IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

Case No PSES 259-06/07WC

In the matter between

E BÖHMER Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE First Respondent

C JOSEPH Second Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 1 FEBRUARY 2007

DELIVERED: 1 MARCH 2007

SUMMARY: Labour Relations Act 66 of 1995 – Section 186(2)(a) - Alleged Unfair Labour Practice relating to promotion – Whether unfair conduct proved – Statutory discretion vested in employer to select best candidate of its choice for appointment – Such discretion to be exercised in a rational manner – Manner in which discretion is exercised will only be interfered with by ELRC if exercised in an irrational, capricious or arbitrary manner or if other recognised grounds of review such as for example bias or failure to apply the mind can be proved;
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

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ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This dispute concerns an alleged unfair labour practice relating to promotion and alleged unfair discrimination. The arbitration hearing in this matter took place in Cape Town on 1 February 2007. Applicant appeared in person. First respondent was represented by Ms V

Phillips, an employee of its Labour Relations Department. Second respondent also appeared in person. The evidence was mechanically recorded on four cassette tapes. The proceedings were concluded on 16 February 2007 when the final written heads of argument were submitted.

THE ISSUE IN DISPUTE

[2] I have to decide whether any unfair labour practice relating to promotion was committed in respect of applicant and/or whether applicant was unfairly discriminated against, and if so, the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[3] During 2005, a vacancy arose for Resource Centre Co-ordinator on post level 3 within the EMDC Metropole East and was advertised as post number OB05/2005. Many candidates, including applicant[1] and second respondent[2], who were both at the time employed by first respondent, applied for appointment. Both applicant and second respondent, together with other candidates, were shortlisted and invited for interviews. Applicant and second respondent both attended the interviews which were held on 14 September 2005. The interview committee[3] ranked second respondent as their first choice and nominated her for appointment, which nomination she accepted and which nomination was confirmed by first respondent when it appointed her in the position as from January 2006. Applicant was dissatisfied with these decisions and referred a dispute to the ELRC.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicant

[4] ***Elizabeth Wilhelmina (Edna) Böhmer****,* the applicant has been employed by first respondent for a number of years in different capacities. She holds several diplomas and degrees including the Higher Education Diploma(cum laude), B.A. Librarianship, B.A Hons. Librarianship (cum laude), M.A Librarianship (cum laude). She has more than 20 years experience as lecturer/researcher at the University of Stellenbosch (1979 – 1984),

[1] who is a white female. [It is necessary to refer to the race of both applicant and second respondent in this award since issues which were raised during the arbitration, namely affirmative action and alleged discrimination based on race, caused the race of applicant and second respondent to be relevant].
[2] who is a black female. [See remarks in footnote 1].
[3] hereinafter also referred to as the "IC"

lecturer/librarian at Hoxani College of Education (1989 – 1994), lecturer/librarian at Western Cape College of Education (1995 – 2004) and Education Specialist (librarian) on post level 2 at EDULIS[4] at Kuils River Branch library since 15 February 2004.

[5] When the post for Resource Centre Co-ordinator was advertised as post number OB05/2005, she applied for the position. The post was at the very same library where she was employed and the job description and responsibilities of the advertised post were also exactly the same as the post she was employed in at the library for the past ten years, the only difference being that this post was on level 3 and she was employed on level 2. Although the post of Resource Centre Co-ordinator at that library had never been filled before on a permanent basis, applicant believes that she was unofficially acting in the position during 2004. In support of this allegation, she referred to the fact that she had attended several meetings of Resource Centre Co-ordinators during that period to represent Metropole East.

[6] Prior to the shortlisting and interviews, she was advised by Dr M Bunding of the WCED that he feels that applicant should be appointed in the position. The interviews were conducted in a professional manner and after the interviews she felt confident that she would be appointed. On 11 January 2006 the acting head of EDULIS, Mrs L McLennan however informed her that she was not successful.

[7] After being informed that she was unsuccessful, she was advised by Dr M Bunding, who was also a member of the IC, that although applicant was the best candidate and should have been nominated, she was unsuccessful because the post had been earmarked for a black person and that the sole reason why she was unsuccessful was because of the application of affirmative action measures. Under the circumstances she believes that she was unfairly discriminated against.

[8] She is of the view that second respondent could and should never have been nominated or appointed. In the first place she feels that second respondent could not have been shortlisted because she does not have a drivers licence, which was a requirement for the job as advertised. Furthermore she believes that applicant is not qualified for the job due to lack of experience and competency. Since second respondent's appointment in the position, applicant deals with second respondent, who is now her supervisor, on a daily

[4] Library and Information Service of the WCED

basis. She has to show second respondent how to comply with her job description. Second respondent cannot fulfil the basic job requirements and does not have the necessary managerial experience.

[9] When asked how she was prejudiced during the promotion process, applicant replied that since she is a female, much better qualified than second respondent and has unofficially acted in the post for a lengthy period, she was prejudiced when second respondent instead of herself, was appointed. She also believes that the process was procedurally unfair because the minutes of the interviews are incomplete and because she was never advised in writing that she was unsuccessful but informed verbally by Mrs. McLennan, the acting head of EDULIS.

Evidence on behalf of first respondent

[10] ***Lynette Elizabeth McLennan*** is employed by first respondent as the acting head of EDULIS and has been employed in that position for the last five years. She met applicant during the 1990's when applicant was librarian at the Western Cape College of Education.

[11] The Western Cape College of Education unfortunately closed during 2003 which resulted in all the staff employed by the college, including applicant being declared in excess. The witness then suggested that instead of completely closing the library, the library should become the Resource Centre of the EMDC Metropole East so that the library could continue and the library staff, employed by the College be absorbed in the Resource Centre. Applicant has never acted as Resource Centre Coordinator, not even unofficially. Although applicant was invited to attend meetings of Resource Centre Coordinators, this was merely done so that she could benefit and learn from the meetings. It is true that Dr Bunding from the WCED at some stage recommended that applicant should act in post level 3, but that was due to a misunderstanding when he was under the mistaken impression that applicant was still in excess. When Bunding made the recommendation applicant was no longer in excess and there was no need for her to act on post level 3. The position of Resource Centre Coordinator at Kuilsriver was a newly created position, which had never existed before. In fact there had never existed a post on post level 3 there. She does not know whether Bunting had promised applicant that she would be appointed in the post, but if he did, he had no authority to do so because strict procedures

are prescribed which need to be complied with in order for an employee to be appointed to a position in the WCED. When the witness heard prior to the shortlistings that applicant was telling people that she would be appointed in the position, she went to speak to applicant and told her that she should not think that she has an automatic right of appointment and that she would have to compete with other candidates and might not necessarily be successful.

[12] There were only five criteria for shortlisting, and they were the same as the five requirements as contained in the advertisement. One of those requirements were that the candidate should have a valid driver's licence. At the time of shortlisting and also when second respondent was nominated, the witness was under the impression that second respondent had a driver's licence. It is only recently, after her appointment that the witness discovered that second respondent does not have a valid driver's licence but is in the process of getting one.

[13] The reason why a driver's licence was a requirement, was to ensure that the successful candidate could not use the fact that he or she does not have a driver's licence as an excuse for not attending meetings and going out to schools when required to do so. Driving a motor vehicle is however not part of the daily duties of the position. Should this have been a post in a rural area, where there is no public transport and taxis, the absence of a driver's licence would indeed have been a problem, but since this post is in the Cape Peninsula where one can with public transportation and taxis get from any point to wherever one needs to go, the fact that second respondent does not have a driver's licence, is immaterial. In fact second respondent had now been in this position for just over a year and had always attended each and every meeting she was required to attend and has relied on taxis for this. Although a driver's licence will be required in the long run, the fact that she does not at present have a driver's licence is immaterial.

[14] Affirmative action played no roll during shortlisting or during interviews. The IC made a conscious decision not to allow affirmative action to influence the interviews. It was decided that merit alone would be used as the criteria during shortlisting and interviews and that the point system would be used during interviews and the candidate with the highest score would be ranked as the IC's first choice. It was decided that once the candidates had been ranked, the envelope containing first respondent's requirements with regard to affirmative action would be opened. If it then transpired that the candidate who

was ranked first did not comply with the affirmative action requirements of the department, then through consensus another candidate would have been ranked as the first choice. It was never necessary to go over to a consensus seeking stage, because after adding up the different scores of the different candidates who were interviewed, second respondent was the candidate with the highest score, without affirmative action having played any roll at all. It was only then that the envelope containing the department's requirements with regard to affirmative action was opened. Since the nomination of second respondent, being a coloured lady, complied with the department's affirmative action requirements and targets, it was unnecessary for the IC to even apply its mind with regard to affirmative action.

[15] She is quite surprised to hear that applicant claims that Bunding has told her after the interviews that applicant was the best candidate, but that she could not be nominated because of affirmative action. This is simply not the truth since affirmative action played no roll in the nomination of second respondent. In any event, Bunding told the witness that although applicant had interrogated him about the interviews, he had told her nothing. She therefore finds it strange that applicant is now alleging that Bunding had allegedly told applicant about what had transpired at the interviews. After the interviews, the witness decided to inform applicant in person that she was unsuccessful, because she did not want applicant to hear this from somebody else.

[16] She did not know second respondent before the shortlisting and interviews. She as well as the other members on the panel were very impressed with second respondent as well as the answers which she gave during interviews. The IC was looking for a team player with the right attitude, who was willing to learn and who had good managerial skills. Those qualities second respondent had. If there were certain other skills which the successful candidate did not have, for example advanced user guidance, that was no problem because those skills could be taught. Second respondent was definitely the right person for the job and that is why she was nominated as the IC's first choice. Although it is true that applicant's academic qualifications in librarianship are superior to that of second respondent, this job is more of a managerial position than that of a librarian. It is no good that the successful candidate was a highly qualified librarian who could not manage. The minimum required academic qualifications, as advertised, were more than sufficient for the post and second respondent had those qualifications. Second respondent is performing remarkably well in the position. She had been in the position for just over a year now. The

witness had enquired from various people, including managers who work with second respondent on a daily basis and the reports had in fact all been very positive.

[17] ***Allen John Meyer*** is employed by first respondent as employment equity coordinator. It is his duty to look at nominations which had been made for appointments and to see if employment equity had been applied before the nomination was made. This particular post was on post level 3. Given the fact that according to the WCED's employment equity profile coloured women are still very much underrepresented on post level 3[5] and given the fact that the nominee in this case, namely second respondent is a coloured woman, the nomination of second respondent as the IC's first choice, was in line with the WCED's equity targets with regard to the implementation of affirmative action. Since first respondent was also satisfied that all the formalities for the nomination had been complied with, second respondent was appointed in the position.

Closing arguments

[18] Written heads of argument were handed in by the parties. Save to state at this stage that it was argued by applicant that the process was unfair and that she should be promoted in the position with retrospective effect whereas respondents argued that the process was fair and should be confirmed, I do not intend to repeat these arguments here in detail and will refer to them during my analysis of the evidence, if and where relevant.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

APPLICANT'S CAUSES OF ACTION

[19] Applicant's causes of action in this matter are based on an alleged unfair labour practice relating to promotion in terms of section 186(2)(a) of the Labour Relations Act No 66 of 1995[6] as well as alleged unfair discrimination based on race in terms of section 6 of the Employment Equity Act No 55 of 1998.[7]

THE UNFAIR LABOUR PRACTICE CLAIM

[5] according to first respondent's equity targets there is currently still a shortage of 41% in respect of coloured women on post level 3

[6] hereinafter referred to as "the LRA"

[20] In support of her allegation that an unfair labour practice relating to promotion had been committed, applicant during her evidence, cross-examination and arguments, relied on the following:

20.1 It is alleged that there were procedural irregularities in the form of incomplete minutes of the interview and a failure to inform applicant in writing that she was unsuccessful;

20.2 It is alleged that applicant had unofficially acted in the post and had acquired an expectation that she would be appointed;

20.3 It is alleged that applicant has superior qualifications to that of the successful candidate;

20.4 It is alleged that the successful candidate namely second respondent does not comply wit the minimum requirements for the job and should never have been shortlisted;

20.5 It is alleged that the successful candidate namely second respondent is incompetent and cannot fulfill the basic job requirements;

20.6 It is alleged that applicant was discriminated against on the basis of race.[8]

THE UNFAIR LABOUR PRACTICE DEFINITION

[21] 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"

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[7] hereinafter referred to as "the EEA"

[8] Although unfair discrimination can also support a finding that an employer has committed an unfair labour practice, the aspect of alleged discrimination will be dealt with separately when evaluating applicant's cause of action which is based on unfair discrimination in terms of the Employment Equity Act.

[22] An employee who alleges that she is the victim of an unfair labour practice bears the onus of proving the claim on a balance of probabilities. The employee must prove not only the existence of the labour practice, if it is disputed, but also that it is unfair.[9] Mere unhappiness or a perception of unfairness does not establish unfair conduct.[10]

[23] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[11] 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.[12] According to Professor Du Toit, 'unfair' implies failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.[13] In the education sector, regard should also be had to the procedures prescribed in PAM,[14] in order to determine whether a fair procedure was followed in promoting a certain candidate as opposed to another. These procedures must be applied,[15] but are merely procedural guidelines and not mandatory,[16] and need only be substantially complied with and not strictly.[17]

[24] An employee who wants to persuade a court or employment tribunal that there was unfair conduct relating to promotion and that the employer's decision should be interfered with, has an onerous task. This is so because an employee has no right to promotion but only to be fairly considered for promotion.[18]

[25] An arbitrator should exercise deference to an employer's discretion in selecting candidates for promotion. The function of an arbitrator is not to second-guess the

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[9] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 43; *Provincial Administration Western Cape (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) para 32

[10] *SAMWU obo Damon v Cape Metropolitan Council* [1999] 3 BALR 255 (CCMA); Du Toit et al *Labour Relations Law* (4th ed) 464

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

[12] *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

[13] Du Toit et al *Labour Relations Law* (4th ed) 463

[14] the Personnel Administrative Measures ("PAM")

[15] *Stokwe v MEC, Department of Education, Eastern Cape Province & another* [2005] 8 BLLR 822 (LC)

[16] *Douglas Hoërskool & 'n ander v Premier, Noord-Kaap & andere* 1999 (4) SA 1131 (NC) at 1144I–1145I

[17] *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng*, Case No 02 / 15349, [2006] JOL 17802 (W) per Horwitz AJ

[18] *Westraat and SA Police Service* (2003) 24 ILJ 1197 (BCA)

commercial or business efficacy of the employer's ultimate decision. Nor is it an arbitrator's function to determine whether the best decision was taken. The test should rather be whether the ultimate decision arrived at by the employer was a reasonable decision in the sense that it was operationally and commercially justifiable on rational grounds:

> *"The court should be careful not to intervene too readily in disputes regarding promotion, especially to senior management positions, and should regard this an area where managerial prerogative should be respected unless bad faith or improper motives such as discrimination are present….."*[19]

> *" ..the legislature did not intend to require arbitrating commissioners to assume the roll of employment agencies. A commissioner's function is not to ensure that employers choose the best or most worthy candidates for promotion, but to ensure that, when selecting employees for promotion, employers do not act unfairly towards candidates…The Labour Appeal Court has made it clear that it will not interfere with an employer's decision to promote or appoint a particular candidate if the employer considers another to be superior, unless when so doing the employer was influenced by considerations that expressly prohibited by the legislature, or akin thereto: see Woolworths (Pty) Ltd v Whitehead [2000] 6 BLLR 640 (LAC).."*[20]

[26] Arbitrators must bear in mind that they are not qualified as employment agencies and do not have practical experience as managers in a corporate environment or in the civil service. Accordingly arbitrators are loath to prescribe to employers how they should go about in selecting a candidate for promotion. There may be reasons for preferring one employee to another apart from formal qualifications and experience.[21] The employer may attach more weight to one reason than another,[22] may take into account subjective considerations such as performance at an interview[23] and life skills[24]:

> *"Inevitably, in evaluating various potential candidates for a certain position, the management of an organization must exercise a discretion*

[19] P A K Le Roux in *Cheadle Landman Le Roux & Thompson* Current Labour Law 1991/1992 at 17
[20] *Cullen v Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA)
[21] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)
[22] *Rafferty v Department of the Premier* [1998] 8 BALR 1077 (CCMA)
[23] *PSA obo Dalton and another v Department of Public Works* [1998] 9 BALR 1177 (CCMA)
[24] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)

> *and form an impression of those candidates. Unavoidably this process is not a mechanical or a mathematical one where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the assessment made of the candidates and the resultant appointment will not always be the correct one"*[25]

[27] In selecting a candidate for appointment or promotion, an employer exercises a discretion. Unless one of the recognized grounds of review are present, arbitrators and courts should not simply interfere with the manner in which a discretion was exercised simply because they do not like the decision which was made:

> *"The courts are, generally, wary and reluctant to interfere with the executive or other administrative decisions taken by executive organs of government or other public functionaries, who are statutorily vested with executive or administrative power to make such decisions, for the smooth and efficient running of their administrations or otherwise in the public interest. Indeed, the court should not be perceived as having assumed the role of a higher executive or administrative authority, to which all duly authorised executive or administrative decisions must always be referred for ratification prior to their implementation. Otherwise, the authority of the executive or other public functionaries, conferred on it by the law and/or the Constitution, would virtually become meaningless and irrelevant, and be undermined in the public eye. This would also cause undue disruptions in the state's administrative machinery*." [26]

[28] In deciding whether conduct relating to a promotion was unfair, an arbitrator has a very limited function and 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.[27] 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 discriminated.[28]

[29] That this is the correct approach in promotion disputes, was confirmed by the High Court, where Miller J remarked as follows:

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[25] *Goliath v Medscheme (Pty) Ltd* (1996) 17 ILJ 760 (IC) 768

[26] *Basson v Provincial Commissioner (Eastern Cape) Department of Correctional Services* (2003) 24 ILJ 803 (LC) at 820C–F

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

[28] *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 per Christie C

> *"The Promotion Committee was tasked with assessing all the applications and had to exercise a discretion in selecting the best candidate. A court of review has no jurisdiction to enquire into the correctness of the conclusion arrived at by a body or functionary lawfully vested with a discretion (see Davies v Chairman, Committee of the Johannesburg Stock Exchange 1991 (4) SA 43 (W) at 46H–J and Ferreira v Premier, Free State and others 2000 (1) SA 241 (O) at 251I–J). It will only be entitled to interfere with the decision taken by such a body or functionary if it is shown that it failed to properly apply its mind to the relevant issues and such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide, or as a result of unwarranted adherence to a fixed principle, or in order to further an ulterior or improper purpose, or that it misconceived the nature of the discretion conferred, or that the decision was so grossly unreasonable as to warrant the inference that it failed to properly apply its mind to the matter (see Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another 1988 (3) SA 132 (A) at 152A–E), or if there is such a material misdirection of fact that it is clear that it failed to exercise its discretion (see Ferreira v Premier, Free State and others (supra) at 251J–252A*)".[29]

THE PROCEDURAL IRREGULARITIES

[30] In support of her claim that there was unfair conduct, applicant, during her evidence, relied on two procedural irregularities in the proceedings namely:

30.1 The fact that the minutes of the interviews were incomplete;

30.2 The fact that she was not advised in writing of the fact that she was unsuccessful.

[31] It is common cause that applicant was never advised in writing that she was unsuccessful, but that McLennan had advised her verbally. It is also common cause that the minutes of the interviews are incomplete in that most of the answers which were given by the respective candidates, are not reflected in the minutes. It is also common cause that Chapter B of PAM requires first respondent as employer to ensure that accurate records of interviews are kept and that unsuccessful candidates are informed in writing:

[29] *Jwajwa v Minister of Safety & Security & others, Case* No 817 / 01 [2005] JOL 15727 (Tk)

> "The employer will inform all unsuccessful candidates, in writing, within eight weeks of an appointment being made" [30]
>
> The employer must ensure that accurate records are kept of proceedings dealing with the interviews, decisions and motivations relating to the preference list submitted by school governing bodies and other such structures[31]

[32] I am not in favour of an over technical approach in terms of which each and every small procedural defect can give rise to a cause of action in labour disputes.[32] Since the early days of Roman Dutch Law it has been recognized that substance should not be sacrificed to form.[33]

[33] I therefore do not believe that exact compliance with each and every procedural requirement, is necessary in order for the decisions and recommendations of an IC to be valid and fair. It is inevitable that in most cases there will be some form of technical procedural irregularity when an IC is required to shortlist, interview and recommend educators for appointment. However, invalidity cannot always follow upon non-compliance with procedures. In this regard Baxter makes the following remarks:

> "Administrative action based on formal or procedural defects is not always invalid. Technicality in law is not an end in itself. Legal validity is concerned not merely with technical but also with substantial correctness. Substance should not always be sacrificed to form; in special circumstances greater good might be achieved by overlooking technical defects".[34]

[34] The High Court itself, when referring to paragraph 3 of Chapter B of PAM, has held that strict compliance with PAM is not necessary, that form must not be elevated above substance and that:

> "One does <u>not go digging</u> to find points to stymie the process of appointing suitable candidates to teaching positions"[35] (emphasis added)

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[30] Clause 3.4(b) of PAM

[31] Clause 3.5 of PAM

[32] see my recent remarks in this regard in the reported arbitration award of *Peterson v Shoprite Checkers* reported by Butterworths publishers in their arbitration law reports as *Peterson v Shoprite Checkers* [2006] 3 BALR 292 (CCMA) at 317

[33] Johannes Voet *Commentarius ad Pandectas* 1.3.16(iv), approved in *Standard Bank v Estate Van Rhyn* 1925 AD 266

[34] Baxter *Administrative Law* at 446 and the authorities referred to by the learned author at footnotes 377 to 379

[35] *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng,* Case No 02 / 15349, [2006] JOL 17802 (W) per Horwitz AJ; see also *Douglas Hoërskool & 'n ander v*

[35] A selection process cannot be regarded as such a fragile process that even the most technical procedural irregularity and slightest criticism would result in the whole process being set aside. Unless it is clear that a procedural irregularity was of an extremely gross nature so as to cause a failure of justice *per se* or unless the irregularity affected the end result of the process in that the best candidate had not been appointed or unless the irregularity had caused some prejudice to an applicant in that her reasonable and realistic chances of being properly considered on her merits, were substantially impaired, the process should not be interfered with by an arbitrator merely because there was a procedural irregularity.

The failure to advise applicant in writing of the outcome

[36] This form of procedural irregularity is so technical and so immaterial to the overall fairness of the process, that I am of the view that failure to adhere to this requirement, can never constitute an unfair labour practice for purposes of section 186(2)(a) of the LRA. Even if I am wrong in this regard and even if it could constitute an unfair labour practice, it would certainly not be an unfair labour practice which would give rise to any remedy being granted to the aggrieved educator. In this particular case the failure to inform applicant in writing is particularly of no consequence and could not possibly have prejudiced applicant in any manner because she was indeed informed of the outcome of verbally. To argue that there was a procedural irregularity in that applicant was not informed in writing but verbally, is unduly technical and petty.

The incomplete minutes

[37] It is common cause that the minutes could have been more complete. They were incomplete in the sense that most of the answers of the various candidates during interviews, have not been transcribed. Although the questions are also not reflected in the minutes of the interviews, the questions are reflected in the minutes of the shortlisting meeting and it is accordingly only the absence of the answers given by the candidates during interviews, which makes the minutes incomplete. All the other material information, which consists of the following details, are however indeed reflected in the minutes:

Premier, Noord-Kaap & andere 1999 (4) SA 1131 (NC) at 1144I–1145I where it was held that paragraph 3 of Chapter B of PAM contains procedural guidelines which are not mandatory.

37.1 The names of the members of the IC who were present are reflected in the minutes;

37.2 The method used by the IC in order to identify the best candidates, was noted.

37.3 The questions which were asked to the candidates, are reflected in the minutes;

37.4 The successful candidates are identified and the ranking order of the best candidates is reflected in the minutes, containing the names of all these candidates;

37.5 The motivation for nomination of second respondent is clearly reflected in the minutes.

[38] In the past I have consistently held in other ELRC arbitration awards that a recommendation of an IC cannot simply be set aside because of the fact that the minutes kept by the IC are incomplete. Even where no minutes were kept, it would be absurd to hold that for that reason alone, the decision of the SGB must be set aside and the whole process must be repeated.

[39] This is so because the High Court has held that the purpose of the procedural requirements laid down in PAM, is merely to ensure that there is a fair and transparent procedure in place for appointing educators, so that nepotism, corruption and fraud can be eschewed.[36] The fact is that in terms of the guidelines laid down in PAM, minutes are not the only mechanism, which is build into the process to ensure a fair and transparent procedure:

39.1 In addition, one of the members of an IC will always be a departmental representative; and

39.2 Furthermore, unions attend the shortlistings and interviews as observers.

[36] *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng*, Case No 02 / 15349, [2006] JOL 17802 (W) per Horwitz AJ.

[40] Even in the absence of minutes, the procedure will be transparent and fair if a departmental representative and/or trade unions are present during the process to monitor it. Complete and accurate minutes can therefore never be an absolute necessity to achieve the primary objectives of Chapter B of PAM.

[41] Complete and accurate minutes, can merely be described as one mechanism to ensure that the process is transparent and fair. Only if all the mechanisms which are aimed at ensuring transparency and fairness are absent, can one argue that the primary objective of the procedural guidelines laid down in Chapter B of PAM, has not been attained where there are incomplete minutes. In this particular case, all the trade unions were invited although only one elected to attend. This, seen in conjunction with the presence of a departmental representative, leads me to the conclusion that there was sufficient transparency in the process despite the incomplete minutes. Hence, the incompleteness of the minutes, did not cause any prejudice to applicant and no unfair conduct was accordingly committed in relation to her on account of the mere fact that the minutes were not as complete as applicant may have liked it to be.

UNOFICIALLY ACTING IN THE POSITION

[42] There is a dispute of fact as to whether applicant had indeed ever unofficially acted in the position before it was advertised. Applicant claims that she did unofficially act in the position whereas McLennan testified that applicant had never ever acted in this position. Obviously one of these witnesses must either be mistaken or lying. I accept the evidence of McLennan that the reason for inviting applicant to attend meetings of resource center co-coordinators, was simply because it was thought that applicant could learn something.

[43] Having had the benefit of observing both witnesses testify before me, having regard to the probabilities and bearing in mind that the onus is on applicant to prove on a balance of probabilities that her version that she has unofficially acted in the position of resource center coordinator is the correct version, I am of the view that applicant either misunderstood the nature of her position or alternatively lied to me in this regard. I accept the version of McLennan that applicant had never acted in the position of resource center co-coordinator, not even in an unofficial capacity. Even if I am wrong and even if applicant had indeed acted in the position before it was advertised, this would, for the following reasons not assist her at all.

[44] I am aware that some arbitrators have held that an employee with the necessary skills acquire a legitimate expectation to be promoted after they have served for some time in an acting capacity.[37] I am however satisfied that those awards are wrong. I agree with arbitrators who have held that an employee in an acting position has no right to be appointed to a permanent position,[38] is not entitled to expect automatic promotion to the position,[39] and has no automatic right or legitimate expectation to be appointed when the post is permanently filled.[40] An important reason why unsuccessful job applicants in promotion disputes cannot claim any legitimate expectation to be appointed when jobs are filled, is because the Supreme Court of Appeal has held[41] that the doctrine of legitimate expectation has been utilised to introduce the requirements of procedural fairness and not as a basis to compel a substantive benefit. The existence of a legitimate expectation does not create a substantive right that can be enforced, but merely lays down the procedure to be followed in order to be heard. In the circumstances arbitrators have held that an employee in a promotion dispute cannot ever claim a legitimate expectation to be promoted to a position[42] and I completely agree with this view.

THE ALLEGATION THAT SECOND RESPONDENT DID NOT COMPLY WITH THE ADVERTISED CRITERIA

[45] I accept the version of McLennan that there were only five criteria for shortlisting and that those criteria are the requirements for the job as advertised. The only requirement which second respondent did not comply with, is the requirement of having a valid driver's licence.

[46] Having regard to the evidence of McLennan, which I accept, I am satisfied that a driver's licence was not an essential requirement for this job. It would have been different if the candidate were to be employed as a taxi driver or in a rural area. However, given the following facts:

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[37] see for example *PSA v Department of Correctional Services* [1998] 7 BALR 854 (CCMA) to which applicant has referred

[38] *SALSTAFF obo Swart / Cape Metro Rail* [1998] 11 BALR 1525 (IMSSA)

[39] *Spoornet (Joubert Park) v Salstaff – Jhb* [1998] 4 BALR 513 (IMSSA); Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) page 51

[40] *Limekaya / Department of Education* [2004] 5 BALR 586 (GPSSBC); *PSA obo Mothata / Department of Labour* [2004] 12 BALR 1486 (GPSSBC); *Mogorosi / South African Reserve Bank* [2005] 11 BALR 1176 (CCMA)

[41] in *Meyer v Iscor Pension Fund* (2003) 24 ILJ 338 (SCA)

[42] *PSA obo Mothata / Department of Labour* [2004] 12 BALR 1486 (GPSSBC); *Mogorosi / South African Reserve Bank* [2005] 11 BALR 1176 (CCMA)

46.1 the driving of a motor vehicle does not form part of the day to day duties attached to this post,

46.2 the only reason for insisting on a driver's licence is the fact that the person must be able to attend official meetings and go to school if necessary and

46.3 this position is not in a rural area but in the Cape Peninsula where one can with a cab taxi, if necessary at any time of the day or night get from any point to anywhere where one needs to go,

I am satisfied that the requirement of a driver's licence was not an essential, material requirement and that failure to have such a licence was no bar to being shortlisted or being nominated for appointment and being appointed. To insist under these circumstances that second respondent or any other candidate must have had a valid driver's licence and to set the appointment aside merely because of that reason, would be unduly technical. I am accordingly of the view that the fact that second respondent did not have a driver's licence, is completely immaterial.

THE ALLEGATION THAT APPLICANT WAS SUPERIORLY QUALIFIED

[47] I will accept that applicant has excellent academic qualifications and experience. However, the fact that an employee alleges that she was the most qualified candidate, is not a basis for finding that the employer in fact acted unfairly by promoting another candidate.[43]

[48] In fact, possession of superior qualifications is not in itself sufficient to lay a basis for an unfair labour practice claim by an unsuccessful candidate when the successful candidate satisfies the minimum requirements for the position.[44] The appointment or promotion of an inferior weaker candidate, does not necessarily mean that the employer has acted unfairly. In general an employer has the right to appoint or promote employees whom he

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[43] *Portnet v SALSTAFF obo Lagrange* [1998] 7 BALR 963 (IMSSA)
[44] *Western Cape Education Department / Dlikilili* [2000] 6 BALR 739 (IMSSA)

considers the best or the most suitable candidate.[45] Arbitrators should be reluctant to interfere with an employer's choice in promoting a specific candidate. The relative strengths and weakness of candidates for a position cannot in themselves prove that an employer committed an unfair labour practice by appointing or promoting an inferior weaker candidate, provided that the employer can provide a good reason for preferring the inferior weaker candidate.[46] The qualities required for some posts may be difficult to determine with precision. Inevitably a measure of subjectivity enters the selection process at some stage.[47]

[49] The relative inferiority of a successful candidate is only relevant if it suggests that the superior candidate was overlooked for some unacceptable reason or insofar as it may show that the employer has acted irrationally or in bad faith.[48] However, it should always be borne in mind that the appointment of an inferior weaker candidate, can in itself never be sufficient proof that an employers has acted irrationally. As long as an employer can logically explain why he has appointed a certain candidate, and no bad faith or ulterior motive on the part of the employer is shown, the employer's conduct in appointing the inferior candidate, cannot be regarded as irrational, even though the arbitrator might feel that he personally would not have made the appointment.[49]

[50] There may be reasons for preferring one employee to another apart from formal qualifications and experience.[50] The employer may attach more weight to one reason than another[51] and may take into account subjective considerations such as performance at an interview[52] and life skills.[53] The personality and attitude of candidates as manifested during interviews, also play an important roll. Inherent in the exercise of the managerial prerogative in the selection of a candidate for the vacant post is the exercise of a wide discretion.[54]

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[45] Du Toit et al *Labour Law through the Cases* LRA 8-14; *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) 582 per Landman P.
[46] *Van Rensburg v Northern Cape Provincial Administration* (1997) 18 ILJ 1421 (CCMA); *NEHAWU obo Thomas v Department of Justice* (2001) 22 ILJ 306 (BCA)
[47] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 52
[48] *Cullen v Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA)
[49] Du Toit et al *Labour Relations Law* (4th ed) 463
[50] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)
[51] *Rafferty v Department of the Premier* [1998] 8 BALR 1077 (CCMA)
[52] *PSA obo Dalton and another v Department of Public Works* [1998] 9 BALR 1177 (CCMA)
[53] *PSA obo Badenhorst v Department of Justice* [1998] 10 BALR 1293 (CCMA)
[54] *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) 582 per Landman P

[51] Despite the fact that applicant has superior academic qualifications and extensive library experience, I can find nothing irrational, capricious or arbitrary in the appointment of second respondent. It was the prerogative of the IC and first respondent to select the candidate which best suited the needs of the employer. The evidence of McLennan demonstrates that the IC had sound reasons for nominating second respondent as their first choice: Second respondent had all the right qualities which the IC was looking for, she had the right attitude and she scored the highest during interviews. For these reasons she was nominated. As far as academic qualifications are concerned, it is not as if second respondent was unqualified, because she did indeed comply with all the material minimum requirements[55] and this is all that was really required. What was more important was who impressed the IC the most during interviews: That person was second respondent and not applicant and that is why applicant was unsuccessful. Second respondent was simply the stronger candidate.

[52] Besides, even if applicant was a stronger candidate than second respondent when one compares their qualifications and experience, this would still not prove that an unfair labour practice was committed when second respondent and not applicant was appointed, because as a legal concept unfairness cannot exist in abstraction.

[53] In order to prove an unfair labour practice, an applicant in an unfair promotion dispute also needs to establish a causal connection between the irregularity 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.[56] This necessarily means that she would need to show she was the best of all the candidates who were considered for the position.[57] This is indeed an onerous task which is very difficult to prove.

[54] In placing information before me, the parties concentrated on applicant and second respondent. I know nothing about the experience, skills and qualifications of any of the other candidates who applied for the post. Hence, even if I, for argument's sake, leave

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[55] I do not regard a valid driver's licence as a material minimum requirement for this position.

[56] *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) 329 per Grogan A*; Minister of Safety and Security & others v Jansen NO* (2004) 25 ILJ 708 (LC) para 27

[57] *National Commissioner of the SA Police Service v Safety & Security Bargaining Council & others* (2005) 26 ILJ 903 (LC) para 10-12, 19

second respondent out of the picture for a moment, I cannot find on the available evidence that applicant was necessarily better than other candidates who had applied for the post. For this reason also, the fact that applicant has better qualifications than second respondent, is not sufficient to prove an unfair labour practice

THE ALLEGATION THAT SECOND RESPONDENT IS INCOMPETENT

[55] Applicant's allegation that second respondent is incompetent, stands in stark contrast with the evidence of McLennan, who testified that after having made enquiries with regard to second respondent's performance, she had only received positive comments and very good reports from everyone she had interviewed. The people interviewed by McLennan included managers who work with second respondent on a regular basis. The onus is on applicant to prove that her version is correct. There are no probabilities which favours applicant's version. At the most I can say that the probabilities in this regard are evenly balanced.

[56] Our law is very clear in this regard. Where there are two mutually destructive versions, as we have in this case, and where the probabilities are evenly balanced, a court or tribunal may only find for the party upon whom the onus rests, if it is satisfied on a balance of probabilities that the version of the party upon whom the onus rests is true and the other is false.[58] On the available evidence I cannot find that McLennan's version is false. Since the probabilities also do not assist me and since applicant does have a motive to lie in this regard,[59] I must accept McLennan's version and find that second respondent is not incompetent in her job.

[57] This issue however, is not really relevant, because even if I did accept applicant's evidence that second respondent is actually incompetent, this would not have assisted applicant in proving that an unfair labour practice was committed. Applicant concedes that she did not know second respondent before the interviews and that her allegations that

[58] *National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 189*

[59] For various reasons applicant can hardly be described as an objective witness when it comes to giving evidence about the skills and competence of second respondent. Second respondent was not only successful in being appointed in the job which applicant feels she should have been appointed in, but in addition second respondent is now applicant's supervisor. It also became very clear to me during the arbitration hearing that applicant and second respondent do not get along very well at all. Under these circumstances, the truthfulness and reliability of applicant's evidence regarding second respondent's competence and skills, must necessarily be suspect and approached with caution.

second respondent is incompetent is based on her interactions with her as from January 2006. One cannot, when assessing the rationality and fairness of an employer's decision to appoint a certain candidate, rely on things which the candidate had done after having been appointed. The competence of the candidate must be evaluated with reference to what was before the IC when the candidate was interviewed. Based on second respondent's curriculum vitae and her performance during the interviews, there was no reason why the IC should have doubted second respondent's competence. She had the necessary qualifications as well as practical experience and based on the information before the IC at the time of the interviews, it was perfectly in order to appoint her given the fact that she had impressed the IC as the strongest and best candidate, displaying all the characteristics which the IC was looking for.

THE UNFAIR DISCRIMINATION CLAIM

[58] In further support of her claim that she was unfairly treated, applicant claimed that she was unfairly discriminated against on the basis of her race. Unfair discrimination based on race 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**[60]
>
> (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.

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

(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[61]

(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

[59] Unfair discrimination consists of at least two elements namely discrimination and unfairness. In fact, in *Harksen v Lane*[62] it was held that there is a three-stage test for establishing whether there was unfair discrimination namely:[63]

- 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?[64]

The onus in unfair discrimination cases

[60] 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.[65] One of the ways in which an employer can show that the discrimination was not unfair, is

[61] Section 6 of the Employment Equity Act No 55 of 1998

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

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

[64] 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

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

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.[66] Affirmative action measures which comply with section 9(2) of the Constitution, are not presumptively unfair.[67]

The first stage of the enquiry – Was there differentiation which amounts to discrimination?

[61] Before one can even think of burdening an employer with an onus to prove that there was no unfair discrimination, it should first be established whether there was indeed any discrimination.

[62] The very first step in an unfair discrimination dispute is therefore to determine whether discrimination[68] had in fact taken place. Neither the Constitution, nor the EEA contains any definition of the word "discrimination". Discrimination at the very least implies that there is some form of differentiation between people or that they are treated differently.[69] Without differentiation between people, there can therefore be no discrimination. Once it is established however that there was differentiation, this however does not automatically imply that there was indeed discrimination. In order to qualify as discrimination the differentiation needs to go further in that it must imply a pejorative meaning relating to the unequal treatment of people based on attributes or characteristics attaching to them.[70] Professor Grogan explains this as follows:

> "The Constitutional Court has held that 'discrimination' denotes a decision that has the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner. [*Cf Harksen v Lane* 1998 (1) SA 300 (CC) para 47] This means, that, to pass the first test, an employee must not only prove that he or she was treated differently from others, but also that the different treatment had the potential referred to by the Constitutional Court. Not every form of difference in treatment will have these effects…..However, the first leg of the test means at least that the employee must prove that he or she has been treated less generously than his or her colleagues by being denied benefits which the others were granted. In this sense discrimination is

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[66] section 6(2)(a) of the Employment Equity Act No 55 of 1998; Dupper & Garbers *Essential Employment Discrimination Law* page 85 and further

[67] *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

[68] It is irrelevant at this stage to determine whether the discrimination was fair or unfair.

[69] Du Toit et al *Labour Relations Law: A Comprehensive Guide* (5th ed) 577; *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC)

[70] Du Toit et al *Labour Relations Law: A Comprehensive Guide* (5th ed) 579; *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) at par 31

> relative: its existence can be established only by comparing the situation of the complainant with the situation of others with which he or she can reasonably be compared…" [71]

[63] It is however important to realize that in the employment context, "discrimination" has a more precise meaning than that ascribed to it in the Constitutional context in *Harksen v Lane supra*. In *HOSPERA obo Venter v SA Nursing Council*[72] Steenkamp AJ noted that the EEA, in terms of its interpretation clause, must be interpreted *"in compliance with ..the International Labour Organisation Convention (No 111) concerning "Discrimination in Respect of Employment and Occupation*".

[64] In the same case the Labour Court further held that given the definition of discrimination contained in Article 1 of Convention 111, discrimination for purposes of section 6(1) of the EEA should similarly be interpreted as "any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".[73] Thus not every differentiation would amount to discrimination. The law anticipates that individuals and groups may be regulated differently without it being unfair or discriminatory[74] So for example it was pointed out in *Germishuys v Upington Municipality*[75] that:

> "any employer which chooses one candidate amongst a group of several for a position of employment, of necessity 'discriminates' against the unsuccessful candidates…More properly, it would be correct to say that the employed 'differentiated' rather than 'discriminated'".[76]

[65] According to Professor Du Toit, the effect of using the definition of discrimination as contained in Article 1 of Convention 111, is that:

> "Rather than requiring a broad inquiry as to whether the employer's conduct amounts to unequal treatment of a 'pejorative' nature, the question is rather whether it falls within the terms of the definition without necessarily making reference to a comparator or to its impact on the complainant's dignity".

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[71] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 893
[72] [2006] 6 BLLR 558 (LC) at pars 30-32
[73] para 31.
[74] *Middleton and others v Industrial Chemical Carriers (Pty) Ltd* [2001] 6 BLLR 637 (LC) at par 9
[75] [2001] 3 BLLR 345 (LC)
[76] at para 81

Application of the above legal principles

[66] Having established how one determines whether there was discrimination, I now intend to apply these principles and determine whether I can, on the available evidence, find that there was any form of discrimination. During her evidence and arguments, applicant relied on several arguments in order to persuade me that she had been discriminated against. I will briefly deal with each of these arguments under separate subheadings.

The alleged statement made by Bunding

[67] The only direct evidence which applicant could tender in support of her allegation that she was discriminated against, is her allegation that Bunding had told her that she was the best candidate but that because of her race she could not have been appointed and that in accordance with first respondent's affirmative action policies, the IC had no choice but to appoint second respondent. Bunding refused to come and testify and accordingly I only have the hearsay evidence of applicant before me in support of this allegation. As opposed to this evidence of applicant, I have the evidence of McLennan, who was part of the IC and who testified that:

67.1 Second respondent was not nominated because of her race and applicant was simply not the best candidate. During the interview process, the issue of affirmative action was completely ignored and candidates were scored on their merits. Second respondent scored the highest on the merits and only thereafter, was the issue of affirmative action considered.

67.2 She finds it strange that Bunding would have said to applicant what applicant is alleging he had said: Not only because McLennan knows that this is not what had happened during the process, because she was there in person, but also because Bunding had told McLennan that although applicant had interrogated him as to what had transpired during the process, he had refused to divulge any information to applicant.

[68] I have no reason to doubt McLennan's version of what had happened during the interview meeting. In fact, McLennan made a very good impression on me as a witness. There were no inherent improbabilities, unsatisfactory features or unconvincing explanations in her

version. I accept her version in its entirety. I find it improbable that Bunding would have said to McLennan that he had said nothing to applicant, whereas on applicant's version, he had told applicant that applicant was the best candidate and was simply not nominated because of her race. In the circumstances I have strong reservations as to whether Bunding really did make this statement to applicant.

[69] Besides, if Bunding really did make the statement, one wonders why Bunding, who is no longer employed by first respondent, was so unwilling to come and testify on behalf of applicant to repeat this alleged statement under oath. However, not much turns on the statement which Bunding had allegedly made to applicant. Even if I am wrong, and even if Bunding did make this statement to applicant, it does not necessarily mean that his statement was the truth. Bunding did not give evidence before me under oath and his credibility and reliability could therefore not be tested by means of cross-examination. Apart from the possibility that he may possibly have had motives for lying, which could have been exposed had he testified before me, there may be other factors which could have been exposed during cross-examination which could possibly have affected the reliability of the statement, namely possible poor recollection on the part of Bunding when he made the statement or even a misunderstanding between himself and applicant. Since none of these issues could be tested through cross-examination, much reliance cannot be placed on the alleged statement of Bunding, if indeed he ever made such a statement.

[70] McLennan is the only person who could really give me a reliable account of what had happened at the meeting. She was present at the meeting, and unlike Bunding, she testified before me under oath, was available for cross-examination and was indeed cross-examined by applicant. As already mentioned earlier herein, she made a favourable impression on me and I could find nothing inconsistent and improbable in her version. Her version must therefore necessarily weigh much heavier than the alleged statement which Bunding had made to applicant. On this aspect it is therefore not difficult for me to choose between the version of McLennan and that of applicant. I accept McLennan's version of what had transpired at the interviews. On this version, the statement of Bunding, is simply not the truth. Applicant's reliance on the alleged statement made by Bunding in support of her claim that she was discriminated against, is therefore unsound and completely without merit. It is therefore not surprising then that in her written heads of argument, applicant did not even pursue this argument.

The appointment of a black candidate with inferior qualifications

[71] The second reason for applicant's claim that she was discriminated against, is based on circumstantial evidence. During her evidence, applicant, as I understood her argument, implied that the mere fact that she is white and has superior qualifications but was unsuccessful, whereas second respondent who is black was successful, confirms that second applicant was appointed because of her race.

[72] In *Onderlinge Assuransie-Assosiasie Bpk v De Beer*,[77] it was held that when dealing with circumstantial evidence, and if more than one inference can be drawn from the evidence, then the court must select the most plausible inference. On the available evidence, I simply cannot find that the most plausible inference to be drawn from these circumstances, is that second respondent was necessarily appointed because of her race and/or that applicant was necessarily not appointed because of her race. Had qualifications and experience been the only factors to be taken into account in selecting a successful candidate for promotion, it would have been easier to draw the inference that second respondent was appointed because of her race and applicant not.

[73] However, precisely because employers are entitled to take into account more than experience and qualifications when selecting the best candidate, this makes it almost impossible to find that merely because a white person with superior qualifications was unsuccessful whereas a black person with inferior qualifications was successful, therefore there was discrimination. In this regard I have already emphasized that possession of superior qualifications is not in itself sufficient to lay a basis for being appointed, that there may be reasons for preferring one employee to another apart from formal qualifications and experience, that employers may attach more weight to one reason than another, that employers may take into account subjective considerations such as performance at an interview and life skills and that personality and the attitude of candidates can play an important roll.

[74] The truth is that any of these considerations or a combination of them could have been the reason for preferring second respondent who happened to be black to applicant who happened to be white and who had superior qualifications. Given all these different variables and factors which can play a roll in selecting suitable candidates for promotion, it is impossible to draw the inference that merely because applicant had superior

[77] 1982 (2) SA 603 (A) at 614E-H

qualifications and experience in librarianship, therefore, she should have been appointed and therefore the only reason why she was unsuccessful in her application for appointment is because of her race. The evidence of McLennan in any event leaves no doubt that second respondent was successful and applicant not, simply because second respondent outscored applicant during interviews and that race had nothing to do with second respondent receiving more points during interviews than applicant. Applicant may be a highly qualified librarian, but the post is much more of a managerial position than that of a librarian. I am satisfied that the reason for not appointing applicant had nothing to do with her race, but everything to do with the fact that she was simply not the best candidate for the job.

Alleged differentiation during shortlisting

[75] In her written closing argument, applicant advanced a further reason why she believes that she has proved discrimination. She argued that the fact that second respondent did not comply with the requirements for shortlisting, but was nevertheless shortlisted, amounts to a difference in treatment between second respondent and applicant since applicant had to meet all the requirements in order to be shortlisted. This argument is certainly very original, but completely defiant of all logic and not supported by the facts. The only requirement which second respondent did not comply with was the one relating to a valid driver's licence. Had applicant or any other candidate also not had a driver's licence and had he or she for that reason not been shortlisted, then one would have been able to say that second respondent was treated differently and that there was discrimination. There is however no factual basis for arguing or finding that applicant would not have been shortlisted, had she also not had a driver's licence.

[76] There is also no factual basis for finding that there were indeed other candidates who did not have a valid driver's licence and who were because of that not shortlisted. To argue that applicant and or other candidates, were required to comply with all the shortlisting criteria in order to be shortlisted, whereas second respondent was not, is therefore simply factually incorrect and I cannot see how applicant can prove discrimination through this argument, which clearly has no factual basis.[78]

[77] In my view the requirement of a driver's licence was a very technical requirement, which served no practical purpose since the ability to drive a motor vehicle is not an inherent

requirement of the job and since the position is in an area where cab taxis are freely available at all times. In the circumstances I believe that it would have been irrational not to shortlist a candidate merely because she did not have a driver's licence. This applied to second respondent and it would also have applied to applicant, had she not had a driver's licence. Shortlisting candidates who did not possess a valid driver's licence, could and did therefore not constitute differentiation or discrimination. It was simply based on common sense and not being unduly technical.

Final remarks on discrimination

[78] On the available evidence I am unable to conclude that applicant was treated differently from other candidates[79] or that she was subjected to "any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" or that she was treated "less generously" than any of the other candidates. I am also unable to find that second respondent was preferred over applicant on the basis of her race or any other listed or non-listed discriminatory grounds. The nomination and appointment of second respondent was based on merit. I am satisfied that applicant has not proved any form of direct or indirect discrimination, let alone unfair discrimination.

[79] In support of her claim applicant also relied on *McInnes v Technikon Natal*[80] where the Labour Court intervened in a promotion dispute where a black candidate without any lecturing experience was appointed as a lecturer instead of a white female who did have such experience. Applicant placed great emphasis on the Court's finding that while it is reluctant to second guess an employer's decision, it will do so where it is found that the employer's affirmative action policy, read properly, was not applied.[81] The *McInnes* case does however not assist applicant at all because the facts in the *McInnes* case, and this case, are completely different.

[80] In the *McInnes* case, it was common cause that McInnes was discriminated against. It was common cause that McInnes who was by the employer's own admission, actually the best candidate, was not appointed merely because it was felt that appointment of a black candidate would better serve the employer's affirmative action targets. The only question

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[78] A Court or tribunal must make findings based on objective facts placed before it through evidence and not on speculation or conjecture. *Cf Macleod v Rens* 1997 (3) SA 1039 (E) at1048
[79] including second respondent
[80] (2000) 21 ILJ 1138 (LC)
[81] at 1150H

for the Court to decide in the *McInnes* case, was whether the discrimination, which was admitted, was unfair. In order to do that the Court had to examine whether the affirmative action policy of the employer complied with legislation and if it did, whether it was applied correctly. It was on this second score that the employer failed when the Court held that the affirmative action policy was not applied correctly, which resulted in a finding that the discrimination, which was admitted, was unfair.

[81] There are at least two important distinctions between the *McInnes* case and this case:

81.1 Whereas it was common cause in the McInnes case that McInnes was the best candidate, I have found that second respondent and not applicant, was the best candidate.[82]

81.2 Whereas it was common cause in the *McInnes* case that McInnes was discriminated against, it was in dispute whether applicant was discriminated against and I have indeed found that no discrimination had taken place and that applicant was not appointed simply because second respondent was a better and stronger candidate.

[82] The enquiry which the Court conducted in the *McInnes* case into the fairness of the discrimination by enquiring whether the employer's affirmative action policy complied with legislation and whether the policy was correctly applied, is therefore unnecessary in this case, because before one can get to that enquiry, a finding first needs to be made that there was indeed discrimination, which finding I cannot make on the available evidence. Accordingly I am satisfied that applicant's reliance on the *McInnes* case, is completely misplaced.

CONCLUSION

[83] That applicant seriously believes that she was the best candidate for the position, seems clear, but that is not the test which I must apply when determining whether I may interfere with the decision of first respondent not to promote applicant. In this regard I myself could not have put it any better than the following remarks made by Commissioner Brand in a similar case:

[82] I have already explained that in order to identify the best candidate, much more than academic qualifications are involved. Many other factors, such as relevant practical experience and subjective factors such as the impression made during an interview, also play an important roll

> "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 in their own minds, either with or without the encouragement of others form expectations as to their suitability. These expectations are however not ' legitimate expectation' 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."[83]

[84] The discretion to select candidates for promotion, is a wide discretion which had, in the case of educators, been entrusted to Interview Committees and Provincial Departments of Education. As long as this discretion is exercised in good faith in a rational and reasonable manner, it is not permissible for arbitrators to intervene. I have no doubt that applicant is a good employee, who is passionate about her profession. That is commendable. She should however accept that the IC was of the view that she was not the best and strongest candidate for this particular position and that for that reason she was not appointed. In exercising this discretion, there is no factual basis to suggest that there was capricious, irrational or arbitrary conduct on the part of either the IC or first respondent or that they had unfairly discriminated and I am accordingly not permitted to interfere with their decision.

AWARD

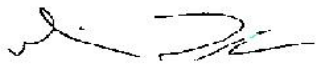
In the premises I make the following order:

1. No unfair conduct, unfair discrimination or any other legally recognized ground of review to justify interference with the decision of the Interview committee was proved with regard to the process followed in shortlisting candidates, interviewing candidates and making a recommendation to first respondent as regards the filling of post number OBO05/2005, being that of Resource Centre Coordinator at EMDC Metropole East. Similarly no unfair conduct, unfair discrimination or any other legally recognized ground

[83] per Brand C in *Jack / Department of Labour* [2000] 4 BALR 373 (CCMA) at 375

of review to justify interference with the decision of the first respondent, was proved with regard to the appointment of second respondent by first respondent.

2. The recommendation of the Interview Committee to appoint second respondent in the aforesaid position and the decision of first respondent to make the appointment, is declared to be fair, lawful and valid and is hereby confirmed.
3. Applicant's claims are dismissed.
4. No order as to costs is made.



adv D P Van Tonder

Arbitrator/Panellist: ELRC