

**TITLE : A CRITICAL ANALYSIS OF THE LAW RELATING TO
THE**

FAIRNESS OF PROMOTION OF EMPLOYEES.

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**Research for a mini dissertation in partial fulfillment of the
Master of Laws degree (LLM) with specialization in Labour
Law.**

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DECLARATION

I declare that this dissertation for the degree Master of Laws hereby submitted has never been previously been submitted by me for a degree at this or any other University. This is my work in execution and design and all the material contained in this dissertation has been duly acknowledged.

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DECLARATION BY SUPERVISOR

I hereby declare that this dissertation by the candidate, student number 200523243 for the degree Master of Law, be accepted for examination.

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ACKNOWLEDGEMENT

I would like to thank my supervisor, Prof K.O Odeku for his guidance, supervision, leadership and timely advice at various stages of my research. I would also want to thank the following people: my immediate supervisor at my workplace, Brigadier Meshack Nyameko Nogwanya, for his perpetual support and encouragement to me to study further and acquire masters degree in law. His moral support enhanced my state of well-being immeasurably. My wife, children, friends, library staff, colleagues and fellow students for their moral support, kindness and patience shown to me throughout my studies. If it was not because of their support, I would not have gone this far with my studies.

ABSTRACT

The issue of promotion in the workplace has become a subject of discussion these days. As this issue is sensitive and important to both employers and employees it will always bring about conflicting interests and rights between the two parties. Promotion of employees in the workplace helps the employers to fill up vacant posts and at the same time helps some employees to move up the ladder or get promoted and thereby improving their livelihood or living conditions. In the process of doing this, some employees who did not succeed will feel disappointed and challenge the employer's decision in the bargaining councils or Commission for Conciliation Mediation and Arbitration (CCMA) and even in courts.

This dissertation has been extensively researched and supplemented accordingly by incorporating the latest case law in promotional disputes in the shop floor in court or arbitration proceedings. Both employers and employees will find the information contained in this comprehensive and reliable work an indispensable guide to a complex and yet interesting area of law. This work deals with promotion in the workplace in general and the manner in which employers should handle them in order to avoid unnecessary promotion disputes which are often protracted and costly and on how these disputes should be dealt with successfully once they arise.

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A CRITICAL ANALYSIS OF THE LAW RELATING TO THE FAIRNESS OF PROMOTIONS IN THE WORKPLACE

CHAPTER ONE

1. Introduction

Under the common law, employees have no legal entitlement to be promoted to higher posts, unless they can prove a contractual right or, perhaps, in the case of public sector employees, a “legitimate expectation.”¹ The existence of that concept in our law was confirmed in *Administrator, Transvaal and others v Traub and others*.² Just as employers are free to choose whom to appoint, they are at liberty to decide which posts to create and who will fill them, and who to appoint to vacancies.³ No particular employee, or employees generally, are entitled to preference when it comes to advancement in their employer’s organization even over ‘outsiders.’⁴ Promotions, in short, falls squarely within the generous area of prerogative left to employers by the common law.⁵ Now, however, the unfair labour practice definition includes unfair conduct by an employer relating to the promotion of employees.⁶ In this context, unfair conduct is not limited to discriminatory treatment, as will be seen, an employer may perpetrate an unfair labour practice relating to promotion in a variety of ways undreamed of under the common law.⁷ The first and obvious requirement of this form of unfair labour practice is that the conduct complained of must relate to promotion.⁸

1. Grogan John: Dismissal, discrimination and unfair labour practices, second edition, 2008, p. 52.

2. 1989 (4) SA 731 (A) (1989) 10 ILJ 823 (A).

3. Ibid of note 1 above, p. 2.

4. Ibid.

5. Ibid.

6. Ibid.

7. Ibid.

8. Ibid.

The promotion of an employee within an organization involves the consideration and application of human resources practice, policy and applicable legislation.⁹ Many countries have legislative provisions protecting employees against unfair dismissal, but South Africa is one of the few that also provides a general protection against unfair employer decisions relating to promotion.¹⁰ This is found in item 2(1)(b) of Schedule 7 to the Labour Relations Act.¹¹ This states that unfair conduct relating to the promotion of an employee can constitute an unfair labour practice. Perhaps true to human nature, this has led to a large number of promotion disputes being referred to the Commission for Conciliation Mediation and Arbitration (CCMA). The promotion of an employee within an organization involves the consideration and application of human resources practice, policy and applicable legislation. The express inclusion of unfair conduct relating to promotion and demotion under the unfair labour practice definition, has led to a flood of cases referred to the CCMA.¹² From these awards, and a number of instances where the Labour Court had occasion to consider promotions and demotions, it is clear that three issues typically arise in these cases:¹³ Firstly, one has to consider what “promotion” and “demotion” actually mean(s). This is a precondition for jurisdiction under the unfair labour practice definition. Secondly, and once it has been established what “promotions” and “demotions” are, one have to consider what could constitute “unfair conduct” in this context. Case law now provides us with a host of examples in this regard and thirdly, one has to address the issue of what remedies may be granted where an employer’s conduct is found to be unfair. Of particular importance here, is the question whether the CCMA (or a Bargaining Council) can actually promote employees who have unfairly been denied a promotion. Each one of these issues will now be considered.

9. Molony, S “ Promotion of employees in the public service” 19th Annual Labour Law Conference, 5- 7 July 2006, p. 1.

10. Garbers C, Promotions: Keeping abreast with ambition: Contemporary Labour Law, Volume 9, No.3 October 1999.

11. Act No. 66 of 1995 as amended, 2002.

12. Basson A, Christianson M, Garbers C, Le Roux K, Mischke C and Strydom E.L.M : Essential Labour Law 1st ed (1998), p. 235.

13. Ibid of note 4 above, p. 235.

CHAPTER TWO

2. Definition of concepts

Promotion is defined in the Oxford English Dictionary as raise to a higher rank or office.¹⁴ Most employers use one, or a combination of, two systems to promote employees.¹⁵ A system of level progression, where employees are evaluated on a periodic basis and, dependent on the outcome of such evaluation, progress within the parameters of the job in question.¹⁶ A system whereby certain vacancies are advertised and current employees are also invited to apply for such posts. In practice, the first of these (level progression) has presented few problems, and the CCMA has been quick to accept jurisdiction to decide on the fairness or otherwise of an employer's conduct. For example in the case of *Misra v Telkom*¹⁷ the employee party referred to the CCMA for arbitration a dispute in terms of Schedule 7 Item 2(1)(b) of the LRA 1995, alleging that the employer party had committed an unfair labour practice involving unfair conduct relating to his promotion from level B3 to level B4 of the organization.

The employee alleged that certain statistics were missing when the feedback appraisals of his performance were carried out, and that his evaluation for promotion was not fairly carried out. The respondent employer stated that the procedures were followed as agreed between the parties, that the employee was given a full opportunity to give his input, and that he had received a fair evaluation. It also argued that in any event it was management's prerogative to decide whether an employee should be promoted or not. Having considered all the evidence the commissioner concluded that the evaluation had been properly conducted and was fair in all respects, and that the employer had not committed an unfair labour practice relating to the employee's promotion.¹⁸ He commented as follows:¹⁹

14. Du Plessis J V, Fouche M A and Van Wyk M W: A practical Guide to Labour Law 4th ed. (2001), p. 7.

15. Ibid of note 12 above, p. 236.

16. Ibid.

17. (1997) 6 BLLR 794 (CCMA).p.153.

18. Ibid.

19. Ibid.

“Having come to this conclusion it is not necessary to consider an employer’s alleged exclusive prerogative to decide whether to promote an employee or not. Mr Mgaga referred to the decision in *George v Association of Africa Ltd.*²⁰ In this case Landman P as he then was alluded to an assumed prerogative or wide discretion which an employer has as to whom he or she will promote or transfer to another position. I doubt very much whether this alleged prerogative if it exists will still carry the same weight under the present Labour Relations Act as it did under the old Labour Relations Act in respect of unfair labour practice.”

However, the second system (application for vacancies), has been more problematic and these problems have been caused by the view expressed in *Public Servants Association v Northern Cape Provincial Administration*²¹ where it was said:

“I am also of the opinion that as the employee had applied for a post duly advertised in a newspaper, such application, should it be successful, could not be a promotion although the appointment would have been made within the same department. It would not constitute a promotion as a promotion is usually an internal matter. Thus the employee is in fact a job applicant and item 2(1)(b) of schedule 7 of the Act could not be of assistance, as job applicants are not eligible for promotion [or] demotion.”

From a number of subsequent cases, however, it becomes clear that (irrespective of the fact that an employee has to apply for an advertised post) one should focus on two issues in order to determine whether one is dealing with a “promotion” or a “demotion.”²² Step 1: An existing employment relationship: The first question is whether there is an existing relationship between the employee and the employer with whom the job applied for exists.²³ Furthermore,²³ the concept “employer” here has been held to include “essentially the same employer.” Last mentioned is of particular importance where employers restructure and invite employees to apply for positions in the new structure.

20. (1996) 17 ILJ (IC).

19. (1997) 18 ILJ 1137 (CCMA) (at 1141B- D) at 1141B-D.

22. Basson A, Christianson M, Garbers C, Le Roux K, Mischke C and Strydom E.L.M : Essential Labour Law, Vol 1, 1st ed (1998),p. 236.

23. Ibid.

24. Ibid.

For example, in *Vereeniging van Staatsamptenare obo Badenhorst v Minister of Justice*²⁵ the aggrieved employee was denied appointment to a post against the background of a restructuring of the Department of Justice. This restructuring entailed that all employee in the “old” Department were invited to apply for one or more of the thousands of newly created posts in the “new” Department. Existing employees were, however guaranteed a job in the structure on at least the same level of pay they had occupied in terms of the old structure. The employee unsuccessfully applied for a higher post in the new structure. The employer argued that the employee should be treated as a job applicant, and that the dispute did not involve a “promotion.” The Commissioner stated as follows:

“It appears that the applicant applied for a post which would have resulted in a promotion for her to a more senior level if her application had been successful. While I accept that this was not a promotion in the ordinary sense of the word, I do not believe that the peculiar nature of the rationalization process can allow semantics to change the essential nature of the dispute.”

No evidence suggested that the applicant’s years of service would not be transferred to the post in the new structure, nor was it suggested that her employee benefits would be interrupted by such transfer. A new post would still essentially be with the same employer, the Department of Justice, but in a remodeled structure in conformity with the rationalization. It is specious to suggests that the applicant was a job applicant, in the sense of being an outside job - seeker.” Similarly, in *Bench v Phalaborwa Transitional Local Council*²⁶ the Labour court was prepared to afford the employee interim relief where the employee woke up one morning to see his post advertised in a newspaper. The Labour Court found that appointment to the advertised post would, in fact, amount to a demotion notwithstanding the fact that the advertised post was part of the envisaged restructured Local Council. This decision was later correctly followed in *Public Servants Association obo Dalton & Another v Department of Public Works*²⁷ where a restructuring of a government department was involved.

25 (1999) 20 ILJ 253 (CCMA) at 256 G-I.

26. (1997) 9 BLLR 1163(LC).

27. (1998) 9 BALR 1177(CCMA).

Step 2 - Comparing Jobs: Once the required nexus between an employee and (essentially the same) employer exists, one has to compare the current job with the applied for to determine whether a promotion or demotion is involved.²⁸ The following factors will typically be taken into account, the presence of one or more of which, may point to a “promotion” or “demotion:”²⁹ Differences in remuneration levels, differences in fringe benefits, differences in status, differences in levels of responsibility, in levels of authority and power and in the level of job security.³⁰

This will typically influence the above-mentioned factors where, for example, an employer had a policy whereby casual employees were, after a certain period appointed as part-time employees and, after a further period, as permanent employees, the CCMA accepted jurisdiction in *Joint Affirmative Management Forum v Pick `n Pay Supermarket*.³¹ An example of how a court or the CCMA will look at these factors is to be found in *Mashegoane & Another v University of the North*.³² Here the Labour Court was called upon to decide whether the refusal to appoint a lecturer as Dean of a Faculty related to a “promotion.” In terms of the applicable legislation, the Senate of the University appointed Deans, after receiving a recommendation from the Faculty Board. Thus, it was argued on behalf of the University that “Dean-ship was not a post applied for, nor a promotion, but a nomination. The court, departing from the fact that the applicant was a current employee, said the following:

“Had Mashegoane been appointed his salary would have remained the same but he would have received a Dean’s allowance and would have a car at his disposal. These are the only mentioned benefits he would receive. I would however also assume that once appointed as Dean his status would be considerably elevated. He would further have responsibilities relating to the management and control of the Faculty. He would also become chairperson of the Faculty Board. It goes without saying that he would be clothed with certain powers and authority to be able to manage and control the Faculty. To me, at least this indicates that the position of Dean is not a token position, it has real meaning and power attached to it. It is a position that is of higher status with more responsibilities than a person who is, for instance, a lecturer in the same faculty. I am therefore of the view that the appointment to the position of Dean amounts to a promotion.”

28. Ibid of note 12 above, p. 237.

29. Ibid.

30. Ibid.

31. (1997) 18 BLLR 1163(CCMA).

32. (1998) 1 BLLR 73(LC)(at 77 G-I).

In contrast, the Court in *Nawa and another v Department of Trade and Industry and others*³³ found the absence of a “promotion” following a decentralization process. In the case *in casu*, the Department of Trade and Industry wanted to decentralize some of its components or sections. Mr Lancelot Nawa and Maamo Teche were not happy about the proposed decentralization process because they thought this amounted to their victimization and that their employer was committing residual unfair labour practice against them and made an urgent application to the Labour Court to interdict the Department on its proposed restructuring process until the mediation between them had been finalized. The Labour Court by Justice Landman in dismissing the application as a whole said the following:

“There is no intention to disturb the existing terms and conditions of employment; there is an intention to alter the way in which the activities are performed; there is an intention to restructure, to a degree, the reporting functions or the chain of command to a slight degree, but all this falls within the managerial prerogative of an employer, including the State in its capacity as employer. The LRA does not provide for a general unfair labour practice definition and concluded that an employee who alleges an unfair labour practice must show that it falls within the residual unfair labour practice definition.”

In general terms, one can say that the Commission for Conciliation Mediation and Arbitration (CCMA) and other institutions will be relatively quick to assume jurisdiction by finding that a “promotion” or “demotion” was involved and not be side-tracked by employers’ arguments about the purported separate identity of employers or about the procedure underlying appointments.³⁴ Note, however, that where the issue in dispute is whether a particular job should be upgraded or otherwise, this apparently does not involve a “promotion.”

The court in *Mzimni & Another v Municipality of Umtata*³⁵ held that:

“Promotions are about people moving between jobs or between different levels assigned to a job, not about people moving with jobs. Promotion is known as the reassignment of an employee to a higher-level job.”

33. (1998) 7 BLLR 701 (LC)(at 701J – 703A).

34. Ibid of note 4 above, p. 257.

35. (1998) 7 BLLR 780 (TK) at 784 G-H.

Generally, it is given as recognition of a person's past performance and future promise.³⁶ When he/she is promoted, an employee generally faces increased demands in terms of skills, abilities and responsibilities and in return an employee is granted better pay benefits and more authority, as well as higher status.³⁷ In terms of item 2(1)(b) of schedule 7 to the Labour Relations Act³⁸ the employer's unfair conduct relating to promotion constitutes an unfair labour practice. Once it is established that a "promotion" or "demotion" is involved, the fairness of the employer's conduct may be investigated.³⁹

In general, scrutiny of an employer's conduct in this context departs from the principle (and this goes for unfair labour practices in general) that unfairness is an objective concept, described as follows in *SACCAWU v Garden Route Chalets (Pty) Ltd.*⁴⁰ The Commission for Conciliation Mediation and Arbitration (CCMA) in *SA Municipal Workers Union obo Damon v Cape Metropolitan Council*⁴¹ said "unfair implies failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended. Applied in the context of promotions, this means, that mere unhappiness or a perception of unfairness does not necessarily equal unfair conduct. "The process of selection inevitably results in a candidate being appointed and the unsuccessful candidate(s) being disappointed. This is not unfair". Secondly, and in much the same vein, perceptions of unfairness also do not necessarily equal unfairness.⁴²

36. Grobler P. A, Warmich S, Carell M.R, Elbert N.F and Hatfield R. D: Human Resources and Personnel Management in South Africa, 2nd ed (2002).

37. Wayner R, Mondy and Robert M.N: Human Resources and Personnel Management, 6th ed (2004).

38. Act No. 66 of 1995 as amended in 2002.

39. Ibid of note 12 above, p. 239.

40. (1997) 3 BLLR 325 (CCMA) at 332 F.

41. (1999)20ILJ 714 (CCMA) at 719 D-E.

42. Ibid of note 12 above, p. 239.

In *Vereeniging van Staatsamptenare obo Badenhorst v Department of Justice*⁴³ the CCMA held that:

“The Department could have done more in its briefing sessions to inform staff. This may have prevented the perception that the process had been unfair, but it does not make the process actually unfair or prejudicial to the applicant.” Promotion is a managerial prerogative and the employer can promote whoever he thinks is the best or most suitable candidate for the position. However, an employer is required to act fairly when promoting or not promoting an employee; unfair conduct in this regard constitutes an unfair labour practice. The managerial prerogative is thus limited both procedurally and substantively, meaning that the employer must act procedurally and substantively fair in the promotion or non-promotion of an employee.”

This was confirmed in the case of *Samuels V South African Police Service*.⁴⁴ In *casu*, the court said the following:

“Although the decision to promote forms part of managerial prerogative, it must be executed reasonably and in good faith. This means that an employer must be able to justify its decision on rational grounds. It must apply its mind to the selection of the best candidate, and supply reasons for its decision. An employer would not act in good faith if it used invidious comparisons, unfair criteria, or no criteria at all. Against the background of these general considerations, one may say that for a promotion to be fair, case law indicates that both procedural and substantive fairness is required.”

43. (1999) 20 ILJ 1964 (CCMA) (at 1968 G-H).

44. (1999) 20 ILJ 253 (CCMA)(at 262 L-J).

CHAPTER THREE

3. Substantive fairness of promotions

As far as substance is concerned (i.e. evaluating the reasons why an employer ultimately decides to prefer and appoint one employee instead of another or over others is a difficult exercise). Recent awards show that the CCMA should exercise deference to an employer's discretion, for example in *Marra v Telkom SA Ltd*⁴⁵ the court said the following:

"Employees' personal interests need to be consistent with the needs of the enterprise, not as objectively determined in a perfect corporation, but as determined by those who have the legitimate power to manage the enterprise."

But even if the needs of the employee apparently meet the needs of the employer in terms of being suitable for promotion, the employer retains a discretion to appoint whom it considers to be the best candidate.⁴⁶ This decision on the part of the employer should be respected by the CCMA commissioners, Bargaining Council arbitrators and the courts unless it is clear on the facts of a particular case that the employer's decision was arbitrary or actuated by *malice* or *mala fide*.

In *Public Servants Association obo Dalton & Another v Department of Public Works*⁴⁷ the Commissioner accepted that:

"It may be difficult to justify the choice of a particular candidate in precise terms, and that an employer is at liberty to take into account subjective factors such as performance at an interview when considering an appointment or promotion."

Similarly, in the *Damon* case referred to above, it was stated as follows:⁴⁸

"Unless the appointing authority was shown to have not applied its mind in the selection of the successful candidate, the CCMA may not interfere with the prerogative of the employer to appoint whom it considers to be the best candidate."

45. (2003) 24 ILJ 1189 (BCA).

46. Ibid of note 4, p. 244.

47. (1999) 20 ILJ 1964 (CCMA) at 1968 G-H.

48. Ibid of note 10 above, p. 26.

In the same vein, it was declared in *Van Rensburg v Northern Cape Provincial Administration*,⁴⁹ that interference in the employer's decision is only justified where the conduct of the employer is "so grossly unreasonable as to warrant an interference that they failed to apply their mind". This means that an employer will be allowed quite a margin of latitude in coming to its decision.

This is subject of course, to legislation such as the Employment Equity Act, 1998 and the fact that employers often forfeit this discretion at least partially, through, for example, a collective agreement.⁵⁰ At bottom, however, an employer has to provide reasons (see *Mashegoane & Another v University of the North*⁵¹ and *Public Servants Association of SA obo Petzer V Department of Home Affairs*.⁵²

Furthermore, the CCMA has shown a willingness to scrutinize those reasons (as typically manifested by the deliberation process of the selection panel to ensure that with due deference to the employer's prerogative, there is a logical connection between the real reasons and the decision taken. This was said by the court in *Vereeniging Van Staatsamptenare obo Badenhorst v Department of Justice*.⁵³ This scrutiny by the CCMA has led to a number of examples of consideration that are acceptable and considerations that are unacceptable which are discussed below.

49. (1999) 20 ILJ 1964 (CCMA) at 1968 G-H.

50. Ibid of note 4 above, p. 27.

51. [1998] 1 BALR 73 (LC).

52. (1998) 9 BLLR 1177 (CCMA)(AT 1426 F-G).

53. Ibid of note 4 above, p. 27.

3.1 Acceptable Considerations

The court in *Rafferty v Department of the Premier*⁵⁴ found that assigning a certain hierarchy to the stated requirements for a job is acceptable. The employer in this case, set three broad requirements for the post in question, but, in making decision, regarded one of these three as more important than the others and was not found to be fatal at all. Applicants for vacant and advertised posts often complain about the fact that they were asked or not asked certain questions by the panel. This was the case in *Van Rensburg v Northern Cape Provincial Administration*⁵⁵ the employee complained that the panel never asked him questions about what was arguably his strongest point. This defect was not found to be fatal, as the evidence showed that the panel was fully informed about the candidate's expertise in this area and, indeed, gave the candidate a very high mark in this area.

3.2. Deviation from hierarchy of marks achieved by candidates in the interview

In both *Van Rensburg v Northern Cape Provincial Administration*⁵⁶ above and *Public Servants Association obo Dalton & Another v Department of Public Works*⁵⁷ the aggrieved employees received higher marks at the interview than other candidates who were ultimately preferred. This defect is also not fatal, provided the employer has good reasons for doing so and unless, for example, the employer is bound, in terms of its policy to the ratings achieved at the interview. In *Mbatha and Durbun Institute of Technology*,⁵⁸ the commissioner held that the mere fact that an unsuccessful applicant for promotion received a higher rating from a selection committee than the successful applicant does not necessarily render the failure to appoint the former unfair. But the employer should prove what those criteria are, and that they are reasonably related to the requirements of the post in question.

54. (1998) 8 BALR 1077 (CCMA).

55. (1997) 18 ILJ 1421 (CCMA).

56. Ibid of note 55 above.

57. (1998) 9 BLLR (CCMA).

58. (2005) 26 ILJ 2054 (CCMA) referred to in Grogan J, Jordaan B, Maserumula P and Stezner S: *Juta's Annual Labour Law Update*, 2006, p. 34.

From the cases discussed in this paragraph, it is now trite and tested principle of the law in the Republic of South Africa that the fact that a particular candidate obtained more marks in the interview is immaterial when it comes to the issue of appointment of a successful candidate.

3.3 Prior promises

Employees are prone to worry about their future and often consult with superiors about their prospects.⁵⁹ In general, superiors should be careful about making promises, but such promises will not, in themselves, entitle an employee to promotion.⁶⁰ In general, if an expectation is created, this merely entitles an employee to be heard before an adverse decision is taken not to a right to get what was promised. Sometimes, however, such promises have a material effect on the outcome of the employer's decision and then the position will be different. If an employer has regard to irrelevant criteria when choosing between a better qualified candidate and a less qualified candidate, the failure to promote the better qualified candidate may also be unfair.⁶¹ Employers are also guilty of unfair conduct relating to promotion if they give employees a reasonable expectation that they will be advanced and then, without adequate reason, frustrate that expectation.⁶² The mere fact that an applicant for promotion has been treated unfairly does not necessarily mean that he is entitled to be promoted. *In Mbatha and Durban Institute of Tecknology*⁶³ the Commissioner held that the mere fact that a preferred candidate for promotion did not accept the post does not entitle another short-listed candidate to be appointed. The test is whether the candidate has proved that he would have been appointed or promoted had it not been for the unfair conduct of the employer and also whether he was found to be appoint able or promotable during the interview.

59. Ibid of note 12, p. 245.

60. Ibid of note 10 above, p. 27.

61. Grogan J, Workplace Law, 7th ed (2003) p. 231.

62. Ibid.

63. (1998) 8 BALR 1077 (CCMA).

In *Rafferty*⁶⁴ for example, the employee had earlier been assigned to perform a task outside her immediate job. When she expressed concern about the effect this might have on her future prospects, she was given the assurance that this would not prejudice her. She was, however, denied promotion, partly because the selection panel took this into account as inapplicable experience. Similarly, an employer may deviate in practice from a policy. In such cases, deviation from the procedure laid down in the policy may well be unfair unless the employer has good and valid reasons to do so.

3.4 Past practices

Sometimes the procedure for promotion is consistently deviated from in practice over a period of time.⁶⁵ This may raise both procedural and substantive issues.⁶⁶ If an employee can show that the original procedure was in fact “amended,” such a deviation from the deviation, so to speak, may well be found to be procedurally unfair.⁶⁷ As far as substance is concerned, it sometimes happens that a policy requires a panel to make recommendations to a higher body about whom should be promoted.⁶⁸ Past practice may show that the higher body has never deviated from the recommendation made by the panel.⁶⁹ Consistently would then seem to require that if an employee is recommended, the employee must be promoted.⁷⁰ It is submitted that such a view is incorrect. If the test to decide on the substantive fairness of a promotion is whether the employer applied its mind, surely the mindless application of a policy cannot be relied on in support for an attack on fairness.⁷¹ Or, viewed from the other side, a denial of promotion in such a case may well be an indication that the higher body actually applied its mind to the issue at hand.⁷²

64. Ibid of note 54 above.

65. Ibid.

66. *Abbot v Bargaining Council for the Motor Industry (Western Cape)*(1999) 20 ILJ 330(LC) at 334 AC and *Van Rensburg v Northern Cape Provincial Administration* (1997) 18 ILJ 1421 (CCMA) at 1424 - 1425) .

67. Ibid of note 10 above, p. 28.

68. Ibid.

69. Ibid.

70. Ibid.

71. Ibid.

72. Ibid.

3.5 Affirmative action

There is little doubt that an employer may take affirmative action into account in denying promotion of an employee, who is not a member of a designated group.⁷³ Bear in mind, that should the employee take the matter further, the dispute will be one concerning discrimination and should be referred as such by the employee.⁷⁴ This becomes evident when one looks at the decision of *Sasko (Pty) Ltd v Buthelezi & others*⁷⁵ which was followed in *SATA obo Van der Mescht v Telkom SA (Pty) Ltd*.⁷⁶ Furthermore, the fact that an employee fall within one of the designated groups, does not mean, that employee has a right to be promoted in a given case.⁷⁷ The employer retains its discretion, within the parameters of its affirmative action policy and the Employment Equity Act, 1998 once its affirmative action provisions become operative, to appoint the best person for a job.⁷⁸ The employee in *Mathakgale and S A Police Service*⁷⁹ a black female, applied for a promotional post. She was short listed as a 'male,' and an Indian male was appointed 'in order to address equity and gender.' Quite understandably, the arbitrator pointed out that Ms Mathakgale had been prejudiced by being classified as a male. She was awarded compensation.

3.6 Subjective factors taken into account by the selection panel

Earlier it was said that the managerial prerogative in the sphere of promotions allow an employer to take subjective considerations (such as performance at an interview) into account.⁸⁰ An employer will be able to take any other consideration, provided it is sufficiently job-related and not discriminatory, into account.⁸¹

73. Ibid of note 12 above, p. 245.

74. Ibid.

75. (1997) 12 BLLR 1639 (LC).

76. (1998) 6 BALR 732 (CCMA).

77. Ibid of note 10 above, p. 30.

78. Ibid.

79. Grogan J, Jordaan B, Maserumula P and Stezner S : Juta's Annual Labour Law Update, 2006, p. 33.

80. Ibid of note 10 above, p. 28.

81. Ibid.

Interestingly, in *Vereeniging van Staatsamptenare obo Badenhorst v Department of Justice*.⁸² The Commissioner found it acceptable that the employer, in judging applicants for appointment as a lecturer, took the age and general life skills evidenced by experience outside the Department of the successful applicant into consideration, because it was sufficiently relevant. When one looks into this decision enquiringly, it becomes evident that apart from the general rule that the panel should consider only the information submitted by the applicants, the panel can deviate from the general rule and consider outside evidence of an applicant provided that evidence is relevant and will not prejudice the applicant.

3.7 Unacceptable considerations

In general, and using the *Damon and Van Rensburg* test, if an employer or its selection panel takes into account any consideration, which shows that it failed to apply its mind to the matter at hand, the defect will be fatal and the decision thus unfair).⁸³ Perhaps the most obvious example of this (and this happened in the *Rafferty* case referred to above), would be where the decision of the panel is swayed by outside influences, such as the preference of more senior people in the organization.⁸⁴

3.8 Conduct by an employee inconsistent with complaints of unfairness

It seems that the normal rules regarding waiver apply to claims of unfair conduct relating to promotion.⁸⁵ Waiver in this context would mean that an employee, who in principle has the right to challenge the conduct of the employer, acts in such a way that it is clear that he or she is not going to exercise that right.⁸⁶

82. (1999) 20 ILJ (CCMA).

83. Ibid of note 39 above, p. 28.

84. Ibid.

85. Ibid.

86. Ibid.

But even if the conduct of the employee does not constitute waiver in a technical sense, inconsistent conduct of an employee may be taken into account in judging fairness. For example, where a trainee manager at one branch was laid off and, during the lay-off, accepted work as a general assistant at another branch, this was found to be demotion (*Gumede v Price and Pride*).⁸⁷ However, the employer's conduct relating to that demotion was found not to be unfair, as the employee consented to the transfer. Consent by an employee, of course, should be approached carefully, as it often does no more than reflect the inequality in power between employer and employee.⁸⁸ Similarly, it often happens that employees apply for voluntary severance packages in the period immediately preceding a challenge to the employer's conduct relating to a promotion.⁸⁹ This happened in both *PSA obo Mclellan v Provincial Administration (Department of Health)*⁹⁰ and *Classen & Another vs Department of Labour*.⁹¹

In *Mclellan*⁹² the application for a severance package was taken into account as a factor supporting a finding that the employer's conduct was not unfair. However, *Classen* warns us that inconsistent conduct on the part of an employee, which may point to a waiver of the right to challenge the employer's conduct, should be seen in context. It was further argued that the applicant's applications for severance packages are inconsistent with their applications for promotions. This would undoubtedly normally be the case. However, as Mr Classen had said, his career prospects in the department appeared to be rather dismal after he had on two occasions received no response to his application for promotion to a post in which he had served in an acting capacity. The same obviously applies to Mr Deysel. When they also received no response to their applications for severance packages, and the posts were again advertised, it was in their interest to again apply for the posts.

87. (1997) 18 ILJ 1464 (CCMA).

88. Ibid of note 10 above, p. 29.

89. Ibid.

90. (1998) 2 BALR 154 (CCMA).

91. (1998) 10 BALR 1261 (CCMA) (at 1265 H-J).

92. Ibid of note 90 above.

If the applicants were not going to receive severance packages, there is no reason why they should not have tried to advance their careers in the department". In other words, the conduct of the employees in the Classen case made it clear that they continued to pursue promotion despite the application for severance packages (which in any event was forced on them). In McLellan, in contrast, the letter in which the employee applied for the severance package also expressed a lack of interest and enthusiasm for the job and gave the go-ahead that the post be filled by another candidate.⁹³

3.9 Can it be said that internal candidate who gets the position has been appointed or promoted to that position?

Some doubt existed as to the difference between "promotion and appointment."⁹⁴ Some ingenious arguments exist in support of a narrower interpretation, but the majority of judgments appear to favour a wider interpretation in terms of which an external applicant is appointed, while an internal one is promoted! Promotion deals with the substance of the new job.⁹⁵ When the employee's current job is compared with the new one and the new one brings about higher remuneration levels, more or better fringe benefits, greater status, authority and power and more responsibility, the new job involves a promotion, even though the employee had to apply for the position.⁹⁶

The case of *Vsa obo Badenhorst v Department of Justice*⁹⁷ referred to above, clarifies the matter. In this case the "old" Department was restructured and all existing employees were invited to apply for newly created posts in the "new" Department. The employer argued that she should be treated as a job applicant and that the dispute, therefore, did not involve a promotion.

93. Ibid of note 39 above, p. 29.

94. Ibid.

95. Ibid.

96. Grogan J, Jordaan B, Maserumula P and Stezner S: Juta Fifteen Annual Current Labour Seminar (2004), p. 32.

97. (1999) 20 ILJ (CCMA) at 256 G.

The court also concurred with the following CCMA Commissioner's finding.

"It appears that the applicant for a post which would have resulted in a promotion for her to a more senior level if her application had been successful. While I accept that this was not a promotion in the ordinary sense of the word, I do not believe that in that peculiar nature of the situation, if the rationalization process can allow semantics to change the essential nature of the dispute. No evidence suggested that the applicant's years of service would not be transferred to the post in the new structure, nor was it suggested that her employee benefits would be interrupted by such transfer. A new post would still essentially be with the same employer, the Department of Justice, but in a remodeled structure in conformity with the rationalization. It is specious to suggest that the applicant was a job applicant, in the sense of being an outside job-seeker."

It remains to be seen whether the factors taken into account in the Department of Justice case, where the CCMA looked at the continuity of service and interruption of benefits will mean that the concept of "essentially the same employer" could be extended even further to, for example, different companies in a group.

In *Department of Justice v CCMA & Others, the Labour Appeal Court*⁹⁸ settled the issue by holding that a dispute arising from an application by an employee for an (externally) advertised post constitutes a dispute concerning a promotion for purposes of LRA. The effect is that aggrieved "internal" applicants may refer their claims to the CCMA while aggrieved "external" applicants must approach the High Court. While this was described as a "very unsatisfactory state of affairs," it does not deprive the CCMA of jurisdiction to resolve disputes about internal promotion. The court rejected the argument that if an employer advertises a vacant post and indicates that potential applicants from outside its organization may also apply, any dispute lodged by an existing employee who feels aggrieved by the fact that he or she was not appointed to that post, cannot allege that this is a dispute relating to promotion.

98. (2004) 4 BLLR 297 (LAC).

The court stated:⁹⁹

“I accept that where, as in this case, the employer has advertised the post both inside and outside his service, a member of the public who applies for appointment to such a post would not be said to be promoted if his application were successful. I accept, too, that the result is that the existing employee will have a dispute relating to promotion-and thus falling under item 2(1)(b)-while an applicant for employment who had not been appointed will simply have a dispute relating to non-appointment. That difference arises from the fact that each one of the two candidates has a different relationship with a decision-maker in this regard. The one is an employee of the decision-maker whereas the other has no existing employment relationship with the decision-maker. The purpose of item 2(2)(a) in including an applicant for employment in item 2(1)(a) where he complains of an unfair labour practice based on unfair discrimination but not extending that to a case where his complaint is not based on unfair discrimination, was that unfair discrimination is so unacceptable in our society that unfair labour practice protection against such conduct should be granted even to an applicant for employment, but, where the complaint is based on other grounds of unfairness, a protection can be confined to existing employees.”

The court further stated:¹⁰⁰

“I have thought about the question whether it cannot be said that, when an employer advertises a post both inside and outside its service, he thereby takes any subsequent dispute outside the ambit of item 2(1)(b) so that one can no longer talk of a dispute relating to promotion. I think not. That construction of item 2(1) (b) would simply make it too easy for an employer to evade the protection which the Act seeks to give existing employees by way of the unfair labour practice provision in item 2(1)(b). An employer who wants to treat an existing employee unfairly in relation to promotion would simply advertise the post inside and outside of its service and then treat such employee unfairly in the knowledge that he is out of reach for the unfair labour practice provision in item 2 (1)(b). In such a case, the employee’s remedy would be to approach the High Court. Unless his complaint is based on the infringement of the right not to be unfairly discriminated against, I have serious reservations that a High Court would be able to come to such employee’s assistance.”

99. (2004) 4 BLLR 297 (LAC) paragraph 58.

100. Ibid paragraph 59.

This is because he might have serious difficulties proving which one of his legal rights has been infringed.¹⁰¹ The result of such a construction would be to deny existing employees a special protection under the unfair labour practice provisions which the Act so clearly confers upon them in terms of item 2(1)(b) of schedule 7 to the Labour Relations Act.¹⁰² The court also rejected the contention on behalf of the Department of Justice that, because its defense included a matter that related to affirmative action and the advancement of representivity which is based on constitutional provisions, and because disputes that fall under item 2(1)(a) (as it then was) fell within the jurisdiction of the Labour Court, the whole dispute could not fall within the jurisdiction of the CCMA.¹⁰³

The court said that:

“There is a simple answer to this. The CCMA is not prevented from interpreting and applying the Constitution. In fact, section 39(1)(a) of the Constitution enjoins not only a court but also a tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”

It was also submitted by the employer that a dispute about a decision not to appoint a candidate to a post is not a dispute that falls within the ambit of item 2(1)(b). Item 2(1)(b) labels as an unfair labour practice in relation to promotion conduct to promotion and not the promotion itself.¹⁰⁴ Since the complaint in this case was based on an allegation that there had been a decision not to promote, this could not constitute conduct relating to promotion.¹⁰⁵ It was argued that the conduct sought to be labeled as an unfair labour practice cannot be the promotion or non-promotion itself, but must be conduct relating to promotion. The court rejected this argument as well.¹⁰⁶

101. Ibid of note 96 above, p. 32.

102. Ibid.

103. Ibid.

104. Ibid.

105. Ibid.

106. Ibid.

CHAPTER FOUR

4. Procedural fairness of promotions

Procedural fairness of promotions is governed by a number of principles: The bottom line allows for deviation from the ideal.¹⁰⁷ The ideal procedure, where applications for a job are called for requires an invitation for applications, the screening of those applications, the compilation of short list, the invitation to an interview of short-listed candidates, the conduct of the interview and the ultimate selection.¹⁰⁸ Employers may, however, find themselves in a position where, for example, the number of jobs at stake combined with time constraints, prevent adherence to the ideal or a detailed and time-consuming procedure.¹⁰⁹ Adherence to the ideal is not hard and fast, as long as an employer adheres to the basic rule for a fair promotion, which was described by the CCMA as ensuring that all candidates were afforded a reasonable opportunity to promote their candidature.¹¹⁰

This was said in *Vereeniging Van Staatamptenare obo Badenhorst v Department of Justice*.¹¹¹ In the light of the above, it is clear that adherence to the ideal or bottom line of a promotion procedure is not sacrosanct or a hard and fast rule. The employer can deviate from it under certain conditions as long as the deviation concerned is not fatal or does not result in material defect to the outcome of the whole process.¹¹²

107. Ibid of note 12, p. 240.

108. Ibid.

109. Ibid.

110. Ibid.

111. (1999) 20 ILJ 253 (CCMA) at 262 F-G.

112. Ibid of note 12 above, p. 240.

4.1 The need for an employer to follow its own procedure.

An employer has to follow its own procedure-the source of these procedures may be legislation, a collective agreement, company policy or an established practice.¹¹³ If the employer discovers that the procedure has not been followed correctly, a fresh procedure may be conducted to cure the defects¹¹⁴ This may include the re-advertising of the post or granting an interview which was originally refused.¹¹⁵

Perhaps the most often encountered and sometimes fatal mistake by employers is not to follow their own policies and procedures in deciding on promotions.¹¹⁶ On the other hand, arbitrators tend to tread warily in this area; there may be reasons for preferring one employee to another apart from qualifications and experience.¹¹⁷ The most glaring example of deviating materially from the Company Policy is found in *NUTESA v Technikon Northern Transvaal*.¹¹⁸ Here, against the background of a policy and practice at the Technikon that posts be advertised, five posts were created with appointments of specific employees in mind, was done secretly with the other employees presented with *a fait accompli*. Most often, however, the failure to adhere to procedures will not manifest in complete failure as in NUTESA case, but in a failure regarding one, or perhaps more, of the steps in agreed guidelines.¹¹⁹ In this case¹²⁰ certain people were appointed to the newly-created positions without ever having been advertised. It was held to be unfair for an employer to advertise a position, setting a prescribed minimum qualification, but appoint a person who did not possess that qualification.¹²¹ Or to create a position for a specific person without advertising it internally in accordance with agreed procedures.¹²²

113. A Practical Guide to Labour Law, 4th ed (2001): p. 349.

114. Ibid.

115. Ibid.

116. Ibid of footnote 12 above p.240.

117. Ibid.

118. (1997) 4 BLLR 467 (CCMA).

119. Ibid of footnote 12 above, p.240.

120. Ibid of note 118 above.

121. Ibid of note 12 above, p. 240.

122. Ibid of not 14 above, p. 349.

The Commission found that what the employer did constitute a violation of the agreed procedures. The five appointments were accordingly set aside and the employer was ordered to re-advertise the positions and follow the proper procedure thereafter. Most often, however, a failure to adhere to procedures will not manifest in a complete failure as in the *NUTESA* case, but in a failure regarding one, or perhaps more, of the steps in agreed guidelines.¹²³ One would expect that this judgment should have served as an eye opener to employers and discouraged or stopped them completely from committing fatal mistakes of this nature in the handling of promotions but in vain. The employers seem not to have learned anything from this judgment because even though they know about it, they continue to commit the same or similar mistakes. As a result of this, arbitrators or courts were left with no option but to interfere with the executive decision or managerial prerogative of the employers and ordered them to remedy the situation.

4.2 Defects in procedure can only be cured through a fresh procedure.

Often defects in procedure can only be cured through a fresh procedure.¹²⁴ It may well happen that an employer will be alive, or alerted to, the fact that it possibly treated employees unfairly in the promotion process.¹²⁵ In such cases the defect may well be fatal, in the sense that the application of the process to the aggrieved employees will be either too little, or too late or both.¹²⁶ *In Public Servants Association obo Dalton and Another v Department of Public Works*¹²⁷ for example, all positions were advertised as part of a restructuring exercise and employees were invited to apply for their old positions or any other position for which they wished to be considered. Following applications, an independent panel interviewed employees. The two employees, who applied for higher posts, were never invited to an interview. Following complaints, interviews by newly appointed officials of the Department were arranged, who, according to the evidence, asked only a few desultory questions during the interviews.

123. Ibid of note 14 above, p. 349.

124. Ibid.

125. Ibid of note 12 above, p. 241.

126. (1998) 9 BALR 1177 (CCMA)(at 1180 CD).

127. Ibid of note 12 above, p. 241.

Accepting the evidence of the employees, the Commissioner said by the time the interviews were conducted, the posts for which the applicants made themselves available had in fact been filled. This is patently unfair, as the applicants were effectively denied the opportunity of being considered for posts which they, together with other employees in the department, had been invited to apply.

Similarly, it sometimes happens that an employer advertises a position, states certain requirements for that position, but nobody who applies meets those requirements.¹²⁸ The question now is whether the employer may relax those requirements and exercise its discretion to appoint someone from the pool of applicants only¹²⁹ This is what *inter alia* happened in *Nutesa v Technikon Northern Transvaal*¹³⁰ where it was held that the posts had to be withdrawn and re-advertised with new requirements. In a curious award, the conduct of the employer was found to constitute discrimination under the old Item 2(1)(a) of Schedule 7 to the Labour Relations Act, 1995.¹³¹ It is submitted that where a current employer is prejudiced in the sense that the employee decided not to apply because he or she did not meet the stated requirements, a failure to re-advertise (stating the amended requirements) may well constitute unfair conduct relating to a promotion.¹³² The applicant in *Du Plooy and National Prosecuting Authority*¹³³ succeeded in persuading the commissioner that she had been unfairly denied promotion. The arbitrator found that Ms Du Plooy's supervisors had ganged up on her because she had lodged a grievance concerning her non-promotion to another post. The arbitrator also rejected the employer's claim that it had been seeking to promote affirmative action, because Ms Du Plooy was also a member of a designated group and was eminently qualified for the post for which she had applied. The Prosecuting Authority was ordered to promote her.

128. Ibid of note 12 above, p. 241.

129. Ibid.

130. (1997) 4 BLLR 467 (CCMA).

131. (1997) 4 BLLR 467 (CCMA).

132. Ibid.

133. (2006) 27 ILJ 409 (BCA).

Cases continue to illustrate that complaints by disappointed applicants for promotion will not succeed unless the employee is able to prove that the employer acted in bad faith or had failed to follow proper procedures. In *Monaheng v Westonaria Local Municipality and another*¹³⁴ was one such exception. The arbitrator ruled that the failure to promote the applicant was unfair because when selecting candidates the municipality had departed from its own policy. In *Wasserman v SA Police Service and others*¹³⁵ the ruling in *Monaheng* was followed with approval.

4.3 An employee may challenge the composition and competency of the selection panel.

An employee may challenge the composition of the selection panel and the competencies of the panelists. The persons on a selection panel need not be experts neither do they need to be qualified in the particular position that is under consideration. What is required is that the panel members should have reasonable knowledge, that is, they should be in a position to make a reasonably informed decision or as is commonly said, they should “apply their minds.”¹³⁶ In *Van Rensburg v Northern Cape Provincial Administration*¹³⁷ the employee challenged the composition of the interviewing panel. Against the background of a staff code that prescribed that a panel should be versed in the field concerned. In the latter case, the employee, contended that none of the panelists had any qualifications in provisioning administration, nor had they expertise or knowledge to sit on the panel. In dismissing this argument, the commissioner took note of the fact that the employee did not object prior to the interviews, nor on the day of the interview.

134. (2006) 27 ILJ 1081 (ARB).

135. (2006) 27 ILJ 2782 (BCA).

136. Ibid of note 14 above, p. 349.

137. (1997) 18 ILJ 1421 (CCMA) at 1423 B-E.

As to the required level of expertise, the following was said:

“From an ideal point of view, the panelist should have the qualifications and experience that (the employee) insists on. However, it seems to me that this approach is neither in accordance with reality, nor with the legal precepts that govern the situation. It is unrealistic because the requirements that only persons with exactly the same kind of qualification and experience that the applicant for a particular post held should sit on the panel will put a serious obstacle in the way of the smooth and efficient running of the administration, and could in fact lead to pettiness and bickering concerning the kind of qualification, etc. that is suitable for a panelist. The approach is not judicially sound for the simple reason that the law does not impose such a strict requirement. All that is required is that the persons on the panel should be in a position to make reasonably informed decision, in other words, that they should be reasonably knowledgeable.”

4.4 Treatment of employees in acting capacities

One interesting development has been in relation to the protection of employees, appointed in acting positions by means of the unfair labour practice.¹³⁸ An employer may expect employees to act in other positions for a certain period of time, and the mere fact that an employee acts in a different position does not entitle the employee to be appointed to the post.¹³⁹ Even where there is a “legitimate expectation” of the employee, (of being permanently appointed to the post in which case is acting, this only means that the employee must be heard before the final appointment decision is made.¹⁴⁰ This was illustrated in *Guraman v South African Weather Services*.¹⁴¹ Where the applicant claimed that the respondent’s failure to promote her in terms of its employment equity policy constituted an unfair labour practice. The commissioner disagreed, finding that the applicant lacked the experience needed for the position she applied for and that her efforts to obtain additional qualifications did not in themselves confer on her a legitimate expectation of promotion. Nor did she allege that the respondent had breached the Employment Equity Act or its own policy by not promoting her.

138. Basson A, Christianson M, Gerbers C, Le Roux K, Mischke C AND Strydom E L M, *Essential Labour Law*, Vol. 1, 2nd ed (2000): p. 285.

139. *Ibid.*

140. *Ibid.*

141. (2004) 4 BALR 586 (GPSSBC).

The application was therefore dismissed. In *Classen & Another v Department of Labour*,¹⁴² the court held that some employees in acting positions have succeeded in challenging the conduct of the employer as unfair conduct relating to a promotion but these cases are the exception rather than the rule. As regards the benefits attached to the higher post, the CCMA in *Public Servants Association and others v Department of Correctional Services*¹⁴³ has held that:

“It would be unfair for an employee to occupy a higher post, do extra work and bear the additional responsibilities, but not be compensated in accordance with the post occupied.”

The problem, of course, is that given the convenience of the solution (using acting appointments) employers tend to forget about employees so appointed. This is where the employer starts running the risk of “unfair conduct” if it does not promote the acting employee in question permanently or, at least, does not afford the employee the remuneration and the benefits of the higher post (*Public Servants Association and others v Department of Correctional Services*).¹⁴⁴ In this case the CCMA ordered the employer to promote the applicant because one of the applicants had been acting in a higher position for a period of twelve years, and most for periods of two years or longer.¹⁴⁵ Bearing this in mind, some employees in acting positions have successfully challenged the conduct of employers as unfair conduct relating to promotion.¹⁴⁶ However, it immediately has to be said that the cases where employees in acting positions were successful in challenging the conduct of the employer as unfair, were rather extreme.¹⁴⁷ Similarly, in *Classen & Another v Department of Labour*¹⁴⁸ the Department required of two Senior Administrative Officers in the Industrial Court to act as Assistant Directors, the one from January 1994, the other from November 1995.¹⁴⁹

142. (1999) 10 BALR 586 (PPSSBC) at 1266 G-H.

143. (1998) 19 ILJ 1655 (CCMA) at 1671.

144. *Ibid.*

145. *Ibid* of note 12 above, p. 243.

146. *Ibid.*

147. *Ibid.*

148. *Ibid* of note 142 above.

149. *Ibid* of note 12 above, p. 243.

During this period however, the posts were advertised on three occasions.¹⁵⁰ The one employee applied on all three occasions, the other twice, and in each case they were interviewed and recommended for the position.¹⁵¹ The only response they ever got for not being promoted was a letter, handed to them during August 1997 at the initial arbitration hearing, which gave the following reasons for their non-promotion: the fact that the Department is trying, as far as possible, to avoid new appointments and promotions in an institution that is currently being phased out; the economic implications, and the public interest.¹⁵²

In finding that the evidence did not support the stated reasons for non-promotion, the Commissioner found that an unfair labour practice had been committed and said the followings:¹⁵³

“The applicants have performed herculean tasks in the service of the respondent, acting in posts up to two ranks above their official ranks. The quality of their services is borne out by their performance appraisals. They had every reason to expect to be appointed to the advertised positions, and have been frustrated time and again. The actions of the respondent are clearly capricious, unreasonable, erratic and prejudicial to the applicants. Furthermore, the respondent lost the valuable services of dedicated and highly experienced officials to the obvious detriment of the department for no cogent reasons, when Mr Classen eventually accepted a severance package and Mr Deysel went on early retirement. It is important to realize that a claim for higher remuneration where an employee was acting in a higher position cannot be brought on its own to the CCMA as unfair labour practice. Similarly it is important to realize that a claim for higher remuneration (or back-pay) where an employee is, or has been acting in a higher position, cannot be brought on its own to the CCMA as unfair conduct relating to the provision of benefits.”

150. Ibid of not 12 above, p. 243.

151. Ibid.

152. Ibid.

153. Ibid.

The Labour Court in *Northern Cape Provincial Administration v Commissioner Hambridge No & Others*¹⁵⁴ held that the dispute relating to higher remuneration (or back - pay) where an employee is, or has been acting in a higher position is a dispute of interest and falls outside the jurisdiction of the CCMA. It is only in conjunction with a finding of unfair conduct relating to a promotion, that a commissioner may possibly make an order relating to such compensation. In the case *in casu*, the court noted that the meaning of the word “benefit” in item 2(1)(b) of Schedule 7 to the Act was a question of law. If the CCMA commissioner had erred on that question, his/her award was reviewable. A salary or wage was an essential element of a contract of service. Other rights, advantages or benefits were derived from collective or individual bargaining or from the operation of law. The court further went on to define benefits as a supplementary advantage conferred on an employee for which no work was done or required. The word “benefit” in the Act was, at least, a non-wage benefit. A claim that an employer acted unfairly by not paying an employee a higher rate could not be said to concern a benefit in that sense. It was a salary or wage issue, and hence a matter of mutual interest.¹⁵⁵

The award was set aside for the simple reason that a benefit is not a dispute of right but of interest. In the light of the ruling or judgment outlined in this case, it is clear that the issue of acting allowance falls within the competence and domain of the employer and for this reason arbitrators are not keen to entertain a complaint which is purely based on acting in a higher position. In order to enable the CCMA or any Bargaining Council to have jurisdiction to entertain such a complaint, the applicant must include promotion in his/her complaint or dispute. In *Hospersa and Roos v The Northern Cape Provincial Administration*¹⁵⁶ an appellant appealed against a Labour Court judgement wherein the court set aside a CCMA arbitration award in favour of second Appellant. The dispute, which had been referred to the CCMA, concerned the issue whether Second Appellant, who had been acting in a more senior position than her own, was entitled to be paid an acting allowance.

155. (1999) 20 (7) ILJ 1910.

154. Ibid.

156. (1999) 10 (7) BALR 586 (PPSSBC).

The CCMA had made the following order:

“I hereby order the employer to pay the employee an acting allowance in an amount which equals the difference in salary between her own position and the position she had been acting in. Such acting allowance is payable for the period 11 November 1996 to August 1997. Such acting allowance is to be paid by the employer to the employee within 30 days of receipt of the award. Respondent had launched an application to the Labour court for the review and setting aside of the afore-going award in terms of Section 145 of the 1995 LRA. Landman J had set the award aside on the basis that the question of the payment of an acting allowance was a dispute of interest which cannot be arbitrated but should rather be dealt with in terms of the collective bargaining process.”

The effect of this decision was that Second Appellant would not get the acting allowance to which the CCMA had decided she was entitled. It was against this decision that Appellants were appealing. The thrust of Appellant’s approach to this issue was that the dispute relating to Respondent’s refusal to pay an acting allowance to Second Appellant was an unfair labour practice envisaged by the provisions of item 2(1)(b) of Schedule 7 of the 1995 LRA on the ground that it related to the provisions of benefits to an employee. Appellants also contended that this was a dispute of right which could be arbitrated. The Labour Appeal Court, per Mogoeng AJA, with Zondo AJP and Conradie JA concurring, held that the Labour Court was correct in setting CCMA award aside. In *Limekaya v Department of Education*¹⁵⁷ the particular applicant referred a dispute to the bargaining council concerning “a failure to make [his] acting position permanent.” The respondent contended *in limine* that the council lacked jurisdiction because the dispute as designated was not something that can be arbitrated. On the merits, the respondent claimed that the applicant knew full well that she had been appointed in an acting capacity until her post was advertised. On the jurisdictional point¹⁵⁸ the arbitrator held that it was clear that the applicant’s complaint was that she had not been promoted to the post in which she was acting. While it was not expressly stated on the referral form that this constitute an alleged unfair labour practice, the arbitrator was obliged to determine the true nature of the dispute. The council accordingly had jurisdiction to arbitrate the matter.

157. (2004) 5 BALR 586 (CCMA).

158. Ibid

Turning to the merits¹⁵⁹ the arbitrator noted that the applicant had applied for the post in which she had been acting when it was advertised. The regulations governing employment in the public sector provide that employees should not be allowed to act in posts higher than their own for periods longer than twelve months. The applicant had been employed in the higher post for 10 months when the post was advertised. An employee person who acts in a post is not automatically entitled to be appointed to it. Nor in the circumstances could the applicant claim to have had a reasonable expectation that she would be appointed. The arbitrator¹⁶⁰ held further that the applicant could not rely on the fact that she was a black female since the department's affirmative action plan had not been implemented at the time in question. The respondent could therefore not be said to have committed an unfair labour practice by not appointing the applicant to the post. The application was dismissed.

In *Gurarnan v South African Weather Services*¹⁶¹ the applicant was employed as Chief Industrial Technician. During the course of her employment with the respondent she obtained several academic qualifications, some with the financial help in the form of bursaries of the respondent, which she believed would assist her in progressing in her career path. The respondent then initiated a policy in terms of which selected employees were "fast tracked" (promoted) to bring the composition of the workforce into line with the requirements of its employment equity policy. The applicant was invited to join this mentorship programme that the respondent wished to start. She was one of a selected group of employees who received this invitation. The applicant believed that she had received this invitation because the respondent had recognized her potential as an employee. At the first meeting the applicant attended, she received a document that indicated that the successful completion of the mentorship programme would lead to the individual filling a new position. The applicant claimed that the respondent's failure to include her in the fast tracking policy and its refusal to promote her to the post for which she was already performing the necessary work constituted an unfair labour practice.

159. (2004) 5 BALR 586 (CCMA).

160. (1998) 10 BALR 1261 (CCMA).

161. (2004) 4 BALR 454 (CCMA).

Moreover, the applicant had admitted that she lacked experience for the post for which she had applied.¹⁶² The applicant was not the only designated employee who had been disappointed by not benefitting from the fast tracking programme. Her efforts to obtain additional qualifications did not in themselves confer on the applicant a legitimate expectation to promotion. Finally, the applicant had neither alleged nor proved that the respondent had breached the EEA or its own equity policy by not promoting her. In the light of the above, it is apparently clear that an employee acting in a different, higher position for a specific period has no entitlement to be appointed permanently in that position unless the expectation is created that he might be appointed in the said position or the employer is guilty of some other unfair conduct.¹⁶³ However, such employee would be entitled to the benefits attached to the higher post in exchange for the additional duties performed by him.¹⁶⁴ The employee will have to show that he was not promoted because of the unfair conduct.¹⁶⁵

In *Imatu obo Coetzer v Stad Tygerberg*¹⁶⁷ it was held that the mere fact of acting in a higher position does not entitle an employee to be appointed to such a post even if one could say that a legitimate expectation for promotion exists. It was further held that a legitimate expectation only entitles an employee to be heard before a decision is made. However, in *De Nysscshen v General Public Service Sectoral Bargaining Council and others*¹⁶⁸ the Labour Court set aside an arbitration award in which the arbitrator dismissed the applicant's claim that the employer had perpetrated an unfair labour practice by not appointing her to an upgraded post in which she had acted with distinction for nearly ten years.

162. (2004) 4 BALR 454 (CCMA).

163. Principles and practice of Labour Law, 1st ed (2001): p.781-782.

164. Ibid.

165. Ibid.

166. (2006) 28 ILJ 375 (LC).

167. (2006) 28 ILJ 375 (LC).

The court held that, although the applicant was not entitled to automatic promotion like in the decision in *HOSPERSA and another v Northern Cape Provincial Administration*¹⁶⁸ the employer failed to justify appointing another candidate, who had been found suitable for several other vacant posts. The employer was ordered to appoint the applicant to the disputed post, with retrospective effect.

In *Kotze v Agricultural Research of SA*¹⁶⁹ the commissioner found that the employer acted in bad faith by permitting the employee to act in a post for two years before informing him that he lacked the formal qualifications for the post. The employer was ordered to promote the applicant and pay him compensation. However the mere fact that employers handle aspirants to promotion unfairly does not mean that they are entitled to be promoted.¹⁷⁰ So, for example, in *National Commissioner of the S A Police Service v Basson and others*¹⁷¹ the Labour Court held that an arbitrator had correctly held that the employer had treated Supt Basson unfairly by not advertising the post in which he had been acting after upgrading it. However, the arbitrator had gone too far by holding that this entitled Basson to be actually promoted to the post. The Court did not agree that an unfair labour practice has been perpetrated when an employer decided not to fill a vacant post. Moreover, while acting in the post, Basson had exercised powers that could not be lawfully delegated to him. He could not claim a legitimate expectation to be appointed to a post he had never lawfully occupied. In *Mbatha and Durban Institute of Technology*¹⁷² the commissioner held that the mere fact that a preferred candidate for promotion did not accept the post does not entitle another short-listed candidate to be appointed. The test is whether the candidate has proved that he/she would have been appointed had it not been for the unfair conduct of the employer.

168. (2000) 21 ILJ 1066 (LAC).

169. (2007) 28 ILJ 261 (CCMA) .

170. Grogan J, Jordaan B, Maserumula P and Stezner S: Juta's Annual Labour Law Update, 2007.p. 31.

171. (2006) 27 ILJ 614 (LC).

172. (2005) 26 ILJ 2454 (CCMA).

4.5 A duty to develop employees

An employer should consider the development of an employee and this may involve a promotion.¹⁷³ The court in *Marra v Telkom SA Ltd*¹⁷⁴ confirmed that an employer does not commit an unfair labour practice if it does not develop or deploy staff in order to gain more knowledge and experience if it is not contractually bound to do so.¹⁷⁵ In this case which was referred to earlier, the employee challenged an unsuccessful evaluation partially on the basis that he was unfairly barred from acquiring skills and that he should have been rotated between departments to expose him to different technologies, equipment and learning opportunities.¹⁷⁶ This argument was answered as follows:¹⁷⁷

“There is no evidence that Telkom was contractually or otherwise obliged to transfer him beyond its own operational requirements. Telkom may have lacked innovation and creativity in the way it developed or even deployed its workforce or employees. It may also be that an enterprise which does not develop its staff will not succeed. It does not however follow that an enterprise which does not use its human resources wisely, commits an unfair labour practice, within the meaning of the Act.”

The position may well be different, not only where a contractual obligation exists, but in the realms of affirmative action.¹⁷⁸ If one looks closely into the issue of affirmative action, it becomes clear that all employers must not lose sight of the fact that employment equity is here to stay and the fact that promotion is an obvious affirmative action measure and training is specifically mentioned as such a measure in section 15 of the Employment Equity Act, 1998. In other words, and in contrast to *Marra* case (referred to above), there is consequently a duty on employers to train and develop employees in the context of affirmative action. This means that a denial of promotion due to lack of attribute, which could have been cured by training, may well constitute unfair conduct relating to promotion. Consider in this context also the possibility that unfair conduct relating to training could constitute an unfair labour practice in itself.

173. Ibid of note 14 above, p. 350.

174. (1999) 20 ILJ 1964 (CCMA)

175. Ibid of note 14 above, p. 350.

176. Ibid.

177. Ibid of note 174 above (at 1968 D and 1968 I -1970-I).

178. Ibid of note 10 above, p. 26.

In the light of the facts and legal principles outlined in this discussion, it is advisable that employers should always rotate their staff members to different sections of the organization as part of on the job-training measure or tool in order to enable them to acquire more skills, knowledge and experience to do a variety of tasks at a given time. This kind of practice is advantageous and helpful to both the employers and employees. The employers will reap benefits in the sense of organizational effectiveness and efficacy in that when one or two employees are absent from duty for various reasons, the work flow will not be affected at all. It will continue to flow as if everyone is at work because the remaining employees will still do the work at hand because they are multi-skillful and knowledgeable. The employees on the other hand will be eligible for promotion to any section or component once a vacant post becomes available because they will be having the requisite skill, competencies and knowledge.

4.6 Treatment of persons in upgraded or re-graded posts

Some doubts existed as to how persons in upgraded or re-graded posts have to be treated or how regulations which deal with this issue have to be interpreted.¹⁷⁹ The matter came to the fore in the interpretation of regulation 24(6) of the South African Police Service Employment Regulations, 2000.¹⁸⁰

This Regulation provides as follows:-

“If the National Commissioner raises the salary of a post as provided under sub-regulation (5), she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent already performs the duties of the post; has received a satisfactory rating in her or his most recent performance assessment; and starts employment at the minimum notch of the higher salary range.”

179. A Practical Guide to Labour Law, 4th ed, (2001): p.350.

180. By the Minister for Safety and Security in terms of section 24(1) of the South African Police Service Act, 1995 (Act 68 of 1995), R 389, Government Gazette 21088 on 14 April 2000.

This regulation is framed in more or less the same way as Regulation C6 of the Public Service Regulations, 1999.¹⁸¹

This Regulation provides as follows:-

“C6 If an executing authority raises the salary of a post as provided under regulation V C.5, she or he may continue to employ the incumbent employee in the higher-graded post without advertising the post if the incumbent:-

- (a) already performs the duties of the post;
- (b) has received a satisfactory rating in her or his most recent performance assessment
- (c) starts employment at the minimum notch of the higher salary range.”

The majority of judgments favoured the incumbent on the upgraded or re-graded posts who happened not to be promoted once their posts have been upgraded or re-graded. One example of such a case is *Basson v South African Police Service and others*.¹⁸² In this case¹⁸³ a police officer, Senior Superintendent Basson who was attached to Legal Services component in the Northern Cape claimed that his post had been upgraded from post level 11 to post level 12 and that because he had been required to act in the higher post, he was entitled to be promoted to that level. The arbitrator found that the police officer’s post had indeed been upgraded and failure on the part of the respondent (SAPS) to promote him constituted unfair labour practice. The arbitrator accordingly ordered the respondent to promote the applicant. As a result of this decision, the South African Police Service realized that divergent interpretation of Regulation 24(6) would bring about serious problems to it as the employer.

181. By the Minister for Public Service and Administration in terms of section 41 of the Public Service Act, 1984 (promulgated under Proclamation No. 103 of 1994), R 679, Government Gazette No. 6544 on 1 July 1999.

182. (2004) 5 BALR 537 (SSSBC).

183. Ibid.

The National Commissioner of the South African Police Service was not satisfied with the interpretation of Regulation 24(6) by arbitrators and the courts and had already launched proceedings in the Pretoria High Court for a declaratory order that on a proper interpretation of Regulation 24(6), he was entitled either to advertise the post which he had decided to re-grade to a higher grade or to continue to employ the incumbent employee in the newly higher-graded post without advertisement. He sought a further declaratory order to the effect that such incumbent was not entitled to automatic promotion at the time Basson's case was decided. The labour unions¹⁸⁴ opposed this application.

The High Court granted the application and issued the declarations as required by the Commissioner. The High Court accordingly granted an order declaring:¹⁸⁵

"That the applicant is vested with a discretion in terms of regulation 26(6) of Regulation 389, the Regulations for the South African Police Service, published in the Government Gazette No. 21088 on 14 April 2000 either:- to advertise the post which he has decided to re-grade to a higher grade, or ; to continue to employ the incumbent employee in the newly higher graded post without advertising the post, provided that the requirements of Regulation 24(6)(a)(b) and (c) are satisfied. That the incumbent of a post is not entitled to an automatic promotion to a more senior rank upon the decision of the applicant in terms of regulation 24(6) to continue to employ the incumbent in a post which the applicant has decided to re-grade to a higher grade. That the costs of this application be borne by the applicant."

184. These included the Public Servants Association of South Africa, the Police and Prisons Civil Rights Union (POPCRU) and the South African Police Union. At a later stage POPCRU distanced itself from the other unions and indicated its support for the position advanced by the Commissioner.

185. The National Commissioner of the South African Police Service v The South African Police Union and others (TPD) Case No. 28812/02, 31 October 2003.

The Public Servants Association (the union) appealed to the Supreme Court of Appeal, which was divided on the matter.¹⁸⁶ Three judges¹⁸⁷ stated that if the High Court interpretation of the regulation were to be held the effect would be that an incumbent of the upgraded post, who happened to be coping with all of the “new” post and doing so satisfactorily, would lose his or her employment if somebody else were appointed to it. This would infringe the incumbent’s right to fair labour practices and the right not to be unfairly dismissed. This consequence, the majority of the Supreme Court of Appeal held that it would be manifestly inequitable, particularly seeing that in sub-regulation (7)¹⁸⁸ and elsewhere in the regulations, the Labour Relations Act¹⁸⁹ and collective agreements between the service and its employees are acknowledged and, by inference respected.

The majority decided that provided the requirements of paragraphs (a) and (b) of regulation 24(6) are met, the Commissioner is not only empowered to retain the incumbent in the upgraded post without advertising it, but under a duty to do so and to do so at the salary prescribed by paragraph (c). In the view of the majority, the application to the High Court ought to have failed. The order of the High Court was accordingly set aside and the application for a declaratory order was dismissed. The majority in the Supreme Court of Appeal²⁰⁰ held that upon the upgrading of a post the Commissioner had discretion whether to continue to employ the incumbent employee in the higher graded post.

186. The Public Servants Association v National Commissioner of the South African Police Service SCA 573/04, 25 November 2005, as yet unreported.

187. Howie P with Nugent and Lewis JJA concurring.

188. Sub-regulation 7 reads: “If the National Commissioner determines that the salary range of an occupied post exceeds the range indicated by a job weight, she or he must- (a) if possible- (i) redesign the job to equate with the post grade, or (ii) transfer the incumbent to another post on the same salary range, and (b) abide by relevant legislation and collective agreements.”

189. Act No. 66 of 1966 as amended in 2002.

190. Ibid of note 185 above.

Should he or she not be employed in the upgraded post he or she could, in the circumstances mentioned in Regulation 36(2)¹⁹¹ without the post being advertised, be appointed to a post to the one that had been filled by him or her, and he or she could also be discharged in terms of Regulation 45. Furthermore, should the incumbent employee in the particular circumstances of the case have a legitimate expectation to be appointed to the higher-graded post, the administrative action would have to be procedurally fair. Should it not be administratively fair it would likewise be reviewed. For these reasons the minority would have dismissed the appeal.

The National Commissioner of the South African Police Service was not satisfied about the decision of the Supreme Court of Appeal and he deemed it fit and necessary under the circumstances and appealed against it in the Constitutional Court. In the *National Commissioner of the South African Police Service v Public Servants Association and others*, the court said that the Commissioner has now applied to this court¹⁹² for leave to appeal against the whole of the judgment and order of the Supreme Court of Appeal. Before it is possible to reach the merits of the application, however, two anterior questions have to be considered. The first is whether the issue raised is a constitutional one.¹⁹³ The second, is whether it is in the interests of justice for leave to appeal, to be granted. The matter concerns the capacity of the Commissioner to fulfill responsibilities entrusted to him by the Constitution.¹⁹⁴ Furthermore, regulation 24(6) was interpreted by the Supreme Court of Appeal in the light of Section 23(1) of the Bill of Rights, which guarantees to everyone the right to fair labour practices. Prominent among these rights, is the right not to be dismissed. At the heart of the decision being appealed against, then, is the manner in which the majority and minority in the Supreme Court of Appeal differed over how appropriately to balance two constitutional requirements, namely, capacity building of the SAPS, on the one hand, and respecting job security, on the other. Two constitutional issues are engaged, and the matter is clearly a constitutional one.

191. The South African Police Service Regulations of 2000.

192. Case No.CCT 68/05 heard on 18 May 2006 and decided on 13 October 2006.

193. Section 167(3) (b) of the Constitution provides that: "The Constitutional Court may decide only on constitutional matters and issues connected on constitutional matters."

194. Section 207(2) provides that: "The National Commissioner must exercise control over and manage the police service in accordance with the national policy and the directions of the Cabinet member responsible for policing."

The Constitutional court ordered that:

1. The application for leave to appeal is granted.
2. The Appeal is upheld to the extent indicated below and the order of the Supreme Court of Appeal is replaced with the following order:-
 1. It is declared that:
 - (a) The applicant is vested with a discretion in terms of regulation 24(6) of the Regulation for the South African Police Service, published in the Government Gazette No. 21088 on 14 April 2000, either:-
 - (i) to advertise the post which he or she has decided to re- grade to a higher grade , or,
 - (ii) to continue to employ the incumbent employee in the newly higher post without advertising the post, provided that the requirements of regulation 24(6), (b) are met.
 - (b) The incumbent of a post is not entitled to an automatic promotion to a post upgraded by the applicant in terms of regulation 24(6).
 - (c) The Commissioner's discretion with regard to upgrading of posts in terms of regulation 24(6) must be exercised in a manner which does not result in retrenchment of an incumbent employee who is not promoted to the upgraded post.
 2. The cost of this application in the High Court, Supreme Court of Appeal and this court shall be borne by the applicant, the costs to include the costs of two counsels.¹⁹⁵

195. Section 207(2) provides that: "The National Commissioner must exercise control over and manage the police service in accordance with the national policy and the directions of the Cabinet member responsible for policing.

CHAPTER FIVE

5. Resolution of promotion disputes and the remedies that may be granted

The Labour Relations Act, 1995 provides that disputes about promotions and demotions (provided unfairness is proved) must be determined on terms deemed reasonable by the Commissioner.¹⁹⁶ In practice, remedies granted by commissioners include declaratory orders, protective promotions, remittal for consideration by the employer, promotion is sometimes coupled with an order of back-pay, re-instatement to a previous position in case of demotion and, in one instance, the setting aside of defective promotions and remittal to the employer for re-consideration.¹⁹⁷ Of course, in those cases where an employer conducts itself unfairly in relation to a promotion, most employees will expect to be promoted.¹⁹⁸ This approach, however, presents a practical and a legal problem because at the time such disputes are heard by the CCMA or a Bargaining Council¹⁹⁹ someone would have been promoted or appointed in that disputed post. In a practical sense, and in those cases where a post is advertised, some other employees will have been promoted or appointed, ie the job is occupied.

In the public service, the solution to this problem is to be found in express provision for the concept of a “protective promotion”, i.e where the employee is not promoted to the actual post, but is promoted in rank and remuneration (see, for example, the *Rafferty* case).²⁰⁰ Absent this possibility, rectification of the problem depends on the initial promotion being set aside, which has only been done once by the CCMA in the face of serious irregularities (in the NUTESA case). For the most part, commissioners have not interfered with the initial promotion, even if flawed, but have chosen to fashion relief around such interference, such as a remittal for consideration for protective promotion or ordering a protective promotion.²⁰¹

196. Ibid of note 12 above, p. 248.

197. Ibid.

198. Ibid.

199. Ibid.

200. Ibid of note 54 above.

201. Ibid of note 12 above, p. 248.

The important point to be made, however, is that even if protective promotion is a possibility or even if the post is still available (e.g where an acting person applied and no-one was appointed), an order for promotion will not automatically follow a finding of unfairness.²⁰² The question still remains whether the employee would have been appointed if the employer conducted itself fairly.²⁰³ This means, as was said in the *Dalton* case, that an employee will only be promoted by the CCMA if he or she not only shows unfair conduct on the part of the employer, but also that he or she would have been promoted but for that unfair conduct.²⁰⁴ For example, if an employee can show that he or she attained the highest ratings at an interview and that the employer is bound by those ratings (in terms of policy or an agreement), the CCMA may consider promoting the employee.²⁰⁵ This requirement of causality is also implicit in the factual findings in the *Classen and Rafferty* cases, where the employees were, in effect promoted by the CCMA.²⁰⁶

In the case of *SAMWU obo Damon v Cape Metropolitan Council*²⁰⁷ the court stated as follows:

“unless the appointing authority were shown to have not applied its mind in the selection of successful candidate, the CCMA may not interfere with the prerogative of the employer to appoint whom it considers to be the best candidate.”

As a result of obvious mistakes by employers in the promotion of employees, the Commissioners or Arbitrators or Courts started to develop the concept of “protective promotion.” This is a situation where the employer is ordered by Commissioners, or Arbitrators or Courts to promote the applicant to the same salary level with the successful candidate in a disputed post.

202. Ibid of note 4 above, p. 248.

203. Ibid.

204. Ibid.

205. Ibid.

206. Ibid.

207. (1999) 20 ILJ 714 (CCMA) at 718B.

This was clearly an interference with the executive decisions of the employer or department.²⁰⁸ Once a protective promotion order had been made, the employer was forced to pay more than one (01) employee in a post that wanted only one (01) person. This kind of a situation created more problems to the employer because in all cases, it would be found that the protected promotion post was not budgeted for and not funded at all.²⁰⁹ Even though this was the case, the employer would still be required to pay the salary of that employee.²¹⁰

This invariably means that the employer would be forced to look for funds somewhere else to fund this post. This unfortunate situation was brought to an end in *PSA v Department of Justice and others*.²¹¹ In this case the Labour Appeal Court had to consider the validity of an arbitration award arising from a complaint by two employees, Duminy and Nortier, that they had been unfairly treated when they were not promoted to posts within the State Attorney's office. The CCMA commissioner found that the failure to promote Duminy and Nortier had been an unfair labour practice and ordered "protective promotion." During the course of the award the commissioner made an explicit finding that the two employees who had been promoted to the post were not suitable for promotion to the posts. On review, the Labour Court overturned the commissioner's decision. The applicants were however not satisfied by this decision and appealed to the Labour Appeal Court. The Labour Appeal Court set the appeal aside and confirmed the decision of the court *aquo*. It did this on the basis that, in a situation such as this, the two successful candidates should have been joined in the arbitration proceedings or should at least have been given an opportunity to be heard prior to the finding being made.

208. Basson A, Christianson M, Garbers C, Le Roux K, Mischke C and Strydom E.L.M : Essential Labour Law Vol.1, 1st ed (1998),p. 248.

209. Ibid.

210. Ibid.

211. [2004] 2 BLLR 118 (LAC).

This had not been done. In rejecting the concept of “protective promotion”, the Labour Appeal Court said the following:

“If the Department of Justice wanted to appoint two additional persons into the vacant positions of Senior Assistant State Attorney, it would have budgeted for such appointments. It did not seek to pay two persons who filled those positions and pay two others (under the guise of protective promotion) for whose additional expenses it might not have budgeted for and who did not fill them. The Minister and the Department of Justice are entitled to say: “if we should not have appointed the appointees because they are not suitable and we should have appointed the appellants, then we cannot keep the appointees in those positions; they must move out of those positions and those who are suitable must be appointed to fill them”. In deed the Minister and the Department of Justice may find it intolerable to keep the appointees in those positions when a statutory body has declared them unsuitable for the positions if its award continues to stand. The Commissioner’s finding that the appointees are unsuitable for the positions to which they were appointed is as good as the Commissioner granting the appellants the relief of a declaratory order that the appointees are unsuitable for their positions. For a tribunal exercising public power to effectively make such a declaratory order against a third party who is not before it or who has not been afforded an opportunity to be heard goes against so fundamental a principle of our law that such a tribunal’s decision cannot be allowed to stand and must be reviewed and set aside. It would then be up to the appellants to commence the proceedings afresh and have all the interested parties joined if they still wish to pursue the matter.”

The Labour Appeal Court in *PSA v Department of Justice and others*²¹² held that, whenever the suitability of a successful candidate in a promotion dispute is being challenged, irrespective of the relief sought, such successful candidate should be joined as a party in the arbitration proceedings and failure to do so will vitiate the entire arbitration proceedings and will constitute grounds to have the award reviewed and set aside. This decision of the Labour Appeal Court brought the question of joinder in labour disputes into the picture. The decision of the Labour Appeal Court was followed in *National Commissioner of the SAPS v Safety and Security Sectoral Bargaining Council & other*.²¹³

212. (2004) 2 BLLR 118 (LAC).

213. (2005) 8 BLLR 808 (LC).

The Labour Court held as follows: “In this case, the Judge President of the Labour Appeal Court, Justice Zondo J P pronounced himself on some very important issues of law. The points that have a direct bearing on the issues in this case can be summarized as follows:

- a. Where a party has a direct and substantial interest in arbitration proceedings he / she must be joined in such proceedings or at least be given an opportunity to be heard. The duty to join the affected party rests primarily on the arbitrator. Of course the parties themselves have a duty to alert the arbitrator in this regard and can apply for the joinder of the affected party.
- b. Failure to join the affected party would be a gross irregularity. The following statement sums up the legal position and I quote:

“In conducting the arbitration proceedings to finality and making such a damaging finding against the appointees without affording them any opportunity to be heard or joined in the arbitration proceedings, the commissioner committed a gross irregularity which vitiates the entire arbitration proceedings over which he presided. The parties before him must also bear some blame for not drawing his attention to the need to join or hear the appointees.”

- c. An adverse order thus made in the absence of the affected party would not be binding on him.
- d. It is no good a defence to a non-joinder point to say that the affected party had knowledge of the proceedings and decided not to join.

When taking into account the legal position as stated above, it becomes clear that referral of the matter to a newly constituted selection panel would be in futility. In the first place, there is no longer any vacancy for which applications can be considered since Nel’s appointment still stands. Secondly, any such referral would have to be preceded by the setting aside of Nel’s appointment, which this court cannot do since Nel has not been joined in the proceedings nor was he given a hearing during the arbitration proceedings wherein adverse findings were erroneously made against him.

Rule 26 of the Rules of the Safety and Security Sectoral Bargaining Council²¹⁴ provides as follows: “Joinder /substitution

- (1) The Secretary on agreement by parties may join any number of persons as parties in proceedings if the relief depends on substantially the same question of law or fact.
- (2) A panelist may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.
- (3) A panelist may make an order in terms of sub rule (2)(a) of its own accord (b) on application by a party; or (c) if a person entitled to join the proceedings applies at any time during the proceedings to intervene as a party.
- (4) An application in terms of this rule must be made in terms of rule 30.
- (5) When making an order in terms of sub rule (2), a panelist may -give appropriate directions as to the further procedure in the proceedings; and make an order of costs in accordance with these rules.
- (6) If in proceedings it becomes necessary to substitute a person for an existing party, any party to the proceedings may apply to Secretary for an order substituting that party for an existing party, and a panelist may make such order or give appropriate directions as to the further procedure in the proceedings.
- (7) An application to join any person as a party to proceedings or to be substituted for an existing party must be accompanied by copies of all documents previously delivered, unless the person concerned or that person’s representative is already in possession of the documents.
- (8) Subject to any order made in terms of sub rules (5) and (6), a joinder or substitution in terms of this rule does not affect any steps already taken in the proceedings.”

214. Safety and Security Sectoral Bargaining Council Dispute Resolution Procedure.

Whilst it was accepted that the issue of “protective promotion” was dealt a terrible blow by the Labour Appeal Court decision in *PSA v Department of Justice and Others*²¹⁵ referred to above, it resurfaced again. In the case of *Dunn v Minister of Defence & Others*,²¹⁶ the applicant, Mr Louis Henry Dunn, sought the review in terms of Sections 6 and 8 of the Promotion of Administrative Justice Act (PAJA)²¹⁷ taken by the Minister of Defence to deny him a promotion to a position as Departmental Head. When the applicant had requested the reasons for this decision he was given a file in which he noticed certain irregularities, for example, that a particular document had been excluded from his curriculum vitae and names of the persons responsible for the promotion were not provided. He had come by a letter addressed to the Minister and signed by the Chief of the South African Defence Force which indicated that Mr H C Coetzee had been appointed.

After the court heard evidence from all the parties involved, it held that the Department of Defence had committed unfair labour practice relating to a promotion when it failed to promote the applicant. The court stated as follows:

“Consequently, the following order is made in terms of Section 8(1) (c)(ii)(bb) of PAJA: “The Department of Defence is directed to ensure that Captain Dunn of (South African Navy) receives the same salary and benefits, dated back to 1 October 2002 with interest calculated at 11 % pa, that he would have received had he been promoted to Rear Admiral (Junior Grade) on 1 October 2002. The Department of Defence is entitled to give effect to this order by granting applicant protected promotion as provided for in the Public Service Act.

As it was earlier pointed out, that CCMA Commissioners, arbitrators of Bargaining Councils and the courts dealing with promotion disputes sometimes grant protected promotion’ to disappointed applicants for promotion who they deem to have been unfairly treated (i.e they are appointed to the same grade as the post in question, and the employer must pay them at the applicable rate attached to that grade, whether or not they are actually promoted).²¹⁸

215. Ibid of footnote 212 above.

216. (2005) JOL 1588 (T).

217. Act No. 3 of 2000.

218. Grogan J, Workplace Law, 10th ed (2009), p. 93.

In *KwaDukuza Municipality v SALGBC and others*²¹⁹ the court ruled that this is merely a disguised form of compensation, which may not be granted in the absence of proof that the employee has suffered an actual loss, and is unlawful if it exceeds the one year limit on compensation prescribed by the LRA. The award of 'protected promotion' was substituted by an award of compensation equal to five months' salary.

The principles on which promotion disputes are to be determined were considered in *Dlamini and Toyota SA Manufacturing*.²²⁰ These are:

- In the absence of gross unreasonableness which leads the court or CCMA to draw an inference of *mala fides*, the CCMA or court should be hesitant to interfere with the exercise of management's discretion.
- In drafting the unfair labour practice provision, the legislature did not intend to require arbitrating commissioners to assume the roles of employment agencies. A commissioner's function is not to ensure that employers choose the best or most worthy candidates for promotion but to ensure that, when selecting employees for promotion, employers do not act unfairly towards candidates.
- The relative inferiority of a successful candidate is only relevant if it suggests that the superior candidate was overlooked for some unacceptable reason, such as those listed in section 6 of the EEA.
- The division of the unfair labour practice jurisdiction between the Labour Court and the CCMA indicates that the legislature did not intend commissioners to concern themselves when deciding disputes relating to promotion with the reasons why the employer declined to promote the employee, but rather with the process which led to the decision not to promote the employee.
- The reasons for the decision to overlook an employee when selecting a candidate for promotion are relevant only insofar as they shed light on the fairness of the process.

219. (2009) 30 ILJ 356 (LC).

220. (2004) 25 ILJ 1513(CCMA).

But, as was shown in a number of awards, arbitrators will interfere where there has been a gross procedural irregularity in the process. For example, the applicant in *Mkhize v South African Police Service*²²¹ then a police inspector, applied unsuccessfully for one of two promotional posts. He claimed that he was a more suitable candidate than the candidate who was appointed to one of the posts, and that the members of the selection committee did not properly apply their minds to the requirements of the SAPS promotion policy.²²² The commissioner noted that selection committees are required by the SAPS promotion policy to keep proper minutes of their deliberations. The committee had not done so. This was unfair to Mr Mkhize and indicated that the members had not properly applied their minds to his application. While the decision to promote an employee falls within the managerial prerogative, employers are still required to justify their choice where on the face of it a particular candidate was eminently suitable for promotion. Mr Mkhize had obtained higher marks in the interview than the successful candidate. Moreover, the qualifications and experience attributed by the selection committee to the successful candidate were not contained in documents before the committee, but had been gathered from the grapevine.” Much of this information was incorrect. Reliance on such information rendered the committee’s decision arbitrary and capricious. Furthermore, the SAPS had not justified the decision to depart from criteria laid down in the promotion policy.

National Commissioner of the SA Police Service v Safety and Security Sectoral Bargaining Council and others,²²³ provides another example. The respondent employee had applied unsuccessfully for a promotional post. It was established later that the selection panel had simply accepted at the outset that one of the candidates was the best man for the job, and had not even considered the applications of the other candidates. On review, the Labour Court held that the commissioner had correctly held that this constituted an unfair labour practice.

221. (2004) 25 ILJ 1513 (CCMA).

222. (2004) 12 BALR 1468 (SSSBC).

223. (2005) 8 BLLR 808(LC).

However, the commissioner's order that the applicant should pay the employee compensation was set aside because the respondent employee had failed to prove that, had his application been considered, he would have been appointed. The dispute must relate to an unfair failure or refusal to promote. A disputed failure to appoint an applicant to a different position, even though of a higher status, will not necessarily be classified as a dispute concerning promotion.²²⁴ In such cases, employees who seek relief must bring their applications under section 6 of the Employment Equity Act, which entails proof that the reason for the non-appointment was unfair discrimination.

Failure to appoint temporary employees to permanent positions has, however, been held to give rise to a dispute concerning promotion²²⁵ as has failure to permanently appoint employees who have been acting in positions to those posts²²⁶

However, the mere fact that an employee has acted in a position does not in itself create an entitlement to be appointed to it on a permanent basis. Unless the employer has given the employee a reasonable expectation of appointment.²²⁷ Failure to appoint temporary employees to permanent positions has, however, been held to give rise to a dispute concerning promotion²²⁸ as has failure to permanently appoint employees who have been acting in positions to those posts.²²⁹ However, the mere fact that an employee has acted in a position does not in itself create an entitlement to be appointed to it on a permanent basis. Unless the employer has given the employee a reasonable expectation of appointment.²³⁰

224. (Labour Court Case No. JR 1802/2002 dated 21 April 2005).

225. See, for example, *Cullen v Distell (Pty) Ltd* [2001] 8 BALR 834 (CCMA).

226. Ibid of note 218 above, p. 77-78.

227. Ibid of note 218 above, p. 78.

228. *SAMWU obo Govender v Durban Metro Council* (1999) 6 BALR 762 (IMSSA).

229. Macken et al op cit 623; Nicholls op cit 75.

230. Clarke op cit 29. Cf *Watches of Switzerland v Savell* [1983] IRLR 141(EAT): the employer's vague promotion procedures found to be indirectly discriminatory because of its implicit male biased assumptions.

CHAPTER SIX

6. The handling of discriminatory practices or policies on promotions

Promotion raises similar issues to selection for appointment and most of the points made in selection are also relevant here. As is the case with other employment practices or policies, the Employment Equity Act is not prescriptive regarding promotion procedures. The risk of engaging in discriminatory practices is far less likely, however, if promotion procedures are formalised.²³¹ Although informal procedures and subjective selection criteria are not *per se* unlawful, they often tend to reinforce existing sex or race ratios and exclude protected groups from more senior jobs.²³²

It was remarked in *National Capital Alliance on Race Relations (NCARR) v Health and Welfare Canada*²³³ that the reason why staffing decisions based on an informal process can create employment barriers for protected groups, will be assessed in a standard manner for all candidates and will allow their recognition in candidates who are different from those who typically perform the job. Employers should therefore review their entire system of promotion of employees, both in respect of procedures (for example notification of vacancies, the system of performance evaluation, interviews, etc) and the criteria for promotion. It is advisable that vacancies should be duly advertised so that eligible candidates from protected groups are not excluded from promotion opportunities.²³⁴

231 Canadian Human Rights Tribunal Decision TD 3/97 (19 March 1997) available at 24 (chrt-yudp.gc.ca/decisions/docs/-ncarr-e.htm).

232. Townshend-Smith op cit 106.

233. [1992], discussed in Clarke op cit 29.

234. 673 F2d 798 (1982) at 827.

A claim of sex discrimination because of an employer's failure to make a vacancy known to an eligible female employee was upheld in *Schofield v Double Two Ltd.*²³⁵ The claimant was employed as a trainee supervisor together with a male employee. The latter was appointed as assistant manager, with the intention of offering him the position at a later date. The post was never advertised and the female supervisor was never informed of a vacancy for which she was qualified and able to contend. Differential exposure to promotional opportunities was also an issue in *Payne v Travenol Laboratories.*²³⁶ The court found that the failure to post a notice of openings had a discriminatory effect on the promotional opportunities of blacks, in a situation where white employees were in a better position to garner information through the grapevine.²³⁷ The employer's practices regarding performance evaluation may critically affect an employee's promotional prospects. Informal and subjective patterns of performance appraisal have the danger of biased decisions-making referred to in the cases above.²³⁸

In *Albermarle Paper Co v Moody*²³⁹ the United States Supreme court criticised a performance evaluation scheme for its failure to provide adequate guidance to the evaluators. The employer made use of "extremely vague" subjective criteria, and the court observed that there was "no way of knowing precisely what criteria of job performance the supervisor were considering, whether each of the supervisors applied a focussed and stable body of criteria of any kind."²⁴⁰

235. See also *Rowe v General Motors Co* 457 F2d 348 (1972): failure to notify employees of promotion opportunities or the necessary requirements to be eligible for promotion, constituted a factor in the court's holding that the promotion procedures were unlawfully discriminatory. See further *Stallworth v Shuler* 777 F2d 1431 (11th Cir 1985); *Faxton Union National Bank* 688 F2d 552 (8th Cir 1982), cert denied 460 US 1083 (1983).

236. At § 8.2.2.1 supra.

237. Ibid of note 229 above.

238. Ibid.

239. 422 US 405 (1975) at 433.

240. 422 US 405 (1975) at 433. See also *Carrol v Sears, Roebuck and Co* 708 F2d 183 (5th Cir 1983) at 192; *Green v USX Corp* 843 F2d 1511 (3rd 1988) at 1516.

Obviously, some form of subjectivity will exist in all performance appraisal methods, but its objectivity can be increased by procedural fairness²⁴¹ and the use of job-related evaluation criteria based on an accurate job analysis. Apart from job-related appraisal criteria, Moody, Noe and Premeax²⁴² mention as the characteristics of an effective appraisal system the following: the definition of performance standardisation of the evaluation instruments (using the same instrument for employees in the same job category under the same supervisor, as well as conducting appraisal regularly for all employees so that they cover similar time periods),²⁴³ responsibility for evaluating employee performance, open communication and employee access to evaluation results and ensuring due process, including the right to appeal appraisal results considered inaccurate or unfair. Formalising interviews and the training of interviewers can reduce the influence of prejudicial stereotypes.²⁴⁴ The code of practice issued by the British Commission for Racial Equality specifically provides that staff responsible for short listing, interviews and selecting candidates should be clearly informed of selection criteria and the need for their consistent application and given guidance or training on the effects which generalised assumptions and prejudices can have on selection decisions.²⁴⁵

241. Such as employee participation in the process, the opportunity to comment on a negative evaluation or a review process that prevents a single supervisor or manager to control a subordinate's career.

242. Op Cit 354-356.

243. Moody, Noe and Premeax say: "It has been held that if a pregnant employee's performance appraisal is due before she goes or on while she is on maternity leave, such an appraisal should be done before she leaves or soon after her return." In *CNAVTS v Thibault* Case C-136/95, decision of 30 April 1998, reported in (1998) All ER (ECJ) 385, the employee was on maternity leave and was subsequently not assessed for promotion. The European Court of Justice found that no unfavourable consequence may flow from exercising maternity rights under arts 2(3) and 5(1) of the European Union Equal Treatment Directive 76/207 (Official Journal 1976 L 39, 40). National provisions may therefore not deprive a woman from assessment and consequently the possibility to *qualify for promotion*.

244. Ibid.

245. Par 1.14(b). See also par 23 of the Code of Practice of the Equal Opportunities Commission. See also *Samuels v South African Police Service* (2003) 24 ILJ 1189 (BCA): although the decision who to promote forms part of management prerogative, it must be executed reasonably and in good faith. This means that an employer must be able to justify its decision on rational grounds. It must apply its mind to the selection of the best candidate, and supply reasons for its decisions. An employer would not act in good faith if it used invidious comparisons, unfair criteria, or no criteria at all.

Reliance on the recommendation of supervisors alone can lead to inferences of discrimination, especially if it is coupled by other practices such as no clear guidance on the selection criteria to be used, no formal application process, failure to publicise job openings or the absence of a proper job analysis.²⁴⁶ As with recruitment and selection for appointment, job descriptions and personal specification should be investigated to ensure that they are sufficiently job-related.²⁴⁷ Requirements that may have a discriminatory effect on potential candidates for promotion should be avoided unless they are inherently job-related. Unnecessary reliance on accrued seniority²⁴⁸ or specific prior work experience as a prerequisite for promotion will have a discriminatory effect in circumstances where protected groups have been excluded from the jobs, or not given the assignment, that would have permitted them to demonstrate competency or to gain new skills.²⁴⁹ In *CBC v O'Connell*,²⁵⁰ job assignments (mobile and remote broadcasting) that were considered desirable for professional advancement were denied to a number of female technicians with the same qualification and seniority as their male colleagues.

The Canadian Human Rights Review Tribunal found that they had been deprived of equality of opportunity and denied the possibility of obtaining better positions within their profession.²⁵¹ The British Equal Opportunities Commission's Code of Practice states that when general ability and personal qualities are the main requirements for promotion to a post, care should be taken to consider favourably candidates of both sexes with differing career patterns and general experience.²⁵²

246. See Rossein op cit 8-5. In *Rowe v General Motors Co 457 F2d 348 (5th Cir 1972)* at 359 the court stated. "We recognise that promotion/transfer procedures which depend almost entirely upon the subjective evaluation and favourable recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks, much of which can be covertly concealed and, for that matter, not really known to management."

247. Clarke op cit 29.

248. For the evolution of the United states supreme Court decisions on the enforcement of seniority rights in circumstances where it perpetuates the effects of prior discrimination, see Schmidt op cit 99-102.

249. Schellenberg op cit 30; Player op cit (1988) 383; townshend -Smith I op cit 106.

250. (1990) 12 CHHR D/69 (<http://www.chrt-tcdp.gc.ca/decisions/docs/cbc-e.htm>).

251. See also *Payne v Travenol Laboratories 673 F2d 798 (198)*.

252. Par 25(d).

If experience in job duties at the lower level is a prerequisite for performing the job duties at the higher level, the experience requirement will be justifiable despite its exclusionary effect on protected groups. Courts in the United States have therefore held, for example, that it is permissible to require law enforcement personnel or firefighters to serve a reasonable number of years in the ranks before being eligible for promotion to officer positions.²⁵³ On the other hand, in *Caviale v State of Wisconsin, Department of Health and Social Services*²⁵⁴ the policy of limiting promotion to those employees who have occupied so-called “career executive positions” with the employer was struck down, because of its exclusionary effect on women and minorities and the employer’s failure to establish the job-relatedness of the requirements.

Apart from the effect of the requirements of seniority or job experience, access to promotions may be limited or denied because of many other factors, such as employee’s refusal to submit to sexual harassment or because of an employer’s inadequate accommodation of family responsibilities.²⁵⁵ As Schellenberg points out²⁵⁶ to require such things as a twelve-hour workday, or evening, weekend or last minute availability, as proof of commitment to a job or career, it is to effectively exclude many women from being able to successfully demonstrate that commitment. Employees may also be disadvantaged in their chances of being promoted because of discriminatory practices regarding access to training opportunities that prepare them for higher positions.²⁵⁷ The importance of access to acting positions was emphasised in *National Capital Alliance on Race Relations (NCARR) v Health and Welfare Canada*.²⁵⁸

253. Player op cit (1988) 383. See *McCosh v Grand Forks* 628 F2d 1058 (8th Cir 1980); *Afro American Patrolmen’s League v Duck* 503 F2d 294 (6th Cir 1974); *Cox v City of Chicago* 868 F2d 217 (7th Cir 1989).

254. 744 F2d 1289 (7th Cir 1984).

255. Townshend-Smith op cit 106.

256. Page 8-74 op cit 26-27.

257. Hemming op cit.

258. Canadian Human Rights Tribunal decision 3/97 (19 March 1997) at 24 (<http://www.chrt-tcdp.gc.ca/decisions/docs/ncarr/-e.htm>).

Acting assignments provide valuable experience and give the person who is acting the appearance of being “right” for the job. The tribunal condemned the practice of making acting appointments on an informal basis without any competition. As a result, potentially qualified persons are not considered for appointment, or when an acting appointment is challenged, the subsequent selection process is affected by an unintended bias so that the person initially appointed is usually confirmed in the position.²⁵⁹ Policies prohibiting or discouraging inter-departmental transfers may operate as indirectly discriminatory barriers to equal promotion opportunities. Historically, some protected groups may have entered employment in a restricted range of jobs only. If it is conventional to promote employees from jobs where such groups are under-represented, restrictions of transfers between job groups could have a discriminatory effect on the professional advancement of such groups.²⁶⁰ The same discriminatory result may follow if the practice of discouraging transfers between jobs is adopted.

For instance, in *Quarles v Philip Morris Inc*²⁶¹ it was decided that a system based on departmental seniority under which black workers were formerly confined to specific departments, cannot be saved by providing that in the future they may transfer into all white departments as vacancies occur, with their departmental seniority beginning on the date of such transfer. Relying on inherently vague or subjective selection criteria in making promotion decisions is not unlawful in itself and often unavoidable²⁶² or subconscious prejudice against protected groups.

259. Townshend-Smith op cit 106.

260. Id at 27.

261. 279 F Supp 505 (ED Va 1967). In later cases United States courts seem to have departed from what appears to be a correct application of the principles of indirect discrimination and upheld seniority practices even under circumstances where this resulted in perpetuating the effects of past discrimination. See Schmidt op cit 102.

262. According to Sedmak and Vidas op cit 151-152, courts in the United States have accepted the use of subjective criteria more easily in white-collar jobs, especially professional and supervisory jobs, than blue-collar jobs. The degree of judicial deference is greater where the job has no visible or individually allocable output that can be objectively measured: *United States v Jacksonville Terminal Co* 451 F2d 418 (5th cir 1971) cert denied 406 US 906 (1972).

In *Adams v Reed*²⁶³ for example, the court upheld the rejection of a female candidate for promotion based on the judgement of a male selecting officer as to “education” “personality” and “ability to plan.” The criteria were shown to be clearly linked to the requirements of the job and could be evaluated objectively, which made it unlikely that they were abused as pretexts for discrimination. Such criteria can, however, more easily disguise conscious or subconscious prejudice against protected groups. Their vague nature may more easily result in the decision-maker unwittingly relying on racial or sexual stereotype.²⁶⁴ In *West Midlands Passenger Transport Executive v Sing*²⁶⁵ the British Court of Appeal stated that where subjective evaluations are required, evidence of a high percentage rate of failure to achieve promotion at particular levels by members of a racial group may indicate that the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions about members of that group.

In *Baker v Cornwall Country Council*²⁶⁶ the same court has recognised that amorphous criteria such as “leadership potential”, “ability to fit in”, or “long-term potential” can be a mask for unlawful discrimination. In *Rowe v General Motors Corp*²⁶⁷ a promotion procedure, which relied solely on company supervisors to recommend employees for promotion, was held to be discriminatory, where the evidence showed that only a disproportionately small percentage of black hourly paid employees were promoted to salary positions. The court found that the standards used by the supervisors were vague and without safeguards to prevent bias.

263. 567 F2d 1283 (5th cir 1978) at pages 8-75.

264. Nichols op cit 75. See also *Fisher v Gamble Manufacturing Co* 613 F2d (5th cir 1980) at 546 cert denied 449 US 1115 (1981): “promotion systems utilizing subjective evaluations by all white supervisors provide a ready mechanism for discrimination.”

265. [1988] IRLR 186 (CA).

266. [1990] IRLR 194, quoted in *Nicholls op cit* 73,75.

267. 457 Fd2 348 (5th Cir 1972).

An employer²⁶⁸ may decide to fill a vacancy through promotion from within or to recruit from outside the organisation. Both options may adversely affect protected groups, depending on the composition of the workforce. If protected groups are under-represented in the employer's workforce, promoting from within may disproportionately exclude qualified members of such groups from the relevant outside labour market. Conversely, if the employer has a large number of lower level employees who are members of protected groups, not considering employees who are members of protected groups, for promotion and recruiting from outside sources can adversely affect the employment opportunities of such groups who make up the rank and file. Should a differential impact on protected groups be proved, it might be difficult to establish the justification for a practice that excludes a significant pool of potentially qualified workers.

In *SA Police Service v Safety & Security Sectoral Bargaining Council & others*²⁶⁹ the court set out the principles to be followed by arbitrators considering disputes concerning alleged unfair labour practices relating to promotion. These principles are:

“Decision on promotion should be made in a manner that does not constitute an unfair labour practice, the definition of unfair labour practice covers only disputes concerning promotion and does not extend to disputes over whether employees deserved to be promoted, the decision whether or not to promote falls within the employer's prerogative which should not be interfered with in the absence of gross unreasonableness or bad faith, arbitrators should not usurp the discretion of employers by choosing between candidates, the mere fact that an employee has been acting in a post does not give the employee a right to be permanently appointed to the post and in deciding on whether a decision not to promote constitute unfair labour practices, arbitrators must strike a balance between the employer's prerogative and employee's right to be treated fairly.”

268. Player op cit (1998) 383 at page 8-76.

269. (unreported LC case No.P54/09, decided on 13 April 2010).

Applying²⁷⁰ these principles, the court set aside an award in which the arbitrator had found that the SAPS had perpetrated an unfair labour practice by not promoting the respondent employee because the selection committee had recommended that the post be re-advertised. The arbitrator had simply assumed without hearing evidence that the respondent employee was the most suitable candidate and had ordered that he be promoted. By so doing, the arbitrator had usurped the employer's prerogative, and had acted unreasonably. The award was set aside.

In *SA Police Service v Zandberg & others*²⁷¹ a white male police officer had applied for a promotional post and was recommended by the selection panel. The divisional commissioner concerned rejected the recommendation and instead appointed a black male police officer, who had been rated second by the panel. A bargaining council arbitrator ruled that the failure to promote the white officer constituted an unfair labour practice and ordered the respondent to pay him compensation. The main reason the arbitrator gave for her ruling was that the post had been advertised as non-designated, which in the arbitrators' view meant that candidates should have been solely on merit. And equity considerations were secondary. The arbitrator further held that as the white candidate, Zandberg, had scored better on managerial ability, vision, leadership and appropriate knowledge and experience than the successful candidate, he should have been appointed. On review, the court found that the arbitrator had erred by assuming that the directive empowering the SAPS national commissioner to advertise posts as designated or non-designated had any bearing on the selection process beyond the advertising stage and set the award aside. The court further held that the distinction between designated and non-designated posts in the SAPS has nothing to do with the short-listing, interviewing, selection and appointment of candidates, but is relevant merely for the purposes of advertising posts and soliciting applicants for it. Considerations of equity as well as the other criteria mentioned in clause 5.3 of SAPS National Instruction continue to apply when candidates are selected for appointment.

270. Grogan J, Jordaan B, Maserumula P and Stezner S, *Juta's Annual Labour Law update*,

271. (2010) 31 ILJ 1230 (LC).

Clause 5.3 of the Nation Instruction referred to above provides as follows:

“The National Commissioner may determine that certain posts be advertised for the designated or the non-designated group. If posts are advertised as such the employees belonging to the non designated group may only apply for posts advertised for the non-designated groups while employees for the designated group may apply for any of the posts advertised for the designated or non designated groups. The non-designated group includes all white males. The designated group includes all African males and females, Indian males and females, Colored males and females, White females and persons with disabilities.”

The commissioner had conflated the advertisement requirements with the requirements for other steps in the appointment process. The arbitrator’s second mistake was to assume that the appointment of candidates on the basis of equity meant that they were less meritorious. While equity cannot be served by appointing second- rate candidates, experience and technical competence are not the only criteria for identifying the best candidate. Since equity is guaranteed by the Constitution as well as the EEA, qualities aimed at ensuring that candidates who are selected promote service delivery are also relevant. The court also held that demographic considerations strongly favoured the appointment of a black officer. The difference between the score of the white officer and that of the successful candidate was negligible.

In conclusion, the court stated as follows:

“Opening the post to all groups does not mean that a higher standard applies when assessing suitability and merit for posts for non-designated groups than when posts are restricted to designated groups. Applying a higher standard for non-designated groups implies that a lower standard is used to appoint persons from designated groups. By implication, less suitable and less meritorious people fill posts reserved for designated groups. That cannot be the intention or the letter and spirit of EEA. Equity means fairness and justice to the candidate and the people they serve. Fairness and justice cannot prevail if candidates who are less than best, who are less suitable and less meritorious are appointed. However, in assessing suitability and merit, technical competency and experience are not the only criteria. Acquiring a higher aggregate is not decisive. Equity on the one hand and merit on the other are not mutually exclusive criteria. Furthermore, equity under the EEA cannot be different from equity which the constitution promises. Promoting equity in the workplace can therefore not conflict with or compromise the constitutional promise, which includes equitable delivery of goods, socio-economic rights and benefits and services, including security services. Equity is therefore not only a workplace concern, but also a community concern. Therefore, in assessing merit and suitability, qualities relevant to ensuring delivery to the community must also be considered. The court held further that the National Instruction does not create a hierarchy of criteria and that all the criteria must be considered cumulatively to balance both equity in the workplace and equity in the delivery of services. Suitable, meritorious candidates, whether from designated or undesignated groups, are those who meet the criteria for selection and are also capable of advancing service delivery.”

Furthermore, it appeared that equity considerations had not been taken into account by the selection panel. The divisional commissioner was obliged to do so. His deviation from the panel's recommendation was accordingly lawful, rational and justifiable. The award was set aside.

The respondent employee in *Minister of Safety & Security v Safety & Security Sectoral Bargaining Council & others*²⁷² was more fortunate. The employee, a serving police captain, applied for a post at the rank of superintendent. The selection committee recommended three other candidates. The candidates rated first and second accepted other posts, and the third-ranked candidate was appointed. After an arbitration hearing in which by agreement the only issue was whether the successful candidate was more suitable for appointment to the post than the respondent employee, the arbitrator ruled that the respondent employee should have been appointed and was accordingly victim of an unfair labour practice. The arbitrator ordered the applicant to promote the third respondent to the rank of superintendent. On review, the applicant contended that the arbitrator had exceeded his powers by usurping the employer's discretion, had misconstrued the evidence and had erred by not ensuring that the successful candidate was joined in the arbitration proceedings. The court rejected both points. The judge pointed out that, if the first were accepted, commissioners would be precluded from interfering with even the most egregious unfair labour practices, and would have to accept the employer's judgement even though it was unable to justify overlooking a worthy candidate for promotion. The court also held that the commissioner could hardly be blamed for considering the merits of the respective candidates because the parties had placed that issue before him in a pre-arbitration minute. Mr Jacobs, then a library manager employed by the erstwhile Tygerberg municipality, applied for the post of Manager Library and Information Services²⁷³ after the Tygerberg municipality and several other municipalities were merged to form the City of Cape Town metropolitan municipality. He was unsuccessful, and referred a dispute concerning an alleged unfair labour practice to the bargaining council. The arbitrating commissioner ruled that Jacobs had never been employed by the City of Cape Town and that he was accordingly an applicant for a new post, over whom the council lacked jurisdiction. The referral was accordingly dismissed.

272. [2010] 4 BLLR 428 (LC).

273. Ibid of note 270 above, p. 41.

On review, the Labour Court found that Jacobs was indeed an employee of the City of Cape Town because he had been transferred to it by virtue of section 197 of the LRA. That being the case, the dispute concerned a promotion, because the City of Cape Town had advertised the post internally as well as externally. The commissioner's ruling was set aside.

The City of Cape Town argued on appeal that the matter fell outside the council's jurisdiction even if the employee was in its employment at the time. In *City of Cape Town v SA Municipal Workers Union on behalf of Jacobs and others*²⁷⁴ the LAC ruled in favour of the municipality, but for reasons different from those advanced by the commissioner. The court found that Jacobs was indeed an employee of the City of Cape Town when he applied for the post. However, when he did so he was not an applicant for promotion. The court also went on to say that this was because in terms of the procedure prescribed by the Local Government Municipal Structures Act²⁷⁵ Jacobs had been placed in a pool of employees for whom equivalent posts could not be found in the new organ-gram. His position could not therefore be compared with that of employees applying for posts with their own employers.

The court further stated that the procedure provided for in the Municipal Structures Act referred to above, anticipated the probability that several employees who might qualify for the particular posts in an amalgamated municipality might apply. Several employees cannot possibly be appointed to the same post. The court accordingly found that the SALGBC had correctly ruled that it lacked jurisdiction to arbitrate the dispute because the employee's complaint was not covered by the definition of unfair labour practice.

274. (2009) 30 ILJ 1983 (LAC).

275. Act No.117 of 1998.

CHAPTER SEVEN

7. Onus of proof in promotion disputes

The unfair labour practice definition in Section 186(1)(a) of the Labour Relations Act²⁷⁶ includes unfair conduct by an employer relating to the promotion of employees.²⁷⁷ Where this form of unfair labour practice is not limited to discriminatory treatment, it is difficult to imagine that employees will have any hope of relief unless they can show that they have been overlooked for promotion on the basis of some unacceptable, irrelevant or invidious comparison, or if the employer is not following its own or agreed promotion policies and procedures.²⁷⁸ The onus of proving the facts on which such allegations rest is on the employee.²⁷⁹

Employees may have a valid complaint if they can show that they have been overlooked for promotion where they possess objective attributes, such as experience or qualifications, which another person who has been promoted does not possess, and their employers cannot explain why they were overlooked.²⁸⁰ While such employees may not be able to show that they have been discriminated against in the sense contemplated by the Employment Equity Act²⁸¹ or on some other unacceptable ground, it is possible that in the absence of a satisfactory explanation from the employer an arbitrator will assume that the employer had acted in bad faith and therefore unfairly.²⁸² Generally, however, it is not enough for an employee who complains of unfair conduct in relation to promotion simply to allege and prove that he or she was better qualified or more “suitable” than the successful candidate.

276. Grogan J, Workplace Law, 7th ed (2003) p. 275.
277. Ibid of note 276 above, p. 230.
278. Ibid.
279. Ibid.
280. Ibid.
281. Ibid.
282. Ibid.

The CCMA Commissioner Professor J G Grogan in *Cullen v/s Distell (Pty) Ltd*²⁸³ has said in this regard:

“The relative strengths and weakness of candidates for a position cannot in themselves prove that an employer committed an unfair labour practice by failing to appoint or promote an inferior weaker candidate. In drafting item 2(1)(b) of Schedule 7, the legislature did not intend to require arbitrating commissioners to assume the roles of employment agencies. A Commissioner’s function is not to ensure that employers choose the best or most suitable candidate for promotion, but to ensure that employers do not act unfairly towards candidates. A more highly qualified or senior candidate may feel badly done by if he or she is overlooked. However, this does not mean that the employer has acted unfairly for purposes of that term as it is used in item 2(1)(b). The relative inferiority of a successful candidate is only relevant if it suggests that the superior candidate was overlooked for some unacceptable reason, such as those listed in section 6 of the EEA. If that is the case, the legislature has to decide whether the reason for the failure to promote is unfair. The Labour Appeal Court has made it clear that it will not interfere with an employer’s decision to promote or appoint a particular candidate if the employer considers another to be superior, unless when so doing the employer was influenced by considerations that are expressly prohibited by the legislature, or are akin thereto. That the unfair labour practice jurisdiction is so divided between the Labour Court and the CCMA indicates that the legislature did not intend commissioners to concern themselves when deciding disputes relating to promotion with the reason why the employer declined to promote the applicant employee, but rather with the process which led to the decision not to promote the employee. The reasons for the decision to overlook an employee when selecting a candidate for promotion are relevant only insofar as they shed light on the fairness of the process.”

However, arbitrators may be prepared to draw an inference of bad faith from the patent superiority of an unsuccessful candidate.²⁸⁴ Thus, example, the employee in *IMATU v Greater Pretoria Metropolitan Council*²⁸⁵ applied for a promotional post but was rejected in favour of another employee who was at the time in a lower position and had been in the council’s service for a much briefer period.

283. (2001) 8 BALR 834 (CCMA).

284. Ibid of note 270 above, p. 23.

285. (1999) 12 BALR 1459 (IMSSA) see also *Portnet v SALTAFF obo Lagrange* (988) 7 BALR 963 (IMSSA).

The disappointed employee claimed that he had effectively done the work attached to the position for 15 years.²⁸⁶ The advertisement for the position in question had stated that the minimum requirements for the position were at least 10 years' experience in local government, and that the job specification required the incumbent to be at least 30 years old. The person appointed was 25 years old at the time. The employer made no attempt during the arbitration to explain why she was a preferred candidate. A schedule that had been used by the interviewing panel indicated that the successful candidate had two degrees, a diploma and was working towards master's degree. There was no rational connection between this information and the decision that the successful candidate was the most 'eligible for promotion' of all the candidates.²⁸⁷

The arbitrator held that the grievant employee was familiar with the work attached to the position. He had been employed at a senior level for many years. He had accounting qualifications and had received training in business leadership. When the employee had asked why he had been overlooked, he had received the cryptic answer that he was in the wrong place at the wrong time. Further correspondence on the issue disclosed no reasons why the successful candidate was preferred. The employer had led no evidence to support its suggestions in argument that it had aligned itself with the state's affirmative action policies. It was therefore not possible to conclude that any rational person would have preferred the successful applicant to the grievant. The grievant was accordingly the victim of an unfair labour practice. In *Rafferty v Department of the Premier*²⁸⁸ it was held that if an employer has regard to irrelevant criteria when choosing between a better qualified candidate and a less qualified candidate, the failure to promote the better qualified may also be unfair. In *Spoornet (Joubert Park) v Sastaff (Johannesburg)*²⁸⁹ it was held that employers are also guilty of unfair conduct relating to promotion if they give employees a reasonable expectation that they will be advanced and then, without adequate reason, frustrate that expectation.

286. Ibid of note 270 above, p. 275.

287. Ibid of note 270 above, p. 230.

288. Ibid of note 54 above.

289. [1998] 4 BALR 513 (IMSSA).

It has also been held to be unfair for an employer to advertise a position, setting a prescribed minimum qualifications, and then to appoint a person who did not possess that qualification,²⁹⁰ and to create a position for a specific person without advertising it internally in accordance with agreed procedures.²⁹¹ In *George v/s Liberty Life Association of Africa Ltd*²⁹² it was held that if an employer has regard to irrelevant criteria when choosing between a better qualified candidate and a less qualified candidate, the failure to promote the better qualified may also be unfair.

Employers are also guilty of unfair conduct relating to promotion if they give employees a reasonable expectation that they will be advanced and then, without adequate reason, frustrate that expectation.²⁹³ It has also been held to be unfair for an employer to advertise a position, setting a prescribed minimum qualifications, and then to appoint a person who did not possess that qualification,²⁹⁴ and to create a position for a specific person without advertising it internally in accordance with agreed procedures.²⁹⁵ On the other hand, arbitrators tend to tread warily in this area; there may be reasons for preferring one employee to another apart from qualifications and experience.²⁹⁶ The mere fact that an unsuccessful applicant for promotion received a higher rating from a selection committee than the successful applicant does not necessarily render the failure to appoint the former unfair.²⁹⁷

290. Ibid of footnote 119 above.

291. Ibid of footnote 283 above.

292. (1996) 17 ILJ (IC).

293. Grogan J, Workplace Law 8th Edition, p. 231.

294. Ibid

295. Ibid.

296. Ibid.

297. Ibid.

But the employer should prove what those criteria are and that they are reasonably related to the requirements of the post in question.²⁹⁸ The dispute must relate to an alleged unfair failure or refusal to promote.²⁹⁹ A disputed failure to appoint an applicant to a different position, even though of a higher status, will not necessarily be classified as a dispute concerning promotion.³⁰⁰

In such cases, employees who seek relief must bring their applications under Section 6 of the Employment Equity Act, which entails proof that the reason for the non-appointment was unfair discrimination.³⁰¹ Failure to appoint temporary employees to permanent positions has, however, been held to give rise to a dispute concerning promotion,³⁰² as has failure to permanently appoint employees who have been acting in positions to those posts.³⁰³ However, the mere fact that an employee has acted in a position does not in itself create an entitlement to be appointed to it on a permanent basis, unless the employer has given the employee a reasonable expectation of appointment.³⁰⁴

298. Ibid.

299. Ibid.

300. Ibid.

301. Ibid of note 12 above, p. 231.

302. Ibid.

303. Ibid.

304. Ibid.

CHAPTER EIGHT

8. Contextualization of key principles from the cases in the dissertation

The first principle is the relevance of higher marks obtained by a candidate for promotion in the interview. This principle was dealt with in the following cases: In *Van Rensburg v Northern Cape Provincial Administration*³⁰⁵ and *Public Servants Association obo Dalton and Another v Department of Works*³⁰⁶ the aggrieved employees received higher marks in the interview but yet were not successful. The employers appointed candidates who obtained less marks in the interview. The unsuccessful candidates challenged the decisions of the employers on the basis of the fact that they were unfair. The legal question to be decided was whether the decision of the employers to overlook the applicants who obtained more marks amounted to unfair labour practices relating to a promotion. The arbitrators in both these cases said that it was not fatal for the employer to do this as long as it can be able to give good reasons. In the light of these decisions, it is therefore immaterial whether a particular candidate for promotion has obtained more marks than others in the interview or not. In other words, the candidate who obtains higher marks does not have the right to claim promotion at all. The employer would still promote someone else who obtain lesser marks in the interview. The arbitrators and the courts can only interfere with the decision of the employer if it is clear that the employer failed to apply its mind properly to the given facts during the selection of the successful candidate.

In *Rafferty v Department of the Premier*,³⁰⁷ the employer set three broad requirements for the post in its advertisement. Potential candidates who felt that they met the requirements of the advertisement applied for the post. During the decision making process, the employer regarded one of these three requirements as more important than others and made the appointment accordingly. The unsuccessful candidate challenged the decision of the employer on the basis of unfair labour practice relating to a promotion. The CCMA arbitrator however did not find anything untoward with the decision of the employer.

305. Ibid of footnote 49 above.

306. Ibid of footnote 47 above.

307. Ibid of footnote 54 above.

The Rafferty case also addresses the principle of prior promises that senior employees often make to their juniors. The CCMA arbitrator ruled that it is in actual fact a fatal mistake on the part of the employers to make certain promises that they fail to accomplish at the end of the day. The decision by the arbitrator in this case made it very clear that there is in actual fact nothing wrong if the employer deemed it fit and necessary under the circumstances to select one of the requirements as more important than others. It is therefore not fatal to do that.

In *Public Servants Association and others v Department of Correctional Services*,³⁰⁸ *IMATU obo Coetzer v Stad Tygerberg*³⁰⁹ and *Guraman v South African Weather Services*³¹⁰ the employees complained of unfair labour practice after their employer did not promote them after the posts in which they have been acting for sometimes were advertised. The legal question was whether their employers committed an act of unfair labour practice relating to promotion by failing to promote them. It was held that it is fatal for the employer to do that as acting in a higher post does not give the incumbent on the post any right or entitlement for promotion at all but what is required on the part of the employer is to give the incumbent on the post an opportunity to be heard before the appointment of the successful candidate can be made. But employers are not supposed to let employees act in higher vacant positions or posts for a very long time and therefore fail to appoint or promote them when those posts are advertised because that would lead to unfair labour practice.

PSA v Department of Justice and others,³¹¹ and *National Commissioner of the SAPS v South African Police Union and Others*,³¹² the courts have ruled that in every case where the positions of the successful candidates are challenged, the successful candidate(s) are joined in the cases so that when they are found to be unsuitable and therefore unfit for those posts or positions they can be demoted and be replaced with the applicant(s) if found to be the most suitable candidates. It is now trite law in South Africa that failure to join the successful candidates in any promotional dispute is fatal.

308. Ibid of footnote 143 above.

309. Ibid of footnote 167 above.

310. Ibid of footnote 161 above.

311. Ibid of footnote 216 above.

312. Ibid of footnote 185 above.

Another principle that emerged from the cases referred to in this dissertation is deviation from procedure or policy by employers during promotion of employees. This became evident in the case of *NUTESA v Technikon Northern Transvaal*.³¹³ In this case, the employer had an established policy and practice that required it to advertise vacant posts before filling them. The employer did not follow this policy in the filling of five advertised posts at its workplace. The employer simply created these posts with the appointment of certain specific employees in mind and did this secretly and eventually appointed those five earmarked employees. The employer was later challenged and the legal question was whether it is fair for the employer not to follow its own established policy or procedures in the filling of vacant posts. The CCMA arbitrator found that it is unfair for the employer to do this and ordered the Technikon Northern Transvaal to withdraw the appointments and re-advertise the posts in question. It is now trite that employers should follow their own procedures when promoting employees. Deviation on the part of employers from their own policies or procedures is not good at all as it prejudices other employee unnecessarily and is often fatal and is something that have to be avoided at all costs.

In *Monaheng v Westonaira Municipality and another*³¹⁴ and *Wasserman v SA Police Service and others*,³¹⁵ it was confirmed that deviation from policy in the selection and promotion of employees is fatal and employers should actually avoid that otherwise they will be ordered to withdraw appointments of certain candidates and re-advertise the posts. And at the time of doing this, the successful candidates whose appointments have to be reversed would have already earned higher salaries, would also have committed themselves financially and this whole thing would affect them financially and psychologically.

313. Ibid of footnote 130 above.

314. Ibid of footnote 134 above.

315. Ibid of footnote 135 above.

Another principle that emerged from the cases referred to in this dissertation is acting capacities which became evident in the discussion of the following cases. In *Guraman v South African Weather Services*,³¹⁶ *Classen and another v Department of Labour*³¹⁷ *Hospersa and Roos v The Northern Cape Provincial Administration*³¹⁸ and *Limekaya v Department of Education*³¹⁹ and *Imatu obo Coetzer v Stad Tygerberg*³²⁰ it was held that acting in a higher post does not entitle the incumbent for promotion to the post in question once it is advertised. It also said that the incumbent on the post is only entitled to be heard before a decision to promote the successful candidate is made. It was also held that even legitimate expectations do not entitle the incumbent for a promotion. The incumbent may only be entitled for an acting allowance which does not fall within the definitional elements of unfair labour practice. In other words, acting allowance cannot be arbitrated as a dispute of right. The principle which was dealt with in these cases is acting capacities in higher positions. It must however, be pointed out that employers who allow incumbents to act in higher posts for longer periods, risk committing unfair labour practice against those employees. It is therefore advisable that employers should avoid allowing people to act in higher posts for a long time.

In the same vein, persons occupying upgraded or re-graded posts do not have any right and/or entitlement to promotion to those posts. The prerogative still lies with the employer to appoint or promote them to the upgraded or re-grading posts without advertising or after advertising them. In other word, the employer is the final orbiter in any such situation. The employer has discretion whether to advertise or not. If the employer decides to advertise the upgraded re-graded post, it can appoint or promote any candidate who is the most suitable of them all. Like in the case of acting capacity, the incumbents in upgraded or re-graded posts are entitled to be heard before a decision to appoint or promote the successful candidate is made.

³¹⁶. Ibid of footnote 161 above.

³¹⁷. Ibid of footnote 142 above.

³¹⁸. Ibid of footnote 156 above.

³¹⁹. Ibid of footnote 157 above.

³²⁰. Ibid of footnote 167 above.

It must, however, be pointed out that the earlier decisions or judgments favoured the incumbent(s) on the upgraded or re-graded posts who happened not to be promoted once their posts have been upgraded or re-graded. One such case is *Basson v SA Police Service*.³²¹ The merits of this case have already been discussed *supra* and it will therefore not be necessary to repeat them here save to say that Basson successfully challenged his employer (SAPS) for promotion after he was made to act on an upgraded or re-graded post of Senior Legal Administration officer for a long time. One should however be quick to point out that the situation has drastically changed as of now and employers are still retaining their discretion to promote or appoint whoever they want as it will be seen from the discussion of the principle of upgrading or re-grading of a post(s) that follows below.

The last but one key principle which was brought into the picture in this dissertation is upgrading or re-grading of posts. This principle has been a very sensitive and thorny issue in the promotion of employees in the work place. The employers and organized labour as representative of aggrieved employees had different interpretation of the regulation that governed this issue. Organized labour was of the view that once a post has been upgraded or re-graded, the incumbent in the post should automatically be promoted to the next higher level where the post had been upgraded or re-graded. The employer on the other hand was of a different view altogether. The employer was of the view that even if a post has been upgraded or re-graded, the incumbent on that post has got no automatic entitlement to a promotion at all but that they (employers) still retains this managerial prerogative to apply their minds and promote or appoint whoever they wanted to appoint or promote. This divergent interpretation caused unnecessary disputes that landed in CCMA and courts. The majority decisions favoured the interpretation by organized labour. This whole thing was brought to finality by the Constitutional Court decision in *National Commissioner of the South African Police Service v Public Servants Association and others*.³²² This decision overruled all earlier decisions with regard to this specific issue.

321. Ibid of footnote 182 above.

322. (2006) Case No. CCT 68/05 (CC) heard on 18 May 2006 and decided on 13 October 2006.

The Constitutional Court ruled that the incumbent on an upgraded or re-graded post does not have an automatic entitlement for promotion to the upgraded or re-graded post. It ruled that the employer still retains the right to apply its discretion in the promotion or appointment of a candidate. Upgrading or re-grading of a post in the context of promotions still gives employers a leeway to decide about the promotion or appointment of any candidate in the post.

The final key principle emerged from the cases referred to in the dissertation is discrimination. All the international cases referred to in the dissertation particularly *National Capital Alliance or Race Relations (NCARR) v Health Welfare Canada*³²³ *Schoffield v Couble Two Ltd*,³²⁴ *Payne v Travenol Laboratories*,³²⁵ *Albermalle Paper Co. v Moody*,³²⁶ *Caviale v State of Wisconsin, Department of Health and Social Services*,³²⁷ and *Quarles v Phillip Morris Inc*³²⁸ to mention but a few, dealt at length with discriminatory policies or practices on promotions of employees in the workplace. Although at face-value, these international cases appear as if they are *per se* concerned about discrimination in general only it must be emphasized that on a thorough analysis and evaluation thereof, it becomes clear that they are dealing with discrimination relating to promotions in the workplace. All these cases are relevant to the topic under discussion. In the context of promotions, discrimination on certain prohibited ground has been the order of the day in the past. The courts have, however, correctly intervened and helped a lot in shaping the entire promotion issues in order to remove any form of discrimination in promotion with the view of leveling the playing field or ground.

323. Ibid footnote 258 above.

324. Ibid footnote 236 above.

325. Ibid footnote 229 above.

326. Ibid footnote 239 above.

327. Ibid footnote 254 above.

328. Ibid footnote 261 above.

Another key principle is unhappiness on the part of a candidate or applicant for promotion to a vacant and advertised post. Applied in the context of promotions, it was held in *SA Municipal Workers Union obo Damon v Cape Metropolitan Council*³²⁹ that mere unhappiness does not necessarily equal unfairness. Perceptions of unfairness do not also necessarily equate to unfairness in the context of promotions. This was said in the case of *Vereeniging van Staatsamptenare obo Badenhorst v Department of Justice*³³⁰.

329. Ibid of footnote 8 above.

330. Ibid of footnote 5 above.

CHAPTER NINE

9. Conclusion

In the light of the legal principles and case law outlined above, it is clear that the employer enjoys a large measure of discretion when it comes to issues of promotion. The employer's managerial prerogative to appoint whoever it wants to appoint as long as it followed its own promotion policy puts the plight of applicants for promotions in the hands and mercy of employers. This common law managerial prerogative is a stumbling block to applicants for posts in any given situation. The employers are empowered or authorized to appoint even a less qualified person in an advertised and vacant post in the expense of highly qualified and experienced applicants sometimes on the basis of affirmative action or even certain ulterior motives.

Although the decision as to who to promote forms part of the managerial prerogative, it must be exercised rationally, reasonably and in good faith. This means that an employer must be able to justify its decision on rational grounds. It must apply its mind to the selection of the best candidate, and supply reasons for its decision. An employer would not act in good faith if it used invidious comparisons, unfair criteria, or no criteria at all. Even though this is the case, it is always difficult for the aggrieved party or employee to prove that the employer did not apply its mind in the selection and eventual promotion or appointment of the successful candidate. What makes matters even worse is the fact that whenever the employer deviates from the promotion policy, those deviations are accepted as long as they did not have any material effect to the outcome of the selection process. They are usually regarded as peripheral. As a result of this protection of employers they continue to do things that are totally wrong when it comes to the promotion of employees in the workplace with impurity. The matter is also exacerbated by the fact that when an unsuccessful candidate to a post challenges the decision of the employer not to appoint or promote him, such applicant is required to join the successful candidate in the post. As a result of this some employees feel discouraged about this requirement because they feel that once the successful candidate is joined, such candidate will feel as if the aggrieved employee or applicant wants him/ her to be demoted and this suspicion creates unnecessary animosity, tension or hatred between the parties involved.

The aggrieved parties in promotion disputes may not be successful if they challenge the decision of the employers. The employers seem to enjoy more support on issues of promotion from the adjudicating bodies. They are actually free to do as they wish because in the majority of cases, the employers continue to win these cases at arbitration because if it is found that the employers have committed some irregularities, their actions are usually condoned on the basis of the fact that they are minor irregularities or peripheral and therefore not material to render the whole process of appointing or promoting the successful candidate on the post unfair.

It must however be pointed out that when errors are committed by applicants, they are not condoned but instead they are condemned. It would seem that when it suits the employers, promotion policies are said not to be sacrosanct or as hard and fast rules or cast in stone but mere guidelines but when the employees or applicants are at the receiving end, promotion policies are hard and fast rules. On the basis of this, it is apparent that even though there is grievance procedure in the majority of workplaces, this does not protect employees or applicants in promotional posts hence making them vulnerable.

It is also a trite and tested principle of the law in this country and globally that CCMA Commissioners, Bargaining Council arbitrators and the courts are powerless to protect the applicants in promotion cases unless the decision of the employers are patently arbitrary, capricious, vexatious and irrational and therefore actuated by *malice* or *mala fides*. It is however difficult for this to be detected and exposed as employers employ the services of legal and labour experts such as legal administration officers and labour relations practitioners to defend their decisions and it is easy for obvious loopholes to be closed. Although it is not easy to win a promotional dispute, a dissatisfied or disappointed incumbent on the post not prevented from having recourse to administrative and labour processes on a case by case basis in order to challenge an exercise of a discretion, first to advertise and second, not to appoint him or her.

The issue of discrimination relating to promotion of employees in the work-place is no longer problematic like in the past during apartheid era to deal with in the Republic of South Africa anymore because section 9(3) of the Constitution³³¹ and section 6 of the Employment Equity Act³³² outlaws unfair discrimination of people based on a variety of grounds such as sex, gender, colour, marital status, religion etc. The Republic of South Africa is not the only country that has got laws that deal specifically with this monster (i.e. unfair discrimination).

331. Act No.55 of 1998.

332. Act No.108 of 1996.

CHAPTER TEN

10. Recommendations

The employer's promotion policies should be framed in such a way that all the loopholes which employers can use to manipulate the process are completely closed. The employer's managerial prerogative and its wider discretion to appoint or promote whoever it wants to appoint or promote should be curtailed by putting very strict checks and balances or control measures in place. The acceptable reasons for the employer to deviate from the hierarchy of marks obtained by candidates in an interview should be enumerated to limited specific situations in order to prevent abuse of the process. Strict control measures must be put in place to serve as checks and balances to curb corruption, nepotism and brotherhood or hand-in-glove actions on the part of panelists. Required qualifications should be strictly adhered to at all times. No deviation from the promotion policy should be allowed no matter how slight it might be. Members of the panel who short-list and interview the candidates should be held accountable for their actions or decisions and if it is found that they in actual fact recommended a candidate who did not meet the requirements of the post or who was outperformed in the interview they must be held personally accountable for their own actions.

The executing authority should also be held accountable for the final decision to appoint or promote inexperienced and less qualified candidate on the post in the expense of more experienced and highly qualified candidates. In a nutshell, all the responsible people for the wrong decision should be made to pay *de bonis proprii* or from their own pockets for the expenses or losses incurred by the employer as a result of their ill-informed and wrong decision. Once this is done, other future panelists and executing authorities will undoubtedly refrain from taking wrong or irrational decisions when handling issues of promotions. This will serve as a deterrent and as such, reasonableness and objectivity at all times will form part of decision making-processes on promotions.

It is also recommended that a candidate who meets the requirements of the advertised post, perform exceptionally well in the interview and obtain more marks than any other candidate should be the one who is appointed or promoted to the post unless if the employer wants to appoint someone from the list of recommended candidates in order to address employment equity targets or representivity in the particular or specific environment of the post.

It should also be placed on record that even in situations where employment equity targets or representivity has to be addressed, employers should know that this is not a blanket authority to advance less qualified, inexperienced and incompetent applicants because the efficiency of the Public Service should always be prioritized.

This will undoubtedly correct the perception in the public domain that says an interview is just a window dressing exercise because in the majority of cases, the person to be promoted or appointed in the advertised post is already known by the employer at the time of advertising the post in question. Furthermore, it is recommended that representatives from Labour Unions should form part of the interview panels even though they will not be taking part actively in the process but on observer status. This recommendation in my view or opinion will help a great deal in preventing and eradicating perception in the public domain that interviewing panels and executing authorities are corrupt, nepotistic, biased towards certain candidates of their liking in the allocation of marks. This will also help because if there are indeed any corrupt tendencies on the part of the employers, this will be noticed by the representatives from Labour Unions and combated and eradicated, *in toto*, from the workplace. It is a well-known fact that employees appointed as a result of nepotism, favouritism, brotherhood, sisterhood or on the basis of ethnicity, tribalism will in most of the time work towards their masters or principals and forget about the interest of the organization or department and the citizens. They will in the majority of cases work to satisfy their narrow and selfish interests and those of their principals who appointed or promoted them into those positions.

In the light of this, room for nepotism and corruption is likely to emerge. On the basis of this, I am of the opinion that representative from Labour should be allowed to take part in the short- listing and interviewing process in order to nip corrupt tendencies in the bud. It is also recommended that the interview processes need to be recorded mechanically so that in future when one or more of the applicants who did not succeed challenges the whole process, the employer can then be in a position to transcribe the record of the proceedings and make a copy of same to the aggrieved applicant at own costs so as to enable him or her to prepare and prosecute the case. All the suggested measures will serve as checks and balances to prevent abuse of power or authority and at the same time eliminate corruption.

It is further recommended that both the short-listing and interview processes be recorded mechanically in the same way as what is happening in disciplinary hearings, arbitrations and in courts or any other independent forums or tribunals in order to keep proper record of all the deliberations made by each and every panelist, if any.

Once the interviews have been finalized, those recordings should then be kept safely and accordingly under closed doors or lock and key where they cannot be easily accessed by everyone but only specific individuals who have been vetted accordingly. This will enable dissatisfied candidates or applicants to access the information at a later stage or in future if they complain and suspect any mal-practice on the part of the panelists and wish to challenge such a decision by the employer.

It is finally recommended that government should lead by example in the implementation of affirmative action policy in line with its employment equity plans and Employment Equity Act. In doing so, the employer should make sure that it does not act in an arbitrary, capricious, biased, unfair, unreasonable, unjustifiable manner and its decision is not actuated by *malice* or *mala fides*. The government must make sure that all Departments in the public sector or service comply with the provision of the Constitution and the EEA and any Head of Department or a Chief Executive Officer who is found not to be compliant with these laws be held accountable and be dealt with accordingly in a very harsh manner.

This will send a very strong and clear message to all Departments in the public service that government is very serious about the implementation of employment equity and the acceleration of affirmative action. The speedy implementation of government affirmative action policy should form part of the employment contract of each and every Head of Department in the public service and every Chief Executive Officer of a private company or semi-official entity so that their performance can also be assessed or evaluated or measured on this key performance area.

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