IN THE EDUCATION LABOUR RELATIONS COUNCIL

HELD AT CAPE TOWN

Case No PSES 221-08/09WC

In the matter between

MARGARET THELMA COETZEE Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE First Respondent

MARIE ENGELBRECHT Second Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 31 March 2009

ARGUMENTS: 6 April 2009

DELIVERED: 14 April 2009

SUMMARY: ***Labour Relations Act 66 of 1995 – Section 186(2)(a) - Alleged Unfair Labour Practice relating to Promotion –Unfair conduct consisting of alleged unfair discrimination;***
Employment Equity Act 55 of 1998 – Section 6 – Alleged unfair discrimination based on race – Test to be applied in order to determine whether there was unfair discrimination;
Affirmative action measures – Such measures a complete defence to a claim of unfair discrimination provided that they meet the requirements of fairness, rationality and proportionality and are consistent with the purpose of the Employment Equity Act
Applying affirmative action measures at school level – Such measures permissible within the Western Cape Department of Education, but within limits

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ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This dispute concerns an alleged unfair labour practice relating to promotion. The arbitration hearing in this matter took place in Cape Town on 31 March 2009. Applicant was represented by Mr. Lerm from SAOU. First respondent was represented by an employee Ms. Bathgate, whereas second respondent was represented by Mr. Carelse from NAPTOSA. The proceedings were digitally recorded.

THE ISSUE IN DISPUTE

[2] I have to determine whether any unfair labour practice relating to promotion was committed, and if so, the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[3] This is a promotion dispute involving post number 0203 at Lochnerhof Primary School in Strand, being the post of HOD at post level 2, advertised in vacancy list 1 of 2008. Applicant and second respondent, together with three other candidates, applied for appointment to this position. At the time when she applied for appointment, applicant was employed at Lochnerhof on post level 1. Second respondent was employed at post level 1 elsewhere. Applicant as well as second respondent were shortlisted. Both of them together with one other candidate were interviewed. Applicant was nominated by the SGB as their first choice, whereas second respondent was nominated by the SGB as their second choice. First respondent decided to appoint second respondent.

[4] Applicant is a white female whereas second respondent is a coloured female. First respondent claims that it appointed second respondent because of affirmative action. It claims that white educators are overrepresented at the school and coloured educators underrepresented in that there are only white educators employed at the school. Coloured females and white females are both overrepresented at provincial level on post level 2 within the WCED. Applicant did not accept first respondent's decision and referred a dispute to the ELRC, claiming that there was unfair conduct relating to promotion.

SUMMARY OF EVIDENCE

Evidence on behalf of applicant

[5] **Margaret Thelma Coetzee**, testified that she has been an educator on post level 1 at Lochnerhof for seven years. For the past two years she has acted as HOD on post level 2. During the last term of 2008 she also acted as deputy school principal. During her evidence she handed in a copy of her CV and gave evidence about her qualifications and experience. She obtained an Education Diploma in 1998 and the junior primary HOD in 1989. She started teaching in 1990. At the time of the appointment, there were 25 educators at the school, some of them in governing body positions. They were all white males and females. There were approximately 720 learners at the school. The learners are predominantly white but some of them are African, Coloured and Indian. She believes that she was the best candidate and that she should have been appointed and not second respondent.

[6] **Almero Greybe** is employed by first respondent as school principal at Lochnerhof Primary. He was on the SGB and Interview Committee responsible for shortlisting and interviewing candidates for this post.

[7] Five candidates were shortlisted. The process used to shortlist candidates was to peruse their curriculum vitae and to allocate points in accordance with the advertised criteria. There were four panellists. Each candidate could obtain a maximum of 480 points in that each panellist could award each candidate a maximum of 120 points. Except for second respondent, all the candidates who were shortlisted were white women. Second respondent is the only candidate who was awarded extra points at shortlisting for being coloured. In this regard she received 2 points. Applicant obtained a total of 336 points at shortlisting, being 70%. S Du Toit obtained 284 points at shortlisting being 59%. Second respondent obtained a total of 253 points at shortlisting, being 52,7%. M Mitrovich obtained a total of 254 points at shortlisting, being 52,9%. F Terblanche obtained a total of 266 points at shortlisting being 55,4%.

[8] The three strongest candidates namely applicant, Du Toit and Terblanche were invited for interviews. On the day of the interviews Du Toit withdrew from the process. Mitrovich being the fourth strongest candidate was not available to attend the interviews and accordingly applicant, being the weakest candidate was invited. Applicant, second respondent and Terblanche attended the interviews.

[9] The process used to test candidates during interviews, was to ask the same 10 questions to all the candidates and to allocate points for the answers. There were five panellists. Each candidate could obtain a maximum of 500 points in that each

panellist could award each candidate a maximum of 100 points. Applicant obtained a total of 362 points during interviews, being 72,4%. Second respondent obtained a total of 317 points during interviews, being 63,4%. F Terblanche obtained a total of 292 points during interviews being 58,4%.

[10] In order to make a recommendation for appointment to the employer, the points of each candidate, namely the points that she scored at shortlisting and the points that she scored during interviews, were added up. At this stage applicant scored 698 out of 980 point, which is 71,2%. Second respondent scored 570 out of 980 points, which is 58,2%. Terblanche scored 558 out of 980 points, which is 56,9%. Accordingly applicant was the first nominee, second respondent the second nominee, and Terblanche the third nominee.

Evidence on behalf of first respondent

[11] **Mathys Cronjé** is employed by first respondent as deputy director. He makes recommendations to the provincial head of department in respect of employment equity when candidates are considered for appointment. While both coloured and white females are overrepresented on post level 2 at provincial level, all the educators employed at Lochnerhof are white. Since second respondent was the second nominee of the SGB and accordingly suitably qualified, it was felt that in order to promote representivity, second respondent should be appointed.

Evidence on behalf of second respondent

[12] **Marie Engelbrecht**, the second respondent testified that she was appointed in the post as from 1 January 2009. When she applied for the post she was employed on post level 1 at the EMDC. She never actually commenced employment at

Lochnerhof and has in the meantime successfully applied for appointment to a post level 3 post at the EMDC. Accordingly the post at Lochnerhof is now vacant again. During her evidence she handed in a copy of her CV and gave evidence about her qualifications and experience. She holds a Junior Primary diploma, a diploma in inclusive education and a reading specialist certificate. She has been teaching since 1994. Since 2002 she has been employed at the EMDC.

CLOSING ARGUMENTS

[13] Written heads of argument were submitted by all representatives. I am not going to repeat these arguments here in detail, but will deal with them, if and where necessary during my analysis of the evidence.

ANALYSIS

[14] The Labour Relations Act No 66 of 1995[1] requires employers to treat employees fairly when they apply for promotions. The statutory provision, in terms of which this tribunal may arbitrate promotion disputes, is to be found in section 186(2)(a) of the LRA, which defines unfair labour practices with regard to promotion as follows:

> " '***Unfair Labour Practice***' means any unfair act or omission that arises between and employer and an employee involving …unfair conduct by the employer relating to the promotion… of an employee"

[15] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[2] The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee.

[1] hereinafter referred to as the "LRA"

Fairness to both means the absence of bias in favour of either.[3] In deciding whether conduct relating to a promotion was unfair, an arbitrator is in a similar position to that of an adjudicator called upon to review a decision made by a functionary or a body vested with a wide statutory discretion.[4]

[16] Therefore in order to show unfairness relating to promotion, an employee needs to show that the employer, in not appointing him or her and appointing another candidate, acted in a manner which would ordinarily allow a Court of law to interfere with the decisions of a functionary by proving for example that the employer had acted irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud, failed to apply its mind or unfairly discriminated.[5]

WAS APPLICANT UNFAIRLY DISCRIMINATED AGAINST?

[17] The main issue to be determined in this case is whether there was unfair discrimination against applicant based on her race and/or gender.

[18] Unfair discrimination based on race and/or gender is not only in conflict with section 9 of the Constitution, but also unlawful in terms of section 6 of the Employment Equity Act No 55 of 1998. For ease of reference I will quote both these sections:

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[2] *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) par 33

[3] *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 (4) SA 577 (A) 589C-D; *National Education Health & Allied Workers Union v University of Cape Town supra para* 38

[4] *PAWC (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) 771

[5] *Ndlovu v CCMA & others* (2000) 21 ILJ 1653 (LC); Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 41; *SA Municipal Workers Union on behalf of Damon v Cape Metropolitan Council* (1999) 20 ILJ 714 (CCMA) 718; *Benjamin v University of Cape Town* [2003] 12 BLLR 1209 (LC) at 1223-1224; *Marra v Telkom SA LTD* (1999) 20 ILJ 1964 (CCMA) 1968

9 Equality[6]

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(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.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

6 Prohibition of unfair discrimination[7]

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

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

The test to establish unfair discrimination

[19] Unfair discrimination consists of at least two elements namely discrimination and unfairness. In fact, in **Harksen v Lane**[8] it was held that there is a three-stage test for establishing whether there was unfair discrimination namely:[9]

[6] Section 9 of The Constitution of the Republic of South Africa Act No 108 of 1996

[7] Section 6 of the Employment Equity Act No 55 of 1998, hereinafter also referred to as the "EEA"

[8] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) para 53

[9] also see Cheadle et al *South African Constitutional law: The Bill of Rights* 4-32

- Was there differentiation which amounted to discrimination?
- Is the discrimination unfair?
- If the discrimination arises out of a law of general application, is it justified?[10]

FIRST STAGE OF THE ENQUIRY – WAS THERE DIFFERENTIATION WHICH AMOUNTS TO DISCRIMINATION?

[20] Discrimination can be direct or indirect. The motive, purpose or intention of the discrimination is irrelevant to the question of whether there has been discrimination, either direct or indirect.[11] Given the fact that applicant's race and/or gender played a significant role in her non-appointment, I am satisfied that that there are sufficient grounds to say that there was discrimination based on race and/or gender. Discrimination in itself is however not actionable in our law. Only when the discrimination is unfair, may a litigant be entitled to relief. That brings me to the next leg of the enquiry.

SECOND STAGE OF THE ENQUIRY – WAS THE DISCRIMINATION UNFAIR?

[21] The next stage of the inquiry is to determine whether the discrimination was unfair. Once an employee or job applicant in an unfair discrimination claim alleges sufficient facts from which an inference of unfair discrimination can be drawn, the onus is on the employer to prove on a balance of probabilities that the discrimination was not unfair.[12] One of the ways in which an employer can prove

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[10] In the labour context however, there is no scope for separating the inquiry in respect of the 'unfairness' from that in respect of 'justifiability' *Cf* Du Toit *Labour Relations law* (5th ed) 596

[11] *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at para 43

[12] Section 11 of the Employment Equity Act No 55 of 1998; Du Toit et al *Labour Law through the Cases* EEA-36

that the discrimination was not unfair, is to prove that the discrimination was necessary in order to implement and promote affirmative action measures consistent with the purpose of the Employment Equity Act.[13] Affirmative action measures which comply with section 9(2) of the Constitution and section 6(2)(a) of the Employment Equity Act, are not presumptively unfair[14] and constitute a complete defence to a claim of unfair discrimination.[15] Respondent is indeed arguing that in order to promote representivity in its workplace, it was justified, in terms of its employment equity plan and policy, to refuse to appoint applicant since her appointment would not positively have influenced its employment equity goals.

The purpose of affirmative action measures

[22] Affirmative action consists of measures which are restitutionary and remedial in nature. Its purpose is to normalize the labour market in the sense that the under representation of certain segments of the population, caused through discriminatory practices in the past, should be rectified. Its purpose is not to reward or compensate people for belonging to a certain segment of the population, which was discriminated against in the past.[16] In **Action Travail des Femmes v Canadian National Railway**,[17] it was stated that the concept of affirmative action was designed:

> " to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past,

[13] section 6(2)(a) of the Employment Equity Act No 55 of 1998; Dupper & Garbers *Essential Employment Discrimination Law* page 85 and further
[14] *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC) par 32; Baqwa *The Resolution of Affirmative Disputes in the light of Minister of Finance & another* (2006) ILJ 67
[15] Dupper & Garbers *Essential Employment Discrimination Law* at 85
[16] *Canadian Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at 11143
[17] Co 40 DDR (4th) 193 at 213-14

> although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forbears.'

[23] Section 2 of the Employment Equity Act emphasizes the need to ensure the equitable representation of people who were discriminated against in the past in all occupational levels and categories in the workforce:

> **"2 Purpose of this Act**
> The purpose of this Act is to achieve equity in the workplace by-
> *(a)* promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
> *(b)* implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce."

[24] The beneficiaries of affirmative action are those who belong to designated groups.[18] "Designated groups" are defined as black people, women and people with disabilities.[19] "Black people" is defined as a generic term which means Africans, Coloureds and Indians.[20] Affirmative action measures are defined as follows in section 15 of the Employment Equity Act:

> **15 Affirmative action measures**
> (1) Affirmative action measures are measures designed to ensure that **suitably qualified people**[21] from designated groups have equal employment opportunities

[18] Sections 1, 2 and 15 of the Employment Equity Act
[19] Section 1 of the Employment Equity Act
[20] Section 1 of the Employment Equity Act
[21] Sections 20(3), (4) and (5) of the Act defined suitably qualified people as follows:
(3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's-
(a) formal qualifications;
(b) prior learning;
(c) relevant experience; or
(d) capacity to acquire, within a reasonable time, the ability to do the job.
(4) When determining whether a person is suitably qualified for a job, an employer must-
(a) review all the factors listed in subsection (3); and
(b) determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.

and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

(2) Affirmative action measures implemented by a designated employer must include-

(a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

(b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

(c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

(d) subject to subsection (3), measures to-

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection (2) *(d)* include preferential treatment and numerical goals, but exclude quotas.

(4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

The need for affirmative action measures

[25] The history of the legislative scheme in our country before 1994 and the grave injustices perpetrated left deep scars which are still visible in our society in many facets of our lives, including the labour market:

> "Until recently, very many areas of public and private life were invaded by systematic legal separateness coupled with legally enforced advantage and disadvantage. The impact of structured and vast inequality is still with us despite the arrival of the new constitutional order."[22]

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

[22]per Ackerman J, O'Regan J and Sachs J in *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 20

[26] It was against this background that the Employment Equity Act was enacted. The explanatory Memorandum[23] to the Employment Equity Act explains the need for the Employment Equity Act as follows:

> "Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and incomes reveals the effects of discrimination against black people, women and people with disabilities. These disparities are reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups, as well as by factors outside the labour market, such as the lack of education, housing, medical care and transport. These disparities cannot be remedied simply by eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed."

[27] The rationale for introducing affirmative action measures and the goals which such measures were meant to achieve in post-apartheid South Africa, is perhaps best summarized by former President Nelson Mandela,[24] who was quoted as follows in the explanatory Memorandum to the Employment Equity Act:

> "This legislation is drafted with a view to advancing those groups who have been disadvantaged as a result of discrimination caused by laws and social practices, and not with a view to seeking retribution for past injustices. As president Mandela has said, **'The primary aims of affirmative action must be to redress the imbalances created by apartheid. We are not . . . asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future. Nor . . . is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards; the special measures that we envisage to overcome the legacy of past discrimination are not**

[23] As published in the Industrial Law Journal at (1998) 19 ILJ 1345. This Explanatory Memorandum appeared in the first version of the Employment Equity Bill published on 1 December 1977 *Government Gazette* 18481 vol 390.

[24] President Nelson Mandela, opening statement to the ANC Conference on Affirmative Action, Port Elizabeth, October 1991

> **intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and those who have been qualified all along but overlooked because of past discrimination, are at last given their due. The first point to be made is that affirmative action must be rooted in principles of justice and equality.**' "

Judicial scrutiny of affirmative action measures

[28] Affirmative action measures are not immune to judicial scrutiny,[25] because only affirmative action measures which are consistent with the purpose of the Employment Equity Act and the Constitution can constitute a defence to a claim of unfair discrimination.[26] In order for affirmative action measures not to constitute unfair conduct relating to promotion in terms of section 186(2)(a) of the LRA, such conduct must therefore not only be tested against the requirement of fairness as intended in section 186(2)(a) of the LRA but also whether the measures are Constitutional and consistent with the purpose of the Employment Equity Act. This means that affirmative action measures as well as the manner in which they are applied must comply with the requirements of **fairness**, **rationality** and to a lesser extent **proportionality**, in order to escape the definition of an unfair labour practice.[27]

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[25] *Gordon v Department of Health, Kwazulu-Natal* (2004) 25 ILJ 1431 (LC); *Public Servants Association of SA & others v Minister of Justice & others* (1997) 18 ILJ 241 (T); *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T); *Coetzer v Minister of Safety & Security* [2003] 2 BLLR 173 (LC); *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council* [2000] 21 ILJ 1119 (LC); However some measure of judicial restraint and deference is called for in recognition of the need for state action to redress past social injustices. *Cf* Alexandre v Provincial Administration of the Western Cape Department of Health (2005) 26 ILJ 765 (LC) par 6 per Murphy J

[26] Section 6(2)(a) of the EEA

[27] Pretorius, Klinck & Ngwena *Employment Equity Law* Chapter 9 – Affirmative Action; *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE); ILO *Equality in Employment and Occupation* Report (1988) at 159; Cooper *The Boundaries of Equality in Labour Law 1* (2004) 25 ILJ 813 AT 840;

The requirement of Fairness

[29] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[28] Fairness depends on the cumulative effect of all relevant concerns, including the extent of the impact of the measure on the rights and interests of the complainant.[29] Conduct which is unreasonable,[30] irrational,[31] capricious,[32] or arbitrary,[33] will be unfair.[34] An affirmative action plan or program[35] as well and its application and implementation[36] should be fair and may not be arbitrary, haphazard, random and overhasty.[37]

The requirement of Rationality

[30] To act rational means to act in a manner "based on reason or logic".[38] The requirement of rationality entails that conduct or decisions must be rationally connected to: (a) the purpose for which it was taken; (b) the purpose of the

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[28] *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC)
[29] Pretorius, Klinck & Ngwena *Employment Equity Law* at 9-59; *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE) para 40
[30] To act unreasonable means to take a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. See *Council of Civil Service Unions v Minister for the Civil Servic*e [1985] AC 374 at 408
[31] To act rational means to act in a manner "based on reason or logic". *Cf Oxford English Dictionary.*
[32] Acting capriciously was defined in *Mail, Trotter & Co v Licensing Board, Estcourt* (1903) 24 NLR 447 at 452 as being the opposite of exercising it reasonably
[33] The word "arbitrary" was defined in *Beckingham v Boksburg Licensing Board* 1931 TPD 280 at 282 by Tindall J as meaning "capricious or proceeding merely from the will and not based on reason or principle".
[34] See authorities referred to in footnote 8
[35] or the manner in which it is applied
[36] *Baxter v National Commissioner, Correctional Services* [2006] 9 BLLR 844 (LC)
[37] *Public Servants Association of SA & others v Minister of Justice & others* (1997) 18 ILJ 241 (T); *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T) 1031

empowering provision; (c) the information before the decision maker and (d) the reasons given for it by the decision maker.[39]

[31] To escape being branded as unfair conduct, affirmative action measures need to be consistent in nature. More importantly there must be a rational connection between affirmative action measures and the aim they set out to achieve. [40]

[32] Examples of how our Courts have approached the requirement of rationality in relation to affirmative action measures include the following: When applying affirmative actions measures in making promotions or appointments, it will constitute unfair discrimination to regard race as the only criterion. Candidates must also be considered based on criteria such as qualifications, experience, prior learning, competence, suitability and the potential to develop and the potential to acquire within a reasonable time the ability to do the job.[41] Where an employer does have an affirmative action policy, such policy must comply with legislation and must be applied correctly.[42]

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[38] Oxford English Dictionary

[39] De Ville *Judicial Review of Administrative Action in South Africa* (reprint 2006) 199; *Pharmaceutical Manufacturers' Association of SA: In re ex parte President of the Republic of SA & others* 2000 (2) SA 674 (CC); *Shoprite Checkers (Pty) v Ramdaw NO & Others* [2000] 3 BLLR 243 (LAC) par 19; *Carephone (Pty) Ltd v Marcus No & others* [1998] 11 BLLR 1093 (LAC) para 53

[40] *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T) 1031

[41] Section 20(3) of the EEA; *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC); *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE); *Fagwusa & another v Hibiscus Coast Municipality & others* (2003) 24 ILJ 1976 (LC)

[42] *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC)

The requirement of Proportionality

[33] Proportionality requires the balancing of competing interests.[43] The concept of proportionality means that measures or conduct must (a) be suitable or effective to achieve the desired aim; and (b) be necessary in the sense that no lesser form of interference with the rights of the complainant was possible in order to achieve the desired aim; and (c) not place an excessive burden on the complainant which is disproportionate in relation to the public interest at stake.[44] Affirmative action measures must be causally related and proportional to their objectives making as limited inroads as possible on the rights of other employees or work seekers.[45] The granting of extravagant benefits that disproportionaly enhance the positions of members of formerly disadvantaged groups at the expense of other would go beyond goals of the EEA.[46] On the other hand affirmative action measures are not required to be *strictly* necessary to achieve a compelling policy objective. It is enough that they be a rational means of advancing the legitimate aims of

[43] Pretorius, Klinck & Ngwena *Employment Equity Law* at 9-59; *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE) para 40
[44] De Ville *Judicial Review of Administrative Action in South Africa* (reprint 2006) 199; *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC); *R v Oakes* (1986) 19 CRR 308
[45] Du Toit et al *Labour Relations Law: A Comprehensive Guide* (5th ed) 600; Du Toit *"When does affirmative action in favour of certain employees become unfair discrimination against others?"* (2001) International Journal of Discrimination and the Law vol 5 147 at 158; Grogan *Dismissal, Discrimination and Unfair Labour Practices* (1st ed, Juta August 2005) 101; *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council* [2000] 21 ILJ 1119 (LC); *Willemse v Patelia NO* [2007] 2 BLLR 164 (LC) 193;
[46] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (1st ed, Juta August 2005) 101

affirmative action.[47] Yet there must be some degree of proportionality, based on the particular context and circumstances of each case.[48]

The obligation to implement employment equity

[34] Implementing affirmative action measures is not a choice. It is mandatory. Designated employers[49] must in order to achieve employment equity, implement affirmative action measures for people from designated groups.[50]

[35] In pubic education, it is not only the provisions of the Constitution and Employment Equity Act that are relevant when selecting suitably qualified educators for appointment. Employment equity is made mandatory by the Employment of Educators Act.[51] The process relating the appointment of educators and the role of employment equity in this process, is set out in sections 6 and 7 of the Act:

> **Powers of employers**
> **6.** (1) Subject to the provisions of this section, the appointment of any person, or the promotion or transfer of any educator ……(b) in the service of a provincial department of education shall be made by the Head of Department.
>
> (3) (1) (a) Subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school, may only be made on the recommendation of the governing body of the public school, and, if there are

[47] *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) par 6 per Murphy J
[48] *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC) par 152 per Sachs J

[49] a **"designated employer"** is defined in section 1 of the Employment Equity Act as meaning--
a person who employs 50 or more employees; or a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of the Schedule 4 of this Act; or a municipality, as referred to in Chapter 7 of the Constitution; or an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; or an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.
[50] Section 13 of the Employment Equity Act
[51] Act No 76 of 1998

educators in the provincial department of education concerned who are in excess of the educator establishment of a public school due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are so in excess and suitable for the post concerned.

(b) In considering the applications, **the governing body… must ensure that the principles of equity, redress and representivity are complied with and the governing body or council, as the case may be, must adhere to….(i) the democratic values and principles referred to in section 7(1)**.

(c) The governing body must submit, in order of preference to the Head of Department, a list of-
(i) at least three names of recommended candidates; or
(ii) fewer than three candidates in consultation with the Head of Department.

(d) **When the Head of Department considers the recommendation contemplated in paragraph (c), he or she must before making an appointment, ensure that the governing body has met the requirements in paragraph (b)**.

(e) If the governing body has not met the requirements in paragraph (b), the Head of Department must decline the recommendation.

(f) **Despite the order of preference in paragraph (c) and subject to paragraph (d), the Head of Department may appoint any suitable candidate on the list**.

Appointments and filling of posts
7. (1) In the making of any appointment or the filling of any post on any educator establishment under this Act **due regard shall be had to equality, equity** and the other democratic values and principles which are contemplated in section 195(1) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), and which include the following factors, namely –
(a) the ability of the candidate; and
(b) **the need to redress the imbalances of the past in order to achieve broad representation**.

The employment equity plan and policy of first respondent (the WCED)

[36] In order for an employer to discriminate fairly in the name of affirmative action, there must be a policy or programme through which affirmative action is to be effected and 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.[52] It is not sufficient that the *purpose* of the measures in question is to redress past discrimination – the means selected to effect that purpose must be reasonably capable of doing so.[53]

[37] If the employer applies affirmative action in a haphazard, random or ad hoc manner without a plan and policy, the conduct is inherently arbitrary and will amount to an unfair labour practice.[54] Affirmative action measures taken by the employer must fall within the ambit of its affirmative action policies and plans.[55]

[38] The employment equity plan and policy of the WCED, which is by now well known in this industry and to ELRC arbitrators, promotes employment equity at departmental (provincial) as well as at institutional (school) level. In this case, the emphasis of the equity measures was at institutional level, and I will accordingly quote a few paragraphs from first respondent's employment equity plan and policy which provide for and emphasise employment equity at institutional level.[56]

> "**Challenges**…
> Ensuring representivity w.r.t race gender and disability at institutional level, while taking into account curricular needs…"[57]

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[52] *Gordon v Department of Health* (2008) 29 ILJ 2535 (SCA)
[53] *Gordon v Department of Health* (2008) 29 ILJ 2535 (SCA)

[54] *Gordon v Department of Health* (2008) 29 ILJ 2535 (SCA); *Public Servants Association of SA & others v Minister of Justice* 1997 (3) SA 925 (T); (1997) 18 ILJ 241 (T), *Stoman v Minister Of Safety & Security & Others* (2002) 23 ILJ 1020 (T)
[55] *McInnes v Technikon Natal* (2000) ILJ 1150 (LC); *Baxter V National Commissioner: Correctional Services & Another* (2006) 27 ILJ 1833 (LC), *Coetzer & Others V Minister Of Safety & Security & Another* (2003) 24 ILJ 163 (LC); *Public Service Association Of SA obo Helberg V Minister Of Safety & Security & Another* (2004) 25 ILJ 2373 (LC)
[56] The employment equity plan and policy of the WCED are both available on the website of the WCED at http://wced.wcape.gov.za/circulars/index-circmins.html. This first plan was published and submitted during 2002. The second plan for 2008 to 2012 was published and submitted during 2007. The employment equity policy directive of the WCED was published on 17 January 2006 in WCED Minute No HRD/0003/2006, also obtainable from the same website.
[57] Clause 2.1(a) of the current plan

> "**Addressing challenges**…
> On institutional level, as a first initiative to promote and focus on integration, which will enhance representivity…"[58]
>
> "**Background and Information**
> Each education institution… needs to develop a strategy to ensure that its work environment reflects representivity with regard to race, gender and disability. To achieve this, each education institution needs to compete its employee profile and to set targets in line with the targets identified by the WCED to be achieved over the medium term, by identifying under-representation in terms of race, gender and disability…"[59]
>
> "**Responsibilities**…
> SGB: selection panel to shortlist and nominate in line with the equity targets of the institution and those identified by the department
> HOD or his delegate: to monitor whether the nomination is in line with the targets set by the institution and department[60]
> "The WCED also acknowledges that there are barriers or constraints in reaching these targets and that the education sector must develop strategies to address these…"

Representivity at school level

[39] As to exactly where a designated employer must implement affirmative action measures, the Employment Equity Act stipulates that such measures must be implemented in all categories and levels in the "workforce" and in the "workplace".[61] Despite the fact that first respondent's employment equity plan and policy provide for the promotion of affirmative action measures at institutional (school) level and not only departmental (provincial) level, Mr. Lerm argued that it is the entire department that is the workplace; not an individual school. Accordingly, he submitted that affirmative action measures are only permissible when they are aimed at redressing imbalances of the past at provincial level; They are not permissible when they are aimed at redressing imbalances at school level.

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[58] Clause 3.3(e) of the current plan
[59] Page 2 of the Policy directive
[60] Page 2 of the Policy directive
[61] sections 2, 15(2), 20, 25 and 26 of the Act

[40] In support of his argument Mr. Lerm relied on the definition of “workplace” in section 213 of the Labour Relations Act, which defines workplace in relation to the public service as follows:

> **'workplace'-**
> ***(a)*** **in relation to the *public service*-**
> **(i) for the purposes of collective bargaining and *dispute* resolution, the *registered* scope of the Public Service Co-ordinating Bargaining Council or a *bargaining council* in a *sector* in the *public service*, as the case may be; or**
> **(ii) for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7 (2) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994), or any other part of the *public service* that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace;…**

[41] Mr. Lerm’s reliance on this definition of workplace in support of his argument is misplaced. While my jurisdiction to arbitrate this dispute is derived from section 186(2) of the LRA, the question whether affirmative action measures are lawful and fair, is not decided with reference to the LRA; it is decided with reference to the Employment Equity Act and the Constitution. Unless a statute specifically incorporates the definition of a word, as defined in another statute, that definition is not applicable. Nowhere in the LRA, Employment Equity Act or Constitution is the definition of “workplace” as contained in the Labour Relations Act made applicable to “workplace” as used in the Employment Equity Act. In fact, section 213 of the Labour Relations Act, which contains the definitions of certain words (including “workplace”) starts off, before defining the words, by stating that “in **this** Act, unless the context otherwise indicated….”. This makes it clear that the definitions in section 213 are only applicable when interpreting the Labour Relations Act.

Therefore, I am satisfied that the definition of workplace as contained in the LRA, is not applicable when interpreting the EEA.

[42] The Employment Equity Act contains no definitions of the words “workplace” or “workforce”. The intention of the legislature in using these words in the Act therefore needs to be determined. [62]

[43] While the EEA itself contains no definition of the word “workplace”, the Employment Equity Regulations, issued by the Minister of Labour, does contain the following definition:

> **'A workplace'** means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function, or organization, the place or places where employees in connection with each other's independent operation, constitute the workplace for that operation

[44] While it is instructive that this definition does not draw a distinction between public service employers and other employers and while on the face of it, this definition is sufficiently wide to regard individual schools as separate workplaces, this definition is of no assistance in interpreting “workplace” as used in the Act itself. The first reason for this is that the regulations state that the definitions contained in the regulations are intended for purposes of defining words as used in the regulations. More importantly it is not permissible to interpret an Act by means of regulations promulgated in terms of that Act.[63]

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[62] Steyn *Die Uitleg van Wette* (5th ed) 2
[63] *Amalgamated Engineering Union of SA v Minister of Labour* 1965 (4) SA 94 (W) 96D

[45] The Employment Equity Act provides that when interpreting the Act, any code of good practice issued in terms of the Act must be taken into account.[64] The Employment Equity Code[65] does not contain a definition of "workplace" but does state the following, which does suggest that different components of a workplace situated in different geographical areas, can all be regarded as workplaces:

> "Designated employers whose operations extend across different geographical areas, functional units, workplaces or industry sectors may elect to submit either a consolidated or a separate report for each of these. This decision should be made by employers after consultation with the relevant stakeholders".[66]

[46] When interpreting words used in a statute, the words must not only be interpreted according to their ordinary meaning, but also in the light of their context. That context *inter alia* includes the language used in the rest of the statute.[67] What is clear from the Employment Equity Act itself, is that for purposes of the Act, an employer **<u>can</u> have more than one workplace**, because section 25(2) provides that "*a designated employer must, in **each of its workplaces**, place in prominent places that are accessible to all employees*" certain documents including the most recent report submitted by that employer to the Director-General. The context in which the plural of the word "workplace" is used in this section, suggests that where an employer's operations extend across different geographical areas,

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[64] section 3(c) of the EEA
[65] Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans
[66] 9.6.4
[67] *Jaga v Donges NO* 1950 (4) SA 653 (AD) at 662-4

consisting of different components in different geographical areas, each component can be regarded as a workplace for purposes of the Act.

[47] This must be the intention of the legislature because the aim of section 25(2) clearly is to make certain documents "accessible to all employees" in the workplace in a "prominent" place. This cannot be done unless the documents are displayed in prominent places where all employees walk past regularly. If applicant's argument (that the provincial education department's workplace is confined to the province as a whole, and does not also extend to individual schools) were to be correct, this would mean that first respondent would only need to display a copy of the documents in a prominent place at its provincial office in Cape Town. Displaying documents there would however not make them accessible to all employees in a prominent place, as required by the Act, because surely the document will for all practical intents and purposes not be accessible to an employee who is based hundreds of kilometers away from Cape Town in a remote, secluded rural village.

[48] The context in which the word "workplaces" is used in section 25 therefore supports the finding that Mr. Lerm's restrictive interpretation of the word "workplace"[68] is not correct. One needs to think wider. There is however a more important reason why Mr. Lerm's interpretation cannot be supported. Since the

[68] in terms of which the workplace is confined to the province with reference to the definition of workplace in the public service as contained in section 213 of the LRA

enactment of our Constitution, statutes are not only subject to the Constitution, but they also have to be read in the light of the Constitution.[69]

[49] The Employment Equity Act also stipulates that it must be interpreted "**in compliance with the Constitution**" and "**so as to give effect to its purpose**".[70] When interpreting a word used in the EEA, such as "workplace" or "workforce" it is therefore necessary to interpret it in a purposive manner in compliance with the Constitution.

[50] Therefore, in order for Mr. Lerm's argument to be valid, it would have to mean that his interpretation of "affirmative action" and "workplace" as intended in the Employment Equity Act,[71] needs to be in compliance with the Constitution. For his argument to be in compliance with the Constitution, it would have to mean that our Constitution supports the argument that provided that an employer ensures that people of all races are equitably represented within his entire workforce, it is permissible to have racially segregated compartments within the workforce in terms of which Africans, Coloureds, Whites and Indians all work separately in their "own" different compartments with people from the same racial group. If this is what is intended by our Constitution, it would mean that our Constitution condones and promotes a culture which is reminiscent of the own affairs culture of apartheid.

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[69] LAWSA *Statute Law and Interpretation* par 315

[70] section 3 of the Employment Equity Act

[71] which contains no definition of "workplace"

I am not at all convinced that this is indeed what our Constitution promotes. In fact, this is exactly what our Constitution does not stand for.

[51] My first reason for this conclusion is that the preamble to our Constitution provides that one of the aims of our Constitution is to **"Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights".** I fail to see how one can heal divisions of the past when a workforce that has become racially segregated under apartheid and still consists of separate racially segregated components, is not transformed so that the separate components that exist are made representative of the population.

[52] Moreover, section 9 of our Constitution enshrines the right to equality. Equality can mean different things to different people:

52.1 **Formal equality** is premised on the assumption that the evils of inequality can be eradicated by simply treating all individuals according to a neutral standard in an identical way. It fails, however, to recognize the existence of deeply rooted patterns of group disadvantage in society, in other words, the existence of structural or systemic inequality.

52.2 **Substantive equality** recognizes the reality of present injustice, caused by past discrimination and the deep levels of systemic inequality on the basis of race, gender and other grounds, which have been inherited from the past. It proposes that in order for full equality to be achieved, this systemic inequality needs to be addressed and eradicated by preferential

treatment of certain groups of people so that genuine equality for all will ultimately emerge in society in the future.

[53] In interpreting the equality clause in our Constitution, the Constitutional Court has held that it is **substantive equality** that our Constitution aims to achieve:

> **"…our Constitution rejects the notion of purely formal equality, which would require the same treatment for all who find themselves in similar situations. Formal equality is based on a status-quo-oriented conservative approach which is particularly suited to countries where a great degree of actual equality or substantive equality has already been achieved. It looks at social situations in a neutral, colour-blind and gender-blind way and requires compelling justification for any legal classification that takes account of race or gender. The substantive approach, on the other hand, requires that the test for constitutionality is not whether the measure concerned treats all affected by it in identical fashion. Rather, it focuses on whether it serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved. It roots itself in a transformative constitutional philosophy which acknowledges that there are patterns of systemic advantage and disadvantage based on race and gender that need expressly to be faced up to and overcome if equality is to be achieved. In this respect, the context in which the measure operates, the structures of advantage and disadvantage it deals with, the impact it has on those affected by it and its overall effect in helping to achieve a society based on equality, non-racialism and non-sexism, become the important signifiers"[72]**

[54] It was also held that "our Constitution imposes a positive duty on all organs of state, not only to eradicate discrimination, but also to promote the achievement of equality – a duty which binds the judiciary too".[73] I fail to see how substantive equality and true transformation can be achieved if there is no obligation on employers to ensure that an own affairs culture which exists in components of the workplace, and which is a legacy of past discriminatory practices and laws, is not eradicated through affirmative action measures. The fact that equity targets have already been reached in the workplace as a whole(in this case at departmental

[72] per Sachs J in *Minister of Finance & another v Van Heerden* [2004] 12 BLLR 1181 (CC) para 142
[73] *Minister of Finance & another v Van Heerden* [2004] 12 BLLR 1181 (CC) para 24 per Moseneke J

level) cannot affect this constitutional obligation to promote true transformation and substantive equality in individual components within the workplace.

[55] There is no authority to suggest that in the public service, affirmative action measures may only be applied at departmental level and not at the level of components within the department. In fact, the Labour Court has recognized that if an employer in the public service, in applying affirmative action measures, gets representivity levels right at the level of the component he will in any event get the departmental representivity levels in the entire workplace right as well. It held that the opposite is however not necessarily true, because if an employer only concentrates on getting representivity levels right by looking at the workplace as a whole, he may eventually have serious racial and/or gender imbalances within components.[74]

[56] I have no doubt that the interpretation that Mr. Lerm has placed on “affirmative action measures” and “workplace” as intended in the Employment Equity Act, is an interpretation that defies the values enshrined in our Constitution. It simply cannot be supported. The words “workplace”, “workforce” and “affirmative action measures” as used in the Employment Equity Act must be interpreted in a purposive manner so as to give effect to the values underlying our Constitution and so as to eradicate racial segregation in all individual components of the workforce and workplace. This necessarily means that “workplace” as used in the EEA cannot bear the same meaning that it has in the LRA and that provincial government as employer cannot be permitted to apply affirmative action measures

[74] *Willemse v Patelia* NO [2007] 2 BLLR 164 (LC) 183 para 52;

only at departmental (provincial) level and not at the level of the component(institution).

[57] I am satisfied that the Employment Equity Act and Constitution enjoin employers to ensure equitable representation of suitably qualified people from all designated groups in all categories and levels in the workforce – throughout the workforce and workplace – and in provincial government, both at departmental (provincial) level **and at the level of the component/institution (which in public education means school level)**.

[58] That integration at school level is indeed required in this province, cannot be disputed, because it is well known in the public education sector in the Western Cape that one of the challenges and barriers facing the WCED, is that due to past discriminatory practices, most of the schools are still divided along racial lines. While the statistics may look good at provincial level, except for African people who are underrepresented at most levels, there is very little integration at school level.

[59] At schools situated in residential areas where predominantly African people reside, the educators are predominantly, if not exclusively Africans. In residential areas where predominantly Coloured people reside, the educators are predominantly Coloured people. In former white areas, which have now become integrated to some extent, there seems to have been some integration at school level, but many of the former model C schools in those areas still have predominantly white

educators. This state of affairs is undoubtedly a legacy of the discriminatory practices of our past and must be addressed.

[60] The reality is that 15 years after the commencement of our democratic system in 1994, there had been very little integration of educators at school level within the Western Cape. This should be of serious concern to all. Apart from the fact that the Constitution is aimed at healing the divisions of the past and enshrines the right to substantive equality, it also provides that a child's best interests are of paramount importance in every matter concerning the child.

[61] Children look up to their educators as role models. The example that is being set where learners at a particular school are being taught exclusively or predominantly by one racial group, is not a good one. The message that this brings across to our children is that apartheid is being kept alive. This cannot be in the best interests of our children, because this own affairs culture will empress itself on children and make it difficult for them to become part of a fully integrated society and workplace when they leave school.

[62] It is time to move away from this "own affairs" culture which is a legacy of our past and to ensure that the educators corps in our schools become integrated and representative. This can only be achieved if affirmative action measures are applied at school level. Arguing that a designated group is already overrepresented at provincial level and can therefore not be preferred on account of race at a school where it is very much underrepresented and where there has

been no or very little transformation, will make it very difficult to achieve transformation at school level and will only assist in preserving the own affairs culture in our schools.

[63] I accept that mother tongue education will always (at least indirectly) play a significant role in determining the racial profile of learners and educators at specific schools. Nobody expects schools where the medium of instruction is Afrikaans to appoint teachers who cannot speak Afrikaans. Nobody expects schools where Xhosa is the medium of instruction to appoint teachers who cannot speak Xhosa. Nobody expects educators to go and work against their will in areas where they do not want to work or in areas that are far from their homes. Nobody expects schools from stopping to employ educators from those groups that are already overrepresented at the specific school. That would be impracticable and not necessarily in the best interests of the learners. Transformation at school level will be a long and difficult process, not likely to be achieved within a short period of time. That we all know.

[64] Where however all the educators at a school (as in this case) or the overwhelming majority of them, belong to the same racial group, and where the governing body's first nominee belongs to that same racial group and the second or third nominee to a different racial group, and both candidates have the same mother tongue(as in this case) which language is the medium of instruction at the school, and are both suitably qualified, there is no excuse not to make a concerted effort to promote transformation in making an appointment at the school. In such instances, nobody must be surprised if the employer interferes in the appointment process in order to

promote representivity at the school, if the governing body in making its nomination, neglected its duties to promote transformation at the school.

[65] On behalf of applicant much was made of the fact that at provincial level, respondent has already exceeded its equity targets for coloured females. Not only does this argument ignore the need to redress imbalances of the past at school level, but it ignores the fact that equity targets are just that – flexible goals or targets; not quotas which must be attained at all costs.[75] Just as targets which are intended to be flexible, cannot be permitted to undermine quality education by appointing an incompetent educator in the name of affirmative action, targets cannot be permitted to undermine transformation at school level merely because equity targets have already been achieved at provincial level but not at school level.

[66] I accept that there might be those who would argue that first respondent will make it impossible for itself to attain its provincial equity targets if it keeps on appointing teachers from specific designated groups at specific schools in order to promote representativity at those schools, when those designated groups are already overrepresented on provincial level. Based on what I have seen in arbitrating disputes in the public education sector in this province, I am satisfied that there is no reason for such concerns.

[75] In *Local 28, Sheet Metal Workers' International Association v EEOC* 478 US 421 at 495 (1986) the Court distinguished between quotas and goals as follows: "A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number or potential applicants who meet necessary qualifications…By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job."

[67] Firstly, I have not yet seen one case where first respondent has promoted a candidate from one group over a candidate from another group in order to promote representivity at a specific school, when the group of the candidate who is promoted in the name of affirmative action is overrepresented at provincial level and the group of the candidate who is discriminated against, is underrepresented at provincial level. It seems that it is only in those cases where both groups are overrepresented or underrepresented at provincial level, where first respondent will discriminate between candidates in order to promote representivity at school level when all or the overwhelming majority of educators at the specific school belong to the same group as the governing body's first nominee.

[68] Secondly, it is not as if first respondent is being selective in its approach, because it is not only certain designated groups who are benefiting from first respondent's approach. In this case the candidate who was at the short end of first respondent's affirmative action policy at school level happened to be a white female. Earlier this year, I arbitrated a similar case for the ELRC in the matter of *Maans vs. Western Cape Education Department and Keunecke*, where the facts were very similar.[76] In that case, a coloured female was at the short end of first respondent's policy at school level.

[76] *Maans v Western Cape Education Department and Keunecke*(Case No PSES 229-08/09, delivered on 26 February 2009). A copy of this award is available on the website of up2speed.co.za

[69] In the *Maans*-case the one candidate was also a white female and the other candidate a coloured female. The educators at the school concerned were almost exclusively coloured and the SGB felt that the internal coloured female was the best candidate and recommended her for appointment as their first choice, whereas the first respondent, in order to promote representivity at the school, appointed the external white female who was the governing body's third choice. I also held in that case that in appointing the one candidate over the other in order to promote representivity at the school, first respondent acted fairly.

[70] Apart from the *Maans*-case, I have been involved in several other similar cases during conciliations or pre-arbitrations in the public education sector in this province. My overall impression is that it is not only specific groups who are benefiting from first respondent's approach to promote representivity at school level, but that the approach includes all groups.

[71] The employment equity plan and policy of first respondent has as its goal integration and representivity with regard to race and gender at departmental and at school level. First respondent's employment equity plan and policy as well as the Employment Equity Act suggest that barriers must be identified and eliminated to ensure respresentivity and diversity throughout the workplace. I am satisfied, that first respondent and school governing bodies are not only entitled to promote

employment equity at school level, but also have a legal, moral and constitutional responsibility to do so.

[72] Preferring one suitably qualified candidate over another for appointment at school level based on race in order to promote representivity at that school, in order to break down barriers caused by past discriminatory laws and practices, is not per se unfair. There is accordingly nothing unfair in first respondent's decision to prefer second respondent over applicant in order to promote representivity at school level where both coloured females and white females are already overrepresented at provincial level on post level 2. The fact that all 25 educators at Lochnerhof Primary are white supports first respondent's argument that there was a need to appoint a suitably qualified candidate who was not white. The racial imbalance at this school is clearly a legacy of past discriminatory laws and practices, creating a barrier that needs to be broken down through affirmative action measures in order to promote diversity.

The duty of School Governing Bodies in promoting equity

[73] In selecting suitable candidates for appointment to teaching positions, school governing bodies are under a legal duty to ensure that the principles of redress, equity and representivity are promoted and that imbalances of the past are addressed in order to achieve broad representation.[77] That the members of the governing body of Lochnerhof were very much aware of this responsibility, is apparent from the fact that they did allocate preferential points to second

[77] Sections 6(1)(b) and 7(1) of the Employment of Educators Act

respondent for race. Did the governing body do enough to fulfill its constitutional and statutory obligations in this regard? I think not.

[74] In **Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism & others**[78] the Constitutional Court held that where a decision maker is required by legislation to promote transformation, the decision-maker is required to do more than "give lip service" to the legislation:

> "The decision must address the need for transformation in a meaningful way when **decisions are made, and be able to demonstrate that this has been done. A failure to do so is unlawful, and the ensuing decision is open to attack"**. [79] (emphasis added)

[75] More to the point is the case of **Kimberley Girls' High School & another v Head, Department of Education, Northern Cape Province & others**.[80] In that case the Head of Department of the Northern Cape Provincial Department of Education (HOD) declined to appoint certain candidates as teachers at the first applicant high school, on the basis that the governing body of the school had failed to consider its duties to promote affirmative action in the hiring process. The applicant school had short-listed three candidates, none of whom was from a previously disadvantaged background. Three candidates, who were from such backgrounds, and who, in addition, had excellent academic qualifications, were not short-listed. The applicants argued that the HOD had not been entitled to take such a decision in terms of the relevant legislation, and sought to have the first respondent's decision reviewed and set aside.

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[78] 2004 (7) BCLR 687 (CC)
[79] para 99
[80] (2005) 26 ILJ 2305 (NC) decided by Majiedt J with Kgomo JP concurring

[76] In considering whether the HOD's decision to decline the recommendation was reviewable or not, the Court undertook a careful analysis of the provisions contained in section 6 and section 7(1) of the Employment of Educators Act 76 of 1998. The Court held that the provisions of section 6 and section 7(1) of the Employment of Educators Act should be interpreted in consonance with each other since they dealt with exactly the same subject, namely, whether the appointment of a particular educator would promote equality, equity and the other democratic values and principles contemplated in section 195(1) of the Constitution 1996; these sections are two sides of the same coin.[81]

[77] The Court held that in fulfilling its duties in terms of section 7(1), the HOD was indeed concerned with whether or not the recommendation of the SGB met the requirements of section 6, and not merely whether or not the recommendation had regard thereto. There is a positive obligation imposed upon a HOD in terms of section 7(1). The learned Judges held that in the process, the HOD must indeed enquire whether a governing body had paid mere lip-service to the democratic values and principles referred to in s 7(1). The imperatives contained in section 6(3) and section 7(1) of the Employment of Educators Act and, more importantly, section 195(1) of the Constitution, were of the utmost importance. In addition, it had to be borne in mind that all legislation now had to be interpreted and

[81] at paragraph 15 of the judgement

measured in accordance with the constitutional imperatives, inter alia, the need to redress the imbalances of the past.[82]

[78] The Court observed that when the opportunity arose at the school to correct the imbalances of the past by filling a post left vacant by a resignation, a concerted effort should have been made (and, importantly, should clearly be seen to be made) to comply with the obligations imposed on a school governing body by section 6(3) of the Employment of Educators Act because there was a serious imbalance in the racial/demographic representativity of the school's educator establishment.[83]

[79] The Court held that regardless of how much compliance there may have been with regard to procedural guidelines, norms, criteria and regulations in the selection process, the entire exercise was rendered completely futile if the constitutional and legislative imperatives contained in the aforementioned sections were overlooked. What was called for was more than a mere mechanical allocation of points and a mere say-so that regard had been had to the democratic values and principles therein.[84]

[80] The Court concluded by pointing out that the South African Schools Act 84 of 1996 had brought about a drastic change in the governance of public schools in that extensive new powers had been allocated to school governing bodies in terms

[82] paragraph 16

[83] paragraph 17
[84] paragraph 27

thereof as part of the process of the democratisation of school governance. However, with these vast new powers and functions, the Court held, came vast new responsibilities and obligations.

[81] One of these new responsibilities and obligations the Court held, was to recognize the need to correct the imbalances of the past as far as recommendations for the appointment of educators are concerned. The Court was satisfied that the governing body of Kimberley Girls High had clearly failed to meet this responsibility and to carry out its statutory obligations imposed by the Employment of Educators Act and by the Constitution.[85]

[82] Although section 6 of the Employment of Educators Act has been amended[86] since the *Kimberley Girls' High School*-case, most of the remarks made by the learned Judges are still relevant and also applicable in this particular case. In this case, the governing body only allocated 2 points out of 480 for race. This, with respect, cannot be regarded as a concerted or serious effort to comply with the obligations of a governing body as required by sections 6(1)(b) and 7(1) the Employment of Educators Act. While lip service was paid to the obligations imposed on the governing body in the Act, there was clearly no serious intention, desire or commitment on the part of the governing body to promote equity and representivity or to ensure that imbalances of the past are addressed in order to achieve broad representation at the school. In this sense the governing body acted unlawfully and unfairly. In my view the provincial HOD was accordingly under a

[85] paragraph 27
[86] The amendments were made in terms of Act 16 of 2006 and aimed giving more powers to the HOD in appointing suitably qualified candidates to teaching positions

legal obligation to intervene in accordance with his mandate in terms of section 6(1)(d) of the Act.

The need for representivity amongst designated groups

[83] White women and coloured women are both designated groups who are entitled to the benefits of affirmative action. I now turn to discuss whether an employer may fairly discriminate against a member of one designated group in favour of a member of another designated group in the name of affirmative action in order to promote representivity. The reality is that even amongst the designated groups, there is a need to promote representivity.

[84] Our Courts and arbitrators have in fact recognized that the achievement of a broadly representative workforce at all levels will not be possible if employers are not permitted to differentiate between candidates who fall within designated groups and that it is indeed permissible and fair to discriminate between members of designated groups in order to promote representivity in the workplace.[87]

[85] In order to determine whether it is fair to prefer a member of one designated group over a member of another designated group in order to achieve representivity, some Courts and arbitrators have resorted to the “degrees of disadvantage” test.

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[87] *NEHAWU obo Thomas v Department of Justice* (2001) 22 ILJ 306 (ARB); *Motala v University of Natal* 1995 (3) BCLR 374 (D); *Fourie v Provincial Commissioner of the SA Police Service (North West Province) & another* (2004) 25 ILJ 1716 (LC); *Henn v SA Technical (Pty) LTD* (2006) 27 ILJ 2617 (LC); *NEHAWU obo Thomas v Department of Justice* (2001) 22 ILJ 306 (ARB); *Samuels and SA Police Service* (2003) 24 ILJ 1189 (BCA); *SAPU obo Siegelaar & Others / SA Police Service* [2002] 11 BALR 1201 (CCMA).

In terms of this test, a hierarchy is created in terms of which it is then said that members of the designated group who suffered most under apartheid, should be preferred to those who suffered less under apartheid.

[86] In one case for example it was suggested that while both African and Coloured men are designated groups, suffered under apartheid, and are entitled to benefit from affirmative action measures, African men suffered more then Coloured men and that for this reason an employer may prefer an African man over a Coloured man who is better qualified.[88]

[87] There are however several problems with the "degrees of disadvantage" test. Firstly, there is no support for this test in the Employment Equity Act. Secondly, it may be very difficult to determine which group suffered more than the other. How is it for example possible to say whether Coloured women in rural areas suffered more or less than African men under apartheid? A third problem with application of this test, is that instead of integrating our society, it leads to more alienation amongst members of the various designated groups in that a particular designated group may feel that despite the discrimination suffered by members of that group in the past, the members of that group are still being treated as second or third class citizens. I am accordingly not in favour of applying the "degrees of disadvantage"-test in promoting employment equity. In my view the "representivity"–test, which I will now discuss is a much more rational and fair test to apply.

[88] *Solidarity obo Christiaans v Eskom Holdings Ltd* (2006) 27 ILJ 1291 (ARB)

[88] Professor Du Toit argues that instead of using the concept of 'degrees of disadvantage' as a test in determining whether and to what extent members of certain designated groups should be preferred over members of other designated groups, the test of representivity (namely the equal representation of all designated groups) in all occupational categories and levels in the workforce should rather be used.[89] Dupper & Garbers also support this test and explain this test as follows:

> "Equitable representation of persons from designated groups is integral to the concept of affirmative action (see section 15(1) of the EEA), and the degree to which persons of particular racial or gender groups are underrepresented in a particular occupational category or level within a workplace should determine the appropriateness of affirmative action in respect of applicants from particular groups. For example, if the facts show that African women are most severely underrepresented in a job category of an employer operating in the Western Cape, the employer will be justified in giving preference to female African applicants who are suitably qualified. Similarly if Coloured men are underrepresented in certain job categories of an employer in the Northern Province, suitably qualified candidates from this group may receive preferential treatment over African men who may already be sufficiently represented in that job category. This approach is more closely compatible with the purpose of the EEA and more sensitive to regional and industry peculiarities".[90]

[89] This is indeed the approach which first respondent has adopted in implementing affirmative action measures and in its employment equity plan. Instead of arbitrarily ranking educators in order of preference based on race and gender, it

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[89] Du Toit *"When does affirmative action in favour of certain employees become unfair discrimination against others?"* (2001) in Equality: Theory and Practice in South Africa and elsewhere (Conference held at the University of Cape Town in January 2001) at 14

[90] Dupper & Garbers in *Essential Employment Discrimination Law* (2004) 266

has looked at the extent to which educators are underrepresented in job levels and categories and at school level according to race and gender.

[90] Based on demographical statistics first respondent has set targets for itself in order to redress these gender and racial imbalances and has implemented and is applying affirmative action measures in order to achieve these goals. When making an appointment at school level, regard is not only had to the provincial targets and statistics, but also to the racial and gender profile of the specific school. Therefore, the employment equity plan is being carried out in a rational and consistent manner. In the circumstances, there was in principal nothing wrong with preferring second respondent who is a coloured female over applicant who is a white female and also a member of a designated group.

Was second respondent suitably qualified?

[91] The concept of affirmative action indeed means that a suitably qualified candidate from a particular designated group is preferred over other candidates, despite the fact that other candidates have superior and better qualifications and experience. Appointment of an unqualified or incompetent person is however never permitted in the name of affirmative action.[91]

[91] *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T)

[92] The Employment Equity Act gives guidance as to how an employer should determine whether a particular candidate is suitably qualified for purposes of benefiting from affirmative action. Sections 20(3), (4) and (5) of the Act define "suitably qualified" people as follows:

> (3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's-
> *(a)* formal qualifications;
> *(b)* prior learning;
> *(c)* relevant experience; or
> *(d)* capacity to acquire, within a reasonable time, the ability to do the job.
> (4) When determining whether a person is suitably qualified for a job, an employer must-
> *(a)* review all the factors listed in subsection (3); and
> *(b)* determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.
> (5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience.

[93] While I will accept that second respondent was the weaker candidate and that she would not have been appointed had it not been for affirmative action, this does not mean that second respondent is incompetent or that she is not a suitably qualified candidate.

[94] Given second respondent's qualifications and experience, I am satisfied that she is indeed a suitably qualified candidate as intended in the EEA. While it is true that applicant does have experience as an HOD and second respondent not, I am

satisfied that by virtue of her experience, second respondent is suitably qualified to perform all the duties of an HOD.

[95] Over the past few years, I have arbitrated many promotion disputes involving the post of HOD on post level 2 in the public education sector. The duties attached to an HOD post are of such a nature that most experienced educators with willingness to learn and basic organizational and administrative skills, can easily acquire the skills to perform these duties in a relatively short time. The Employment Equity Act states that in applying affirmative action, an employer may not discriminate against a person solely on the ground of that person's lack of relevant experience. Her capacity to acquire, within a reasonable time, the ability to do the job must be taken into account.

[96] In arriving at my conclusion that second respondent was suitably qualified, I was mindful that significant weight should be placed on the fact that the SGB has nominated applicant as their first choice and second respondent as their second choice because it is the SGB who has interviewed the candidates.[92] I was however of the view that because of the need to redress imbalances of the past and promote representivity at the school, there were compelling reasons for not appointing the governing body's first choice but instead appointing its second choice.

[92] *Head, Western Cape Education Department and others v Governing Body, Point High School and others* 2008 (5) SA 18 (SCA)

The importance of qualifications and experience

[97] In arriving at my decision that second respondent was a suitably qualified candidate and that it was not irrational of first respondent to appoint her, I also took into account the gap between the scores allocated by the governing body to applicant and second respondent. Section 15(1) of the Employment Equity Act imposes on all employers the duty 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. Section 20(3) of the Act states that a person may be suitably qualified for a job as a result of any one of, or any combination of that person's formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job. The appointment of an unqualified or incompetent person is however never permitted in the name of affirmative action.[93]

[98] When making appointments, experience and qualifications are always relevant and may never be ignored. The real challenge is to determine to what extent merit, experience and qualifications must give way to the appointment of a less experienced and less qualified candidate who has been previously disadvantaged and/or whose group is more underrepresented in the workplace. One method

[93] *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T)

which has been developed in the United States for this purpose, is known as the "tie breaker" or the "relatively equal test". Professor Rycroft explains this test as follows:

> "The *relatively equal test* is not so favourable to the affirmative action applicant. That test requires that if one of the candidates is notably better qualified and capable of filling the vacancy, that candidate would be appointed, regardless of any preference considerations. However, if the two candidates are relatively equal in qualification, experience and ability, then the affirmative action candidate should be appointed."[94]

[99] This method is completely inadequate for South African conditions and in my view too conservative. Professor Rycroft argues that the relatively equal test tends to reward those privileged in the past and, whilst recognizing their expertise and seniority, leaves the need for transformation in specific grades unresolved.[95] In **Gruenbaum v SARS**[96] a CCMA commissioner questioned this approach and stated:

> 'If this notion prevails there will, because of past discrimination, be little scope to transform the private and public sectors. Affirmative action candidates will invariably be less experienced precisely because of limited opportunities in the past to acquire that experience. It is accepted that there was no detailed policy in place at the time of the appointment, but I find that the applicant, on every criterion for the job, demonstrated an ability to do the job. On this basis the employer was obliged to justify why it did not appoint an affirmative action candidate. No evidence was presented that there was no need to make an affirmative action appointment because there was already demographic representation in that job grade in the department. The inequality of white male domination of the public sector and civil society will continue, and be perpetuated, unless remedial steps are taken to re-structure the racial and gender composition of the economy.'

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[94] Rycroft *Obstacles to Employment Equity?: The role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies* (1999) 20 ILJ 1411 at 1427; also see Pretorius, Klinck and Ngwena *Employment Equity Law* (Lexis Nexis Butterworths) at 9 –55 and further where this method is explained; *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616

[95] ibid 1427

[96] CCMA Case No KN20090, dated 6 November 1998

[100] In **Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council** the Labour Court held the same view:

> '…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'.[97]

[101] Similarly in **Stoman v Minister of Safety and Security**, the High Court also rejected the relatively equal test:

> "The same applies to the statement…that the appointment of a candidate from one race group above a candidate from another race group is only acceptable where candidates all have broadly the same qualifications and merits. It is of course highly unlikely that candidates would ever have exactly the same qualifications and merits….But where candidates have the same qualifications and merits to such an extent that there is virtually nothing to choose between them… a selection panel or committee could in any event decide to appoint any of them. This would be the proverbial situation of 'all things being equal'. To allow considerations regarding representativity and affirmative action to play a role only on this very limited level would be too restrictive to give meaningful effect to the constitutional provision for such measures and the ideal of achieving equality. All that it would mean is that, for example, race could then be taken into account rather than other preferences which are not related to qualifications or merits".[98]

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[97] *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council* [2000] 21 ILJ 1119 (LC) par 31

[98] *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T) 1033H

[102] With reference to the *Stoman*-case, dr. Grogan states that when applying affirmative action measures in making appointments, a considerable gap between the skills, experience and qualifications of a person who is preferred and appointed in the name of affirmative action, over another with superior qualifications and experience, is indeed permitted, and that such an appointment will not be seen as irrational, merely because of the considerable gap between the two candidates.[99]

[103] Where however the gap between two candidates is too wide, appointment of the weaker candidate in the name of affirmative action will be irrational.[100] This is true especially in the education sector because in appointing educators, the best interests of the learners are of paramount importance.[101]

[104] In addition to these authorities referred to, it should also be noted that first respondent's 2007 plan, provides as follows:

> "All appointments will be based on the inherent requirements of the position. However, where there is **an insignificant gap** between possible candidates in terms of merit/performance, preference will be given to an employee from a designated group, should the appointment contribute to the improvement of the representation of specific designated groups".[102] (emphasis added)

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[99] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2nd ed, Juta) 119
[100] *Settlers Agricultural High School v Head of Department : Department of Education, Limpopo Province* [2002] JOL 10167 (T), Case No 16395 / 02; *Head, Western Cape Education Department and others v Governing Body, Point High School and others* 2008 (5) SA 18 (SCA)
[101] *Settlers Agricultural High School v Head of Department : Department of Education, Limpopo Province* [2002] JOL 10167 (T), Case No 16395 / 02
[102] paragraph 3.4.3

[105] First respondent's 2002 plan contained a similar clause. That clause was interpreted by the Supreme Court of Appeal as follows:

> "It seems that the word 'insignificant' may have been unfortunately chosen, but it must obviously be construed in its context and bearing in mind the fundamental principles of employment equity. A difference in actual ability between two candidates where one is from a so-called 'designated group', though marked, may be rendered insignificant by the potential of the candidate from the designated group. In other words the benefit of employing such a candidate may only become perceptible with training and experience. I do not intend to embark upon an analysis of what precisely is meant by 'insignificant' in this particular passage, but the general intention behind the precept is plain. Employment equity provisions should only prevail in circumstances where there is approximate equality between the ability or potential ability of the two candidates." [103]

[106] It is the duty of an arbitrator to assess in each case whether the gap between the candidates in that particular case was sufficiently significant to have caused appointment of the weaker candidate in the name of affirmative action to be irrational. **The extent to which a gap between the qualifications and experience of the two candidates will be permissible, will also depend on the job level and nature of the job**.[104] As stated hereinbefore, the position of HOD at post level 2 is of such a nature that most experienced educators with some administrative and organizational skills and willingness to learn, can easily acquire all the skills necessary to perform this job satisfactorily within a relatively short time. This is an important factor in determining whether the gap between the

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[103] *Head, Western Cape Education Department and others v Governing Body, Point High School and others* 2008 (5) SA 18 (SCA) paragraph 14

[104] Pretorius, Klinck and Ngwena *Employment Equity Law* (Lexis Nexis Butterworths) at 9-58

scores of the two candidates was significant. A wider gap will be permissible than for instance in the case of a school principal's post at level 4.

[107] At first sight the gap in scores between applicant and second respondent appears significant. At shortlisting applicant scored 336 out of 480 and second respondent 251(when one deducts the 2 points allocated to second respondent for her race). At interviews applicant scored 362 out of 500 and second respondent 317. The total points of applicant amount to 698 out of 980 and the total points of second respondent to 568(when one deducts the 2 points allocated to second respondent for her race). Given the fact that these scores are however made up by adding up the totals awarded to a candidate by several panelists, it is more realistic to look at the difference in scores allocated by the individual panelists to the respective candidates. If one looks at it from this perspective, a different picture starts to emerge. The average difference in scores allocated by the different panelists to applicant and second respondent at shortlisting was 21 and during interviews 9.

[108] The best way to look at the difference in scores is however to look at the difference percentage wise. Percentage wise the difference in scores at shortlisting was 17,71% and during interviews the difference in scores was only 9 %. The overall difference in scores (after the scores of shortlisting and interviews were added up) was only 13,25%. Taking into account second respondent's good experience and qualifications, her potential, and the job level and nature of the job, I am satisfied that the gap of 13,25% between the two candidates was not significant and that there was approximate equality between the ability and/or potential of the two respective candidates.

[109] Based on my own observations of the curriculum vitae of applicant and second respondent and based on their evidence before me, I in any event believe that objectively, the gap between them at shortlisting could and should not have been as much as 17,71 percent.[105] I am satisfied that when one compares the curriculum vitae of the two candidates to the advertised criteria, which the SGB did to allocate scores during shortlisting, applicant should indeed have obtain a **slightly** higher score than second respondent. Objectively seen however, the gap between the two candidates should not have been nearly as much as 17,71 percent. This off course means that the final scores allocated by the governing body by adding up the shortlising and interview scores also need to be adjusted in favour of second respondent and that the gap between the two candidates at that stage should have been considerably less than 13,25 percent.

[110] Finally it is should be borne in mind that governing bodies have a tendency to be institutionally biased (in most cases not intentionally but at least subconsciously) in favour of candidates who are employed at their school. Since allocating scores during a selection process is not a mathematical process and since subjective considerations invariably enter the process (very often subconsciously), it is difficult to find any concrete prove that this has in fact happened. To completely ignore this factor when looking at the gap in scores between an external and

[105] 17,71% was the gap between their scores at shortlisting when one deducts the two additional points allocated to second respondent for being a coloured female

internal candidate, seems somewhat unrealistic. However, I am not relying on this at all for purposes of my finding, but merely mentioning it in passing.

CONCLUSION IN RESPECT OF ALLEGED UNFAIR DISCRIMINATION

[111] I am satisfied that first respondent's employment equity plan and policy is designed to achieve the adequate advancement of certain categories of persons or groups disadvantaged by unfair discrimination at provincial and at school level and that the means selected to effect that purpose are reasonably capable of redressing past discrimination. In preferring second respondent over applicant on account of race, because of the racial imbalances at Lochnerhof Primary, first respondent applied affirmative action in a fair, rational and proportional manner, consistent with its employment equity plan and policy and consistent with the purpose of the Employment Equity Act, the Employment of Educators Act and the Constitution.

[112] The fact that both white and coloured females were already overrepresented at provincial level in schools did not make the process unfair because in order to make transformation in schools meaningful, transformation needs to take place at school level. It is no use that the provincial targets for all schools in the province look good while in reality an "own affairs culture" is being kept alive at individual schools. This will not bring about true transformation and redress the wrongs of the past. Many people may not like to know it, but the reality is that we are still living in a deeply divided society where the own affairs culture of our discriminatory past is still extremely visible. The best place to start changing this is at school. Children must learn and experience what it is like to live in an integrated society where race

is no longer important. This cannot be achieved while there are white schools, coloured schools, african schools and indian schools.

[113] It is not ideal that race, gender and disability should play any role in selecting candidates for appointment. In an ideal world merit should be the sole criterion. We are not living in an ideal world. The scars that our discriminatory past have left on our society can unfortunately not be wished away. In order to move away from our past, burdens will unfortunately have to be imposed on innocent individuals. In this regard the American Supreme Court remarked in **Wyngant v Jackson Board of Education:**[106]

> **"as part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy"**

[114] Until we have attained the goal of a completely transformed society, as envisaged in our Constitution, the reality is that innocent persons will have to keep on bearing some burden in order to redress the wrongs of the past. When exactly that day will finally arrive, is hard to predict. I am satisfied that while there was discrimination against applicant, the discrimination was fair.

[106] *Wyngant v Jackson Board of Education* 476 US 267 at 280-281, 106 SCt 1842 at 1850(1986)

CAUSAL CONNECTION IN PROMOTION DISPUTES

[115] Even if I am wrong in my finding that applicant was not unfairly discriminated against, there is a further reason why the relief that applicant seeks, namely appointment to the post, must fail. An arbitrator cannot "reward" an applicant in a promotion dispute with an appointment to the post which she had unsuccessfully applied for or with remuneration at the same salary scale as that of the post or with any other form of substantive relief, merely because there was some form of unfair conduct in the selection process. Promotions are not based on rewards for unfair conduct. They are primarily based on merit.

[116] Even if there was unfair conduct by an employer during a promotion process, this does not mean that an unfair labour practice relating to promotion was proved. As a legal concept unfairness cannot exist in abstraction. Therefore, an applicant in a promotion dispute also needs to establish a causal connection between the irregularity or unfairness and the failure to promote. To do that she needs to show that, but for the irregularity or unfairness, she would have been appointed to the post.[107]

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[107] *National Commissioner of the SA Police Service v Safety & Security Bargaining Council & others* (2005) 26 ILJ 903 (LC); *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) para 24 per Zondo AJP; *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC) para 35; *Public Service Association obo Dalton & Bradfield and Department of Public Works* (1998) 3 LLD 328 (CCMA) p329 per Grogan; *Minister of Safety and Security & others v Jansen NO* (2004) 25 ILJ 708 (LC) para 27. This in any event needs to be proved in order to prove substantive unfairness and before any form of substantive relief such as appointment or protective promotion can be awarded. See *KwaDukuza Municipality v SALGBC* [2008] 11 BLLR 1057 (LC). Where it is merely compensation that is awarded for a procedural irregularity, it would appear that it would be sufficient for the applicant to prove that she stood a realistic chance of being appointed, but in such cases minimal compensation is awarded. Compare *KwaDukuza*

[117] This necessarily means that she must show that not only was she better qualified and suited for the post than the successful candidate who was appointed, but also that she was the best of all the candidates who applied for the position.[108]

[118] In this case, the parties concentrated on the qualifications and experience of applicant and second respondent. Given the fact that evidence about the qualifications and experience of these two candidates were presented to me and given the fact that I had the benefit of perusing their curriculum vitae and asking them both questions, I could see for myself that applicant was in fact **slightly** better qualified and suited for the post than second respondent. No direct evidence was however placed before me in respect of the qualifications and experience of the third candidate Terblanche. Her cv was not presented and neither were any details about her qualifications and experience presented. The only evidence before me about Terblanche's competence, is Greybe's evidence about the scores allocated to all the candidates including Terblanche. This evidence is opinion evidence. I bear in mind that significant weight should be placed by the employer on the fact that the SGB has nominated a candidate as its first choice because it is the SGB who has interviewed the candidates.[109]

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supra where R5000 was awarded because the terms of a collective agreement were breached during the selection process.

[108] *National Commissioner of the SA Police Service v Safety & Security Bargaining Council & others* (2005) 26 ILJ 903 (LC) para 10-12

[109] *Head, Western Cape Education Department and others v Governing Body, Point High School and others* 2008 (5) SA 18 (SCA). I also bear in mind that it is difficult for an arbitrator to determine who was the best candidate because in selecting candidates for promotion, employers may have good reasons for preferring one employee to another apart from formal qualifications and experience. The employer is entitled to attach more weight to one reason than another, may take into account subjective considerations such as performance at an interview, impression made during and interview, personality and life skills. Cf *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA); *Rafferty v*

[119] The fact that significant weight should be given by the employer to the fact that the governing body was of the opinion that a candidate was the best candidate, does however not mean that for that reason, an arbitrator must or can make the same finding. Inasmuch as I am not here to rubberstamp decisions of the employer, I am also not here to rubberstamp decisions and opinions of the SGB. It is for the applicant to prove all elements of an unfair labour practice on a balance of probabilities by presenting reliable evidence.

[120] Even if I can regard the members of the SGB and Greybe as experts in their field, then it should be borne in mind that it is ultimately the arbitrator's duty to decide whether an expert's opinion is to be relied on or not and to determine what weight (if any) has to be given to it.[110] An arbitrator must not blindly accept expert testimony. He is obliged to decide whether it would be safe to accept the opinion or not.[111] Since Terblanche's qualifications, experience and CV were not placed before me, there is no objective, rational basis upon which I can find that the SGB's opinion that applicant was better than all the candidates (including Terblanche) who applied for appointment, is in fact a reliable assessment of the competence of the candidates. This necessarily means that applicant, who bears the onus, has failed to prove that she was the best candidate out of all the candidates who applied for the post and that she should have been appointed.

Department of the Premier [1998] 8 BALR 1077 (CCMA); *PSA obo Dalton and another v Department of Public Works* [1998] 9 BALR 1177)

[110] *R v Jacobs* 1940 TPD 142; *Annama v Chetty* 1946 AD 142 145; *R v Mbongwe* 1954 3 SA 1016 (T) 1019; *R v Sibanda* 1963 4 SA 182 (SR) 190; *S v Gouws* 1967 4 SA 527 (E) 528; *S v Du Preez* 1972 2 SA 519 (SWA). See also *S v Laubscher* 1979 3 SA 47 (A); *Guardian Royal Exchange Assurance Rhodesia Ltd v Jeti* 1981 2 SA 102 (ZA); *S v Baleka* (3) 1986 4 SA 1005 (T); *S v Van As* 1991 2 SACR 74 (W); *Motor Vehicle Assurance Fund v Kenny* 1984 4 SA 432 (G)

[111] *R v Morela* 1947 3 SA 147 (A).

[121] Accordingly, even if applicant was treated unfairly or was unfairly discriminated against, and even if she was a stronger candidate than second respondent, no causal connection has been proved between her non-appointment and the alleged unfairness. Put differently, it has not been proved that but for the alleged unfairness, applicant and not any other stronger candidate (who for example could be Terblanche) should have been appointed. For this reason also applicant's claim should be dismissed.

CONCLUDING REMARKS

[122] Educators need to realise that the Head of the provincial department of education and not the governing body has the final say in appointing suitably qualified educators to teaching positions[112]. While the HOD cannot ignore the fact that the SGB has nominated a particular candidate as their first choice, and whilst the HOD should realise that significant weight should be placed on the fact that the SGB has nominated a candidate as their first choice when the SGB and not the HOD has interviewed the candidate,[113] the legislature has given the HOD the right to appoint the second or third nominee instead of the first nominee.

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[112] sections 6 and 7 of the Employment of Educators Act

[123] Provided that the HOD does so for compelling, rational and fair reasons, and provided that he does not appoint an incompetent person or person who is significantly weaker than the best candidate, the HOD is entitled to appoint the second or third nominee if that candidate is suitably qualified.[114] That was the whole intention behind the amendment to section 6 of the Employment of Educators Act during 2006. The fact that a candidate is nominated by the SGB as its first choice, can therefore not give that candidate any reasonable expectation that she will necessarily by appointed.

[124] While Mr. Lerm did not raise this in his closing arguments, applicant did in her evidence and in her application for condonation place considerable emphasis on the fact that the deputy school principal has already retired and that his position was currently vacant and that the school principal would retire during April 2009. As I understood her argument, she was of the view that in the circumstances, she, and not an external candidate, would have been the best choice for the post of HOD in order to promote continuity in management at the school. I do not agree. This school has 802 learners, which means that there must be a number of HOD's at post level 2 at the school. It is therefore not correct to say that the whole management team of the school would shortly be replaced. Secondly, there is continuity in management at the school because HOD educators at the school are

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[113] *Head, Western Cape Education Department and others v Governing Body, Point High School and others* 2008 (5) SA 18 (SCA)

[114] One would in any event expect that a governing body will not nominate an educator who is not suitably qualified for a position, because it would be absurd and irrational to nominate a candidate for appointment when one is of the view that the candidate is incompetent or not suitably qualified for the position.

currently acting as deputy school principal. The same would happen once the school principal has retired.

[125] Finally I need to deal with the fact that second respondent has now decided to take up a position elsewhere and is no longer interested in the post. Mr. Lerm submitted that for this reason second respondent did not “accept” her appointment, and that I must disregard her appointment and appoint applicant. There is no merit in this argument. The fact that second respondent never commenced working at the school is of no consequence. It is not necessary for an educator to physically commence working at a school before it can be said that she has accepted her appointment. Second respondent’s evidence before me, which I accept, is that she did accept her position and in fact went to the school to meet the principal and discuss her duties at the school. It is because of alleged tension between herself and personnel at the school that she eventually decided not to commence working at the school. At that stage however, she had already accepted the appointment.

[126] While it is regrettable that second respondent never commenced her duties at the school and that the position has now once again become vacant because second respondent has been appointed in a post level 3 position elsewhere, this cannot affect the outcome of this arbitration. It merely means that the post will now be re-advertised again and that applicant like all other candidates will once again be able to apply for appointment to the post.

AWARD

In the premises I make the following order:

1. There was no unfair conduct or unfair discrimination by first respondent in respect of the decision to appoint second respondent and not applicant in post number post 0203 advertised in Vacancy List No 1/2008, being the post of HOD at Lochnerhof Primary School in the Strand at post level 2. First respondent did not commit an unfair labour practice.

2. The decision of first respondent to appoint second respondent to the aforementioned position is hereby confirmed

3. Applicant's claim is dismissed.

4. No order as to costs is made.

adv D P Van Tonder
Arbitrator/Panellist: ELRC
Chambers
Cape Town