UNFAIR LABOUR PRACTICE RELATING TO PROMOTION IN THE PUBLIC EDUCATION SECTOR

by

TOTO TSHEKO

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Supervisor: Mr T Qotoyi

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PLAGIARISM DECLARATION

I, Toto Tsheko student number 210246545, hereby declare that the treatise submitted in partial fulfilment of the degree LLM (Labour Law) to be awarded is my own work and that it has not been previously submitted for assessment or completion on any postgraduate qualification to another university or for another qualification.

Signature: _____

Date: _____

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SUMMARY

This topic deals with unfair labour practice relating to promotion and will focus mainly on the public education sector. The Labour Relations Act of 1956 and 1995, with respect to the concept of unfair labour practice, will be analysed. It is through this discussion that one appreciates how the concept of unfair labour practices has evolved in South African law.

An attempt is made to define promotion and in this regard reference is made to cases decided upon by the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Labour Court (LC). Furthermore, promotion is defined within the context of public education and applicable legislation. Due regard must be to the employment relationship between the employer and the employee as well as compare the current employee's job with the job applied to.

Unfair conduct by the employer will be discussed within the context of promotion. The prerogative of the employer will be discussed with reference to case law and that discussion will include an analysis of various principles with regard to procedural and substantive fairness.

Various remedies provided for in dispute resolution mechanism in line with the provisions of the Labour Relations Act 66 of 1995 and relevant case laws will also be discussed.

The last chapter deals with how to strike a balance between employee rights (that is educators) and the rights of learners, in the context of promotion disputes. In this regard reference to case laws will be made.

In general the topic will deal with unfair labour practice, definition of promotion including promotion of educators, unfair conduct of the employer, onus of proof, remedies and striking the balance between the rights of the learners and educators.

CHAPTER 1
INTRODUCTION

Public Education is the custodian of the constitutionally recognised "paramountcy" of the interest of the child.[1] Section 29 of the Constitution[2] (the Constitution) provides a right to a basic education to which the South African Schools Act[3] (SASA) has added a further quality in that such education must be of "progressively high quality for all learners". Section 39(2) of the Constitution goes on to say that when interpreting any legislation it must be done in manner that promotes the spirit and purport of the Bill of Rights.

In the context of section 29 of the Constitution, which creates a basic right to education, it is clear that educators are employed to give effect not only to their contractual obligations but also to the fundamental rights of learners, with respect to education.

Unlike other constitutions that contain freedom of association, collective bargaining and the right to strike, the South African Constitution contains the right to fair labour practice. It is rare to find a constitution that includes such a broad and vague right to fair labour practice. The motivation to include this right was to protect the position of public sector employees during the transition to a new dispensation by giving them access to the unfair labour practice labour law developed by the Industrial Court under the 1956 Act.[4]

Further than that, the South African labour law provides legislative protection for employees subjected to unfair labour practices by their employers relating to promotions. This protection is found in Chapter VIII of the Labour Relations Act[5] (the LRA) as amended, dealing with unfair dismissal and unfair labour practices.

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1 S 28(2) of the Constitution; *Settlers Setters High School v Head of Education, Limpopo Province* [2002] JOL 10167(T).

2 108 of 2006.

3 84 of 1996.

4 Brassey and Cooper "Labour Relations" in Chaskalson *Constitutional Law of South Africa* (1999) 30-15.

5 66 of 1995.

The first part of the study will focus on defining and providing an overview on unfair labour practice and in doing so reference will be made to relevant case laws and literature. In defining unfair labour practice the following will be explained:

- the right to fair labour practice;
- whether everyone can rely on the provisions of section 186(2) of the LRA; and
- whether the list contained in section 186(2) of the LRA is exhaustive or not?

This study therefore will deal with unfair labour practice in relation to promotion within the public education sector.

The term "promotion" will be defined. In defining this term, reference will be made to the common law position.

Another issue that will be addressed is whether employees are entitled to promotion or not and whether the claim for unfair labour practice can only be within the ambit of the relationship between the employer and the employee. The employer's prerogative in promotion will be explained.

The legislative framework that regulates the promotion of educators will be discussed. In doing so the process of promotion as outlined in the Employment of Educators Act[6] (the Educators Act) will be explained and the following areas will be focused on:

- ✓ The role players in the promotion process of educators;
- ✓ Different interests of role players in the process; and
- ✓ Powers of the School Governing Bodies and to this effect the provision of the Educators Act and the SASA will be outlined.

These issues more than often come into play in promotion disputes at public schools and their effects are always felt by learners as they cause tension amongst educators

6 76 of 1998.

and the School Governing Bodies (SGB) or the School Governing Bodies and the Department of Education.

The study will further focus on what constitutes unfair conduct by the employer. In this regard both procedural and substantive fairness of the employers will be discussed using relevant case laws. The followings areas will also be discussed.

- Employers of educators
- Joinder of parties; and
- Deviation from scoring during interviews

The appropriate remedies available or that may be granted will also be analysed. In this regard reference is made to the LRA and relevant case laws. The following remedies will be discussed:

a) declaratory orders;
b) protective promotions;
c) actual promotions;
d) repeating the process;
e) remittal; and
f) compensation

The balance between the right of learners to education and the right of educators to fair labour practice will also be discussed.

In conclusion it will be emphasised that the right of learners is paramount in every respect and caution should be taken in dealing with disputes in public education.

CHAPTER 2

OVERVIEW OF THE CONCEPT OF UNFAIR LABOUR PRACTICE

2 1 INTRODUCTION

The LRA defines an unfair labour practice as follows:

> "Any unfair act or omission that arises between an employer and an employee involving –
>
> a) Unfair conduct by the employer relating to the promotion, demotion, probation(excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provisions of benefits to an employee;
> b) The unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
> c) A failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
> d) An occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act[7] on account of the employee having made a protected disclosure defined in that Act."

An unfair labour practice relating to promotion as defined in section 186(2) of the LRA consists of at least the following elements namely:[8]

a) An act or omission;
b) Constituting a labour practice;
c) Between an employer and an employee, committed by the employer;
d) Involving unfair conduct; and
e) Relating to promotion.

2 2 THE LABOUR RELATIONS ACT[9] (the 1956 LRA)

The concept of "unfair labour practice" was refined by a number of amendments to the 1956 LRA.

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7 26 of 2000.
8 Grogan *Employment Rights* (2010) 93.
9 28 of 1956.

The Labour Courts, acting under the 1956 LRA, identified a variety of employment practices which they pronounced unfair under the general definition of "unfair labour practice".[10] However, due to objections from various trade unions, *i.e.* the Congress of South African Trade Unions (COSATU) and the National Council of Trade Unions (NACTU) as well as the South African Employers' Consultative Committee on Labour Affairs (SACCOLA) and the conclusion of Laboria Minute on 2 February 1990, the final version of the definition of an unfair labour practice of the 1956 LRA read as follows:[11]

> "An 'unfair labour practice' means any act or omission, other than a strike or lock-out, which has or may have the effect that –
>
> (i) Any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
> (ii) The business of any employer or class of employees is or may be unfairly affected or disrupted thereby;
> (iii) Labour unrest is or may be created or promoted thereby;
> (iv) The labour relationship between employer and employee is or may be detrimentally affected thereby."

This also included an addition to section 1(4) to the 1956 LRA:

> "The definition of 'unfair labour practice' referred to in subsection (1) shall not be interpreted to include or exclude a labour practice which in terms of the said definition is an unfair labour practice, merely because it was or was not an unfair labour practice, in terms of the definition of 'unfair labour practice', which definition was substituted by section (1) of the Labour Relations Amendment Act, 1991: Provided that a strike or lockout shall not be regarded as unfair labour practice".[12]

The concept was introduced into labour law dispensation as a result of recommendations of the Wiehahn Commission.[13] Initially, the concept was breathtakingly wide.

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10 Grogan *Dismissal Discrimination & Unfair Labour Practices* (2005) 37.

11 1956 LRA s 1(1) as amended by Labour Relations Act 9 of 1991 s 1(a) contained in GN 741 *Government Gazette* 1991 (13145).

12 Labour Relations Amendment Act 9 of 1991 s 1(b).

13 Commission of Enquiry into Labour Legislation appointed under GN 445 GG 5651 of 8 July 1977.

An unfair labour practice, according to its first statutory definition, was "anything the Industrial Court deemed to be an unfair labour practice".[14] This definition gave the Industrial Court enormous leeway and "amounted to a licence to legislate".[15] This definition was inclusive of all labour activities and encompassed conduct by employers, employees and their organisation which in the view of the Industrial Court is covered. The definition of unfair labour practice became open ended. The main aim of this wide definition was to enable the courts to develop an "equity based jurisprudence for the South African workplace".[16] However, the person complaining of an unfair labour practice had to prejudge his problem because the complainant had to consider whether the Industrial Court would be of the opinion that the complained conduct did indeed result in an unfair labour practice.[17] In *Mawu v A Mauchle (Pty) Ltd t/a Precision Tools*[18] the court held that if an act resulted in an unfair labour practice it had to:

> "establish the true relationship between parties and the issues in dispute and then, in the light thereof, form an opinion as to whether an act (of the employer) constitutes an unfair labour practice."

As a result of the amendments to the 1956 Labour Relations Act, at that time, the concept of the "unfair labour practice" was placed at the centre stage in our labour legislation.[19]

2 3 THE CONSTITUTION

The Constitution provides the necessary ambit in which to shelter all the casualties of the Unfair Labour Practice.[20] The Constitution now provides a guarantee of the right to fair labour practices, which it confers on "everyone". Section 23(1) of the Constitution, states that "everyone has the right to fair labour practices".

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14 Grogan *Dismissals Discrimination & Unfair Labour Practices* 37.

15 Thompson and Benjamin *South African Labour Law* (1997) 60.

16 Grogan *Employment Rights* 91.

17 Ehlers "Dispute Settling and Unfair Labour Practice: The Role of the Court vis-à-vis the Industrial Court" 1982 Industrial Law Journal 3:11-21.

18 (1980) 1 *ILJ* 227 IC.

19 Basson Christianson, Dekker, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* 5th ed (2009) 91.

20 Cheadle *South African Constitutional Law*: *The Bill of Rights* (2002) 364-365.

A huge debate still exists as to whether the word 'everyone' has broadened the scope of protection beyond the traditional employer- employee relationship. However, in *National Education, Health and Allied Workers Union v University of Cape Town & Others*[21] the Constitutional Court (CC) held that the word "everyone" in section 23(1) of the Constitution is broad enough to include employers and juristic persons. As such it is possible for an employee to commit an unfair labour practice. The CC expressed the view that the focus of section 23(1) of the Constitution is the relationship between the employer and the worker and its continuation so as to achieve fairness for both parties.[22] The subject of the sentence in section 23(1) of the Constitution, namely "everyone" should be interpreted with reference to the object of the sentence, namely "labour practices"[23]

Since "labour practices are practices that arise from the relationship between workers, employers and their respective organisations" the term everyone should be understood in this sense and should include the persons[24] specifically named in section 23, namely workers, employers, trade unions and employers' organisations.[25] Ngcobo J further held that the focus of section 23(1) is:

> "...the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both...Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices".[26]

Van Jaarsveld *et al*[27] supports this argument by stating that because the Constitutional right to fair labour practices guarantees everyone this right, any victim of an unfair labour practice would be entitled to relief in terms of the Constitution and

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21 *National Education, Health and Allied Workers Union v University of Cape Town & Others* (2003) 24 *ILJ* (CC); *Maseko v Entitlement Experts* [1997] 3 BLLR 317 CCMA.

22 *National Education, Health and Allied Workers Union v University of Cape Town & Others* (2003) 24 *ILJ* (CC).

23 Cheadle *South African Constitutional Law*: *The Bill of Rights* 364-365.

24 Cheadle *South African Constitutional Law* 364-365.

25 *Ibid*.

26 *National Education, Health and Allied Workers Union v University of Cape Town & Others* (2003) 24 *ILJ* (CC).

27 (2001) 13-14& 688.

the common law. In *National Union of Metalworkers of SA Vetsak Co-operative Ltd & others*[28] Smalbeger JA held the following:

> "Fairness comprehends that regard must be had not only to the position and interest of the workers, but also those to the employer, in order to make a balanced and equitable assessment."

When legislation is interpreted as being fair to both employer and employer and employee it means that there is an absence of bias in favour of either.[29]

2 4 LABOUR RELATIONS ACT NO 66 OF 1995

The 1991 amendments to the LRA did not satisfy COSATU. COSATU lodged a complaint with International Labour Orgainisation (ILO) and a fact-finding Commission was appointed and a comprehensive set of recommendations were issued in 1992 that played a major role in the finalisation of the LRA.[30]

Most of the fair labour practices laid down by the Industrial Court (IC) were codified into statutory rights[31]and no provision was ever made for specific unfair labour practices.[32] Du Toit *et al* provide a summary of this codification of unfair labour practices, as listed below:[33]

a) Unfair dismissals were codified in chapter 8 of the LRA.
b) Unfair conduct relating to freedom of association was codified in chapter 2 of the LRA.
c) Unfair practices regarding organisational rights were codified in chapter 3 of the LRA.
d) Unilateral changes to terms and conditions of employment were codified in section 64(4) of the LRA.

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28 1996 4 SA 577 A.

29 *Ibid*.

30 Brassey *Employment Law* Vol 1 1998 52.

31 Du Toit and Potgieter *Bill of Rights Compendium Labour Law and the Bill of Rights* Service Issue 21 2007 4B 15.

32 186(2) specific form unfair labour practices.

33 Du Toit,Woolfrey,Murphy,Godfrey,Bosch and Christie *Labour Relations Law: A Comprehensive* Guide 5th ed (2006) 482; Du Plessis and Fouché *A Practical Guide to Labour Law* 6th ed (2006) 301.

e) Four other residual unfair labour practices were codified in Schedule 7 to the LRA.

The LRA, although regulating some individual relations, was mainly enacted to deal with collective relations. The initial regulation of unfair labour practices was not guaranteed as a general right to fair labour practices.[34] Instead, "interim-protection" was afforded to employees against any unfair conduct arising during the existence of the employment contract, except for unfair dismissals,[35] known as residual unfair labour practices.[36]

The then Item 2 of Schedule 7 read as follows:[37]

> "2(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee, involving:
> (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
> (b) the unfair conduct of the employer relating to promotion, demotion or training of an employee or relating to the provision of benefits to an employee;
> (c) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;
> (d) the failure to reinstate or re-employ a former employee in terms of any agreement.
>
> 2(2) For the purposes of sub-item (1) (a):
> (a) "employee" includes an applicant for employment;
> (b) an employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms; and
> (c) any discrimination based on an inherent requirement of the particular job does not constitute unfair discrimination."

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34 *Nawa v Department of Trade & Industry* [1998] 7 BLLR 701 LC.

35 Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2001) Service Issue 22 Durban (LexisNexis) 13-14 & 688

36 Van Jaarsveld *et al Principles and Practice of Labour Law* 13-14.

37 28 of 1956.

The current regulation on unfair labour practices has done away with the general definition of an unfair labour practice.[38] Instead, specific rules and rights have replaced it.[39] The provisions of unfair labour practices are contained in section 186(2) of the LRA. Section 186(2) (a) of the Labour Relations Act (LRA) provides that "unfair labour practice" means any unfair act or omission that arises between an employer and an employee, involving unfair conduct by the employer relating to promotion. This definition, as it is, poses a number of interesting questions one being who is protected, the second is whether only those types of conduct listed can constitute an unfair labour practice.[40]

2 5 WHO CAN CLAIM AN UNFAIR LABOUR PRACTICE?

With reference to the LRA, the first limitation is with reference to what an unfair labour practice entails and, it is limited in the scope of its application since, not everyone can rely on the LRA provision for protection.[41]

The first part of section 186(2) of the LRA speaks of an unfair labour practice as an act or omission that arises between an employer and an employee.[42] This section requires that there is a labour practice that arises between an employer and an employee and that the conduct (whether act or omission) is unfair.[43] The specific unfair conduct occurs during the currency of employment.[44]

There is no definition in the LRA of "labour practice" but it is necessary at least that the practice must arise within the employment relationship.[45] This means that any

38 Du Plessis and Fouché *A Practical Guide to Labour Law* 301.

39 Grogan *Employment Rights* 93.

40 S 186 of the Labour Relations Act.

41 S 213 of the LRA defines an employee as: "(a) any person excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assist in carrying on or conducting the business of an employer".

42 S 186 of the LRA.

43 Van Niekerk *Law@Work* (2008) 167-168.

44 *Ibid*.

45 *Ibid.*

person who is already in the employment enjoys the protection against unfair labour practice.[46]

In some cases the identity of the employer may be disputed.[47] In *MEC for Transport Kwa-Zulu Natal & Others v Jele*[48] an employee in another provincial department applied for a more senior post in another department, but his application was not successful.[49] *In casu* the employer argued that there was no employment relationship between the employee and the department where he had applied and as such there could be no unfair labour practice. The Labour Appeal Court (LAC) disagreed and held that the state is an employer of the department in which the employee works.[50]

The only exception is the Department of Education where in terms of the Educators Act [51] each Head of Department (HoD) is the employer of educators in that province and the School Governing Body (SGB) could also be an employer in terms of SASA.[52]

In terms of the LRA an unfair labour practice can no longer be committed by an employee, *i.e.* there are no remedies are available to an employer.

The question of whether employers can sue their employees for unfair labour practice was first raised in *Newu v CCMA & others.*[53] This is a matter where the deputy president of trade union, which was the employer in this case, resigned about a month after he was appointed seemingly unhappy with the manner in which the union was run. The union felt that he did not follow a fair procedure and had violated the union's right to fair labour practice. It referred the matter to CCMA for relief (seeking compensation).[54] The CCMA held that it lacked jurisdiction. The CCMA

46 Basson *Essential Labour Law* 192.
47 *Ibid.*
48 [2004] 12 BLLR 1238 (LAC).
49 Basson *Essential Labour Law* 192.
50 *MEC for Transport Kwa-Zulu Natal & Others v Jele* [2004] 12 BLLR 1238 (LAC)
51 S 3(4).
52 S 20(4).
53 [2004] 12 BLLR 165 (LC).
54 *National Entitled Workers Union v CCMA & Others* (2007) 28 *ILJ* 1233 LAC.

held that an employee cannot be guilty of an unfair labour practice in terms of section 186(2) of the LRA. The Labour Court (LC) confirmed the CCMA's decision. The court, however, acknowledged the employer's right to fair labour practices and held that:

> "An employee may, in limited circumstances, commit conduct vis-à-vis an employer that may be lawful but unfair. An employer has the right to expect that in certain circumstances an employee will not merely comply with his or her rights in the regard to the employer but will also act fairly.[55] This conduct may, in my view, qualify as an unfair labour practice, i.e. a practice that contrary to that contemplated by s 23 of the Constitution"[56]

The court also held that the fact the LRA does not make provisions for an unfair labour practice by an employee, does not render the LRA unconstitutional, but merely means that the LRA does not give full effect to section 23(1) of the Constitution.[57]

NEWU launched an application for review of the "ruling" and sought another declaring the LRA and the Employment Equity Act[58] (EEA) unconstitutional, because they failed to provide the employers with remedies against unfair labour practice. The LC dismissed the application and refused leave to appeal. NEWU persisted on appeal granted by petition arguing that the LRA and EEA are unconstitutional because they fail to recognise the unfair labour practice perpetrated by employees.

The LAC[59] accepted that the Constitution gives "everyone" the right to fair labour practice. It further recognised that neither the LRA nor the EEA recognises the unfair labour practices perpetrated by employees. However the Basic Conditions of Employment Act[60] (BCEA) makes provision for termination of employment by either party. Whilst the 1956 LRA made provision for the protection of employers against unfair labour practices by employees this was never utilised and therefore provisions

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55 Also acknowledged in Council for Scientific & Industrial Research 1996 17 18 A.

56 *Newu v CCMA & Others* (2007) 28 *ILJ* 1233 LAC.

57 *Ibid.*

58 55 of 1998.

59 *Newu v CCMA & Others supra*.

60 75 of 1997.

of BCEA are suffice to cover the employers with relevant remedies.[61] Since NEWU did not sue for breach of contract the court was reluctant to order re-instatement as this would compel a reluctant employee to render services after his resignation. The appeal was dismissed. The court refused to declare the employee's resignation without notice an unfair labour practice, as the employer could have brought an action for a specific performance , or could have sued an employee under the BCEA for a sum equal to the salary equal he would have earned had notice been given.[62] This meant that unfair labour practices move in one direction, i.e. they are actions of the employer against the employee.[63]

2 6 IS THE LIST OF UNFAIR LABOUR PRACTICES A CLOSED LIST?

The wording of 186(2) of the LRA through the use of the word "involving" prior rather "including" to the actual type of conduct listed in section 186(2), suggests that unfair labour practices are limited to those mentioned in the list.[64] For instance can an educator who is transferred to another school seek shelter from section 186 of the LRA?

Such an educator would not get refuge from section186 of the LRA; unless the educator can show that the transfer amounted to disciplinary action short of dismissal.[65] However, the LC stated that there may be a remainder of unfair conduct which may be covered by section 23(1) of the Constitution.[66]

2 7 THE DEFINITION OF PROMOTION

Promotion could be defined as being elevated to a position that carries greater authority and status than the current position that the employee is in.

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61 *Newu v CCMA & Others supra*.

62 Grogan *Employment Rights* 152.

63 Basson *Essential Labour Law* 192.

64 *Nawa v Department of Trade and Industry* [1998] 7 BLLR 701 (LC).

65 Basson *Essential Labour Law* 193.

66 *Govender v Dennis Port (Pty) Ltd* (2005) 26 *ILJ* 2239 CCMA; *Simela v MEC for Education, Province of the Eastern Cape* [2001] 9 BLLR 1085 LC.

In *Mashegoane & Another v University of the North*[67] it was pointed out that "promote" is defined in the New Shorter Oxford as "advance" or "raise to a higher rank or position.

The first requirement for the unfair labour practice in relation to promotion is that the conduct complained of relates to promotion.[68] Under the common law, employees have no legal entitlement to be promoted to posts, unless they can prove a contractual right or, perhaps, a "legitimate expectation" based on some prior promise or practice.[69] This concept was confirmed in *Administrator, Transvaal and others v Traub and others*.[70] 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 whom to appoint to vacancies.[71]

The definition of promotion can generally be in terms of two different systems used by employers through which employees may advance or progress in an organisation.[72] Most employers use one, or a combination of, the two systems to promote employees.[73] However, in education the promotion of educators involves the consideration and application of human resources practice, policy and applicable legislation.[74] A promotion is the advancement of an educator's rank or position within the school's staff establishment hierarchy system. School staff establishment provides for an upward mobility for educators. Generally schools staff establishment will comprise of an educator, head of department, deputy principal and school principal. Promotion of educators is structured through career progression from an educator post to head of department post, deputy principal or principal and such that should be regarded as promotion.

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67 [1998] 1 BLLR 73; *Jele v Premier of the Province of KwaZulu Natal & others* (2003) *ILJ* 392 (LC) 1398.

68 Grogan *Dismissals Discrimination* (2005) 48.

69 Grogan *Employment Rights* 107.

70 1989 (4) SA (A); (1989) 10 *ILJ* 823 (A).

71 Grogan *Employment Rights* 107.

72 Garbers "Promotions: Keeping Abreast With Ambition" 1999 *Contemporary Labour Law* 21.

73 Basson *Essential Labour Labour Law* (1998) 235.

74 Molony "Promotion of Employees in the Public Service" 19th Annual Labour Law Conference, 5-7 July 2006 1.

Grogan states that employees, like soldiers, are promoted when they are "elevated to higher posts".[75] What should be noted in schools is that when educators are promoted this can involve advancement in terms of designation, salary and benefits and in some instances job activities or change of responsibilities.

In *Mashegoane and another v University of the North,*[76] the LC defined promotion as being, "elevated to a position that carries a greater authority and status than the current position that the employee is in".

Promotion can also be defined in terms of two general systems used by most employers through which employees may advance or progress in organisations.[77] Employees based on their performance may also be promoted or by a system where vacancies are advertised and current employees are also invited to apply.[78]

Although not a requirement for promotion, an increase in salary could be indicative of a promotion.[79] An employee must therefore prove that he applied[80] for a post of a higher status than the post that he occupied at the time.[81]

The other system is where employers on a regular basis evaluate their employees before progressing to another level and based on the outcome of their assessment the employers promote these employees. The promotion system for educators is based on the system where vacancies are advertised and current employees are invited to apply.

In *Westraat's*[82] case, the arbitrator raised a question of how far could arbitration go in reviewing an appointment made on the strength of a notice of vacancy and a process of selection? It was noted that an appointment "is a discretionary decision that is subjected to a limited challenges and the arbitral jurisdiction on the merits in no more

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75 Grogan *Dismissal, Discrimination & Unfair Labour Practices* 2nd ed (2008) 52.

76 [1998] 1 BLLR 73 (LC)

77 Garbers "Promotion: Keeping Abreast With Ambition" 1999 *Contemporary Labour Law* 21.

78 Grogan *Workplace Law* 5th ed (2000) 217.

79 *Jele v Premier of the Province of KwaZulu-Natal & others* (2003) 24 *ILJ* 1392 (LC).

80 *Loggenberg & another v Area Commissioner, Correctional Services* [2008] 3 BLLR 250 (LC).

81 Grogan *Dismissal, Discrimination & Unfair Labour Practices* 53.

82 (2003) 24 *ILJ* 1197 (BCA); *Dlamini v Toyota* (2004) 25 *ILJ* 1513 (CCMA).

than a limited review." It was also noted that an employer's discretion to appoint, assign or promote might be reviewed only if it shows some very serious flaws. The arbitrator held that an unfair labour practice jurisdiction does not extend to permitting an arbitrator to replace an employer's determination of its job requirements and assessment of applicants.

2 8 DIFFERENTIATING BETWEEN APPOINTMENT AND PROMOTION

The unfair labour practice jurisdiction contained in the LRA only applies when there is an existing employer-employee relationship.[83] Where an outsider applies for the post and fails, s/he has no recourse under the unfair labour practice jurisdiction.[84] If discrimination can be proved then the matter will be dealt with in terms of the EEA.[85]

The case of *Department of Justice v CCMA & Others*[86] addressed the issue. In this case, the applicants (two white males) had applied for the two vacant positions of senior assistant state attorney in Cape Town branch. They were both unsuccessful. The respondent contended that the dispute did not concern promotion because the positions that they applied for had been externally advertised. It also contended that it had used the word *"appointment*" and not promotion in the advertisement. The respondent further contended that as they had to apply and attend the interviews, the issue was, therefore, not promotion but rather non-appointment. The LC held that the respondent had refused to promote the two applicants as they were already in the public service.

The jurisdiction to deal with discrimination matters stems from section 6 of the EEA; which provides that for the relevant sections dealing with discrimination; the term employee includes an applicant for employment.[87]

In *Vereeniging van Staatsamptenare on behalf of Badenhorst v Department of Justice*[88] the Commissioner, in deciding whether the applicant had correctly referred

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83 LRA s 186.
84 S 186.
85 S 6.
86 [2001] 11 BLLR 1229 (LC).
87 S 6 of Employment Equity Act.

the dispute regarding promotion in terms of Item 2(1) (b) found that the applicant had applied for a post at a more senior level than that which she had occupied previously and as a consequence of this, the success of the application would result in a promotion. The aggrieved employee was denied appointment to a post against the background of a restructuring of the Department of Justice. This involved employees in the old Department invited to apply for posts in the newly created posts in the new Department. Existing employees, were, however guaranteed a job in the new structure on at least the same level of pay they had occupied in terms of the old 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 did not agree and held 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 an ordinary sense of the word, I do 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 new structure, nor was it suggested 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 outsider job seeker."[89]

Prior to 1999 there were different systems in the public service, in terms of the public service code employees would be promoted internally based on a certain criteria and appointments were occasional and based on advertisement.[90] The LAC[91] stated that an external advertisement of a post places internal applicants outside the ambit of the definition and this would create a recipe for evasion of section 186(2) (a) of the LRA; which was intended to confer special protection on employees.[92] The court found nothing wrong about treating internal and external applicants for the same post differently.[93]

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88 (1999) 20 *ILJ* 253 (CCMA).

89 *Vereeniging van Staatsamptenare on behalf of Badenhorst v Department of Justice supra*.

90 *Jele v Premier of the Province of KwaZulu-Natal and Others supra*.

91 *Department of Justice v Commission for Conciliation, Mediation & Arbitration & others* (2001) 22 *ILJ* 2439 (LC).

92 Grogan *Employment Rights* 108.

93 *Ibid*.

In deciding whether a dispute involves a promotion or not one has to compare the employee's current job with the job or post applied for to determine if promotion is involved. The following are some of the factors that should be taken into account:

1. Difference in remuneration levels
2. Different in fringe benefits
3. Differences in status
4. Differences in levels of responsibilities
5. Difference in levels of authority and power
6. Difference in the level of job security

2 9 MEANING OF AN ACT OR OMISSION IN THE LRA

The phrase "act or omission" in the LRA makes it plain that an unfair labour practice can arise only if the SGB or HoD whichever is the employer does something or refrains from doing something.[94]

For any educator to claim an unfair labour practice that must be measured against what the HoD or SGB has done or failed to do.[95] What this entails is that the SGB in instances where educators are employed by the SGB or the HoD must have acted unfairly.[96]

2 10 RELATIONSHIP BETWEEN AN EMPLOYER AND EMPLOYEE (COMMITTED) BY THE EMPLOYER

An unfair labour practice can only be committed by an employer against his own employee.[97] Furthermore, there must be an existing relationship between the employer and the employee when the employee seeks promotion and it can only be committed by an employer against its own employees.[98]

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94 Grogan *Employment Rights* 94.

95 *Reddy v KZN Department of Education & Culture* (2003) 24 *ILJ* 1358 (LAC).

96 Grogan *Employment Rights* 94.

97 S 186 of LRA.

98 *Reddy v KZN Department of Education & Culture* (2003) 24 *ILJ* 1358 (LAC).

2 11 INVOLVING UNFAIR CONDUCT

Once it is established that the conduct of the employer relates to a "promotion" attention turns to the question of whether the conduct of the employer is fair or not.[99] The LRA requires employers to treat employees fairly when they apply for promotion. Fairness depends on the circumstances of a particular case and involves value judgement.[100] Fairness also depends on the cumulative effect of all relevant concerns, including the extent of the impact of the measures on the rights and interests of the complainant.[101] Any conduct which is unreasonable, irrational, or arbitrary, will be unfair.[102] The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee.[103]

There are three basic requirements for a fair appointment or promotion. The procedure must have been fair, there must have been no unfair discrimination, and the decision must not have been grossly unreasonable, it needs to be demonstrated that the employer acted irrationally or arbitrarily, was bias or failed to apply its mind or had exercised his discretion arbitrarily or based it on any wrong principle.[104]

An employee who refers a promotion dispute must do more than just demonstrate that he or she has the minimum requirements and experience as advertised.[105] He/she must allege and prove that the decision not to appoint him or her was unfair.[106] In *Ndlovu v CCMA*[107] the Labour Court held that:

> "It can never suffice in relation to any such questions for the complainant to say that he or she is qualified by experience, ability and technical qualifications such as university degrees and the like, for the post. That is merely the first hurdle. Obviously a person who is not so qualified cannot complain if they are not appointed. The next hurdle is of equal if not greater importance. It is to show that

99 Basson *Essential Labour Law* 200.

100 *National Education Health & Allied Workers Union v UCT* (2003) 24 *ILJ* 95 (CC).

101 Pretorius, Klinck and Ngwenya *Employment Equity Law* (2006) 9-59; *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 *ILJ* (SE) 40.

102 *Louw v Golden Arrows Bus Services (Pty) Ltd* [2000] 3 BLLR 311 (LC); *Trade and Investment South Africa & another v GPSSBC & others* [2005] 5 BLLR 517 (LC).

103 *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 SA 577 (A).

104 *Arries v CCMA and others* (2006) 27 *ILJ* 2324 (LC).

105 *Ndlovu v CCMA* (2000) 21 *ILJ* 1653 (LC).

106 *Ibid*.

107 *Ibid*.

> the decision to appoint someone else to the post in preference to the complainant was unfair. That will almost invariably involve comparing the qualities of the two candidates. Provided the decision by the employer to appoint one in preference to the other is rational. It seems to me that no question of unfairness can arise."[108]

Therefore, in order to show unfairness relating to promotion, an employee needs to show that the employer, in not employing him, acted in a manner which would ordinarily allow a court of law to interfere with the decisions of a functionary by proving for example that the employer had acted irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud, failed to apply its mind or unfairly discriminated.[109] It needs to be proven that had it not been for the unfair conduct, he would have been promoted and this can be done by proving that he was the best candidate of all candidates who applied for the post.[110] Perception of unfairness or mere unhappiness does not establish conduct.[111] The conduct of the employer may be substantively and/or procedurally unfair.[112] There can be no hard and fast rules, the concept of unfairness can be determined according to facts on hand. However, the conduct of the employer must:

a) Not be arbitrary , capricious or inconsistent;
b) Not fail to meet an objective standard;
c) Not be unreasonable; erratic; prejudicial; or unacceptable;
d) Not result in an irrelevant or invidious comparison; and
e) Follow policy and procedure.

2 11 1 SUBSTANTIVE FAIRNESS

Substantive unfairness relates to the reason for not promoting the employee and this does not translate into a right to promotion.[113] There is no right to promotion.[114]

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108 *Ibid.*

109 Grogan *Dismissal, Discrimination and Unfair Labour Practices* 41; *Benjamin v University of Cape Town* [2003] 12 BLLR 1209 (LC) 1223-1224; *SA Municipal Workers Union on behalf of Damon v Cape Town* [2003] 12 BLLR 1209 (LC) 1223-1224.

110 *Minister of Safety and Security & others v Jansen NO* (2004) 25 *ILJ* 708 (LC) 27; *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC) 24.

111 Du Toit *Labour Relations Law: A comprehensive Guide 5ed* 488.

112 Van Jaarsveld *et al Principles and Practice of Labour Law* 778; *Department of Justice v CCMA* (2001) ILJ 2439 (LC).

113 Du Toit *et al Labour Law*: *A Comprehensive Guide* 486.

What employees could strive and fight for is a right for a fair consideration when a vacancy exists.[115] Employers are expected to appoint the best suitable candidate for the post.[116] The only exception to that would be when an employer applies an affirmative action by appointing a weaker candidate.[117] However, this should be understood in the context that section 15[118] describes the permissible character of affirmative action measures. They must be designed to ensure that "suitably qualified" people from designated groups have equal employment opportunities and are equitably represented in all occupation categories and levels". What this means is that a designated employee should be equal to task at hand.

2 11 1 1 THE BEST CANDIDATE FOR THE POST

The best weapon for any aggrieved employee is to show that in addition to the conduct being unfair, the employee must be best candidate for the post. In *Maharaj v South African Police Services*[119] the applicant challenged her non-promotion. In this case the successful candidate was rejected but later was revisited upon the recommendation of one of the panellists. The applicant was also rejected but was not given an opportunity to be reconsidered for the post. In casu the applicant was unable to show that she had the experience necessary for the post or that she was the best candidate for the post.

2 11 1 2 REASONABLENESS OF THE EMPLOYER'S DECISION

In the Department of Education, the Member of the Executive Council (MEC) is responsible for the provisioning of posts[120] and the HoD is in charge of distributing the posts.[121] In almost all school based posts the profile of the posts is determined

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114 *Ibid*.

115 *Ibid.*

116 *Public Service Association of SA on behalf of Helberg v Minister of Safety & Security & another* (2004) 25 *ILJ* 2373 (LC).

117 Employment Equity Act 55 of 1998 s 6(2).

118 S 15 EEA.

119 PSSS 322 5 December 2001.

120 Employment of Educators Act 76 of 1998.

121 *Ibid*.

by the SGB and the SGB's are empowered in terms of the Educators Act to make recommendations to the HoD of the provincial department.[122]

It has been clear through practice that of course dictated to by legislation that the head of department can only rely on the SGB to make a reasonable decision.[123] Having said that the HoD is called upon to make the best out of the situation and take reasonable decisions for any promotion to stand the test. The least the HoD can do is to interrogate a recommendation made by the SGB.

Although an employer is expected to act fairly an employee cannot just walk in the door and claim unfairness, an employee must at least show that she/he met minimum requirements, the decision of the employer was unreasonable and that if it was not for the unfairness she/he would have been appointed. What is expected of the HoD is to appoint the best candidate for the job[124] as this is in the interest of the learners and the country. When the employer appoints one candidate instead of another, the employer's decision should be rational and reasonable so as to avert the question of unfairness.[125]

The CC stated that an action is unreasonable if it is "one that a reasonable decision maker could not reach".[126] It further stated that a reasonable approach to a determination of reasonableness is the following:[127]

> "What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstance of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, identity and the expertise of the decision maker, the range of factors relevant to the decision, the reason given for the decision, the nature of the competing interests involved and the impact of decision on the lives and wellbeing of those affected .Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be

122 Employment of Educators Act 76 of 1998 and SASA.

123 *Ibid.*

124 *PSA obo Helberg v Minister of Safety & Security & another* (2004) 25 *ILJ* 2373 (LC).

125 *Head, Western Cape Education Department and others v Governing Body* 2008 (5) SA 18 (SCA).

126 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and* Others 2004 (4) SA 490 (CC).

127 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others; Pharmaceutical Manufacturers Association of South Africa and Others* 2000 (2) SA 674 (CC).

> significant. The court should take care not to usurp the functions of administrative agencies. Its tasks is to ensure that the decisions fall within the bounds of reasonableness as required by the Constitution"[128]

In *Aberdeen Senior Secondary School*[129] the above test was applied. The facts of the case are; the school advertised the post of deputy principal and the learning areas were Life Sciences and English Grade 10-12. The SGB made its recommendation in order of preference, first preference being Mr Ivan Green and this was submitted to the Department for appointment. However, the HOD declined to appoint Mr Ivan Green but preferred to appoint Malusi Sheppard Koltana.

This is the conduct which was attacked by the school on the ground that it was unreasonable and irrational to the extent that the HoD took into account irrelevant considerations and omitted relevant ones. The school based their case on the following points; the question of representation by Africans in the management of a school was irrelevant as it was not a requirement for the deputy principal post, it was further contended that Mr.Koltana did not poses the required qualifications at tertiary level.

The Department disagreed with this assertion and contended that Mr.Koltana had relevant qualifications for instance Biology at Matric level and English as a major in his BA degree; completed a post graduate relevant to high school education; had more than seven years teaching experience at school and well known disciplinarian at his school. It further believed that given the poor educational performance of the school which was due to lack of discipline, Mr Koltana was more suitable for the post. What further persuaded the HoD was the fact the SGB failed to consider and give adequate weight to section 7(1) of the Educators Act which states that;

> "In the making of any appointment or the filling of any post on any educator establishment under this Act due regard shall be had to equality, equity and the other democratic values and principles which are contemplated in section 195(i) of the Constitution of the Republic of South Africa, 1996(Act 108 of 1996), and which include the following factors, namely -
> (a) the ability of the candidate; and
> (b) the need to redress the imbalances of the past in order to achieve broad representation."

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128 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* .2004 (4) SA 490.

129 *Aberdeen SSS v MEC and others (*2010) 372/09 ZAECBHC 16:(2011).

The further consideration was that Mr Koltana was in fact one of the applicants recommended for the appointment.

The court agreed with the HoD and Nhlangulela J had this to say:

> "...the qualifications of the third respondent trumped those which the fourth respondent had. Therefore, the HoD cannot be faulted for having decided the matters as he did. In my judgement the HoD took into account relevant factors without abusing powers in any manner"

However, in *Head of Western Cape Education Department v Governing Body of Point High School*[130] the Supreme Court of Appeal (SCA) came to a different conclusion using the same *Bato Star* test.[131] This is a matter where the school advertised the post of principal and deputy principal in 2007. The SGB made a recommendation of two names but having been persuaded by a departmental official they included the third name. The following recommendation was made to the HoD Messrs Du Toit, Bester and Van der Merwe. This was accompanied by a motivation recommending that Mr Du Toit be appointed. For the deputy principal the following names were submitted Messrs Pieterse, Swanepoel and Swart were submitted, the recommendation being that Mr Pieterse be appointed.

Contrary to the SGB's recommendation the HoD appointed Mr Swanepoel instead of Mr Pieterse as recommended. The same applied to the post of Principal, the HoD appointed Mr van der Merwe instead of Mr Du Toit as recommended by the Governing Body. When asked to provide reasons for his decision the HoD pinned his hope on section 6(3) of the Educators Act and the Employment Equity as per the directive.[132]

Subsection 6(3) (e) of the Educators Act now provides, quite logically, that if the governing body has not met the requirements in paragraph (b), the HoD must decline the recommendation. Section 6(3) (f) of the Educators Act (after the amendments in 2006) contains the most far-reaching challenge to the powers of SGBs regarding the

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130 (584/2007) [2008] ZASCA 48 (31 March 2008).

131 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* .2004 (4) SA 490.

132 Employment Equity Directive issued under Circular 18/2006.

appointment of educators. It provides that, despite the order of preference in paragraph (c), the HoD may appoint any suitable candidate on the list.

What the SGB could not understand in their application for review was how employment equity could be a factor in a decision involving three white males?

The HoD decision was based on the following:

1. The fact that the recommended applicants were from outside the province and as such their appointment would perpetuate the current situation where white males dominate and that if you appoint applicants from within the province it maintains the status quo and still room hopefully to continue persuading the equity directive.
2. The SGB did not understand section 6(3) and 6(3)(f) of the Educators Act, suitability of certain candidates flawed due to subjectivity of interviewing committee, the names were part of the recommendation as such were suitable for appointment and they had proved their worth.

The HoD regarded the provisions section 6(3) of the Educators Act as allowing him to use his discretion with no responsibility on his part to provide any reasons for his action.

The court disagreed and had this to say:

> "That the HoD considered that he was free, under the provisions as of the amended section to disregard the Governing Body's recommendation in favour of considerations of employment equity, is clear. In taking his view he failed, significantly to perform the balancing exercise referred to in *Bato Star* by weighing the (somewhat obscure) employment equity consideration which had occurred to him, against the disparity in ability and suitability between the candidates recommended by the Governing Body and the candidates whom he decides to appoint."

In an attempt to emphasise the fact that the HoD did not balance the competing interests the court stated further in paragraph 14 that:

> "In making both appointments in this case, the HoD ran roughshod over the significant disparities in suitability and effectively sacrificed the interest of the school on the altar of employment equity-and 'contingent employment equity' at that."

Griessel J in *Eikendal Primary School & Another v The Minister of Education for Western Cape Province & Others* (unreported in case no 394/2009) held that:

> "… where gender balance at institutional level is one of the objectives of the EEP. Mr.Wyngaard's decision to ignore such balance in this instance in favour of the imbalance on provincial level is not rationally connected to the reasons furnished for the decision."

This is a clear demonstration that reasonableness will be determined on the merits of each particular case.

2 11 1 3 CAUSAL CONNECTION REQUIRED

For substantive unfairness to be proved an employee must also prove the causal connection between the irregularity or unfairness and the failure to promote. An employee needs to show that but, for the irregularity or unfairness she would have been appointed to the post.[133]

This was the case in *Swart v Mr Video (Pty) Ltd*[134] where the CCMA concluded that there was no evidence to show that, had the applicant not fallen foul of the unfairly discriminatory age limit, she would have got the job. This issue was further raised in *Woolworths*[135] and Zondo AJP held that:

a) The establishment of a causal connection between the unfair conduct and the harm suffered by the alleged victim of an unfair labour practice finding; and
b) No such causal connection had been established in casu in that it had not been shown that the cause of Whitehead's non-appointment to the position in question (the harm suffered by Whitehead) was Woolworths' discrimination against Whitehead on the grounds of her pregnancy/sex (the alleged unfair

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133 *National Commissioner of the SA Police Service v Safety & Security Bargaining & others* (2005) 26 *ILJ* 903 (LC).

134 (1996) 7 (1) SALR 89 (CCMA).

135 *Woolworths (Pty) Ltd v Whitehead* (1999) 10 (8) SALR 34 (LAC).

conduct) in the sense that it had not been shown but her pregnancy, Whitehead had not been appointed in the end because Dr Young had been a better candidate than Whitehead for the job.

In *University of Cape Town v Auf der Heyde*[136] a further requirement was established that it had to be shown that there was a causal connection between the unfair conduct and the harm suffered in the sense that it had to be shown that but for the unfair conduct, the applicant would not have suffered the harm in question. The LAC concluded that Greyling could not succeed with his unfair labour practice relating to promotion claim unless he could show that, but for the irregularity in the selection process perpetrated by the employer, he, would have been promoted to the position in question. For that to happen it had to be shown that Greyling had been the "best candidate" for the job. The court further stated that even if Greyling was a better candidate it had to be shown that he was better than the other applicants.

2 11 1 4 MINIMUM REQUIREMENTS

For any educator to claim substantive unfairness he or she must first meet the minimum requirements of the job as advertised. These are set within the parameters of PAM and the Educators Act by the governing bodies. It could be very difficult to justify the promotion of a candidate who does not meet the minimum requirements. An educator, who does not comply with the minimum requirements for a job, cannot complain of any unfair conduct relating to promotion because he should in the first instance never even have been shortlisted, let alone appointed. However, while an applicant in a promotion dispute needs to prove that he complied with the minimum criteria for the post, it is never sufficient for him to prove that he is qualified by experience, ability and technical qualifications, such as university degrees and the like, for the post. This is merely the first hurdle he needs to cross.[137]

136 (2001) (CA11/00) (2001) ZALAC 5 (4January 2001).

137 *Ndlovu v CCMA & others* (2000) 21 *ILJ* 1653 (LC).

2 11 1 5 DEVIATION FROM MARKS ACHIEVED BY CANDIDATE

Generally, scoring systems are described to be merely a “guideline”. This has been refined in some of the systems to allow a departure from the scoring system, provided that the discrepancy in score is not beyond a certain numerical value. Any deviation from the system which has been imposed inevitably gives rise to a grievance or dispute. The purpose is to allocate points in attempt to grade the applicants. As a matter of fact almost all selection processes involve an element of grading applicants and one of the methods used is to allocate points or marks or scores.

In Education this task rests with the Interviewing Committee (IC) as established by the SGB. However, the process can only be finalised through a recommendation by the SGB to the HoD to effect.

Technically, the IC is a sub-committee of the SGB and whatever it does needs ratification by the SGB. In schools a lot of dynamics come into play; union contestation for a terrain in schools as they would like to see their members take up promotions, in some communities political affiliation[138] also plays a role, literacy levels of SGB particularly parent component where you will find that they are trained a week before the start of the interview clearly this is not enough to claim that the SGB have command on the process.

If this is the situation in some schools scoring could not be done in a scientific and well thought manner and subjectivity could come into play. It should be understood correctly, that, these are not the only reasons for some panel members to be subjective. Some of the reasons in some instances involve manipulation of SGB’s by candidates through bribery, political conspiracy and some departmental officials abusing the SGB’s by imposing their preferred candidates. It stands to reason therefore that the SGB should create time to scrutinise the outcomes from the IC and not merely treat this as a routine process.

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138 *Natu v Superintendent General Department of Education & Culture KwaZulu Natal and another* (2008) 38 *ILJ* (LC).

This is rather a difficult call as members of the IC also take part in the ratification of their own decision. Deviation from marks is a tight call to make unless there are glaring discrepancies and substantial reasons to do so.

In *Van Rensburg v Northern Cape Provincial Administration*[139] and *Public Servants Association obo Dalton and Another v Department of Public Works*[140] the aggrieved employees received higher marks at the interview than the other candidates who were ultimately preferred. It was held that interference in the employer's decision is only justified where the conduct of the employer is "so grossly unreasonable as to warrant an inference that they failed to apply their mind." This means that employers have latitude as to who they employ as long as their conduct is fair.

In *Aptos v Western Cape of Education*[141] the arbitrator noted that the deviation from marks was not unfair as there was reasonable ground to do so, i.e. affirmative action. This should not be an issue because the SGB is called to make a recommendation on the basis of their preference. All applicants listed on the recommendation are applicants eligible to be appointed irrespective of the order of preference.[142]

The mere fact that one person looks better on paper than another does not necessarily mean that the promotion of another person is unfair. The defect of not adhering to scores is not fatal, provided the employer has good reasons for doing so and unless, for example, the employers is bound in terms of its policy to the ratings achieved at the interview.[143]

The SGB and the HoD are duty bound to uphold the Constitution and legislative frameworks which task is not bestowed upon the IC unless directed to.

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139 (1997) 18 *ILJ* 1421 (CCMA).

140 [1998] 9 BLLR 1177 (CCMA).

141 *Naptosa obo Gebhardt v Western Cape Education Department & Others* (2008) PSES 482(1).

142 *Ibid.*

143 Garbers "Promotions: Keeping Abreast with Ambition" Vol 9.3 October 1999 *Contemporary Labour Law* 27.

2 11 2 PROCEDURAL FAIRNESS

This relates to unfair process applied by an employer during the selection process. An employer must follow a fair procedure that includes following a collectively agreed procedure or regulated procedure.[144]

Procedural fairness includes advertising, sifting, short listing, the interview process, the school governing body's recommendation. For the purposes of Education paragraph 3 of Chapter B of the Personnel Administration Measures (PAM) sets out procedure for purposes of promotion. This allows for advertisement, screening of those applications, short listing, interview and ultimate selection.

Employers may sometimes, however, find themselves in a position where, for example, the number of jobs at stake combined with time constraints, prevent adherence to the ideal and time-consuming procedure.[145] Adherence to the ideal is not hard and fast, as long as an employer adheres to the basic principle for a fair promotion, which was described by the CCMA as ensuring that all candidates were afforded a reasonable opportunity to promote their candidature.[146]

The employer may deviate from it under certain conditions as long the deviation concerned is not fatal or does not result in material defect to the outcome.

2 11 2 1 THE NEED FOR AN EMPLOYER TO FOLLOW ITS OWN PROCEDURE

An employer has to follow its own procedure which could be sourced from the legislation, a collective agreement, company policy or an established practice.[147] Perhaps the most often encountered and sometimes fatal mistake by employers is not to follow their own policies and procedures in deciding on promotions.[148]

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144 *Nutesa v Technikon Northern Transvaal* [1997] 4 BLLR 467 (CCMA).

145 Basson, Christianson, Garbers, Le Roux, Mischke and Strydom (1998) *Essential Labour Law* 235.

146 Basson *Essential Labour Law* 235.

147 Du Plessis, Fouché and Van Wyk *Practical Guide to Labour Law* 4th ed (2001).

148 Carter and Goldsmith 2001 *Best Practices in Organisation Development and Change*, San Francisco USA.

An employer is expected to follow its own applicable procedures, whether they are derived from legislation, a collective agreement, company policy or an established practice.

The most glaring example of deviating materially from the policy is found in *NUTESA v Technicon Northern Transvaal.*[149] Here, against the background of a policy and practice at Technicon that the posts be advertised, five posts were created with appointments of specific employees in mind, appointment was done secretly with 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. In the case of *NUTESA*, certain people were appointed to the newly-created positions without the positions being advertised. The arbitrator had to decide whether there was a violation of existing procedures with the creation of new positions and the appointment thereto of certain individuals. Concerning the failure to advertise the positions, the CCMA held that the positions concerned had been created in secret with the appointment of specific people in mind. The CCMA set aside defective promotions and remitted the matter to the employer with an express stipulation that no person who was involved in the initial (flawed) promotion process was to play a role in the second procedure. Moreover, the employer also appointed candidates who did not meet the requirements of the post that were specified in the advert. With respect to the appointment of a candidate who did not meet the requirements the CCMA held that it was unfair for an employer to advertise a position, setting prescribed minimum qualification, but appoint person who did not possess that qualification or create a position for a specific person without advertising it in accordance with agreed procedure.

The CCMA found that what the employer did constituted 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.

149 [1997] 4 BLLR 467 (CCMA).

In the matter of *Douglas Hoerskools v Premier Northern Cape and others*[150] the point of contention was whether the school was correct to recommend only one candidate if he was the only qualified candidate to apply. The court confirmed that the school was correct in interviewing the only qualified candidate, because all the other four applicants were unqualified.

The High Court in *Diphetoho School Governing Body and others v Department & others*[151] dismissed the claim of the SGB to set aside the appointment of a principal because the HoD unilaterally appointed the principal after having withdrawn the powers of the SGB. This is the case where the school advertised the post of a principal in 2009. A panel met and set up criteria which was to shortlist only one person who had acted as principal and was from Bothaville. This led to an objection from trade union observers and the departmental officials cautioned the SGB as a result the process stopped. The HoD, without success, requested the SGB to make a recommendation. Having failed to cause the Governing Body to make a recommendation, the HoD appointed an independent panel and proceeded with the appointment of the principal without the SGB's recommendation as per the Educators Act.[152] The court agreed with the HoD and stated that:

> "The subsequent use by the head of the department of an independent panel to make a recommendation to him cannot be faulted in the circumstances. In my judgement the decision to appoint Mr.Legopo as principal of the school is unassailable."

In *Aberdeen vs MEC for Education for Eastern Cape*[153] the issue in contest was the alleged failure of the department to sift candidates for short listing and the decision of the employer did not comply with the provisions of the Educators Act[154] and PAM. The school contested the fact the appointed candidate was not recommended by the SGB.

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150 1999 (4) SA 1131 (NC).
151 (2012) 4218(10) SA.
152 76 of 1998 s 6.
153 (2010) 372 (9) ZAECBHC 16.
154 76 of 1998 s 6(3)(c).

The facts of the case are that the school made a recommendation to the HoD with four names and recommended that Mr I Green be appointed to the post of the deputy principal. This recommendation was in order of preference in terms of section 6(3)(c) of the Educators Act and was duly submitted to the HoD to appoint the 1st candidate as a preferred candidate by the SGB. However, the HoD appointed Mr.Koltana who was the second on the recommendation list of the SGB.

The SGB contested this decision on the grounds that they did not recommend the second candidate on the list. The court disagreed with this assertion and concluded as follows:

> "The interpretation by the applicant that the SGB did not recommend the third respondent is untenable because the HoD can only appoint an alternative candidate whose name appears on the list as submitted by the SGB. Unlike in *Kimberley*, supra, the position of the third respondent here was such that he would be eligible to be appointed by the HoD acting in terms of s (6)(3)(g) of the EEA where the first preferred candidate on the list was rejected by the HoD acting in terms of 6(3)(e). Consequently, to the extent that the third respondent was a recommended candidate in terms of the resolution of the SGB, the facts of the case are distinguishable from those in *Kimberley*. Therefore I find that the decision of the HoD to consider the third respondent for the appointment as a deputy principal was regular."

The second argument of the school on the same case was that sifting did not happen as dictated to by PAM[155] which reads as follows:

> "The employing Department shall handle the initial sifting process to eliminate applications of those who do not comply with the requirements of the post as stated in the advertisement."

The school further contended that the third respondent did not possess Biology and despite that he was to be assessed by the HoD. The court found that there was no basis for this allegation as Mr Koltana possessed qualification in Biology, and, secondly there was evidence that sifting did take place and the objection on this ground was dismissed.

In *Kimberley*[156] the Supreme Court of Appeal came to a different conclusion on the matter of procedural fairness. In this case the matter has its origin in the decision of

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155 Par 3.2(b).

the HoD to appoint a female person instead of the male white male as school principal. The SGB applied to the Kimberley High Court but was dismissed and the school made the appeal against that judgment to the Supreme Court of Appeal. The school conceded that the HoD a taken the decision to appoint the female candidate in terms of section 6(3) (f) of the Educators Act, but their contention was that she was not a suitable candidate in terms of the subsection.

The HoD elicited his action from the fact that the female candidate was one of the three candidates recommended by the SGB for the position.

On enquiry, the court found that real question to be answered was whether the HoD had any discretion to make an appointment in terms of section 6(3) (f) of the Educators Act at all and whether the SGB had recommended the female candidate. This question arises out of the provisions of section 6(3) (a) of the Educators Act; which set a precondition for an appointment that:

> "any appointment, promotion, or transfer of an educator by the head of the department to a post at a public school may only be made on the recommendation of the governing body"[157] and this theme is maintained in s 6(3) (f)."

The court went further to scrutinise whether there was any existence of necessary precondition or jurisdictional facts that empowered the HoD to make the appointment. In casu the question was whether the form NCK2 which was used to write the recommendation read with the letter recommending the white male candidate can be regarded as a recommendation of three candidates including the black female.

The HoD believed that he could because section 6(3) (c) (i) of the Educators Act requires that the government 'must submit a list of at least three names of recommended candidates'.[158] In an event that the SGB is unable to recommend three candidates; it can submit fewer than three candidates, but in consultation with

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156 *Kimberley Junior School v Education Department, Northern Cape Education Department and Others* 2010 (1) SA 217 (SCA).

157 See also *Head, Western Cape Education Department v Governing Body, Point High* School 2008 (5) SA 18.

158 76 of 98 s 6(3) (c) (i).

the HoD. The SGB believed that it was not aware of the provisions of the section 6(3) (c) (i) and it was not provided for in the form. Handing down judgment the court Bran J had this to say:

> "In the absence of the jurisdictional fact of a recommendation by the SGB the HoD had no authority to make an appointment. Or-in the language of s 6(2) (a) (i) and s 6(2) (f) (i) of PAJA –absent any recommendation by the SGB, the HoD was not authorised by the empowering provision to make an appointment. It follows that his appointment of Mrs Rantho as principal of the School falls to be set aside. In the event, the SGB requested that we should appoint Mr.Theunissen as principal of the School. I do not believe that would be appropriate. Apart from the separation of powers, which dictates that a court should be hesitant to usurp executive functions, there was in this case not even a proper recommendation by the SGB as contemplated by s 6(3) (c).In the circumstances, both the SGB and the HoD should, in my view, be afforded the opportunity to perform their respective functions in terms of s 6(3) in a proper manner."

It is clear from the judgments as stated above that the employers should follow their own procedure. It is clear from the case that any material flaw will not be tolerated by the courts.

What could be preferred particularly in the context of education is for arbitrators to focus more on substantial unfairness than procedural defects. This is more so when the procedural defect is minor and did not result in a gross irregularity. It cannot be correct that form should take precedence over substance.[159] School governance structures change every three years. This means that[160] schools don't have constant and consistent SGBs that could over a period of time understand applicable procedures through constant application of the PAM procedures.

Furthermore, a number of school SGBs rely on training by the Department on promotion which in some districts are not forthcoming and some SGB's are illiterate with no legal knowledge. If arbitrators will compromise the quality of education on the basis of minor procedural defects they will be contributing to weakening of our already shaky education system.

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159 *Unity vs. MEC Department of Education Limpopo and others* (2007) 22179 SA.

160 SASA 84 of 1996 s 31(1).

In *Unity Primary School v MEC Department of Education and Others*[161] a lot of time, school resources and energy was spent over a mere procedural lapse and placed above substance. In this case the SGB made the recommendation to the HoD who declined their recommendation due to uncertified documents of the applicant. The HoD appointment was contrary to the SGBs' recommendation. The SGB brought an application to the High Court to set aside the appointment made by the HoD; which they succeeded. If such issues could be allowed by arbitrators to stand it means that are our schools will remain forever disrupted. As much as educators will rely on both procedural and substantive fairness it should also be borne in mind that delivery of education could be compromised by petty disputes based on procedural aspect.

In *Itusa v Department*[162] *of Education: North West*[163] the arbitrator dismissed the applicant's application and declared that the panel had waived its right to recommend. The facts of the case are that the applicant was not appointed as PL4 School principal. He referred the matter to the Education Labour Relations Council (ELRC) claiming that the HoD did not consult with the SGB when making an appointment. The respondent submitted that there were compelling reasons why the applicant could not be appointed like health, misconduct etc. The arbitrator dismissed the applicant's application citing that the SGB has waived its right to appoint. It is clear that in some cases there would be cases worth being attended to in terms of relief, but not at the expense of education. This does not take away anybody's right to fair labour practice but at least when it comes to remedies substance should take precedence unless there are gross procedural defects.[164] This does not negate the fact that an employer has to follow its own procedures which may be sourced from legislation, a collective agreement, policy or an established practice.[165] The most fatal mistake by employers is not to follow their own procedures in deciding on promotions.[166]

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161 *Unity vs. MEC Department of Education Limpopo and others* (2007) 22179 SA.

162 *Itusa obo Mokoka v Department of Education North West* (2006) PSES 412 (ELRC).

163 *Itusa obo Mokoka v Department of Education North West* (2006) PSES 412 (ELRC).

164 *Observatory Girls Primary School &another v Head of Dept: Dept. of Education, Province of Gauteng* [2006] JOL 17802.

165 Du Plessis, Fouché and Van Wyk *Practical Guide to Labour Law* 4th ed 2001.

166 Carter *Best Practices in Organisation Development and Change*, San Francisco USA.

2 11 2 2 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 panellist. The persons on selection panel need not be experts neither do they need to be qualified in the particular position that is in 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.

In *Van Rensburg v Northern Cape Provincial Administration*[167] the employee challenged the composition of the interviewing panel. This challenge was against the background of a staff code that prescribed that a panel should be versed in the concerned area to be advertised. The contention of the employee was that none of the panel 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. As to the required level of expertise, the following was said.

> "From an ideal point of view, the panellist 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 legal precepts that govern the situation. It is unrealistic because the requirements that only persons with exactly the same kind of qualifications 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 panellist. 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 decisions, in other words, that they should be reasonably knowledgeable"

In *Mpono v Eastern Cape Department of Education,*[168] the educator challenged the composition of the panel claiming different reasons that have prejudiced her promotion chances. The facts of the case are that the applicant applied for the post of Deputy Chief Education Specialist HIV AIDS and School Nutrition Coordinator was shortlisted but not appointed. The applicant claimed that the panel was flawed and

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167 (1997) 18 *ILJ* 1421 (CCMA).

168 (2009) 441-08/09PSES 16-18.

irregular, there was nepotism on the appointment, she was prejudiced and that she was better qualified and suitable candidate. She claimed that the chairperson of the panel was the same person against whom she had lodged a grievance on the previous panel that she chaired and further that one member had a love relationship with the second respondent who happened to be appointed in the post in question. She further questioned the absence of a line function manager with the knowledge of the relevant job function and that the department was bias in dealing with her grievance in the previous advertised post. The Department on the other side claimed that there was no irregularity on the composition of the panel and the appointment should stand. The arbitrator found that the Department of Education committed an unfair labour practice in that the panel was not properly constituted; the applicant suffered prejudice at the hands of the departmental officials. The arbitrator found that if it was not for the wrong advertisement of the post and prejudice, the applicant might have been appointed.

2 11 2 3 FAILURE TO SHORT-LIST AND/ OR INTERVIEW

One of the defects in promotion is failure to short-list and interview applicants who happen to qualify for an advertised post without a valid reason. When this happens such an act may constitute an unfair labour practice. However, should it be established that the employee would have actually been promoted had he been interviewed because of his experience and qualifications are superior to those of the incumbent, the failure to consider such an employee will constitute an unfair labour practice.[169] This was a case in *Lutze v Department of Health*[170] where the employee applied for a post but was not shortlisted or interviewed and was advised that she did not qualify for the post. An employee who was less qualified with less experience was promoted to the post. It was common cause that the employee would have achieved promotion had she been interviewed because her experience and qualifications were superior to those of the incumbent and this was found to constitute unfair labour practice. The actions of the employer were found to constitute an unfair labour practice and the employer was ordered to compensate the

169 Milo "The Ups and Downs of Promotion and Demotion" Vol 11 No 4 Nov 2001 *Contemporary Labour Law* 33.

170 (2000) 21 *ILJ* 1014 (CCMA).

employee. This demonstrates that employers in exercising their prerogative to employ should do so within the ambits of fairness.

2 12 AFFIRMATIVE ACTION/DISCRIMINATION

Origins of affirmative action permitting measures of fair discrimination based on gender, race and disability in South African law in public education can be traced back to the Constitution,[171] the Employment Equity Act[172] (EEA) and the Educators Act.[173] Affirmative action can be defined as restitutionary and remedial measures designed to normalise labour market by rectifying under representation of certain section of population caused by past discriminatory practices.[174]

In *George v Liberty Association of Africa Ltd*[175] Land P examined the concept of affirmative action in the workplace and stated that:

> "Affirmative action, viewed positively, is designed to eliminate inequality and address systemic and institutionalised discrimination including racial and gender discrimination. It is a mechanism which is capable of eventually ensuring equal opportunities."

Although there is a 1994 democratic breakthrough it is clear that there is dire need for redress of past imbalances.[176] It is against this background that designated[177] employers are mandated to implement affirmative action and such measures must comply with section 9(2) of the Constitution and section 6(2)(a) of the EEA.[178]

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171 Ss 9 and 195(1)(i) of the Constitution of the Republic of South Africa No 108 of 1996.

172 S 6 of the Employment Equity Act 55 of 1998.

173 S 6(3)(b) of the Employment of Educators Act 76 of 1998; s 7 of the Employment of Educators Act 76 of 1998.

174 *Canadian Co v Canada* (Canadian Human Rights Commission) [1987] 1 SCR 1114 at 11143; *Action Travial des Fermmes v Canadian National Railway* Co 40 DDR (4th) 193 at 213-14; Employment Equity Act 55 of 1998 s 15.

175 [1996] 8 BLLR 985(IC); *Department of Correctional Services v Van Vuuren* [1999] 11 BLLR 1132 (LAC).

176 *Prinsloo v Van der Linde and another* 1997 (30) SA 1012; 1997 (6) BCLR 759 par 20; Explanatory Memorandum Industrial Law Journal at (1998) 19 *ILJ* 1345.

177 As defined in s 1 of Employment Equity Act 55 of 1998.

178 *Minister of Finance & another v Van Heerden* (2004) 25 *ILJ* 1593 (CC) 32.

It is a fact that an employer may take affirmative action into account in denying promotion of an employee, who is not a member of designated group.[179]

The EEA recognises two defences against a claim of unfair discrimination, namely, that it is not unfair to take affirmative action measures consistent with the purposes of the EEA or to "distinguish, exclude of prefer any person on the basis of an inherent requirement of a job".[180] However, such measures and the manner in which they are applied should comply with the requirements of fairness, rationality and proportionality, in order to escape the definition of unfair labour practice.[181]

The purpose of the EEA is to ensure fair representation of designated groups.[182] The problem here is that even amongst designated groups there is a need to promote representation.

Du Toit[183] argues for representivity in all occupational categories and levels to be used as a test in determining whether and to what extent members of the designated groups should be preferred over members of other designated groups. Employees may raise the issue of discrimination in promotion and appointment under two guises which are:[184]

a. Individual claiming discrimination on the basis of race, gender or disability.
b. Individual claiming should have received preference and appointed because they belong to a particular racial or gender group.

The fact that the employee falls within the designated groups does not mean that employee has a right to be promoted.[185] The employer still retains its prerogative,

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179 *Ibid*.

180 S 6(2) and (b) of the Employment Equity Act 55 of 1998.

181 Pretorius, Klink & Ngwena *Employment Equity Law* Chap 9 Affirmative Action; ILO *Equality in Employment and Occupation* Report (1988) 159.

182 Employment Equity Act 55 of 1998.

183 Du Toit "When does affirmative action in favour of certain employees become unfair discrimination against others?" (2001) in *Equality: Theory and Practice in South Africa and Elsewhere* (Conference held at the University of Cape Town in January 2001) at 14; Dupper and Garbers in *Essential Labour Law* (2004) 266.

184 *Guraman v South African Services* (2004) 4 BALR 586 (GPSSBC).

185 *Ibid*.

within the parameters of its affirmative action policy and the EEA[186] to promote the best candidate for the job.[187]

The courts held that the important question was whether an alleged affirmative action policy or practice was justifiable and acceptable within the context and wording of the Constitution.[188] There had to be a rational connection between the measures and the aim they were designed to achieve. The court held the view expressed in *Public Servants Association of South Africa and others v Minister of Justice*[189] that representivity in the Public Service could not be pursued in vacuum but had to be balanced against efficiency and that the appointment of a candidate from one race group above a candidate from another race group was acceptable only where the candidates all had broadly the same qualifications and merits.

The courts further emphasised the fact employers would have to weigh the competing interest when effecting affirmative action appointment[190] and that the need for representivity must be weighed up against individual's right to equality and a fair decision made.[191]

It is clear that affirmative action is here to stay for a long time to come and this places the onus on employers in particular the public service to have proper employment equity plans as this will go a long way in achieving the goals which are enshrined in the Constitution. As the judge commented on the ernomosity of the task:

> "Transformation is a veritable quagmire of emotions and beliefs. The responsibility of anybody tasked with achieving equity is profoundly onerous. It has to adroitly balance demographics, the aspirations of employees, the need to retain skills and experience and the exigency of redressing past injustice."[192]

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186 55 of 1998.

187 *Guraman v South African Services* (2004) 4 BALR 586 (GPSSBC).

188 *Stoman v Minister of Safety and Security* (2002) 23 *ILJ* 1020 (T).

189 (1997) 18 *ILJ* 241 (T).

190 *Head of Western Cape Education Department v Governing Body of Point High Schoo*l (584/2007) [2008] ZASCA 48(31 March 2008).

191 *Minister of Finance and another v Van Heerden* [2004] 12 BLLR 1181 (LC) para 22-32; *Bato Star Fishing (Pty) Ltd v Minister of Enviromantal Affairs and Tourism and Others supra.*

192 *SA Police Union obo Venter v SAPS* (2002) 23 *ILJ* 454 (BCA) 456D-E.

However, what should be debated in public education is how our schools' cross pollination has affected this debate as stated above. The exodus of African learners from townships, villages and outlying areas to former white schools has become the thorn in the flesh of provincial HoDs as they seek to diversify the staff compliment in attempt to make it reflect the demographics of learners. The question to be asked is whether learner populations should form the basis of affirmative action appointments in those institutions or should educator demographics informs affirmative action appointments. Further than that others have argued that affirmative action should be implemented at provincial level and not at school.

This is soon going to catch up with the country as some provincial departments fail to draw up instructive affirmative action plan. This call for provincial departments to have well thought employment equity plans with clear and achievable targets.

2 13 ONUS OF PROOF IN UNFAIR LABOUR PRACTICE DISPUTES

Neither the current Labour Relations Act[193] nor the Labour Relations Act prior to its amendments deals with who bears the onus in disputes relating to unfair labour practices. The majority of cases seem to indicate that it is up to the employee who complains of an unfair labour practice to prove all the elements thereof.[194]

In *PSA obo Williams v Department of Correctional Services*[195] it was stated that:

> "The onus is on the union (on behalf of the employee) to make a case of unfair labour practice. In order to do so, it must show that the national commissioner did not apply his mind his mind, or acted incorrectly in promoting Lesole to the position."

Ndlovu's[196] case creates a two-pronged test. If the employee succeeds in showing that the conduct was unfair for whatever reason, the employee still has to show that he was the best candidate for the post in terms of experience, ability, qualifications, etc. This will involve the employee proving by comparison that he is more qualified in

193 66 of 1995 with its amendments in terms of Act 12 of 2002.

194 Garbers 1999 *CLL* 29.

195 *PSA obo Williams v Department of Correctional Services* (1999) 20 *ILJ* 1146 (CCMA).

196 *Ndlovu v CCMA* 5 (2000) 21 *ILJ* 1653 (LC).

terms of experience, training, education and qualifications than the successful candidate.

It is also very important not only to prove unfairness or existence thereof but must go beyond that. This indicates that onus of proof is more than a routine but rather more of factual and substance to prove that the conduct was unfair and if it was not for the conduct the complainant would have been appointed.

In *Westraat v South African Police Services*,[197] the arbitrator noted that the applicant bears the onus of proving that the employer had exercised its discretion improperly. The arbitrator, therefore, held that the evidence was not enough to discharge the onus of showing that the panel had exercised its discretion improperly. 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.

In the case of a promotion unfair labour practice dispute, the applicant must be certain that he can establish not only that the employer committed some or other unfair conduct in respect of the promotion in question and that the applicant suffered harm, in that he was not promoted to the position in question, but also that there was a causal connection between the employer's unfair conduct and the applicant's non-promotion in the sense that, but for such unfair conduct, the applicant would have been promoted to the position in question.

197 (2003) 24 *ILJ* 1197 (BCA).

CHAPTER 3

PROMOTION OF EDUCATORS IN THE PUBLIC EDUCATION SECTOR

3 1 PROMOTION OF EDUCATORS

Schooling in South Africa is governed by the Constitution, the South African Schools Act,[198] the National Education Policy Act[199] (NEPA) and the laws passed by the 9 Provinces are the principal laws governing schooling in South Africa.[200] Since 1994, the education laws were aimed at achieving the immensely complex tasks of transforming education a discriminatory, inequitable and fragmented education system-one of the main legacies of apartheid and replacing it with a new and democratic system of Education.[201] This immense task could only be achieved through a dedicated workforce in a work environment conducive to teaching and learning in a well structured environment and efficient management. The efficiency of management heavily relies on the nature and the manner in which promotions are done. Thus, the promotion of educators should in itself promote the values and principles enshrined in the Constitution.

Promotion in education is regulated by a set of legislative framework which is tailor made for education. Of importance to the functioning of the schools and promotion are the following legislative frameworks:

- The South African Schools Act No 84 1996 (SASA)
- Provincial Education Legislation
- Personnel Administrative Measures (PAM)
- Education Labour Relations Council Resolution 5 of 1998
- The Employment of Educators 76 of 1998

198 84 of 1996.

199 27 of 1996.

200 Barry *Schools and the Law: A Participants Guide* 2006 7.

201 *Ibid*.

3 2 THE PROMOTION PROCESS

The promotion of educators is governed by Chapter 1 and Chapter 3 of the Educators Act as well as Chapter B, paragraph 3 of the PAM.

Section 3 of the Educators Act assigns different responsibilities to different persons. All these persons are therefore defined as employers of educators in respect of the employer responsibilities assigned to them.[202] Section 6 of the Educators Act accords powers to various employers of educators.[203] The PAM in terms of paragraph 3 deals with the advertising and filling of educator posts. This is where the actual process of promotion is outlined step by step. These procedures require that all vacancies that arise at public schools must be advertised in a gazette, bulletin or circular.[204] The content and requirements of the advert are clearly spelt out in the PAM in Chapter B, paragraph 3.1. (a) as follows:[205]

> "The advertisement of vacant posts for educators must:
>
> I. Be self-explanatory and clear and must include:-
> - Minimum requirements,
> - Procedure to be followed for application,
> - Names and telephone numbers of contact persons,
> - Preferable date of appointment, and
> - Closing date for the receipt of applications
>
> II. Be accessible to all who may qualify or are interested in applying for such post(s);
>
> III. Be non-discriminatory and in keeping with the provisions of the Constitution of the RSA; and
>
> IV. Clearly state that the State is an affirmative action employer."

After the closing date, the Department of Education performs the sifting and decides which applications go to the next stage of the process. The sifting is done at the entry point of the applications, which is the District or Regional Office, and eliminates defective applications for one of the following reasons;[206]

1. Incomplete application

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202 76 of 1998 s 3.

203 76 of 1998 s 6.

204 PAM par 3.1. (b).

205 PAM par 3.1(a).

206 PAM par 3.2(b).

2. Required documentation have not been included
3. The applicant does not meet the minimum requirements for the job.

When the sifting process is complete applications which have not been eliminated are then delivered to the schools in case of institution (school) based educators or district in the case of office based educators. The educational institutions where these advertised vacancies are located shall establish the Interview Committees.[207] The IC consists of one departmental representative (who may be the school principal) as an observer and resource person, the principal of the school (if she or he is not the departmental representative) except in the case where he or she is an applicant and members of the school governing body, excluding educators who are applicants to the advertised post.[208] Unions that are party to the ELRC attend as observers.[209] The interviewing committee conducts the short listing according to the following guidelines:[210]

i. The criteria used must be fair, non-discriminatory and in keeping with the Constitution of the country.
ii. The curricular needs of the school.
iii. The obligations of the employer towards serving educators.
iv. The list of shortlisted candidates for interview purposes should not exceed five per post.

At the conclusion of the short listing process, the shortlisted applicants are invited for interviews. The interview committee shall conduct interviews according to the agreed upon guidelines by parties to the provincial chamber.[211] Having concluded the interviews, the IC shall rank the candidates in order of preference and submit this to the school governing body for their recommendation to the relevant employing department.[212] After receiving the recommendation from the Interview Committee

207 PAM par 3.3. (a).
208 PAM par 3.3. (b).
209 PAM par 3.3. (b).
210 PAM par 3.3(f).
211 PAM par 3.3(g).
212 PAM par 3.3(i).

the SGB must consider the applicants and ensure that the principle of equity, redress and representativity are complied with and the governing body must adhere to:[213]

i. The democratic values and principles referred to in section 7(i);[214]
ii. Any procedure collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators;
iii. Any requirement collectively agreed upon or determined by the Minister for the appointment, promotion or transfer of educators which the candidate must meet;
iv. A procedure whereby it is established that the candidate is registered or qualifies for registration as an educator with the South African Council for Educators; and
v. Procedures that would ensure that the recommendation is not obtained through undue influence on the members of the governing body.

The governing body must submit their recommendation to the Provincial Education Department.[215] The submission made should be in order of preference.[216] The Head of the Provincial Department must consider the recommendation from the SGB and ensure that the SGB has complied with the relevant requirements before making the appointment.[217] In making the final decision the Department must satisfy itself that the agreed upon procedures were followed and that the decision complies with the Educators Act and the LRA.[218]

A recommendation by a school governing body is an essential prerequisite for the appointment of an educator in a departmental position, without such a recommendation the HoD acts ultra vires and unlawfully.[219] Despite the order of preference by the SGB, the HoD may appoint any suitable candidate on the list.[220]

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213 76 of 1998 s 6(3) (b).
214 *Ibid*.
215 76 of 1998 s 6(3) (c); PAM par 3.3. (j).
216 76 of 1998 s 6(c) (i) and (ii); PAM par 3.3(j).
217 76 of 1998 s 6(3) (d); 7(1) PAM par 3.3.
218 PAM par 3.4.
219 *Kimberley Junior School v The Head of the Northern Cape Education Department* [2009] 4 All SA 135 (SCA).
220 76 of 1998 s 6(3) (f).

SGBs are part of the democratic process that unfolded after 1994 in terms of our Constitution and represent a significant decentralisation of power. Therefore, although a Provincial Head of Department as employer may despite the order of the preference of the governing body, appoint[221] any suitable candidate on the list of candidates provided by the governing body, our Courts have held that the HoD must however place significant weight on the order of preference of the SGB because it is the SGB who has interviewed the candidates and not the HoD.[222] If the governing body has not met the statutory requirements, the HoD must decline the recommendation.[223] Should the HoD decline a recommendation by the SGB he or she must consider all the applicants for the post, apply the requirements and appoint a suitable candidate on a temporary basis or re-advertise the post.[224] In an event the HoD declines the recommendation, the SGB may lodge an appeal to the MEC regarding the temporary appointment and such an appeal must be lodged within 14 days of receiving the notice.[225]

This safety net is intended to protect the interest of the community, whilst at the same time respecting the employers' prerogative to employ. When the employer has made the decision to promote, the employer will inform all unsuccessful candidates in writing.[226] It is the responsibility of the employer to make sure that accurate records of the proceedings are kept.[227] Of importance is how some aspects of educators' promotion process have changed. The significant change was through the Education Laws Amendment Act.[228] Prior to these amendments the Educators Act had only required the HoD to take into account whether or not transformational needs had been addressed in deciding whether to accept the SGB's recommendation or not. The second critical area relates to the recommendation by the SGB to the HoD. The SGB used to submit three applicants in order of preference and the HoD could only

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221 However in terms of s 6(3)(a) of the Employment of Educators Act 76 of 1998 any appointment, transfer or transfer to any post on the educator establishment of a public school, may only be made on the recommendation of the governing body of the public school.

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

223 S 6(3) (e) of Employment of Educators Act.

224 S 6(3) (g).

225 S 6(3) (h) (i).

226 PAM para 3.4(b).

227 PAM para 3.5.

228 24 of 2005.

depart from the recommendation on very narrow grounds. Owing to the current amendment[229] the SGB makes its recommendation but the HoD is no longer bound by the order of preference or whole recommendation itself. Furthermore, the HoD can make an appointment outside of the candidates recommended by the SGB and that would be made on a temporary basis and subject to appeal by the SGB. Should the SGB not appeal, then the appointment stands.

3 3 THE ROLE OF THE GOVERNING BODY IN THE PROMOTION PROCESS

In terms of section 15 of the SASA a public school is a "juristic person" with legal capacity to perform its function under the Act.[230] In terms of its legal personality, the school is a legal subject and has the capacity to be a bearer of rights and obligations.[231] As a juristic body, the public school cannot participate in the law in the same manner and to the same extent as a natural person. It has to act through its duly appointed agent, and section 16(1) of SASA makes provision for the governance of a public school to be vested in its governing body. The governance of public schools would, therefore, be the responsibility of elected school governing bodies comprising parents, educators, non-educator staff, learners and the principal as ex-officio member.[232] Every public school is a juristic person, with legal capacity to perform certain functions prescribed in the SASA.[233] The governance of every public school is vested in its governing body, which is a separate autonomous legal entity and may perform such functions as prescribed in the Act.[234]

The roles of the SGB stems from section 195 of the Constitution; which decrees that:[235]

1. Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

229 Education Laws Amendment Act 24 of 2005.
230 84 of 1996.
231 84 of 1996 s 1.
232 South African Schools Act 84 of 1996 s 24.
233 84 of 1996 s 15.
234 84 of 1996 s 16(1).
235 Constitution s 195.

(a) A high standard of professional ethics must be promoted and maintained.
(b) Efficient, economic and effective use of resources must be promoted.
(c) Public administration must be development-oriented.
(d) Services must be provided impartially, fairly, equitably and without bias.
(e) People's needs must be responded to, and the public must be encouraged to participate in policy making.
(f) Public administration must be accountable.
(g) Transparency must be fostered by providing the public with timely, accessible and accurate information
(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

These principles are encapsulated and fulfilled in section 20 of the SASA.[236] The role of the SGB should be understood in the context that, public schools operate with a considerable degree of independence from provincial education departments.[237] The control of a public school is the responsibility of its governing body as they are participatory governance structures. This structure[238] stands in position of trusts towards the school and has fiduciary duty to act in the best interest of the school as a whole.[239] Should the school cease to exercise its fiduciary function the HoD may withdraw one or more functions in terms of section 22 of the SASA;[240] alternatively appoint one or more persons to perform such functions in terms of section 25 of the SASA. In *Head Department, Mpumalanga Department of Education and Another v Hoerskool Ermelo and another*[241] three matters were decided in determination of withdrawal of functions and failure to perform one or more functions. Firstly, it was

236 84 of 1996.
237 84 of 1996 s 15 SASA.
238 School Governing Body.
239 Barry *Schools and the Law* 65; 84 of 1996 s 16(2) SASA.
240 84 of 1996.
241 2010 (2) SA 415 (CC).

decided that any function may be withdrawn in terms of section 22 of the SASA.[242] Secondly, it was explained that there is no direct connection between section 22 and section 25 of the Act. Section 25 regulates the failure by a governing body to perform its functions.[243] The jurisdictional requirements or the invocation of section 25 of the SASA are that the governing body must have ceased or failed to perform one or more of its allocated functions.[244] The possibility therefore exists that should the School Governing Body fail to perform their duties as enacted, the Head of Education may withdraw such duties or appoint sufficient persons to perform such functions.[245] Heads of Departments should not be quick to revoke these provisions in an attempt to circumvent SGB recommendations in instances where they cannot find their way through SGB recommendations and appoint what they usually call an independent panel. The irony of these panels is that they are made of departmental officials and thus taking away the rights of parents to have a say in the promotion process at their school. The two provisions do not in any way exclude parents when the HoD appoints a person or more persons to perform those powers that the SGB has failed to perform like failure to make a recommendation as prescribed. It is my opinion that, the fact that SGB as a body has failed to perform its duties it does not negate the right of parents to participate as intended by both the South African Schools Act[246] and the Educators Act.[247] This manifestation is as a result of the inherent contradictions as a result of the negotiated settlement when Constitutional democracy ushered in. It is very clear that the legislature wants to balance the Constitutional rights of parents and that of the employer to employ its employees. The wording of both the South African Schools Act[248] and the Educators Act[249] seeks to allow parents to have a role in the appointment and promotion process whilst at the same time entrenching provincial departments as employers of educators. This of course has its own historical background given the South African history although parties agreed on the necessity of parental involvement.

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242 *Head Dept., Mpumalanga Department of Education and Another v Hoerskool and another* 2010 (2) SA 415 (CC).

243 *Head Dept, Mpumalanga v Hoërskool* 2010 (2) SA 415 (CC).

244 *Ibid*.

245 *Ibid.*

246 84 of 1996.

247 76 of 1998.

248 84 of 1996.

249 76 of 1996.

The primary role of the SGBs is to make a recommendation on the basis of the submission by the interviewing committee. What has arisen as a question in most instances is whether the SGB can deviate from the recommendation of the Interview Committee. In *Dubuzana & Department of Education KwaZulu Natal*[250] the question whether or not the SGB may deviate from the recommendation of the interview committee came to the fore. The commissioner made it clear that the governing body must exercise its mind in making a recommendation and not merely rubber stamp the decision of the Interview Committee. In the above case the commissioner found as follows:

> "Given the clear and unambiguous wording of Resolution 5 of 1998(PAM), as well as the clear wording of 11.2 above, it must be accepted that the law as it presently stands, is that the governing body has the right to exercise an independent choice, it is not obliged to "rubber stamp" the recommendation of the interviewing committee."

As much as the SGB makes a recommendation it should in all fairness refer the areas of disagreement back for reconsideration by the IC.

What the legislation does is to allow another person (SGB) to choose and then pass on to another to the decision to appoint from their preferred candidates and if no appointment is made, there must be a good reason why the appointment was not made.

One of the major complexities revolves around the governing body's function to recommend the appointment of educators to the HoD. This becomes a contentious issue because the interests of the education authorities, teacher unions, parents and learners differ in many respects. In many cases, conflicts that cannot be resolved spill over into courtrooms across the country. While the participatory principle and decentralisation of certain functions to the SGB is appreciated, this has its own unintended consequences in that the department as an employer no longer has the

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250 2003 123/4 PSES.

prerogative neither to appoint nor to promote. The Educators Act [251] makes it clear that any appointment or promotion will be done at the instance of the SGB.

Whilst is clear in terms of the Educators Act as to who is an employer, the procedure as it stands places a lot of responsibility on the school governing bodies and the Head of Department is at the tail end of the process and denied any opportunity of active participation in the initial processes.

3 4 THE ROLE OF TRADE UNIONS

Trade unions are supposed to play an observers status in the process, which means they should not actively participate in any of the proceedings as they are observers.[252] However, it is true that in most instances this is not the case as they sometimes end up participating in the actual process.[253] The commissioner emphasised this point and said the following:[254]

> "In my view what is contemplated is that an observer has a positive duty to intervene at the stage whenever there is a prospect that one candidate may be prejudiced or another given advantage. However, there is clearly a line to be drawn between the input of an observer and full participation of a committee member, particularly in relations to matters such as scoring. It does not form part of the function of an observer to insist on the amendment of questions that the scoring members of the selection committee have discussed and formulated. Similarly, it is not for an observer to give upon the revision of a particular score. It is not the function of the observer to give directions on matters of substance. Committee members receive independent training to that end. The primary role of an observer is to ensure procedural fairness and equality of treatment of different candidates."

Political allegiance also plays part in these processes as deployment is considered important. These are some of the tendencies which compromise the credibility of the process. Education is one of the contested terrains and thus the promotion of educators will not be immune from this contest.

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251 76 of 1998.

252 Employment of Educators Act 76 of 1998.

253 *Rashe v Department of Education Eastern Cape* PSES (2003) 41.

254 *G Singh v the Minister of Education and Culture and the Goverment for the Province of KwaZulu-Natal and Others* (2009) JOL 23472(D).

3 5 THE ROLE OF THE HEAD OF DEPARTMENT

The Educators Act [255] provides that it is the Provincial HoD who is the employer of educators and who appoints educators.[256] Section 6(3) (d) - (g) of the Educators Act outline the responsibilities of the HoD in considering and dealing with recommendations contemplated in section 6(3) (a) - (c). The HoD has a duty as an employer to make the necessary appointments. In terms of section 6(d) of the Educators Act,[257] the HoD must revisit the five requirements set out in section 6(b) before making an appointment. The HoD has a number of choices as set in the Educators Act. He may appoint the educator ranked highest by the SGB,[258] or may; alternatively, appoint any one of the three applicants recommended by the SGB without reference to the SGB's ranking.[259] The HoD may alternatively appoint a person who was not recommended by the SGB.[260] If the HoD appoints one of the candidates recommended by the SGB, it appears that the SGB has no redress other than possible remedies under the administrative law jurisdiction. However, should the HoD follow the procedure in terms of section 6(g) of the Educators Act[261] and appoint "a suitable candidate temporarily" (not recommended by the SGB), the SGB has a right of appeal and the procedures set out in sections 6(h) - (k) of the Educators Act apply. This is more power given to the HoD and could be viewed as SGB's losing all power regarding recommendation and appointment of educators.

However, judgment handed down in the *Point High School and others v the Head of Department of the Western Cape Department of Education*[262] seems to suggest that the court is not necessarily of the opinion that subsections 6(3)(f) of the Educators Act gives unfettered power to HoDs to reject or approve SGB recommendations at will.[263] In this case the Point High School in the Western Cape Province of South Africa and its SGB challenged a decision by the Western Cape Education

255 76 of 1998.
256 S 3 and 6 of EEA 76 of 1998.
257 76 of 1998.
258 S 3(f) of EEA 76 of 1998.
259 S 3(f) of EEA 76 of 1998.
260 S 6(g) of EEA 76 of 1998.
261 76 of 1998.
262 (2007) SAC 14188/06.
263 Beckam and Prinsloo "Legislation on school governors' power to appoint educators: friend or foe" Vol 29 2009 *South African Journal of Education* 171-184.

Department not to approve their recommendations for appointment, as principal and deputy-principal, of the persons they believed to be the most suitable candidates having duly followed the procedures in the Educators Act and other legislation. The court reviewed and set aside the decisions of the HoD of the Western Cape [Province] Education Department to appoint the persons he did in fact appoint. The HoD was directed to appoint the persons viewed by the school and it's SGB as the most suitable candidates. What is clear is that, these powers are not given as a blank cheque to the HoD as the courts have protected the rights of SGBs and learners against unreasonable decisions by HoDs.

3 6 THE REGRADING OF SCHOOLS

Some doubts existed as to how persons in upgraded or re-graded posts have to be treated or how regulations which deal with the issue have to be interpreted. The education department has its own regulations with regard to re-grading of schools. The re-grading of schools is done in terms of Chapter A, paragraph 2.7 as well as Chapter B paragraph 2.5 of the PAM and Collective Agreement 3 of 2006 signed in the ELRC. This sections[264] deals with positions of principals where an institution is downgraded or upgraded.

The purpose of Collective Agreement 3 of 2006 is recorded as follows:

> "The purpose of this agreement is to determine measures according to which education institutions are re-graded and what the position of such re-graded institution is."

Chapter A, paragraph 2.7 of the PAM was amended to provide that an institution will be upgraded to a higher level if in terms of two consecutive annual statistics surveys, the learner enrolment of the institution exceeds the minimum enrolment requirements of such higher grading level by at least 50 full-time equivalent learners. The HoD may re-grade the institution where sufficient evidence that the new enrolment will be maintained for a reasonable period.

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264 PAM par 2.5; Collective Agreement 3 of 2006.

Paragraph 2.5 of the PAM as amended by Collective Agreement 3 of 2006 prescribes that:

> "(a) When an institution is re- graded, the post of the principals is regarded as new, and therefore vacant, post that must, subject to these measures be filled in terms of paragraph 3 with undue delay.
>
> (b) If the permanent incumbent of a principal post that has been upgraded qualifies to be promoted to the new level and the governing body or council recommends in writing that the person may be appointed to the higher post, such appointment may be made without the need to advertise the post. If the governing body or council does not make such a recommendation, the post must be advertised in which case the incumbent will be entitled to apply for the upgraded post in which case the incumbent will be entitled to apply for the upgraded post and s/he shall be shortlisted."[265]

Normally there is supposed to be a difference between the upgrading and promotion. The upgrading of a post does not necessarily give the incumbent the right to automatic promotion.[266] Where there is a dispute whether a certain job should be upgraded, the view has been expressed that this does not involve promotion.[267] What makes this species in my view to translate into promotion is the manner in which the PAM and the agreement are worded in that:

1. The PAM[268] describes an upgraded post as a new post, vacant and subject to promotion procedure in terms of the Educators Act.
2. The criteria to upgrade the post is that there should be an added responsibility in terms of staff or learners enrolment in that a post is only upgraded when there is an increase in the number of educators. Of course the number of educators increases as a result of learner numbers.
3. The third point is that these educators are remunerated a difference between the educator's salary and the entry level of salary in which the post is upgraded. In *National Commissioner of the SA Police Service v Portterill NO and Others*[269] the court held:

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265 PAM par 2.5.

266 *National Commissioner of the SAPS v SA Police Union & others* (2004) 25 *ILJ* 203 (T).

267 Basson *Essential Labour Law* 197.

268 PAM par 2.5.

269 (2003) 24 *ILJ* 1984 (LC) 16.

> "In my view, regulation 24 requires one to draw a distinction between a decision to re-grade a post and decision to allow the incumbent employee in the regarded post to continue to occupy that post. Where the incumbent employee is permitted to continue to occupy the re-graded post and is afforded the appropriate higher salary, the employee is, in my view "promoted". In my view such a situation falls within the first meaning for the word "promote" in the Concise Oxford Dictionary 9th Ed, namely: "Advance or raise (a person) to a higher office, rank, etc."

It is very clear that retention, with increased benefits, of an incumbent on a newly upgraded post, has its consequence the same substantive outcome as a promotion.[270] Where the incumbent is permitted to continue to occupy the re-graded post and is afforded the appropriate higher salary, the employee is promoted[271]

The PAM[272] regard posts of upgraded schools as new and vacant this makes disputes arising out of this provision arbitrable if an employee can prove he had applied or has not been recommended by the SGB for the post which has been created by PAM provisions.[273] Care should be taken in that the paragraph 2.5(b) of the PAM confers a choice on the department to either appoint a qualified incumbent principal or to advertise the post. The fact that the SGB can recommend the present incumbent does not compel the department to accept the recommendation of the SGB. This is because the upgraded post is regarded as new and such subject to the provision of section 6 of the Educators Act.

The fact that an incumbent occupies an upgraded post does not provide a preferential right to promotion. It is also true that the fact the SGB has made a recommendation does not mean that the post cannot be advertised this is so because the post is regarded as new and should the department decline the recommendation it can advertise the point. However, should an incumbent be subjected to a competitive process the provisions of Chapter B, paragraph 2.5(c) of the PAM applies; which states that such an educator will be "regarded as in excess

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270 *National Commissioner of the SAPS v Basson & others* (2006) 27 *ILJ* 614 (LC).

271 *National Commissioner of the South African Police Service v SA Police Union and Others* (2003) 24 *ILJ* 1984 (LC) 16; *Minister of Labour v Mathibeli and others* (JR38/10) ZALCJHB 126; (2013) 34 *ILJ* 1548 (LC) (23 Oct 2012).

272 PAM par 2.5. (a).

273 Grogan *Dismissal, Discrimination & Unfair Labour Practices* 53; *Polokwane Local Municipality v SALGBC & other* [2008] 8 BLLR 783 (LC).

as a result of operational requirements and must be dealt with in terms of paragraph 2.4" of the PAM which reads as follows:

"**2.4. Transfer of serving Educators in terms of operational requirements**

(a) Operational requirements for educational institutions are based on, but not limited to the following:
  (i) change in pupil enrolment
  (ii) curriculum changes within a specified educational institution
  (iii) change to the grading of the specific educational institution
  (iv) financial restraints

(b) These measures do not deal with the transfer of level one serving educators declared in excess in term of operational requirements linked to rationalisation to affect equity in staff provisioning. This aspect is covered by Resolution No. 6 of the Education Labour Relations Council (ELRC), dealing with the procedures for rationalisation and redeployment of educators in the provisioning of educator posts.

(c) In cases referred to in paragraph (a) above the following procedure shall apply.
  (i) All vacancies that arise at educational institutions must be offered to serving educators displaced as a result of operational requirements of that specific provincial education department as a first step.
  (ii) All vacancies must be advertised and filled in terms of paragraph 3 (The advertising and Filling of Educator Posts). Provided that:
    • every attempt is made to accommodate serving educators, displaced as a result of operational requirements, in suitable vacant posts at educational institutions or offices; and
    • a provincial education department may publish a closed vacancy list. In such an event, the procedures contained in the resolution dealing with the rationalisation and deployment of educators in the provisioning of educator posts shall apply.
  (iii) When a governing body exercises its functions in terms of section 20(1) (i) of the South African Schools Act 1996 and chapter 3 of the Employment of Educators Act, they must accommodate the obligations of the employer towards serving educators. The governing body must also take into account the requirements for appointment as determined by the Minister of Education and/or the requirements of the post as determined by the Head of the Provincial Education Department.
  (iv) All applicants who are serving educators displaced as a result of operational requirements and who are suitable candidates for a vacant post in an educational institution or office must be shortlisted.
  (v) At historically disadvantaged institutions (institutions that fell under the control of the ex-Department of Education and Training, Homeland Governments and TBVC states), any educator who acted for longer than 2 continuous years in the post, at the institution, must be included in the interviews for the post. Provided that:
    • the educator is currently in the post
    • the post is part of the post establishment of that institution
    • the relevant provincial education department had approved the appointment; and
    • the educator must have applied for the post."

The current schools systems grades principals according to the staff provisioning and in turn principals are graded accordingly. In essence, all schools have enrolment and therefore it could be argued that this is not promotion.

What comforts me in my conclusion is how the Act is constructed in this regard as it states that the post is vacant and subject to appoint procedures. However, where the post has been upgraded and the incumbent retained and is not promoted to a higher salary this has been held not to constitute an unfair labour practice;[274] which is unlikely within education as the PAM and the relevant collective agreement provide for higher salary once the post is upgraded.

Cele J in *Minister of Labour*[275] had this to say:

> "It must follow necessarily then, that the retention, without increased benefits, of an incumbent on a newly upgraded post, does not have, as its consequence, the same substantive outcome as a promotion. Where, therefore the incumbent employee is permitted to continue to occupy the re-graded post and is not afforded the appropriate higher salary, the employee is not promoted. The re-graded of a post may bring with it new essential requirements for the population of that post, which the current incumbent may not be possessed of. There is therefore a need to draw a distinction between a decision to re-grade a post and a decision to allow the incumbent employee in the re-graded post to continue to occupy that post."

In *Mahango v MEC, Department of Roads and Transport and another,*[276] the court considered the implications of upgrading a post and held:

> "In my view, the events leading to the upgrading of the post, and the subsequent downgrading thereof, fall inside the ambit of 'unfair labour practice' as defined. Even if this was not a 'promotion' or 'demotion' on any interpretation, the events still, in my opinion, 'relate to the provision of benefits to an employee' as included in the definition prescribed in section 186(2)(a) of the Labour Relations Act ('the LRA')."

The majority of judgments favoured the incumbents on the upgraded posts who happened not to be promoted once their posts have been upgraded or regarded.[277]

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274 *National Commissioner of the SAPS v Basson & others* (2006) 27 *ILJ* 614 (LC).

275 *Minister of Labour v Mathibeli and others* (JR38/10) ZALCJHB 126; (2013) 34 *ILJ* 1548 (LC) (23 Oct 2012).

276 (2009) JOL 23293 (GNJ) 34.

277 *Basson v South African Police Service and others* (2004) 5 BALR 537.

Although this is the case there is no automatic promotion to a senior rank or a right to be promoted.

3 7 EMPLOYERS OF EDUCATORS IN TERMS OF SASA AND THE EDUCATORS ACT

In some public schools there are two types of educators employed which literally means that in one schools there might be two employers operating.

Firstly, there are educators employed by the SGBs in terms of the SASA.[278] These are educators employed and paid by the SGBs in terms of the SASA.[279] In this instance the SGB of that school becomes an employer of such educators. The SASA[280] provides as follows:

> "(4) Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for educators and employ educators additional to the establishment determined by the Member of the Executive Council in terms of section 3 (1) of the Educators' Employment Act, 1994.
>
> (5) Subject to this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law, a public school may establish posts for non-educators and employ non-educator staff additional to the establishment determined in terms of the Public Service Act, 1994 (Proclamation 103 of 1994).
>
> (6) An educator and a non-educator employed in a post established in terms of subsection (4) or (5) must comply with the requirements set for employment in public schools in terms of this Act, the Labour Relations Act, 1995 (Act 66 of 1995), and any other applicable law.
>
> (7) A public school may only employ an educator in a post established in terms of subsection (4) if such educator is registered as an educator with the South African Council of Educators.
>
> (8) The staff contemplated in subsections (4) and (5) must be employed in compliance with the basic values and principles referred to in section 195 of the Constitution, and the factors to be taken into account when making appointments include, but are not limited to -
> (a) the ability of the candidate;
> (b) the principle of equity;
> (c) the need to redress past injustices; and

278 S 20(4) of SASA and s 3(4) of Employment of Educators Act.

279 *Ibid*.

280 S 20(4) of SASA.

(d) the need for representivity.

(9) When presenting the annual budget contemplated in section 38, the governing body of a public school must provide sufficient details of any posts envisaged in terms of subsections (4) and (5), including the estimated costs relating to the employment of staff in such posts and the manner in which it is proposed that such costs will be met.

(10) Despite section 60, the State is not liable for any act or omission by the public school relating to its contractual responsibility as the employer in respect of staff employed in terms of subsections (4) and (5).

(11) After consultation as contemplated in section 5 of the National Education Policy Act, 1996 (Act 27 of 1996), the Minister may determine norms and standards by notice in the Gazette regarding the funds used for the employment of staff referred to in subsections (4) and (5), but such norms and standards may not be interpreted so as to make the State a joint employer of such staff."

Clearly from the wording of SASA in some instances SGBs are employers of educators that are employed in terms of provision of SASA and in this instance the affected educators can declare a dispute against the Governing Body.

Secondly, there are educators employed by the Head of Department in terms of the Educators Act,[281] which provides as follows in respect of educators:

"(1) Save as is otherwise provided in this section –
(a) The Director-General shall be the employer of educators in the service of the Department of Education in posts on the educator establishment of the said Department for all purposes of employment; and
(b) The Head of Department shall be the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for all purposes of employment.

(2) For the purposes of determining the salaries and other conditions of service of educators, the Minister shall be the employer of all educators.

(3) For the purposes of creating posts –
(a) On the educator establishment of the Department of Education, the Minister shall be the employer of educators in the service of the said Department; and
(b) On the educator establishment of a provincial department of education, the Member of the Executive Council shall be the employer of educators in the service of that department.

[281] S 3 Employment of Educators Act 76 of 1998.

(4) A public school shall be the employer of persons in the service of the said school as contemplated in section 20(4) or (5) of the South African Schools Act, 1996 (Act No. 84 of 1996)."

In terms of section 3 of the Educators Act the provincial HoD is the employer of educators in that particular province.[282] In this situation the only person against whom an educator can declare a dispute is a provincial education HoD.

It is important also to note that within the context of the LRA an educator employed by School Governing Body and applies for a post within staff establishment declared by the Member of the Executive Council· cannot seek protection from the LRA unless discrimination can be proved.[283] The same goes for educators employed in terms of Educators Act,[284] and apply for a post within the provisions of SASA

The question of whether an existing relationship between the applicant employee and the employer is required, has been considered in *Vereeniging van Staatsamptenare obo Badenhorst v Department of Justice*.[285] The facts of the case were as follows:

The Department of Justice was undergoing restructuring. The restructuring process entailed that all employees in the previous Department were invited to apply for one or more of the newly created posts in the current Department. The applicants applied for such a post in the new structure. Existing employees were guaranteed a post in the new Department on at least the same level of pay that they had occupied in previous Department.

The employer contended *in limine* that the CCMA lacked jurisdiction on two grounds. The first was that the dispute was based on an alleged discrimination issue and that only the LC had jurisdiction to hear the matter. This contention was dismissed on the ground that the matter fell squarely within Item 2(1) (b) of the LRA. The second ground was that the position for which the applicant had applied was not a promotion in the normal sense but was a result of the rationalization process undertaken by the

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282 S 3(1)(b) Employment of Educators Act 76.of 1998.

283 S 9 of the Employ Equity Act extends the meaning of "employee" to include applicants for employment.

284 S 3 Employment of Educators Act 76 of 1998.

285 1999 20 *ILJ* 253 CCMA.

Department. The employer argued that the position for which the employee had applied was a newly created post under the auspices of a new establishment constructed to replace the old structure.

It argued that the employee was therefore a job applicant and not an employee applying for a promotion post. The Commissioner disagreed with this assertion and answered this argument 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 believe that the peculiar nature of the rationalisation 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 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 remodelled structure in conformity with the rationalisation. It is specious to suggest that the applicant was a job applicant, in the sense of being an outside job seeker."

It is clear from this case that even the true identity of the employer concealed through restructuring the courts are prepared to dig deeper and reveal the existence of employer-employee relation.

The *Department of Justice*[286] case is one of many judgments that seem to favour a differentiation in terms of which an external applicant is "appointed" while an internal candidate is promoted.[287]

The fact that unfair labour practice protection is only available to existing employees was further clarified by the LAC[288] where the court found that employees in the provincial government are part of the public service and that all employees who are employed in the public service are employees of the state. It was found that Mr.Jele was applying for another position within the same employer and therefore could invoke the provisions of the unfair labour practice. In this case the court emphasised the point that in the context of promotion there must be an existing relationship.

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286 1999 20 *ILJ* 253 CCMA.

287 1999 20 *ILJ* 253 CCMA; *Public Servants Association v Northern Cape Provincial Administration* 1997 18 *ILJ* 11137 (CCMA).

288 *MEC for Transport KwaZulu-Natal and others v Jele* [2004] 12 BLLR 1238 (LAC).

Educators should be able to clearly identify who their employer is before seeking shelter in the provisions of the LRA.

3 7 1 UNFAIR CONDUCT BY THE SCHOOL GOVERNING BODIES

The situation with the SGB is peculiar, in that, there are schools where educators are employed by the Department of Education[289] and those employed by the SGB.[290] The SGB can play dual role, firstly make recommendation to the HoD[291] but secondly makes an appointment as an employer in terms of SASA.[292]

Where there SGB has made the recommendation to the HoD and no decision has been made by the HoD, the educator cannot claim he/she was unfairly overlooked.[293] Any claim against the HoD is premature when the SGB has not made any recommendation.[294]

According to the LRA an unfair labour practice can only be committed by an employer against its own employee, it was held in *Reddy v KZN Department of Education and Culture*[295] that the Department of Education could not be held responsible for acts of the SGB, at least until such time an appointment has been made by the Department. The facts of the case are that an educator in the employ of the Department of Education and Culture, KwaZulu-Natal, applied for a post of principal at one of the department's schools. A selection committee recommended him for the post, and sent its recommendation to the governing body of the school, of which three members of the selection committee were also members.

The governing body expressed several reservations about the appellant, including the fact that he was an African National Congress (ANC) municipal councillor and a

289 Employment of Educators Act 76 of 1998 s 3 and 6.

290 SASA 84 of 1996 s 20(4) or (5).

291 Employment of Educators Act 76 of 1998 s 3 and 6.

292 SASA 84 of 1998 s 20(5) or (4).

293 *Department of Justice v Commission for Conciliation, Mediation & Arbitration & others* (2004) 25 *ILJ* 248 (LAC); *Reddy v KZN Department of Education and Culture* (2003) 26 *ILJ* 1358 (LAC).

294 *Department of Justice v Commission for Conciliation, Mediation & Arbitration & others* (2004) 25 *ILJ* 248 (LAC); *Reddy v KZN Department of Education and Culture* (2003) 24 *ILJ* 1358 (LAC).

295 2003 24 *ILJ* 1358 (LAC).

member of the executive of a trade union. In the light of these reservations, the three SGB members who had served on the selection committee held a "caucus", and decided among themselves to appoint another candidate to the post.

The governing body then recommended that candidate, who ultimately declined to accept the post, which remained empty. The appellant then referred a dispute to the Education Labour Relations Council (ELRC), complaining that he was the victim of an unfair labour practice. The parties agreed that the matter should be referred for arbitration. The respondent arbitrator held that the reasons for which the governing body had decided not to appoint the appellant were unfair, unreasonable and unjustifiable, and that the decision not to appoint him constituted unfair discrimination.

The arbitrator ordered the Department to compensate the appellant. The award was set aside by the LC. On review, the Department contended that the arbitrator's award requiring the Department to pay compensation was grossly unreasonable in the light of his finding that the governing body had discriminated against the appellant.

The court held that the arbitration conducted by the second respondent was not a private arbitration, subject to review only on the narrow grounds set out in section 33 of the Arbitration Act,[296] because the arbitration was conducted under the auspices of a bargaining council, the respondent arbitrator was performing functions in terms of the LRA. The award was accordingly reviewable in terms of section 158(1) (g) of the LRA.

The court noted that the arbitrator had held that the Department was accountable for the actions of the governing body because the latter was a statutory body elected to govern a school and responsible *inter alia* for appointing educators, and exercised its duties on behalf of the Department.

None of these observations led to the conclusion that the Department was liable for the actions of the SGB. Furthermore, the governing body was not the appellant's

296 42 of 1965.

employer. In this regard, the court rejected the appellant's contention that the perpetrator of an unfair labour practice against an employee need not necessarily be an employer of that employee. Unfair labour practices could only be perpetrated by parties to an employment relationship.

The LC found that, the arbitrator had disregarded the Department's argument that it could not be held liable for the governing body's decision because the governing body was still required to make a recommendation after the rival candidate had withdrawn. Had the arbitrator considered this valid submission, he would have considered the possibility that the appellant might have been appointed after he had been paid compensation. This possibility was a further indication of the gross unreasonableness of the arbitrator's decision.

If the HoD has not made a decision he cannot be held accountable for decisions taken by others in this instance the School Governing Body.[297]

In the *Department of Justice v CCMA & Others*[298] the LC made it clear that pre-mature referral of promotion disputes where no final decision not to promote has been taken yet, will not be entertained.[299]

3 7 2 CAN AN EDUCATOR DECLARE A DISPUTE AGAINST ANOTHER PROVINCIAL EDUCATION DEPARTMENT?

This question arises out of the fact that employees may only refer unfair labour practice dispute against their own employers. If so, can an educator employed by one provincial department refer a promotion dispute against another provincial department?

The answer lies in section 3 of the Educators Act which provides that an employer of an educator employed by a provincial department of education is the provincial HoD

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297 *Reddy v KZN Department of Education and Culture* (2003) 24 *ILJ* 1358 (LAC).

298 (2004) 25 *ILJ* 248 (LAC).

299 *SAPS v SSBC* (2010) 31 *ILJ* 2711 (LC).

of that educator. This was in fact confirmed by the *Jele*[300] judgement in respect of education as an exception.

This issue was decided in *MEC for Transport: Kwa-Zulu Natal v Jele*.[301] Mr Jele who was employed by the Department of Health, KZN applied for a higher post in the Department of Transport, KZN. When he was not appointed, he referred an unfair labour practice dispute relating to promotion. Since the unfair labour practice jurisdiction is only available to existing employees it was therefore critical to determine whether Jele could be considered an existing employee of the State in the broad sense or whether he was merely an employee of the Department of Health. If he was only an employee of the Department of Health, he had no right to invoke the unfair labour practice jurisdiction, whereas he would have the right to do so if he was an employee of the State in the broad sense.

After analysing the applicable provisions of the Constitution and the Public Service Act,[302] 1994, the LAC concluded that all public servants are employed by the public service, unless the statute to their employment specifies a particular Department as their employer.[303]

In Jele's case the applicable statute did not specify a particular Department as his employer. The State in the broad sense was his employer and therefore, the court held, he was applying for a promotional post within the same employer and could accordingly refer an unfair labour practice relating to promotion.

Since section 3 of the Educators Act specifically provides that the employer of an educator employed by a provincial department of education is the provincial HoD of that educator, the *Jele* judgement is not applicable in the education sector. That was in fact confirmed by the Labour Appeal Court in the *Jele* judgment when the unique situation in respect of educators as an exception to the general rule was specifically

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300 *MEC for Transport: Kwa-Zulu Natal and others v Jele* (2004) 25 *ILJ* 2179 (LAC).

301 *MEC for Transport: Kwa-Zulu Natal and others v Jele* (2004) 25 *ILJ* 2179 (LAC) confirming the decision in *Jele v Premier of the Province of KwaZulu-Natal & Others* (2003) 24 *ILJ* 1392 (LC).

302 104 of 1994.

303 This part of the judgement is often overlooked by those who argue that the Jele judgment is also applicable to educators or to the education sector.

emphasised.[304] This means that an educator employed by one provincial education department cannot refer a promotion dispute against another provincial department of education. It also means that an educator cannot refer a promotion dispute against another state department and neither can a non-educator employed by another state department refer a promotion dispute against a department of education.[305]

3 8 JOINING PARTIES / JOINDER

3 8 1 WHAT IS A JOINDER?

Third parties with a direct and substantial interest in a dispute are entitled to be joined before a judgment is given which affects their interests.[306] This concept is derived from the common law practice, which entitles any third party with a substantial interest in the outcome of the dispute/litigation proceedings, to be afforded an opportunity to be heard. The need for joinder of a third party is prevalent in unfair labour practice disputes within the Public Service.

However, it is the education sector which records the highest number of promotion related disputes as a consequence of the large number of promotion posts advertised on an annual basis. Traditionally parties in disputes of unfair labour practice lodged in the CCMA or a bargaining council would be the applicant (employee) and the respondent (employer). There would be instances, however, which justify the joining of the so called third party to the proceedings (conciliation/arbitration) if such a party demonstrates having a direct and substantial interest in the outcome of the dispute.

In the light of the recent developments in our courts, it is peremptory for the promotion disputes to be lodged only after the employer has made a decision to effect an appointment or having made an appointment, as the case may be. The effect of this is a situation in which there is always be a joined party to promotion

304 *MEC for Transport: Kwa-Zulu Natal and others v Jele* (2004) 25 *ILJ* 2179 (LAC).

305 *Ibid.*

306 *PSA v Department of Justice & others* [2004] 2 BLLR 118 (LAC).

dispute, save in instances where the appointed incumbent waives his right to join proceedings.

3 8 2 TYPES OF JOINDER

Joinders can take two different forms and these are:

(a) Parties could be joined if their right to relief depends on “substantially the same question of law and fact. This form of joinder refers to an instance when the ELRC is in receipt of more than one dispute which relies on the same set of facts.
(b) Joining a third party.

Joining a third party when the need arises to join to the extent such an educator’s rights could be materially affected by the outcome of the dispute.

3 8 3 JOINING INTERESTED PARTIES IN A DISPUTE

(a) Of its own accord, when the disputing parties had not identified or alerted the joinder party or the ELRC. In this instance the ELRC prior scheduling a hearing or the presiding commissioner as the case may be, of their own accord invite the appointed educator to apply for joinder to proceedings.
(b) On application by a party, this could occur in one of three instances.
    i. When a party to the dispute or an applicant has taken it upon himself to identify the appointed educator and provide this information to the ELRC who, in turn, would serve notice on the appointed educator to apply for a joinder.
    ii. When the employer/respondent on being served with a dispute referral form, identifies and informs the appointed educator of his right to be joined to apply for joinder at the hearing.
    iii. When the appointed educator becomes aware of a dispute been lodged in the post they occupy, takes it upon himself to apply for the joinder, either via the LRC or directly at the hearing.

The test whether a joinder is ordered is whether a person has a direct and substantial interest or whether he has a legal interest in the subject matter of the dispute which may be affected prejudicially by the arbitration award or whether the arbitration award cannot be sustained or carried into effect without prejudicing that person.[307] The only exception is when the person has waived his right.[308] In instances where there is a request that the process must be repeated or that the applicant must be appointed to the post, the successful candidate will have to be joined.[309]

In *National Commissioner of the SA Police Service v Safety and Security Bargaining Council & others*[310] this matter was further clarified and summarized as follows:

> "In the Public Servants Association case Zondo JP 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 at 704H-I 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 not good 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 an exercise in futility. In the first place, there is no longer any vacancy for which

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307 *Labour Bulletin ELRC* October 2011; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637.

308 *Public Servants Association v Department of Justice, CCMA* 25 *ILJ* 2535 (SCA).

309 *Gordon v Department of Health, KwaZulu-Natal* (2008).

310 (2005) 26 *ILJ* 903 (LC).

> applications can be reconsidered 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."

It has recently become compulsory that successful candidate in a promotion dispute should be joined and failure to do so might constitute gross irregularity.[311]

The effects of section 3 of the Educators Act have been emphasized by the LC as it provides that where an educator refers a promotion dispute to the ELRC, both the HoD as well as the MEC should be joined as defendants.[312]

The HoD is the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for all purposes of employment;[313] and for the purposes of creating posts on the educator establishment of a Provincial Department of Education, the MEC is the employer of educators in the service of the Department.[314]

According to this judgment public schools where there is a dispute must also be joined. This in my view would also provide trust and transparency on the dispute resolution process.

3 8 4 THE IMPLICATIONS FOR FAILURE TO JOIN ANY PERSON HAVING SUBSTANTIAL INTEREST IN A DISPUTE

Failure to join any party with substantial interest has its negative consequences particularly in the context of a school environment and the process itself.

a. Delays in proceedings

When there is no joinder the commissioner will be forced to postpone the proceedings until such time due and proper notice has been served on appointed educator to apply for joinder.

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311 *Public Servants Association v Department of Justice, CCMA and others* (2004) 25 *ILJ* 692; *Head Department of Education, Northern Cape v Wessels & others* [2009] JOL 23715 (LC).

312 *Head Department of Education, Northern Cape v Wessels & others* [2009] JOL 23715 (LC).

313 S 3(1) (b).

314 S 3(8) (b).

b. Award being rendered defective, successfully reviewed and set aside

In an event a commissioner proceeds to finalise the matter, which is unlikely, in the absence of joinder party, to the extent of offering relief which affects the rights appointed educator, then such an award must, if challenged, be set aside. This again would have severe financial and time-consuming implications.

In *PSA v the Department of Justice & others*[315] paragraph 32 the court held that:

> "This created a state of affairs in which it could be said that the employer was faced with contradictory claims as to who should have been appointed. The unsuccessful candidates, Messrs. Duminy and Nortier, then took their grievances or complaint to arbitration. That arbitration was to say the least, about who should have been appointed. To my mind this demonstrates quite clearly that the successful candidate had a direct and substantial interest in the arbitration proceedings It seems to me, therefore, that the commissioner could not and should not have sat in judgments on Messrs. Duminy's and Nortier's claim in the absence of the other two affected parties. As the two had a direct and substantial interest in the arbitration proceedings, they should have them joined in the arbitration proceedings led to the issuing of an award adversely affecting their rights and interest without their having been joined and without their having been afforded an opportunity to be heard."

It is imperative for the disputing parties to make every effort to join the third party, either on their own accord or by working together. Where a third party who has a direct and substantial interest in a matter is not joined in the proceedings, it is not a defense to a point of non-joinder to say that such party had knowledge of the proceedings but did not intervene. His mere non-intervention, despite having knowledge of the proceedings, does not make the judgment emanating from those proceedings binding on such party.[316]

The process of joinder has its own advantages and should be favoured for the following reasons, namely:

1. It creates a perception of transparency and inclusiveness amongst successful candidates. This is the key in creating stability in public schools as it enhances trust in the dispute resolution system. This approach provides all the parties an

315 *Public Servants Association v Department of Justice and Others* (CA 5/2002) [2004] ZALAC 1.

316 *PSA v Department of Justice & others* [2004] 2 BLLR 118 (LAC).

opportunity to be heard and as such creates a stable environment in the affected school. An employee who is uncertain of the future is easily demoralised and this could only be curbed by providing the affected employees an opportunity to state their side of story.

2. Successful candidates can very often give the arbitrator valuable information that could assist in making a factual finding.

3 9 EDUCATORS IN AN ACTING CAPACITY

Owing to delays in the manner in which the public sector, including education, advertises posts a number of educators are forced or made to act in higher positions. An employer may expect employees to act in other (higher) positions for a certain period of time[317] in an attempt to enhance service delivery acting is also good for employees as they gain a valuable experience. This is where the employer starts running the risk of unfair conduct if it does not promote the acting employee to the position in question permanently or at, least does not afford employee the remuneration and benefits of the higher post.[318]

The mere fact that an employee acts in a higher positions does not entitle the employee to be appointed to the post, even if one could say that a legitimate expectation for promotion exists.[319]

In *De Nysschen v General Public Service Sectoral Bargaining Council*[320] the court set aside an arbitration award in which the arbitrator dismissed the applicant's claim that the employer perpetrated an unfair labour practice by not appointing her to an upgraded in which she acted for nearly ten years. In this case, the applicant had been acting in an upgraded post for several years, and had applied for the post when it was advertised. The selection committee recommended her appointment, but the Member of the Executive Council (MEC) appointed another candidate. The arbitrator

317 Basson *Essential Labour Law* 201; Public *Servants Association and others v Department of Correctional Services* (1998) 19 *ILJ* 1655 (CCMA) 1673A.

318 *Public Servants Association and others v Department of Correctional Services* (1998) 19 *ILJ* 1655 (CCMA) 1671A.

319 *IMATU obo Coetzer v Stad* (1999) 20 *ILJ* 971 CCMA 976.

320 (2007) 28 *ILJ* 375 (LC).

dismissed the application. On review the LC noted that there was no compelling evidence that the candidate was suitably qualified for the post, because the appointment was based on arbitrary reasoning which was unreasonable and unfair. The court held that the employer's conduct was unfair and that the employer failed to justify appointing another candidate, who had been found suitable for several other vacant posts. 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*,[321] the discretion of the MEC was not an unlimited one as it had exercised in a way that did not result in an unfair labour practice. The prerogative of an employer should be exercised in a manner that is fair that is not going to result in unfair labour practice.The employer was ordered to appoint the applicant to the disputed post, with retrospective effect.

The employer may not trick employees into acting; in *Kotze v Agricultural Research of SA*[322] 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.

However, Garbers[323] stated "In general, superiors should be careful not make statements or promises to subordinates regarding possible promotions. However, such promises will not, in themselves entitle an employee to promotion. At best this may create a legitimate expectation."[324] 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.

This was illustrated in *Guruman v South African Weather Services*[325] 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 arbitrator

321 [2007] 5 BLLR 461 JR 1531/03.

322 (2007) 21 *ILJ* 261 (CCMA).

323 Vol 9 No 3 October 1999 *Contemporary Labour Law*.

324 Vol 9 No 3 October 1999 *Contemporary Labour Law* 27; *Administrator Transvaal & Others v Traub* (1989) 10 *ILJ* 823.

325 (2004) 4 BALR 586(GPSSBC).

disagreed, finding that the applicant lacked 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[326] or its own policy by not promoting her. The application was therefore dismissed.

In *Naptosa & other vs. Department of Education Eastern Cape & others*[327] the commissioner noted that:

> "The fact that a person has been acting and doing the job is no guarantee that she has been doing it the best and that there is no better candidate than her nor does it give rise to an expectation of appointment the employer has created such expectation."

The mere fact that the employee acts in such a position does not entitle the employee to be appointed to such post.[328] What at best complainants of unfair labour practice with regard acting expect is an opportunity to be considered as acting on its own does not accord anyone the right to promotion.

The mere fact that employers handle aspirant workers to promotion unfairly does not mean that they are entitled to be promoted. This was the case for example in *National Commissioner of the SA Police Service v Basson and others.*[329] 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.

In the Public Sector acting is regulated by the Public Sector Bargaining Council Resolution 9 of 2001 paragraph 1 and 5. This resolution then entrusts various sector bargaining councils to determine policy and compensation of acting allowance.[330] The Education Labour Relations Council concluded two agreements namely:

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326 55 of 1998.

327 PSES44-11/12 EC 13.

328 Basson *et al Essential Labour Law* 201; *PSA & others v Department of Correctional Services* 1998 19 *ILJ* 1655 (CCMA) 1673A.

329 (2006) 27 *ILJ* 614 (LC).

330 *PSCBC Resolution* 9 of 2001.

1. Resolution 8 of 2001
2. Collective Agreement 1 of 2002

Educators can perform duties in an acting capacity in terms of Resolution 8 of 2001[331] and Collective Agreement 8 of 2002.[332] The former allows educators to act in higher vacant substantive posts[333] while the latter allows educators to act in a higher post where the incumbent is absent.[334]

These educators are then remunerated the difference between their current salary and that of the post they are acting in.[335] The acting is limited to a period of 12 months or until the advertisement of the post in terms of the Educators Act .[336] In the context of these resolutions it is clear that educators cannot claim legitimate expectations to be promoted the least is to be considered for promotion.[337] These provisions do not in any manner create an impression of any promise of some sort.

331 *Education Labour Relations Council Resolution* 8 of 2001 Annexure A par 1.
332 *Education Labour Relations Council Collective Agreement* 8 of 2002 Annexure A par 1.
333 *Education Labour Relations Council Resolution* 8 of 2001 Annexure A par 5.
334 *Education Labour Relations Council Collective Agreement* 8 of 2002 Annexure A par 5.
335 *Education Labour Relations Council Collective Agreement* 8 of 2002 Annexure A.
336 *Education Labour Relations Council Collective Agreement* 8 of 2002.
337 Grogan *Employment Rights* 113; *Durusa and University of Durban Westville& others* (2001) 7 BALR 753 (CCMA).

CHAPTER 4
REMEDIES

4 1 INTRODUCTION

Most unfair labour practice disputes especially in the public sector are concerned with promotions. Employees always wish that the outcome should be in their favour so as to be granted relief they sought. In terms of the LRA[338] an arbitrator may grant remedies which may include ordering reinstatement, re-employment or compensation. The LRA merely says that disputes about promotions (provided unfairness is proved) must be determined on terms deemed 'reasonable' by the arbitrator. In practice this has led to a range of remedies being fashioned by commissioners, including:[339]

a. A declaratory order-where a decision was taken not to fill the post and no evidence was available about any other appropriate remedy.
b. Remittal to an employer for consideration of employees for promotions.
c. Protective Promotion.
d. Actual Promotion
e. Compensation
f. Repeating the Process

4 2 REMITTAL TO AN EMPLOYER FOR CONSIDERATION OF EMPLOYEES FOR PROMOTIONS

Remittal was considered in *NUTESA v Technikon Northern Natal*,[340] where the CCMA set aside defective promotions and remitted the matter to the employer with an express stipulation that no person who was involved in the initial (flawed) promotion process was to play a role in the second procedure. Likewise in *NUMSA*

338 S 193(4) of the LRA.
339 *Ibid*.
340 (1997) 4 BALR 467 (CCMA).

obo Cook v Delta Motor Corporation[341] the employer was ordered to restart the process of recruitment by giving all employees an equal opportunity.

4 3 PROTECTIVE PROMOTION

Protective promotion is a form of promotion set out in terms of the Public Service Staff Code. Part B/VI/III item 9 of the Staff Code states that:

1. Protective promotions are effected on the recommendation of [public service or provincial] commission to protect the position of officers or employees-

    d. who is found to have been prejudiced in the filling of a promotional post after such post has been filled.

Essentially this amounts to compensatory promotion where an employee is promoted to a particular post with terms and conditions similar to those the employee would have received if it was not for unfair labour practice by an employer. In the case of *Kwadakuza*[342] the court had to consider the case of a prospective job applicant who had missed the opportunity to apply for promotion because the post he was interested in applying for was not advertised as required by a collective agreement which prescribed the relevant procedure to be followed by the employer when new posts were created. The arbitrator found the failure to advertise the posts in question had been an unfair labour practice for which the employee was entitled to compensation in the form of a protected promotion in terms of the provisions of section 193(4) of the LRA 1995. However, it must be emphasized that it is only when the circumstances of the promotion dispute in question clearly show that the unfair labour practice most probably had the effect of denying the employee appointment in a post, as in this instance, that a compensatory form of promotion of this kind is likely to be an appropriate remedy under section 193(4) of the LRA.[343] The recommendation may only be made if the commission:

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341 (2000) 9 CCMA 6.9.6 EC 204404.

342 *KwaDukuza Municipality v SALGBC & others* (2009) 30 *ILJ* 356 (LC).

343 *Ibid.*

> "Without any doubt establishes that the officer/employee concerned is indeed the most suitable candidate for the particular promotional post. Only one candidate can be the most suitable candidate at any specific moment and the protective promotion of only one candidate is considered at a time."[344]

In *Department of Justice v CCMA*[345] and others it was held by the court that only the Public Service Commissioner has the power to make a recommendation of protective promotion and the Public Service Commission (PSC) may only make such a recommendation where it is satisfied that the employee concerned is the most suitable candidate for the job.[346]

It seems that arbitrators do not have the power to award protective promotion in the absence of the Public Service Commissioner being party to the dispute.[347]

Generally, protective promotion created more problems to the employer because in some instances if not all there were budgetary constraints as the posts are sometimes not funded.[348]

4 4 ACTUAL PROMOTION

Section 193(4) of the LRA may be used by arbitrators to remedy disputes relating to promotion.[349] Section 193 provides wide terms for unfair labour practice remedies that are available:

> "An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering, re-instatement, re-employment or compensation."

What has been debatable is whether arbitrators can indeed make an appointment or promotion for an example in cases where the statue (the Educators Act) sets out

344 *Department of Justice v CCMA and others* (2001) 22 *ILJ* 2439 (LC).
345 (2001) 22 *ILJ* 2439 (LC).
346 *Ibid*.
347 *Ibid*.
348 Basson *et al Essential Labour Law* 248.
349 *Khanyile v CCMA & others* [2005] 2 BLLR 138 (LC).

procedures which must be followed in approving promotion, and is clear that any promotion by the HoD can only be done with the recommendation of the SGB.

Those who hold the view that an arbitrator can make an appointment pin their hopes section 209 and 2010 of the LRA, the latter asserting that provisions of LRA will prevail in instances of conflict[350] and others believe that arbitrators cannot usurp functions of employers. However; this does not necessarily mean that there are two schools of thought on the issue. The point is that each case will be dealt with on its own merits but in the final analysis arbitrators have to make a decision.

In *Minister of Home Affairs*[351] it was argued on behalf of the employer that only the Minister has the statutory discretion to make appointments, and arbitrators cannot. This was rejected by the courts relying on the LRA.[352]

In *Minister of Safety and Security v General Public Service Bargaining Council and others*[353] Lagrange AJ stated that:

> "The remedial powers which are afforded to an arbitrator when making an award under section 193(4) of the LRA are powers derived from that Act and are not same powers of appointment exercised by the National Commissioner acting within the parameters of N1/2004 and other statutory instruments governing his authority, nor are they substitute for those powers he possesses. It should be noted that in so far as it might be argued that the provisions of section 193(4) conflict with the procedures to be by SAPS when implementing promotions, section 2010 of the LRA will prevail."

On the other hand in *KwaDukuza Municipality v SALGBC*[354] it was held that it is impermissible for a court or arbitrator to substitute its own decision-to give effective promotion- for that of the employer. In this case reference was made to the Supreme

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350 *Minister of Home Affairs v General Public Service Sectoral Bargaining Council and Others* (JR 1128/07) [2008] ZALC 35. See also *Minister of Safety and Security v Safety Sectoral Bargaining Council and others* (P186/08) LC 24.

351 (JR 1128/07) [2008] ZALC 35.

352 Ss 209 and 210.

353 *Minister of Safety and Security v Safety Sectoral Bargaining Council and others* (P186/08) LC 24.

354 *KwaDukuza Municipality v Dunn & others* [2008] 11 BLLR 1057 (LC).

Court of Appeal's judgment in *Minister of Defence v Dunn*[355] although this was said with reference to review powers of the High Court (HC).

In an event that an educator is appointed to the same post it means that one of them is additional or in excess and the employer would have to act in accordance with operational requirements.[356]

One option could be demotion on the basis of the award of the arbitrator who made the finding.[357] Alternatively, the employer can approach the High Court in review for proceedings to set aside its appointment of the successful candidate and this was confirmed by the Supreme Court Appeal (SCA).[358]

Much as I agree with the assertion that powers given to arbitrators in terms of the LRA[359] are not the same as those for instance in the Educators Act [360] for purposes of promotion in education the SGB holds the key to any promotion. What becomes peculiar and different with educators is that any appointment, promotion, or transfers should be done within the parameters of the SGB recommendation.[361]

Another factor to be considered is the impact of such decision in the smooth running of the school. This is raised in the context that when arbitrators make these appointments in some instances the previous appointments are not often set aside. As schools are public entities it is important for arbitrators to consider that efficiency and good tone of the schools are paramount to the success of learners.

In some schools SGB's are not readily amenable to what they perceive as imposition of appointments particularly promotions in their schools and sometimes simply chase away the appointee. It is very important that when arbitrators pronounce they should apply their mind; therefore they should pronounce themselves clearly with regard to

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355 *Minister of Defence v Dunn & others* [2008] 2 AII SA 14 (SCA).

356 *SACCAWU & others Mahawane Country Club* [2002] 1 BLLR 20 (LAC).

357 *PSA v Department of Justice and another* (2004) 12 BLLR (LAC) par 33.

358 *National Education Health & Allied Workers Union v UCT* (2003) 24 *ILJ* 95 (CC) paras 33 and 38.

359 S 209.

360 EEA 76 of 1998 s 6.

361 *Ibid.*

joined parties. This is very tight call to make as joined parties have contractual agreement with the employer and it might be difficult for arbitrators to interfere.[362]

4 5 COMPENSATION

Where an employer commits an unfair labour practice as a result of a procedural irregularity (such as not processing an application before an appointment is made, or where an employee is subsequently dismissed) the remedy of compensation is often granted.

The compensation is normally the salary that the person missed out on for the period when they should have been appointed but were not. There have also been a number of cases where compensation has been awarded even though a person has not yet been promoted.

Section 213 of the LRA[363] defines compensation as "any *payment in money or in kind…made or owing to any person for that person working for another person, including the state…"*

Section 194[364] provides guidance in respect quantification of compensation to be awarded and arbitrators are not allowed to award more than twelve months' remuneration as compensation and that it must be just and equitable. The majority of promotion disputes would fall within the category of non-patrimonial loss.

4 6 REPEATING THE PROCESS

Repeating the process should be carefully considered taking into account the implications as well as the rationale for such an order. Unique facts of the case should be carefully considered before repeating the process.[365] In schooling environment repeat of a process should be considered when there is gross

362 *PSA v Department of Justice & others* [2004] 2 BLLR 118 (LAC) 33.

363 66 of 1995.

364 LRA 66 of 1995.

365 *Pityana v MEC, Department of Education, Eastern Cape Province* (2009) 30 *ILJ* 2664.

irregularity and the applicant shows that if it was not for unfairness in the process he stands a good chance to be appointed.[366] It is pointless to temper with the good tone of the school even in cases where based on merit there is no prospects for the applicant to be appointed even if the process is repeated or even if there was no unfairness.[367]

Decisions of arbitrators when it comes to relief are very important to the enhancement of quality public education. When making these awards arbitrators should be mindful of the state of education more particularly at the institution with a dispute. As much as there is a contractual obligation for educators to fulfil they have an obligation derived from section 29 of the Constitution and the preamble of SASA.

The public sector is not about making more business it is about efficiency and effectiveness. It should only be in cases where the best candidate was overlooked where any tempering with appointment should be done. However, a great emphasis should be how the department and the SGB's conform to the law and that they should lead by example as this would minimise disputes.

As much as the LRA provides discretion to arbitrators when it comes to relief it is also incumbent on the arbitrators to understand the space and scope in which they are operating. Understanding of the public education sector will help arbitrators to find more appropriate relief that will help in the delivery of education.

366 *Ibid*.

367 *Ibid.*

CHAPTER 5
STRIKING A BALANCE BETWEEN THE INTERESTS OF THE EMPLOYEES AND THE LEARNERS IN A PROMOTION DISPUTE

Section 23(1) of the Bill of Rights provides that everyone has the right to fair labour practices whereas section 28(2) of the Bill of Rights provides that the child's best interests are of paramount importance in every matter concerning the child. The question then is how one resolves a conflict between these two competing fundamental constitutional rights. Section 23(1) of the Bill of Rights provides that everyone has the right to fair labour practice while section 28(2) of the Constitution provides that: "A child's best interests are of paramount importance in every matter." Our Constitution guarantees learners a basic right to education[368] and provides that in all matters concerning the child, the best interests of the child are of paramount importance.[369]

The courts have noted that the right to basic education, unlike other socio economic rights, is "immediately realizable" and there is no internal limitation clause in the Constitution requiring that the right to basic education be "progressively realized" within "available resources" subject to "reasonable legislative measures".[370] Although reference *in casu* is to provision of resources it is however clear that the right of learners to basic education cannot be suspended for any other reason. Any negation or suspension of that right is suicidal for any nation or society.

The evaluation of fairness within the context of an unfair labour practice requires that the situation is looked at from both the employer and the employee's perspective.[371] The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee.[372]

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368 S 29(1) (a) of the Constitution.

369 S 28(2) of the Constitution.

370 *Governing Body of the Juma Musjid Primary School* v *Essay* 2011 (8) BCLR 761 (CC).

371 *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 (4) SA 577 (A) 589C-D; *National Education Health & Allied Workers Union v UCT* (2003) 24 *ILJ* 95 (CC) 33 and 38.

372 *Ibid.*

A third factor to be taken into account, especially in promotion disputes in the public service, is the public interest. Hence, in *Woolworths (Pty) Ltd v Whitehead*[373] the court emphasised the importance for consideration of societal interest when matters of fairness are considered and the court noted as follows:

> "Fairness… requires an evaluation that is multidimensional. One must look at it not only from the perspective of the… employee but also employers and the interests of society as a whole. Policy considerations play a role."[374]

It is true that education is a public concern and everyone has an interest on the decisions taken with regard to education. This was evident in *Ntlini JSS*[375] where educators challenged the decision of Superintendent General to appoint without the recommendation of the SGB. The court ruled that even educators have an interest on who should be promoted.[376]

The Constitution recognises children as one of the categories of people that should enjoy extra protection. This recognition by the Constitution is derived from a number of international conventions, one of them being United Nations Convention on the Rights of a child 1989.[377] This convention makes profound pronouncements and places obligations on all parties concerned with matters that have a bearing on the right of children.[378] Article 3 of the Children's Convention gives useful content to the best interest requirements and states that:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration.
2. States parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties for his or her parents, legal guardians, or other individuals legally responsible for

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373 (2000) 21 *ILJ* 571 (LAC) 127.

374 *Woolworths (Pty) Ltd v Whitehead supra*.

375 *Makhitshi and others v SGB Ntilini JSS and others* [2010] 615/2008.

376 *Ibid*.

377 See also OAU Charter in the Rights of the Child.

378 Hague Convention on the Civil Aspects of International Child Abduction 1980, Civil Aspects of International Child Abduction Act 72 of 1996.

him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform to the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

These instruments are meant to protect the child's best interest at all material time.

The courts have lived up to the challenge and brought life to the realisation of the right of learners as enshrined in our Constitution. In promotion disputes in public education, a fourth and even more important consideration than the public interest to take into account, is the best interest of the learners of the particular school where the promotion is sought.[379]

The HC[380] has emphasized that in process of promoting educators, the rights and interests of the learners at the school are of paramount importance because section 28(2) of the Constitution provides that "A child's best interests are of paramount importance in every matter concerning the child".[381]

Hence, in a promotion dispute in the public education sector, it is not the interests of educators, departments of education or trade unions that are of paramount importance, but the best interests of the learners. The central focus in promotion disputes (especially when it comes to relief) in the ELRC should therefore strive to strike a balance between the rights and interests of the learners at the particular school as well as those of educators.

Before granting any relief, an arbitrator should reflect on how this would be affecting the learners at the school and whether indeed this would be in the best interests of the learners.

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379 *Settlers Agricultural High School v Head of Department of Education, Limpopo Province* [2002] JOL 10167 (T).

380 *Ibid*.

381 Per Bertelsmann in *Settlers Agricultural High School v Head of Department of Education, Limpopo Province* [2002] JOL 10167 (T), case No 16395, delivered on 3 September 2002.

The effects of arbitration decisions could have devastating effects to learners in that, should an incorrect decision be made learners might have to leave with that decision for a long time. For an example affirmative action where the notion of suitably qualified is ignored and unqualified educator is promoted under the pretext of affirmative action. Other instances would be where arbitrations postponement and failure to join parties with substantial interest, these delays affect the tone of the school including learning and teaching as they cause uncertainty and sometimes tension amongst staff members at the school.

In education all efforts and activities should be geared towards realising the interest of the learners.[382] This has been proven by a number of decisions in our courts putting emphasis on the matter.

The SCA in *Phenithi v Minister of Education*[383] considered the constitutionality of section 14(1) of the Educators Act, and agreed that the limitation by section 14(1) of the educator's right to procedural fairness was a reasonable and justifiable limitation when balancing right to fair labour practice in section 23(1) against right enshrined in section 28(2) providing that the child's best interest are of paramount importance in every matter concerning the child.

In the *Settlers*[384] case the competing rights of the child on one hand was considered vis-a-vis the right to equality. The Department appointed an African female in order to redress the imbalances of the past even though the governing body recommended a white male as its preferred candidate. On review the HC accepted that the right to equality and the need to redress imbalances of the past, are fundamental values in our Constitution, but held that the Constitution also entrenches rights to proper education and provides in section 28(2) that a child's best interest are of paramount importance in every matter concerning the child. It was further held that as important as the rights of educators are, and in particular those belonging previously disadvantaged communities, the paramountcy of children's rights and interest must

382 S 28(2) of the Constitution.

383 [2006] 9 BLLR 821 (SCA).

384 *Settlers Agricultural High School v Head of Department of Education, Limpopo Province* [2002] JOL 10167 (T).

not be overlooked. The decision of the Education Department to appoint the African female department was duly set aside.

As Sachs J reflected on the matter *of Head of Department, Department of Education, and Limpopo Province v Settlers Agricultural High School*:

> "So now education Department said, 'Aha, we are coming back to this' and they asked for a very late appeal to our court. We responded that it was too late the school had been functioning for over a year with the principal in place. It would have been too destabilising for the children, for the teachers, for the tranquillity that a school needs to function, to hear an appeal then, months after the time for noting the appeal has passed."[385]

The school could have lost the principal who had the confidence of the governing body and could have experienced turbulence if a new principal had been appointed nine months after the school body's first choice.

In *Harts Water High v HOD Education NC*[386] the same issue was considered by the court. In casu the High Court set aside the Education Department decision not to appoint the stronger white male candidate preferred by the school governing body but to appoint a weaker candidate in order to address the imbalances of the past. The court held in this case that the best interest of the child cannot be a rigid rule and should depend on the circumstances of each case. Therefore, the best interest of the child principle could be limited by section 36 of the Constitution. According to this judgement it should be noted that no right is absolute and can be limited if it is in the interest of justice.

In the *Marizburg College* [387]the court was not pleased with the failure of the department to make a decision on the expulsion of the learners depriving learners of 21 months of certainty regarding their future education and noted as follows:

> "I find it disturbing (to put it mildly) that a public official had to be galvanised into action to his duty only when served with a Court application. Even more disturbing in his attitude as spelt out in paragraph 11 of his answering affidavit,

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385 *Settlers Agricultural High School v Head of Department of Education, Limpopo Province* [2002] JOL 10167 (T), case No 16395, delivered on 3 September 2002.

386 *Harts Water High and Another v Head of Department Education NC* 2006 1138H-1139F.

387 *Maritzburg College v C.R. Dlamini NO and others Natal Provisional Division* (2009) 2089/2004.

> quoted earlier in this, that there is ' ... no obligation on me to expeditiously make a decision on expulsion as a number of issues had to be considered by me'. He then goes on in the paragraph to state that to expect him to make a decision within 2 months was 'utterly unreasonable'. This attitude not only ignores the obligations on the Governing Bodies to maintain discipline and good standards at the schools, but more importantly disregards the rights of the pupils who stand in the shadow of expulsion. They have a right to know expeditiously whether they are going to be expelled so that they may be taken up in another school."

Setting aside the order of the court in *Juma Musjid Primary School*,[388] the Constitutional Court held that the order had an impact on the learners' right to a basic education under section 29(1) of the Constitution and on learners' best interests under section 28 of the Constitution.[389] The court ruled that:

(a) the Trustee had a constitutional duty to respect the learners' right to a basic education under section 29 of the Constitution,
(b) having regard to all the circumstances of the case, including that obligation, the Trustees had acted reasonably in approaching the High Court for an eviction order but that was not sufficient reason for the High Court to grant the eviction order, and that
(c) in considering the eviction application, the High Court failed to consider properly the best interest of the learners and their right to a basic education.

The court held that the MEC had a primary positive obligation to provide access to schools in respecting the learners' right to a basic education, but the trustees had a negative obligation in terms of section 8 of the Constitution not to infringe that right.[390]

This sums it all that what becomes a priority is the tranquillity of institutions so as to provide better education for the learners. In determining what is fair and what remedy would be appropriate in a promotion dispute in the public service, the public interest must be taken into account because ultimately the sole purpose of the public service is to serve the people. This necessarily means that the needs of the community must

388 *Governing Body of the Juma Musjid Primary School & Others v Ahmed Asruff Essay NO and Others CCT* 29/10.
389 *Ibid*.
390 *Ibid*.

be taken into account and can play a decisive role in the ultimate finding when having to decide whether a particular candidate should have been promoted.[391]

More importantly is how arbitrators take into account the interest of the school. This does not negate the fact that no right can be applied in such a rigid manner that leads to the violation of all other rights guaranteed by the Constitution.[392]

391 *South African Police Services v Inspector Zandberg and others* (Case No JR1162/08), delivered on 2 September 2009 by the Labour; also see *Coetzer & Others v Minister of Safety & Security & Another* (2003) 24 *ILJ* 163 (LC) where Landman J, on the basis of community needs ordered the South African Police Service to promote white inspectors in the explosives unit (the bomb squad) when no members of designated groups applied, and when the employer refused to promote them because it wanted to reserve the posts for members of designated groups.

392 *Harts Water High and Another v Head of Department Education* NC 2006 1138H-1139Fd.

CHAPTER 6
CONCLUSION

It is clear that educators, like all other employees, enjoy fundamental rights as enshrined in the Constitution and the LRA. One of those rights is the right not to be subjected to unfair labour practice.

However, from the discussions it is clear that in dealing with the definition promotion one has to establish the existence of employment relationship between the employer and the employee. Having established the existence of that relationship, an enquiry has to be made on the nature of the job in question so as to establish whether promotion is involved or not. The discussion has been able to clarify the confusion that might be there on the various employers of educators in terms education laws i.e. SASA and the Educators Act.

What is apparent from the discussion is that in dealing with unfair conduct by an employer due regard should be given to both procedural and substantive fairness.

Reference has been in this article to a number of cases adjudicated upon by the CCMA and LC. All cases referred to indicate that the employer's prerogative to appoint whoever it so wishes will not be readily attacked by the Courts or CCMA, as long as it follow its own procedures and apply its mind at all material times.

Available remedies that may be granted to aggrieved employees have been discussed. These remedies include remittal, declaratory orders, protective promotion, actual promotion and compensation.

Critical to the discussion has been how the balance between the rights of learners and those of educators must be maintained when dealing with disputes relating to promotion. It has been established through discussions in this treatise that in balancing these competing rights it should be borne in mind that learners should be a priority.

It is advisable that care should be taken in dealing with unfair labour disputes by all concerned.

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