IN THE EDUCATION LABOUR RELATIONS COUNCIL

HELD AT WORCESTER

Case No PSES 229-08/09WC

In the matter between

YVETTE MAANS Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE First Respondent

RONEL KEUNECKE Second Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 16 February 2009

DELIVERED: 26 February 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 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

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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 Worcester on 16 February 2009. Applicant appeared in person.[1] First respondent was represented by an employee Ms. Randall, whereas second respondent appeared in person. 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 0040 at Kosie De Wet Primary School in Villiersdorp, being the post of HOD at post level 2, advertised in vacancy list 1 of 2008. Applicant and second respondent, together with many other candidates, applied for appointment to this position. At the time when she applied for appointment, applicant was employed at Kosie De Wet on post level 1. Second respondent was employed at post level 1 at another school.

[1] Although applicant did obtain the services of an attorney, Ms Louw from Bosman & Smit through Legal Wise, the attorney did not attend the arbitration hearing. The attorney sent a fax to the arbitration hearing on the morning of the arbitration, requesting for a postponement. In motivation of her request for a postponement, she claimed that she only received notification of the hearing via applicant on 13 February 2009 and that she was unable to attend because of prior commitments in the regional Court on 16 February. Despite the request per fax from applicant's attorney that the matter must be postponed, applicant requested me to proceed with the arbitration and said that she will appear in person. Applicant also mentioned that she had known about the arbitration date since middle January 2009, and that she had advised her attorney during middle January already of the hearing. Despite this, applicant however wanted to proceed with the hearing. The hearing accordingly proceeded without a postponement.

[4] Both applicant as well as second respondent were shortlisted and interviewed together with 2 other candidates. Applicant was nominated by the SGB as their first choice, whereas second respondent was nominated by the SGB as their third choice. First respondent decided to appoint second respondent.

[5] Applicant is a coloured female whereas second respondent is a white female. First respondent claims that it appointed second respondent because of employment equity. It claims that coloured females and coloured males are overrepresented at Kosie De Wet whereas white females and white males are underrepresented at that school. Coloured females are also overrepresented on post level 2 within the WCED, more so than white females. 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

[6] **Yvette S. Maans**, the applicant, testified that she is aware that the HOD does not necessarily have to appoint the SGB's first nominee. If the best candidate is not appointed based on employment equity, the candidate who is appointed must at least be suitably qualified. She believes that second respondent was not suitably qualified. She did not meet the advertised criteria in that she did not have sufficient organisational and administrative experience and neither did she have experience and qualifications in remedial education. She also does not have the NCS qualification.

[7] Applicant testified that she is not opposed to employment equity. She admits that at the time of appointment the educators at Kosie De wet were predominantly coloured. This is still the position. When the appointment was made there were thirty eight educators at the school. Of these educators, one was a white female and one an African female while the rest were all coloured males and females.

[8] She however feels that by reason of her experience and qualifications, she is better qualified for the job than second respondent, who is not qualified for the job at all. Applicant took me through her cv and explained that she had attended several courses over the years. She had also acted in the post of HOD before the appointment, whereas second respondent had never acted in a HOD post before her appointment. She has obtained a further diploma in remedial education whereas second respondent has no qualification in remedial education.

[9] According to applicant there was a strong emphasis on remedial education for this post of HOD, when it was advertised. The HOD position is in respect of the foundation phase from grades R to 3. The reason for the emphasis on remedial education is because there are many learners with learning disabilities at the school. Although there is a special class for learners with learning disabilities with a specific educator allocated to that class, the learners are not placed out on a permanent basis in the special class. They attend class with the other learners and attend the special class on a roster basis.

[10] As part of her duties as HOD for the foundation phase, the HOD merely has to oversee the remedial education process in the foundation phase. That is merely one of her duties as HOD. The HOD would not necessarily be the educator who would be teaching the special class. There is in fact another educator at Kosie who is appointed to teach the special class.

Evidence on behalf of first respondent

[11] **Mymona Jacobs** is employed by first respondent as an HR practitioner in its employment equity unit. The interviews were conducted by the SGB during May 2008 and the appointment was made shortly thereafter. At that stage, the employment equity statistics as at the end of March 2008 were applicable.

[12] First respondent has an employment equity plan, which promotes representivity in the work place. The employment equity targets are based on the 2001 census. Based on the employment equity targets, the employment equity statistics for white female educators and coloured female educators as at 31 March 2008 were as follows. Whereas the target for coloured female educators on post level 2 was 951, there were actually 1214 coloured female educators on post level 2. Whereas the target for white female educators on post level 2 was 324, there were 469 white female educators on post level 2. Although coloured females and white females are both overrepresented on post level 2, coloured females are more overrepresented than white females.

[13] First respondent does however not only look at the provincial statistics. It also looks at the statistics at the school. At the stage there we 33 educators at Kosie De Wet. Nine of them were coloured males, of which one was deputy principal, one HOD and the other seven post level 1 educators. Twenty two of them were coloured females, of which one was principal, one deputy principal, three HOD's and the other seventeen post level 1 educators. Out of the thirty three educators at the school, there were only two who were not coloured, namely one African female on post level 1 and one white female on post level 1.

[14] Therefore, coloured females and coloured men were completely overrepresented at the school, whereas other races were underrepresented. The appointment of second respondent would have positively influenced the employment equity profile of the school whereas the appointment of applicant would not. Second respondent was suitably qualified for the post and taking all these factors into account it was decided to appoint second respondent.

Evidence on behalf of second respondent

[15] **Ronel Keunecke**, the second respondent testified that she was appointed in the post as from June 2008. She is coping very well in the post. She believes in employment equity. The reason why she applied for appointment to the post, was because she wanted to be part of a more diversified workplace. She has been teaching at various schools and to various cultures over the years. She has taught at kindergarten level. She has also taught at various primary schools in England and in South Africa. She has also taught at former model C schools.

[16] It is not true that she does not have experience in remedial education. Over the years she has had many learners with learning disabilities in her class. She has even taught a learner with cerebral palsy for some months on two occasions at his house. She did mention her experience with learners with learning disabilities in the covering letter which accompanied her application when she applied for the post.

[17] She denies that she does not have the NCS qualification. She did obtain this qualification. In fact without this qualification, she is not permitted to teach. First respondent has however not yet provided her with the certificate to certify that she does have this qualification.

[18] While she has never acted as HOD like applicant, she has all the necessary administrative and organizational skills for the job. Although she finds the job challenging and asks many questions, she does not find it difficult. She is surprised that applicant places so much emphasis on formal qualifications in remedial education for the position, because although she(second respondent) does have extensive experience in remedial education, she has not at any stage since her appointment been asked to be actively involved in remedial education. She is only involved in remedial education in the sense that as HOD she must monitor the work of level 1 educators with regard to their work in respect of learners with learning disabilities, and feel that there is nothing difficult about that, especially given her background.

[19] She feels very happy in her current position. She is being treated very well by all her colleagues including the principal and deputy principals. The only colleague who did not want to cooperate with her was applicant. She was meant to be applicant's HOD, but applicant then refused to accept her authority and the principal had to intervene. She has no ill feelings towards applicant.

ANALYSIS

[20] Whilst it is true that appointments and promotions fall within the prerogative of the employer, the Labour Relations Act No 66 of 1995[2] 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"

[2] hereinafter referred to as the "LRA"

[21] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[3] The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either.[4] 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.[5]

[22] 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.[6]

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

[4] *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

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

[6] *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

[23] The main question to be decided on in this case, is whether there was unfair discrimination against applicant based on her race and/or gender. 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:

> **9 Equality**[7]
>
> (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**[8]
> (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).

[7] Section 9 of The Constitution of the Republic of South Africa Act No 108 of 1996
[8] Section 6 of the Employment Equity Act No 55 of 1998, hereinafter also referred to as the "EEA"

The test to establish unfair discrimination

[24] Unfair discrimination consists of at least two elements namely discrimination and unfairness. In fact, in *Harksen v Lane*[9] it was held that there is a three-stage test for establishing whether there was unfair discrimination namely:[10]

- 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?[11]

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

[25] 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.[12] Given the fact that applicant's race and/or gender played a significant roll 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.

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[9] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) para 53
[10] also see Cheadle et al *South African Constitutional law: The Bill of Rights* 4-32
[11] 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
[12] *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at para 43

SECOND STAGE OF THE ENQUIRY – WAS THE DISCRIMINATION UNFAIR?

[26] 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.[13] One of the ways in which an employer can prove 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.[14] 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[15] and constitute a complete defence to a claim of unfair discrimination.[16] 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.

[13] Section 11 of the Employment Equity Act No 55 of 1998; Du Toit et al *Labour Law through the Cases* EEA-36
[14] section 6(2)(a) of the Employment Equity Act No 55 of 1998; Dupper & Garbers *Essential Employment Discrimination Law* page 85 and further
[15] *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
[16] Dupper & Garbers *Essential Employment Discrimination Law* at 85

The purpose of affirmative action measures

[27] 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.[17] In *Action Travail des Femmes v Canadian National Railway*,[18] 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, 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.'

[28] 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 workplace:

> **"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."

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[17] *Canadian Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at 11143
[18] Co 40 DDR (4th) 193 at 213-14

[29] The beneficiaries of affirmative action are those who belong to designated groups.[19] "Designated groups" are defined as black people, women and people with disabilities.[20] "Black people" is defined as a generic term which means Africans, Coloureds and Indians.[21] 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**[22] from designated groups have equal employment opportunities 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.

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[19] Sections 1, 2 and 15 of the Employment Equity Act
[20] Section 1 of the Employment Equity Act
[21] Section 1 of the Employment Equity Act
[22] 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.
(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.

> (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

[30] 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."[23]

[31] It was against this background that the Employment Equity Act was enacted. The explanatory Memorandum[24] 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."

[23] 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

[24] 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.

[32] 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,[25] 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 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.**' "

The obligation to implement employment equity

[33] Implementing affirmative action measures is not a choice. It is mandatory. Designated employers[26] must in order to achieve employment equity, implement affirmative action measures for people from designated groups.[27]

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

[26] 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.

[27] Section 13 of the Employment Equity Act

[34] 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.[28] The process relating the appointment of educators and the roll 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 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**.

[28] Act No 76 of 1998

> **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**.

[35] The employment equity plan of the WCED, which is by now well known in this industry and to ELRC arbitrators, promotes employment equity at 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 which emphasise employment equity at institutional level:

> "**Challenges**…
> Ensuring representivity w.r.t race gender and disability at institutional level, while taking into account curricular needs…"
>
> "**Addressing challenges**…
> On institutional level, as a first initiative to promote and focus on integration, which will enhance representivity…"
> "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…"
>
> "**Responsiblities**…
> 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
> "The WCED also acknowledges that there are barriers or constraints in reaching these targets ad that the education sector must develop strategies to address these…"

Judicial scrutiny of affirmative action measures

[36] Affirmative action measures are however not immune to judicial scrutiny,[29] 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.[30] 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.[31]

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[29] *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

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

[31] 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

[37] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[32] 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.[33] Conduct which is unreasonable,[34] irrational,[35] capricious,[36] or arbitrary,[37] will be unfair.[38] An affirmative action plan or program[39] as well and its application and implementation[40] should be fair and may not be arbitrary, haphazard, random and overhasty.[41]

The requirement of Rationality

[38] To act rational means to act in a manner "based on reason or logic".[42] 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 empowering provision; (c) the information before the decision maker and (d) the reasons given for it by the decision maker.[43]

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[32] *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC)
[33] 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
[34] 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
[35] To act rational means to act in a manner "based on reason or logic". *Cf Oxford English Dictionary.*
[36] 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
[37] 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".
[38] See authorities referred to in footnote 8
[39] or the manner in which it is applied
[40] *Baxter v National Commissioner, Correctional Services* [2006] 9 BLLR 844 (LC)
[41] *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
[42] Oxford English Dictionary
[43] 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

[39] 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. [44]

[40] 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.[45] Where an employer does have an affirmative action policy, such policy must comply with legislation and must be applied correctly.[46]

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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

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

[45] 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)

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

The requirement of Proportionality

[41] Proportionality requires the balancing of competing interests.[47] 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.[48] 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.[49] 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.[50] 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 affirmative action.[51] Yet there must be some degree of proportionality, based on the particular context and circumstances of each case.[52]

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[47] 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

[48] 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

[49] 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;

[50] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (1st ed, Juta August 2005) 101

[51] *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) par 6 per Murphy J

[52] *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC) par 152 per Sachs J

The need for representivity at school level and at Kosie De Wet Primary

[42] 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 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 all levels, there is very little integration at school level. 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.

[43] The reality is that almost 15 years after 1994, there had been very little integration of educators at school level within the Western Cape. This should be of serious concern to all. Children look up to educators as roll 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 will eventually make it more difficult for children to become part of a fully integrated society and workplace when they leave school. 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 fully integrated.

[44] The Employment Equity Act specifically enjoins employers to ensure equal representation of suitably qualified people from designated groups in all categories and levels in the workplace.[53] The employment equity plan of first respondent also has as its goal integration and representivity with regard to race and gender at school level. Both first respondent's employment equity plan as well as the Employment Equity Act suggests that barriers must be identified and eliminated to ensure respresentivity.

[45] In the circumstances, I am satisfied, that first respondent is not only entitled to promote employment equity at school level, but also has a legal and moral responsibility to do so. Preferring one suitably qualified candidate over another for appointment at school level based on race or gender in order to promote representivity at that school, and to break down barriers caused by apartheid, is not per se unfair. There is accordingly nothing per se unfair in first respondent's decision to prefer second respondent to 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 out of 33 educators at Kosie De Wet, only two were not coloured, of which one was white, supports first respondent's argument that there was a need to appoint a suitably qualified female candidate who was not coloured. 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.

[53] section 15

Is it permissible and fair to prefer a white female over a coloured female?

[46] The textbook example of affirmative action, is where a black person or white woman is preferred over a white male. Provided that the candidate being preferred on the basis of race or gender, is suitably qualified, reasonable people would not generally have a problem with employment equity under such circumstances. Where however, a member of one designated group is preferred over a member of another designated group, this however becomes a very sensitive issue.

[47] The reality however is that even amongst the designated groups, there is a need to promote representivity. 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.[54]

[48] 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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[54] *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).

[49] 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. 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.[55]

[50] 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.

[51] 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.

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

[52] 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.[56] 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".[57]

[53] 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 has looked at the extent to which educators are underrepresented in job levels and categories according to race and gender.

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[56] 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

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

[54] Based on 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. 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 white female over applicant who is a coloured female.

[55] Furthermore it should be borne in mind that affirmative action measures are not designed to reward particular individuals of particular racial groups for wrongs of the past. The aim is simply to redress wrongs of the past by inter alia eliminating discriminatory practices, breaking down barriers in the workplace, and ensuring equitable representation of all designated groups at all job levels and categories in the workplace. White women form part of a designated group. It is accordingly not unfair to prefer a white woman over a member of another racial group if this would promote equity and equitable representation of race and gender on ‘n particular job level in a particular workplace where white women are underrepresented in comparison to members of other designated groups. In principle there is accordingly nothing inherently unfair per se in preferring a white woman over a coloured woman during promotion. The circumstances under which it is done should be the determining factor in determining whether there was unfair discrimination.

Was second respondent suitably qualified?

[56] 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.[58]

[57] 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.

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

[58] Applicant in effect claimed that second respondent was not suitably qualified for the post. In this regard she alleged that second respondent did not have sufficient experience or qualifications in remedial education, that she did not have the necessary administrative and organizational experience and skills and that she did not have the NCF qualification.

[59] Before me second respondent testified under oath that she does indeed have the NCF qualification. Applicant could not dispute this evidence. In fact, all the parties agreed that it was illegal for any educator to teach in the public education system without this qualification. It seems to me therefore that there is no merit in this argument. Clearly first respondent would never have permitted second respondent to teach if she did not have this qualification and I must accordingly accept respondents' version that second respondent does have this qualification. .

[60] Applicant placed much emphasis on her qualifications in remedial education, the fact that a qualification and experience in remedial education was allegedly an important criterium for the job and the fact that second respondent allegedly does not have such experience or qualifications.

[61] In my view, applicant exaggerated the importance of experience and qualifications with regard to remedial education as a criterion for the job. It is true that the advertisement did mention remedial education as a criterium, but it only stated that the candidate should have **knowledge** of remedial education. Knowledge of a particular subject does not mean that the candidate needs to have formal qualifications in respect of the subject or be an expert in the subject.

[62] Applicant could not dispute second respondent's evidence that she does indeed have knowledge of remedial education. Second respondent testified that over the years she had acquired experience in this regard by teaching at various schools in this country and abroad where she taught to children with learning disabilities. In fact, she had even taught to a child with cerebral palsy. In my view therefore, second respondent has excellent knowledge of remedial education. Applicant could also not dispute second respondent's evidence that she did mention her experience in remedial education in the covering letter which accompanied her cv when she applied for the post.

[63] Furthermore applicant could not dispute second respondent's version that since second respondent's appointment, second respondent has not been expected by the principal to be actively involved in remedial education. The only inference I can draw from this, is that given the fact that second respondent does have very good experience in remedial education, and given the fact that she is despite that experience not expected to be involved actively in remedial education, remedial education never was an important aspect of the job or important criterion for appointment. Applicant's two year diploma in remedial education is therefore a qualification which cannot possibly make her more qualified for this position as HOD than second respondent. It seems to me that a person with such a diploma in remedial education in this position would in effect have a qualification which cannot really assist her to do the job better than any other educator with knowledge of remedial education.

[64] I accept second respondent's evidence that to the extent that she is indirectly involved in remedial education, by assessing the work of level 1 educators in phase 1 who teach to learners with learning disabilities, she is more than qualified to do the job by virtue of her experience and that she can indeed do it with ease.

[65] Applicant is also of the view that by reason of her past experience, amongst other having acted as HOD, she is more experienced than second respondent for the post and that second respondent was in fact not qualified for the position.

[66] Certain jobs such as being a brain surgeon, air force pilot or nuclear scientist require exceptional skill, experience and training. Most jobs which entail administrative and organizational skills, do not fall into this category. I have arbitrated many cases concerning the post of HOD in the public education sector. I fail to see what is difficult about the organizational and administrative functions attached to this post. While applicant must undoubtedly have gained good experience when she acted in the post of HOD, this does not necessarily mean that she would be better suited for the post than second respondent. In my view the duties attached to an HOD post are of such a nature that any educator who has the willingness to learn and who have basic organizational and administrative skills, can acquire the skills to perform these duties in a relatively short time. In this regard it should be borne in mind that the legislature has stated 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.

[67] The Act further provides that in order to determine for purposes of employment equity whether a particular candidate from a designated group is suitably qualified, an employer must not only have regard to the person's formal qualifications, prior learning and experience, but that the capacity of the candidate to acquire within a reasonable time the ability to do the job, must also be taken into account.

[68] If indeed it is true that applicant was by reason for her experience as acting HOD, able to perform the job better than second respondent, I am satisfied that it cannot be said that second respondent cannot after her appointment in the position of HOD, within a reasonable time, acquire sufficient experience and sufficient skills to enable her to do the job as well or better than applicant. It is not a difficult job and I am satisfied that second respondent has sufficient skills and experience to perform the job effectively. This is supported by second respondent's evidence that although she has learnt a lot since she has started in the job, and although she has asked many questions, she does not find the job difficult.

[69] Applicant also emphasized the fact that at shorlisting she obtained a score of 25 whereas second respondent obtained a score of 17 and that during interviews she obtained a score of 59 whereas second respondent obtained a score of 45. Scores are obviously important to use as a guideline in order to assess the competence of candidates. However, due to the fact that subjective impressions of interview panelists invariably enter the process, scores in themselves are very seldom an exact or correct indication of the actual suitably for the job or competence of any particular candidate.

[70] I accept that if the difference in scores between two candidates are extremely wide, it may be said that it would not be fair or rational to appoint the person with the lower score in the name of affirmative action. However, it could not be said that the difference in scores between applicant and second respondent was significant or extremely wide. At shortlisting the difference was merely 8 points whereas it was merely 14 points during interviews. The problem however is that we do not know what the maximum score was that a candidate could obtain. It does accordingly not make much sense to place a strong emphasis on the scores.

[71] In assessing the suitability and competence of applicant and second respondent, I have had the unique benefit of seeing their cv's and hearing and seeing them testify. In my view, they both appear to be equally suitably qualified for the position and I find it hard to see on what basis one could say that applicant is necessarily better qualified for the position than second respondent. As far as academic qualifications is concerned, they seem to be equally well qualified. While it is true that applicant has the further education diploma in remedial education, this qualification does not seem to be a qualification that would be of much use in carrying out the duties associated to this post. Furthermore second respondent has a four year Higher Diploma in Education whereas applicant only has a three year Diploma in education.

[72] As far as teaching experience is concerned, it is true that applicant has acted as HOD whereas second respondent has not and that applicant has taught longer than second respondent.

[73] On the other hand, second respondent appears to have a much wider experience that applicant. She has taught in England and South Africa at various levels in primary schools. She has taught to kindergarten children. She has taught privately at home to a child with cerebral palsy. She has taught at former model C schools. She has taught to children from various backgrounds. Applicant on the other hand has, except for three months when she taught at Elandsrivier Primary, only been teaching at Kosie De Wet ever since she started teaching during 1994. She does not have the same wide experience and exposure as second applicant. In addition second respondent did have administrative and organizational experience, albeit mostly extra curricular.

[74] In the circumstances, I must say that after having compared the qualifications and experience of the two candidates, and after having heard them testifying about their jobs and their passion about education, it seems to me that one cannot say that applicant is necessarily the stronger candidate. Nothing much turns on this however, because I have already found that even if applicant was the stronger candidate, second respondent was not much weaker and was indeed suitably qualified for the job as intended in the Employment Equity Act.

Concluding remarks

[75] Given the enthusiastic manner in which applicant gave her evidence and prepared and presented her case, it seems clear that like most job applicants, applicant, in her own mind, believes that she was the best candidate. She clearly had an expectation of being appointed. I am however satisfied that such expectation was not a reasonable or legitimate expectation. In this regard I completely agree with the following remarks which are equally applicable in respect of applicant:

> "I accept that the applicant must have formed an expectation of her suitability for the position, but as was said by the High Court in *Swanepoel v Western Region District Council and Another* (1998) 19 ILJ 1418 (SE) **"in the race for employment there must, indeed, be few job-seekers who do not <u>in their own minds</u>, either with or without the encouragement of others form expectations as to their suitability. These expectations are however not 'legitimate expectations' upon which applicant could conceivably rely for relief ".** In my view any expectations which she might have had were properly met by giving the applicant access to a fair selection procedure**…**"[59] (emphasis added)

[76] Educators should realise that the HOD and not the SGB has the final say in appointing suitably qualified educators to teaching positions. 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,[60] the legislature has given the HOD the right to appoint the second or third nominee instead of the first nominee.

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[59] *Jack / Department of Labour* [2000] 4 BALR 373 (CCMA) at 375 per Commissioner Brand

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

[77] Provided that the HOD does so for a rational and fair reason, and provided that he does not appoint an incompetent person or person who is shockingly weaker than the best candidate, the HOD is entitled to appoint the second or third nominee if that candidate is suitably qualified. 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.

[78] I am satisfied that the decision of first respondent to appoint second respondent and not applicant was a fair decision. I am satisfied that in preferring second respondent over applicant on account of race, because of the racial imbalances at Kosie De Wet Primary, first respondent applied affirmative action in a fair, rational and proportional manner, consistent with its employment equity plan and consistent with the purpose of the Employment Equity Act and the Constitution. I am also satisfied that in the process first respondent did not discriminate unfairly against applicant.

[79] Finally I wish to remark that I have no doubt that applicant is a good educator who is passionate about her profession. I believe that she will be promoted sooner or later. I therefore trust that applicant will continue to apply for promotion posts.

AWARD

In the premises I make the following order:

1. There was no unfair conduct or unfair discrimination on the part of first respondent in respect of the decision to appoint second respondent and not applicant in post number post 0040 advertised in Vacancy List No 1/2008, being the post of HOD at Kosie De Wet Primary School in Villiersdorp at post level 2. First respondent did not commit an unfair labour practice and neither has it unfairly discriminated against applicant.

2. The decision of first respondent to appoint second respondent in 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: SALGBC
Chambers
Keerom Street
Cape Town