IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

Case No PSES 438-06/07WC

In the matter between

SM VOS Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 8 MARCH 2007

DELIVERED: 20 MARCH 2007

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

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ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This dispute concerns an alleged unfair labour practice relating to promotion and alleged unfair discrimination. The arbitration hearing in this matter took place in Cape Town on 8 March 2007. Applicant was represented by Mr. I Gelderblom of SAOU, a registered trade

union, whereas respondent was represented by Ms. S October, an employee of respondent's Labour Relations Department. The evidence was mechanically recorded on two cassette tapes.

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 2006 respondent advertised 7 different posts for Senior Education Specialists : School Psychological Services on post level 3 at various EMDC's. One of these posts, being post number OB/09/2006 was at EMDC Metropole East and applicant applied for that post. The requirements for the posts included an appropriate postgraduate academic qualification, a recognised teaching qualification, 5 years appropriate teaching experience and registration as a psychometrist/counsellor or psychologist with the Professional Board of the Health Professions Council. Applicant, a white female, was interviewed and nominated for appointment by the Interview Committee[1] as its first choice. The second nominee was a coloured male and the third nominee was a coloured female. When respondent's Head of Department[2] received the nomination, he decided that there are already too many white females on post level 3 in the office based educators sector and that applicant's appointment would not positively influence respondent's employment equity targets.

[4] The second nominee was a coloured male and as he would also not have positively influenced the respondent equity targets he could also not be appointed. The third nominee, a coloured female would indeed have positively influenced respondent's equity targets, but since she had already accepted another position, it was not possible to appoint her. In the circumstances, respondent decided not to make any appointment in this vacancy, but to re-advertise the position.

[1] hereinafter referred to as the "IC"
[2] hereinafter referred to as the "HOD"

[5] Applicant is applying for an order, restraining respondent from re-advertising the position as well as an order that respondent must appoint her in the position. Respondent is opposing this application. Respondent admits that applicant is suitably qualified and was indeed the best candidate out of all the candidates who had applied for this post, but argues that it was entitled not to appoint applicant in order to promote equitable representation in the workplace in accordance with affirmative action measures which complied with the Employment Equity Act.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicant

[6] **Sanél Mariét Vos**, the applicant has been employed by respondent for ten years in different capacities. Her highest qualification is a Masters Degree in educational psychology and she is registered with the professional board of the Health Professions Council as a psychologist. She believes that the respondent had unfairly discriminated against her on the basis of race and gender when it refused to appoint her in the post. She testified that she is in favour of affirmative action, but said that it must be applied correctly and fairly. She accepted the statistics contained in respondent's employment equity policy in terms of which white women represents 9,31% of the economically active population of the Western Cape. She does however not agree with the manner in which respondent has determined its employment equity targets.

[7] She criticized the respondent's approach of preparing two different targets for educators who are actually teaching and educators who are office based. She pointed out that if the department does not distinguish between school based and office based educators, the statistics show that whereas there should actually be 136 white females[3] on post level 3, there are actually only 111, which means that white female educators are actually underrepresented. She argued that if it was necessary to distinguish between different groups in order to set employment targets, it would have been more realistic to see employees who do educational- psychological work as a separate category and to set different targets for that group instead of grouping them in one group on post level 3 with other professionals such as curriculum advisors whose work is completely different from

theirs. According to her information, respondent employs 78 psychologists in the various EMDC's. Of these posts, 6 are filled by African women, 8 by coloured women and 8 by white women. The remaining 56 posts are all filled by men.

Evidence on behalf of respondent

[8] ***Allen John Meyer*** is employed in respondent's employment equity unit 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 correctly before the nomination was made. In the case of this particular post, the nomination list contained three nominations. Applicant was the first nominee, whereas a coloured male was the second nominee and a coloured female the third nominee. Since, according to respondents employment equity targets for office based educators, there are already too many white females on post level 3, it was felt that appointing applicant would not positively influence the targets. Since the second nominee was a coloured male, he could also not be appointed because coloured males are also over-represented on post level 3.

[9] Appointing the third nominee would have positively influenced the targets since she was a coloured female and coloured females are still underrepresented on post level 3. She had however already accepted another position and could not be appointed. The volume of applications received for the post indicated that there are other candidates who could potentially meet the requirements and on that basis it was decided to re-advertise the post.

[10] The goal in respondent's employment equity plan is that 9,3% of employees on all levels and job categories should be white females. This is based on statistics from the 2001 census in respect of the economically active population in the Western Cape. In order to establish how far respondent is from reaching its employment equity goals, educators are divided into two groups namely office based educators and educators who are actually teaching. Different targets are set for these two different groups. This post is classified as an office based educator post. The staff profile which was used by respondent for this specific post is contained in exhibit A52 and is based on information obtained from the

[3] This target is based on the premise that 9,3 percent of the economically active population in the Western Cape are white women and that this should be the target for their representation at all levels and in all categories in the workplace

persal system. This document shows that there are currently 36 white female office based educators on post level 3 whereas according to the target of 9,3% there should actually only be 22 white females on that post which means that 14 are oversubscribed.

[11] He concedes that when one does not distinguish between office based educators and educators who are actually teaching, there should actually be 136 white females on post level 3, but there are actually only 111. One can however not use these statistics because the shortages of white women which are shown on post level 3 are in respect of educators who are actually teaching. When it was put to him during cross-examination that if the department divides the educators into two such main groups, it would make more sense to rather also see the psychologists as a separate group, he conceded that this makes sense, but added that respondent's employment equity policy currently does not provide for that and that he could not implement such decisions unilaterally. He added that this may be something which applicant should take up through her union so that representations could be made to amend the policy.

[12] He in fact conceded that it may be a good idea to categorise professionals who must belong to professional associations such as psychologists and occupational therapists separately for purposes of determining equity targets instead of including them in the same category with other non office based staff such as curriculum advisors on post level 3.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

LEGAL PRINCIPLES

[13] Whilst it is true that appointments and promotions fall within the prerogative of the employer, the Labour Relations Act No 66 of 1995[4] requires employers to treat employees fairly when they apply for promotions. The statutory provision, in terms of which this tribunal may arbitrate promotion disputes, is to be found in section 186(2)(a) of the LRA, which defines unfair labour practices with regard to promotion as follows:

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

[4] hereinafter referred to as the "LRA"

[14] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[5] 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.[6] 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.[7]

[15] 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.[8]

[16] In support of her claim that she was treated unfairly, applicant only relied on one cause of action and that is that she was unfairly discriminated against based on 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[9]**
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> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
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> (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

[5] *National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) par 33
[6] *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
[7] *PAWC (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) 771
[8] *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
[9] Section 9 of The Constitution of the Republic of South Africa Act No 108 of 1996

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[10]

(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

[17] Unfair discrimination consists of at least two elements namely discrimination and unfairness. In fact, in *Harksen v Lane*[11] it was held that there is a three-stage test for establishing whether there was unfair discrimination namely:[12]

- 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?[13]

[10] Section 6 of the Employment Equity Act No 55 of 1998, hereinafter also referred to as the "EEA"
[11] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) para 53
[12] also see Cheadle et al *South African Constitutional law: The Bill of Rights* 4-32

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

[18] 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.[14] Respondent admits that applicant was the best candidate for the post and that the only reason why she was not appointed was because she is a white female. These admissions are sufficient to support a finding that applicant was indeed discriminated against on the basis of her race and gender.

SECOND STAGE OF THE ENQUIRY – WAS THE DISCRIMINATION UNFAIR?

[19] Since there can be no doubt that applicant was indeed discriminated against on the basis of race, the next inquiry is to determine whether such 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.[15] 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.[16] 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[17] and constitute a complete defence to a claim of unfair discrimination.[18] Respondent is indeed arguing that in order to promote representativity in its workplace, it was justified, in terms of its employment equity plan and policy, to refuse to appoint applicant since her appointment would not positively have influenced its employment equity goals.

The purpose of affirmative action measures

[20] Affirmative action consists of measures which are restitutionary and remedial in nature. Its purpose is to normalize the labour market in the sense that the under representation of

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[13] 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

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

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

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

[17] *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

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.[19] In *Action Travail des Femmes v Canadian National Railway*,[20] 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.'

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

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

[22] The beneficiaries of affirmative action are those who belong to designated groups.[21] "Designated groups" are defined as black people, women[22] and people with

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[18] Dupper & Garbers *Essential Employment Discrimination Law* at 85
[19] *Canadian Railway Co v Canada (Canadian Human Rights Commission)* [1987] 1 SCR 1114 at 11143
[20] Co 40 DDR (4th) 193 at 213-14
[21] Sections 1, 2 and 15 of the Employment Equity Act
[22] Although white females form a designated group in terms of the Employment Equity Act who must benefit from affirmative action measures, white females are not necessarily entitled to the same preferential treatment as black people. It has been recognized that the achievement of a broadly representative public service will not be easy if departments are unable to differentiate between candidates who all fall within designated groups as defined in Employment Equity Act. Cf *NEHAWU obo Thomas v Department of Justice* (2001) 22 ILJ 306 (ARB). It is now trite law that there are different degrees of discrimination to which people within designated groups were subjected and that an employer may therefore differentiate amongst different categories of designated groups in applying affirmative action measures. Therefore it is not unfair to discriminate between applicants from members of designated groups for purpose of attaining representativity. Cf *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*

disabilities.[23] "Black people" is defined as a generic term which means Africans, Coloureds and Indians.[24] 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[25]** 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

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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). So for example it has been recognized that although white women also constitute a designated group because of discrimination against them in the past, they were not discriminated against to the same extent as blacks and that therefore preferring blacks to white women when making appointments, constitute fair affirmative actions measures in accordance with the Employment Equity Act. Cf *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)

[23] Section 1 of the Employment Equity Act
[24] Section 1 of the Employment Equity Act
[25] 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.

> appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.
>
> (3) The measures referred to in subsection (2) *(d)* include preferential treatment and numerical goals, but exclude quotas.
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> (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

[23] 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."[26]

[24] People were divided into different groups. In terms of the labels which were attached to them as members of those groups, they were then given certain rights and privileges:

> "The approach of apartheid was to categorise people and attach consequences to those categories. No relevance was attached to the circumstances of individuals. Advantages or disadvantages were metered out according to one's membership of a group"[27]

[25] These appalling practices left behind a deeply divided society. With this legacy which was left behind, it was not sufficient to simply do away with discriminatory practices and give every person an equal opportunity to compete for jobs, because doing so would simply have perpetuated the misery and poverty to which black[28] people were subjected to under apartheid. Strong remedial measures were required to ensure that black people would become equitably represented in the workplace at all levels and job categories. Since women, including white women were very seldom allowed to make much progress in the workplace before 1994, there was also a need to introduce remedial measures to ensure that they are equitably represented in the workplace on all levels and job categories. It was against this background that the Employment Equity Act was enacted.

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[26] 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

[27] per Mokgoro J *Minister of Finance & another v Van Heerden* [2004] 12 BLLR 1181 (CC) para 85

[28] black is used here as generic term referring to Africans, Coloureds and Indians

[26] The explanatory Memorandum[29] to the Employment Equity Act explains the need for the Employment Equity Act as follows:

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

[27] The rationale for introducing affirmative action measures and the goals which such measures were meant to achieve in post-apartheid South Africa, is perhaps best summarized by former President Nelson Mandela,[30] who was quoted as follows in the explanatory Memorandum to the Employment Equity Act:

> "This legislation is drafted with a view to advancing those groups who have been disadvantaged as a result of discrimination caused by laws and social practices, and not with a view to seeking retribution for past injustices. As president Mandela has said, **'The primary aims of affirmative action must be to redress the imbalances created by apartheid. We are not . . . asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so a black skin should be the basis of privilege in the future. Nor . . . is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of barriers to the attainment of standards; the special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and those who have been qualified all along but overlooked because of past discrimination, are at last given their due. The first point to be made is that affirmative action must be rooted in principles of justice and equality.**' "

The obligation to implement affirmative action measures

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[29] 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.

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

[28] Implementing affirmative action measures is not a choice. It is mandatory. Designated employers[31] must in order to achieve employment equity, implement affirmative action measures for people from designated groups.[32]

[29] The obligation to implement affirmative actions measures when selecting suitably qualified educators for appointment is also echoed in the Employment of Educators Act.[33] Section 6(3)(b) read with section 7(1) of that Act provides that when school governing bodies select and recommend candidates of their choice for appointment they must ensure that the principles of equity, redress and representivity are complied with. They must also have regard to equality, equity and the other democratic values and principles which are contemplated in section 195(1) of the Constitution which include the ability of the candidate and the need to redress the imbalances of the past in order to achieve broad representation. Section 6(3)(d) read with section 7(1) of that Act provides that before the HOD makes an appointment from the list of candidates submitted to him by a school governing body, he or she must ensure that the governing body has complied with the requirements of equity and the need to redress imbalances of the past as referred to hereinbefore. If the governing body has not adhered to these principles, then the HOD must decline the recommendation.

[30] Section 6(3) read together with section 7 of the Employment of Educators Act does however not authorize unfair discrimination against educators in the name of affirmative action. It merely serves to direct the attention of SGB's and HOD's to the obligation to apply affirmative actions measures when making appointments.

Judicial scrutiny of affirmative action measures

[31] In the previous paragraphs I have emphasized that the concept of affirmative action is indeed a noble one. It is instrumental in ensuring that practical meaning is given to the right to equality in respect of black people, women and people with disabilities. The noble purpose of and intention behind affirmative action does however not mean that affirmative

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[31] a **"designated employer"** is defined in section 1 of the Employment Equity Act as meaning--
a person who employs 50 or more employees; or a person who employs fewer than 50 employees but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of the Schedule 4 of this Act; or a municipality, as referred to in Chapter 7 of the Constitution; or an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; or an employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.

[32] Section 13 of the Employment Equity Act

action measures are immune to judicial scrutiny,[34] because only affirmative action measures which are consistent with the purpose of the Employment Equity Act can constitute a defence to a claim of unfair discrimination.[35] Furthermore affirmative action measures must be in harmony with the Constitution,[36] since section 3 of the Employment Equity Act provides that the Act must be interpreted in compliance with the Constitution. The Constitution is the supreme law of the land.[37] Law or conduct inconsistent with the Constitution is invalid.[38] 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.[39]

The requirement of Fairness

[32] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[40] 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.[41] Conduct which is unreasonable,[42] irrational,[43] capricious,[44] or arbitrary,[45]

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[33] Act No 76 of 1998

[34] *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

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

[36] The Constitution of the Republic of South Africa, Act 108 of 1996

[37] section 2 of the Constitution; *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs and Tourism & others* 2004 (7) BCLR 687 (CC) para 72

[38] *ibid*

[39] 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;

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

[41] 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

will be unfair.[46] An affirmative action plan or program[47] as well and its application and implementation[48] should be fair and may not be arbitrary, haphazard, random and overhasty.[49]

The requirement of Rationality

[33] To act rational means to act in a manner "based on reason or logic".[50] 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.[51] 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. [52]

[34] 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.[53]

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[42] 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

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

[44] 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

[45] 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".

[46] See authorities referred to in footnote 8

[47] or the manner in which it is applied

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

[49] *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

[50] Oxford English Dictionary

[51] 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

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

[53] 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)

Where an employer does have an affirmative action policy, such policy must comply with legislation and must be applied correctly.[54]

The requirement of Proportionality

[35] Proportionality requires the balancing of competing interests.[55] 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.[56] 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.[57] 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 [58]

[36] 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.[59] Yet there must be some degree of proportionality, based on the particular context and circumstances of each case.[60]

APPLICATION OF THE LEGAL PRINCIPLES

[37] Applying the above legal principles, I now intend to analyse the fairness, rationality and proportionality of the affirmative action measures which respondent resorted to in arriving at its decision not to appoint applicant. Before doing so, I wish to mention that since

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

[55] 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

[56] 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

[57] 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;

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

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

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

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.

[38] 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 with respondent's refusal to appoint applicant and I will now proceed to discuss these concerns under different subheadings.

I Classification of the post & advertisement of the post without restrictions

[39] No evidence was placed before me to suggest that this post was ever officially classified as a post which was reserved for Africans and Coloured females. Neither did the advertisement contain a notice advising applicants that the post had been earmarked for Africans and Coloured females only.

[40] In *SA Police Union on behalf of Du Toit and SA Police Service*[61] it was held that where a post has not been classified as a designated post, the criteria of representativity is not applicable to such a post and that failure to appoint the best candidate, even though the best candidate is a white male, is unfair discrimination which does not qualify as affirmative action measures consistent with the Employment Equity Act.

[41] In *Kruger and SA Police Service*[62] it was common cause that the applicant, a white female police officer was the best candidate. The employer however refused to appoint her, arguing that in the particular region white females are already over-represented. The arbitrator held that by inviting applications for the post without indicating such restrictions, the employer created a reasonable expectation of promotion on the part of best candidate and that the failure to promote was unfair. The arbitrator remarked:[63]

[61] (2003) 24 ILJ 878 (CCMA)
[62] (2003) 24 ILJ 477 (BCA)
[63] par 479 per Seedat A

> "I am also aware that the employer has the prerogative as to whom it will promote to another position..However, for SAPS **to invite applications for positions that have obviously been earmarked for a certain class of people without indicating the restrictions, surely creates a reasonable expectation of an applicant, especially one who has been described as the best candidate, that she would be promoted.** By denying her a promotion, SAPS is scandalously ambushing that expectation. This makes the conduct of SAPS irrational to the extent that it ravages the precepts of fairness. I am therefore compelled to determine that SAPS must promote Kruger to the position of captain retrospective to 1 February 2002 by no later than 1 November 2002."

[42] Whilst no evidence was placed before me to suggest that the post was officially reserved for Africans and Coloured females and whilst respondent at no stage admitted during the arbitration hearing that this post was reserved for Africans and Coloured females, the effect of not appointing the best candidate because she was a white female and not appointing the second best candidate because he was a coloured male but rather making no appointment at all, was, when read in conjunction with exhibit A52,[64] indeed that the post was treated as if it was reserved for Africans and Coloured females.

[43] Employers are indeed allowed to reserve certain jobs for certain designated groups, provided that they do so in a fair manner. [65] In order for the reservation of certain posts to be fair, posts must not be reserved in such a manner that certain employees will never ever be able to get any promotion in that company under any circumstances, irrespective of whether they are the best candidates or not.[66] Reserving certain posts from time to time

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[64] the statistics contained in exhibit A52 was Meyer's motivation for not appointing applicant and not appointing the coloured male who was ranked second because according to exhibit A52 both coloured males and white females are over-represented on post level 3. In fact, according to exhibit A52 it is only Africans and Coloured females who are not over-represented on post level 3 in the office based educators section.

[65] While section 15(4) of the EEA does not require employers to implement absolute barriers to persons from non-designated groups, it also does not prohibit such barriers. *Cf Coetzer v Minister of Safety & Security* [2003] 2 BLLR 173 (LC) at par 25; Du Toit et al *Labour Law through the Cases* EEA-40. Employers are thus free to include or exclude measures of this nature. *Cf* Du Toit et al *Labour Law through the Cases* EEA-40. In reserving jobs for members of designated groups an employer must however be fair and may therefore not create an insurmountable barrier or obstacle to the advancement members from non- designated groups in such a manner that they will never again be able to be eligible for promotion, despite being the best candidate. *Cf Coetzer v Minister of Safety & Security* [2003] 2 BLLR 173 (LC) at par 26 – 27; *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE) para 40

[66] So for example the reservation of positions for members of designated groups was held to be fair on the basis that members of designated groups were able to apply for other positions elsewhere within the workplace. *Cf SAPU obo Lotter v SAPS* [2002] 8 BALR 889 (CCMA). In *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE) the employer adopted such a strict

for certain categories of employees in order to remedy inequalities, can however never be seen as making it impossible for other employees from certain groups never to be promoted, because they would still be allowed to apply for promotion when other vacancies become available.

[44] I do not agree with the arbitrators in the *Kruger* and *Du Toit* cases, that in order for an employer to appoint and prefer employees from certain designated groups over other candidates, it is mandatory to officially classify the job as being reserved for a specific group and/or to indicate in the advertisement that the post had been earmarked for a certain designated group of people.

[45] I do however believe that it is irrational and unfair not to indicate in an advertisement that a post had been earmarked for a certain group of people and then, because no suitable candidates from the group for which the post had been earmarked have been nominated or are available for appointment, refuse to make an appointment at all where the best candidate is a person who is not from the group for which the post had been earmarked.[67] The mere fact that respondent, instead of appointing applicant who was actually the best candidate, rather decided to re-advertise the post, means that applicant as a white female never really stood a chance of being successful. It was unfair to waste applicant's time by bringing her under the false impression that she had a realistic chance of being appointed when she clearly never did. Had the advertisement been clear on this, applicant would have known right from the start that white women did not stand a realistic chance of being appointed in this post. Applicant would then most probably not have wasted her time to compile a cv, apply for the job and attending interviews and she would probably not have felt so aggrieved as she does now.

[46] If a decision was never taken by respondent before advertising the post, to earmark the post for only Africans and Coloured females, then it was unfair to refuse to make an appointment and re-advertise the post when no suitably qualified Africans or Coloured females were available for appointment after the first advertisement and where the best candidate was indeed willing to accept the appointment. If on the other hand respondent had unofficially decided at some stage that the job would be earmarked for Africans and Coloured females, it should have said so in the advertisement. I am aware that

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approach against white male magistrates, that it was practically impossible for white male magistrates to ever be promoted to the position of regional magistrate. This was held to constitute unfair discrimination.

[67] Unless of course there were special circumstances such as procedural irregularities in the process.

respondent's Employment Equity Policy stipulates that advertisement must not exclude any person on grounds of race, gender or disability.[68] It does however not make any sense to me that persons may not be excluded on the grounds of race or gender in an advertisement, whereas in practice persons such as applicant were for all practical purposes excluded on the basis of race and gender for purposes of making an appointment in this post. In this respect I find the policy to be irrational.

[47] It makes no sense to pretend on paper that no persons are excluded on the grounds of race and gender whereas in practice they are. It is much more unfair to play cat and mouse games with employees by secretly treating a post as earmarked for a specific group than being upfront with employees and advising them in an advertisement that the particular post had been earmarked for certain designated groups only. I must however emphasize that had a suitably qualified Coloured female or African with lesser qualifications than applicant actually been appointed, I would despite the failure to mention the preference for Africans and Coloured females in the advertisement, not have had a problem with respondent's decision not to appoint the best candidate, namely applicant.[69]

[48] While it is true that section 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act[70] stipulates that no person may publish any advertisement that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person, it should be borne in mind that only advertisements which displays an intention to **unfairly** discriminate fall within the ambit of this section. Reserving certain jobs from time to time for suitably qualified members from certain designated groups, will certainly constitute discrimination, but it will not be unfair discrimination, provided that the job in question is reserved for such designated groups for a valid and fair reason.[71]

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[68] See paragraph 4.1 of Annexure A to Respondent's Employment Equity Plan

[69] The concept of affirmative does indeed mean that suitably qualified candidates from designated groups are preferred over other candidates, despite the fact that other candidates have superior and much better qualifications and experience. Appointment of an unqualified or incompetent person is however never permitted in the name of affirmative action. See *Stoman v Minister of Safety & Security & others* (2002) 23 ILJ 1020 (T).

[70] Act No 4 of 2000

[71] i.e. in order to correct serious gender and/or racial imbalances in a specific job category and/or level. A good example would be a situation where for years the senior management of a certain school consisting of a principal and two deputy principals had always been males. Should one of the deputy principal posts become vacant, it cannot possibly be regarded as unfair discrimination if that post is reserved for a suitably qualified female and if this is so stipulated in the advertisement. The purpose of the discrimination will be to promote representativity at a school where there is a real problem with representativity. Hence

[49] I am not suggesting that respondent should in respect of each and every advertised post stipulate that it has been reserved for certain groups. That would be unfair discrimination because it would prevent certain employees from certain groups from ever being promoted. Where however it is clear, as it was in this case, that respondent is only interested in appointing certain designated groups for example Africans or Coloured females in a post, respondent should rather play open cards with educators and mention this in the advertisement, provided that there is a fair and valid reason for reserving the post for certain groups only. In this particular matter, it seems to me however that respondent has not proved on a balance of probabilities that there was indeed a fair and valid reason for treating this particular post as one that was earmarked for Africans and Coloured females.[72]

II No appointment made despite no barriers being identified

[50] I have already indicated under the previous subheading that I would not have felt that the failure to officially reserve the job for Africans and Coloured females and the failure to indicate in the advertisement that the job was reserved for Africans and Coloured females, was unfair if an African or Coloured female was indeed appointed. It is the fact that no appointment at all was made, despite the fact that the best candidate is suitably qualified and prepared to accept the appointment, that sits uneasy.

[51] In *Coetzer v Minister of Safety and Security*[73] the employer refused to promote white males even though there were no eligible black candidates and no applications for these promotional posts had been received from black candidates. This the Labour Court held constituted unfair discrimination and the Court ordered the employer to promote the white males.[74]

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the discrimination will be for the greater good of the community in order to redress imbalances of the past. Furthermore men will not be able to complain that an insurmountable obstacle had been created to their promotion, because they will still qualify for appointment in other deputy principal posts at other schools. For these reasons the discrimination cannot be regarded as unfair.

[72] See paragraphs 66 to 70 hereinafter where I express my concerns with regard to the motivation of respondent that Africans and Coloured females are the preferred groups for appointment in this post.

[73] *Coetzer v Minister of Safety & Security* [2003] 2 BLLR 173 (LC)

[74] Also see *UTATU / Transnet Limited* [2002] 6 BALR 610 (AMSSA) where it was held that where an employer re-advertised a promotion post after assuring white employees that they would be considered if no suitable black candidates are available, this was held to constitute unfair discrimination and affirmative action measures consistent with the EEA

[52] Professor Grogan expresses the view that the *Coetzer* case confirms that in he public service, the goal of representativity must be pursued rationally and that rationality can never be served where a public authority fails to make appointments at all simply because there are no takers for positions from the intended beneficiaries of affirmative action.[75] Discrimination he argues becomes unfair to members of non-designated groups where an employer disadvantages them in the name of affirmative action in circumstances where members of non-designated groups do not actually benefit.[76] The irrational pursuit of goal representativity in the public service at the expense of the public renders discrimination unfair.[77] Where an employer's decision not to make an appointment but to re-advertise is solely based on affirmative action goals, an employer, at the very least needs to prove that his reason for not appointing the best candidate who is suitably qualified, is related to some barrier during the selection process which prevented suitably qualified candidates from the preferred designated groups to be identified. No evidence of such barrier/s was presented in this case.

[53] The discrimination against applicant in this case did not benefit any member of the Coloured female or African group because no appointment was made. Hence, the discrimination does not seem to serve any rational purpose and this is unfair. Meyer testified that there was reason to believe that there may be candidates from the African and Coloured female groups who meet the requirements for the post because of the volume of applications which the respondent had received. Therefore it was decided to re-advertise the post. Anything is possible in theory. There may indeed, I suppose, possibly even be a Father Christmas and a Tooth Fairy after all. How probable these things are, is however a different question. When making important decisions which affect the rights and expectations of others we are not concerned with what is possible but with what is more probable than not. The fact that many applications were received says nothing because applying for a job and being suitably qualified are two different things.

[54] No evidence was presented by respondent to suggest that amongst all the applications received, there were indeed African or Coloured female candidates who were not nominated or interviewed or shortlisted, but who indeed have the capacity to acquire, within a reasonable time, the ability to do the job, or who are suitably qualified in any other manner for the post. A court or tribunal must base its findings on facts and not on

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[75] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (1st ed, Juta August 2005) 103
[76] *ibid*
[77] *ibid*

speculation.[78] Meyer's evidence that there may possibly be suitably qualified candidates for this post out there is based on pure speculation. One cannot on the basis of such speculation delay the appointment of the best candidate, who respondent admits is suitably qualified for the job, simply because she happens to be a white female. That is irrational and constitutes nothing else but unfair discrimination. If these posts had been properly advertised in English as well as Afrikaans newspapers and also in the Vacancy list, as Meyer has testified, then I am completely at loss as to why, if after the first round of advertisements no suitably qualified African and Coloured females could be identified for this post, the situation would all of a sudden be any different after a second advertisement. Surely all suitably qualified candidates who were interested in the post had a fair chance to apply after the first advertisement.

[55] It seems to me that there is indeed a strong probability that no suitably qualified candidates from one of the preferred designated groups could be found for this post simply because there are no suitably qualified candidates within those groups who are interested in working for respondent. It is after all requirements for this post that the candidates must have teaching experience, have an appropriate postgraduate academic qualification and be registered as a psychologist, counselor or psychometric with the Professional Board of the Health and Professions Council. People who are so highly qualified can earn much more in the private sector and many may not be interested in working for the State. Had this consideration been taken into account, I do not believe that a rational person who has applied his mind properly would have decided to re-advertise the post.

III Insurmountable obstacle to being appointed

[56] In reserving jobs for members of designated groups an employer must be fair and may therefore not create an insurmountable barrier or obstacle to the advancement of members from certain groups in such a manner that they will never ever be able to be eligible for promotion, despite being the best candidate.[79] Barriers may be created but not insurmountable barriers.

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[78] *Macleod v Rens* 1997 (3) SA 1039 (E) 1048

[79] *Coetzer v Minister of Safety & Security* [2003] 2 BLLR 173 (LC) at par 26 – 27; *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ 1811 (SE) para 40

[57] Since respondent did not indicate that this job was reserved for members from certain designated groups, the mere fact that applicant, despite being the best candidate, was not appointed in circumstances where she did not even have competition from Africans and Coloured females because there were not any takers from these preferred designated groups for the post, justifies the inference that applicant as a white woman never stood any chance of being appointed in this post.

[58] If applicant did not even stand a chance of being appointed where she had no competition from Africans and Coloured females, her chances of being appointed when she does indeed compete with suitably qualified Africans and Coloured females, are equally if not more remote. This suggests that respondent has taken such a tough stance against white females on post level 3 in the office based educators sector that until such time as all designated groups are represented in accordance with the demographics in the economically active population, applicant does not stand any realistic chance of being promoted within the WCED. Based on race and gender, an insurmountable obstacle to applicant's promotion within the WCED had therefore been created and this is not permissible in the name of affirmative action. Reserving certain posts for certain designated groups from time to time is not unfair, but making it practically impossible for employees from certain groups on certain post levels to be promoted, is indeed unfair.

IV Efficiency of the public service and the bests interests of children

[59] 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.[80] Although it is true that efficiency is not completely separate and antagonistic to the requirement of representativity,[81] 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 criterion.

[60] Apart from race and gender, candidates must also be considered based on criteria such as qualifications, experience, prior learning, competence, suitability and the potential to

[80] Section 195 of the Constitution
[81] *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

develop and the potential to acquire within a reasonable time the ability to do the job.[82] Retention of skill must also be considered.[83] Some occupations may even be considered to be so important that 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. In such cases it may constitute unfair discrimination to pass over the best candidate.[84]

[61] In the education sector there is an additional factor to take into account in that the Constitution itself stipulates that where children are involved, the best interests of the child must always prevail.[85] How this impacts on the appointment of educators and the application of affirmative action measures, was explained as follows by the High Court in *Settlers Agricultural High School v Head of Department : Department of Education, Limpopo Province*:[86]

> "It might possibly be argued – I make no finding in this regard – 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:
>
> > "A child's best interests are of paramount importance in every matter concerning the child."

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[82] 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)
[83] *Willemse v Patelia* NO [2007] 2 BLLR 164 (LC) 194;
[84] *Visser v Minister of Justice & Constitutional Affairs & others* (2004) 25 ILJ 1417 (T)
[85] Section 28(2) of the Constitution.
[86] *Settlers Agricultural High School v Head of Department : Department of Education, Limpopo Province* [2002] JOL 10167 (T), Case No 16395 / 02

> **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."[87]

[62] This post is a position which carries great responsibilities, not only because it involves children but also because it involves delivery of psychological services. It is in the interests of learners that a competent person is appointed and that such appointment be made with some degree of urgency.

[63] Had a suitably qualified candidate from the African or Coloured female group with lesser qualification and experience than applicant actually been appointed in order to promote greater representativity, I would not have had a problem with such an appointment and would in all probability have confirmed that appointment. However seeing that no suitable candidates from those groups were available for appointment after the first advertisement, I am of the view that to re-advertise the post instead of appointing applicant who was the best candidate, will amount to overemphasis of race and gender and placing far too little emphasis on qualifications, experience, prior learning and competence. It will also not be in the best interests of learners since filling of the post will be delayed pending a further round of interviews, after which it is not even certain that a suitably qualified candidate from the preferred designated groups will indeed be found.

[64] Furthermore applicant is highly qualified. Not only does she have an appropriate Masters degree, which is higher than the minimum required University degree for this post, but she is also a registered psychologist, which is once again better than the minimum requirement for this posts seeing that registration as a psychometrist would also have

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[87] 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.

been acceptable. Where no suitably qualified African or Coloured female could be identified for appointment in this post after the post had been widely advertised once, it will not be in the best interests of our learners that applicant may, because of the refusal to appoint her, resign and go and work in the private sector.

[65] To run the risk of loosing such a highly skilled and qualified professional through re-advertising the post merely because there is a vague possibility, that possibly, there may still be out there, somewhere, a suitably qualified African male or female or Coloured female who may possibly be interested in working for the State, but who did not apply for appointment after the first advertisement, seems extremely irrational.

V Respondent's method of determining under-representation and targets

[66] The recent decision of the Labour Court in *Baxter v National Commissioner, Correctional Services*[88] has again underscored the fact that the mere existence of an employment equity plan or program is not in itself sufficient for a defence based on affirmative action to succeed against a claim of unfair discrimination. In both its implementation and application, the employment equity plan must be fair. If the employer argues, for instance, that its targets have not been met and that it is declining to appoint or to promote an employee for this reason, an arbitrator may consider the targets and the numbers concerned and it will be necessary for the employer to show that it has crunched the correct set of numbers. If the employer has determined its targets on an incorrect basis, a finding that the employer's purported application of its own employment equity plan is unfair will be justified. Counting heads is one thing, but determining which heads should be counted in the first place is something else altogether. On this score respondent has failed.

[67] An employer may, due to its large size, develop separate employment equity plans for each "business unit".[89] In principle, there is therefore nothing wrong with respondent's decision to separate the educators who actually teach in schools from educators who are office based and to determine different goals for affirmative action appointments in these two sectors based on the different demographics of the two staff components. What does

[88] [2006] 9 BLLR 844 (LC); also see *Willemse v Patelia* NO [2007] 2 BLLR 164 (LC)

however not make sense is that whereas respondent is prepared to divide its educator corps into two such broad categories for purposes of setting affirmative action goals, it does not go further and set separate goals for specialist professions such as psychologists and occupational therapists or separate goals for different EMDC's. With this approach, respondent may never be able to address diversity problems within certain EMDC's or certain professions such as psychologists. If you get representativity levels right at the level of the component you will get it right in the Department as a whole. The opposite however is not true.[90]

[68] Pretorius, Klinck and Ngwena[91] points out that although the employment equity goals in terms of section F of form EEA2 are to be set according to occupational categories broadly, it is advisable to subdivide the categories into smaller departments or sections. The reason for this, they argue, is that in the event that some sections may not be that under representative, those with real diversity problems may be able to hide within the statistics of the broader category. A further reason for this, they argue, is that the pool of suitably qualified persons may also differ widely within a single specific category. This is basically the same argument which applicant has advanced before me. She argued that if respondent wants to distinguish between school based educators and office based educators for purposes of setting its affirmative action goals, it should go one step further and set separate goals for those office based educators who render psychological services instead of grouping them together on post level 3 with other professionals. After careful consideration of this argument I find it compelling.

[69] The reason for distinguishing between office based educators and school based educators, must surely be to prevent office based educators or school based educators from hiding in the statistics of the broader category. That this is so is evident from Meyer's evidence that the real problem with under-representation of white females lies in the school based educators section and not in the office based educator section, where they are actually over-represented. Inasmuch however as one cannot allow white female educators on post level 3 who are office based to hide in the statistics of the broader category of educators on post level 3 and ride on the back of statistics of school based educators on post level 3, one cannot allow office based educators on post level 3 such as for example curriculum advisors, to hide in the statistics of the broader category of

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[89] *Coetzer v Minister of Safety & Security* [2003] 2 BLLR 173 (LC) at par 20
[90] *Willemse v Patelia* NO [2007] 2 BLLR 164 (LC) 183 para 52;
[91] Pretorius, Klinck and Ngwena *Employment Equity Law* (Lexis Nexis Butterworths) at 10-35

office based educators on post level 3 and ride on the back of the demographical statistics of other office based educators on that same level, such as psychologists. If this problem is not addressed, diversity problems will continue to exists, and may even increase in certain components.

[70] Respondent did not even attempt to rebut applicant's version that white females are not at all over-represented on post level 3 amongst psychologists.[92] Since psychology is such a specialized profession, it would make sense to set separate goals for employees who render physiological services. It was not fair, rational and well thought through of respondent not to have had regard to the demographics amongst physiologists[93] on post level 3 when it considered applicant's appointment because by ignoring the demographics amongst the corps of psychologists, respondent allowed other professionals on post level 3 to ride on the back of the demographical statistics of psychologists. The real reason for the overrepresentation of white females on post level 3 in the office based educators sector may very well be because of other professionals such as for example curriculum advisors.[94] Yet respondent never investigated this before refusing to appoint applicant. The refusal to appoint applicant under such circumstances was irrational, not well thought through and unfair.

VI The flexibility of affirmative action plans

[71] I accept that Meyer cannot make important policy decisions on his own and this is probably why he said that although it makes sense for psychologists to be seen as a separate group for purposes of affirmative action goals, applicant should ask her union to raise that with respondent.

[72] This explanation does not assist respondent at all because if this is the reason why respondent had not investigated whether white female psychologists are over-represented on post level 3 before refusing to appoint applicant, this means that respondent either did not properly apply its mind to all the relevant facts or sees its affirmative action policy, plan and goals as such rigid and inflexible devices that no matter how irrational or unfair its application may prove to be in practice, it still needs to be slavishly followed.

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[92] Although the onus was on respondent to prove that applicant's allegations in this regard are not correct, which it failed to do, I am not taking into account the unverified statistics which applicant placed before me with regard to the profile for psychologists employed by respondent in the various EMDC's.

[93] I am referring here to all professionals who render psychological services

[94] The onus was on respondent to prove that this was no so, because the employer bears the onus to prove that discrimination is not unfair. Cf section 11 of the Employment Equity Act

[73] This is impermissible because affirmative action policies, plans and goals are merely guidelines and goals. Furthermore such unwarranted adherence to a fixed principle by a decision maker has always constituted sufficient ground to set aside his decision.[95]

VII The flexibility of affirmative action goals

[74] This brings me to the next aspect which concerns me. That is the rigid adherence to the numbers in respondent's affirmative action goals which was displayed by refusing to appoint applicant even in circumstances where there were no takers for the post within the preferred designated groups and where white female educators, apart from being a designated group under the EEA, are overall under-represented on post level 3 in the WCED. This suggests that the numerical affirmative action goals which respondent has set for itself are regarded as rigid objectives or quotas[96] which must be met at all costs.[97]

[75] Pretorius, Klinck and Ngwena[98] states 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.[99] The learned authors argue 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.

[76] In addition to these arguments of *Pretorius et al* there are further reasons why in this case, respondent's affirmative action targets should be treated as very flexible goals. I will discuss these reasons in the footnote.[100]

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[95] *Johannesburg Stock Exchange and another v Witwatersrand Nigel Ltd and another* 1988 (3) SA 132 (A) at 152A-E; *Hira and another v Booysen and another* 1992 (4) SA 69 (A); *Kaefer Insulation (Pty) Ltd v President of the Industrial Court & others* [1998] 3 BLLR 230 (LAC)

[96] instead of flexible goals or targets

[97] This unfortunately is the only reasonable inference I can draw from the refusal to appoint the best candidate because of her race and gender where there were not any suitably qualified African and Coloured female candidates who could be appointed

[98] Pretorius, Klinck and Ngwena *Employment Equity Law* (Lexis Nexis Butterworths) at 9-49

[99] 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

[100] In addition to the reasons advanced by *Pretorius et al* as to why affirmative action goals are merely goals and not rigid objectives, there are two further reasons why respondent needs to take care not to adhere too rigidly to its targets. 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, it should be borne in mind that these statistics are now very outdated because we are currently relying on statistics of the 2001 census. The second reason relates to the fact

[77] 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.[101] One of the reasons why the Court rejected the employer's affirmative action goals in *Ensley Branch NAACP v Seibels*[102] 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.[103]

[78] In my view, the refusal to appoint the best candidate or the second best candidate based on the targets as contained in exhibit A52 when no suitably qualified African or Coloured female candidates could be identified, and where in general white female educators on post level 3 are under-represented in the WCED, implies that respondent completely lost sight of the fact that its own employment equity policy does not regard targets as hard and fast objectives that have to be met at all costs.

[79] Instead of treating its objectives merely as 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.[104]

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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. It would appear that respondent had only taken into account regional demographics in setting its goals and not also the other factors as provided for in the Employment Equity Act. This is therefore a further reason why the targets which it has set for itself should be treated as very flexible goals.

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

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

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

[104] **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."**

Concluding remarks regarding respondent's refusal to appoint applicant

[80] The **cumulative effect** of **all** these factors which I have discussed causes respondent's conduct to be irrational, disproportional and unfair. The measures which were taken exceeded the boundaries of legitimate affirmative action measures and constituted nothing else but blatant unfair discrimination based on gender and race. I am satisfied that the affirmative action measures which were applied in this case, were applied in such a manner that they were inconsistent with the purpose of the Employment Equity Act. Accordingly they do not qualify as a defence to the claim of unfair discrimination in terms of section 6(2)(a) of the Employment Equity Act.

[81] Accordingly I am satisfied that respondent has exercised its discretion[105] not to make an appointment and to re-advertise the post in an irrational and unfair manner and has abused this discretion.[106]

[82] Unfair discrimination constitutes unfair conduct as intended in the unfair labour practice definition contained in section 186(2)(a) of the LRA. I am also satisfied that that had it not been for this unfair conduct, applicant would indeed 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.

RELIEF

[83] An arbitrator's powers in granting relief in unfair labour practice disputes are indeed wide. In the first place 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

[105] which discretion is granted to respondent in terms of sections 6(3) and 7(1) of the Employment of Educators Act No 76 of 1998

[106] I want to make it clear that I have no reason to believe that Meyer or the HOD acted with malice or ulterior motives. This however is irrelevant because a person with the best intentions in the world can be guilty of unfair discrimination, because motive and intention are not elements of unfair discrimination.

declaratory order. 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.[107] Where an arbitrator in a promotion dispute finds that the employer was indeed guilty of unfair conduct, like I have already found, 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.[108]

[84] 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 white female. It was therefore not necessary for applicant to prove this and accordingly there is nothing which stands in my way to order that applicant must be appointed in the post.

[85] 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.[109] 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. 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 fully entitled to expect that the best candidate, being herself will be appointed.

[86] Furthermore 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 not be appropriate. The promotion of the applicant would,

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[107] 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

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

[109] *Public Service Association of SA on behalf of Helberg v Minister of Safety & Security & another* (2004) 25 ILJ 2373 (LC) para 12

in my view, be the most appropriate remedy and be one which is reasonable, just and equitable.

AWARD

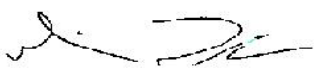
In the premises I make the following order:

1. Respondent's refusal to appoint applicant in post number OB/09/2006 being that of Senior Education Specialist : School Psychological Services at EMDC Metropole East constituted unfair discrimination and an unfair labour practice relating to promotion as contemplated in section 186(2)(a) of the LRA.

2. Respondent is interdicted and restrained from re-advertising the aforesaid post.

3. Respondent is directed to appoint applicant in post number OB/09/2006 being that of Senior Education Specialist : School Psychological Services at EMDC Metropole East with effect from 1 April 2007, from which date onwards applicant shall be entitled to the remuneration and all other benefits attached to this post.[110]

4. No order as to costs is made.



adv D P Van Tonder

Arbitrator/Panellist: ELRC

[110] This order is not made retrospectively