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An Overview of the Contentious Issues Inherent in the Promotional Exercises in the Workplace: Unfair Labour Practices Re-Visited

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Abstract: This study examines fairness or unfairness of promotion in the workplace by considering section 186 (2) (a) of the Labour Relations Act 66 of 1995 (LRA) which establishes that any unfair act or omission relating to amongst others promotion may result in unfair labour practice by the employer towards the employee. The two fundamental principles of fairness namely; substantive fairness and procedural fairness are examined in detail to determine the consequences and extent of failure to consider or apply them in the promotion of employees when the need arises. The study discusses the controversial cadre deployment policy of the African National Congress (ANC) and its impact on the promotion of deployees to administrative and managerial positions in the public service.

Key words: Unfair labour practices, promotional exercises, demotion, Cadre-deployment, workplace, South Africa

INTRODUCTION

The right to a fair labour practice is guaranteed in terms of section 23 (1) of the CRSA (1996) and section 186 (2) (a) of the LRA, respectively. Regarding the issue of promotion in the workplace if an employee's right to promotion is transgressed by denying or refusing to promote this will amount to unfair labour practice. The employee may therefore sue for unfair labour practice. Promotion means a form of recognition for employees who make significant and effective research contributions in the workplace (Heathfield, 2011). It is against this backdrop that the employer is expected to apply its mind when considering whether to promote or not to promote an employee (Wuorio, 2001). The case of Mashegoane v University of Limpopo is a clear illustrative scenario of how the promotional issues of employees in the workplace could be handled. In this case the question was whether the University's refusal to appoint a lecturer as Dean related to promotion or not. The Labour Court held that if the employee had been appointed his salary would have remained the same but he would have received a Dean's allowance and would have a car at his disposal. These are the benefits he would receive. But the Labour Court was also of the view that once appointed as the dean of the faculty, the employee's status would be considerably elevated. He would also become the chairperson of the faculty board. It goes without saying that the employee would be clothed with certain powers and authority to be able to manage and control the faculty. For this reason the court held that the position of the Dean is not a token position that it has real meaning and real power attached to it. It entailed a higher status and additional responsibilities. Therefore, the court said the appointment of the Dean constituted a promotion.

The earlier decision laid a solid foundation for ensuring that when considering the issue of whether to promote or not it is imperative for the employer to be procedurally and substantively fair. The former provides for the rules which the employer has to follow when promoting an employee and the latter addresses the reasons for preferring one employee over another for promotion.

It is pertinent to point out that the paper considers the issue of promotion from private and public employment perspectives and highlights the fact that promotion remains within the managerial prerogative to decide upon (McGregor and Dekker, 2012). It is within the discretion of the employer to promote an employee. The employees are not conferred with the right to promotion however, at times circumstances may show that an employee had a reasonable expectation regarding promotion (McGregor and Dekker, 2012). The employer has to conduct and follow a fair process when promoting

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or choosing not to promote an employee. Employer who failed to observe and follow such process would be considered to have transgressed section 186 (2) (a) of the LRA.

PROBLEM STATEMENT

In the workplace, promotion which is done outside of the principles of fairness is destructive and invites unnecessary and unwarranted litigations. Although, several court cases have proved that both substantive and procedural fairness are key in the promotions of employees at the workplace some of the employers are seen to be reluctant in taking these pivotal principles of fairness very seriously thereby continuing to incur litigious costs which are unwarranted. Though, it is trite law that the employers are not bound to promote their employees to higher positions but when such situations arise they are bound to act fairly and within the boundaries of the LRA. Most scholars have written a lot on substantive and procedural fairness but there is scholarly inertia on the issue surrounding fairness of promotion of employees in the workplace. This is the reason why this study makes a modest contribution to the scholarly debates and notes that any promotion which is done or effected without putting into consideration the fairness of the promotion will be regarded as invalid and therefore subjected to review by the necessary forum such as the CCMA and Bargaining Councils.

The issue of cadre deployment policy of the African National Congress (ANC) in the public service is considered to be problematic. The implementation of cadre deployment has a huge impact on the fairness of promotions in the workplace especially in parastatals and government establishments where government is the majority shareholder. People are being promoted or appointed to senior positions without having requisite qualifications and expertise to occupy those managerial positions. These promotions and appointments are being done at the expense of the deserving and competent employees or prospective employees. In most instances, these promotions are done and effected without following both the principles of substantive and procedural fairness as contemplated in the LRA.

METHODOLOGY

The methodology is reliance on literature relevant to the topic. Therefore, qualitative research method was used whereby case laws, articles, journals and books were consulted and analysed.

SUBSTANTIVE FAIRNESS OF PROMOTION

In order for the decision of the employer to be substantively fair the employer must provide reasons for promoting an employee. If the employer does not have valid reasons for promoting an employee if challenged successfully by a competing employee seeking the same position this will amount to an unfair labour practice. The employer is expected to show that its decision was based on a correct principle and that the employee is promoted because the employee is suitable for the position. In other words, there must be a logical connection between the real reason and the decision taken (De Plessis *et al*., 2002).

Therefore, as far as substance is concerned evaluating the reasons why an employer ultimately decides to prefer and appoint one employee instead of another or over others is a difficult exercise. Recent awards show that the CCMA should exercise deference to an employer's discretion for example in Marra v Telkom SA Ltd. The court stated the following: employees personal interests need to be consistent with the needs of the enterprise not as objectively determined in a perfect corporation but as determined by those who have the legitimate power to manage the enterprise.

But even if the needs of the employee apparently meet the needs of the employer in terms of being suitable for promotion the employer retains discretion to appoint whom it considers to be the best candidate (Grogan, 2008). The CCMA commissioners, Bargaining Council arbitrators and the courts would undoubtedly uphold this decision unless it is clear on the facts of a particular case that the employer's decision was arbitrary or actuated by malice or mala fide.

In the case of Public Servants Association Obo Dalton and Another v Department of Public Works (1999) the commissioner accepted that: it may be difficult to justify the choice of a particular candidate in precise terms and that an employer is at liberty to take into account subjective factors such as performance at an interview when considering an appointment or promotion.

Similarly, in the Damon's case earlier referred to earlier it was stated that unless the appointing authority was shown to have not applied its mind in the selection of the successful candidate the CCMA may not interfere with the prerogative of the employer to appoint whom it considers to be the best candidate.

In the same vein, it was decide in the case of Van Rensburg v Northern Cape Provincial Administration (1999) that interference in the employer's decision is only justified where the conduct of the employer is so grossly unreasonable as to warrant interference that they failed to apply their minds. This means that an employer will be

allowed quite a margin of latitude in coming to the decision. This is subject of course to legislation such as the Employment Equity Act (EEA) 1998 and the fact that employers often forfeit this discretion at least partially, through, for example a collective agreement (Grogan, 2008) but the employer has to provide valid reasons.

Furthermore, the CCMA has shown a willingness to scrutinize those reasons as typically manifested by the deliberation process of the selection panel to ensure that with due deference to the employer's prerogative there is a logical connection between the real reasons and the decision taken. However, this scrutiny by the CCMA has led to a number of examples of consideration that are acceptable and considerations that are unacceptable which are discussed.

Acceptable considerations: The court in the case of Rafferty v Department of the Premier found that assigning a certain hierarchy to the stated requirements for a job is acceptable. The employer in this case set three broad requirements for the post in question but in making a decision regarded one of these three as more important than the others and was not found to be fatal at all. Applicants for vacant and advertised posts often complain about the fact that they were asked or not asked certain questions by the panel. This was the case in Van Rensburg v Northern Cape Provincial Administration 1997 where the employee complained that the panel never asked him questions about what was arguably his strongest point. This defect was not found to be fatal as the evidence showed that the panel was fully informed about the candidate's expertise in this area and indeed gave the candidate a very high mark in this area.

Deviation from hierarchy of marks achieved by candidates in the interview: In the cases of Van Rensburg v Northern Cape Provincial Administration and Public Servants Association Obo Dalton and Another v Department of Public Works the aggrieved employees received higher marks at the interviews than other candidates who were ultimately preferred. This defect is also not fatal, provided the employer has good reasons for doing so and unless for example, the employer is bound, in terms of its policy to the ratings achieved at the interview. In Mbatha and Durbun Institute of Technology (2005), the commissioner held that the mere fact that an unsuccessful applicant for promotion received a higher rating from a selection committee than the successful applicant does not necessarily render the failure to appoint the former unfair. But the employer should prove what those criteria are and that they are reasonably related to the requirements of the post in question.

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

Prior promises: Employees are prone to worry about their future and often consult with superiors about their prospects (Basson *et al*., 1998). In general, superiors should be careful about making promises but such promises will not in themselves, entitle an employee to promotion (Garbers, 1999). In general, if an expectation is created, this merely entitles an employee to be heard before an adverse decision is taken not to a right to get what was promised. Sometimes however, such promises have a material effect on the outcome of the employer's decision and then the position will be different. If an employer has regard to irrelevant criteria when choosing between a better qualified candidate and a less qualified candidate, the failure to promote the better qualified candidate may also be unfair (Grogan, 2003). Employers are also guilty of unfair conduct relating to promotion if they give employees a reasonable expectation that they will be advanced and then, without adequate reason, frustrate that expectation (Grogan, 2003). The mere fact that an applicant for promotion has been treated unfairly does not necessarily mean that he is entitled to be promoted. In Mbatha and Durban Institute of Technology (2005), the commissioner held that the mere fact that a preferred candidate for promotion did not accept the post does not entitle another short-listed candidate to be appointed. The test is whether the candidate has proved that he would have been appointed or promoted had it not been for the unfair conduct of the employer and also whether he was found to be appointable or promotable during the interview.

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

Past practices: Sometimes the procedure for promotion is consistently deviated from in practice over a period of time. This may raise both procedural and substantive issues. If an employee can show that the original

procedure was in fact amended such a deviation from the deviation so to speak may well be found to be procedurally unfair (Gabers, 1999). As far as substance is concerned, it sometimes happens that a policy requires a panel to make recommendations to a higher body about whom should be promoted. Past practice may show that the higher body has never deviated from the recommendation made by the panel (Gabers, 1999). Consistency would then seem to require that if an employee is recommended, the employee must be promoted. It is submitted that such a view is incorrect. If the test to decide on the substantive fairness of a promotion is whether the employer applied its mind, surely the mindless application of a policy cannot be relied on in support for an attack on fairness. Or viewed from the other side a denial of promotion in such a case may well be an indication that the higher body actually applied its mind to the issue at hand.

Affirmative action: There is little doubt that an employer may take affirmative action into account in denying promotion of an employee who is not a member of a designated group (Basson *et al*., 1998). Bear in mind that should the employee take the matter further, the dispute will be one concerning discrimination and should be referred as such by the employee. This becomes evident when one looks at the decision of Sasko (Pty) Ltd. v Buthelezi and others (1997) which was followed in SATA Obo Van der Mescht v Telkom SA (Pty) Ltd. (1998).

Furthermore, the fact that an employee falls within one of the designated groups does not mean that employee has a right to be promoted in a given case. The employer retains its discretion within the parameters of its affirmative action policy and the Employment Equity Act, 1998 once its affirmative action provisions become operative to appoint the best person for a job. The employee in Mathakgale and S A Police Service a black female applied for a promotional post. She was short listed as a male and an Indian male was appointed in order to address equity and gender. Quite understandably, the arbitrator pointed out that Ms. Mathakgale had been prejudiced by being classified as a male. She was awarded compensation.

Subjective factors taken into account by the selection panel: Earlier, it was said that the managerial prerogative in the sphere of promotions allow an employer to take subjective considerations (such as performance at an interview) into account. An employer will be able to take any other consideration provided it is sufficiently job-related and not discriminatory into account (Garbers, 1999).

Interestingly in Vereeniging van Staatsamptenare Obo Badenhorst v Department of Justice (1994). The commissioner found it acceptable that the employer in judging applicants for appointment as a lecturer took the age and general life skills evidenced by experience outside the department of the successful applicant into consideration because it was sufficiently relevant. When one looks into this decision enquiringly it becomes evident that apart from the general rule that the panel should consider only the information submitted by the applicants, the panel can deviate from the general rule and consider outside evidence of an applicant provided that evidence is relevant and will not prejudice the applicant.

Unacceptable considerations: In general and using the Damon and Van Rensburg test if an employer or its selection panel takes into account any consideration which shows that it failed to apply its mind to the matter at hand, the defect will be fatal and the decision thus unfair (Basson *et al*., 1998). Perhaps the most obvious example of this would be where the decision of the panel is swayed by outside influences such as the preference of more senior people in the organization.

Conduct by an employee inconsistent with complaints of unfairness: It seems that the normal rules regarding waiver apply to claims of unfair conduct relating to promotion (Basson *et al*., 1998). Waiver in this context would mean that an employee who in principle has the right to challenge the conduct of the employer acts in such a way that it is clear that he or she is not going to exercise that right.

But even if the conduct of the employee does not constitute waiver in a technical sense, inconsistent conduct of an employee may be taken into account in judging fairness. For example where a trainee manager at one branch was laid off and during the lay-off, accepted work as a general assistant at another branch this was found to be demotion. However, the employer's conduct relating to that demotion was found not to be unfair as the employee consented to the transfer. Consent by an employee of course should be approached carefully as it often does no more than reflect the inequality in power between employer and employee. Similarly, it often happens that employees apply for voluntary severance packages in the period immediately preceding a challenge to the employer's conduct relating to a promotion (Basson *et al*., 1998).

In Mclellan the application for a severance package was taken into account as a factor supporting a finding that the employer's conduct was not unfair. However, the case of Classen indicated that that inconsistent conduct

on the part of an employee which may point to a waiver of the right to challenge the employer's conduct should be seen in context. It was further argued that the applicant's applications for severance packages are inconsistent with their applications for promotions. This would undoubtedly normally be the case. However, according to Mr. Classen his career prospects in the department appeared to be rather dismal after he had on two occasions received no response to his application for promotion to a post in which he had served in an acting capacity. The same obviously applies to Mr. Deysel. He did not receive a response to his application for severance packages and the post was re-advertised it was in his interest to re-apply for the post and if successful get promoted.

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

Can it be said that internal candidate who got the position has been appointed or promoted? Doubt existed as to the difference between promotion and appointment (Basson *et al*., 1998). Some ingenious arguments exist in support of a narrower interpretation but the majority of judgments appear to favour a wider interpretation in terms of which an external applicant is appointed while an internal one is promoted. Promotion deals with the substance of the new job. When the employee's current job is compared with the new one and the new one brings about higher remuneration levels more or better fringe benefits, greater status, authority and power and more responsibility, the new job involves a promotion even though the employee had to apply for the position (Grogan, 2003).

The case of Vsa Obo Badenhorst v Department of Justice (1990) referred to above, clarifies the matter. In this case, the old department was restructured and all existing employees were invited to apply for the newly created posts in the new department. The employer argued that she should be treated as a job applicant and that the dispute therefore did not involve a promotion. The court concurred with the following CCMA Commissioner's finding: it appears that the applicant for a post which would have resulted in a promotion for her to a more senior level if her application had been successful. While we accept that this was not a promotion in the ordinary sense of the word I do not believe that in that peculiar nature of the situation if the rationalization process can allow semantics to change the essential nature of the dispute. No evidence suggested that the applicant's years of service would not be transferred to the post in the new structure nor was it suggested that her employee benefits would be interrupted by such transfer. A new post would still essentially be with the same employer the Department of Justice but in a remodelled structure in conformity with the rationalization. It is specious to suggest that the applicant was a job applicant in the sense of being an outside job-seeker.

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

In the case of DOJ (2004) settled the issue by holding that a dispute arising from an application by an employee for an (externally) advertised post constitutes a dispute concerning a promotion for purposes of LRA. The effect is that aggrieved internal applicants may refer their claims to the CCMA while aggrieved external applicants must approach the High Court. While this was described as a very unsatisfactory state of affairs it does not deprive the CCMA of jurisdiction to resolve disputes about internal promotion. The court rejected the argument that if an employer advertises a vacant post and indicates that potential applicants from outside its organization may also apply any dispute lodged by an existing employee who feels aggrieved by the fact that he or she was not appointed to that post cannot allege that this is a dispute relating to promotion.

The court stated at paragraph 58 that it: accept that where, as in this case, the employer has advertised the post both inside and outside his service a member of the public who applies for appointment to such a post would not be said to be promoted if his application were successful. I accept too that the result is that the existing employee will have a dispute relating to promotion and thus falling under item 2 (1) (b) while an applicant for employment who had not been appointed will simply have a dispute relating to non-appointment. That difference arises from the fact that each one of the two candidates has a different relationship with a decision-maker in this regard. The one is an employee of the decision-maker whereas the other has no existing employment

relationship with the decision-maker. The purpose of item 2 (2) (a) in including an applicant for employment in item 2 (1) (a) where he complains of an unfair labour practice based on unfair discrimination but not extending that to a case where his complaint is not based on unfair discrimination was that unfair discrimination is so unacceptable in the society that unfair labour practice protection against such conduct should be granted even to an applicant for employment but where the complaint is based on other grounds of unfairness a protection can be confined to existing employees.

The court further stated at paragraph 59 that: when an employer advertises a post both inside and outside its service, he thereby takes any subsequent dispute outside the ambit of item 2 (1) (b) so that one can no longer talk of a dispute relating to promotion. I think not. That construction of item 2 (1) (b) would simply make it too easy for an employer to evade the protection which the Act seeks to give existing employees by way of the unfair labour practice provision in item 2 (1) (b). An employer who wants to treat an existing employee unfairly in relation to promotion would simply advertise the post inside and outside of its service and then treat such employee unfairly in the knowledge that he is out of reach for the unfair labour practice provision in item 2 (1) (b). In such a case, the employee's remedy would be to approach the High Court. Unless his complaint is based on the infringement of the right not to be unfairly discriminated against I have serious reservations that a High Court would be able to come to such employee's assistance.

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

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

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

CADRE DEPLOYMENT AND PUBLIC SERVICE

The practice of cadre deployment finds its genesis in the ANC's Strategy and Tactics Policy Document that calls for the ANC to strengthen the hold of the democratic movement over state power and to transform the state machinery to serve the cause of social transformation. This document highlights that the levels of state power include the legislatures, the executives, the public, the security forces, the judiciary, parastatals, the public broadcaster and so on (De Havilland, 2009). The document requires that ANC members should owe their primary allegiance to the ANC wherever they may be deployed or promoted.

Through this policy competent employees who are not aligned to the ruling party ANC have been overlooked for positions and promotions in the public service while those who aligned to the ruling party have been placed in the positions for which they are not better qualified. In a sense it implies that the deserving candidates will be compromised when it comes to the issues of promotions and appointments. This issue of cadre deployment was dealt with in the case of Vuyo Mlokoti v Amathole District Municipality where it was held that cadre deployment was unfair towards the deserving employee on the basis of promotion. Pickering in his judgement held that: in my view the involvement of the Regional Executive Council of the ANC constituted an unauthorised and unwarranted intervention in the affairs of first respondent's council. It is clear that the councillors of the ANC supinely abdicated to their political party their responsibility to fill the position of the municipal manager with the best qualified and best suited candidate on the basis of qualifications, suitability and with due regard to the provisions of the pertinent employment legislation as set out in paragraph 1 of the recruitment policy. This was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters.

This judgement implies that the substantive fairness in the promotion of the employee was not followed. Unlike the EEA, the LRA affords no protection against unfair labour practices to applicants for employment; only employees can be promoted or demoted.

What these judgments inferred is that the issue of cadre deployment is illegal and unconstitutional since the appointments and promotion do not confine within the pretext of substantive and procedural fairness. Cadre deployment creates a climate for incompetence by the promoted or appointed candidates especially if they do not have the necessary expertise and consequently it invites low morale in the workplace by those candidates who have been overlooked.

PROCEDURAL FAIRNESS OF PROMOTIONS

It is of paramount importance that the employer conducts a fair promotional procedure when promoting or choosing not to promote an employee. The procedural fairness in the context of promotions means that where there are company policies, collective agreements and a statute that entails the procedures for promoting an employee an employer has to follow and comply with such procedures when promoting an employee. If the employer did not follow the correct procedure a new procedure (as a rule) must be followed. This means that the entire process of selection and evaluation must be started from scratch.

Be that as it may, procedural fairness of promotions is governed by a number of principles. The bottom line allows for deviation from the ideal (Basson *et al*., 1998). The ideal procedure where applications for a job are called for requires an invitation for applications the screening of those applications, the compilation of a short list, the invitation to an interview of short-listed candidates, the conduct of the interview and the ultimate selection (Basson *et al*., 1998). Employers may however, find themselves in a position where for example, the number of jobs at stake combined with time constraints prevent adherence to the ideal or a detailed and time-consuming procedure. Adherence to the ideal is not hard and fast as long as an employer adheres to the basic rule for a fair promotion which was described by the CCMA as ensuring that all candidates were afforded a reasonable opportunity to promote their candidature.

This was said in Vereeniging Van Staatamptenare Obo Badenhorst v Department of Justice (1999). In the light of the above, it is clear that adherence to the ideal or bottom line of a promotion procedure is not sacrosanct or a hard and fast rule. The employer can deviate from it under certain conditions as long as the deviation concerned is not fatal or does not result in material defect to the outcome of the whole process.

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

Perhaps the most often encountered and sometimes fatal mistake by employers is not to follow their own policies and procedures in deciding on promotions. On the other hand, arbitrators tend to tread warily in this area; there may be reasons for preferring one employee to another apart from qualifications and experience (Basson *et al*., 1998). The most glaring example of deviating materially from the company policy is found in NUTESA v Technikon Northern Transvaal (1997). Here, against the background of a policy and practice at the Technikon that posts be advertised, 5 posts were created with appointments of specific employees in mind was done secretly with the other employees presented with a fait accompli. Most often however, the failure to adhere to procedures will not manifest in complete failure as in the NUTESA case but in a failure regarding one or perhaps more of the steps in agreed guidelines. In the NUTESA case certain people were appointed to the newly-created positions without ever having been advertised. It was held to be unfair for an employer to advertise a position setting a prescribed minimum qualification but appoint a person who did not possess that qualification. Or to create a position for a specific person without advertising it internally in accordance with agreed procedures.

The commission 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. Most often however, a failure to adhere to procedures will not manifest in a complete failure as in the NUTESA case but in a failure regarding one or perhaps more of the steps in agreed guidelines (Du Plessis *et al*., 2002). One would expect that this judgment should have served as an eye opener to employers and discourage or stop them completely from committing similar mistakes of this nature in the handling of promotions but all the insights emanating from these decisions have been handled by

them with levity. The employers seem not to have learned anything from this judgment because even though they know about it they continue to commit the same or similar mistakes. As a result of this, the arbitrators and courts were left with no option but to interfere with the executive decision or managerial prerogative of the employers and ordered them to remedy the situation.

Defects in procedure can only be cured through a fresh procedure: Oten defects in procedure can only be cured through a fresh procedure (Du Plessis *et al*., 2002). It may well happen that an employer will be alive or alerted to the fact that it possibly treated employees unfairly in the promotion process. In such cases, the defect may well be fatal in the sense that the application of the process to the aggrieved employees will be either too little or too late or both. In Public Servants Association Obo Dalton and Another v Department of Public Works (1998) for example all positions were advertised as part of a restructuring exercise and employees were invited to apply for their old positions or any other position for which they wished to be considered. Following applications, an independent panel interviewed employees. The two employees who applied for higher posts were never invited to an interview. Following complaints interviews by newly appointed officials of the department were arranged who according to the evidence, asked only a few desultory questions during the interviews.

Similarly, it sometimes happens that an employer advertises a position states certain requirements for that position but applicants did not meet the requirements (Basson *et al*., 1998). The question now is whether the employer may relax those requirements and exercise its discretion to appoint someone from the pool of applicants only. This is what happened in the case of Nutesa v Technikon Northern Transvaal (1997) where it was held that the posts had to be withdrawn and re-advertised with new requirements. In a curious award the conduct of the employer was found to constitute discrimination under the old Item 2 (1) (a) of Schedule 7 to the Labour Relations Act, 1995. It is submitted that where a current employer is prejudiced in the sense that the employee decided not to apply because he or she did not meet the stated requirements, a failure to re-advertise may well constitute unfair conduct relating to a promotion.

The applicant in Du Plooy and National Prosecuting Authority succeeded in persuading the commissioner that she had been unfairly denied promotion. The arbitrator found that Ms. Du Plooy's supervisors had ganged up on her because she had lodged a grievance concerning her non-promotion to another post. The arbitrator rejected the employer's claim that it had been seeking to promote affirmative action because Ms. Du Plooy was also a member of a designated group and was eminently qualified for the post for which she had applied. The Prosecuting Authority was ordered to promote her.

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

CONCLUSION

From the onset, this paper deals with crucial issues to be considered in the determination of fairness in promotion processes. This study outlines those factors such as the possession of the necessary qualification, ability to do the work and performance at an interview that should be taken into consideration when preferring one employee over another for promotion. However, it has been argued that an employee who possesses these factors does not automatically become entitled to a promotion (Basson *et al*., 2009). One of the substantive reasons that may be acceptable in the deviation on these factors is the affirmative action. An aggrieved employee may bring a claim of unfair labour practice before CCMA and prove that in the selection process for promotion,the employer exercised its discretion capriciously the reasons provided by the employer cannot be substantiated that the decision was taken on the wrong principle or the decision was taken in a biased manner (McGregor and Dekker, 2012). It must be borne in mind that once the above requirements are proved therefore the CCMA would give the appropriate relief based on the facts of the case.

On the procedural front if there were irregularities in promotion processes then the employer has to remedy such irregularities by conducting a fresh procedure. This may include the re-advertising of a post or granting an interview which was originally refused (Basson *et al*., 2009). If an employee has reason to believe that the selection panel is not competent such employee is allowed to challenge the composition and the competency of a selection panel. It is important that an employee who challenges the composition and the competency of the

selection panel takes cognizance of the fact that the members of the selection panel need not have academic qualification in order for them to form part of such a panel. What is vital is whether the selection panel has applied its mind during the selection process if not and then the employee has a good ground to challenge the composition and the competency of the selection panel.

In the case of Van Rensburg v Northern Cape Provincial Administration (1997) it was stated that once the panellist complies with the requirements for the performance of an administrative act ratione persone, there cannot be a legal objection to his or her sitting on such a panel. All that is required is that the persons on the panel should be in a position to make a reasonably informed decision, in other words that they should be reasonably knowledgeable.

RECOMMENDATIONS

It is submitted that in order for the labour laws to remain viable every selection panel in any work place should be a statutory body with its members possessing special knowledge and qualifications in matters of selections either for appointments or promotions. This applies to matters that involve demotion of employees. It is not sufficient enough as suggested by the Van Rensburg case that the members of the selection panel should be reasonably knowledgeable and special qualification is not required. When researchers look at the case of PSA Obo Bruwer's case the appointment of an employee of less formal qualification would have been avoided had an impartial statutory selection panel was established. This panel would assist in reducing the backlog of matters at the CCMA and most importantly it would ensure that candidates are assessed properly during the selection process and are thus appointed because they are qualified for the positions.

With regard to the issue of cadre deployment, it is submitted that steps to reverse any appointments made purely as a result of political deployments should be revisited and reconsidered. Consequently, appointments, promotions, transfers and dismissals should be made solely on the basis of the requirements set out in sections 195 and 197 of the Constitution and the Public Service Act.

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