IN THE EDUCATION LABOUR RELATIONS COUNCIL

HELD AT CAPE TOWN

Case No PSES 285-07/08WC

In the matter between

N ABRAHAMS Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 23 July 2009

ARGUMENTS: 11 August 2009

DELIVERED: 13 August 2009

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

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This dispute concerns an alleged unfair labour practice relating to promotion. The arbitration hearing in this matter took place in Cape Town on 23 July 2009. Applicant was represented by Mr. Tassiem from NAPTOSA, whereas respondent was represented by an employee Mrs. Newat. 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.

BACKGROUND

[3] This is a promotion dispute involving post number 0062 at Queens Park High School in Woodstock, being the post of HOD at post level 2, advertised in vacancy list 1 of 2007. Applicant and Mrs. Fatima Jainudien Khan (hereinafter referred to as "K") together with three other candidates applied for appointment to this position. At the time when she applied for appointment, applicant was employed by respondent at Queens Park High School on post level 1. K was employed at post level 1 elsewhere. Only applicant and K were interviewed. In consultation with respondent, the governing body only nominated two candidates. Applicant was the governing body's first nominee and K was the second nominee. Respondent decided to appoint K as from 1 January 2008. Applicant felt aggrieved and referred a dispute to the ELRC. On 31 December 2008 K resigned and the position is currently vacant.

[4] Before me respondent admitted that applicant was the best of all the candidates who applied for the position. Respondent claims that the only reason why applicant was not appointed was because of affirmative action. It claims that K is an Indian female and applicant a Coloured female. Respondent argued that although Indian females and Coloured females were both underrepresented at provincial level when the appointment was made, Coloured females were overrepresented at Queens Park whereas Indian females underrepresented and that therefore it was fair to appoint K even though applicant was the stronger candidate.

SUMMARY OF EVIDENCE

Evidence on behalf of applicant

[5] **David Cupido** has 42 years experience as an educator. He also has extensive experience as school principal. He has been employed at Queens Park High since 2003 as educator and mentor for the school principal. During 2007 he was the secretary of the school governing body. He was on the shortlisting and interview committee of the governing body for this post. After the interviews and perusal of the cv's, it was clear that applicant was the stronger candidate. In fact there was a significant gap between applicant and K. While K was not completely unsuited for the position she did not have any experience in timetabling and neither did she have senior management team experience and proved excellence in administrative, managerial and organisational skills. These were advertised criteria. Applicant on the other had excellent experience in all the advertised criteria. Applicant scored the highest during interviews.

[6] K is in his view not Indian, but a Coloured Muslim. She has the appearance of a Coloured person and not of an Indian. While the majority of the educators at the school are Coloured, the deputy school principal is a White female and one HOD is a White male. In addition the school also has an Indian female educator on post level 1 namely Mrs Govender, who was already employed at the school at the time of the interviews during 2007. After the process was completed he personally delivered all the required documents to the WCED.

Evidence on behalf of respondent

[7] **Nomalungelo Ngema** is employed by respondent as assistant director in the diversity management department. It is the function of this department to make a recommendation to the provincial head of department about employment equity whenever an appointment needs to be made. Mr. A Meyer who has now resigned made the recommendation in this case to rather appoint K instead of applicant. This decision was based on employment equity.

[8] At the time when Meyer made his recommendation there were 1200 Coloured females employed on post level 2 at provincial level whereas the target was 1227. There were 16 Indian females employed on post level 2 at provincial level, whereas the target was 23. Hence both Indian females and Coloured females were underrepresented. The targets are based on the last census. At Queens Park Coloured females and Coloured males were overrepresented and it was necessary to appoint the Indian candidate in order to promote representivity at the school.

[9] **Harry Wyngaard** is employed as deputy director in HR. He has delegated authority from the provincial HOD to make appointments. He dealt with the appointment of K. When he makes an appointment he looks at the recommendation from the employment equity department, the minutes of the governing body, the cv's and applications. He never compares the cv's of the candidates in order to determine who is the strongest candidate. The purpose of perusing the cv's is simply to ensure that the candidates comply with the minimum criteria for the post. He only peruses the score sheets kept by the governing body if scores are mentioned in the minutes. In this case the governing body did not mention scores in the minutes and accordingly he did not peruse the score sheets. He never attempted to ascertain whether the gap between applicant and K was significant, because a governing body would not recommend a candidate who is not suitable for the position.

CLOSING ARGUMENTS

[10] I do not intend to summarise the written heads of argument in detail, but will deal with them, if and where necessary during my analysis of the evidence.

ANALYSIS

INTRODUCTION

[11] The Labour Relations Act No 66 of 1995[1] requires employers to treat employees fairly when they apply for promotions.

[1] hereinafter referred to as the "LRA"

[12] 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"**

[13] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[2] The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee. Fairness to both means the absence of bias in favour of either.[3] In deciding whether conduct relating to a promotion was unfair, an arbitrator is in a similar position to that of an adjudicator called upon to review a decision made by a functionary or a body vested with a wide statutory discretion.[4] Therefore in order to show unfairness relating to promotion, an employee needs to show that the employer, in not appointing him or her and appointing another candidate, acted in a manner which would ordinarily allow a Court of law to interfere with the decisions of a functionary by proving for example that the employer had acted irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud, failed to apply its mind or unfairly discriminated.[5]

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[2] *National Education Health & Allied Workers Union v UCT* (2003) 24 ILJ 95 (CC) par 33
[3] *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 (4) SA 577 (A) 589C-D; *National Education Health & Allied Workers Union v University of Cape Town supra para* 38
[4] *PAWC (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) 771
[5] *Ndlovu v CCMA & others* (2000) 21 ILJ 1653 (LC); Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 41; *SA Municipal Workers Union on behalf of Damon v Cape Metropolitan Council* (1999) 20 ILJ 714 (CCMA) 718; *Benjamin v University of Cape Town* [2003] 12 BLLR 1209 (LC) at 1223-1224; *Marra v Telkom SA LTD* (1999) 20 ILJ 1964 (CCMA) 1968

[14] The main issue in dispute 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**[6]
>
> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

> **6 Prohibition of unfair discrimination**[7]
> (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.
>
> (2) It is not unfair discrimination to-
> *(a)* take affirmative action measures consistent with the purpose of this Act; or
> *(b)* distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.
> (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

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

THE TEST TO ESTABLISH UNFAIR DISCRIMINATION

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

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

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

[16] Discrimination can be direct or indirect. The motive, purpose or intention of the discrimination is irrelevant to the question of whether there has been discrimination, either direct or indirect.[11] Given the fact that applicant's race and/or gender played a significant role in her non-appointment, I am satisfied that that there are sufficient grounds to say that there was discrimination based on race and/or gender. In fact respondent made a formal admission at the commencement of the hearing that there was indeed discrimination. 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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[8] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) para 53
[9] also see Cheadle et al *South African Constitutional law: The Bill of Rights* 4-32
[10] In the labour context however, there is no scope for separating the inquiry in respect of the 'unfairness' from that in respect of 'justifiability' *Cf* Du Toit *Labour Relations law* (5th ed) 596
[11] *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at para 43

Second stage of the enquiry – was the discrimination unfair?

[17] The next stage of the inquiry is to determine whether the discrimination was unfair. Once an employee or job applicant in an unfair discrimination claim alleges sufficient facts from which an inference of unfair discrimination can be drawn, the onus is on the employer to prove on a balance of probabilities that the discrimination was not unfair.[12] One of the ways in which an employer can prove that the discrimination was not unfair, is to prove that the discrimination was necessary in order to implement and promote affirmative action measures consistent with the purpose of the Employment Equity Act.[13] Affirmative action measures which comply with section 9(2) of the Constitution and section 6(2)(a) of the Employment Equity Act, are not presumptively unfair[14] and constitute a complete defence to a claim of unfair discrimination.[15] Respondent is indeed arguing that in order to promote representivity in its workplace, it was justified, in terms of its employment equity plan and policy, to refuse to appoint applicant since her appointment would not positively have influenced its employment equity goals.

[12] Section 11 of the Employment Equity Act No 55 of 1998; Du Toit et al *Labour Law through the Cases* EEA-36
[13] section 6(2)(a) of the Employment Equity Act No 55 of 1998; Dupper & Garbers *Essential Employment Discrimination Law* page 85 and further
[14] *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC) par 32; Baqwa *The Resolution of Affirmative Disputes in the light of Minister of Finance & another* (2006) ILJ 67
[15] Dupper & Garbers *Essential Employment Discrimination Law* at 85

THE PURPOSE OF AFFIRMATIVE ACTION MEASURES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDICIAL SCRUTINY OF AFFIRMATIVE ACTION MEASURES

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

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

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

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

The requirement of Fairness

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

The requirement of Rationality

[26] To act rational means to act in a manner "based on reason or logic".[37] 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.[38]

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

[29] Pretorius, Klinck & Ngwena *Employment Equity Law* at 9-59; *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE) para 40

[30] To act unreasonable means to take a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. See *Council of Civil Service Unions v Minister for the Civil Servic*e [1985] AC 374 at 408

[31] To act rational means to act in a manner "based on reason or logic". *Cf Oxford English Dictionary.*

[32] Acting capriciously was defined in *Mail, Trotter & Co v Licensing Board, Estcourt* (1903) 24 NLR 447 at 452 as being the opposite of exercising it reasonably

[33] The word "arbitrary" was defined in *Beckingham v Boksburg Licensing Board* 1931 TPD 280 at 282 by Tindall J as meaning "capricious or proceeding merely from the will and not based on reason or principle".

[34] or the manner in which it is applied

[35] *Baxter v National Commissioner, Correctional Services* [2006] 9 BLLR 844 (LC)

[36] *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

[37] Oxford English Dictionary

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

[27] 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. [39]

[28] 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.[40] Where an employer does have an affirmative action policy, such policy must comply with legislation and must be applied correctly.[41]

[39] *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T) 1031
[40] 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)
[41] *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC)

The requirement of Proportionality

[29] Proportionality requires the balancing of competing interests.[42] 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.[43] 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.[44] 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.[45] 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.[46] Yet there must be some degree of proportionality, based on the particular context and circumstances of each case.[47]

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[42] 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

[43] 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

[44] 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;

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

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

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

FAIRNESS, RATIONALITY, AND PROPORTIONALITY OF RESPONDENT'S CONDUCT

[30] Applying the above legal principles, I now intend to analyse the fairness, rationality and proportionality of the affirmative action measures applied by respondent in arriving at its decision not to appoint applicant. Before doing so, I need to mention that because restitutionary measures such as affirmative action lie at the heart of our constitutional value system of substantive equality, my approach is not to subject affirmative action measures to a too strict level of scrutiny. I allow employers considerable latitude to exercise their prerogative in order to implement affirmative action with the aim of redressing imbalances in the workplace.

[31] This lenient approach may however not allow me to abrogate my duties as arbitrator and turn a blind eye to irrational and unfair conduct. After careful consideration of the affirmative action measures which respondent has applied in this case and the manner in which those measures were applied, I indeed have several concerns about respondent's refusal to appoint applicant and I will now proceed to discuss these concerns under different subheadings.

I Promoting a weaker Indian female over a stronger Coloured female in the name of affirmative action

[32] I accept that the employment equity plan and policy of the WCED promotes employment equity at departmental (provincial) as well as at institutional (school) level.[48] Furthemore the Employment Equity Act imposes an obligation on the HOD and on governing bodies to promote representivity in order to redress imbalances of the past when making appointments.[49] I also accept that the Employment Equity Act emphasizes the need to ensure the equitable representation of people from designated groups[50] in all occupational levels and categories in the workforce.[51]

[33] I further accept that there is a need to promote representivity amongst designated groups. In this regard our courts and arbitrators have 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.[52]

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[48] The employment equity plan and policy of the WCED are both available on the website of the WCED at http://wced.wcape.gov.za/circulars/index-circmins.html. This first plan was published and submitted during 2002. The second plan for 2008 to 2012 was published and submitted during 2007. The employment equity policy directive of the WCED was published on 17 January 2006 in WCED Minute No HRD/0003/2006, also obtainable from the same website.

[49] Sections 6 and 7 of the Employment of Educators Act No 76 of 1998

[50] Designated groups" are defined in section 1 as Black people, women and people with disabilities. And "Black people" is defined as a generic term which means Africans, Coloureds and Indians.

[51] Section 2 of the EEA

[52] *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).

[34] In order to promote representivity amongst designated groups, it is best to use the test of representivity (namely the equal representation of all designated groups) in all occupational categories and levels in the workforce.[53] Dupper & Garbers who supports this test, explains it 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".[54]

[35] This indeed means that affirmative action may require that in some cases it might be necessary to appoint a weaker Indian female over a stronger Coloured female depending on the profile in the workplace. For the following reasons I am however not persuaded that it was rational, fair and proportional to promote a weaker Indian female over a stronger Coloured female in this case.

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[53] 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

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

[36] At the time when respondent made its decision, both Coloured females and Indian females were underrepresented on provincial level at post level 2. What is more is that respondent only had to appoint seven more Indian females on post level 2 before it would reach its target for Indian females at post level 2 whereas it still had to appoint 27 more Coloured females at post level 2 before it would reach its target for Coloured females on post level 2. This factor alone seems to indicate that any decision to promote a weaker Indian female over a stronger Coloured female was completely irrational, arbitrary and unfair.

[37] In previous arbitration awards I have emphasized the need for integration at school level and have held that it is not acceptable that we are still sitting with schools where the entire educator corps consists of only one racial group.[55] Queens Park High can however not be described as one of those schools in our province where all the educators belong to one racial group. While it is true that the majority of the educators at the school are Coloured, the management team consisted of a Coloured male as school principal, a White female as deputy school principal and a White male as HOD. There had accordingly been some integration at the school already. Blindly applying affirmative action at all costs without consideration of other factors such as merit, and in the interests of the learners, is not what affirmative action is supposed to be about.

[55] *Maans v Western Cape Education Department and Keunecke*(Case No PSES 229-08/09, delivered on 26 February 2009); Coetzee *v Western Cape Education Department* (Case No PSES 221-08/09, delivered on 14 April 2009).

[38] This brings me to the representation of Coloured females at management level at the school. At the time when the decision was made, there were no Coloured females in management at the school. Given the fact that:

38.1 Coloured females were not represented at all at management level, and

38.2 Coloured females were still underrepresented at provincial level on post level 2, and

38.3 Coloured females represents 23.8% of the ecomically active population in the Western Cape, whereas Indian females only represent 0,3% of the economically active population in the Western Cape[56], and

38.4 applicant was the stronger candidate and K was the weaker candidate,

it would have made more sense to appoint applicant in the position instead of K. Taking into account these considerations, the decision to appoint K seems irrational, capricious, illogical and unfair. The inescapable inference once again is that respondent was completely blinded by employment equity quotas without any consideration of other relevant factors.

[56] See respondent's Employment Equity Plan for the representation of the various designated groups amongst the comically active population in the last census

[39] Cupido's evidence that the school had at all material times employed an Indian female namely Ms Govender at post level 1, was never challenged during cross-examination. Later when respondent presented its case it attempted to contradict Cupido's evidence on this issue by pointing out that according to the profile of the school as contained in respondent's records, Ms Govender is in fact a Coloured female. This respondent is not permitted to do. It is an essential part of the administration of justice that a cross-examiner has a responsibility to cross-examine a witness if it is intended to argue later that the evidence of the witness should be rejected. The witness' attention must first be drawn to a particular point on the basis of which it is intended to suggest that he is not speaking the truth and thereafter be afforded an opportunity of providing an explanation.[57] A failure to cross-examine may, in general, imply an acceptance of the witness's testimony.[58]

[40] The fact that respondent's computer records indicate that Ms Govender is Coloured is in any event not conclusive proof that she is indeed Coloured. Cupido who testified before me knows Govender very well and has worked with her foe many years. He was convinced that Govender is Indian. I have no reason to doubt his evidence. Respondent's computer records are not necessarily reliable because we all know that computer entries are made by humans and humans very often make mistakes when capturing data on computers. For purposes of this award I thereof accept that Govender is indeed Indian.

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[57] *Zwart & Mansell v Snobberie (Cape) (Pty) Ltd* 1984 (1) PH F19 (A)
[58] *Small v Smith* 1954 (3) SA 434 (SWA) at 438; confirmed in *President of the Republic of SA v SA Rugby Football Union* 2000 (1) SA 1 (CC) at paras 61-63 and *S v Boesak* 2001 (1) SACR 1 (CC) para 26

[41] The fact that Govender is Indian, makes respondent's version that an Indian female had to be appointed at the school in order to promote diversity at the school even more absurd. According to the 2001 census, Indians represent only 0.9 % of the economically active people in the Western Cape whereas Coloured people represent 51,2% of the economically active people in the Western Cape. The percentage for Indian women and Coloured women respectively were 0,3% and 23.8%.[59] Given the fact that the Indian group is such a small minority in the Western Cape compared to the Coloured group, it is absurd to argue that where an Indian female is already employed at a particular school, it is necessary to appoint another Indian female rather than a Coloured female at the same school, especially where the Indian female is the weaker candidate.

[42] The fact that respondent might not have been aware at the time that Ms Govender is an Indian female, does not assist respondent either because our Courts have held that where a decision maker was not aware of material facts when he made his decision, this in itself is sufficient reason to conclude that his decision was unlawful and invalid.[60] The fact that Ms Govender is Indian is a material fact that should have been before respondent when it made its decision. The fact that respondent was not aware of this important factor, which should in my view have made a difference to its decision, is all the more reason for finding that respondent's decision was unlawful and unfair.

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[59] See respondent's Employment Equity Plan

[60] see *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) par 47; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 25

II A significant gap between the two candidates

[43] The Employment Equity Act imposes on all employers the duty to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.[61] It also states that a person may be suitably qualified for a job as a result of any one of, or any combination of that person's formal qualifications, prior learning, relevant experience or capacity to acquire, within a reasonable time, the ability to do the job[62]. The appointment of an unqualified or incompetent person is however never permitted in the name of affirmative action.[63]

[44] When applying affirmative action measures there is generally no need to apply affirmative action only in those cases where the two candidates are relatively equal in qualification, experience and ability. A gap between the skills, experience and qualifications of a person who is preferred and appointed in the name of affirmative action, over another with superior qualifications and experience, is indeed permitted, and such an appointment will not be seen as irrational, merely because of the gap between the two candidates.[64] Where however the gap between two candidates is too wide, appointment of the weaker candidate in the name of affirmative action will be irrational.[65]

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[61] Section 15(1)
[62] Section 20(3)
[63] *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T)
[64] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2nd ed, Juta) 119; *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T) 1033H; *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council* [2000] 21 ILJ 1119 (LC) par 31
[65] *Settlers Agricultural High School v Head of Department : Department of Education, Limpopo Province* [2002] JOL 10167 (T), Case No 16395 / 02

[45] In respect of the permissible gap between two respective candidates, respondent has however limited itself in its employment equity plan by having provided that affirmative action may only be applied as follows:

> "All appointments will be based on the inherent requirements of the position. However, where there is **an insignificant gap** between possible candidates in terms of merit/performance, preference will be given to an employee from a designated group, should the appointment contribute to the improvement of the representation of specific designated groups".[66] (emphasis added)

[46] Recently the Supreme Court of Appeal interpreted this clause as follows in the **Point High School**-case:

> "It seems that the word 'insignificant' may have been unfortunately chosen, but it must obviously be construed in its context and bearing in mind the fundamental principles of employment equity. A difference in actual ability between two candidates where one is from a so-called 'designated group', though marked, may be rendered insignificant by the potential of the candidate from the designated group. In other words the benefit of employing such a candidate may only become perceptible with training and experience. I do not intend to embark upon an analysis of what precisely is meant by 'insignificant' in this particular passage, but the general intention behind the precept is plain. **Employment equity provisions should only prevail in circumstances where there is approximate equality between the ability or potential ability of the two candidates.**" [67] (emphasis added)

[47] Cupido testified that there was a significant gap between applicant and K. He testified that while K was not completely unsuited for the position she did not have experience in timetabling. Nor did she have senior management team experience or proven excellence in administrative, managerial and organisational skills. These skills formed part of the advertised criteria.

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[66] Both the 2002 and the 2007 plans contain this clause

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

[48] If respondent disagreed with this evidence, I would have expected it to have cross-examined Cupido by referring him to the score sheets and cv's of the respective candidates in order to show with reference to the score sheets and cv's that there was not a significant gap between the two candidates. Wyngaard testified that respondent is in possession of both cv's. While Ms Newat initially said that she was only in possession of the score sheet of one candidate, Cupido handed her a copy of the other candidate's score sheet during his evidence. The cv's and score sheets were however not handed in as exhibits or shown to me. During cross-examination Ms Newat was therefore in possession of all the necessary documents to challenge Cupido's evidence that there was a significant gap between K and applicant. This was however not done. If there was not a significant gap between applicant and K, there is no reason why Ms Newat could not have shown Cupido and me with reference to the cv's and score sheets during Cupido's evidence that the gap was not significant. The only reasonable inference I can draw in the circumstances from her failure to do so, is that Ms Newat did not want to refer me or Cupido to these documents because she realised that they would confirm Cupido's evidence that the gap between the two candidates was significant. I therefore accept Cupido's evidence in this regard and find that the gap between the two candidates was indeed significant and there was not approximate equality between the ability and potential of the two candidates as required by respondent's own employment equity plan.

[49] It is now well established that affirmative action measures taken by the employer must fall within the ambit of its affirmative action policies and plans, failing which it will be unfair.[68] Since respondent failed to comply with its own affirmative action plan, the decision to appoint K was unlawful and unfair.[69]

III Failure to apply the mind

[50] Failure of a decision maker to apply his mind to relevant considerations, has always been a ground upon which decisions could be reviewed and set aside.[70] In applying affirmative action measures, one may never forget that the Constitution requires the creation of not only a representative public service, but also one which is efficient.[71] Although it is true that efficiency is not completely separate and antagonistic to the requirement of representivity,[72] public servants must indeed be adequately qualified in order to render an efficient service to the public. When applying affirmative actions measures in making promotions or appointments, it must be born in mind that race is not the only relevant consideration.

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[68] *McInnes v Technikon Natal* (2000) ILJ 1150 (LC); *Baxter V National Commissioner: Correctional Services & Another* (2006) 27 ILJ 1833 (LC), *Coetzer & Others V Minister Of Safety & Security & Another* (2003) 24 ILJ 163 (LC); *Public Service Association Of SA obo Helberg V Minister Of Safety & Security & Another* (2004) 25 ILJ 2373 (LC); *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC)

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

[70] De Ville Judicial Review of Administrative Action in South Africa (LexisNexis) 189; Shidiack v Union Government 1912 AD 642 at 651-652

[71] Section 195 of the Constitution

[72] *Gordon v Department of Health, Kwazulu-Natal* (2004) 25 ILJ 1431 (LC); *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T) 1031

[51] Apart from race and gender, candidates must also be considered based on criteria such as qualifications, experience, prior learning, competence, suitability, the potential to develop and the potential to acquire within a reasonable time the ability to do the job.[73] Retention of skills must also be considered.[74] The implementation of affirmative action policies at all costs and irrespective of other considerations will not be permissible merely to make the job category more representative.[75]

[52] In selecting suitable candidates for teaching positions one may not loose sight of the fact that our Constitution provides that where children are involved, the best interests of the child must prevail. Hence, in **Settlers Agricultural High School v Head of Department : Department of Education, Limpopo Province** the High Court remarked:[76]

> "It might possibly be argued…that the provisions of section 7(1)(b) indicate that a candidate from a previously disadvantaged community ought to be preferred in cases where the evaluation of such candidate and a competitor from a previously privileged group leads to a comparative parity in the assessment of their suitability for the post. But where the difference in the respective suitability for the post is, in the opinion of an interviewing committee which honestly applies the agreed procedure, as substantial as is the case here, neither the Constitution nor the statute or the equity plan demand the preferring of the candidate who belongs to a group which was previously discriminated against.
> It is clear that the Constitution, Act 108 of 1996, places our society firmly on the foundational values of democracy, human dignity, equality, non-racism, non-sexism and the respect for the individual, and that every organ of State and every court is enjoined to promote the spirit, purport and objects of the Bill of Rights, including affirmative action. But the Constitution also entrenches the right to proper education and provides specific protection for children. Section 28(2) of the Constitution reads as follows:

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[73] 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)
[74] *Willemse v Patelia* NO [2007] 2 BLLR 164 (LC) 194;
[75] *Visser v Minister of Justice & Constitutional Affairs & others* (2004) 25 ILJ 1417 (T)
[76] *Settlers Agricultural High School v Head of Department : Department of Education, Limpopo Province* [2002] JOL 10167 (T), Case No 16395 / 02

> "A child's best interests are of paramount importance in every matter concerning the child."
>
> **As important as the rights of educators, and in particular those belonging to previously disadvantaged communities are, the paramountcy of children's rights and interests must not be overlooked.** Section 7(1)(a) of the Act expressly decrees that the candidate's ability must be taken into consideration as much as the need to redress the imbalances of the past and the desirability of achieving broad representation in the composition of the educators' compliment of the applicant. Where it is common cause that the third respondent is clearly the candidate best able to perform the function of principal of the applicant, and in the absence of other compelling reasons why he should not be appointed, the interviewing committee and the second applicant cannot be said to have erred in the observance of their duty to accord paramountcy to the best interest of the school's learners."[77]

[53] I fail to see how respondent even attempted to attach any weight to the paramountcy of the interests of the learners when it made its decision not to appoint applicant. Had the interests of the learners been considered, then respondent would have compared the competence, ability, qualifications and experience of the two competing candidates.

[54] Wyngaard's evidence is that he did not attempt to ascertain whether one candidate was stronger than the other. He merely looked at the cv's to ensure that both candidates comply with the minimum requirements. He also did not look at the score sheets because they were not referred to in the minutes. According to him, one must assume that a governing body would not have included the name of any candidate in their nomination list unless that candidate is suitable for the position.

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[77] per Bertelsmann J. See also *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) where the Court also emphasized that the need to promote the upliftment and advancement of previously disadvantaged communities cannot be the only criterion when making appointments at an educational institution. The needs of the institution and the need to provide the highest standard of education to students must also be considered.

[55] In the **Point High School** judgement, the Court referred to this attitude of assuming that merely because a candidate is included in the nomination list, therefore she is suitable for the position as "naïve".[78] During Wyngaard's evidence it came out clearly that he is aware of the **Point High School** judgement. What surprises me is that respondent and more particularly Wyngaard still believes that the approach that he had adopted in this case is correct, despite being aware of the **Point High School** judgement. I would have thought that after the **Point High School** judgement there cannot be any further confusion as to how the HOD should go about in applying affirmative action in favour of a weaker candidate. The Supreme Court of Appeal made it very clear in that case that the HOD must attach significant weight to the recommendation of the governing body and that all the relevant factors including the merits of the candidates must be weighed:

> "in exercising this discretion, the HOD is required to act reasonably and, by taking into account all of the relevant factors and considering the competing interests involved, to arrive at a decision which strikes a 'reasonable equilibrium'…[79]
>
> if he considers that the governing body has performed its functions properly, the HoD must obviously attribute substantial weight to the recommendations submitted to him. He is called upon to decide upon the appointment of a person from a list of people about whom he may have no personal knowledge. The governing body of such a school, constituted (in terms of the South African Schools Act) mainly by elected representatives of parents and staff, would naturally be expected to have a reliable comparative picture of the various candidates and their suitability for appointment at the school. Its choice and recommendation would obviously be better-motivated, and more reliable, than any that the HoD could make in the circumstances. While it is quite correct that he has a specified discretion to disregard the governing body's motivated recommendation and even its order of preference, he must clearly exercise this discretion in a manner which conforms to the statutory requirements of fair administration in the Constitution and in PAJA and also, in general, with the Department's policy….[80]

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[78] *Head, Western Cape Education Department and others v Governing Body, Point High School and others* 2008 (5) SA 18 (SCA) par 13
[79] par 10
[80] par 10

> There would also have had to be weighty considerations necessary to justify the sacrifice of superior performance which the HoD's decision entailed..[81].
>
> In my view the HoD proceeded with out a proper understanding of the scope of the discretion which he was called upon to exercise. He disregarded the necessity of actually weighing the equity considerations to which he sought to give effect, against the interests of the Governing Body and the School (including its pupils) to have the benefit of improved ability in the teaching staff. In doing so he omitted to reach a reasonable equilibrium between these interests, rendering his decision reviewable…[82].

[56] If the approach described by Wyngaard is the approach that the HOD adopts in applying affirmative action, it means that no effort is made to ascertain whether the gap between the stronger candidate (the first nominee) and the weaker candidate (who is appointed in the name of affirmative action) is significant. Given the fact that respondent's own equity plan itself provides that affirmative action may only be applied where the gap between the candidates is not significant, this approach is impermissible.[83]

[57] Unless the HOD actually peruses and compares the cv's and score sheets of the two candidates there is no manner in which he can ascertain whether there is an insignificant gap between the two candidates. This amounts to a failure to apply the mind to relevant considerations which means that the decision arrived at was unlawful, invalid and unfair.

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[81] par 13
[82] par 15
[83] *Head, Western Cape Education Department and others v Governing Body, Point High School and others* 2008 (5) SA 18 (SCA); also see *McInnes v Technikon Natal* (2000) ILJ 1150 (LC); *Baxter v National Commissioner: Correctional Services & Another* (2006) 27 ILJ 1833 (LC), *Coetzer & Others v Minister Of Safety & Security & Another* (2003) 24 ILJ 163 (LC); *Public Service Association Of SA obo Helberg v Minister Of Safety & Security & Another* (2004) 25 ILJ 2373 (LC); *Willemse v Patelia NO & others* (2007) 28 ILJ 428 (LC)

[58] Ms Newat's argument that score sheets were not submitted by the governing body and the suggestion that Wyngaard did not know that there were score sheets because they were not mentioned in the minutes, is without merit. It is a fact that Ms Newat had at least one score sheet of one candidate in her file at the commencement of the arbitration. There is accordingly no reason why Wyngaard could not have noticed this score sheet when he made his decision. It was respondent's duty to ensure that Wyngaard had all the relevant information (including the score sheet which was in respondent's possession) before him when he made his decision. If Wyngaard perused all the information in respondent's possession as he was supposed to, he would have noticed that there are score sheets despite the fact that the minutes do not mention them. If score sheets were then outstanding it was his duty to contact the SGB to obtain all outstanding score sheets.

[59] If the approach I have just explained is not followed then it is not possible for Wyngaard to determine whether there is a significant gap between the two candidates. The fact that the SGB eventually made a decision based on consensus is irrelevant to the question whether Wyngaard had established for himself that the gap between the two candidates were not significant before he interfered with the decision of the governing body. If respondent wants to depart from the choice of the SGB based on affirmative action, it is respondent's duty to satisfy itself that the gap between the two candidates is not significant.

[60] In order to find that the gap between the two candidates is not significant this necessarily means that where there are score sheets, respondent must compare them. It is not use to try and put the blame on the SGB for not mentioning score sheets in the minutes. If respondent wants to interfere with decisions of governing bodies based on affirmative action, respondent must go beyond minutes, peruse all the information submitted by the governing body, and if necessary gather outstanding information from the governing body to determine whether objectively the gap between the candidates is significant. Without objective evidence (such as a comparison between score sheets[84] and cv's) respondent cannot satisfy itself that the gap between two candidates is insignificant and unless respondent can satisfy itself that the gap between two candidates is insignificant it would be unlawful, irrational and unfair for it to apply affirmative action, because this is what its own affirmative action plan says.

IV Treating affirmative action goals as rigid targets

[61] Affirmative action is never just about numbers. It is not simply an exercise in mathematics. Professors Pretorius, Klinck and Ngwena[85] argue that affirmative action programmes that rigidly adhere to numerically determined employment outcomes within a specified time will be difficult to reconcile with the requirements that affirmative action measures must be rational and proportional.[86]

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[84] when there are score sheets
[85] Pretorius, Klinck and Ngwena *Employment Equity Law* (Lexis Nexis Butterworths) at 9-49
[86] The requirement of proportionality means that affirmative action measures may not impose more than is necessary on the rights of employees who are not appointed because of the application of affirmative action measures

[62] The learned authors further note that the function of both rationality and proportionality as requirements, is to ensure that no single interest, no matter how important in itself, should be insulated from being weighed against other legitimate competing considerations in order to arrive at a fair balance. In addition to these arguments of *Pretorius et al* there are further compelling reasons why respondent's affirmative action targets should be treated as flexible goals.[87] Numerical goals should merely be seen as benchmarks to measure progress and not hard and fast objectives that have to be met at all costs.[88]

[63] One of the reasons why the Court rejected the employer's affirmative action goals in **Ensley Branch NAACP v Seibels**[89] was indeed because they were treated as "absolute commandments" rather than goals. In fact respondent's own employment equity policy states that the policy contains targets and that the targets are merely an ideal that needs to be reached.[90]

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[87] The first one relates to the fact that according to respondent's employment equity plan, the targets are based on the economically active people in the Western Cape. While it is true that employment equity targets are primarily based on national and regional statistics of the economically active population, these statistics are now very outdated because we are currently relying on statistics of the 2001 census. The second reason relates to the fact that section 42 of the Employment Equity Act and Item 7.3.2 of the Code of Good Practice on the preparation of employment equity plans provide that in addition to the national and regional demographics, employers must also take into account other factors such as the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees when determining the extent of under-representativity of groups for purposes of setting targets. Respondent had only taken into account regional demographics in setting its goals and not also the other factors. For this reason also the goals that it has set for itself must be treated as very flexible goals because the scientific basis of the data upon which these goals is based, is questionable.

[88] *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616 at 636; Pretorius, Klinck and Ngwena *supra* 9-49

[89] *Ensley Branch NAACP v Seibels* 31 F3d 1548 (11th Cir 1994) at 1567

[90] See Annexure A to respondent's Employment Equity Plan

[64] The manner in which respondent went about in appointing a weaker candidate over a stronger candidate in this case without even attempting to ascertain whether there was a significant gap between the two candidates, leads me to only one conclusion and that is that it failed to realise that its own employment equity policy does not regard equity targets as hard and fast objectives that have to be met at all costs. Instead of treating its objectives merely as flexible goals or targets, as they were meant to be treated, respondent instead treated them as quotas, and this was unfair because respondent's employment equity plan and policy does not provide for quotas.[91] For this reason also respondent's decision is unlawful, irrational and unfair and cannot be permitted to stand.

V The race of the successful but weaker candidate

[65] Respondent's defence of affirmative action is premised on the assumption that the weaker candidate K who was preferred over applicant on account of affirmative action[92] is an Indian female. It is in dispute whether K is indeed Indian.

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[91] **Quotas vs goals**
Section 15(3) of the Employment equity Act states that the affirmative action measures an employer must take include preferential treatment and numerical goals **but exclude quotas**. Quotas refer to all preferential techniques that the effect of reserving job opportunities for designated groups. This may be achieved by setting aside a specific number of positions for designated groups or by making designated group status the only or dominant criterion for eligibility for employment opportunities. *Cf Pretorius Klinck & Ngwena supra* at 9-50. In *Local 28, Sheet Metal Workers' International Association v EEOC* 478 US 421 at 495 (1986) the Court distinguished between quotas and goals as follows:

> **"A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number or potential applicants who meet necessary qualifications…By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job."**

[92] because Indian females were underrepresented at provincial level and at school level

[66] The onus is on an employer to prove that discrimination on account of race was fair.[93] Where an employer in a promotion dispute raises the defence of affirmative action in an attempt to prove that the discrimination was fair, the onus resting on the employer in terms of section 11 of the EEA, necessarily means that where the race of the successful incumbent is in dispute, the onus is on the employer to prove his or her race.

[67] The employment Equity Act does not provide any guidelines or tests for determining the race of a person. It merely states that Black people and women are designated groups and then goes on define Black people as Africans, Indians and Coloureds. [94] Unlike the days of apartheid when there were official registers containing the race of citizens, we do not have similar registers anymore. So how does one determine the race of a person then for purposes of affirmative action and who makes such decision? What guidelines are used? Shortly after the enactment of the Employment Equity Act, Brassey already commented on this problematic aspect of affirmative action in our law:

> "The Act [referring to the EEA] requires us to decide what colour people are, and this off course presents a ticklish problem. Who decides? The worker, the employer, the state of the courts? The Canadian legislature came up with an engenious solution: employees were given the right to choose the group they wished to belong to, employers were permitted to second-guess the choice…and the authorities were given the power to override both".[95]

[93] See Section 11 of the Employment Equity Act No 55 of 1998
[94] See section 1 of the Employment Equity Act
[95] Brassey *The Employment Equity Act: Bad for employment and bad for Equity* (1998) 19 ILJ 1539 at 1356

[68] In order to determine race, the apartheid government enacted various tests through the Population Registration Act of 1950 that had to be taken into account in determining the race of people. In terms of this Act, the task of classifying people rested with the secretary for the interior.[96] Citizens who were dissatisfied with their racial classification as determined by the secretary often resorted to the courts. In this manner a large body of jurisprudence concerning the racial classification of people was developed by the courts under apartheid. It is understandable that we wanted to move away from this absurd and racist regime after 1994 and that all statutory provisions regarding the racial classification of persons were repealed. The practical problem that we now face when applying the Employment Equity Act is that where, as in this case, the race of a candidate is in dispute, there are no statutory guidelines that assist in determining the race of a person.

[69] This necessarily means that the unfortunate task of making a pronouncement about the race of a person when disputed in an affirmative action dispute, rests on the presiding officer who has no statutory guidelines to assist him in making this difficult decision. This is an embarrassing and humiliating experience for any presiding officer, but given the fact that we do not have a similar system to that of the Canadians in order to overcome this dilemma, I unfortunately have no choice but to attempt to make a factual finding about K' race.

[96] See Boberg *The Law of Persons and the Family* (1977 ed) at 99 and further

[70] In support of its version that K is Indian, respondent produced the application form that K completed when she applied for the post. In this form she stated that she is an Indian female and certified that this information is correct. Respondent also argued that K's race is reflected as Indian on the persal system. While the opinion of a person about her own race cannot be completely ignored in determining her race, it would be absurd to classify a person in a particular racial group merely based on her say-so.[97] If it was so easy, this would lead to absurd consequences. For example, some opportunistic Whites with dark complexion could simply claim to be Coloured and thereby benefit from affirmative action at the expense of other White people and Black people. The fact that K's race is reflected on the persal system as Indian does not take the matter further either because it is common cause that this entry on the system is once again based on K's own opinion.

[71] Cupido testified that after having seen and interviewed K, he was and still is of the firm view that she is definitely a Coloured Muslim and not Indian. He based this opinion not only on the fact that he had ascertained that she is Muslim, but also because in appearance she is a Coloured person and not an Indian person. Coincidentally this "appearance test" upon which Cupido based his opinion, was one of the tests used under apartheid to determine a person's race.[98] Cupido's objective opinion in this regard can therefore not be ignored. He has seen K. I did not.

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[97] It is not surprising therefore that under apartheid the onus was on a person who claimed to belong to a particular racial group to prove that claim(see Van der Vyver et al *Persone- en Familiereg* (1980 ed) at 262

[98] See Boberg *The Law of Persons and the Family* (1977 ed) 102

[72] In order to be classified as Indian under apartheid, it was generally required that the person must be from full-blooded Indian descent.[99] There is no evidence before me to suggest that K is from full blooded Indian descent.[100] There is also no evidence before me to clarify whether K was classified as Coloured or Indian under apartheid. The fact that K is Muslim does not assist in determining her race.[101] The surname Khan does not assist either because Khan is merely K's married surname.

[73] The only evidence before me about K's race are two mutually destructive versions namely K's own opinion as contained in the records of the respondent on the one hand and on the other hand the opinion of Cupido that she has the obvious appearance of a Coloured Muslim and not of an Indian. There are no probabilities that can assist me in making a factual finding about this factual dispute. At best it can be said that the probabilities are evenly balanced in this regard. It is trite law that where there are two mutually destructive versions, as we have in this case about the race of K, 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 story of the party upon whom the onus rests is true and the other is false.[102]

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[99] *Kolia v Secretary for the Interior* 1969 (1) SA 287 (C). Given the fact that the goal of affirmative action is to redress racial and gender imbalances caused by discriminatory legislation, it seems to me that an arbitrator who must determine the race of a person for purposes of affirmative action, cannot completely ignore the manner in which the apartheid regime classified people because otherwise affirmative action might not benefit those who experienced discrimination under apartheid.

[100] This is however not determinative but only a factor I take into account

[101] Some Indians are Muslim while some are Hindu. In the Western Cape many Coloured people are Muslim and some White and African people are Muslim as well.

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

[74] There is no basis for me to reject the evidence of Cupido. Because the onus to prove the race of K rested on respondent, and because it could not discharge this onus, this necessarily means that I cannot find on a balance of probabilities that K is Indian and must accept Cupido's version that she is Coloured. [103] Therefore respondent's decision to prefer the weaker candidate K over applicant on account of affirmative action was irrational because they both appear to be from the same designated group and race. For this reason also the defence of affirmative action must fail. The decision to appoint K and not applicant was irrational and unfair. I must however add that even if I could find that K was indeed Indian, I would still, based on the other considerations I have discussed, have concluded that the decision to appoint K and not applicant was unfair, irrational and unlawful.

VI Concluding remarks

[75] The provincial HOD has wide and far-reaching powers in selecting suitable candidates for teaching positions.[104] In exercising that discretion, the HOD must ensure that the governing body has complied with the requirements of section 6(3)(b) of the EEA[105] and that the ability of the candidates and the need to redress the imbalances of the past in order to achieve broad representation have been taken into account in making an appointment.[106]

[103] Based on the limited evidence before me and the onus on respondent, I had no choice but to find that for purposes of this award K is not Indian
[104] See sections 6 and 7 of the Employment of Educators Act No 76 of 1998
[105] See section 6(3)(d) of the Employment of Educators Act No 76 of 1998
[106] See section 7(1) of the Employment of Educators Act No 76 of 1998

[76] While the HOD is permitted to interfere with the recommendation of governing bodies in order to redress imbalances of the past, his discretion is however not an unfettered discretion. The HOD may not interfere with the recommendations of governing bodies indiscriminately and without due regard to the ability of the respective candidates, the interests of the learners and the provisions of the departmental affirmative action plan. The discretion must also be exercised in a rational, proportional and fair manner. Furthermore, due to the manner in which the affirmative action plan of the Western Cape Department of Education has been drafted, the HOD of the Western Cape Education Department is only permitted to interfere with the recommendation of a school governing body in the name of affirmative action and appoint a weaker candidate where the gap between the two candidates is not significant.[107]

[77] I am satisfied that the conduct of the HOD was irrational, disproportional and unfair. The affirmative action measures taken exceeded the boundaries of legitimate affirmative action measures and constituted unfair discrimination based on race. The measures were inconsistent with the purpose of the Employment Equity Act and do not qualify as a defence to the claim of unfair discrimination in terms of section 6(2)(a) of the Employment Equity Act. Respondent has exercised its discretion in an irrational and unfair manner and has abused its discretion.

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

[78] Unfair discrimination constitutes unfair conduct as intended in the unfair labour practice definition contained in section 186(2)(a) of the LRA. Had it not been for this unfair conduct, applicant would have been promoted. In the circumstances, I am satisfied that respondent has indeed committed an unfair labour practice relating to promotion when it refused to appoint applicant.

[79] Many people perceive affirmative action as unfair. It is however not affirmative action itself that is unfair. It is the manner in which government as employer often applies affirmative action that is unfair when it is implemented in such a manner that it does not promote equality but discriminates unfairly. I trust that respondent will learn from the mistakes that it has made in this case and that similar mistakes will not be repeated again in future.

APPROPRIATE RELIEF

[80] An arbitrator's powers in granting relief in unfair labour practice disputes are wide. Section 193(4) of the LRA provides that an arbitrator may determine any unfair labour practice dispute on terms that the arbitrator deems reasonable, which may include (but is not limited to) ordering reinstatement, re-employment or compensation. Furthermore section 138(9) of the LRA, provides that an arbitrator may make any appropriate arbitration award including, but not limited to an award that gives effect to the provisions and primary objects of the LRA or an award that includes, or is in the form of, a declaratory order.

[81] It is generally accepted that arbitrators and Courts may indeed order the appointment and promotion of employees in unfair labour practice disputes relating to promotion and arbitrators and Courts in fact very often make such orders.[108] The fact that it is the provincial HOD who is given the statutory discretion to appoint educators and not arbitrators, makes no difference either. In **Minister of Home Affairs v GPSSBC**[109] the Labour Court dealt with a similar situation where an arbitrator in an unfair labour practice dispute relating to promotion appointed an applicant when only the Minister had the statutory discretion to make appointments. In rejecting the argument that an arbitrator does not have the authority to make an appointment under such circumstances the Labour Court remarked as follows:

> "I turn finally to deal with the submission by Counsel for the Applicant that the Arbitrator had no authority to make the order that he did for the reason that power to appoint and promote employees in the department involved is vested in the Executing Authority, who, in this case, is the Applicant Minister.[110]
>
> That submission is without substance in the face of the provisions of Sections 209 and 210 of the Labour Relations Act 66 of 1995, respectively providing that that Act binds the State and that in the event of any conflict between the Act and the provisions of any other law, save for the Constitution or any other enactment specially amending this Act, its provisions will prevail".[111]

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[108] see for example *Coetzer v Minister of Safety & Security* [2003] 2 BLLR 173 (LC); *Public Service Association of SA on behalf of Helberg v Minister of Safety & Security & another* (2004) 25 ILJ 2373 (LC); *Lotter and SA Police Service* (2005) 26 ILJ 578 (BCA); *SA Police Union on behalf of Du Toit and SA Police Service* (2003) 24 ILJ 878 (CCMA); *Samuels and SA Police Service* (2003) 24 ILJ 1189 (BCA); *UTATU / Transnet Limited* [2002] 6 BALR 610 (AMSSA); *Kruger and SA Police Service* (2003) 24 ILJ 477 (BCA); *Douglas Hoërskool v Premier, Noord Kaap* 1999 (4) SA 1131 (NC) at 1144 – 1145; *Observatory Girls Primary School v Department of Education* 2003 (4) SA 246 (W) at 257D-E; *contra KwaDukuza Municipality v SALGBC & others* [2008] 11 BLLR 1057 (LC)

[109] *Minister of Home Affairs v General Public Service Sectoral Bargaining Council and Others* (JR 1128/07) [2008] ZALC 35 (26 March 2008)

[110] par 16

[111] par 17

[82] Where an arbitrator in a promotion dispute finds that the employer was indeed guilty of unfair conduct, an order that the employer must appoint the applicant in the post may not be made unless it has been proved that the applicant was indeed the best out of all the candidates and would have been appointed had it not been for the unfair conduct.[112] At the commencement of the hearing respondent admitted that applicant was indeed the best candidate and that the reason why she was not appointed was simply because she is a Coloured female. It was therefore not necessary for applicant to prove this.

[83] A further factor to be taken into account by an arbitrator when considering whether an appointment must be made is whether the post is vacant or whether it is filled. Appointment of two candidates in the same post is not necessarily in the public interest since it will amount to an unnecessary burden on the taxpayers which will not improve service delivery. That consideration presents no obstacle in this case because the disputed post in this case is now vacant again after K has resigned. Appointing applicant to the post would accordingly not impose an unfair burden on the taxpayers.

[112] *National Commissioner of the SA Police Service v Safety & Security Bargaining Council & others* (2005) 26 ILJ 903 (LC);

[84] Although there is no doctrine of legitimate expectation in promotion, the Labour Court has made it clear that what is always expected is that the best candidate be appointed.[113] Since I have found that the affirmative action measures which respondent had applied in this case were not consistent with the purpose of the Employment Equity Act, applicant is entitled to expect that the best candidate, being herself will be appointed, especially since the post is now vacant again.

[85] A further consideration to take into account is that where the unfair discrimination, as in this case, ultimately affects the best interests of learners and the efficiency of the public service, a remedy restricted to monetary compensation would mostly not be appropriate, especially where the post is currently vacant. The promotion of the applicant would in my view, be the most appropriate remedy and will be one which is reasonable, just and equitable and I will accordingly make an appropriate order in this regard.

[113] *Public Service Association of SA on behalf of Helberg v Minister of Safety & Security & another* (2004) 25 ILJ 2373 (LC) para 12, I accept that the expectation that the best candidate will be appointed is not applicable where affirmative action measures which are consistent with the Employment Equity Act are applied.

AWARD

In the premises I make the following order:

1. Respondent's refusal to appoint applicant in post number 0062 advertised in Vacancy List No 1/2007, being the post of HOD at Queens Park High School in the Woodstock at post level 2 constituted unfair discrimination and an unfair labour practice relating to promotion as contemplated in section 186(2)(a) of the LRA.

2. Respondent is ordered not to re-advertise the aforesaid post.

3. Respondent's provincial head of department is directed to appoint applicant in post number 0062 advertised in Vacancy List No 1/2007, being the post of HOD at Queens Park High School in the Woodstock at post level 2 with effect from 1 September 2009, from which date onwards applicant shall be entitled to the remuneration and all other benefits attached to this post.[114]

4. No order as to costs is made.

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

[114] This order is not made retrospectively and applicant is not entitled to any backpay