 BLLR 143 (LC). in which the parties agreed that the only issue in dispute during the arbitration was whether the interviewing panel complied with the employer’s promotion policy. The arbitrator found that a number of irregularities had taken place such as that the chairperson had not signed the list of preferred candidates, which lead the arbitrator to question whether the chairperson was in fact present. Other procedural errors were that the successful candidates references were not checked, the marks allocated to the short listed candidates did not add up, and the panel applied the promotion policy in a discretionary manner, when in her view it should have been applied rigidly. The arbitrator then concluded that “The least an employee can expect

¹⁹⁰, an arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council in which the writer was the arbitrator.

from the employer is to follow its own procedures. The errors and omissions can be regarded as the prime cause of the eventual substantive unfairness of the decision taken by the selection committee” and that: “Clearly the authors of the instruction could not have intended that an interviewing panel, irrespective of scores awarded to candidates, can exercise their discretion.” The arbitrator then found that the failure to promote the employee was substantively unfair. On review of this decision, however the court found that

“The arbitrator cloaked the substantive issue in a whole host of procedural findings about breaches of procedure. This is borne out by her award. On the basis of her findings on several alleged irregularities, she gave an award which is completely disproportionate to the nature of the procedural shortcomings of the interview proceedings.”

In the *Westraat* matter on the other hand the “defects were numerous and significant”, the arbitrator held the employer’s conduct was procedurally unfair and granted the employee a remedy.

Examples of procedurally unfair conduct

a. That the employer departed from its own policy

In order for the employee to establish that the employer did in fact depart from its own policy it must show first of all what the policy was, and secondly that the employer did not comply with the policy in a material manner.

For example, in *Cullen and Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA). the employee complained that the employer ‘departed from its own appointment policy because Greeff [the successful candidate] was not from the Port Elizabeth region’. This was dealt with by the arbitrator as a claim of procedural unfairness, and the arbitrator then took note of the policy, in this case the merger guidelines, which the employee contended, obliged the employer to ‘appoint persons from the region to which the new managerial positions are attached, provided only that there were suitable applicants from that region’. The arbitrator concluded that the guideline ‘does no more than afford employees in the region concerned a right to indicate that they “wish to be considered”. The provision offered no guarantee that only employees working in the region concerned would be appointed, or even that they

would automatically proceed beyond the preliminary screening stage'. The arbitrator then dismissed the employee's claim.

Where the employer has a policy in terms of which only candidates who have applied for promotion to the post can be promoted, the promotion of a person who had not applied for the post was held to be an unfair labour practice as the employer was not entitled to deviate from the policy without good and sufficient reason – see *Page and SA Police Service (2002) 23 ILJ 1111 (ARB)*.

b. That the employee was not considered for the post

This ground has been discussed above. However, the ground has also been held to be an example of procedural unfairness. In *Lötter & Fourie and The South African Police Service [2002] 10 BALR 1003 (BC)* the facts were that the employee applied to be promoted to a senior superintendent's post as station commander. He posted off the completed application from which was received by the employer after the closing date for applications. However, for reasons unknown his application was not registered and consequently not processed. This meant said the arbitrator that the employee was not considered for the post. In terms of the employer's policy the application of the employee should have been processed, even though it was received after the closing date. The arbitrator stated that the failure by the employer to process the employee's application was procedurally unfair, and that

"[T]he failure by the employer to process the employee's application, which would have allowed him to promote his application, prevented him from doing so, and furthermore, it left me in a situation where I am not in a position to determine the employee's prospects of success had it not been for such failure. In my view that constituted a serious procedural defect resulting in serious consequences for the employee, which cannot be rectified..... It is difficult to conceive a more serious procedural defect in the context of promotion procedures than a failure by an employer to register and process an employee's application for promotion, thereby denying such employee an opportunity to have his application considered and to promote his application

7.7 Conduct by the employer which has been held not to be unfair

Cases in which the employer's conduct was found not to amount to an unfair labour practice are-

- The fact that one employee was unjustifiably promoted does not mean that the failure to promote other employees who had the same experience and

skills was an unfair labour practice - *SALSTAFF obo Nel & another v Transnet Ltd – Spoornet* [1998] 1 BALR 48 (CCMA).

- If the applicant does not meet the requirements for the post, the failure to promote the applicant is not unfair - *Diphiko and University of North-West & Another* [2001] 3 BALR 229 (CCMA).; *Chauke and SA Reserve Bank* [2004] 10 BALR 1216 (CCMA).
- The fact that the applicant possessed the skills and had the experience to do the job does not mean that the failure to promote her was unfair - *Cullen and Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA).; and *FAWU obo Makhubu and Nestlé SA (Pty) Ltd* [2003] 6 BALR 710 (CCMA).
- It is not unfair not to follow the recommendation of a lower functionary and to re-advertise the post rather than appoint the applicant if the decision to do so is not arbitrary- *Lamana and SA Police Service* [2002] 8 BALR 802 (BC).
- If the employee's performance is not satisfactory the failure to promote the employee is not unfair - *CWU obo Joyi & Another and South African Post Office* [2003] 5 BALR 552 (CCMA).
- If the employee can not show that the post was a promotion, the CCMA or council has no jurisdiction over the dispute - *IMATU obo Harmse and City of Cape Town* [2003] 5 BALR 569 (CCMA).
- The failure to appoint the applicant because she was a female whereas the successful candidate was a male is not unfair, as the applicant failed to prove that she had more knowledge, skills and experience than the successful candidate - *Makhasi and South African Police Services***Error! Bookmark not defined.** [2003] 7 BALR 759 (SSSBC).
- Even if the selection committee erroneously accepts that the successful candidate had had seven years experience in a post similar to the post in question, and that the applicant had never acted in such a post, the failure to promote the employee was not unfair, as the successful candidate was a more suitable candidate than the applicant - *Masemola and SAPS*[2004] 8 BALR 973 (SSSBC).
- If the employee can not prove that the employer has departed from its promotion policy, the employer has not committed an unfair labour practice - *Maphisa and Department of Health (Gauteng)* [1999] 4 BALR 490 (IMSSA).

- If the post has been abolished the failure to promote the employee to the post is not unfair - *NUM obo Grootboom and Eskom*[1999] 4 BALR 490 (IMSSA).
- The fact that the employee has acted in the post for a long period [three years], does not mean that the employer must promote the employee to the post, or that the employer's policy of promoting groups of people only at fixed times was inherently unfair- *SAPU obo Miller and SAPS* [1999] 10 BALR 1252 (IMSSA).

7.8 Causation

In order to establish an unfair labour practice the employee must prove that there was a causal connection between the employer's unfair conduct and the failure or refusal to promote the employee. Garbers states-

"Commissioners are reluctant to overturn the initial promotion. Another practical issue is that of causation – not only must the employee prove that the employer acted unfairly, but that he or she would indeed have been promoted if it were not for the unfair conduct of the employer. This is a difficult onus to discharge."¹⁹¹

Further authority for this proposition is found in *PSA obo Dalton & another and Department of Public Works* [1998] 9 BALR 1177 (CCMA), the arbitrator stated that The applicants' claim is premised on the assumption that since they were treated in an unfair manner and they were objectively qualified for promotion they are entitled to be promoted. It is true that arbitrators are empowered to compel an employer to promote an employee who has been treated unfairly in respect of an application for promotion to promote such employee (see item 4(2) of schedule 7). But any order must be "on reasonable terms". In my view, such an order can only be made if the arbitrator is satisfied on the evidence that the employee concerned would have been promoted but for the unfair conduct of the employer. In other words, there must be a causal connection between the unfair conduct proved and the failure or refusal of the employer to promote the employee [my underlining]. On the evidence before me, I cannot find such a causal connection. I have found that the failure of the employer to interview the applicants before the posts for which they were invited to apply were filled constituted unfair conduct within the meaning of item 2(1)(b) of schedule 7. But I am unable to conclude from the evidence that had the applicants been interviewed prior to the appointments to the new positions on the amended organogram they would have been promoted to the rank of chief inspector. In the absence of evidence that the employer was bound by the interview ratings I cannot find that that the appointment of some candidates with lower ratings than those of the applicants was in itself unfair.

¹⁹¹ *Essential Labour Law* 3ed 2002 page 293.

This was quoted with approval in *Lutze v Department of Health* (2000) 21 ILJ 1014 (CCMA).

The failure to deal with the question of causation in the arbitration is a ground for review of the arbitration award. In *Minister for Safety & Security & others v Jansen NO & others* [2004] 2 BLLR 143 (LC), the court held that

[27] Before reaching the conclusion that the third respondent should be promoted, [the arbitrator] must have considered whether there was a causal connection between the unfair conduct and the failure to promote him. This would have involved an assessment of the substantive basis of his promotion.

The same point was made in *Metrorail (Pretoria) and TWU* (1998) 7 ARB 6.9.17. where the arbitrator stated that

"...the fact that an irregularity occurred in the appointment of a person other than the grievant does not automatically lead to the conclusion that she should have been appointed. At most it could be used as circumstantial evidence that the grievant was not given a fair chance during the selection process".

In *Coetzee and South African Police Services* [2004] 2 BALR 139 (SSSBC) the arbitrator stated

It is trite that an arbitrator may only interfere with the decision of an employer not to promote a particular candidate if the arbitrator determines unfair conduct on the part of the employer, as well as that the candidate would have been promoted, but for that unfair conduct.

In *Goeda and South African Police Services* [2004] 5 BALR 561 (SSSBC) the arbitrator stated

Maybe I should also add that an employee will only be considered for promotion by an arbitrator, if he or she shows both unfair conduct on the part of the employer as well as that he or she would have been promoted, but for that unfair conduct. There must be a casual connection between the unfair conduct proved and the failure or refusal to promote the employee.

This proposition has been accepted and applied in numerous cases¹⁹².

¹⁹² See *Cullen v Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA); *Lamana v SA Police Service* [2002] 8 BALR 802 (BC); *IMATU obo Xamleko v Makana Municipality* [2003] 1 BALR 4 (BC); *Bosman v SA Police Service* [2003] 5 BALR 523 (SSSBC); *Public Servants Association obo Dalton & Another / Department of Public Works* [1998] 9 BALR 1177 (CCMA) at page 1178 F–G; *SAMWU obo Damon / Cape Metropolitan Council* [1999] 3 BALR 255 (CCMA); *Western Cape Education Department / Dlikelili* [2000] 6 BALR 739 (IMSSA).

7.9 The reasonable remedy

Section 193(4) of the LRA states

“(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.”

Where the employer had committed an unfair labour practice relating to the promotion of an employee, the remedy is what the arbitrator determines as being terms which are reasonable. The question arises as to what a reasonable remedy is with respect to a promotion dispute.

Claassen & another and Department of Labour [1998] 10 BALR 1261 (CCMA) concerned an unfair labour practice in terms of schedule 7. When considering what award should be granted, the arbitrator stated

I am empowered by item 4(2) to determine the dispute on reasonable terms. If one compares the powers of a CCMA arbitrator with those of the Labour Court in determining unfair labour practices, it seems that “reasonable terms” does not include an award of compensation. Item 4(1) provides that the Labour Court has the power to determine a dispute referred to it in terms of item 3 on terms it deems reasonable, including, but not limited to, the ordering of reinstatement or compensation. Item 4(2) gives an arbitrator the power to determine such a dispute on reasonable terms. The sub-item does not specify that such reasonable terms may include reinstatement or compensation, as subitem (1) does in respect of the Labour Court. I am therefore rather limited in the type of award I am able to make.

Arbitrators and judges who have concluded that the employer committed an unfair labour practice by failing or refusing to promote an employee have determined the dispute in very different ways. The following summary of case law illustrates that point.

The remedy of promotion to the post

When determining what a reasonable remedy is, the first question is whether an arbitrator can order the employer to promote the applicant. As has been pointed out, it is not the role of the arbitrator [or judge] to promote the most suitably qualified candidate¹⁹³; the arbitrator or judge does not take over the prime function of the selection committee. Does this mean that an award of promotion of the applicant to

¹⁹³ See Chapter 7.5.

the post is not a reasonable remedy? It has been my experience that the employer will often argue that 'Mr X has been promoted to the post, and so it is not possible i.e. unreasonable- to promote the applicant to the post, even if the employer is found to have committed an unfair labour practice'.

The fact is that the remedy of promotion to the post has been awarded in a number of promotion disputes. For example, in *Bosman and South African Police Service* [2003] 5 BALR 523 (SSSBC), the arbitrator promoted the applicant but left it to the parties to agree on the post. In *Coetzer & Others v The Minister of Security & Another* (2002) 11 LC 6.9.2, the court ordered that the applicants be promoted to posts identified by the respondent. In *Cowley and South African Police Services* (2003) 12 SSSBC 6.9.3., the applicant was promoted to the rank and level sought by him. In *Page and SA Police Service* (2002) 23 ILJ 1111 (ARB). where an employee of SAPS was not appointed to a promotional post despite being the best qualified applicant for post and meeting requirements of post. Another employee, who had not applied for post, had been appointed in breach of directive that such person could not be appointed if he had not applied for post. The arbitrator held that the SAPS was not entitled to deviate from the directive without good and sufficient reason, which was not shown, and the SAPS was ordered to promote employee

In *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA)., in which the Applicant was found to have been unfairly discriminated against, he sought a declaration to the effect that the employer discriminated against him, alternatively that it acted unfairly towards him in relation to a promotion opportunity. He did not seek an order that he be promoted to the position of assistant superintendent but wanted to be remunerated at the level of, and carry the rank of assistant superintendent. He did not seek an order setting aside the appointment of the incumbent. The arbitrator stated that

"In considering an appropriate remedy I am mindful that I am empowered by the relevant legislation to make any appropriate order that is just and equitable in the circumstances including (but not limited to) ordering compensation. Landman J in the case *Walters v Transitional Local Council of Port Elizabeth*¹⁹⁴ quoted with approval the remarks of Ngcobo J in the *Hoffmann* case:

¹⁹⁴ (2000) 21 ILJ 2723 (LC).

'An order of reinstatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice, but also requires that the person who suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.'

The arbitrator was of the view that these remarks apply equally in the context of unfair labour practices and unfair discrimination in an employment setting, and ordered the employer to promote the applicant to the post in dispute retrospectively with all benefits ¹⁹⁵.

In *UTATU and Transnet Limited* [2002] 6 BALR 610 (AMSSA), the employer assured the applicants that they would be considered if no suitable black candidates were but then re-advertised the promotion posts thereby contravening the employer's promotion policy. The employer was ordered to promote the employees to the post.

It is submitted that this remedy would be reasonable if the employer's conduct was found to be substantively unfair, or both substantively and procedurally unfair but would not be reasonable if the employer's conduct was only procedurally unfair.

In *Janse van Rensburg & others and South African Police Services* [1999] 3 BALR 288 (IMSSA) the arbitrator found that it was unfair that some members of a 'school' of police officers were promoted from one particular date while others were promoted from a later date as this effected the seniority of the latter group. The arbitrator then ordered that the promotion of the second group be backdated to the same date as the first group. In *Mkhize and South African Police Service* [2004] 12 BALR 1468

¹⁹⁵ The arbitrator then further made no order in relation to the promotion of the incumbent "since he was not party to this matter". It is submitted that this aspect of the arbitrator's award is not in line with best practice, as the incumbent should have been joined to the dispute. See Chapter 4.5.

(SSSBC)., the arbitrator also promoted the applicant to the post and backdated the effective date of the promotion.

An award promoting the applicant to the post in contention can form the basis of a review application. For example in *Department of Health v Naidoo & another* [2004] 9 BLLR 890 (LC), the arbitrator had assumed that an applicant who was allegedly prevented from applying for a promotion post would have been appointed had proper procedure been followed, and accordingly promoted the applicant to the post. On review the court held that the arbitrator's finding was "speculative" and did not justify the order compelling employer to promote the employee to the post.

The remedy of compensation

The Labour Relations Amendment Act 12 of 2002 amended the principal Act with respect to the remedy of compensation for an unfair labour practice by adding a new sub section (4), which states that the compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration.

In the case of *Beukes and South African Post Office* (2002) 11 CCMA 6.9.5, the arbitrator ordered compensation made up of the difference between the remuneration he did receive and the remuneration the applicant would have received from the time the date of the referral of the dispute to the date of the arbitration. In *Govender and Department of Health (KwaZulu Natal)* [2001] 1 BALR 21 (CCMA), the applicant was granted an order that he be awarded compensation equal to the difference in the income that he would have received had he been promoted to the post and the income that he actually received until the time that he was promoted. This in the arbitrator's view was 'fair and equitable in all the circumstances' [sic]. In *Lötter & Fourie and South African Police Service* (2002) 11 SSSBC 6.9.1, where the employer failed to process the applicants' applications, the arbitrator ordered the employer is to pay to the employee an amount of compensation equal to the difference between the salary level of the employee and the salary level of the post claimed by the applicant for a period of twelve months calculated retrospectively from the last day of the arbitration proceedings.

For example, in *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA), the arbitrator stated that

The measure of what relief to award is difficult to determine and the parties submitted no argument on this point. There is extensive jurisprudence from the Industrial Court that compensation is intended to be restitution generally for financial loss. General damages including what in civil law are referred to as moral damages are not compensatory. But the case law on compensation for procedural unfairness in relation to dismissal does provide for compensation in circumstances in which an employee has not suffered financial loss. I am obliged to make an award that is 'just and equitable' but it may be no more than 12 months' remuneration (s 193(4) read with s 194(4)) and in the absence of specific argument from the parties I have considered that a relatively modest award of R12 000 may go some way to remedy the procedural unfairness.

In *Health & Other Service Personnel Trade Union of SA on behalf of Klaasen and Paarl Hospital* 2003) 24 ILJ 1631 (BCA) the arbitrator likewise applied the incorrect remedy. The arbitrator stated

"I am obliged to make an award that is 'just and equitable'. As the defect was of a substantive nature, I could order that the process of interviews be redone. I am, however, reluctant to disturb the appointments that have already been made. For the same reason I am reluctant to appoint Klaasen to the position - it will also be disruptive from a human resources and work position. In the circumstances, I see no reason not to grant the remedy requested by the union and award Klaasen protective promotion to the position of ASO."

In *Tlou-Msiza and University of South Africa* [2005] 3 BALR 370 (CCMA) the arbitrator also applied the 'just and equitable' test when deciding to award the applicant 12 months compensation. The arbitrator stated

"It is clear that the applicant has unfairly been prejudiced by the failure of the respondent to advertise the "acting position" as a permanent substantive position to date, and she decidedly in my respectful view is entitled to "just and equitable" compensation in terms of section 194(4) of the Act for this proverbial "slip-up" by the respondent."

If the failure to promote the employee was procedurally unfair only, compensation may be the reasonable remedy. The question arises as to how much compensation is reasonable? Furthermore, should the amount of compensation increase depending on the degree of unfairness? These questions were discussed in *Somiah and South African Police Services* P555 2069¹⁹⁶; the arbitrator found that the

¹⁹⁶ An unreported arbitration held under the auspices of the Safety and Security Sectoral Bargaining Council, in which the writer was the arbitrator.

employer's conduct was procedurally unfair in three relevant ways and awarded the sum of R 5000 for each.

*The remedy of "protective promotion"*¹⁹⁷

The relief of protective promotion is provided by clause 9 of the Public Service Staff Code in the following terms:

'(1) Protective promotions are effected on the recommendation of a Commission to protect the positions of officers or employees . . .

(d) who are found to have been prejudiced in the filling of a promotion post after such a post has been filled.'

In *Imatu obo Xamleko and Makana Municipality* [2003] 1 BALR 4 (BC) this remedy was described as follows-

"This form of promotion entails that the beneficiary be placed on an appropriate higher salary scale, which is personal to holder in that it attaches to that person and does not accrue to the person's successor in the said post. This is a method often used by employers to resolve anomalies that arise from time to time in the grading of positions. It does not, however complete relief as only the financial component of the unfair labour practice is addressed. The person is denied the higher status which would have accompanied a pure promotion and the concomitant further opportunity to advance his career more expeditiously."

In *Health & Other Service Personnel Trade Union of SA on Behalf of Klaasen and Paarl Hospital* (2003) 24 ILJ 1631 (BCA) the arbitrator –erroneously it is submitted, granted the remedy of protective promotion despite the fact that the Public Service Commission was not joined as a party.

In *Lutze v Department of Health* (2000) 21 ILJ 1014 (CCMA) the arbitrator was of the view that

I am satisfied that an arbitrator can grant by way of relief 'protective promotion' under the rubric of reasonable relief as provided by schedule 7 item 4(2). Effectively, 'protective promotion' is the retrospective placement of an employee in circumstances where the physical incumbency of the disputed position renders it impossible physically to place the aggrieved applicant, and therefore an equitable solution is provided whereby the successful applicant receives the material benefits associated with the promotion, without actually replacing the successful candidate for the post. Clearly such relief can be awarded by an arbitrator in terms of schedule 7 item 4(2).

¹⁹⁷ Note that this remedy is only available to public servants, and only if the Public Service Commission has been joined as a party to the promotion dispute. See Chapter 4.5.

The payment of an acting allowance

In *Spoornet and UTATU obo Holtzhausen* [2003] 1 BALR 33 (AMSSA) the employer refused to promote the applicant to a post of which he had acted for a lengthy period, and has instead elected to pay him an acting allowance. The arbitrator held that the refusal to promote had not been unfair *per se*, but that the employee was entitled to an acting allowance. The arbitrator in *Tlou-Msiza and University of South Africa* 2005] 3 BALR 370 (CCMA), applied this remedy –incorrectly it is submitted, to a dispute in which the employer’s failure to advertise a vacant post was held to be unfair. The applicant was awarded an amount of compensation she would have received as an acting allowance had she served in the post for 12 months.

Setting aside the promotion process or an order that the applicant be re-interviewed

A number of arbitrators have ordered the employer to re-interview the applicant. In *Dumisa and University of Durban Westville & Others* [2001] 7 BALR 753 (CCMA) the arbitrator found that the University’s conduct with respect to the handling of the special procedure to upgrade the applicant’s post was unfair in that it was inconsistent with its declared intent, and the manner in which it was pursued was unreasonable and prejudicial to him. As a result the arbitrator ordered the University to convene a Special Committee to review the suitability of the applicant to be promoted to the rank of Associate Professor in the upgraded post in his department.

In *National Union of Metalworkers of South Africa on behalf of Motsiri and Technology Services International (A Division Of Eskom Enterprises)* (2003) 24 ILJ 282 (ARB) the employer advertised for new executive posts both internally and externally, and appointed an external applicant in breach of the employer’s obligation to conduct fair recruitment process and to accord preference to internal candidates who met job requirements. The employer was ordered to re-conduct interviews for the post. In *NUMSA obo Cook and Delta Motor Corporation* (2000) 9 CCMA 6.9.6 an employee who took part in short-listing of candidates for position was appointed to the position. The commissioner found that the selection process was unfair, and ordered the employer to begin the entire process again. In *NUTESA v Technikon Northern Transvaal* [1997] 4 BLLR 467 (CCMA) the commissioner found that where posts were created for specific persons without advertising in terms of an

agreed procedure, and set aside the appointments made set aside and ordered the employer to advertise the posts.

In *Titus and South African Police Services* PSSS 116-03/04 ¹⁹⁸ the panel assessed the candidates using the wrong criteria. The arbitrator was of the view that this meant that all the candidates – not just the applicant, or the candidates promoted to the posts in question had been treated unfairly and held that the entire promotion process was unfair and ordered the process to begin *de novo*.

Other remedies

The creative nature of some remedies show how wide the notion of a 'reasonable remedy has been taken. For example, in *Van Rensburg & another and South African Police Services* (1999) 8 ARB 6.9.3 some members of "school" of police officers promoted on a date earlier than others who were also promoted, the arbitrator found that this differentiation was unfair as financial considerations were the only basis for so doing. The SAPS was ordered to advance date on which employees qualified for next rank promotion.

7.10 Conclusion

This chapter has suggested that the onus is on the employee party to show that the employer's conduct amounted to an unfair labour practice, and that the nature of a arbitration concerning a promotion dispute is a review of the selection panel's decision. Examples of conduct by the employer which has been found to be substantively and procedurally unfair have been given. The proposition that, not only must the employer's conduct be found to be unfair, but that unfair conduct must have been the cause of the failure to promote the employee has been set out. The chapter has suggested that the remedy which an arbitrator grants must be reasonable and types and examples of such remedies have been given.

Candidates for promotion are sometimes unfairly discriminated against when they apply for promotion. This issue is discussed in the following chapter.

¹⁹⁸ An unreported arbitration held under the auspices of the SSSBC in which the writer was the arbitrator.

Chapter 8: Acting in a Post

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8.1 Introduction

One of the questions which has bedevilled employees, arbitrators and the courts and which relatively often arises in the context of promotion disputes, is the right of an employee who has acted in a post to be promoted into that post.

At first blush it would seem to be fair that the person who is working in a post should be promoted to that post, particularly if the employee has been acting in the post for a period of time. After all, the person is doing the work, and carrying the responsibilities of the post so why should he not be promoted to the post? Why was he asked to act in the post if he is not suitable to be promoted to the post? Such employees have based their claim to be promoted to the post on the doctrine of legitimate expectation which is discussed in this section.

A further question which arises when an employee acts in a post is whether the employer is obliged to remunerate the employee who acts in a post, and whether the failure to pay an acting allowance is an unfair labour practice relating to promotion.

8.2 Legitimate expectation

Does an employee who has been acting in a post acquire a legitimate expectation to be promoted to the post in which he has been acting?

The question in the case of *Fourie v The Director-General of the North West Province* [1997] 3 BLLR 275 (IC), was whether the Respondent had committed an unfair labour practice in terms of the provisions of the Labour Relations Act, 1956. The facts were that the applicant had acted in the position of Hospital for a period of 13 months. He then applied to be promoted into the post and was interviewed and was then recommended candidate for the post by the interviewing panel. However the second preferred candidate was promoted, and the applicant then referred a dispute to the Industrial Court and alleged, amongst others, that he had a legitimate expectation to be promoted to the post as he had acted in the post. The court stated “...there can be no doubt that his failure to be appointed as Hospital Secretary is not fair. That, however, is not the end of the matter. The question is whether it is unfair in terms of the law and whether it constitutes an unfair labour practice as contemplated by the Act [the Labour Relations Act, 1956].

.....

Insofar as the Applicant relies on the doctrine of legitimate expectation, I consider that the doctrine does not assist him. All that the doctrine means is that the Applicant has a right to a hearing before any adverse decision is taken against him. On that basis, the only relief that the Applicant could claim is for the decision regarding his appointment (or non-appointment) to be set aside and a decision only made after he has been given a hearing. That is the relief which can only be granted by the Supreme Court, which has the power of review. That is not relief which this court can grant. Nor is it, in fact, the relief which the Applicant seeks. The Applicant is claiming that he has been unfairly treated and that the decision of the Respondent should be set aside and that he should be given the appointment of Hospital Secretary. This would mean that this court is taking upon itself the power to make an appointment or to make a contact between the Respondent and the Applicant. This the court has no power or authority to do. I can find nothing in the decision in *Administrator Transvaal v Traub* 1989 (4) SA 731 (AD) which assists the Applicant.” [my editing]

In *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA) the arbitrator stated that “There is no doctrine of legitimate expectation in promotion cases - even where the applicant has acted in the position for some time. Unless there is something *ex contractu* or *ex lege*, no one has a right to a job.”

Does a failure by an employer to comply with its own policy give rise to a legitimate expectation that an employee who has acted in a post be promoted to the post? The arbitrator in *Beukes and South African Post Office* [2002] 11 BALR 1102 (CCMA) held that it did. The facts were that the applicant was a Postmaster who acted in the

higher post of Area manager for seven months. The employer had a policy in terms of which the opportunity for acting must be rotated if the position is vacant for longer than three months, and if there is no other competent employee available for the rotation, written permission must be obtained from the Regional General Manager for the currently acting incumbent to act for one additional month. Thereafter, permission for two additional months' acting must be obtained from the General Manager: Human Resources. The applicant averred that the company had not complied with these procedures and that as he had acted in the position of Area Manager for seven months, he had a "legitimate expectation" that he would be appointed as Area Manager. The arbitrator said

At the outset, I am satisfied that the company erred in failing to follow its own set down rules and procedures. The failure by the respondent company

- (i) in following its rotation policy;
- (ii) filling the vacant position within six months;
- (iii) to show that the applicant was incompetent for the position;
- (iv) not getting the applicant to sign the necessary declaration;

all contributed to a creation of legitimate expectation in the mind of the applicant to be appointed to the higher position.

No authority was cited for this proposition. With respect, this decision is not correct as the doctrine of legitimate expectation does not create substantive rights.

In *Public Servants Association & Others v Department of Correctional Services* (1998) 19 ILJ 1655 (CCMA) the issue in dispute was whether the employer committed an unfair labour practice in failing to promote the applicants retrospectively to the posts they acted in. The arbitrator found that the applicants had been the incumbents of the posts in some instances for a number of years, and that during this time no efforts were made to appoint another person or persons in the posts and no comparison was made between the current incumbents and any other person or persons to fill those posts on a permanent basis. Some posts were advertised and some of the applicants had applied for those positions but without success. In fact, in some of the applicants were informed that the posts were not vacant despite the fact that they were the only persons that applied for those posts. The arbitrator asked

“How can one ever accept that a post that one occupies in an acting capacity for years is not vacant especially when no steps are taken to fill such a post? Surely, the applicants after many years of loyal service in those posts must have formed some kind of expectation to be promoted to the posts they so occupied?”

The arbitrator then concluded that the applicants did have a legitimate expectation to be promoted to the posts, and ordered the twenty six applicants to be promoted to the posts which they acted in.

In *Portnet and SALSTAFF on behalf of Romer* (2002) 23 ILJ 621 (BCA) the facts were that the assistant business development manager resigned and the applicant was required to act in the position and was paid an acting allowance in terms of the Bargaining Council Main Agreement and the company policy. Another company directive stated that

'(4) Acting should not be allowed to proceed for longer than six months unless there are special circumstances. Such matters should be dealt with in a manner that will prevent the person acting from laying claim to the post on the basis of his period of acting in the post .'

The applicant then submitted a grievance claiming that he was entitled to be promoted to the post as he had acted for longer than six months in the post. When the grievance was not resolved to his satisfaction he referred the matter to arbitration, where his case was that he believed that to act for more than six months, according to the directive referred to above, entitled him to be appointed to the post, and in his case, where he had acted for over a year, he said that he believed he had acquired a legitimate expectation to the post. The remedy he sought was the cash allowance for the ten-month period during which he had acted in the post.

The arbitrator discussed whether the applicant had a legitimate expectation to be promoted to the post. He stated that

Let me say very emphatically that, subject to what is said below, the doctrine of legitimate expectation in South African law does not operate in this area of our law, other than to afford a person a right to a hearing. (See *Administrator, Transvaal v Traub* (1989) 10 ILJ 823 (A)). The doctrine does have application in the area of employment contracts in the context where a temporary appointment is repeatedly renewed, to the extent that it can be said that the holder of that temporary post can legitimately expect that the position can be made permanent. However, it has been repeatedly stated not only by arbitrators, but by the courts of this country, that as a result of an acting appointment, an

incumbent does not accrue a legal right, or a legitimate expectation to be appointed to the permanent position.

In *CWU obo Keikelame and SA Post Office* [2003] 6 BALR 688 (CCMA) the facts were that the applicant was employed for eight months in an acting capacity, and claimed he was entitled to an acting allowance, and that he had been given an expectation that he would be promoted to the position as he had received training for the position. The arbitrator found on the facts that the applicant had been seconded to the position, and had that secondment to a post for a period does not create a legitimate expectation of appointment to it.

In *Spoornet and United Transport & Allied Trade Union obo Holtzhausen* (2003) 24 ILJ 267 (BCA), the employee had been employed as a 'principal yardmaster' but had acted in the more senior position of 'junior manager yards' for about five and a half years. In 1998 that position was advertised and the employee applied and despite not being promoted continued to act in the position. He was paid an acting allowance, but only for a 14-month period. The employee referred a dispute to arbitration, alleging that the employer's failure to promote him to the position of junior manager yards and to provide him with certain benefits amounted to an unfair labour practice. The arbitrator held that

"In my opinion the fact that the grievant acted in the post for a lengthy period does not lead to an obligation on the part of the company to appoint him permanently in that post. That he performed satisfactorily does not alter the position. While it would lend strength to an application for permanent appointment by him, it could be argued that an employer is entitled to expect satisfactory performance from an employee even when the employee is working in an acting capacity."

In *Spoornet (Joubert Park) v SA Footplate Staff Association* [1998] 2 BALR 239 (IMSSA) the employee alleged that he had been unfairly treated by not being promoted to the position of risk manager after having acted in that position and had been given an expectation of promotion which the employer should have fulfilled. The employer contended that the employee had never been promised a higher position, and had not been paid a higher salary for acting as risk manager. The arbitrator held that the had to show that his expectation that he would be promoted to the position in which he acted, was reasonable. The employer had categorically

informed the employee that he would not be appointed to the position, and therefore the employee's expectation was not reasonable.

In *Swanepoel v Western Region District Council & another*[1998] 9 BLLR 987 (SE) the employee alleged that the fact that her superiors' commendation of her work afforded her legitimate expectation that she would be appointed to a promotion post. The court stated that "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." The Court noted that that doctrine gave rise only to procedural rights, and the evidence was that she had been treated in a procedurally fair manner as she had been short listed, interviewed and evaluated by the selection panel. None of these acts constituted a past practice, prior promise or binding undertaking from which such expectations could have arisen. In *Hadebe v Woolworths (Pty) Ltd* (1999) 20 ILJ 2459 (CCMA) the employee was employed as a casual employee, and claimed that he had been promised a permanent position but failed to produce any evidence of such a promise.

In *Dumisa and University of Durban Westville & Others* [2001] 7 BALR 753 (CCMA) the arbitrator explained the doctrine of legitimate expectation, and stated that in *Administrator, Transvaal and others v Traub and others* (1989) 10 ILJ 823 (A) the court endorsed the notion that procedural protections against administrative abuse are part of natural justice where a person asserts a private interest that has acquired the character of a "legitimate expectation" that falls short of a legal right. Such procedural protections are simply part of the duty to act fairly where there is some reasonable basis for the legitimate expectation. The judgment recognises that a legitimate expectation can arise either from express promise or from the existence of a regular practice which the claimant can reasonably expect to continue. The doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectations. On the evidence presented the arbitrator found that representations had in fact been made as a result of which the employee could and

did, acquire a legitimate expectation that a procedure would be followed to investigate his application for promotion using other criteria.

In *Limekaya and Department of Education*[2004] 5 BALR 586 (GPSSBC) the arbitrator stated that

“... a person who is acting in a position is not automatically entitled to be appointed in that position. In *Salstaff obo Swart / Cape Metrorail* [1998] 11 BALR 1525 (IMSSA) it was held that an employee in an acting capacity was not entitled as of right to be appointed to a permanent position. This notion was also stated in *Spoornet (Joubert Park) v Salstaff (Jhb)* [1998] 4 BALR 513 (IMSSA). The presiding officer stated that an employee in an acting position was not entitled to expect automatic promotion. In order to find such entitlement, the expectation must be reasonable and raised by an official with the authority to promote.

8.3 The unfair labour practice

Claassen & another and Department of Labour[1998] 10 BALR 1261 (CCMA) is one of a few cases in which the applicants did not allege that they had a legitimate expectation to be promoted, but relied instead on the unfair labour practice jurisdiction to allege that they should have been promoted into a higher rank. The arbitrator noted that the applicants had ‘acted in posts up to two ranks above their official ranks’, that the ‘quality of their services is borne out by their performance appraisals’, that their application to be appointed to the advertised positions had ‘been frustrated time and again’, that the posts the applicants claimed promotion to were vacant, and funds were available, that the applicants were never informed that their applications were unsuccessful, they just received no response and that the reasons for not promoting them were ‘without substance’. The arbitrator concluded that the actions of the respondent were “clearly capricious, unreasonable, erratic and prejudicial to the applicants”.

The fact that an employee in the South African Police Services had served two years as a Captain, was considered qualified and suitable for promotion to the post of Superintendent, and he had acted as commander of a detective branch in Superintendents post which the employee maintained was vacant did not mean that the employer’s failure to promote him was unfair. The arbitrator was of the view that promotions should be ‘based on qualification, competence and seniority’ rather than

on the chance of occupying a particular acting position in a particular place in the country –see *SAPU obo Miller and SAPS* (1999) 8 ARB 6.9.15 .

8.4 The payment of an acting allowance

Is an employee who acts in a position entitled to be paid an ‘acting allowance’?

This question was answered in the affirmative in *PSA obo Hofmeyer and Department of Correctional Services* GA 5236, in which the arbitrator made the following remark:

‘However I am of the view that applicant is entitled to receive some form of monetary compensation for the period that he has acted in the capacity as Acting Director.’

In *Northern Cape Provincial Administration v Hambidge NO & others* [1999] 7 BLLR 698 (LC) the applicant who was employed as a nurse acted in the post of a matron for two years. When her application to be promoted to the post was not successful she claimed that the Respondent’s failure to pay her a matron’s salary during the period she acted as a matron was an unfair labour practice. The arbitrator held with regard to the judgment in *Schoeman & another v Samsung Electronics SA (Pty) Ltd* (1997) 18 ILJ 1098 (LC) that that the term ‘benefit’ as found in Schedule 7, item 2(1)(b) of the LRA is inclusive of an acting allowance. On review the court [as per Landman J] noted that the applicant wanted to be paid more for acting in a higher position than that for which she was employed, a position which carried more responsibilities, and held

“It certainly seems fair that she should be so paid. However, a claim that an employer has acted unfairly by not paying the higher rate cannot be said to concern a benefit even if its receipt would be beneficial to the employee. It is essentially a claim or a complaint that the complainant has not been paid more for a certain period for carrying extra responsibilities. It is a salary or wage issue. It is not about a benefit. It is about a matter of mutual interest.”

In *Gauteng Provinsiale Administrasie v Scheepers & others* [2000] 7 BLLR 756 (LAC) a number of administration clerks had for some time been required to perform tasks ordinarily performed by incumbents of a higher occupational class. Their claim that their employment in such work without extra remuneration constituted an unfair labour practice was upheld by the Industrial Court. On appeal, the court [Conradie JA], agreed with the court’s finding in the *Northern Cape Provincial Administration*

case that their dispute concerned a matter of mutual interest over which the court had no jurisdiction.

The arbitrator in *Cronje v Bloemfontein TLC* (1997) 18 ILJ 862 (CCMA) came to an entirely different conclusion. In an award which, with due respect, is difficult to understand and clearly wrong, the arbitrator concluded that, because the applicant had 'accepted the full responsibility of the post as acting assistant secretary to the mayor, and indeed did perform the tasks of such', 'he would be surely entitled to remuneration therefore and would have in the least a legitimate expectation to be compensated for such additional tasks performed by himself. The principle of legitimate expectation being a well-acknowledged principle in the current South African law as emanating from the Appellate Division of *Traube v Administration of Transvaal* 1989 (4) SA 731 (A) The arbitrator came to this startling conclusion on the basis of the Appeal Court decision of *NUM v East Rand Gold & Uranium Co Ltd* (1991) 12 ILJ 1221 (A) 1237 where the court stated

"where it was as such stated 'in the exercise of its powers and the discretion given to it, the Industrial Court is obliged to have regard not only or even primarily to the contractual or legal relationship between the parties to an industrial dispute. It must have regard to the application of principles of fairness'. In this instance, fairness should also be applied, even if it means overlooking perhaps one of the administrative requirements of the conditions of service, which requirements, I must clarify, I am not saying, were not complied with in this dispute. [sic]"

The arbitrator then ordered the employer to pay the applicant "his acting allowance for acting in the post as assistant secretary to the mayor" for a period which commenced from prior to the commencement of the Act.

In *Hospersa & another v Northern Cape Provincial Administration*(2000) 21 ILJ 1066 (LAC) the employee claimed the payment of an acting allowance for the fact that she acted in a position higher than her own. The Labour Appeal Court enquired whether the dispute about an acting allowance was a dispute of right or a dispute of interest and held that as her dispute was for the difference in remuneration between her own post and the post in which she had been acting, it was not about something to which she was entitled but about a benefit which she hoped would be created through arbitration. This was not what was contemplated by item 2(1)(b) of schedule 7 to the LRA 1995. The item deals only with benefits *ex contractu* or *ex lege*.

In *SALSTAFF and Spoornet* (2002) 23 ILJ 1956 (BCA) the arbitrator held that a dispute concerning an entitlement to an acting allowance while acting in higher post is not a dispute over a 'benefit' but a dispute of interest.

In *Spoornet and United Transport & Allied Trade Union obo Holtzhausen* (2003) 24 ILJ 267 (BCA) the arbitrator held that the withdrawal of an acting allowance, which it had paid to the employee for 14 months, was unfair and ordered the employer to pay the allowance for the period it was not paid. No reasons or authority for this order were provided or referred to.

8.5 The revocation of an employee's appointment to an acting post.

As the above cases show, what often happens is that an employee other than the incumbent is appointed or promoted to the acting post. The question then arises as to the rights of the employee whose appointment to the acting post is revoked. Two questions arise: is the revocation of the acting appointment an administrative act, and is the removal of an employee from an acting appointment a demotion?

Administrative action

Is the nature of the decision to terminate an employee's acting appointment an administrative act and if that right is violated does the High Court have jurisdiction? This was the question before the court in *Bensingh v Minister of Education and Culture: Province of KwaZulu-Natal & others* [2003] 6 BLLR 598 (D) the facts of which were that the applicant was appointed acting principal of the Durban Teachers Centre in January 1998, and served in that post up to March 2002 when applications were invited to apply for appointment to the post. After being interviewed the applicant went on leave, during which time another candidate was appointed to the post. On the applicant's return from leave, he received a letter terminating his position as acting principal. He referred a dispute to the Education Labour Relations Council, and sought an interdict in the High Court preventing the respondents from interfering with his continued performance of his duties as acting principal. The applicant argued that he had a right to lawful, reasonable and procedurally fair administrative action guaranteed by the Constitution, and that as section 157(2) gives the Labour Court concurrent jurisdiction with the High Court in respect of any

violation of any fundamental right entrenched in the Constitution of the Republic of South Africa Act 108 of 1996, the High Court had jurisdiction in the matter. The court disagreed, noting that Section 157(1) of the Act confers exclusive jurisdiction on the Labour Court in respect of all matters that elsewhere in terms of the Act or any other law are to be determined by the Labour Court, and that Section 158(1)(h) of the Act allows the Labour Court to review any decision taken or any act performed by the State in its capacity as employer, on legally permissible grounds. The termination of the applicant's appointment was an act performed by the State in its capacity as the applicant's employer, and therefore the Labour Court had exclusive jurisdiction to review this decision.

The *Bensingh* case is therefore authority for the proposition that an employee can approach the Labour Court for an interdict in order to set aside on review the decision to relieve the employee of his acting post.

The Constitution affords everyone 'the right to administrative action that is lawful, reasonable and procedurally fair'. This means that every exercise of public power must, in order to be constitutional, be mandated by law, be performed in good faith by a decision maker who has not misconstrued his or her powers, be rational, and be conducted with due regard to the rules of natural justice¹⁹⁹. The constitutional right to fair administrative action is regulated in the Promotion of Administrative Justice Act 3 of 2000. Fundamental to the notion of fair administrative action is the common-law principle that when a statute empowers a public body or official 'to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectations, he has the right to be heard before that decision is taken unless the statute expressly or impliedly indicates to the contrary'²⁰⁰.

The central question before the court would be whether the decision to revoke an employee's acting appointment is an administrative act. There is no authority for this proposition. However, in *Simelela & Others v Member of the Executive Council for*

¹⁹⁹ In this regard see *Pharmaceutical Manufacturers of SA; In re Ex parte Application of President of the RSA* 2000 (3) BLLR 241 (CC) at 259D-263C; and *President of the Republic of SA v SA Rugby Football Union* 2000 (3) BLLR 241 (CC) at 85.

²⁰⁰ See *Administrator of the Transvaal & others v Traub & others* 1989 (4) SA 731 (A) at 748G; (1989) 10 ILJ 823 (A), *Administrator, Transvaal & others v Zenzile* 1991 (1) SA 21 (A) at 35J-36A; (1991) 12 ILJ 259 (A).

Education, Province of the Eastern Cape & Another (2001) 22 ILJ 1688 (LC) the transfer of public service employee without prior consultation, was held to amount to an unfair labour practice. The court [as per Francis AJ] stated

“The applicants have been treated in a grossly unfair manner which infringed their constitutional and common-law right to fair administrative action. The applicants' right to administrative action that is reasonable has been infringed by virtue of the reasons for which they were summarily removed from their posts at the school.”

It is submitted that the administrative act of affecting the transfer of an employee and the administrative act of revoking the appointment of an employee to an acting post are similar in result, and the acting employee would therefore have the right to be given reasons for his removal from the acting post and consulted concerning his removal.

Unfair labour practice in the form of demotion

It is suggested that further possible recourse may be found in the allegation that the employee who has been relieved of his acting post has been demoted. A demotion is “a reduction in rank or category”²⁰¹. The South African Labour Glossary by Barker and Holtzhausen, published by Juta & Co, defines demotion as: “Reassignment of an employee to a position with a lower status, responsibility and/or pay”. According to Rycroft and Jordaan in *South African Labour Law 2* ed Juta & Co, at 187 “Demotion involves a variation or amendment of an employee's terms of employment to the extent that he or she is required to fill a different position or to fulfil different functions to that which he or she normally holds or fulfils, coupled with a reduction in status”.

Indirect authority for the above proposition may be found in the case of *Van Der Riet v Leisurenets Ltd t/a Health and Racquet Club* [1998] 5 BLLR 471 (LAC) in the applicant was the manager of the Gauteng region and reported to the Group Operations Manager, while the managers of the individual clubs reported to him. The company then embarked upon a restructuring exercise one result of which was that a new post of “regional general manager” was created, to whom the regional managers and club managers reported. When another employee was promoted to

²⁰¹ *Ndlela v SA Stevedores Ltd* (1992) 13 ILJ 663 (IC) at 667.

the position of regional general manager in Gauteng, the appellant resigned, claiming that he had effectively been demoted. The Court held that while the respondent had proved that there was a genuine commercial reason for the restructuring, as there had been no consultation with the appellant about the restructuring, which was a breach of its own rules, its conduct was accordingly unfair. Furthermore, the Court held that the restructuring resulted in the effective demotion of the appellant, and that he was entitled to reject it as it been unilaterally imposed.

8.6 Acting in a post as an indication of the capacity to acquire the ability to do the job.

One of the indications that a particular candidate may be suitably qualified for the promotion post is the candidate's 'capacity to acquire, within a reasonable time, the ability to do the job'²⁰². An indication that a candidate has, or does not have, such capacity is that the candidate has acted in the post or in a similar post.

Section 2 of the Skills Development Act states that one of the purposes of the Act is to improve all workers 'prospects of work', and in particular to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education. Clearly one way to achieve these objectives is to give employees the opportunity to act in a higher post.

There may be a positive duty on employers to do so. In *SA Transport & Allied Workers Union and Metrorail Services* (2002) 23 ILJ 2389 (ARB) the employer's policy stated that-

"3. When the need, therefore, arises for a post to be filled by means of an employee acting therein, the local competent turn strategy employee must be given this opportunity. Should the local competent turn strategy employee not be available, competent turn strategy employees from other depots within the region may be considered for this purpose with the most competent employee being given preference.

4. Should a competent turn strategy employee be unavailable due to lack of the necessary experience, the local competent white employee may function in the higher graded post, on condition that a turn strategy employee is given exposure to the duties of his/her post for that period."

²⁰² Section 20(3)(d) of the Employment Equity Act, 55 of 1998.

It was therefore company policy to place competent employees in acting positions for a period of time to allow them to gain the experience necessary. However, to apply the policy selectively by allowing some employee's to act in the post and while others were not given the same opportunity was held to be unfair. Furthermore the employer was held to have breached section 2 of the Skills Development Act. The fact that the employee who was acting in the post was found by the selection panel to be the most suitable candidate was because he could answer questions by the interview panel; he could answer the questions because he had acted in the post for eleven months a period the arbitrator felt was unreasonably long in view of the company policy.

8.7 Conclusion

Employees who either choose or are required to act in a post are in a tenuous position. Firstly because such an employee has no right to be promoted into that post; the most the employee has is a right to be considered for the post. Secondly, a claim for payment of an acting allowance or for the difference between the remuneration the employee is paid and the remuneration paid to the occupant of the higher post is a dispute of interest. The employee who is not paid for undertaking the [usually] increased responsibilities and duties of the higher post has no recourse other than to go on strike in order to force the employer to pay the employee on the higher remuneration scale of the post or an acting or other allowance, which is not possible if a single employee is involved.

The most which these employees have achieved is that the courts have expressed sympathy with their plight.

It is suggested that a company policy²⁰³ on acting appointments should state that-

- An employee has the right to refuse to act in a post;
- All employees be informed that should they be required to act in a post, they have no right to be appointed to that permanent post, and that they cannot

²⁰³ It is not necessary that a written agreement be entered into between the acting employee and the organization. In *PORTNET and SALSTAFF on behalf of ROMER* (2002) 23 ILJ 621 (BCA), the arbitrator, Lyster C rebuked the employer party for insisting that the employee sign an agreement and for refusing to pay him an allowance because of his refusal.

have any legitimate expectation to that permanent post. [See *PORTNET and SALSTAFF on behalf of Romer* (2002) 23 ILJ 621 (BCA).

- Whether the employee will be remunerated while acting in the post, and if so whether this remuneration is an allowance, or the remuneration commensurate with the level of the post;
- Should the post be advertised as a promotion post the employee is entitled to apply for promotion to the post and will be considered for the post;
- The duration of the acting appointment;
- That the employee has the right to be informed of the reasons why his acting appointment has been revoked and consulted over the revocation.

Chapter 9: Discrimination in Promotion Disputes

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9.1 Introduction

Another cause of action is to allege that the employer's decision not to promote the Applicant discriminated against him unfairly. The Applicant's case would be brought under section 6 of the Employment Equity Act 55 of 1998 [referred to as the 'EEA'] and in terms of section 10 the dispute resolution process would be to refer the dispute to the CCMA, which has exclusive jurisdiction over these disputes, and the referral must be done within "six months of the after the act or omission that allegedly constitutes unfair discrimination". The Applicant must follow the referral procedure set down in section 10(4), and the CCMA must then attempt to resolve the dispute by conciliation [in terms of section 10(5)]. If the dispute remains unresolved after conciliation, any party to the dispute may refer it to the Labour Court for adjudication. However, the parties may consent to the arbitration of the dispute in terms of section 10(6)(a) ²⁰⁴.

In *Marnitz v Transnet Ltd T/A Portnet* (1998) 19 ILJ 1501 (LC) Landman J stated that in order to found an application or claim in the Labour Court based on unfair discrimination ²⁰⁵, it is necessary for an applicant to make the following averments:

²⁰⁴ See for example *Ackerman & Another and United Cricket Board of SA* (2004) 25 ILJ 353 (CCMA)

²⁰⁵ The *Marnitz* case in fact concerned an allegation of residual unfair labour practice in terms of item 2(1)(a) of the Act. It is submitted that the averments in terms of section 6 of the Employment Equity Act 55 of 1998 are the same except for the averment that 'The discrimination must be alleged to have taken place on arbitrary grounds', which does not form part of section 6.

1 That the applicant is an employee, including, where applicable, an applicant for employment.

2 That the respondent is an employer.

3 That there is an employment relationship between the employer and the employee, in the sense of a relationship based on a contract of employment or a relationship between an applicant for a post and an employer advertising or holding out such a post.

4 The applicant must allege that the employer has committed an act or omission against the employee.

5 This act or omission must involve discrimination, i.e. there must be more than mere differentiation.

6 The applicant must allege that the discrimination is unfair.

7 This discrimination may be direct or indirect.

In addition a further jurisdictional fact must be alleged and proven, which relates to the obligation to refer the dispute to a bargaining council, where one has jurisdiction or, where there is no such council, to the CCMA in terms of section 10 of the

9.2 An overview of discrimination law ²⁰⁶

The Employment Equity Act 55 of 1998

Unfair discrimination in the workplace was regulated for the first time by the Labour Relations Act, No 56 of 1995 in item 2(1)(a) of Schedule 7, which dealt with transitional arrangements and residual unfair labour practices. This was “an interim measure pending the introduction of more comprehensive legislation regulating equal opportunity in employment” ²⁰⁷. The item provided that:

‘For the 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, either 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.’

The ‘more comprehensive legislation’ was the Employment Equity Act, 55 of 1998 which states in section 6(1) that

‘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,

²⁰⁶ The subject of this dissertation is not equality and discrimination. It is however necessary in my view to give an outline of these concepts in order to properly explain discrimination in the context of a promotion dispute. When doing so I am painfully aware of the limitations of this summary.

²⁰⁷ Explanatory Memorandum to the Draft Labour Relations Bill, page 154.

family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

Substantive equality

Du Toit et al²⁰⁸ state that "the unfair discrimination provisions in the EEA must be interpreted *inter alia* in compliance with the Constitution, with particular reference to the right to equality enjoined by the preamble to the Act, and with ILO Convention 111²⁰⁹.

Section 9 of the Constitution Act 108 of 1996 discusses equality, the relevant portions of which state

'(2) 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.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'

Cooper²¹⁰ notes

"The overall objective of the EEA is the achievement of substantive equality in the workplace, thus reflecting the approach in constitutional jurisprudence. Its main thrust is transformative in nature - as such it is both retrospective and prospective. It looks to eradicating inequality in all its forms, including systemic inequality."

The approach to equality in South Africa is one aimed at achieving substantively equal outcomes, with affirmative action being the measure used to bring this about. This approach is one which while it seeks to achieve the goal of affording each

²⁰⁸ D Du Toit, D Woolfrey, J Murphy, S Godfrey, D Bosch, S Christie *Labour Relations Law: A Comprehensive Guide*, Butterworths 4th Edition, referred to as 'Du Toit'.

²⁰⁹ ILO Convention 111 Concerning Discrimination in Respect of Employment and Occupation [s 3(d), EEA], defines discrimination as –

'(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity in treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies' [Art 1].

²¹⁰ 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 813.

human being equal treatment on the basis of equal worth and freedom “requires 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”²¹¹. The Labour Court has consistently applied this approach to equality, which means that “the prohibition of unfair discrimination ... may imply differential treatment of employees and work seekers in order to achieve substantive equality among them”²¹². In *Stoman v Minister of Safety & Security & Others* (2002) 23 ILJ 1020 (T) in which Captain Stoman applied to be promoted to a post and alleged that he had been unfairly discriminated against because a black male, who had scored less marks than him in the evaluation process had been promoted. The Court said-

Analysts and theorists often state that the South African Constitution recognises and embodies the concept of substantive equality, as opposed to mere formal equality. Without attempting to go into a detailed and academic discussion of these concepts, it would perhaps suffice to say that the recognition of substantive equality *inter alia* means that equality is more than mere non-discrimination. When a society, and perhaps the particular role players in a certain situation, come from a long history of discrimination, which took place individually, systemically and systematically, it cannot simply be assumed that people are in equal positions and that measures distinguishing between them amount to unfair discrimination. This also applies to possible applicants for appointment or for promotion. Therefore the Constitution explicitly states that equality includes the full and equal enjoyment of all rights and freedoms and that legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken, in order to promote the achievement of equality.

The elimination of discrimination

The EEA seeks to achieve substantive equality by eliminating unfair discrimination and does so by firstly requiring an employer to enhance equal opportunity by eliminating unfair discrimination in an ‘employment policy or practice’²¹³, which is defined in a comprehensively in section 1 and includes promotion. The EEA further prohibits the employer from discriminating against employees on a number of

²¹¹ As per Goldstone J in *President of the Republic of South Africa v Hugo* [1997] 6 BCLR 708 CC

²¹² Du Toit page 544.

²¹³ Section 5.

grounds. The meaning of 'employee' is extended for these purposes to include applicants for employment²¹⁴.

Discrimination and differentiation

In order for a court to find that an employer has unfairly discriminated against an employee, it will firstly have to determine that the employer discriminated against the employee. In *Germishuys v Upington Municipality* [2001] 3 BLLR 345 (LC), the court explained that

"Strictly speaking, any employer which chooses one candidate amongst a group of several for a position of employment, of necessity "discriminates" against the unsuccessful candidates. Discrimination in that context implies the preferring of one party above another. More properly, it would be correct to say that the employer "differentiated" rather than "discriminated".

In *Leonard Dingler Employee Representative Council and others v Leonard Dingler (Pty) Ltd and others* [1997] 11 BLLR 1438 (LC) Seady AJ explained that

"It is incorrect to equate discrimination with actual prejudice. Discrimination occurs when people are not treated as individuals. To discriminate is to assign [people] characteristics which are generalised assumptions about groups of people". [My editing].

Furthermore, discrimination arises when there is prejudicial differentiation on one of the grounds listed in section 6²¹⁵. If the employee alleges that he was discriminated against on an unlisted or unspecified such discriminate must be "based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them in a comparably serious manner"²¹⁶. According to ILO Convention 111 Article 1(1)(b), the test, which is applicable in respect of an unlisted ground as well as a listed ground, is whether differentiation on that ground 'has the effect of nullifying or impairing equality of opportunity [of] treatment in employment or occupation'.

Direct and indirect discrimination

Both direct and indirect discrimination are prohibited by the Constitution and the EEA. Landman JP [as he then was] explained the former in *Association of*

²¹⁴ Section 9 of the EEA.

²¹⁵ *Stoman v Minister of Safety & Security & Others* (2002) 23 ILJ 1020 (T).

²¹⁶ *Harksen v Lane* 1998 (1) SA 300 (CC).

Professional Teachers & Another v Minister of Education & Others (1995) 16 ILJ 1048 (IC) as follows

“Direct discrimination is generally easily recognizable as it involves a direct differentiation between the two sexes. For example, an employer follows a policy of remunerating a female employee on a lower scale simply because she is a woman, whereas a male employee is remunerated at a much higher scale for the same work.”

Indirect discrimination takes place when the use of an apparently neutral criterion firstly has a disproportionate adverse impact on a particular group, defined in terms of a listed or unlisted ground of discrimination, and secondly cannot be justified. In *Pretoria City Council v Walker* [1998] 3 BCLR 257 (CC) it was held that “indirect discrimination arises when conduct which may appear to be neutral and non-discriminatory may nonetheless be discriminatory”.

Examples of indirect discrimination are the requirement that in order to be a member of the staff benefit fund an employee must be paid monthly, rather than weekly. Where the all black employees were weekly-paid and nearly all monthly-paid employees were white, the Court found that the criterion amounted to indirect discrimination on the grounds of race because it had ‘a disparate impact on the company’s black employees’ [See *Leonard Dingler Employee Representative Council and others v Leonard Dingler (Pty) Ltd and others* [2001] 2 BLLR 186 (LC) the ostensibly neutral criterion was seniority, while in *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC) it was job experience. The court said

“On the face of it, so it was contended, the preference for experience as an agent or inspector in the Department of Labour is a neutral one but, given our history, there would be few experienced black agents or inspectors in the market. Thus the council was preferring whites above blacks. There is some merit in this” [My editing’.

Listed and unlisted grounds and the burden of proof

The relevance of the grounds listed in section 6(1) of the EEA is that if the discrimination occurs on any of these listed grounds the discrimination is presumed to be unfair unless such discrimination is shown to be fair. Discrimination on grounds not contained in the list in section 6(1) will not be presumed to be unfair, and the employee will have to prove its unfairness.

Both listed and unlisted grounds were defined in the now repealed Schedule 7 of the LRA as being 'arbitrary' in nature which in *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) was said to mean "denoting the absence of justifiable reason". For example, in *Lagadien v University of Cape Town* [2001] 1 BLLR 76 (LAC), the lack of tertiary education was accepted as being a potential ground for discrimination of a candidate for promotion. However, the "mere arbitrary actions of an employer do not, as such, amount to discrimination" - *Ntai v South African Breweries* [2001] 2 BLLR 186 (LC). If the reasons given for the differentiation by the employer are not arbitrary, no unfair discrimination has taken place - *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC).

Section 11 states that 'Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair'. However a mere allegation of discrimination is not sufficient, the employee must at least establish some facts from which an inference can be drawn that the employee was discriminated against²¹⁷.

The EEA does not require the employee to prove that the employer intended to discriminate against the employee, or applicant for employment. The absence or presence of the intention to discriminate does not impact on the finding that there was discrimination or whether such discrimination was unfair.

The courts have however held that there must be a causal link between the prohibited ground and the prejudicial treatment. For example in *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC). Ms Whitehead was 'unable to show that, but for her pregnancy, she would have been appointed to the position', [as per Zondo JP], or that the ground of discrimination alleged was the 'sole reason' for the unfair discrimination [per Willis JA]. In *Walters v Transitional Council of Port Elizabeth & another* (2000) 21 ILJ 2723 (LC) the court held that the ground must be the principal or predominant reason for the differentiation.

²¹⁷ This approach is consistent with that stated in ILO Committee of Experts Equality in Employment and Occupation Report 3 part 4B (1996) at para 298 at 121.

When is discrimination 'unfair'?

The classical test of unfair discrimination in a law of general application, such as the Employment Equity Act, 55 of 1998 was laid down in an often-quoted passage in *Harksen v Lane NO* 1998 (1) SA 300 (CC) which the Constitutional Court formulated as follows:

'The determination as to whether differentiation amounts to unfair discrimination under s 8(2) [of the interim Constitution] requires a two stage analysis. Firstly, the question arises whether the differentiation amounts to 'discrimination' and, if it does, whether, secondly, it amounts 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 s 8(2), which by virtue of s 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.'

In the context of labour law the enquiry as to whether the conduct of the employer was unfair also involves a consideration of whether there was a justification for the employer's conduct in the employment context. In *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) Landman stated [at 1089 G-H] that "the consideration of justification is considered together with the question of fairness and does not usually require a separate investigation"²¹⁸. The Labour Court has found that in line with the notion of substantive equality, unfairness is what distinguishes between permissible and impermissible discrimination. This means that while some employment measures may be discriminatory, they might nevertheless be justified because they are designed to redress inequality²¹⁹. When determining if the discrimination is fair or unfair, the court will look at the context of the discrimination - in other words the position of the applicant's group in society, the impact of the conduct on the individual as part of the group, as well as the power in terms of which it was effected.

Conclusion

The above is, of necessity, a summary of the law with regard to discrimination in South Africa. In the following section claims of discrimination which have arisen in the context of a promotion dispute are discussed, and the defences of affirmative

²¹⁸ See also Thompson and Benjamin *South African Labour Law* (2002) CC 1-30.

²¹⁹ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC) at 294.

action and the inherent requirements of the job as applicable to such disputes are discussed.

9.3 Defences to unfair discrimination

The EEA provides two specific defences or exceptions to the right to equal treatment. In terms of section 6(2) it is not unfair discrimination to –

- (a) take affirmative action measures consistent with the purpose of the Act; or
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job [s 6(2)].

Are the employer's only defences the inherent requirements of the job and affirmative action?

The question has arisen as to whether these two defences are the only defences or whether there is a more general defence to a claim of discrimination. The suggestion that there may be defences other than those provided for in section 6(2) was first raised in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC) where the court considered factors similar to those under the constitutional justification provision²²⁰. The court stated

'Discrimination is unfair if it is reprehensible in terms of the society's prevailing norms. Whether or not the society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational'. [at 295]

The courts have considered whether discrimination could be justified on the grounds of commercial rationale with different results. In *Woolworths (Pty) Ltd v Whitehead* [2000] 6 BLLR 640 (LAC) for example the employer raised what was effectively a defence to the effect that there were commercially justifiable reasons why Ms Whitehead had been unfairly discriminated against, which the court [Willis JA] accepted. Du Toit states that "In terms of this standard, it would seem, almost any commercially rational reason would suffice as a defence"²²¹. Interestingly in the Labour Court decision in the same matter the court completely rejected the suggestion that commercial rationale could negate unfairness. Waglay J held "If profitability is to dictate whether or not discrimination is unfair", '[it] would negate the

²²⁰ Section 36 of the Constitution of South Africa, Act 108 of 1996.

²²¹ Du Toit et al page 561.

very essence for the need for a Bill of Rights". In another case in which commercial rationale were proffered as a defence ²²² to a claim of unfair discrimination the court held that, the commercial rationale must be

'of sufficient magnitude that it outweighs the rights of the job-seeker and is not morally offensive. The discrimination must be balanced against societal values, particularly . . . the dignity of the complainant and a society based on equality and the absence of discrimination.[My editing]

In *Ntai v South African Breweries* [2001] 2 BLLR 186 (LC) the court stated that it was doubtful if 'mere commercial rationale will trump the fundamental value of substantive equality and a test more akin to necessity will in all probability have to be adopted' [at 229]. In *Hoffmann v SAA* (2000) 21 ILJ 2357 (CC) the court said 'legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interest. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination' [at 2370].

As regards the defence of the inherent requirements of the job, Willis JA in *Whitehead* seems to have opened the door to other defences when he held in response to the argument that 'unless discrimination were based on an inherent requirement of a particular job it would be unfair' held that

"I disagree that this is the correct interpretation of the law.... It is not difficult to imagine situations outside of the inherent requirements of a particular job where discrimination would not be unfair."

In *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC) Landman stated [at para 40]

"Any discrimination based on an inherent requirement for the particular job does not constitute unfair discrimination. It does not seem to me that this is the sole justification for discrimination. There may be other circumstances which may legitimately be taken into account".

Pretorius et al ²²³ suggest that there are additional defences which may be available to the employer. They state

²²² *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC).

“The ambit of legitimate employer defences is also extended beyond those expressly mentioned in the Employment Equity Act by the operation of section 36 of the Constitution. To the extent that any individual case of unfair employment discrimination also constitutes a breach of section 9 of the Constitution, section 36 is applicable and may be utilised as a basis of justification. It is only in the rare case where a breach of section 6 of the Act will not at the same time also constitute a breach of section 9 of the Constitution, that the limitation clause will be inapplicable”. [at page 5-4]

Cooper ²²⁴ on the other hand is ‘strongly’ of the view that the only defences are those provided in section 6(2) of the EEA because international law ²²⁵ recognises only these defences to a claim of unfair discrimination, and because a proper interpretation of the section does not permit further defences to be raised.

9.4 Affirmative action in the context of promotion disputes

Introduction

The following extract from the article by Faundez provides a useful introduction to the discussion of affirmative action in the context of promotion disputes ²²⁶. The learned author states

“Thus, for example, barrier elimination measures, such as getting rid of testing requirements not related to the requirements of the job, reviewing interviewing practices and fair recognition of educational qualifications and work experience are all essential components of affirmative action programmes. This is also true in the case of job accommodation measures such as the introduction of flexible hours or the provision of facilities to ensure easy access to buildings.

Some affirmative action measures are less controversial than others. Measures such as those aimed at broadening the scope of a firm's recruitment efforts, or which involve the review of selection and promotion procedures are acceptable even to many who, in principle, are opposed to affirmative action. Likewise, the provision of special training programmes for groups who have suffered discrimination is widely accepted. Indeed, given the special needs of South Africa, the provision of accelerated training is likely to become one of the most important components of affirmative action. Other measures are less acceptable either on grounds of economic efficiency or on grounds of fairness. This is the case, for example, if employees are dismissed so as to make room for persons from a target group. Likewise, the creation of supernumerary jobs simply to meet affirmative action goals is neither economically nor politically wise.

²²³ JL Pretorius, ME Klinck, and CG Ngwena, *Employment Equity Law*, Butterworths, August 2001, referred to as ‘Pretorius et al’ hereafter.

²²⁴ ‘The Boundaries of Equality in Labour Law’ (2004) 25 *ILJ* 813 at 832.

²²⁵ That is ILO Convention 111.

²²⁶ ‘Promoting Affirmative Action’ (1994) 15 *ILJ* 1187.

Perhaps the most controversial of all affirmative action measures is the hiring of persons who do not have the requisite skills or qualifications to do a particular job. This measure is unacceptable for several reasons. First, because it is economically inefficient and could well endanger the health and safety of a large number of persons. Second, because it generally involves excluding an otherwise qualified person, thus giving credibility to the allegation of reverse discrimination. And thirdly, because it is generally counter-productive as the individual who benefits from such 'token' appointment is often the target of open hostility and isolation among colleagues.

Appointing or promoting unqualified persons is rejected because it contravenes the merit principle which requires that the best qualified be chosen. Since affirmative action involves preferential treatment for certain individuals, it would appear that it is inconsistent with the merit principle. This is an issue which has troubled promoters of affirmative action in other jurisdictions. In the United States, for example, the 1964 Civil Rights Act (s 703(j)) provides that nothing in title VII of the Act shall be interpreted as requiring an employer to grant preferential treatment to any individual or group because of race, colour, religion, sex or national origin. This section was interpreted by the Supreme Court in the case of *United Steelworkers of America v Weber* 443 US 193 (1979). In *Weber* the Supreme Court upheld a voluntary affirmative action plan which involved preferential treatment in favour of blacks. The plan at issue in *Weber* had been established in a collective bargaining agreement between the Steel Workers Union and Kaiser Aluminium & Chemical Corporation. The object of the plan was to eliminate the racial imbalance in the firm's craft workforce which was almost exclusively white. It established a training programme that reserved 50-9 of the openings for black employees and set hiring goals for blacks at a percentage equal to the percentage of blacks in the local workforce.

The Supreme Court, in a majority opinion, rejected the argument that voluntary racial preferences were not allowed under s 703(j). According to the court, s 703(j) does not limit what private employers or unions are permitted to do with respect to such references. The court's approval of the programme, however, was narrowly circumscribed in the following way:

The court acknowledged that although there had been no finding of discrimination, there was a serious underutilization of blacks in the relevant job categories.

The plan did not unnecessarily trammel the interests of white employees as it did not require their discharge and replacement with black employees.

The plan did not absolutely bar the employment or advancement of white employees.

The plan was a temporary measure which would end when the goals set in the plan were achieved.

The four factors outlined above can be seen, in my view, as an attempt by the Supreme Court to reconcile affirmative action with the merit principle. The plan is acceptable to the court insofar as it is flexible, is not an absolute bar to employment of persons who are not in the target group and it has a limited duration. According to this interpretation, affirmative action is thus a temporary and limited

departure from the merit principle in order to eliminate racial imbalance in the workforce. A similar approach was taken by the court in cases which challenged the constitutionality of legislation requiring a certain proportion of federal funds to be set aside for minority business enterprises (*Fullilove v Kluznick* 448 US 448 (1980)). The court upheld the constitutionality of the law which had established this programme on the ground, inter alia, that the plan was flexible and would not have an unfair impact on non-minority business enterprises. Other cases confirm that affirmative action is permissible as a temporary and flexible departure from generally accepted practices - that is, the merit principle.

In Australia the Affirmative Action (Equal Employment Opportunities for Women) Act 1986 contains a strong reaffirmation of the principle of merit. Section 3(4) of the Act reads as follows: 'Nothing in the Act shall require the relevant employer to take action incompatible with the principle that employment matters should be dealt with on the basis of merit.' This section would appear to exclude altogether the notion of preferential treatment. Not surprisingly, this section has prompted a debate on the definition of merit."

What is the purpose of affirmative action?

In *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 Landman J stated

[12] Affirmative action of persons belonging to disadvantaged groups or categories is a defence against the principal injunction not to discriminate in employment. But does this mean that affirmative action is then merely a shield for an enlightened employer or does it serve as a sword for a disadvantaged person? It was conceded by Mr Bozalek, in my opinion correctly in this case, that an applicant for employment derives no right from a contractual or negotiated affirmative action policy, as policies envisaged by this subitem are called. It was however submitted that in assessing whether an applicant was a victim of a residual unfair labour practice the existence and scope of an affirmative action policy and the obligations which it placed on the employer are vital considerations. From an equity and labour relations point of view an employer should be bound by such a policy.

[13] Juridically it seems to me that this policy does not give a right to an applicant for employment, at least one who has no existing relationship with the employer. See *George v Liberty Life of Africa Ltd* (1996) 17 ILJ 571 (IC). The policy seems to stand on the same footing as the terms of the advertisement inviting applications for the job. The policy is, I think, a term of the invitation to treat and good labour relations binds the employer to follow it.²²⁷

The question of whether the purpose of affirmative action is to advantage the group rather than the individual member of the group arose in *Stoman v Minister of Safety*

²²⁷ See further M McGregor 'Affirmative Action: An Account of the Case Law' (2002) 14 SA Merc LJ 270; Thompson & A Benjamin SA Labour Law at CC1-59.

& *Security & others* (2002) 23 ILJ 1020 (T) in which Van der Westhuizen J discussed this question as follows-

“During oral argument it was submitted on behalf of the applicant that there is no proof that the fourth respondent as an individual is indeed a person previously disadvantaged by unfair discrimination. It was in fact argued that, in view of the fact that he had already achieved a relatively high rank in the SAPS, he could not be regarded as such a person. Leaving aside the logical difficulties that the last submission entails, the question whether the individual who may in a particular case benefit from a decision based on a policy of affirmative action has to be someone who has him or herself been factually disadvantaged is sometimes used in hypotheticals discussed in textbooks and law school classrooms. Many permutations of this question are conceivable and some have factually occurred, for example in American jurisprudence. What would the case be if it is accepted, for example, that South African black people, and women, have been disadvantaged by unfair discrimination, but a particular applicant for a job grew up in London where she received an outstanding education of a high standard? What would the situation be if the applicant is a black woman who grew up in another African country and who was not subject to South African apartheid policies and practices? Would it make any difference if the last mentioned fictitious candidate was also subjected to discriminatory practices because of the colonial history of that country? These and more examples may well show that the intention of the legislature with the constitutional recognition of measures designed to protect and advance previously disadvantaged persons or categories of persons could not have been to make such measures dependent on the individual circumstances of each particular case. It is a given fact that African people were discriminated against very severely under apartheid and that other race groups who were regarded as non-white were also discriminated against, although not necessarily to the same extent (as was found in the earlier mentioned Motala case). Certainly the detailed circumstances of individual members of any group may differ. Whereas some individuals may perhaps coincidentally have had access to relatively better educational and other facilities, others may have been unfortunate enough to be subject to the worst possible discriminatory practices which occurred during a certain era. It would be impossible to make this particular distinction and in the present case it would make very little sense to say that, seeing that the fourth respondent has already been promoted to a rank just below the position to which he was appointed, he was not disadvantaged. The emphasis is certainly on the group or category of persons, of which the particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. *The aim is not to reward the fourth respondent as an individual, but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of South African society. Similarly, the aim is not to punish or otherwise prejudice the applicant as an individual, but to diminish the over-representation which his group has been enjoying as a result of previous unfair discrimination.*” [My emphasis]

In *Dudley v City of Cape Town and another* [2004] 5 BLLR 413 (LC) the court followed the *Stoman* case, and referred with approval to the American case of *Local 28, Sheetmetal Workers' Industrial Association v EEOC* 478 US 421 (1986) at 424:

'The purpose of affirmative action is not to make identified victims [of past discrimination] whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and the beneficiaries need not show that they were victims of discrimination.'

Case law and the affirmative action defence

"Affirmative action presents itself within the context of the EEA both as a duty and as a defence"²²⁸. The latter aspect is discussed here. As a defence the measures are aimed at remedying the disadvantaged position of people from designated groups, that is, 'black people, women and people with disabilities', while the defence is available to all employers.

In *Public Servants Association of SA v Minister of Justice* (1997) 18 ILJ 241 (T) a matter which dealt with item 2(2)(b) of schedule 7 of the LRA, and section 8(3)(a) of the [interim] Constitution, the court interpreted affirmative action as an exception to the basis right to equal treatment, and as such held that affirmative action should be applied in restrictive or narrow manner. The court held there must be a rational nexus between the means used and the objective of the affirmative action measures.

In *Abbott v Bargaining Council For The Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC) Landman J said "[a]ffirmative action of persons belong to disadvantaged groups or categories is a defence against the principal injunction not to discriminate in employment". He then went on to pose the question of whether affirmative action is 'a shield for an enlightened employer or does it serve as a sword for a disadvantaged person?', and held that it the former.

McInnes v Technikon Natal (2000) 21 ILJ 1138 (LC) was another case brought before the court under the jurisdiction of the now repealed schedule 7 of the LRA and before the introduction of the Employment Equity Act, 55 of 1998. Ms McInnes applied and together with Mr Mpanza, an African male for a lecturing post at the

²²⁸ Du Toit et al page 563. I have used the term 'defence' for convenience as does Du Toit et al.

Technikon. Mr Mpanza did not meet the requirements of the advertisement because he did not have extensive lecturing experience. He was nevertheless short-listed, presumably said the court, “because he was black”. Ms McInnes had worked as a lecturer for a number of years on a series of fixed term contracts. When she was not offered employment again she alleged, amongst other things, that she had been unfairly discriminated against on the ground of her race i.e. she was not appointed to the lecturing post because she was a white person. The Technikon admitted that its affirmative action policy was taken into account in the selection of Mr Mpanza for the post, and that the implementation of this policy was permissible in terms of item 2(2)(b) of schedule 7. The court’s approach was to decide whether the discrimination against McInnes was sanctioned by the LRA, which said the court required an examination of the respondent’s affirmative action and employment policies in order to determine firstly whether these policies fall within the ambit of what is sanctioned by item 2(2)(b) , and secondly whether the selection of Mpanza above the applicant fell within the ambit of such policies. Having done so the court stated-

“[39] The fact that Mr Mpanza was a member of the African community gave him a distinct advantage. This was an important factor having regard to the policy. But this factor had to be balanced against the need to provide the highest standard of tertiary service to its students. This could hardly have been achieved by appointing someone at the eleventh hour where the incumbent was the far better candidate and was able to continue with the work she was doing, particularly also where the appointee has no previous teaching experience.”

Affirmative action will not justify appointing or promoting a candidate who is, objectively assessed, not suitably qualified for the post, as in this case – Mpanza ‘had no previous teaching experience’.

With the introduction of the Employment Equity Act, 55 of 1998 it became clear with the introduction of section 6(2) that affirmative action measures are not an exception to the right to equality but an essential part of the substantive right to equality. The differences between the interim Constitution and Section 9 of the Constitution were discussed in *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T). as follows

“The wording of s 8(3) of the interim Constitution and s 9(2) of the final Constitution is not exactly the same, although there is considerable similarity. Both clauses mention ‘measures’ that are ‘designed’ for a certain purpose. Both also mention persons or categories of persons who have been disadvantaged by unfair discrimination. However, whereas s 8(3)(a) mentions the achievement of ‘the

adequate protection and advancement' of such persons or groups or categories of persons, s 9(2) mentions measures designed 'to protect or advance' persons or categories of persons previously disadvantaged. Perhaps there is some significance in the fact that the wording of s 8(3) is stronger or more emphatic in its specific mentioning of 'the adequate protection and advancement' of the relevant persons and groups, whereas the requirement that the protection and advancement must be 'adequate' is not specifically mentioned in s 9(2). Furthermore, s 9(2) is structured differently in that it starts with the opening statement that equality includes the full and equal enjoyment of all rights and freedoms. Then it states that to promote the achievement of equality, measures designed to protect or advance the relevant persons, etc may be taken."

The Court agreed with Swart J in the *Public Servants Association* case that "a policy or practice which can be regarded as haphazard, random and overhasty, could hardly be described as measures designed to achieve something. There must indeed be a rational connection between the measures and the aim they are designed to achieve" [at 1031].

However, there are still a number of potential restrictions on the application of the affirmative action defence. The first is in relation to the group it seeks to protect. Section 2 of the Employment Equity Act, 55 of 1998 states that the purpose of the Act is to achieve equity in the workplace, and that one of the ways in which this purpose is achieved is by the implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups. The term designated groups means 'black people, women and people with disabilities' [section 1 of the Act]. Du Toit et al point out, correctly it is submitted, that

"The apparent effect is to limit the scope of section 6(2)(a) to measures intended to advance people from designated groups only. While Chapter II of the Act (prohibiting unfair discrimination) applies to all employees and employers [s 4(1)], it would seem that measures affirming non-designated groups are excluded from the ambit of the defence."²²⁹

A further restriction relates to the beneficiaries of affirmative action measures who are disadvantaged members of designated groups. While the disadvantage relates to both present and past disadvantage, the concept is not defined²³⁰. Its importance is that "[T]his concept ...determine(s) who will qualify as beneficiaries of affirmative

²²⁹ Du Toit et al page 566.

²³⁰ See McGregor 'Disadvantage in affirmative action' *Juta Business Law*, Vol 10 Part 3 page 141

action measures”²³¹. The concept of disadvantage is grounded in that of substantive equality, which unlike formal equality which is directed at the individual and is aimed at equality of treatment, is directed at both the individual but particularly the group²³² and aims to ensure equality of outcomes. Macgregor notes that “it appears that the focus of affirmative action [in the Act] is on groups and not on individuals”. The question is whether membership of a designated group sufficient of itself to qualify for a person to be a beneficiary of affirmative action, or must “personal, actual disadvantage be shown even though a person belongs to a designated group?”²³³ Kentridge²³⁴ argues for the former position, and is of the view that it is not necessary for each individual who has or will have benefited from affirmative action measures to have been disadvantaged by unfair discrimination. Rycroft points out that one view of the Act is that it “assumes that all people in the designated group (blacks, women, people with disabilities) are disadvantaged”²³⁵. As a result some arbitrators and judges are of the view that an individual does not have to show individual disadvantage, simply that s/he belongs to a disadvantaged group. Rycroft criticises such an approach because in order for a grievant to be ‘disadvantaged’ because of his/ her race for example, “the definition of disadvantage requires that it was because of race that prejudice occurred. My reasoning has been that if race has not prevented education or training, the use of the term disadvantage is inappropriate.” [at 1424]. His approach is therefore to look at individual experience, rather than make an assumption that the grievant was in fact disadvantaged because he is a member of a designated group. Rycroft further points out that there are degrees of disadvantage and suggests that the solution is “to focus more on the broad social purposes of the Act, namely representivity, regardless of whether a person in the designated group comes from a wealthy background and has received the best education” [at 1423]²³⁶. Rycroft points to another difficulty inherent in the assumptive

²³¹ Ibid.

²³² Section 2(b) of the Act refers to disadvantages in employment experienced by designated groups in order to ensure their equitable representation ... [My emphasis].

²³³ Ibid 142.

²³⁴ Kentridge ‘Equality’ in Matthew Chaskalson et al *Constitutional Law of South Africa* pages 14-55

²³⁵ Rycroft ‘Obstacles of employment equity?: The role of judges and arbitrators in the interpretation and implementation of affirmative action policies’ (1999) 20 *ILJ* 1411 at 1423.

²³⁶ This does not, however, mean that the arbitrator or judge should not take note of the definition of disadvantage, if any in the employer’s affirmative action policy. An example of such a definition is found in the Employment Practices Policy Agreement (EPPA) of the Durban City Council, namely “any person or group of people who have:

approach to disadvantage, namely the question of whether, in choosing between the three categories in the designated groups, any one category is more disadvantaged than another.

Du Toit ²³⁷ is also of the view that the Act supports the interpretation that disadvantage may be assumed if the grievant is a member of the designated groups. He is of the view that even relatively educated or prosperous black South Africans should be entitled to the benefit of affirmative action because the advantages they enjoyed were despite the disadvantages imposed on them by apartheid.

For the arbitrator in *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA) the question of relative disadvantage was crucial in order to determine which candidate should have been promoted when both candidate came from the designated group. He stated

"Both Crotz and Damane came from the designated group, 'black'; there is no evidence that the selection committee or the council ever canvassed the relative disadvantage of the two men with them. There was an attempt to show how disadvantaged Damane had been at the arbitration. But that came too late for the WTLC to have applied its mind to the issue.Crotz had longer relevant experience and greater qualification than Damane. It is also clear from the evidence that when it came down to the wire, the fact that Damane was African and Crotz coloured was critical. "

The arbitrator concluded that the council should have promoted the best candidate, which on the evidence was the applicant.

The role of the courts and arbitrators in interpreting and implementing affirmative action policies.

3.2.1 been adversely affected or excluded from access to education, training and/or skills on the grounds of race, gender or physical disability; and/or

3.2.2 been adversely affected economically, politically, socially or in occupational mobility on the grounds of race, religious belief, gender, national origin, or physical disability; and/or

3.2.3 been discriminated against by any form of distinction, preference or exclusion or personal treatment which directly or indirectly restricted development, made separate provision for, or provided less favourable treatment on grounds of race, religious belief, gender, national origin, or physical disability.

Note: The parties to this agreement acknowledge that there are various degrees of "disadvantaged".

²³⁷ I have relied on Macgregor's summation of Du Toit's article in as I am unable to find his article at the reference mentioned by Macgregor. See M Macgregor 'Disadvantage in affirmative action' *Juta Business Law*, Vol 10 Part 3, page 144.

Rycroft argues that the adjudicative role played by the courts and arbitrators is “a conservative one, more attuned to the protection of individual rights than the promotion of broader social purposes”²³⁸. He suggests that because the vast majority of litigants are white males, adjudicators are generally interpreting the law with one sort of applicant in mind and acting, by and large, to protect this group. He concludes that when it comes to promotion ‘the trend would seem to be for commissioners to scrutinize the affirmative action policy to discern if it is narrowly tailored’.

Pillay²³⁹ takes a more measured view when discussing the same point and states As all adjudicators are compelled to adopt a value based method of interpretation, one's life experience and world view may come into play. Having adjudicators representative of a plural society determine the values of a democracy anticipates that there may be as many conflicting decisions as there are adjudicators. It also implies that there may be no single right answer to a given problem. For instance, insofar as 'values' means morality, fairness and equity, the decisions of adjudicators with a socialist perspective could be diametrically different from those with a capitalist outlook. Those who have experienced discrimination personally may be more sympathetic to granting relief in favour of an employee who complains of discrimination than one who has not had such an experience.

Dissent amongst adjudicators is predictable. Controversy and dissenting judgments are a reminder of our plurality and a demonstration of our democracy in action. They attract public participation to the discourse about rights. This reinforces the dialogue that is constitutionally structured, on the one hand, by the interpretation clause insofar as it extends a law-making function to adjudicators and which, on the other hand, is limited by the principle of the separation of powers. This tension triggers the dialogue. Adjudicators are therefore instrumental in stimulating the dialogue amongst themselves, other arms of government, institutions and society generally.

Affirmative action measures

In terms of Section 15 of the Act affirmative action measures are those which are “designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer”²⁴⁰.

²³⁸ A. Rycroft ‘Obstacles To Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies’ (1999) 20 *ILJ* 1411.

²³⁹ D. Pillay ‘Giving Meaning To Workplace Equity: The Role of the Courts’ (2003) 24 *ILJ* 55 at 63.

²⁴⁰ Section 15(1) of the Employment Equity Act, 55 of 1998.

In *George v Liberty Life Association of South Africa Ltd* (1996) 17 ILJ 571 (IC) the court stated that “affirmative action is a means to an end and not an end in itself”. Garbers suggests that this means that while affirmative action is fundamental to the achievement of equality, “we have to remain wary of simply equating a measure (such as affirmative action) with a value (such as equality)”²⁴¹.

An example of what is not an affirmative action measure is the dismissal of employees from previously advantaged groups. For example in *Espach and Telkom SA Ltd* [2004] 9 BALR 1128 (CCMA) the employer embarked upon a restructuring exercise in the procurement department in terms of which employees were required to apply for posts in the now restructured department where the employer had decided to reduce the number of managers from 63 to 54. All the managers who did not apply for voluntary packages had to apply for the new 54 positions. The employee, a white male who had worked for Telkom for 35 years, was not selected for one of the new posts and was then retrenched. The arbitrator concluded that the exercise was a sham, as while the selection criteria were ostensibly LIFO, skills and ‘correction for race and gender’ the latter may be used when appointing or promoting candidates, but not for purposes of retrenchment. As for the employer’s case that the criteria were agreed with the unions, the arbitrator referred to an article by Hepple *Security of Employment* in *Blanpain Comparative Labour Law and Industrial Relations* 2 edition at 473

“Sometimes the rules negotiated between employers and trade unions may indirectly discriminate against women workers or ethnic minorities and for this reason may be unlawful. For example, in the UK a collective agreement providing for the selection first of part-time employees has been held by and industrial tribunal to be in contravention of the Sex Discrimination Act because its impact is greater on women than on men.”

The arbitrator held that ‘the employer’s actions constituted discrimination’, and awarded ‘the maximum’ of twelve months compensation for unfair dismissal. It is submitted with respect that the employee’s dismissal was automatically unfair. Du Toit et al state that “affirmative action dismissals would [in terms of the LRA] be automatically unfair [s 187(1)(f)]”²⁴².

²⁴¹ ‘The right of a job candidate to affirmative action selection: a landmark case?’ *Contemporary Labour Law* Vol 12 No 10 May 2003 page 94.

²⁴² at page 567.

Does affirmative action grant a right?

In *Abbott v Bargaining Council for the Motor Industry (Western Cape)* [1999] 2 BLLR 115 (LC) Landman stated -

[12] Affirmative action of persons belonging to disadvantaged groups or categories is a defence against the principal injunction not to discriminate in employment. But does this mean that affirmative action is then merely a shield for an enlightened employer or does it serve as a sword for a disadvantaged person?

Two cases concerning promotion disputes have considered this question – *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC) and *Dudley v City of Cape Town* [2004] 5 BLLR 413 (LC) with very different results. The facts of each case were startlingly similar. Both *Harmse* and *Dudley* were designated employees by virtue of their race, were employed by the City of Cape Town, applied for promotion posts, were not selected, and in both instances they were aggrieved when white males were promoted instead of them, and claimed in the Labour Court that the municipality had unfairly discriminated against them by failing to promote them. The essence of both their cases was that “employers may discriminate against their designated employees for purposes of the EEA not only if they fail to eliminate unfair discrimination in particular cases, as required by section 5, but also if they fail to promote affirmative action, as required by section 13”²⁴³. In *Harmse* the court concluded at paragraph 47 that

“This right not to be unfairly discriminated against is a right enjoyed by all employees whether or not they fall within any of the designated groups as identified in the Act. If an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not to be unfairly discriminated against. Similarly, if an employer discriminates against an employee in the non-designated group by preferring an employee from the designated group who is not “suitably qualified” as contemplated in sections 20(3) to (5) of the Act, then the employer has violated the right of such an employee not to be discriminated against unfairly. In either case, the issue is whether the employer has violated an employee’s right not to be discriminated against. To this extent, affirmative action can found a basis for a cause of action”.

The court in *Dudley* disagreed with this view on a number of grounds, finding firstly that there is a distinction between a claim for unfair discrimination, dealt with in

²⁴³ Grogan ‘Blunting the sword - The rights of designated employees’ *Employment Law Journal* Vol 20 April 2004.

Chapter II of the Act, and the situation where affirmative action measures have not been applied by a designated employer, which gives rise to an enforcement issue under Chapter III of the Act. A proper interpretation of the Act is that each Chapter should be understood separately, and that therefore it is not correct to interpret section 20(5) which states that an employer may not unfairly discriminate against an employee solely on the ground of that person's lack of relevant experience, as if it is part and parcel of the general prohibition against unfair discrimination contained in section 6. A contravention of section 20(5) is an enforcement issue, and does not give rise to a claim of unfair discrimination provided for in section 6, and 'it also does not bring about an individual right to affirmative action' [at 76]. Rather

"The collective nature of affirmative action and the absence of an independent individual right to claim an appointment is a well-recognised one. See for instance *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1010 (T) at 1035H-I:

"The emphasis is certainly on the group or category of person, of which the particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. The aim is not to reward fourth respondent as an individual but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of South African society."

Conclusion

It is clear that if the employer promotes a candidate who is a designated employee rather than a candidate who is a non-designated employee the employer may effectively raise the section 6(2) defence of affirmative action against a claim of unfair discrimination arising from the latter.

However, in terms of *Harmse* a designated employee may allege unfair discrimination by the employer if a non-designated candidate is promoted where the candidates are both suitably qualified. In terms of *Dudley* is it not sufficient for the designated employee who was not promoted to simply allege that he should have been promoted because he is a designated employee and the other candidate was not.

Neither case heard evidence on the merits of the dispute. As a result it is presently unclear whether and in what circumstances the courts will find that employees in the position of *Harmse* and *Dudley* were in fact discriminated against.

9.5 Employment equity plans and promotion

Introduction

Section 20 (1) of the EEA states that a “designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce”. The plan must state

- “(a) the objectives to be achieved for each year of the plan;
- (b) the affirmative action measures to be implemented as required by section 15 (2);
- (c) where under representation of people from designated groups has been identified by the analysis, the numerical goals* to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;
- (d) the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;
- (e) the duration of the plan, which may not be shorter than one year or longer than five years;
- (f) the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;
- (g) the internal procedures to resolve any dispute about the interpretation or implementation of the plan;
- (h) the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and
- (i) any other prescribed matter.²⁴⁴”

In terms of the Regulation 3 to the EEA, a designated employer may refer to the Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans when preparing the employment equity plan required by section 20 of the Act. The plan must be retained for a period of three years after the expiry of the plan, unless the employer employs fewer than 150 employees, in which case the plan must be retained for two years. In terms of the Code of Good Practice:

²⁴⁴ Section 20(2) of the EEA.

Preparation, Implementation and Monitoring of Employment Equity Plans, one of the affirmative action measures to be contained in the plan concerns the promotion of people from designated groups.

What is an employment equity plan?

A number of questions arise from the obligation to prepare and implement an employment equity plan. The first question is what is an employment equity “plan”? In *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA) the employer sought to rely on the National Agreement on Equal Employment Practice and Affirmative Action, which “acknowledges the right of the local authorities and its employees to determine their own affirmative action goals and timetables within the guidelines and framework of the national agreement, and which “serves as a framework for local negotiations around access, procedures, structures and most importantly programmes to overcome discriminatory attitudinal problems and to target and set goals for redress of disadvantaged people”. The employer argued that because all the stakeholders participated in the structure, the National Agreement “amounted to a planned, programmatic intervention as required by the legislation”. The arbitrator disagreed and found that the employer had no 'detailed, specific and feasible affirmative action programme' as specified in item 5.3 of the national agreement. The fact that the parties set up a structure, an affirmative action steering committee, to deal with issues regarding appointments, which the unions and political parties fully participated in, and that they investigated the demographics of their geographical location and adopted the findings as a norm was still not sufficient for the National Agreement to be considered an employment equity plan in the arbitrator's view.

In the case of *IMAWU v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC) the employer relied on an “Agreement on Equal Employment and Affirmative Action”, which the arbitrator found “envisages further steps by individual local authorities such as the respondent. The most important of these is the formulation of an affirmative action programme”. The arbitrator found that “adopting” the agreement was insufficient as the

“action plans envisaged in the agreement have not been carried out or implemented by the respondent. In a nutshell the respondent has done nothing envisaged by the agreement. In my view

therefore the respondent cannot even begin to consider affirmative action in appointments before it has complied with the agreement.”

The court in *McInnes v Technikon Natal* [2000] 6 BLLR 701 (LC) came to a similar conclusion. The court found that while the employer’s affirmative action policy complied with the labour legislation, the employer had disregarded its provisions by appointing an unsuitable candidate merely because he was black.

How specific must the employment equity plan be?

There is some support for the proposition that if an employer does have an employment equity plan it needs to be specific i.e. for the business unit of the employer and relevant to the employee/s.

In *Blignaut and South African Police Service* (2003) 12 SSSBC 6.9.2. the employee’s claim that the employer’s failure to promote her was unfair was rebutted with evidence that the employer had an equity plan, which was produced as evidence in the arbitration. In terms of this plan, which was for the business unit in which the employee worked, the Forensic Science Laboratory, there were 200% more white females that were allowed by the representivity statistics at level 8, the level to which the employee sought to be promoted.

It is apparent that the organisational structure of the organisation needs to be taken into account when determining which employment equity plan should be relied upon. In *Coetzer & others v Minister of Safety & Security* [2003] 2 BLLR 173 (LC) the employer had reorganised its structure over a period of time. The employees all held the rank of inspectors in the explosives unit, which in terms of the structure of the employer at the time of the case, was part of Forensic Science Laboratory which in turn fell within the Detective Service. In the Labour court the employer alleged that while the employees, who were all white males, had been discriminated against on the grounds of their race the discrimination was not unfair as it was in accordance with affirmative action measures consistent with the purposes of the Employment Equity Act of 1998. The employer then produced a number of equity plans. The court [Landman J] stated as follows-

[19] SAPS produced the “South African Police Service Employment Equity Plan” (the “EEP”) which applies to all persons employed in the SAPS. It is undated.An employment equity plan is, of course, relevant because it contains the affirmative action measures which may be used to justify discrimination.

[20] The EEP records that: “The SAPS has taken the approach of implementing Employment Equity Plans per business unit. Due to the large size of SAPS, 123 204 members and the spread throughout the different provinces it is impractical to develop a single plan that will integrate all the dynamics and cater for specific needs and unique circumstances.” The EEP therefore divides the SAPS into 20 business units, one of which is the Detective Service. Each business unit is responsible for communicating their own individual employment equity plan to all personnel within the relevant business units. The plans of the business units have been consolidated in a plan for the entire service (the EEP). The EEP proclaims that it has been approved and implemented by the National Commissioner.

[21] An employment equity plan: “Head office Detective Service” was produced. This is of no relevance to this case. The applicants are not head office staff. A “Draft Employment Equity Plan: Detective Division” was produced but it too cannot be taken into account because of its uncertain status. It is clear from the EEP that the Lab should have its own plan which would be incorporated in the EEP. The Lab did not have one during the critical period. It was submitted by Ms Pretorius, who appeared for the respondent Minister and the National Commissioner, that in this event the national plan, the EEP, would prevail.

[22] What is the effect of the absence of an employment equity plan and therefore an affirmative action plan for the Lab? Does the EEP (and the general affirmative action measures) justify racial discrimination? [My editing]

After further discussion around related issues the court answered the latter question in the negative for two reasons one of which was

[39][T]here is no specific affirmative action plan for the explosives unit. This deficiency would not have been of much significance had the EEP made provision for addressing “all the dynamics and cater for specific needs and unique circumstances” of highly specialised units pending the completion and incorporation of, in this case, an equity plan for the Lab. [My editing]

It is apparent from the above that where the organisation is divided into business units, the equity plan relied on by the employer should be that of the particular business unit. In the interim, that is until business unit specific plans have been compiled, the employment equity plan for the entire organisation should make provision for any specialised business units.

Must the employer have an employment equity plan in place in order to raise the affirmative action defence?

A further question is whether an affirmative action measure implemented before the adoption of a plan is necessarily discriminatory²⁴⁵. Several cases²⁴⁶ have held that to satisfy the requirement of being 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce'²⁴⁷ there has to be a employment equity plan.

The first case to express an opinion on the question is *Public Servants Association of SA v Minister of Justice* 1997 (3) SA 925 (T); (1997) 18 ILJ 241 (T), which concerned promotions in the Department of Justice during 1995. At the time the interim Constitution was in effect. The Court concluded that there is no principle of law barring review of affirmative action programmes undertaken pursuant to s 8(3)(a) of the interim Constitution, and then considered what the legal requirements for the affirmative action programmes undertaken in the case before the court. Swart J held that as 'affirmative action measures' is the reason why the employer sought to promote certain candidates over others, then such measures must be designed, meaning "the antithesis of mere intention and of haphazard or random action". The measures must also be designed to achieve something, in other words there must be "a causal connection between the designed measures and the objectives". Furthermore, the objectives of the measures must be the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination. In The Shorter Oxford English Dictionary on Historical Principles the word 'adequate' means 'equal in magnitude or extent' and 'commensurate in fitness; sufficient, suitable'. In verb form it is stated 'to make or be equal or sufficient'. An efficient administration must be promoted at the same time a broadly representative administration is promoted, and the efficiency of the public administration cannot be compromised by promoting a broadly representative public administration. However,

²⁴⁵ See 'No plan required – affirmative action, equality and unfair discrimination' *Employment Law Journal*, Vol 21 February 2005. The author of this article is not stated in the journal.

²⁴⁶ For example: *Public Servants Association of SA & others v Minister of Justice & others* (1997) 18 ILJ 241 (T); *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC); *MWU obo Van Coller and Eskom* [1999] 9 BALR 1089 (IMSSA); *ESKOM v Hiemstra NO & others* (1999) 20 ILJ 2362 (LC); *Walters v Transitional Local Council of Port Elizabeth & another* [2001] 1 BLLR 98 (LC).

²⁴⁷ Section 15(1) of the EEA .

efficiency need not be sacrificed if the 'black' and 'white' candidates "all have broadly the same qualifications and merits, on a properly controlled and rational basis".

In *Department of Correctional Services v Van Vuuren* (1999) 20 ILJ 2297 (LAC) the issue in dispute was whether the appellant had acted *ultra vires* by implementing the terms of an affirmative action policy before it was registered. Van Vuuren, a white female had applied for a promotional post and despite being recommended by the selection panel, a black male was promoted by the commissioner of the Department. The Industrial Court found that employer had unfairly discriminated against Van Vuuren as the precondition for implementation of Department's affirmative action policy, namely registration, had not occurred by the time the commissioner made his decision. On appeal the court held that the commissioner was the competent person to decide who to promote. The court held with reference to the interim constitution then in force, Public Service Labour Relations Act 1994, and the relevant collective agreement reached in the Public Service Bargaining Council that the commissioner's decision did not derogate from, or annul the agreement reached in collective bargaining, was not *mala fides*, and that the commissioner had "acted within his competence or powers when he made the decision".

The case of *Eskom v Hiemstra NO & others* (1999) 20 ILJ 2362 (LC); [1999] 1 BLLR 1041 (LC) came before the court as a review of an arbitrator's award. The court found that the arbitrator's conclusion that the document tendered by Eskom was not an affirmative action policy as contemplated by item 2(2)(b), did not constitute a gross irregularity and the award was not therefore reviewable.

In *IMATU v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC), the Mlambo J took note of the statement of Cheadle & others in *Fundamental Rights in the Constitution* (1997 Juta) at 60 where, in relation to s 8(3)(a) of the interim Constitution (Act 200 of 1993) which Mlambo J said 'has essentially been retained by s 9(3) of the Constitution', the following is said:

'The interpretation of s 8(1) apart, s 8(3)(a) is designed to insulate from judicial review those measures designed to benefit individuals or groups who have been disadvantaged by unfair discrimination. Provided that the corrective measures comply with the internal requirements of s 8(3)(a), those measures will not be subjected to the rigours of s 33(1). The clause does have internal

requirements. The use of the word "designed" clearly imports that there must be a rational connection between the means employed and the objects of the measures. The measures can only be directed to those groups or categories that are "disadvantaged" by unfair discrimination.'

Mlambo J also noted that Du Toit & others in *The Labour Relation Act of 1995* (Butterworths 1998 2 ed) echo the same sentiments. At 441 the following is stated:

'Measures are permitted if they are "designed" to achieve the purposes set out in item 2(2)(b) . The word "designed" suggests that more than mere intention is required, though not necessarily that the measures should be likely to achieve their purpose. Section 9(2) of the Constitution must be read as permitting only those corrective measures which do not unduly prejudice the individuals or groups who are disadvantaged as a result.'

Mlambo J came to the conclusion that there is

"[19]no doubt therefore that for affirmative action to survive judicial scrutiny the following is relevant:

19.1 there must be a policy or programme through which affirmative action is to be effected;

19.2 the policy or programme must be designed to achieve the adequate advancement or protection of certain categories of persons or groups disadvantaged by unfair discrimination.

[20] In the court's view there are good reasons for these requirements. These requirements ensure that there is accountability and transparency. They ensure that there is a measure or standard against which the implementation of affirmative action is measured or tested. They ensure that no arbitrary or unfair practices occur under the guise of affirmative action. They also ensure full knowledge and participation in the establishment and implementation of the programme."

The candidates for the post of town treasurer were subjected to a test compiled by the previous town treasurer. The results were that Mr M, the candidate selected by the town council achieved 44/120, while the candidates who challenged the appointment of Mr M achieved 79/120, and 95/120. The court also noted that Mr M had not only achieved the lowest score, but had the least experience in local government, and that the "sole criterion applied by the council in the appointment of [Mr M] was the colour of his skin hence the attempt to bring it under affirmative action". It was the latter consideration which the court found difficult to accept, and stated -

"In the appointment of [Mr M] it is not clear what criteria were considered save that he is black. It is not clear why he was preferred to the other two black candidates who scored higher than him in the test."
[My editing]

In *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA), the arbitrator stated that

“For the respondent to raise a successful defence of implementing affirmative action measures it needs to show that:

- The measures were 'designed' to achieve something, in other words they were not random or haphazard.
- The measures must have as an end result the adequate protection and advancement of designated groups or people belonging to those groups.
- The beneficiaries of the affirmative action should have been disadvantaged - either personally or as part of a group that suffered disadvantage previously.
- There must be a causal connection between the designed measures and the objectives they set out to achieve.

In *Coetzer & others v Minister of Safety & Security* (2003) 24 ILJ 163 (LC) there was no employment equity plan for the specialised unit in the SAPS. The court was of the view that this deficiency was not crucial, and could not in fairness be advanced as a reason not to promote candidates just because they were not from the designated group particularly were the court was of the view that by not promoting suitably qualified candidates from the non-designated group the SAPS had failed to discharge its constitutional obligation to promote efficiency.

In *Gordon v Department of Health (Kwazulu-Natal)* (2004) 25 ILJ 1431 (LC) Pillay J was required to deal with the same question. The dispute arose as a result of a decision by the Department in March 1996 not to promote Mr Gordon and to promote a black male instead. The provisions of the interim constitution were in force at the time [as in the *Public Servants Association of SA* case]. Mr Gordon alleged that he had been unfairly discriminated against as the Department had no employment equity plan in place at the time of the decision. Pillay J said that the issues in dispute were “whether the applicant was discriminated against, whether such discrimination was unfair or whether [Mr Gordon] was otherwise unfairly treated I need to consider whether the appointment of Mr Mkongwa [the successful candidate] was substantively fair”. When deciding this question Pillay J noted that the correct interpretation of s 8 of the interim constitution is one which “promote[s] the values which underlie an open and democratic society based on freedom and equality. Furthermore, in the interpretation of any law a court shall have due regard to the

spirit, purport and objects of the Bill of Rights (s 35(1) and (2) of the interim Constitution).” Applying this Pillay J said that items 2(1) and (2) must be interpreted consistently with the interim Constitution, the right to equality is substantive and not merely formal, and it is implied in s 8(1) of the interim Constitution that in order to give effect to it, measures may be necessary to enable disadvantaged people to enjoy the right to equality. Equally, it is implied from subsection (2) that such measures as are applied to give effect to subsection (1) cannot discriminate unfairly against any person. Pillay J concluded that “A broad constitutional clause on equality supported by a constitutional court can authorize the implementation of affirmative action to achieve equality”, and that

[25] The absence of affirmative action plans or other measures contemplated in subsection (3)(a) cannot frustrate the objectives of subsections (1) and (2). It could not have been the intention of the Constitutional Assembly to freeze the operation of subsections (1) and (2) until affirmative action measures are in place. Nor does the wording of s 8 lend itself to such an interpretation.

[26] The existence or otherwise of such measures can also not change the essential content of the rights and protections in subsections (1) and (2). In other words if there is no affirmative action plan, it cannot mean that a disadvantaged person can have no right to substantive equality in terms of s 8(1). Or, that a privileged person will be unfairly discriminated against in terms of s 8(2) if substantive equality is afforded to a disadvantaged person.

The court then reviewed the case law [discussed above] and said “Nothing from the foregoing cases suggests that an affirmative action plan is a prerequisite for making an affirmative action appointment”. Rather

[48] The test for whether a decision to appoint or not to appoint a person is whether there is a rational connection between the reasons and the decision to appoint or not to appoint a person. If the appointment/non-appointment is in terms of a documented measure, it could facilitate proof that there is a rational connection.

However, just because an appointment or promotion is based on affirmative action does not mean the decision can not be challenged [at para 49].

In conclusion, the above cases have been quoted fairly extensively because they have been used to justify the proposition that if an employer does not have an employment equity plan it can not implement affirmative action fairly. It is submitted that these cases are not in fact authority for such a proposition; on a proper reading of the cases it is apparent that the real reason for the courts’ finding was the view

that the decision to appoint or promote the particular candidate was not justifiable on the ground of affirmative action because the candidates were in fact not suitable [as in *Public Servants Association of SA*, and the *IMATU* cases]. If an employer has an employment equity plan it must implement it correctly, and if it has no plan it must still ensure that the candidate promoted is nevertheless the most suitable candidate.

The promotion of a designated employee over another designated employee

In *Biggs v Rand Water* (2003) 24 ILJ 1957 (LC) the applicant, a white female and therefore a member of the designated group, was employed on a fixed term contract which was renewed a number of times. When her post was advertised as a permanent post she applied, but was not appointed. While the selection panel recommended Biggs for the post, the employer appointed a black female - and therefore a member of the designated group, who held a permanent post in the organisation already to the post instead. The employer's affirmative action policy applied to 'all women'; in other words no distinction was made between sub-groups i.e. black female and white female, in the designated group. The employer sought to justify its appointment of the black female on the basis of its obligations in terms of the Employment Equity Act, and that the applicant was not the best candidate but rather both candidates were equally competent even though they did not have the same qualifications, skills and experience. The court noted that the employer had no written policy to support its view that it is entitled to discriminate between black and white females. The evidence was that the general manager of Rand Water had overruled the recommendation of the panel without interviewing both candidates and solely on the basis of the names and races of the two candidates, which conduct said the court "is rationally not capable of being construed as fair discrimination". It is apparent that the court also considered the relative merits of the two candidates, noting that while no documentation as to the qualifications of the black female was produced, the white female had changed the functional content of her position into one which was quite different and more effective than it was when she was appointed and the evidence that through her good performance, the applicant created systems and procedures to such an extent that Rand Water identified a need for the creation of the permanent position. The court concluded that the employer had unfairly discriminated against the employee.

In *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA) Crotz, a coloured male, applied to be promoted but was not appointed. The Council decided to promote a black male instead and did so on the basis of the latter's race. It sought to justify this discrimination on the basis of affirmative action. However, the council had no employment equity plan in place²⁴⁸. The arbitrator found that the applicant had been unfairly discriminated against and stated that

“For affirmative action to succeed and help achieve the desired objective, merit and experience remain relevant insofar as members of a designated group are concerned in relation to their own group. In other words the successful candidate should be the best of the group.”

The arbitrator noted that the applicant was the longest serving and most experienced employee in his grade, and that he had acted as assistant superintendent several times. He was in other words the ‘best of the group’. The arbitrator then promoted the applicant to the post.

Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council (2000) 21 ILJ 1119 (LC) is another case where the grievant and the person appointed to the post were both from the designated group. The council attempted to justify its selection of candidate on the basis of affirmative action. In response Mlambo J stated

“[31] For affirmative action to succeed and help achieve the desired objective merit and experience would remain relevant insofar as the applicants previously disadvantaged by unfair discrimination are concerned in their own group. In other words the successful candidate should be the best out of the group previously disadvantaged by unfair discrimination. I say this for the simple reason that if the playing field is levelled, ie where all groups are considered, candidates from groups previously disadvantaged by unfair discrimination will always come second especially if one considers experience. Candidates previously advantaged by unfair discrimination invariably possess the necessary experience which candidates from groups previously disadvantaged by unfair discrimination would not normally possess. In view of this situation it would be prudent therefore in affirmative action appointments to consider the qualification and potential to develop as crucial and that successful candidates from previously disadvantaged groups are the best from those groups.

[32] In the appointment of Masengana it is not clear what criteria were considered save that he is black. It is not clear why he was preferred to the other two black candidates who scored higher than him in the test. There is no explanation that sets out whether he was found to have potential to develop or perform the work which would justify his appointment. It appears justified therefore to conclude that the decision to appoint Masengana cannot be justified on any other basis. It has not been demonstrated in what way was Masengana the best candidate for the post of town treasurer

²⁴⁸ The validity of this finding is discussed at Chapter 9 page 42 above.

when compared with the other candidates. It therefore appears justified to conclude that the decision to appoint Masengana as town treasurer discriminated unfairly in an arbitrary manner against other candidates in terms of item 2(1)(a) of schedule 7 to the Act.”

An issue in dispute in *National Education Health & Allied Workers Union on behalf of Thomas v Department of Justice*(2001) 22 ILJ 306 (ARB) was an employer could justifiably differentiate between different classes of people falling within 'designated groups'. The facts were that both the grievant, a coloured male and the preferred candidate, an Indian female, were designated employees. The candidates were interviewed and scored by a panel but despite the fact that the applicant achieved the highest score with 38 and the preferred candidate second with 35, the grievant was not promoted to the post. The union argued that the department acted unfairly by not appointing the grievant to the advertised position because, when applying affirmative action measures, it was not entitled to differentiate between two candidates who both fell within designated groups as defined in the EEA. The department answered that it was entitled to differentiate between such candidates in order to improve representivity in a part of the public service. It based its argument especially on the provisions of s 195(1)(i) of the Constitution, which states that one of the principles that should govern the public service is that:

'Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'

In *Walters v Transitional Local Council of Port Elizabeth & another* [2001] 1 BLLR 98 (LC) the applicant was a white female while incumbent was a black male. The court found that on the facts the applicant was the better candidate, and that the Ms Walters was not interviewed after the short listing stage as she was a white person. The court came to the conclusion that the reason for not appointing Ms Walters was because of her race, and held that she was discriminated against on the grounds of her race. Furthermore, the applicant had been unfairly discriminated against as the council was unable to justify its selection of the incumbent.

It is therefore clear that there is a duty on employers to promote the most suitably qualified candidate within the designated groups, and that an employer will find it

difficult to justify preferring one candidate from a designated group over another candidate from a designated group if it fails to do so.

Can an employee from the non designated group apply for promotion to a post in respect of which the employer has indicated an intention to apply affirmative action?

Another way to formulate the question is to ask: is the fact that a particular post has been set aside for designated candidates act as an absolute barrier to the promotion of candidates from the non-designated group?

Section 15(4) of the EEA states

(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.

In terms of section 42 of the EEA, the Director- General or any person or body applying this Act [i.e. the employer], should take into account all of the following when determining whether a designated employer is implementing employment equity in compliance with the Act:

- (a) The extent to which suitably qualified people from and amongst the different designated groups are equitably represented within each occupational category and level in that employer's workforce in relation to the—
- (i) demographic profile of the national and regional economically active population;
 - (ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
 - (iii) economic and financial factors relevant to the sector in which the employer operates;
 - (iv) present and anticipated economic and financial circumstances of the employer; and
 - (v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover;
- (b) progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector;
- (c) reasonable efforts made by a designated employer to implement its employment equity plan;
- (d) the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and

- (e) any other prescribed factor.

In *Coetzer & others v Minister of Safety & Security* [2003] 2 BLLR 173 (LC) Landman J stated

“[26] An absolute barrier is an insurmountable obstacle. Whether a barrier is an insurmountable obstacle must be judged in the light of the purposes of the EEA and with respect to the non-designated group generally.”

In *SALSTAFF obo Strydom and Spoornet* [2002] 6 BALR 604 (AMSSA) Strydom, a white female, applied for a promotion post but was neither considered, short-listed nor interviewed. The employer’s response to her allegation of an unfair labour practice was that she was excluded because she is a white female, and the exclusion came as a result of the staffing policy that provides for a “black list” and a “white list” of candidates. The arbitrator held, correctly it is submitted, that

“The EEA does not require an employer to totally disregard persons who are not from one of the designated groups – see section 15(4) of the EEA in this regard. More over, the EEA does not require an employer to exclude any category or part of a category of the designated groups.....It is the company’s evidence that competence is the main criterion in considering a candidate and that affirmative action does not replace competency. It follows then that all candidates who are competent – or, in the spirit of the EEA, who are suitable – should be afforded an opportunity to promote their candidature; they should be considered.....The company argued that white females are excluded because, if white females were to be employed or promoted, it would comply with the EEA but would not achieve demographic representation. This argument does not have merit. Firstly, nothing compels the company or any employer to appoint white females only. It is in any event common knowledge that employers do not employ white females only in an attempt to comply with the EEA. Secondly, the same argument can be used for any of the other designated groups. The EEA does not require that one designated group or a portion of a designated group receive preferential treatment over other designated groups. All members of the legally defined designated groups must be considered in order to achieve equity. There is a very fine line that employers are required to walk between acting fairly in all circumstances and achieving equity and they must develop policies and practices that do not establish barriers for any category of employees, especially not one of the designated groups.” [My editing]

In a number of cases it appears that parties have accepted that the employer can define a particular post as ‘designated’ or ‘non-designated’, and that a member of a non-designated group may not apply for promotion if the post has been defined as designated. For example in *SA Police Union on behalf of Du Toit and SA Police*

Service (2003) 24 ILJ 878 (CCMA) the arbitrator records that it is common cause that

“2 Positions are advertised either as applicable to 'designated' and 'non-designated' groups. Only designated applicants (defined as black (ie African, coloured and Indian), females and people with disabilities) may apply for positions in the former category. White males are limited to apply for positions in the latter category, but all other groups may also apply for a post so defined in this category”. [at page 879]

It is submitted that the practice of determining before the promotion process has begun that a post is in effect reserved for persons from one or other group is in contravention of section 15(4).

In *Health & Other Service Personnel Trade Union of SA on behalf of Klaasen and Paarl Hospital* (2003) 24 ILJ 1631 (BCA) the employee alleged that the employer's failure to promote her from general assistant to auxiliary services officer (ASO) was an unfair labour practice. The facts were that the employee had been employed as a general assistant for 17 years, had acted in the position of ASO from time to time and had improved her educational qualification by obtaining her grade 10 certificate in her own time. The Hospital advertised two posts for ASO posts and five candidates, one of whom was Klaasen, were short-listed and interviewed. While Klaasen was a 'coloured' woman and member of a 'designated group', coloured women were already over-represented in the occupational class at the Hospital. The selection panel chose Klaasen as one of the two recommended candidates for the posts, but was then advised to select another candidate in terms of the department's numeric goals, and a third candidate who complied with those requirements was then promoted. During the arbitration the representative from the Department of Health on behalf of the Hospital handed in a written employment equity plan setting out its numerical goals for occupational categories which was signed on 30 June 2000, and which the arbitrator said

“.....is rational and justifiable. I can understand the employer's argument that there are too many 'coloured' women occupying that occupational class and that its numeric goals require future appointments to those positions to be from the designated numeric groups as per its EE plan (white man, black man or woman, Indian man or woman). Historically, in the Western Cape, it is 'coloured' women who have occupied cleaning positions of the type under consideration.”

However, the arbitrator noted that the relevant collective agreement between the employer and the union sets out that in accordance with s 15(4) of the EEA no absolute barrier is established to the prospective or continued employment or advancement of candidates who are not from the designated groups. The arbitrator held that

“This equally applies to the designated numeric groups and to Klaasen who had the right to apply, and be interviewed, for the position. This is consistent with the notion of the setting of goals and objectives rather than the requiring of quotas.

In other words, the EE plan sets goals and objectives, not quotas. It cannot be an absolute bar to promotion. Klaasen was the best candidate after G [the other successful candidate]. Were it not for the EE plan, Klaasen would have been appointed. The effect of appointing H [the candidate who replaced Klaasen] to the position with disregard to the exceptional long service, how she bettered herself and the fact that she acted in the position etc, is effectively to create an absolute bar to Klaasen's promotion until the department's numeric goals are met. The department has by doing this created an absolute bar to Klaasen's promotion. This surely must be contrary to the EEA. Had the candidates been closer together in terms of work experience, years of service, etc, it would have been more easily justifiable to favour the numeric goals; but here Klaasen was such a strong candidate and possibly never better suited for the post than at this particular time. To deny Klaasen the appointment A now, is in effect to tell her she is absolutely barred from the position until the numeric goals are met. This is not fair.” [My editing]

In summary it is suggested that a candidate from the non designated group may apply and be considered for promotion to a post set aside for a designated candidate, and the refusal or failure to either permit such a candidate from applying or not considering such a candidate is an unfair labour practice and may amount to unfair discrimination. Furthermore a candidate from the designated group may likewise apply and be considered for promotion even where the candidate is part of a group which is oversubscribed in the employer's employment equity plan, which can not act as an absolute barrier to the promotion of candidates from either class. The failure to promote a candidate from either class is unfair were the candidate is the most suitable candidate in terms of the selection criteria for the post [as in the *Klaasen* case], or where Constitutional and other imperatives, including the need for the police service “to discharge its responsibilities effectively”, operate as in the *Coetzer* case.

9.6 Inherent requirements of the job

The question of what an inherent requirement is has been discussed below²⁴⁹. The question of the inherent requirement of a job as a defence to an allegation of unfair discrimination is discussed here.

It is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job²⁵⁰. The fact that a particular requirement is an inherent requirement is therefore a justification to an allegation of unfair discrimination. The employer will be required to prove that the requirement is an inherent requirement, and that the discrimination was as a result of the inherent requirement. If the employer succeeds in doing so the discrimination may be held to be fair.

By including a provision providing a justification for discrimination on the ground of the inherent requirements of the job the legislature has applied international convention in the form of Article 1(2) of the Discrimination (Employment and Occupation) Convention no 111 of 1958, and follows other similar examples such as the Equal Treatment Directive of the European Community, the American Civil Rights Act, the Americans with Disabilities Act 1990, the Canadian Human Rights Act 1985, the British Sex Discrimination Act 1975 and Race Relations Act 1976²⁵¹, the Australian Sex Discrimination Act 1984, and Workplace Relations Act 1996.

In accordance with the general principle that courts will be extremely cautious before a justification for an act which limits the right to equality is upheld, Nielsen suggests that the defence of an inherent requirement will be narrowly interpreted²⁵². In other jurisdictions the extent of the defence is limited by permitting the ground to apply to only in respect of some grounds of discrimination and not others²⁵³. Pretorius et al suggest that although the EEA does not restrict the defence in a similar manner “in

²⁴⁹ See Chapter 6.2.

²⁵⁰ Section 6(2)(b) EEA.

²⁵¹ Which refers to a 'genuine occupational qualification',

²⁵² Nielsen 'The concept of discrimination in ILO Convention No 111' (1994) *International and Comparative Law Quarterly* 827-856.

²⁵³ For example, the British Sex Discrimination Act 1975 allows the defence only with respect to sex discrimination but not discrimination on the ground of marital status, and the American Civil Rights Act 1964 does not include either race or colour as a *bona fide* occupational qualification, but permits it to operate as a defence in disputes concerning the decision to hire and access to training programmes.

practice its operation will not differ much from the situation in countries that have incorporated explicit limits on its use”²⁵⁴.

A narrow interpretation was applied in *Association of Professional Teachers & Another v Minister of Education & Others* (1995) 16 ILJ 1048 (IC) where the court said

“...a differentiation based on the inherent requirements of a particular job should only be allowed in very limited circumstances and should not be allowed in circumstances where the decision to differentiate is based on a subconscious (or worse, a conscious) perception that one sex is superior to the other. Also, where a differentiation is based on a stereotyped notion about women, such distinction should also be outlawed as unfair discrimination. Perceptions such as this which are used as a basis on which to differentiate between men and women, often lead to a woman's not being employed or promoted or in receiving less benefits than she would have received had she been a man” [at 1081].

Nielsen suggests further that if indeed the defence is narrowly interpreted, in order to be accepted as an *inherent* requirement, “the requirement will only be considered inherent if it is a necessary, as opposed to a merely useful, convenient, or beneficial condition to perform the essential functions of the job”²⁵⁵. As a result even if it is accepted that a particular race or gender performs better in a particular occupation, this does not mean that membership of that race or gender is a necessary requirement for a job in the occupation²⁵⁶. It is submitted however, that the term ‘inherent’ implies that the requirement is both necessary and reasonable. To this extent the phrase “inherent requirement of the job” more clearly sets out what is required than, for example, the ‘occupational qualification’ exception in under the American Civil Rights Act, 1964 or the ‘*bona fide* occupational requirement’ defence in terms of the Canadian law.

Should health and safety be a consideration when determining if a particular requirement is an inherent requirement? Put another way, could the employer argue that a particular requirement is an inherent requirement because of health and safety of clients, customers or co-workers? Legislation such as the Canadian Human

²⁵⁴ Pretorius et al 5-14.

²⁵⁵ Nielsen op cit 845.

²⁵⁶ For example, the fact that women performed certain duties as a flight attendant better than men was not enough to justify appointing only female flight attendants in *Diaz v Pan American World Airways Inc* 442 F2d 385 (5th Cir 1971).

Rights Act 1985 and the Americans with Disabilities Act 1990 make provision for such considerations²⁵⁷. In the Australian case of *X v The Commonwealth* [1999] HCA 63 a soldier was discharged from the army because he was HIV positive. The employer argued that the soldier was unable to carry out the inherent requirements of his employment because of the potential risk to other soldiers. The court drew a distinction between an inherent requirement and other requirements, and held that the former included the skills for which a soldier is specifically trained. In the court's view inherent requirements are the "characteristics or essential requirements of the employment as opposed to those requirements which may be described as peripheral" [at paragraph 102]. However, when determining the inherent requirements of a particular job, the court was of the view that regard must be had to the social, legal and economic context from which legitimate employment requirements may arise. As such it would be artificial to draw a distinction between the physical capability to work and the safety considerations of such work [at par 103]. For that reason it is necessary to consider the chance of the risk being realised, and the seriousness of the harm that will result if the risk is realised. A similar conclusion was reached by the Supreme Court of the United States in *School Board of Nassau County Florida v Arline* 480 US 273 in which a school teacher was dismissed because of her vulnerability to tuberculosis and held that the risk of transmission, as well as the probability and severity of the consequences of transmission should be taken into account. Similar factors were considered in the Canadian case of *Ontario Human Rights Commission v Etobicoke* (1982) 132 DLR (3rd) 14 in which the question was whether it was a bona fide occupational qualification to be under the age of 60 in order to be a fireman. The court considered the risk of 'employee failure' and the interests of safety of the employee, his fellow employees and the public at large [at 20-21], and concluded that in order for a prohibited ground of discrimination i.e. age to qualify as a bona fide occupational qualification, it must be objectively linked to the ability to perform the job. In *Dothard and Rawlinson* 433 US 321 (1997) the court found such a link to exist and held that only males could be prison guards in a prison containing male prisoner due to the relative ability to keep order, and the risk of assault.

²⁵⁷ See section 15(2) of the Canadian Human Rights Act 1985, and sections 12113(b) and 12111(3) of the Americans with Disabilities Act 1990.

Can cost and profitability be considerations constitute the foundations of the defence of the inherent requirement of the job? Courts have generally found that as the inability of the candidate or employee to perform the work is central to the defence, considerations such as the costs associated with changing and maintaining the workplace and profitability of the organisation can not be justifiable reasons to exclude a particular employee or group of employees. The fact that it cost more to train older pilots or that the employment of older pilots meant that the company had less time to recover the high cost of training was not held to provide sufficient ground to justify the practice of employing only pilots younger than 35 years of age ²⁵⁸. In *Whitehead and Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC) the court held that “if profitability is to dictate whether or not discrimination is unfair it would negate the very essence for the need for a Bill of Rights”.

Can the demands or preference of customers or other employees be considered as an inherent requirement of the job? In *Fernandez v Wynn Oil* 653 F2d 1273 (9th Cir 1891) the company attempted to justify its refusal to promote a female to the position of Director of International Operations because of what it said was the culture of its clients in South American countries. The court rejected this and emphasized that such stereotyped assumptions can not for the basis of a *bona fide* occupational qualification defence. The American Equal Employment Opportunity Commission's regulations permit a form of customer expectation to be an inherent job requirement namely the authenticity of the job. So for example an Asian restaurant may employ only persons of Asian ethnic origin, and a 'strip joint' offering topless dancing may employ only women dancers.

On the other hand the privacy, modesty or decency of clients and customers has been held to justify the exclusion of one or other sex from certain jobs. For example, gender is an occupational requirement of custom officials who perform strip searches of persons at airports, the requirement being that only female custom guards conduct searches on women passengers. The British Sex Discrimination Act recognizes that privacy or decency could provide the basis for a defence of sex being a genuine occupational qualification ²⁵⁹. In *Etam Ltd and Rowan* [1989] IRLR

²⁵⁸ *Smallwood v United Airlines Inc* 661 F2d 303.

²⁵⁹ Section 7(2)(b).

150 404 (EAT) for example the court held that being a female was a genuine occupational qualification for an assistant in women's change rooms.

9.7 Discrimination during the promotion process

It is submitted that the following forms of conduct by the employer during the promotion process may be held to amount to unfair discrimination-

Inherent requirement of the job

While the employer has an obligation to determine what the inherent requirements of the job are by way of a job analysis, the employer needs to be aware whether a particular requirement is or may be discriminatory or not. As has been stated above, section 6 of the EEA lists grounds which are on the face of it discriminatory.

While an employer may list a particular requirement as being an inherent requirement, if it does so it needs to be able to defend its determination when challenged.

The advertisement

An advertisement may be discriminatory if the contents contravene the Employment Equity Act. The following are some examples of statements which may be held to be discriminatory-

- Sex specific job titles such as 'waitress', 'salesman', 'patrolman'. Instead gender neutral language should be used such as salesperson, waitron etc.
- Where the gender is stated as a requirement, for example 'a young man with a college degree'²⁶⁰. Gender neutral words like person, assistant, or consultant should rather be used.
- Where the marital status is a requirement, for example 'salesperson wanted...due to extensive travelling, preferably single'.
- Where an age is a requirement, for example 'person under 32 years of age wanted'²⁶¹.

²⁶⁰ This was held in *Banks v Heun-Norwood* 566 F2d 1073 (8th Cir 1977) to amount to disparate treatment of female applicants.

²⁶¹ This phrase was held in *Perera v Civil Service Commission* [1982] IRLR 147 to amount to indirect discrimination against black people.

- Graphics, illustrations or photographs which accompany an advertisement must likewise not be discriminatory. A picture of a woman as a secretary or nurse reinforces a stereotype which may be difficult to justify if challenged.

In order not to be held to be discriminatory the advertisement must also be placed in an advertising medium which is appropriate for the job and accessible both in terms of language and geographical location.

Information gathering

Information regarding prohibited grounds of discrimination will be suspect only if the answer would tend to affect a member of a protected group differently from other candidates. If such information influences the final promotion decision it may be held to be discriminatory. In addition the mere fact that such information is required may be held to have tainted the promotion process or to have discouraged members of certain groups from applying at all.

Candidates for promotion may be required to provide information concerning their gender and race. Despite such information being used by the employer to determine if the candidate is suitably qualified for the post or not, this practice would not if it is submitted amount to unfair discrimination as the EEA draws a distinction between designated and non designated groups.

If a candidate is not promoted because of his credit record or criminal record, this may be indirectly discriminatory if it can be shown that such rejection has a disproportionate impact on groups which tend to have an unhealthy credit history.

The failure to appoint candidates with a criminal record has been held to be justifiable in some cases. In *Richardson v Hotel Corporation of America* 468 F2d 951 (5th Cir 1972) the court upheld the practice of employing only persons who did not have a criminal record of property related crimes did not unfairly discriminate in jobs which required the employee to have access to clients' personal property.

Selection criteria

In terms of section 20(3)(c) of the EEA 'relevant experience' is one of the factors which an employer who is considering if an employee or applicant for employment is suitably qualified must consider in order to decide if that person has the ability to do the job. When making this determination, an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience in terms of section 20(5). Du Toit et al²⁶² state that

The provision is designed to deal with the fact that black people, women and disabled people were practically or legally excluded from certain jobs in the past and thus prevented from gaining 'relevant experience' in these fields. If such experience remains a decisive criterion, they will remain excluded even though they might have the ability to perform the work in question. The prohibition only applies, however, if lack of relevant experience is the only reason for rejecting an applicant. An applicant may still be excluded if, in addition to lacking relevant experience, he/she also lacks formal qualifications, prior learning or capacity to learn to do the job within a reasonable time.

The criterion of work experience may be indirectly discriminatory if the criterion is used to exclude certain groups: *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC).

As for the selection criteria of formal qualifications, the comments of Hepple²⁶³ are apposite. He states-

"A preliminary point is to distinguish between pre-entry discrimination and post-entry discrimination in the labour market. The former occurs when groups experience discrimination in the acquisition of skills and education prior to starting work, and hence cannot compete successfully with those who have not experienced such discrimination. The latter occurs when individuals of the same level of education, ability, work experience, training and the like - what economists would call 'productivity' - are paid different amounts. Reverse discrimination occurs when people who are paid the same amounts do not have the same qualifications. Post-entry discrimination need not be limited to earnings. *Where individuals with similar levels of qualifications are employed in relatively small numbers proportionately to their size in the relevant population, we may presume that discrimination has occurred against the under-represented group. This may be either direct discrimination on grounds such as race or gender, or it may be indirect because of employer practices or policies (eg a requirement to have passed matric) which have a disparate impact on certain groups.* Obviously, the employment and occupational equity statute cannot deal directly with pre-entry discrimination, but only with employers' decisions 'about employees for reasons that are not related to genuine work requirements'. Even opponents of the statute would concede that pre-entry discrimination has to be

²⁶² Du Toit et al, *Labour Relations Law: A Comprehensive Guide*, Butterworths, 4th edition page 595.

²⁶³ Hepple B A *Equality Laws and Economic Efficiency* (1997) 18 ILJ 598.

remedied through a variety of other governmental and private programmes for education, training, and reconstruction.” [My emphasis]

The selection committee

A selection committee which is made up exclusively of white persons may be considered to be *prima facie* evidence of a discriminatory process ²⁶⁴, although in itself is not sufficient evidence that there was in fact discrimination.

Short listing

Rycroft notes that “This stage is often difficult for an applicant for a job or promotion to access or monitor; a rejection can too easily be cast in such general terms as ‘there were other candidates who were better qualified’ ²⁶⁵. In *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC) ²⁶⁶ the court noted that “shifting, short-listing and selection involve a process of discrimination”.

Pre-employment testing

In order for pre-employment tests not to contravene section 7(1) of the EEA, and thus be held to discriminate unfairly, the employer will be required to show that it is an inherent job requirement that the candidate be, for example, drug free or not use or be under the influence of alcohol. The test will need to be relevant and appropriate to the type of work to be undertaken by the promoted employee.

As for pregnancy tests, Basson is of the view that

“I strongly argue that an employer should not be allowed to request a pregnancy test as part of pre-employment medical screening, not even with reference to the inherent requirements of the job, simply because considerations of privacy outweigh the arguments in favour of the inherent requirements of the job” ²⁶⁷.

Section 7(2) of the EEA prohibits tests the purpose of which is to determine the HIV status of an employee unless such test is held to be justifiable by the Labour Court.

²⁶⁴ While there is no South African case law in point, American jurisprudence such as *Payne v Travenol Laboratories* 673 F2d 798 (1982), and *Fisher v Proctor and Gamble Manufacturing* 613 F2d 527 (5th Cir 1980) are authority for this proposition.

²⁶⁵ Rycroft ‘Obstacles To Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies’ (1999) 20 ILJ 1411.

²⁶⁶ at 335D.

²⁶⁷ Basson ‘Pre-employment testing’ *SA Mercantile Law Journal* vol 14 No2 2002, page 309.

The interview

The fact that questions were asked of a candidate during the interview concerning the marital status, religion, sexual orientation and so on will not necessarily mean that the decision was discriminatory. However if the selection panel based its decision on the information gained as a result, the court may well conclude that the candidate was unfairly discriminated against²⁶⁸.

An interesting example of what questions to ask and what not to ask, based on the EEOC Guide to Pre-Employment inquiries is the following²⁶⁹ -

National Origin

Appropriate:

None unless national origin is a bona fide occupational qualification (BFOQ).

Inappropriate:

What is your nationality? Were you born in the United States? What country are your parents from? Where were you born?

Race or Color

Appropriate:

None

Inappropriate:

What is your skin color? What is your race?

Religion

Appropriate:

None unless religion is a BFOQ.

Inappropriate:

Are you a Christian? What is your religious denomination? Do you attend church? What religious holidays do you observe?

Age

Appropriate:

Are you at least 18 years of age? If not what is your age?

Inappropriate:

How old are you? What is your date of birth?

²⁶⁸ See EEOC Guide to pre-employment inquiries 8A Fair Employment Practice Manual (BNA) 443:65 (1992).

²⁶⁹ www.county.org/cms/field/rtf/InterviewingAVerbalMinefield

Sex

Appropriate:

None unless sex is a BFOQ.

Inappropriate:

Are you male or female? Do you plan to have children? Do you practice birth control? Do you feel like that a woman can handle this job?

Disability

Appropriate:

None

Inappropriate:

Are you disabled? Have you ever been treated for any of the following injuries or illness (followed by a list)? Have you ever filed a workers' compensation claim? Have you ever had any mental or psychological problems? How long have you been in a wheelchair?

Marital Status

Appropriate:

None

Inappropriate:

Are you married? Do you preferred to be called Miss? Mrs? Ms? What is your spouse's name? Have you ever been divorced?

Arrest Record

Appropriate:

Have you ever been convicted of a felony? (NOTE: In most jobs, a felony conviction cannot be the sole basis for failure to hire.)

Inappropriate:

Have you ever been arrested?

Driver's License

Appropriate:

Do you have a current driver's license (if driver's license is required for performance of the job)?

Inappropriate:

Do you have a driver's license (where a driver's license is not required for the job)?

Citizenship

Appropriate:

Are you a citizen of the United States? If not a citizen, are you legally authorized to work in the United States?

Inappropriate:

Of what country are you a citizen? Are you a native born or naturalized U.S. citizen? Are your parents citizens?

Languages

Appropriate:

Do you speak Spanish (or other language required for the job)?

Inappropriate:

What foreign languages do you speak or write? How did you learn those languages? What is your native tongue?

Military Experience

Appropriate:

Have you served in the Armed Forces of the United States? If so, what were your duties?

Inappropriate:

Have you ever served in the Armed Forces of a country other than the United States. Have you ever received a discharge under less than honorable conditions?

Education

Appropriate:

Any questions pertaining to educational requirements that are truly a requirement for the job.

Inappropriate:

Any questions about an applicant's educational background that is not a true requirement for the job.

Photograph

Appropriate:

None

Inappropriate:

Any requirement that an individual provide a photograph before being hired.

Personal Characteristics

Appropriate:

None

Inappropriate:

What color are your eyes? What color is your hair? What is your height and weight?

Comments

Generally, any question that has direct bearing on an applicant's ability to do the job is acceptable. However, questions asked of only certain applicants, and not of all applicants, can make an otherwise valid inquiry appear to be discriminatory. For example, asking a person in a wheelchair how he or she would perform the duties of the job but not asking the question of other applicants. The key to staying out of trouble in the interview and selection process is to ask questions that pertain only to the job and avoid any questions that pry into an applicant's personal background.

Once an employee is hired, it may be necessary to obtain information for benefit programs or government reporting that should not be sought during the pre-employment process. This is okay but, before obtaining any such information, be sure that there is truly a need to have it and, once obtained, keep it separate from the employee's personnel file.

Another example²⁷⁰ given by a firm of attorneys is

"Pre-Employment Inquires

As a general rule, state and federal equal opportunity laws prohibit the use of all pre-employment inquiries that disproportionately screen out members based on protected status when the questions are not justified by some business purpose. Enforcement agencies take the position that the information obtained and requested through the pre-employment process should be aimed solely at determining qualifications without regard to such irrelevant criteria as race, sex, national origin, age and religion.

Accordingly, inquiries that tend to reveal data having no relationship to the qualifications for the job sought (e.g., year of graduation from high school) have been used as evidence of a discriminatory intent.

Unacceptable Pre-Employment Inquiries

The following pre-employment inquiries may be regarded as either unlawful or of questionable validity when asked in the pre-employment context:

- Applicant's religious denomination or affiliation.
- Applicant's citizenship, place of birth.

²⁷⁰ www.wildmanharrold.com/labor_library/Equal_Opportunity_Employment_Laws.htm - 74k -

- Whether applicant is pregnant.
- Nature of applicant's military discharge.
- Birthplace of applicant or applicant's parents, spouse or other close relatives.
- How applicant acquired ability to read, write or speak a foreign language.
- Applicant's original name if changed by court order or otherwise.
- Name and address of relative to be notified in case of an emergency.
- Applicant's arrest record.
- Maiden name of applicant's spouse.
- Applicant's period of residence in state or city.
- Height and weight.
- Marital status of applicant.
- Number and age of children.
- Organizations, clubs, societies or lodges of which the applicant is a member, where the name or character of the organization indicates the racial or ethnic origin of its members.

Acceptable Pre-Employment Inquiries

The following questions are generally permissible because they elicit job-related information about the applicant:

Work Experience

- How obtained job with current or previous employer.
- Describe present responsibilities and duties.
- Describe a typical day on the job.
- What is enjoyable about current position?
- What is least enjoyable?

- What are major accomplishments at current company?
- What are setbacks and disappointments experienced?
- Describe personal progress made during current employment.
- Reasons for leaving previous employers.
- Describe present supervisors. What are major strengths and limitations?
- Describe problems encountered on the job and how resolved.
- Length of time seeking another position. Type of position seeking.
- Perceived advantages of joining company.
- Does the prospective job meet career goals and objectives?
- If you joined our organization, where do you think you could make your best contributions? Why?
- What changes and developments are anticipated in particular field?
- If you joined our company, what development do you feel you would need to make your best contribution?

Education

- Why choose the particular school attended?
- What determined choice of major?
- Describe academic achievements.
- Extracurricular activities in which participated.
- Describe summer employment.
- Additional training or education after graduation.
- Contribution of schooling to overall development.
- Specific courses which prepared for position.

Personal Factors

- Describe shortcomings and developmental needs.
- Describe outstanding qualities.
- Areas in which to develop.
- Traits or qualities most admired in immediate superior.
- Career success up to the present time.
- Disappointments, setbacks, or failures in career.
- Long-range goals and objectives.
- Major problems or decisions have had to make.
- Changes would make in life and career.
- Aspects of a job that are important.
- What would you want in your next job that you are not getting now?
- Kind of position would like to hold in five years. In ten years.
- Present salary expectations.
- Current recreational and leisure time interests.
- Memberships in civic or professional clubs or organizations.
- Offices held.
- Other activities in which would like to participate.

Explanation of Legal Status of Specific Pre-Employment Inquiries

There are direct legal implications that arise as a result of pre-employment questions concerning the following subjects.

Military Record

Reasoning that minorities receive more general and undesirable discharges than non-minorities and that there is no demonstrable relationship between receipt of an honorable discharge and ability to perform on the job, the EEOC takes the position that employers should not require job applicants to

produce proof of honorable discharge. Additionally, a number of state EEO laws (including Illinois' Human Rights Act) prohibit discrimination on the basis of unfavorable military discharge.

Financial Status

Unless a particular position requires employees to have a good financial record, the EEOC and the courts take the position that the refusal to hire an applicant because of a poor credit status can be problematic because minorities and single mothers tend to have poorer credit records and a lower socioeconomic status generally. For this reason, the EEOC views with suspicion any investigation into an applicant's financial background, including inquiries as to bankruptcy, car ownership, home ownership or wage garnishments, unless it is directly related to the position (e.g., bank teller).

Arrests

The EEOC Guide to Pre-Employment Inquiries (the "EEOC Guide") provides that a request for information concerning arrests tends to discourage minority applicants and is, therefore, a potential violation of Title VII. The federal courts have adopted that position, ruling that an employer's use of arrest records to disqualify job applicants is unlawful discrimination without proof of business necessity. Additionally, many state employment discrimination laws (including Illinois') specifically prohibit discrimination on the basis of arrest records.

On the other hand, it is generally permissible to inquire about an applicant's criminal convictions. For example, the following question is acceptable:

"During the previous seven years, have you ever been convicted of a felony or a misdemeanor which resulted in imprisonment?"

A specific question concerning criminal convictions can therefore be substituted for the improper inquiry regarding arrests.

Birth Dates

The EEOC Guide stipulates that requests for an applicant's age or date of birth may deter older applicants and otherwise indicate discrimination based upon age. Consequently, requests for such information are closely scrutinized.

Since an applicant's age is not relevant to a consideration of qualifications for the job, this question should not be asked before an employment offer is made and accepted. An applicant's age may be obtained, however, as part of the post-employment procedure when it is necessary for insurance and pension plan coverage. Asking an applicant's legal age for child labor law purposes, particularly for employment in "hazardous" occupations, may be relevant and, therefore, the following inquiry may be substituted for the birth date question; "Are you over 18 years of age?"

Maiden Name

The EEOC Guide prohibits all inquiries that directly or indirectly disclose an applicant's sex. Additionally, a number of state EEO laws prohibit discrimination on the basis of marital status. An inquiry regarding an applicant's maiden name clearly falls into that prohibited category. A lawful inquiry such as the following may be substituted:

"Please identify any other assumed name or nicknames you have used in the past for work and while in school."

Height and Weight

The EEOC and the federal courts have consistently held that minimum height and weight requirements are presumptively unlawful because they tend to screen out a disproportionate number of minority group individuals and females. Again, job requirements are the key and questions about lifting ability and strength are preferable.

Marital Status and Dependents

The EEOC Guide explains that questions about marital status and number and ages of children are frequently used to discriminate against women and may be in violation of Title VII if used to deny or limit employment opportunities of female applicants. The guidelines specifically caution employers against the use of non job-related questions involving marital status, number and/or ages of children or dependents, and names and addresses of relatives, spouses, or children of the applicant. Such inquiries may be asked after an employment offer has been made and accepted if needed for insurance or other purpose.

Disabilities

No "otherwise qualified" individual with a disability may be discriminated against on the basis of such disability, and employers must provide reasonable accommodations to applicants and employees to allow them to apply for and perform the essential functions of the job. EEOC regulations issued with regard to pre-employment inquiries prohibit an employer from asking whether an applicant is disabled or has any medical condition. An employer is permitted to make pre-employment inquiry into an applicant's ability to perform job-related functions. Post-offer, pre-employment questions may include inquiries regarding physical condition.

Birthplace/Citizenship

Questions about the birthplace of the applicant, or the applicant's spouse, parents or other relatives are generally prohibited. Questions regarding citizenship or whether the applicant's spouse or

parents are naturalized or native born U.S. citizens and the date when such person acquired citizenship are similarly prohibited unless a clear job-related reason exists to support the inquiry.

The Immigration Reform and Control Act requires employers to verify the identity and eligibility for employment in the United States of all employees hired after November 6, 1986 and to complete the appropriate verification document (Form I-9). Because of potential claims of alienage discrimination, inquiries necessary for compliance with this law should be made after the decision to hire has been made. Applicants may be informed of these requirements in the pre-employment setting by adding the following statement on the employment application:

In compliance with federal law, all persons hired will be required to verify identity and eligibility to work in the United States and to complete the required verification document upon hire.

National Origin

Pre-employment inquiries regarding the applicant's nationality, lineage, national origin, descent or parentage and questions about the language commonly used by the applicant, applicant's spouse or parents are generally prohibited.

Examples of prohibited inquiries include questions such as the following:

What is mother's (native) tongue?

What language does mother speak?

Were you born in this country?

Do you have people in the "old country?"

That's an unusual name. What nationality is it?

Sex, Marital Status and Family

Questions about an applicant's sex, (unless it is a bona fide occupational qualification and is considered essential to a particular position or occupation), marital status, pregnancy, medical history of pregnancy, future child bearing plans, number and/or ages of children or dependents, provisions for child care, abortions, birth control, ability to reproduce, and name or address of spouse or children are generally viewed as non-job related and problematic under Title VII. Any pre-employment inquiry in connection with prospective employment expressing or implying limitations, special treatment because of sex (unless based upon a BFOQ) or any inquiry made of members of one sex and not the other, is similarly troublesome.

Examples of inquiries to be avoided include the following:

With whom do you reside or do you live with your parents?

Do you get along well with other women?

Are you supplementing the household income?

Will your husband let you travel?

Do you plan to get married, have children, etc.?

Religion

Questions about an applicant's religious beliefs, denomination, affiliation, church, parish, or religious corporation, association, educational institution or society or religious day observed is not job related and could be viewed as a violation of Title VII.

Examples of suspect questions are as follows:

Provide a pastor's recommendation or reference.

Does your religion prevent you from working weekends or holidays?

Do you attend religious services or a house of worship?

What church do you attend?

Are you active in any church groups?

Do you attend church regularly?

Do you miss work to attend services on religious holidays?

Organizations

A requirement that the applicant list all organizations, clubs, societies and lodges to which he or she may belong or inquiries into the names of organizations to which the applicant belongs, including unions and trade or professional organizations, should be avoided if such information would indicate the applicant's race, sex, national origin, handicap status, age, religion, color or ancestry. On the other hand, inquiries regarding professional associations and memberships are acceptable.

Economic Status

Inquiry into an applicant's current or past assets, liabilities, or credit rating, including bankruptcy or garnishment, refusal or cancellation of bonding, car ownership, rental or ownership of a house, length

of residence at an address, charge accounts, furniture ownership, or bank accounts, absent a showing that such information is related to the particular job in question, should be avoided because they tend to impact more adversely on minorities and females, unless there is a valid business reason.

Political Affiliation

An employer should not request an applicant's political affiliation or membership in lawful political organizations which might indicate race, sex, religion, color, national origin, or country of ancestry, unless a business necessity can be shown.

The selection panel

In *National Education Health & Allied Workers Union on Behalf of Thomas v Department of Justice* (2001) 22 ILJ 306 (ARB) the union attacked the selection committee because it consisted of three women against only one man, which the union argued indicated a gender bias against the applicant, a black male. This, said the arbitrator, was an averment of gender discrimination over which he had no jurisdiction, but nevertheless commented that

[13] "...it must be said that the fact that a woman is appointed by an interviewing panel consisting of a majority of women is not proof of gender discrimination. It is merely a factor that can be taken into consideration in assessing the veracity of a charge of discrimination, together with others. The evidence does not prove that such discrimination existed."

The selection decision

It is submitted that if a candidate for promotion is not promoted because he or she has, in the opinion of the selection panel, been fairly discriminated against the candidate should be informed of such a decision.

If the candidate wishes to challenge the decision, the candidate will then have to show that he or she was unfairly discriminated against on one or more of the grounds listed in section 6 of the EEA. If the ground is not a listed one, the candidate will in addition have to show that it was unfair to discriminate against him or her on that ground.

9.8 The remedy for unfair discrimination in promotion disputes

In terms of section 50(2) if the Labour Court decides that an employee has unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including—

- “(a) payment of compensation by the employer to that employee;
- (b) payment of damages by the employer to that employee;
- (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
- (d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;
- (e) an order directing the removal of the employer’s name from the register referred to in section 41; or
- (f) the publication of the Court’s order.”

It is suggested that the statement that an order of the court must be ‘just and equitable’ means that the principles governing the remedies for unfair discrimination are constitutional in nature, form and application. This is because section 172 of the Constitution²⁷¹ states

172 Powers of courts in constitutional matters

- (1) When deciding a constitutional matter within its power, a court-
- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is *just and equitable*, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.[My emphasis]

An illustration of the application of the above section is found in *Hoffmann v SA Airways* (2000) 21 ILJ 2357 (CC). When considering the remedy to be granted the court stated

[42] Section 38 of the Constitution provides that where a right contained in the Bill of Rights has been infringed, ‘the court may grant appropriate relief’. In the context of our Constitution ‘appropriate relief’ must be construed purposively, and in the light of s 172(1)(b), which empowers the court, in constitutional matters, to make ‘any order that is just and equitable’. Thus construed, appropriate relief must be fair and just in the circumstances of the particular case. Indeed, it can hardly be said that relief that is unfair or unjust is appropriate. As Ackermann J remarked, in the context of a comparable provision in the interim Constitution, ‘[i]t can hardly be argued, in my view, that relief which was unjust

²⁷¹ Act 108 of 1996.

to others could, where other available relief meeting the complainant's needs did not suffer from this defect, be classified as appropriate'. Appropriateness, therefore, in the context of our Constitution, imports the elements of justice and fairness.

[43] Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer.

[45] The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, 'we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source'. [My editing]

Order of compensation

The question of whether compensation was the same as damages has arisen in a number of cases. Basson J, in *Chothia v Hall Longmore & Co (Pty) Ltd* [1997] 6 BLLR 739 (LC); ²⁷², held that "compensation" in section 194(1) should be given what he considered its ordinary meaning, namely "the value, estimated in money, of something lost". This meant that only actual, proven loss could be recovered by an employee dismissed unfairly for want of a fair procedure. In *NUMSA v Precious Metal Chains (Pty) Ltd* [1997] 8 BLLR 1068 (LC) ²⁷³, Maserumule AJ took an opposite view and held that "compensation is not in the nature of damages and the employee does not have to prove his or her losses."

In *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC) the LAC held that compensation means "a sum of money for something lost". The court said "The compensation for the wrong in failing to give effect to an employee's right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong in some way or another."²⁷⁴

²⁷² At 745A–C Also reported at (1997) 18 *ILJ* 1090 (LC) at 1095H–J (ILJ).

²⁷³; (1997) 18 *ILJ* 1346 (LC) at 1073J–1075J (BLLR); 1352B–1354C (ILJ).

²⁷⁴ Despite this a number of judgements such as *Whall v BrandAdd Marketing (Pty) Ltd* (1999) 20 *ILJ* 1314 (LC) have stated, incorrectly it is suggested, that the assessment of the amount of

In the context of unfair discrimination the 'something lost' is the "right not to be discriminated against or to be subjected to victimisation because of the exercise of any of the rights conferred upon one in terms of the Employment Equity Act"²⁷⁵.

The discretion as to the amount of compensation must be exercised judicially. Cohen suggests that

"...the introduction of a judicial discretion to award 'just and equitable compensation' requires arbitrators and adjudicators to weigh up all relevant factors that will contribute towards an assessment of fair compensation. This assessment would be incomplete without establishing the extent of the financial loss suffered by the employee, and related factors such as the period for which the employee was unemployed and his or her efforts to find alternative employment and thereby mitigate the loss. Similarly, in assessing whether an employer has made an attempt at substantial redress for the procedural unfairness, it will be necessary to establish the extent of the financial loss incurred and the reasonableness of the employer's attempts at making such redress."²⁷⁶

The question of whether compensation includes the patrimonial loss of the employee has been the subject of much case law. Page AJA in the *HM Liebowitz (Pty) Ltd t/a The Auto Industrial Centre Group of Companies v Fernandes* (2002) 23 ILJ 278 (LAC) matter says "...the ruling by this court that patrimonial loss is irrelevant to the exercise of the court's discretion has enjoyed almost general acceptance and has never been reversed", a statement which Zondo JP in a majority finding disagrees with. Instead Zondo JP takes a middle of the road approach and says

.....where the period from the date of dismissal to the last day of the hearing is less than 12 months and the compensation claimed or sought to be awarded is above the minimum but less than the maximum.....it seems to me that patrimonial loss is relevant because, if no patrimonial loss was suffered, an award of compensation exceeding the minimum may offend the requirement of the subsection that compensation awarded must be 'just and equitable in all the circumstances'. This does not necessarily mean that the absence of patrimonial loss would operate as a bar to the court awarding compensation exceeding the minimum. Indeed, there may well be circumstances which satisfy the court that, despite the absence of patrimonial loss, it would be 'just and equitable in all the

compensation requires the court to examine factors such as the actual patrimonial loss suffered by the applicant in consequence of his or her dismissal, his or her length of service with the employer, his or her prospects of finding alternative employment, the financial position of the employer, and so on – in other words a reversion to the position under the old LRA as set out in *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC) at 981D to G.

²⁷⁵ Pretorius et al page 12-20.

²⁷⁶ 'Exercising A Judicial Discretion - Awarding Compensation For Unfair Dismissals' (2003) 24 ILJ 737.

circumstances' for the court to award the employee compensation that goes beyond the minimum - even up to the maximum.

The guidelines by Combrink J in *Du Ruiters v Ferodo (Pty) Ltd* (1993) 14 ILJ 974 (LAC) in order to establish the loss and determine the amount of compensation to be awarded, are generally accepted, and are the following-

- '(a) [T]here must be evidence before the court of actual financial loss suffered by the person claiming compensation;
- (b) there must be proof that the loss was caused by the unfair labour practice;
- (c) the loss must be foreseeable, ie not too remote or speculative;
- (d) the award must endeavour to place the applicant in monetary terms in the position which he would have been had the unfair labour practice not been committed;
- (e) in making the award the court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;
- (f) there is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment;
- (g) any benefit which the applicant receives eg by way of a severance package must be taken into account.'

Pretorius et al however are of the view, correctly it is submitted, that "Awards for compensationinclude awards for injury to feelings and other non-patrimonial losses" ²⁷⁷.

Examples of promotion disputes in which compensation have been ordered are *Public & Allied Workers Union Obo Brinkley & Others v SA National Defence Force* (2000) 21 ILJ 2105 (IC), and *Biggs v Rand Water* (2003) 24 ILJ 1957 (LC).

Payment of damages

Damages should, in the context of unfair discrimination, be regarded as the monetary equivalent of the patrimonial damage caused to a person with the object of eliminating as fully as possible her/his past and future losses. The employee should be placed in the position she/he would have occupied had the discriminatory act not occurred ²⁷⁸.

²⁷⁷ Pretorius et al page 12-20.

²⁷⁸ Pretorius et al page 12-15.

In *Hoffmann v SA Airways* (2000) 21 ILJ 2357 (CC) Hoffmann applied to SAA for employment as a cabin attendant. He went through a selection process and was found to be a suitable candidate for employment, subject to a pre-employment medical examination which included a blood test for HIV/AIDS which showed that he was HIV positive. He was therefore regarded as unsuitable for employment as a cabin attendant and was not employed. Hoffmann challenged SAA's refusal to employ him alleging that the refusal to employ him constituted unfair discrimination and violated his constitutional right to equality, human dignity and fair labour practices. The constitutional court upheld his claim and granted him an order of reinstatement. The court held that

"[50] An order of reinstatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. It is an expression of the general rule that where a wrong has been committed, the aggrieved person should, as a general matter, and as far as is possible, be placed in the same position the person would have been but for the wrong suffered. In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice, but also *requires that the person who has suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.*" [My emphasis]

The order of reinstatement, in the context of promotion disputes, would mean one in which the applicant who was unfairly discriminated against is promoted to the promotion post or to a post of similar rank, status and remuneration levels.

Such an order would it is submitted be appropriate and just and equitable provided that it does not involve the removal of the candidate promoted to the post. There at least two reasons for this. Firstly it is settled law that not the place of the arbitrator or adjudicator to determine who is the most suitably qualified candidate²⁷⁹. Secondly, an award which is unfair to other interested parties, such as the person promoted to the post, would not constitute an appropriate award²⁸⁰. This would be the case even

²⁷⁹ See Chapter 7.5.

²⁸⁰ In *Hoffmann v SA Airways* (2000) 21 ILJ 2357 (CC) the court held "Fairness requires a consideration of the interests of all those who might be affected by the order. In the context of employment, this will require a consideration not only of the interests of the prospective employee but also the interests of the employer".[at paragraph 43].

if the employee promoted was joined as a party to the promotion dispute. While there is no case on record in which the incumbent has been removed from the promotion post and the successful applicant promoted adjudicators have in some instances ordered promotion when the post was already occupied. For example, in *Walters v Local Council of Port Elizabeth & another* [2001] 1 BLLR 98 (LC), the facts were that the Applicant, a white female, was employed as a senior personnel officer, and applied for the vacant post of a principal personnel officer (job evaluation) as the position would entail a promotion for her. She was short-listed together with a number of other applicants including the preferred candidate, an African male. The court held that the Applicant had been unfairly discriminated against and then considered the appropriateness of the remedy of reinstatement, and made the order that the Applicant be promoted into the post of principal personnel officer backdated to the date on which the interviews were held with all benefits. The Court appears to have disregarded the fact that the incumbent already occupied the post to which the Applicant was now promoted, and that the effect of the order was that the employer now had two persons occupying the same post. Another illustration is the case of *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA) in which the remedy sought by the applicant Crotz, was a declaration to the effect that the Council discriminated against him. Despite the fact that there was another person occupying the post, and that the applicant did not seek an order that he be promoted to the disputed post but wanted to be compensated by being paid the remuneration attached to the post, the arbitrator ordered that Crotz be promoted to the post.

In *Coetzer & others v Minister of Safety & Security* (2003) 24 ILJ 163 (LC) Landman J was of the view that

"[43]In fashioning a remedy for a case of unfair discrimination within the state sector, it is not sufficient only to consider the circumstances of the grievants. Where the discrimination, as in this case, affects the ability of the police service to render an efficient service to protect the community, a remedy restricted to monetary compensation would not be appropriate. The remedy must be one which addresses the interests of and benefits the South African people. An order for damages or compensation, is not one which would be appropriate. The promotion of the applicants would, in my view, be the most appropriate remedy and be one which is just and equitable. [My editing]

In *SA Police Union on behalf of Du Toit And SA Police Service* (2003) 24 ILJ 878 (CCMA) the arbitrator found that Du Toit had been discriminated against unfairly on the ground of his race and order that he be promoted to the rank of captain, retrospectively to the date on which the promotion would have become effective had he been successful.

In *POPCRU on behalf of Baadjies and SA Police Service* (2003) 24 ILJ 254 (CCMA), the arbitrator applied the *Hoffman* case and ordered that the applicant be appointed as a detective in terms of the SAPS Act and that he be compensated for the difference in salary between an auxiliary officer and a detective for the period from when the dispute arose until he is appointed as a result of the award.

Another promotion dispute in which promotion was ordered where the employee was found to have been unfairly discriminated against is *Public Service Association of SA on behalf of Helberg v Minister of Safety & Security & Another* (2004) 25 ILJ 2373 (LC).

Punitive damages, which are intended to penalise a person for an unlawful act, may not be awarded by the court for unfair discrimination²⁸¹. Pretorius et al state

“The specific elements that need to be proved in discrimination cases afford them the status of actions *sui generis* and, consequently, they should be classified neither as criminal nor delictual actions. However, the standard of proof in discrimination cases is also a balance of probabilities, and in principle it would, therefore, not be fair to make orders of penalties were liability was not established beyond a reasonable doubt”.

Prevention orders

Section 50(2)(c) of the EEA enables the Labour Court to make an order directing an employer to take steps to prevent the same unfair discrimination or a similar discriminatory practice from occurring in the future with respect to other employees.

There is no reported case law in which such an order has been granted.

Compliance orders

²⁸¹ See also *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) at 885.

Section 50(2)(d) of the EEA empowers the Labour Court to direct a non-designated employer to comply with the affirmative action provisions of the Act.

Publication of the award

In terms of section 50(2)(f) of the EEA the court may make an order directing the publication of its finding and award in cases of unfair discrimination. According to Pretorius et al the reasons for this provision is to ensure that the public has knowledge of the unfair discriminatory acts, policies or practices of the employer and to serve as a deterrent to other employers²⁸².

9.9 Conclusion

While the number of reported cases concerning discrimination in promotion disputes is surprisingly low, it is submitted that the many of the issues which arise in such disputes are now settled.

The comments of Cooper²⁸³ are however apposite. She writes

“The effect of having an Act (the EEA) dedicated to the achievement of employment equity within the context of the constitutional equality norm has had, and will continue to have, a profound effect on the development of an equality imbued labour jurisprudence. It is important that in giving effect to this promise of equality that, in interpreting the EEA, its reach is not unnecessarily restricted.” [at 852]

²⁸² Pretorius et al page 12-28.

²⁸³ Carole Cooper ‘The Boundaries of Equality in Labour Law’ (2004) 25 *ILJ* 813.

Chapter 10: Conclusion

It has been suggested in Chapter 3 that

Promotion is the process of selection of the most suitably qualified employee from a pool of candidates and the appointment of that employee to a position of greater status, responsibility and authority than previously enjoyed by the employee in the organisation.

In Chapter 4 it was suggested that the parties to a promotion dispute may be

- the employee,
- a union of which the employee is a member,
- the employer of the employee,
- unsuccessful candidates, and
- parties against whom a remedy may be sought, such as the Public Service Commission.

In Chapter 5 it was suggested that the term 'promotion dispute' is a dispute of right in which one or more of the following are in dispute between the parties

- Whether the dispute concerns the "promotion" of the applicant employee.
- Whether the process of the promotion was fair or discriminatory. This will be discussed in detail in the next chapters.
- Whether the candidate selected was the most suitable candidate.
- Whether the decision not to promote the applicant employee amounted
 - to an unfair labour practice or
 - unfair discrimination.
- The reasonable remedy.

It was further suggested that the promotion dispute may be founded on two possible causes of action:

- that the employer's failure or refusal to promote the employee amounted to an unfair labour practice, and/ or
- that by failing or refusing to promote the employee the employer unfairly discriminated against the employee.

The process which a promotion usually follows was discussed in Chapter 6, being the development of the inherent requirements of the job, the advertisement, gathering information about candidates, and establishing selection criteria. Thereafter the selection committee short lists candidates, who may in certain circumstances be required to undertake pre-employment tests whereafter they are interviewed by the committee which then determines the most suitably qualified candidate for the post. The circumstances in which the decision of the committee may be changed and the right of the employer not to promote any candidate or to re-advertise the post has been discussed.

In Chapter 7 it was suggested that the onus is on the employee party to show that the employer's conduct amounted to an unfair labour practice, and that the nature of a arbitration concerning a promotion dispute is a review of the selection panel's decision. Examples of conduct by the employer which has been found to be substantively and procedurally unfair were given. The proposition that, not only must the employer's conduct be found to be unfair, but that unfair conduct must have been the cause of the failure to promote the employee was set out. The chapter then suggested that the remedy which an arbitrator grants must be reasonable and types and examples of such remedies were been given.

The position of an employee who acts in a post was discussed in Chapter 8 and it suggested that an employee has no right to be promoted into the post in which he has acted; the most the employee has is a right to be considered for the post. Furthermore, a claim for payment of an acting allowance or for the difference between the remuneration the employee is paid and the remuneration paid to the occupant of the higher post is a dispute of interest. The employee who is not paid for undertaking the [usually] increased responsibilities and duties of the higher post has no recourse other than to go on strike in order to force the employer to pay the employee on the higher remuneration scale of the post or an acting or other allowance, which is not possible if a single employee is involved.

In Chapter 9 it was concluded that while many of the issues arising from the discrimination of employees in the promotion process are now settled law, the

development of what Cooper calls an 'equality imbued jurisprudence'²⁸⁴ remains the challenge for adjudicators and arbitrators.

It is apparent that the law of promotion of employees in South Africa has been developed to a significant extent. It is also apparent that promotion disputes will continue to arise between employers and employees for the foreseeable future. One can only trust that such disputes will be resolved and awards or judgements handed down in line with the jurisprudence which has been developed and which, it is hoped, this dissertation has succeeded in explaining.

²⁸⁴ 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 813 at 852.

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