THE UNFAIR LABOUR PRACTICE
RELATING TO PROMOTION

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This article deals with the South African law relating to promotions. As promotion disputes mostly arise as alleged unfair labour practices, a short discussion on how the concept of an unfair labour practice developed in South Africa is undertaken. In this regard the common law is studied in order to see whether it makes provision for protection of employees subjected to unfair labour practices relating to promotions. Through this study one soon realises that the common law is in fact inadequate to deal with unfair labour practices relating to promotions, and thus an enquiry into various legislative provisions are undertaken. The impact of the all-important Wiehahn Commission of Enquiry, established in 1979, is also briefly discussed.

In this article an attempt is made to define the term ‘promotion’. In this regard reference is made to some cases adjudicated upon by the Commission for Conciliation Mediation and Arbitration (the “CCMA”). The cases referred to seem to favour the view that when one is defining the term ‘promotion’, regard must be had to the employment relationship between the employer and the employee, as well as the nature of the employee’s current work in relation to the work applied for, in order to establish whether in fact a promotion has taken place.

It is necessary to consider what unfair conduct is defined as in the context of promotions. It seems that managerial prerogative is at the center of the enquiry into unfair conduct of the employer. Further to the analysis of unfair conduct, various principles that govern both procedural and substantive unfairness are considered. These principles are dealt with separately with reference to case law.

Lastly the dispute resolution mechanisms are considered and a brief discussion on remedies is undertaken. The remedies are discussed with reference to case law, as well as the provisions of the Labour Relations Act 66 of 1995 as amended by the Labour Relations Amendment Act 12 of 2002.

The broad headings of this article are accordingly unfair labour practices, definition of promotions, unfair conduct of the employer, onus of proof and remedies. It is concluded with the proposition that once an employer has set policies and
procedures in place in dealing with promotions, then such an employer should stick to those policies and procedures within the context of the law, as well as within the percepts of the vague and nebulous term of ‘fairness’. Should the employer fail to do so, the majority of cases indicate that such an employer will be guilty of an unfair labour practice relating to promotion.
1 INTRODUCTION

South African labour law provides legislative protection for employees subjected to unfair labour practices by their employers relating to promotions. This protection is found Chapter VIII of the Labour Relations Act 66 of 1995 as amended, dealing with unfair dismissal and unfair labour practices. However, the concept of an unfair labour practice has undergone an array of changes since 1979, when the concept was first introduced. This article will thus firstly concentrate on the history and development of the concept of an unfair labour practice. In this regard a number of Industrial Court decisions are considered. Also, a number of legislative provisions dealing with this concept are referred to. Examples of such provisions are to be found in the Industrial Conciliation Amendment Act 94 of 1979, the Labour Relations Amendment Act 9 of 1991, and the Labour Relations Act 66 of 1995.

Secondly, the term ‘promotion’ is defined. In defining this term, reference is made to the relationship between the employer and the employee. A further means of defining the term is through comparing jobs. In both these instances cases heard before the CCMA and the Labour Court are referred to.

Thirdly, a discussion on what might constitute unfair conduct by an employer is undertaken. In this regard reference is made to both procedural and substantive fairness of the type of conduct complained of by the employee. Under procedural fairness a few CCMA cases are discussed to illustrate the importance of an employer to follow its own procedures. Further to the discussion on procedural fairness, an enquiry is made as to whether an employee may challenge the composition and competency of a selection panel. Employees in acting capacities might raise the argument of legitimate expectation to be appointed to the post they are acting in. The doctrine of legitimate expectation is thus briefly dealt with.

In discussing substantive fairness some CCMA and Labour Court cases are discussed, as these cases deal with substantive issues such as prior promises made by an employer; employers deviating from marks achieved by the candidates at the interview; and promotions in the context of affirmative action.
It sometimes occurs that employees, by virtue of their conduct, are unable to successfully claim unfair conduct on the part of the employer. This often happens where employees apply for voluntary severance packages in the period immediately preceding a challenge to the employer's conduct relating to promotions. This issue is briefly dealt with in the context of waiver.

Lastly the article deals with appropriate remedies that may be granted. In this regard reference is made to both the current Labour Relations Act 66 of 1995 with its amendments brought about by the Labour Relations Amendment Act 12 of 2002, as well as the Labour Relations Act 66 of 1995 prior to its latest amendments. The remedies granted are declaratory orders, protective promotions, actual promotions, remittal and compensation. Each of these remedies are discussed with reference to case law.

2 HISTORY OF THE CONCEPT 'UNFAIR LABOUR PRACTICE'

The statutory concept of an unfair labour practice was first introduced into South African labour law by the 1979 amendments to the Labour Relations Act 28 of 1956.\(^1\) The first question is whether an employee had a right to be treated fairly at common law. Stated differently, the question is whether the common law is adequately equipped in dealing with equity and fairness at the workplace.

The common law does not address labour practices dealing with promotions. Unless promotional issues are regulated contractually, an aggrieved employee who has not been promoted by an employer because of such employer's unfair conduct would not find the common law to be very helpful.

A century ago the South African economy was largely agriculturally orientated. Most people were employed on farms or in the countryside. The principles of the common law contract of employment, to wit *locatio conductio operarum*, were adequate to deal with and regulate the relationship between an employer and individual employees. However, the discovery of minerals resulted in rapid economic growth and industrial

development. Labour activities expanded and the relationships regulating the rendering of services and the performance of work became more complicated.²

The impact that political instability and increased immigration and emigration can have on the respective positions of employer and employee, are some of the factors that the common law cannot reasonably be expected to respond to as they occur.

At common law therefore, if there is no contractual arrangement giving effect to promotional prospects, an employee has no right in law to claim that the employer acted unfairly in not promoting such an employee.³

For reasons expounded above, it became necessary for the state to intervene early in the twentieth century in order to regulate labour relations by statutory intervention. The enactment of the 1956 Labour Relations Act did little to provide relief for the aggrieved employee who was not promoted for reasons related to the employer’s unfair conduct.

The reason for this lies primarily in the fact that if the employment contract did not regulate issues dealing with promotions, then the courts were reluctant to assume jurisdiction on issues that fell outside the scope of the contractual relationship between the employer and the employee.

The legislature has attempted to address some of the problems and deficiencies of the common law contract of employment by enacting legislation regulating conditions of employment at the workplace⁴. It is therefore submitted that what is lawful in terms of a contract of employment is not always fair. South African labour law centers around different ways in which common law lawfulness has developed into a legislative concern for fairness.

² Van Jaarsveld, Fourie and Olivier “Labour Law and Social Security” 2001 LAWSA 5.
³ Van Jaarsveld et al 2001 LAWSA 8.
⁴ The Labour Relations Act 28 of 1956, The Wage Act 5 of 1957 and The Basic Conditions of Employment Act 3 of 1993 are examples of legislation curtailing an employer’s contractual rights.
Prevailing circumstances, including South Africa’s isolation from the international labour and political sphere largely as a result of the social engineered policy of apartheid; economic progress since 1970; the shortage of skilled employees and suspect labour practices all made it necessary for the government to appoint a commission of enquiry to investigate prevailing laws.\textsuperscript{5}

The concept of an unfair labour practice was introduced into South African labour law for the first time by the Industrial Conciliation Amendment Act\textsuperscript{6} following upon the recommendations of the Commission of Enquiry into labour legislation under the chairmanship of Prof N E Wiehahn.\textsuperscript{7}

The Industrial Conciliation Amendment Act\textsuperscript{8} defines an unfair labour practice as follows:

\begin{quote}
\textit{any labour practice which in the opinion of the industrial court is an unfair labour practice.}\textsuperscript{9}
\end{quote}

The industrial court\textsuperscript{10} had the arduous task of defining the concept of an unfair labour practice. In substance then, the industrial court was the legislature’s delegate to give content to the phrase ‘unfair labour practice’. In determining a dispute concerning an unfair labour practice, the industrial court must decide whether the practice concerned is unfair or not. If the court decides that it is unfair it must resolve the matter by making a determination akin to an arbitration award.\textsuperscript{11}

As a result of its wide definition, the legislature was obliged to intervene and in 1980 the concept of an unfair labour practice was more comprehensively defined, although still in general and non-specific terms.\textsuperscript{12}

\begin{footnotes}
\item[8] 94 of 1979.
\item[9] S 1(1).
\item[10] Established in terms of s17(1)(a) of the Industrial conciliation Amendment Act 94 of 1979 21 June 1979.
\item[11] SEAWUSA v Trident Steel (Pty) Ltd 1986 7 ILJ 418 IC 437C-D.
\item[12] The Industrial Conciliation Amendment Act 95 of 1980 states that "an unfair labour practice means –
\begin{enumerate}
\item any labour practice or any change in any labour practice, other than a strike or lockout or any action contemplated in s 66(1), which has or may have the effect that –
\end{enumerate}
\end{footnotes}
The industrial court has, since its establishment\textsuperscript{13}, developed a substantial body of law covering both the individual and collective employment relationships.

The court has for instance considered the refusal to negotiate in good faith;\textsuperscript{14} victimization of employees because of trade union membership;\textsuperscript{15} selective dismissal or re-employment;\textsuperscript{16} the use of derogatory language;\textsuperscript{17} and the failure to renew a migrant worker’s contract where there had been a reasonable expectation of renewal;\textsuperscript{18} to be unfair or potentially unfair. These cases were decided under the amended Industrial Conciliation Act 95 of 1980.

In 1988 the non-specific and open-ended definition of an unfair labour practice was replaced with a more comprehensive and specific definition. The 1988 definition dealt with 14 specific labour practices that were applicable to collective issues and since 1980, had been accepted and recognized by the industrial court as unfair labour practices. Amendments had however been effected and in 1991 these amendments were enacted in Section 1 of the Labour Relations Amendment Act 9 of 1991\textsuperscript{19}. These amendments did not deal specifically with promotions. In other words, even though it was more comprehensive, it was still not an all-embracing definition.

\begin{itemize}
\item[i.] any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work securities or physical, economic, moral or social welfare is or may be prejudiced or jeopardized thereby;
\item[ii.] the business of an employer or class of employers is or may be unfairly affected or disrupted thereby;
\item[iii.] labour unrest is or may be created or promoted thereby;
\item[iv.] the relationship between employer and employee is or may be detrimentally affected thereby; or
\end{itemize}

(b) any other labour practice or any other change in any labour practice which has or may have the effect which is similar or related to any effect mentioned in paragraph (a).\textsuperscript{9}

\begin{footnotesize}
\textsuperscript{13} Established on 21 June 1979.
\textsuperscript{14} MAWU v Natal Die Casting Co (Pty) Ltd 1986 7 ILJ 520 IC.
\textsuperscript{15} Mbatha v Vleissentraal Co-operative Ltd 1985 6 ILJ 333 IC.
\textsuperscript{16} NUM v Durban Roodepoort Deep Ltd 1987 8 ILJ 156 IC.
\textsuperscript{17} UAMAWU v Fodens SA (Pty) Ltd 1983 4 ILJ 212 IC.
\textsuperscript{18} Mtshamba v Boland Houtnywerhede 1986 7 ILJ 563 IC.
\textsuperscript{19} Van Jaarsveld et al 2001 LAWSA 302.
\end{footnotesize}
The definition of an unfair labour practice in terms of the Labour Relations Amendment Act limits unfair labour practices to the following three cases:

(a) any act or omission which may prejudice an employee in an unfair manner;
(b) any act or omission which may prejudice the business of an employer in an unfair manner; and
(c) any act or omission which may prejudice or disrupt the relationship between the employer and his employees.

The Labour Relations Act did not until 1 August 2002, recognize a general right not to be subjected to unfair labour practices. The LRA, through the unfair labour practice jurisdiction adopted by the Industrial Court, codified the different kinds of unfair labour practices that had been recognized in terms of the previous LRA. These included:

- unfair dismissals as codified in Chapter VIII, read with Schedule 8 to the Act;
- unfair conduct related to the employees’ and employers’ rights to freedom of association as codified in chapter II of the Act;
- trade union rights of access to the workplaces and other organizational rights as codified in Part A of Chapter III of the Act; and
- unilateral implementation of changes to terms and conditions of employment as codified in s64(4) of Chapter IV of the Act.

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20 9 of 1991. S1 defines an unfair labour practice as –

“any act or omission other than a strike or lock-out, which has or may have the effect that:

(a) 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 jeopardized thereby;
(b) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
(c) labour unrest is or may be created or promoted thereby; or
(d) the labour relationship between employer and employee is or may be detrimentally affected thereby.


22 66 of 1995, prior to the 2002 amendments. Hereinafter referred to as the LRA.

23 28 of 1956 as amended.

24 Du Toit et al 460.
Schedule 7 to the LRA defined four further categories of unfair labour practices, namely:

- unfair discrimination;
- unfair conduct relating to the promotion, demotion or training of an employee and the provision of benefits to an employee;
- the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;
- the failure or refusal of an employee to reinstate or re-employ a former employee in terms of any agreement.\(^{25}\)

The subsequent amendments to the LRA\(^{26}\) removed the residual unfair labour practices from Schedule 7 and placed them in more appropriate statutory settings without altering their substance. Unfair labour practices are currently\(^{27}\) regulated by section 185 and section 186 of the LRA. Section 185 (b) states that every employee has the right not to be subjected to unfair labour practices, while section 186(2) contains the three remaining\(^{28}\) residual unfair labour practices and one further unfair labour practice.

Section 186 (2) reads as follows:

"'Unfair labour practice' means 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 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, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act."\(^{29}\)

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25 Supra.
26 As brought about by ss40 and 41(c) of the Labour Relations Amendment Act 12 of 2002.
27 Since 1 August 2002.
28 The 'unfair discrimination' provision is dealt with in s6 of the Employment Equity Act 55 of 1998.
29 Du Toit et al 460.
Du Toit argues that the current definition of an ‘unfair labour practice’, unlike the open-ended definition in the 1956 Act, is confined to employer conduct and no longer offers a remedy to employers against employees or trade unions.\textsuperscript{30} It is only employees as defined who enjoy protection under this section.\textsuperscript{31}

\textsuperscript{30} Du Toit et al 461.

\textsuperscript{31} Job seekers are excluded. It would therefore not be an unfair labour practice if an employer offered to pay the airfares of one job seeker to attend an interview while refusing to pay for another. Such job seeker might have recourse against the ‘would-be’ employer in terms of the Employment Equity Act 55 of 1998.
3 UNDERLYING ISSUES CONCERNING PROMOTIONS

An employer is guilty of an unfair labour practice if the employer commits any form of unfair conduct relating to the promotion, demotion, probation or training of an employee. From this it is clear that three core issues arise. Firstly, a definition of promotion is necessary; secondly, unfair conduct relating to promotions needs to be explained; and thirdly, the remedies that may be granted and the appropriate methods of dispute resolution need to be discussed.

4 ‘PROMOTION’ DEFINED

“Promotion” can be defined in terms of two general systems used by most employers through which employees may advance or progress in an organization. Generally speaking, most employees are evaluated on a regular basis before progressing from one level of employment to another. In other words, based on the outcome of their evaluation, employees are promoted by their employers, resulting in greater remuneration or benefits in respect of their employment relationship.

Employees may also be promoted by means of a system where certain vacancies are advertised and current employees are also invited to apply for such posts.

Should a current employee be awarded the position, which will obviously be more favourable in respect of remuneration and/or benefits, these academics argue that a promotion has taken place.

This view, however, has not always been shared by the courts, as is illustrated in the case of Public Servants Association v Northern Cape Provincial Administration.

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32 S186(2)(a) of Act 66 of 1995. Hereinafter referred to as the LRA.
35 1997 18 ILJ 1137 (CCMA).
The facts of the case were briefly as follows:

The employee, employed as an Assistant Director at the Department of Health, Developmental Social Welfare and Environmental Affairs, had applied for the position of Deputy Director in both probation and field services, welfare and institutions of the Department of Health, Developmental Social Welfare and Environmental Affairs.

The employee had not been short-listed or interviewed for either position. At the arbitration hearing it emerged that the Deputy Director-General of Health, Developmental Social Welfare and Environmental Affairs had offered during a conversation with the previous Provincial Manager of the Public Service Association, to place the employee on a higher salary scale in lieu of not being short-listed.

The representative for the employer did not deny the fact that a conversation had taken place between the representative for the unions and the Deputy Director-General of the department. However, the representative for the employer denied that it had been the intention of the Deputy Director-General to place the employee on a higher salary scale to compensate him for not being short-listed, and also denied that an agreement had been reached to that effect.

Furthermore, it was common cause that the alleged agreement was not in writing. It was also common cause that the reasons for not short-listing the employee were not in dispute.

The issue to be decided was whether the employer had committed an unfair labour practice as envisaged in Schedule 7 item 2(1)(b) of the Labour Relations Act. Commissioner Hambridge, after considering all the evidence expressed the common law view that

"as the employee had applied for a post, duly advertised in a newspaper, such application, should it be successful, could not be a promotion. Although the appointment would have been made in the same department, it would not constitute a promotion as a promotion is usually an internal matter. Thus the employee is in fact a job applicant and item 2(1)(b) of Schedule 7 of the Act could not be of assistance, as job applicants are not eligible for promotion, demotion, training or benefits."36

36 1997 18 ILJ (CCMA)1141B-D.
Level progression in the workplace has not been as problematic as applications for vacancies, when dealing with promotions. The Commission for Conciliation, Mediation and Arbitration\(^{37}\) has been quick to accept jurisdiction to decide on the fairness or otherwise of an employer’s conduct in the context of level progression.\(^{38}\)

The principle that level progression is a system of promotion has been dealt with in at least two cases before the CCMA. In *Misra v Telkom*\(^{39}\) the applicant employee was evaluated in terms of a fixed procedure, that had been agreed to between the employer and a number of trade unions, to determine whether he should be upgraded.

The evaluation was based on assessment points rating the employee’s productivity, personal qualities and qualifications in the past year. The original evaluation rated the employee with 10.35 points, which score was increased on appeal to 12.68 points.

In order to be promoted to the next grade up, the employee required 15.36 points. The employee contended that the evaluation had been defective for various reasons. The Commission held that the evaluation had been properly conducted in all respects and that the applicant employee therefore failed to show that the employer was guilty of an unfair labour practice relating to promotion.\(^{40}\)

In *SATA obo Van der Mescht v Telkom SA (Pty) Ltd*\(^{41}\) the Commissioner expressed the view that “level progression is clearly a system of promotion”.

In contrast, it may happen that a post occupied by an employee is upgraded due to restructuring. Should a dispute arise about whether a particular job should be upgraded or otherwise, such a dispute does not involve a promotion.\(^{42}\)

\(^{37}\) Hereinafter referred to as the CCMA.

\(^{38}\) Garbers 1999 *CLL* 22.

\(^{39}\) 1997 6 BLLR 794 (CCMA).

\(^{40}\) 794E-G.

\(^{41}\) 1998 6 BALR 732 (CCMA) 734C-D. Hereinafter referred to as the *van Der Mescht* case.

\(^{42}\) Mzimni and Another v Municipality of Umtata 1998 7 BLLR 780 (Tk) 784G-H.
Garbers argues that the reason for this is that promotion is about a person moving between jobs or between different grade levels.\textsuperscript{43}

The two systems of promotions, namely level progression and applications for vacancies, do not clarify the murkiness surrounding the definition of the term “promotions”. Garbers\textsuperscript{44} suggests that one should focus on two core issues in order to determine whether one is dealing with a promotion.

The first issue is whether there is an existing relationship between the applicant employee and the employer. The second issue is the comparison of the employee’s current job with the job applied for to determine whether a promotion is involved.

\textbf{4 1 RELATIONSHIP BETWEEN EMPLOYEE AND EMPLOYER}

The question of whether an existing relationship between the applicant employee and the employer is required, has been considered in \textit{Vereniging van Staatsamptenare obo Badenhorst v Department of Justice}.\textsuperscript{45} The facts of the case were briefly 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 \textit{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 Labour Court had jurisdiction to hear the matter. This contention was dismissed on the ground that the matter fell squarely within item 2(1)(b). The second ground was that the position for which the applicant had applied was not a promotion.

\textsuperscript{43} Garbers 1999 \textit{CLL} 22.
\textsuperscript{44} \textit{Supra}.
\textsuperscript{45} 1999 20 \textit{ILJ} 253 CCMA. Hereinafter referred to as the \textit{Department of Justice} case.
in the normal sense but was a result of the rationalization process undertaken by the 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. Commissioner Loveday responded to the employer’s second contention as follows:

"[I]t 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. I am satisfied that her complaint that she was not appointed can properly be described as an allegation of unfair conduct by the employer relating to a promotion. While I accept that this was not a promotion in the ordinary sense of the word, I do not believe that the peculiar nature of the rationalization process can allow semantics to change the essential nature of the dispute. No evidence suggested that the applicant’s years of service would not be transferred to the post in the new structure, nor was it suggested that her employee benefits would be interrupted by such transfer. A new post would still essentially be with the same employer, the Department of Justice, but in a re-modelled 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."

The Department of Justice 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.

4.2 COMPARING JOBS

Once it has been established that the required nexus between an employer and employee exists, one must then compare the employee’s current job with the job applied for to determine whether a promotion is involved. Differences in:

- Remuneration levels;
- Fringe benefits;
- Status;
- Levels of responsibility;

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46 254B-D.
47 256G-I.
48 Du Toit et al 464. See also Public Servants Association v Northern Cape Provincial Administration 1997 18 ILJ 11137 (CCMA).
49 Garbers 1999 CLL 22.
• Levels of authority and power; and
• Level of job security

are all factors, one or more of which may be taken into account in establishing whether a promotion has taken place.\(^{50}\)

In *Mashegoane and Another v University of the North*,\(^ {51}\) the Labour Court had the opportunity to consider how the abovementioned factors would impact on the outcome of a case dealing with promotions.

Briefly, the facts are as follows:

The Senate of the University of the North, guided by the University of the North Act 47 of 1969, appointed Deans on the recommendation of the respective faculty boards. Mashegoane was a lecturer employed by the University in the Department of Psychology. On 18 November 1996 Mashegoane was nominated by the Faculty Board of the Faculty of Arts as Dean. The Faculty Board then recommended his nomination to the Senate of the University. On 22 November 1996 the Senate rejected the Faculty Board’s nomination of Mashegoane. Mashegoane then referred the matter to the CCMA as a dispute relating to an unfair labour practice dealing with promotion.\(^ {52}\)

Although the Senate was empowered by the University Statute to reject a recommendation concerning the appointment of a Dean by a Faculty Board, it could not do so in an arbitrary manner. Since no basis had been laid in the papers for the Senate’s rejection of the nomination of the first applicant, the court assumed that it had been done arbitrarily.\(^ {53}\)

It was common cause that there was an employment relationship between Mashegoane and the University. It was also apparent that the position of Dean was of a higher status. For Mashegoane to succeed the court had to be satisfied that

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\(^{50}\) Garbers 1999 *CLL* 22-23.
\(^{51}\) 1998 1 *BLLR* 73 (LC).
\(^{52}\) 74F-I.
\(^{53}\) 74A-C.
appointment as Dean amounted to a promotion. It was, however, argued on behalf of the University that a Deanship was not a post applied for, nor a promotion, but a nomination.

The court rejected this argument and per Mlambo J came to the following conclusion:

“Had Mashegoane been appointed his salary would have remained the same but he would have received a Dean’s allowance and would have a car at his disposal. These are the only mentioned benefits he would receive. I would, however, also assume that once appointed as Dean his status would be considerably elevated. He would further have responsibilities relating to the management and control of the Faculty. He would also become chairperson of the Faculty Board. It goes without saying that he would be clothed with certain powers and authority to be able to manage and control the Faculty.

To me, at least, this indicates that the position of Dean is not a token position; it has real meaning and power attached to it. It is a position that is of a higher status with more responsibilities than a person who is, for instance, a lecturer in the same faculty. I am therefore of the view that the appointment to the position of Dean amounts to a promotion.”  

Similarly in De Villiers v SA Police Service, the applicant, a licensed pilot, was transferred from his functional post as major in the SAPS to the police air-wing at the rank of “lieutenant: pilot”. The new post carried a lower salary but the grievant was placed on a “personal notch” to ensure that his salary did not drop.

The SAPS preferred to use the term “translation” rather than “promotion” to describe the change of the grievant’s status. It must, however, be noted that the grievant did not apply for an advertised post. He had, for years, worked towards appointment as a pilot.

The matter was presented before arbitrator Bosch at the Safety and Security Sectoral Bargaining Council.

Arbitrator Bosch pointed out that:

“The preliminary point on which I am asked to rule is whether the dispute relates to promotion as provided for in the residual unfair labour practice provision.”

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54 77G-I.
55 2002 8 BALR 795 (BC).
56 796F.
The arbitrator noted further that the term “promotion” is not defined in the LRA, and that one would therefore have to use the ordinary meaning of the term. After considering the case law related to the issue of definition of the term “promotion”, the arbitrator concluded that:

“[I]t seems that a promotion is involved where each of the following criteria is met:

(a) where there was an existing relationship between the employer and employee;
(b) where, after a comparison between the employee’s previous job and the job for which the employee has applied or for which he or she has been considered, there has been a significant advancement, elevation in his or her rank, or rise in his or her status. This comparison includes an examination of the position of the employee to establish whether appointment to the new post will improve his or her status, salary, benefits, powers or responsibilities, or a combination of these…”

The arbitrator then stated that:

“I am satisfied that the grievant was promoted, for the following reasons:

(a) there had been a pre-existing relationship between the grievant and the employer.
(b) there was a significant advancement and rise in the grievant’s status, although his rank and his remuneration were lower. The fact that the post of pilot had a higher status is borne out by the fact that it required significant additional qualifications and training, and that the grievant had served in the ‘functional class’ before and his post was then ‘translated’ to one in the ‘occupational class’. The post in an occupational class would generally be considered as being above one in a functional class.
(c) the potential advancement and rise in status does not relate to a post advertised generally by the employer. It fell within the scope of logical career-advancement for the grievant and was significant enough to justify the use of the term ‘promotion’.”

It seems, therefore, that the CCMA will readily assume jurisdiction by ruling that a possible promotion was involved where it is found that there is an existing employment relationship between the applicant and essentially the same employer; and that there is a difference in substance between the two jobs, even if external applications are also invited.

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57 798H-J.
58 799E-H.
59 Garbers 1999 CLL 23.
5 UNFAIR CONDUCT

It has been stated earlier that South African labour law centres around different ways in which common law lawfulness has developed into a legislative concern for fairness. It is therefore necessary to examine what could constitute unfair conduct by an employer.

Employees generally have no right to promotion and the employer has the right to appoint or promote employees whom it considers to be the most suitable. The CCMA and the Labour Court are loath to interfere with employer prerogative. However, the CCMA has on occasion shown a willingness to scrutinize the reasons behind the employer’s decision to ensure that, with due deference to the employer’s prerogative, there is a logical connection between the real reasons and the decision taken.

It is obvious that when choosing between two parties, one would have to discriminate between the two in order to choose one. According to Garbers, “unfair” implies a failure by the employer to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended.

Should an employee be unhappy, or perceive the conduct of the employer to be unfair in not promoting such employee, then such unhappiness or perceptions do not necessarily amount to unfairness.

Commissioner Newall in SA Municipal Workers Union obo Damon v Cape Metropolitan Council was called upon to adjudicate on a matter dealing with “unhappy perceptions” by an employee concerning a promotion.

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60 As envisaged by s186(2)(a) of the LRA.
61 Du Toit et al 463.
62 Supra.
63 Garbers 1999 CLL 23.
64 1999 20 ILJ 714 (CCMA).
The facts of this case are briefly as follows:

The employer party advertised vacancies for three posts within the Council. The employee party and eight other candidates were short-listed for the posts. All candidates were interviewed and tested on the same day, and a union representative was present for part of the proceedings to observe the interviews, tests and the deliberations of the panel. Two posts were filled, but the third was left vacant as the employer claimed that none of the candidates met the minimum requirement.

The union alleged that the failure to appoint the employee to the third post constituted an unfair labour practice in terms of item 2(1)(b) of Schedule 7 to the LRA 1995.65

In analyzing the evidence Commissioner Newall stated:

“[T]he process of selection inevitably results in a candidate being appointed and the unsuccessful candidate(s) being disappointed. This is not unfair. I find that the union’s pursuit of this case is unsustainable, as it has provided no evidence of unfairness.”

Similarly in the Department of Justice case the CCMA held that better communication by the employer about a rationalization process “may have prevented the perception that the process had been unfair, but it does not make the process actually unfair or prejudiced to the applicant”.68

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65 714D-E.
66 718A-B.
67 719D-E.
68 262I-J.
As with any body that has the authority to exercise prerogative, the managerial prerogative of an employer to promote whom it deems fit is limited both in a procedural and a substantive sense.  

5 1 PROCEDURAL FAIRNESS

According to the Department of Justice case employers must adhere to the bottom line in following a fair promotion procedure and ensure that all candidates were afforded a reasonable opportunity to promote their candidature.

Garbers suggests that if an employer advertises a particular post, the ideal procedure to follow would be inviting for applications for the post, the screening of those applications, the compilation of a short-list, the invitation to an interview of those short-listed, the conducting of interviews and the ultimate selection. Garbers further suggests that procedural fairness is governed by a number of principles; namely that, firstly, an employer must generally follow its own procedures, secondly, that an employee may challenge the composition and competency of a selection panel, thirdly the treatment of employees in acting capacities and, lastly, dealing with promotions without reward.

5 1 1 AN EMPLOYER MUST TO FOLLOW ITS OWN PROCEDURE

Where a procedure is laid down in legislation, a collective agreement, established practice, equity plan or directive, then an employer is bound to follow such procedure. Deviation from such procedure is permissible only where the employer can show that a good and sufficient reason for the deviation exists.

The case in point is NUTESA v Technikon Northern Transvaal. In this case the applicant union referred two disputes concerning unfair labour practices to the CCMA. The first dealt with unfair discrimination and the second with the secret

69 Du Toit et al 464.
70 262F-G.
72 Du Toit et al 463-464.
73 1997 4 BLLR 467 (CCMA). Hereinafter referred to as the NUTESA case.
74 This issue will be discussed below.
appointment of certain people to newly-created posts. The background to the second
dispute was that an affirmative action task team had sought and obtained permission
to advertise all vacant and newly-created posts.

This notwithstanding, certain people had been appointed to newly-created posts
without invitations for applications for the positions ever having been advertised.75
Commissioner Tucker responded as follows:

“Whether the appointments involved higher positions in the department in which the
positions were created or filled, or to positions in other departments or the establishment
of totally different departments there can be no doubt that the salutary practice of
advertising for vacant positions as well as new posts being created, was established at
the Technikon. Not only was this expressly approved as applying as an interim measure
but it was totally consistent with the transformation of the Technikon which involved
transparency and fairness... It may well be that those appointed are the most suited for
the position and would have been appointed in any event. But without the observance of
the proper process, the appointments are fatally flawed.”76

Similarly in SA Transport and Allied Workers Union obo Fourie and another v
Transnet Ltd77 it was found that an employer who held out to an employee the
possibility of applying for promotion would be held to the promise in the absence of
any justification for not doing so. The employer had created a reasonable
expectation of promotion and, by not following the normal practice of re-advertising
the post, had made itself guilty of unfair conduct relating to promotion.

In contrast, employers sometimes commit an unfair labour practice relating to
promotion in that they, despite re-advertising for the post, do not follow their own
procedure by considering applicants from an existing list of candidates, especially
where those candidates were promised that they would be considered.

This is what happened in UTATU v Transnet Limited.78 The individual grievants, both
employees of Transnet, applied for promotional posts. After interviews were
conducted, an “employment equity” candidate selected from a “black” list was
appointed to one of the posts. The company then re-advertised the other posts.

75 467H-J, 468A-B.
76 471I-J, 472A-D.
77 2002 23 ILJ 1117 (ARB).
78 2002 6 BALR 610 (AMSSA).
The grievants claimed that Transnet had committed an unfair labour practice, because they had been assured that "serious consideration" would be given to the appointment of white candidates.

Prior to reaching his finding, arbitrator Beän, in dealing with company practice and procedure, quoted the following from *George v Liberty Life Association of Africa Ltd* 1996 17 ILJ 571 (IC):

"[I]t was accepted that an employer may be held to a contractual term or practice to the effect that the employee will be promoted or transferred and/or that a certain procedure will be followed prior to the filling of the post. The presiding officer stated that: 'it would therefore stand to reason that during the subsistence of the contractual relationship or the wider concept of an employment relationship issues regarding promotion or a lateral transfer to another job with the employer would be considered legitimate subjects of the existing employment relationship. An employer who held out to a person in his or her employ that that person could apply for promotion and that a certain procedure and practice would be followed before filling a vacancy would be held by this court, in the absence of any necessary justification, to that contract of promise'."  

The arbitrator thus held that by re-advertising the second post without considering candidates from the "white list", the company had departed from its staffing policy and procedure. Furthermore, the grievants had been promised that white employees would be considered. This gave them a reasonable expectation that they would at least be considered for the posts. The company had therefore perpetrated an unfair labour practice by re-advertising posts without first considering whether there were suitable white candidates, and the company was consequently ordered to promote the aggrieved employees.

It sometimes happens that employers become, or are made, aware of the defects in the procedure used to appoint employees, and that the employers possibly treated the employees unfairly in the promotion process. Garbers states that it is possible that defects in procedure can be cured through a fresh procedure.  

In *Public Servants Association obo Dalton and another v Department of Public Works*, all positions were advertised as part of a restructuring exercise and

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79 616G-H.
80 Garbers 1999 **CLL** 24.
81 1998 9 BALR 1177 (CCMA). Hereinafter referred to as the *Dalton* case.
employees were invited to apply for their old positions, or any other position for which they wished to be considered.

A number of persons applied and an independent panel was appointed to interview the applicants. The two employees in question, who applied for higher posts, were never invited to an interview. The two employees complained and interviews were subsequently arranged by newly appointed officials. Those officials asked only a few random questions during the interviews.

The Commissioner, after accepting the evidence of the employees, said:

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

On occasion, an employer might advertise a position, and state certain requirements for that position. It might happen that none of the applicants meet the requirements as set by the employer. The question now is whether the employer may relax those requirements and exercise its discretion to appoint someone from the pool of applicants only. The applicant union in the NUTESA case referred two disputes concerning alleged unfair labour practices to the CCMA. The second dispute has been dealt with above.

The first dispute dealt with the appointment of a Dean whose experience did not comply with that prescribed by the employer. Commissioner Tucker found that the employer had in its advertisements for the posts of Deans stipulated that applicants should *inter alia* have been employed by it for at least three years. However, it had appointed one Dean who had entered its service only two months prior to his appointment as such. The Commission held that although the advertised requirement was only one of the factors to be considered and was not pre-emptory, the language in which the advertisement was couched must have deterred certain people who did not have the required length of service from applying.

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82 1180C-D.
Before appointing a candidate who was suitable but for the absence of this qualification, the Committee concerned should have re-advertised the position. Failure to do so entailed unfair discrimination on an arbitrary ground against employees who might otherwise have applied for the position, and may have constituted unfair conduct relating to promotion.\textsuperscript{84}

5 1 2 AN EMPLOYEE MAY CHALLENGE THE COMPETENCY AND COMPOSITION OF A SELECTION PANEL

It seems that the CCMA will not readily entertain a claim that a selection panel interviewing an employee for promotion lacks competence by reason of it not being composed of expert and qualified panelists. This is evident in the case of \textit{Van Rensburg v Northern Cape Provincial Administration}.\textsuperscript{85} The issue to be decided in this case was whether an interviewing panel that conducted interviews with a number of applicants for the post of Deputy Director: Provisioning Administration in the Office of the Provincial Tender Board, treated Mr Van Rensburg unfairly compared to the other job applicants during the interviews that took place at Kimberly on 1 November 1996.

Mr Van Rensburg also disputed the competence of the panel with regard to his appointment.\textsuperscript{86} He pointed out that none of the panelists had any qualifications in provisioning administration, or had the required knowledge or expertise to sit on the panel. From the evidence it seems that no objections to the panel were lodged prior to the interviews concerned. Mr Van Rensburg also did not object to the composition of the panel on the day of the interview itself. The staff code of the Provincial Tender Board prescribes that the panel should simply be versed in the field concerned. It does not require more experience and knowledge than this.\textsuperscript{87} Commissioner Cloete responded as follows:

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"One could of course agree with Mr Van Rensburg to the extent that from an ideal point of view, the panelists should have the qualifications and experience that Mr Van Rensburg 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 requirement that only persons with exactly the same kind of qualifications and experience
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\textsuperscript{84} 467H-J.
\textsuperscript{85} 1997 18 ILJ 1421 (CCMA). Hereinafter referred to as the \textit{Van Rensburg} case.
\textsuperscript{86} 1421H-J.
\textsuperscript{87} 1422H-J.
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 that is suitable for the panelists. The approach is not juridically sound for the simple reason that the law does not impose such a strict requirement. Once the panelist 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.\textsuperscript{88}

The commissioner found that:

"The administration has in this particular case not acted _mala fide_, or so grossly unreasonably as to warrant an inference that they failed to apply their minds to the matters concerned."\textsuperscript{89}

It seems from the _Van Rensburg_ case that if an employee wishes to challenge the composition and competency of a selection panel, then such employee must at least prove that the panel _failed to apply its mind_ to the interview. This failure to apply its mind may constitute an unfair labour practice relating to promotion.

5 1 3 TREATMENT OF PERSONS IN ACTING CAPACITIES

It is possible that on occasion, employers may require employees to act in certain higher positions in the hierarchical structure of the workplace.\textsuperscript{90} Employees who act in these higher positions are not automatically entitled to be appointed to such a post.\textsuperscript{91} It is possible that such an employee may raise the doctrine of legitimate expectation in not being promoted to such a post. This defense however has not always been met with a favourable outcome. This is well illustrated in the case of _Independent Municipal & Allied Trade Union obo Coetzer v Stad Tygerberg_.\textsuperscript{92}

On 18 May 1993 the employee was appointed as acting town secretary of Lingelethu West with retrospective effect from 1 May 2003. During October and November 1995 various temporary posts, including that of the employee, were advertised.

\textsuperscript{88} 1423B-E.
\textsuperscript{89} 1426F.
\textsuperscript{90} _Public Servants Association & Others v Department of Correctional Services_ 1998 19 _ILJ_ 1655 (CCMA) 1673A.
\textsuperscript{91} ibid.
\textsuperscript{92} 1999 20 _ILJ_ 971 (CCMA). Hereinafter referred to as the _Tygerberg_ case.
The employee was unanimously recommended for the post of town secretary. This recommendation was ratified by the town council’s executive committee on 20 May 1994. Because of the seniority of the post, the appointment also had to be ratified by the town council.

It was clear that if the employee’s appointment by the Lingelethu West Council had been confirmed he would, in terms of the proclamation, have retained the benefits and remuneration of a department head until he was placed in an equivalent position in the new structure.93

The employee contended further that the council of Tygerberg was legally compelled to confirm his appointment; alternatively that he had a legitimate expectation that the council would confirm his appointment; and in the further alternative that he had a reasonable expectation that the council would adhere to the audi alteram partem rule before it decided not to continue with the filling of posts at Lingelethu West.

Commissioner Jordaan stated that the employee could not by rights lay claim to appointment to the post of town secretary because there was no obligation on the Tygerberg council to ratify the recommendation of the executive committee of Lingelethu West.

Regarding the principle of legitimate expectation, the commissioner found that the local authority, by reason of the fact that it is a government organ, must apply the audi alteram partem rule before it makes decisions which may prejudicially affect individuals. This obligation has both a common law and a constitutional basis. This right to be heard is given by law to employees in the public sector.94

The commissioner found that Tygerberg had acted unfairly by not giving the employee an opportunity to be heard before making a decision regarding appointments, and made a declaratory order that Tygerberg in future comply with the

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93 971F-I.
94 972E-H.
audi alteram partem rule before taking decisions which could be potentially prejudicial to employees.95

Employers sometimes appoint employees in acting positions for unreasonably long periods of time and in so doing, create in the employees an expectation of permanent appointment in that (acting) position.

Public Servants Association obo Botes & Others v Department of Justice96 is the case in point. The four applicant employees all held positions as senior assistant state attorneys within the Department of Justice. At different times during 1994 and 1995 they were instructed to act as deputy state attorney within their section of the employer department.

The duties and responsibilities they had were the same as that of the permanent appointees as section heads, which included the management of their sections. The Public Service Regulations make no provision for the payment of an allowance to officers acting in positions more senior than their own, and the applicants received no additional remuneration. From the facts it is clear that the applicants sought remedies on the basis of two claims. The one being a claim for compensation and the other a claim for promotion.97 The first claim deals with benefits and does not warrant discussion at this point.

The applicants contended secondly that the department had created a legitimate expectation that they would be promoted. Commissioner Hiemstra dismissed this contention on the basis that:

“...The CCMA is not the forum where the ambit of this doctrine should incrementally be expanded.”98

He declined to make an award that the applicants should be promoted on the basis of a legitimate expectation.

95 973B-E.
96 2000 21 ILJ 690 (CCMA). Hereinafter referred to as the Botes case.
97 698A.
98 698D.
He stated further that:

“Legitimate expectation to be promoted is however not the only basis upon which the promotion of the applicants could be considered. If I should find, regardless of whether the applicants had a legitimate expectation to be promoted, or whether I can order their promotion based on that doctrine, that the conduct of the respondent had been unfair to them, then I must nevertheless determine the dispute on reasonable terms.”

Commissioner Hiemstra then stated that in assessing the dispute on reasonable terms, the first question is always whether the employer acted unfairly.

According to the commissioner, apart from considering fairness from the view of the applicants, one must also consider the reasons for the actions of the employer, namely whether the employer had acted frivolously, capriciously or unreasonably.

In making the award, Commissioner Hiemstra stated:

“Although the applicants had been deeply frustrated by the long acting appointments, I cannot find that the respondent had committed an unfair act or omission relating to their promotion. It is certainly undesirable to require of employees to act in more senior positions for such long periods without additional compensation. However, the respondent has given compelling reasons for allowing the situation to continue for inordinately long periods of time... The hardship that the applicants have suffered is the result of the transformation process and the fact that, in the absence of a collective agreement or legislative provision, there is no legally enforceable remedy to compel payment for acting in a more senior position... Although ‘fairness’ is superimposed upon the duty to act lawfully, the power of the CCMA to pronounce on the fairness of the actions of the employers should be used sparingly, especially where the decision under consideration falls within the domain of managerial prerogative.”

It seems clear from the Botes case that where employees are employed in acting positions for unreasonably long periods of time, the employer will be committing an unfair labour practice relating to promotions should the conduct of the employer not fall within the precepts of fairness.

The managerial prerogative of the employer, it seems, will take preference only where the employer can give compelling reasons why the situation has been allowed to continue for unreasonably long periods of time.

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99 698E.
100 698G.
101 699F-J.
From the cases discussed above it would appear that a legitimate expectation only entitles an employee to be heard before a decision is made, and not to actually be promoted.

It has been pointed out that employers who appoint employees in acting positions for considerably long periods of time run the risk of unfair conduct if they do not promote the employee to the position in question permanently, or at least, afford the employee the remuneration and benefits of the higher post.\textsuperscript{102} An applicant might, however, run into jurisdictional problems if such applicant were to bring a claim for higher remuneration for acting in a higher position on its own to the CCMA as unfair conduct relating to the provision of benefits. This is what happened in \textit{Northern Cape Provincial Administration v Commissioner Hambridge NO and Others}.\textsuperscript{103} The respondent nursing sister was employed by the applicant provincial administration as acting matron for about two years. She was not paid for acting in this higher rank. She applied for the post when it was advertised, but was turned down. When the Public Service Bargaining Council failed to convene a conciliation board, she applied to the CCMA for arbitration of her dispute.\textsuperscript{104}

The commissioner found that the provincial administration had committed an unfair labour practice and ordered it to pay the nurse the difference between what she had been paid and what she ought to have been paid for the acting position. The administration applied to the Labour Court to review the award by attacking the finding of the commissioner that the dispute concerned an unfair labour practice and not a matter of mutual interest.

The court noted that the commissioner had to ask herself whether she had jurisdiction to entertain the matter – if it related to a matter of mutual interest she would not have jurisdiction.

\textsuperscript{102} Garbers 1999 \textit{CLL} 25.
\textsuperscript{103} 1999 20 \textit{ILJ} 1910 (LC). See also \textit{PSA obo McLellan v Provincial Administration (Department of Health)} 1998 2 BALR 154 (CCMA).
\textsuperscript{104} 1910G.
Judge Landman briefly analysed the meaning of “benefit” as used in item 2(1)(b) of Schedule 7 of the LRA and found that the nurse wanted a monetary benefit for acting as matron.

Although it seemed fair that she should be so paid, a claim that an employer has acted unfairly by not paying the higher rate cannot be said to concern a benefit, even if its receipt would be beneficial to the employee.

It is essentially a claim or a complaint that the complainant has not been paid for a certain period for carrying extra responsibility. It is a salary or wage issue. It is about a matter of mutual interest and falls within the realms of collective bargaining. The court accordingly found that the commissioner’s characterization of the dispute as one concerning an unfair labour practice was wrong in law. The CCMA therefore did not have jurisdiction to entertain the matter.\textsuperscript{105}

Garbers\textsuperscript{106} suggests that it is only in conjunction with a finding of unfair conduct relating to promotions that a commissioner may make an order relating to such compensation. An example of this is to be found in \textit{Beukes v South African Post Office}.\textsuperscript{107} The applicant, a postmaster, applied unsuccessfully for a post of area manager. He claimed that the respondent’s failure to appoint him to the position was an unfair labour practice, because he had acted in the position for which he had applied for about seven months. Commissioner Jugwanth noted that the respondent had a policy in terms of which employees placed in acting positions were rotated after three months.

If management decided to fill the position, this had to be done within six months of the date on which the position became vacant. The applicant had served in the position for seven months.

\textsuperscript{105} 1910H-I, 1911A-D
\textsuperscript{106} Garbers 1999 \textit{CLL} 26.
\textsuperscript{107} 2002 11 BALR 1102 (CCMA).
The respondent had not followed its own policy, and had given the applicant a reasonable expectation that he would be appointed.\textsuperscript{108}

In this regard commissioner Jugwanth stated that:

"The fact that the applicant acted for a period of seven months in the Area Manager position would require the company in terms of its own policy to grant such assistance and advice to enable such person to fulfill the more complex job requirements of the higher post. The company did not do so as the applicant performed his function well. The applicant had received an extra R41816.16 whilst in his acting position."\textsuperscript{109}

In this particular case the applicant was awarded compensation as he had already been dismissed.

It is submitted that despite the applicant seeking compensation (which was the appropriate remedy in this case) for not being promoted, the CCMA clearly had jurisdiction to arbitrate, as what the applicant was seeking related to an existing right (the right not to be unfairly treated in regard to promotions) and not the creation of new rights (which will be a matter of mutual interest and hence non-justiciable).

5 2  SUBSTANTIVE FAIRNESS

Substantive fairness relates to the real reasons why an employer ultimately decides to prefer one employee over another. The CCMA will not readily interfere with an employer’s prerogative to choose whom it deems suitable for promotion, as long as it is within the realms of fairness. This is evident in the case of \textit{Marra v Telkom SA Ltd.}\textsuperscript{110} In this case the employee party was employed by Telkom since 1971. He was upgraded to C1 on the Patterson scale in 1994.

His work was evaluated in 1995 and 1996 by a process that formed part of a collective agreement between the employer and the employee’s trade union. The employee was not satisfied with that evaluation and started an appeal process in terms of that agreement.\textsuperscript{111}

\textsuperscript{108} 1102E-F.
\textsuperscript{109} 1105H-J.
\textsuperscript{110} 1999 20 \textit{ILJ} 1964 (CCMA).
\textsuperscript{111} 1964C-D.
Marra’s complaint was that Telkom committed an unfair labour practice because it graded him unfairly and inconsistently and refused to remedy this.

He further claimed that Telkom unfairly barred him from acquiring skills and that he should have been rotated between departments to expose him to different technologies, equipment and learning opportunities. Commissioner Christie responded to this argument as follows:

“It may well have been in Marra’s personal interests to be moved to a department in which he would have been exposed to more complex optic system functions. But in my view (in the absence of contractual or collective agreement) management of an enterprise has a prerogative to determine its own operational requirements and deploy its human resources to meet those needs... But, 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 legitimate power to manage the enterprise. It is not the job of labour law to interfere in the management style of an enterprise except where management style is manifestly arbitrary or it unfairly discriminates or victimizes staff for union affiliation.”

Similarly in Van Rensburg commissioner Cloete stated that:

“I cannot detect any aspect of the interview or the treatment of Mr Van Rensburg at the hands of the panel that was so glaring or grossly unreasonable so as to warrant the rescission of the recommendations that the panel made, and its replacement with recommendations or decisions of my own...”

The Labour Court and the CCMA have on occasion declared that when an employer exercises its managerial prerogative in coming to a decision on who gets appointed, such employer has to be in a position to provide reasons for its decision. Various factors

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112 1968D-H.

113 Van Rensburg 1426E.

114 See for example Mashegoane & Another v University of the North 1998 1 BLLR 73 (LC) 78C where Mlambo J stated: “The lack of reasons leaves very little for the court to assess if the refusal was for a fair reason or not”.

115 Garbers 1999 CLL 27.
impact on the assessment process by the CCMA. These factors will be considered below.

5 2 1 DEVIATION FROM MARKS ACHIEVED BY CANDIDATES AT THE INTERVIEW

Where an employer can show good reasons why it chose candidates who received lower marks at the interview over those who received higher marks, the employer will not be committing an unfair labour practice relating to promotions. 116

5 2 2 PRIOR PROMISES

It sometimes happens that employees are promised possible promotions by their superiors. It has been noted earlier that such conduct might create a legitimate expectation of promotion, but that such legitimate expectation merely entitles the aggrieved employee the right to be heard, and not necessarily the right to be promoted.

However, in Rafferty v Department of the Premier 117 the applicant applied for a permanent post in which she had acted for more than a year without additional remuneration. An employee whom the applicant had supervised for 17 years was appointed.

The applicant alleged that the person appointed did not meet the requirements of the advertisement as she did not have the required knowledge or experience, and that the employer had violated the requirements of the Public Service Act that no person who qualified for promotion should be prejudiced, and that in considering applications for promotion, “qualification, level of training, merit, efficiency and suitability” should be taken into account.

The applicant contended further that the selection panel had noted that she was “an experienced all-rounder and an asset”, and that its conclusion that the successful

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116 See for example Van Rensburg and Dalton. In both these cases the employees received higher marks at the interview than the other candidates who were ultimately preferred.
117 1998 8 BALR 1017 (CCMA). Hereinafter referred to as the Rafferty case.
applicant was “bright and intelligent” was subjective and not based on fact. The record of the deliberations of the interview panel showed that the members had been influenced by the director of the department, who had from the outset shown a preference for the other candidates, and that it had, contrary to earlier assurances, attached negative significance to the performance by the applicant of certain tasks she had been assigned in the past. Had they not done so, they would have been obliged to prefer the applicant.

It was accordingly held that the failure of the employer to appoint the employee to the post amounted to an unfair labour practice.¹¹⁸

The Rafferty case shows that prior promises might sometimes have a material effect on the outcome of the employer’s decision to ultimately appoint one and disappoint another.

5 2 3 PAST PRACTICE

It has been held that one of the tests to decide on the substantive fairness of a promotion is whether the employer applied its mind.¹¹⁹ On occasion, a policy might require a panel to make recommendations to a higher body about who should be promoted and past practices in the workplace may reflect that the higher body has never deviated from the recommendations made by the panel. From this it seems that if one is to be consistent, then the employee so recommended must be promoted. Garbers¹²⁰ suggests that this is incorrect. He states that if the test to decide on the substantive fairness of a promotion is whether the employer applied its mind, then the mindless application of a policy cannot be relied upon in support for an attack on fairness. It is submitted that this view is correct. It may very well be that a denial of promotion in such cases may be an indication that the higher body actually applied its mind to the issue at hand.

¹¹⁸ 1017E-H.
¹¹⁹ See for example Van Rensburg, as well as SA Municipal Workers Union obo Damon v Cape Metropolitan Council 1999 20 ILJ 714 (CCMA).
¹²⁰ Garbers 1999 CLL 28.
There is no doubt that employers will be faced with making decisions about promotions in the context of affirmative action. Employees might firstly be denied promotion because they do not fall under one of the so-called “designated groups”, or, secondly, some might be denied promotions despite them falling within a designated group. It might happen that an employer takes affirmative action into consideration in denying promotion to an employee who is not a member of a designated group. Such a dispute, according to *Sasko (Pty) Ltd v Buthelezi & Others*, 121 may initially manifest itself as conduct relating to promotion, but is in fact a dispute relating to discrimination.

The importance of the distinction is that disputes about discrimination are adjudicated upon by the Labour Court (except if the parties consent to the jurisdiction of the CCMA), while unfair labour practice disputes are arbitrated by the CCMA. In the *Sasko* case the Labour Court had the opportunity to review an award of the CCMA dealing with unfair discrimination. The third respondent in this case, a commissioner at the CCMA, handed down an arbitration award finding that the applicant had committed an unfair labour practice by overlooking the first respondent for promotion and ordered the applicant to take corrective measures to remove the said unfair labour practice.122

The applicant contended that the CCMA did not have jurisdiction to make the award as the dispute was not lawfully before him, that his reliance on unfair conduct relating to promotion was misconceived as the first respondent had relied in his referral on alleged racial discrimination, and that the CCMA had in any event failed to have regard to the evidence before it. The court noted that the CCMA had begun its enquiry by asking whether the first respondent had complained of unfair discrimination, and having correctly decided that it did not have jurisdiction to hear such a complaint, had found that the dispute could be entertained as one pertaining to unfair conduct relating to promotion.

121 1997 12 BLLR 1639 (LC). Hereinafter referred to as the *Sasko* case.
122 1639H.
The court, per Landman J held that the CCMA in doing this had misdirected itself and stated:

“Where one complains about failure to be promoted it is envisaged that there is a post to which one can aspire, alternatively that there is a rung of progression to which one can aspire. In this case there appears to be no post or vacancy available and, if there was a rung to which Buthelezi aspired, this was not the case set out at the arbitration. Accordingly I am of the opinion that the commissioner misdirected himself in regard to the proper issue before him and on this ground alone the portion of the award dealing with the unfair labour practice should be reviewed and set aside.”

The Sasko case was authoritatively referred to in SATA obo van Der Mescht v Telkom SA (Pty) Ltd, which dealt with racial discrimination. The applicant, employed by Telkom, applied for the post of technical supervisor, but was rejected in favour of an affirmative action appointee. He alleged that the appointment of the other employee (based on affirmative action) was unfair.

Commissioner Osler conceded that if the dispute concerned alleged unfair conduct relating to promotion, the CCMA would have jurisdiction, whereas if it concerned alleged unfair discrimination it should be adjudicated by the Labour Court. The applicant had referred the dispute as one concerning his non-appointment to a vacant position after a legitimate expectation had been created that he would be given the position, and also “unfair discrimination on the basis of race”. It was clear that, although the applicant had characterised the dispute as one concerning alleged unfair promotion, its underlying cause was discrimination on the basis of race. The fact that the alleged discrimination took the form of a failure to promote did not bring it within the jurisdiction of the CCMA.

Garbers correctly argues that the practical effect of Van der Mescht is that the moment the employer raises affirmative action as a ground of justification for a decision dealing with promotion, the actual dispute is about discrimination and such dispute will have to be adjudicated by the Labour Court.

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123 1642H-J.
124 1998 6 BALR 732 (CCMA). Hereinafter referred to as the Van der Mescht case.
125 732F.
126 732F-H.
Generally speaking, neither the Employment Equity Act 55 of 1998 nor affirmative action policies give an employee the *right* to be promoted. The employer retains its discretion within the parameters of the Act and existing policy to decide on the best candidate for the job.\(^\text{128}\)

### 5 2 5 OTHER FACTORS TAKEN INTO ACCOUNT BY THE SELECTION PANEL

Garbers suggests that an employer may take any factor into account in making its decision in the sphere of promotions, as long as such factors are sufficiently job-related.\(^\text{129}\) Performance at an interview as a subjective consideration might be taken into account. Age and life skills might also be considered.\(^\text{130}\) When a selection panel undertakes its “deliberation process” it must, in making its decision, apply its mind. This, as was stated earlier, seems to be the general test for employers when ultimately deciding who gets the job.\(^\text{131}\) Therefore if the selection panel failed to apply its mind in making its decision, the defect might prove to be fatal and consequently the decision unfair.\(^\text{132}\) In the *Rafferty* case referred to earlier, the panel was influenced by outsiders’ preferences of more senior people in the organization, and this was found to be an unfair labour practice.

### 5 3 CONDUCT BY AN EMPLOYEE INCONSISTENT WITH COMPLAINTS OF UNFAIRNESS

In assessing the fairness of the conduct of the employer in claims of unfair conduct relating to promotions, the conduct of the employee is sometimes taken into account. This is primarily done in the field of waiver.

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\(^{128}\) In this regard see *Abbot v Bargaining Council for the Motor Industry (Western Cape)* 1999 20 ILJ 330 (LC) 334A-C, as well as *Van Rensburg* 1424B and 1425.

\(^{129}\) Garbers 1999 *CLL* 28.

\(^{130}\) See for example the *Badenhorst* case, where the commissioner found it acceptable that the employer, in judging applicants for employment as lecturer, took these factors of the applicant into consideration.

\(^{131}\) For the tests, see *Damon*, as well as *Van Rensburg*.

\(^{132}\) Garbers 1999 *CLL* 28.
An employee may thus have a legitimate claim against an employer of unfair conduct relating to promotion, but may by virtue of his or her conduct (be it an act or omission) act in such a way that he or she is not going to exercise that right against the employer.\textsuperscript{133}

A typical example is where employees apply for voluntary severance packages in the period immediately preceding a challenge to the employer’s conduct relating to promotion. This happened in the case of \textit{PSA obo McLellan v Provincial Administration (Department of Health)}.\textsuperscript{134}

In the \textit{McLellan} case the applicants contended that the respondent employer’s failure to promote the applicant employee to the advertised post of Control Medical Technologist constituted an unfair labour practice. The employer objected \textit{in limine} that the CCMA had no jurisdiction to entertain the dispute as the issue of compensation of the employees who acted in higher positions was still the subject of negotiations in the provincial and central bargaining chambers of the Public Service, and was the subject of a collective agreement. Commissioner Yawa accepted the contention made by the respondent and held that the CCMA had no jurisdiction to arbitrate. As to the merits of the application, the arbitrator noted that the employee had been interviewed for the post in question before it was abolished due to rationalisation a day before she retired.

It was common cause that the employee had applied for voluntary retirement before she applied for the post. It was held that this had played a role in the employer’s failure to appoint her.\textsuperscript{135} Commissioner Yawa held that:

\begin{quote}
“A[n employer (the department) does not commit an unfair labour practice if he does not proceed to appoint an employee who, \textit{inter alia},

(a) expresses a lack of interest and enthusiasm for the job;
(b) chooses to retire instead of the promotion or appointment to the post;
(c) gives the go-ahead that the post be filled with another candidate.”\textsuperscript{136}
\end{quote}

\begin{flushleft}
\textsuperscript{133} Garbers 1999 \textit{CLL} 29.
\textsuperscript{134} 1998 2 BALR 154 (CCMA). Herein after referred to as the \textit{McLellan} case. See also \textit{Classen \& Another v Department of Labour} 1998 10 BALR 1261 (CCMA). This case is discussed later.
\textsuperscript{135} 154E-H.
\textsuperscript{136} 159D-E.
\end{flushleft}
Sometimes, however, despite the employee waiving his right (by accepting a severance package, for example) to challenge the employer’s conduct, the adjudicator may find the conduct of the employer unfair, especially where the employees continue to pursue promotional prospects in the workplace. This is evident in the case of *Classen & Another v Department of Labour*. The applicants had occupied active positions as Assistant Directors in the Industrial Court when the posts were advertised.

Both applicants applied for the permanent positions and were interviewed, but were never informed of the outcome. A year later the posts were again advertised. Again both applicants applied, were placed on a short list and interviewed, and again were not informed of the results and the posts remained vacant. At the end of that year the first applicant was appointed as acting Chief Registrar of the Industrial Court, a position two ranks higher than his own. Shortly thereafter all officers were invited to apply for severance packages. The applicants did so, but received no response. At all material times the respondent denied that there were vacant posts in the Industrial Court. While it might normally be the case that an employee’s request for a severance package was inconsistent with an application for promotion, the applicants had had no option but to seek to secure their futures in the department after they received no reply to their applications for voluntary retrenchment.

The applicants had performed loyally in positions two ranks higher than their official ranks and accordingly had every reason to expect to be appointed to the advertised positions. The commissioner held that the respondent’s response had been erratic, capricious, and unreasonable to the applicants, and this amounted to an unfair labour practice.

The conduct of the employees in the *Classen* case made it clear that they continued to pursue promotion despite their applications for severance packages. Whereas in *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 for the post to be filled by another candidate.

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137 1998 10 BALR 1261 (CCMA). Herein after referred to as the *Classen* case.
138 1261E-I.
6  ONUS OF PROOF

Neither the current Labour Relations Act,\textsuperscript{139} 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.\textsuperscript{140}

In \textit{Rafferty}, for example, commissioner van Zuydam clearly stated that:

\begin{quote}
“In the absence of evidence from the department, the evidence of Mrs. Rafferty stands alone and undisputed. Nonetheless, she bears the onus to prove the alleged unfair labour practice (my emphasis).”\textsuperscript{141}
\end{quote}

Similarly, in the case of \textit{Nawa & Another v Department of Trade and Industry}\textsuperscript{142} the applicants sought an order restraining the respondent from proceeding with a “decentralisation” programme and from victimising them pending the outcome of mediation, and alleged that the respondent’s conduct amounted to an unfair labour practice as envisaged in item 2(1)(b) of the definition of unfair labour practice in Schedule 7 to the LRA.

The court noted that while it had the power to interdict harassment of various forms, applicants alleging victimisation under the unfair labour practice definition had to make out a case that they were in fact victimised (my emphasis).\textsuperscript{143}

7  REMEDIES THAT MAY BE GRANTED

Prior to the 2002 amendments to the Labour Relations Act 66 of 1995, Schedule 7 regulated the powers of the Labour Court and the Commission in granting remedies. Item 4 stated:

\begin{itemize}
  \item \textsuperscript{139} 66 of 1995 with its amendments in terms of Act 12 of 2002.
  \item \textsuperscript{140} Garbers 1999 \textit{CLL} 29.
  \item \textsuperscript{141} 1021H-I. See also \textit{PSA obo Williams v Department of Correctional Services} 1999 20 \textit{ILJ} 1146 (CCMA) where it was stated: “The onus is on the union (on behalf of the employee) to make a case of unfair labour practice. In order to do so, in must show that the national commissioner did not apply his mind, or acted incorrectly in promoting Lesole to the position.”
  \item \textsuperscript{142} 1998 7 \textit{BLLR} 701 (LC).
  \item \textsuperscript{143} 701G-H.
\end{itemize}
“(1) The Labour Court has the power to determine any dispute that has been referred to it in terms of item 3 on terms it deems reasonable, including, but not limited to, the ordering of re-instatement or compensation.

(2) The arbitrator has the power to determine any dispute that has been referred to it in terms of item 3 on reasonable terms.”

As regards the issue of compensation, it is interesting to note that no limit on compensation is set in item 4(1), in contrast to the limits set on compensation where such is awarded for an unfair dismissal. From the point of view of legal certainty, a preferable situation would have been to impose such limits and also to have set guidelines as to how such compensation should be calculated.

The amendments to the LRA in terms of s193(4) now state that:

“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.”

Section 194(4) states that:

“The compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months remuneration.”

As the amendments to the LRA are relatively new, most of the cases heard before the Labour Court and the CCMA (including accredited bargaining councils) were dealt with in terms of Schedule 7 of the LRA. It must be noted, however, that there is not much difference in the provisions of the current LRA and the LRA in terms of Schedule 7. The biggest innovation in this regard is the limitation on compensation set out in s194(4) of the amended LRA. Commissioners have, therefore, in the past fashioned a range of remedies including but not limited to a declaratory order, remittal to an employer for consideration, protective promotion, actual promotion, and compensation. These remedies will now be briefly discussed.

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144 Item 4, Part B of Schedule 7 of the LRA 66 of 1995.
145 In terms of the Labour Relations Amendment Act 12 of 2002.
146 The amendments came into effect on 1 August 2002.
7 1 DECLARATORY ORDER

It sometimes happens that companies make decisions on who they are going to appoint, and proceed with actually appointing the successful candidate. It might ensue later (at arbitration hearings, for example) that the employer did not follow its own procedures, or that it did not comply with the *audi alteram partem* rule prior to making its decision. This conduct could prove to be potentially prejudicial to the other employees.

Section 138(9) of the current LRA provides that:

> “The commissioner may make any appropriate arbitration award in terms of this Act, including, but not limited to, an award –
> ...
> (c) that includes, or is in the form of, a declaratory order.”

The application of this section is well illustrated in the case of *Independent Municipal and Allied Trade Union obo Coetzer v Stad Tygerberg*.147 The commissioner in this case, having found that Tygerberg had acted unfairly by not giving the employee the opportunity to be heard before it made its decision, stated that although item 2 of Part B of Schedule 7 to the LRA did not prescribe remedies in the event of findings of unfair labour practices, and item 4(2) only provided that a dispute in terms of item 2 had to be determined on reasonable terms, nevertheless found that s138(9) provided that an award could take the form of a declaratory order.

Since Tygerberg had already taken its decision, it made no sense at this stage to order it to give the employee a hearing. The commissioner accordingly ordered that Tygerberg in future complied with the *audi alteram partem* rule before taking decisions which could be potentially prejudicial to employees.148

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147 1999 20 *ILJ* 971 (CCMA).
148 973C-D.
7.2 REMITTAL TO AN EMPLOYER FOR CONSIDERATION OF EMPLOYEES FOR PROMOTION

On occasion employers might interview candidates for promotion posts after these posts have already been filled, thus subjecting themselves to a challenge of unfair labour practices. The case of *PSA obo Dalton & Another v Department of Public Works*[^149] is a classic example. In this case the applicant employees applied for promotion in response to invitations from the employer to all its employees. Over a period of six months, the independent interviewing panel appointed by the employer conducted interviews, but had not interviewed the applicant employees.

Thereafter, on their insistence, the applicant employees were granted interviews by officials of the employer, but were not appointed to the positions for which they had applied.

The applicants contended that they were unfairly treated because the appointments had in fact been made before they were interviewed; that they were more deserving of promotion than some of the people who had been appointed to the positions concerned; and that certain *mala fide* officials were behind the decision to promote them.

The commissioner accepted that the posts in question had already been filled by the time the applicant employees were interviewed. This, the commissioner held, was patently unfair.

As to relief, the commissioner noted that an order that an employer should appoint an unsuccessful applicant to a position would only be reasonable where it was proved that there was a causal connection between the unfair conduct perpetrated during the selection process and the non-appointment of the applicants, but no such causal link could be established on the evidence.

[^149]: 1998 9 BALR 1177 (CCMA).
It was found on the evidence, that promotions in the public sector could only be made on the recommendation of a Public Service Commission. The commissioner also stated that he could not find in the absence of evidence, that the employer was bound by the interview ratings, that the appointment of some candidates with lower ratings than those of the applicants was in itself unfair. Commissioner Grogan found that:

“In my view the only reasonable determination I can make in the circumstances is to order the employer to re-interview the applicants with a view to considering whether they are worthy of protective promotion... The most I can do therefore, is to order the employer to refer the matter to the relevant commission with a request that Messrs Bradfield and Delton be considered for protective promotion.”

In *Great North Transport v Legodi & Others*, a review application to the Labour Court, the respondent employee had referred a dispute to the CCMA after the applicant employer failed to appoint her to a typing post for which she had applied.

A CCMA commissioner ordered the applicant to re-test the employee with a view to considering whether she should be appointed to the post. The applicant had chosen not to lead evidence at the arbitration to contradict the employee’s claim that she had made no more mistakes during the typing test than the successful candidate. The applicant had only itself to blame for the consequences of that omission. The Labour Court decided that the commissioner’s order that the applicant be re-tested fell within the scope of the remedies provided for unfair labour practices.

7 3 PROTECTIVE PROMOTION

One must bear in mind that where an employer conducts itself unfairly in relation to a promotion, most employees will expect to be promoted. However, even if the post is still available, an order for promotion will not automatically follow a finding of unfairness. A practical problem arises in those cases where a post is advertised, and some other employee is appointed or promoted, and the job is subsequently occupied. In the public service, as will be illustrated in a case below, the solution is

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150 1177E-J.
151 1181J, 1182A.
152 2004 1 BLLR 51 (LC).
153 51F-H.
to be found in the concept of “protective promotion”. This remedy lends itself to the situation where the employee is not promoted to the actual post, but is promoted in rank and remuneration.

This is well illustrated in *Health & Other Service Personnel Trade Union of South Africa obo Klassen v Paarl Hospital.* The applicant, a coloured female, maintained that the hospital’s failure to promote her from general assistant to auxiliary services officer (ASO) constituted unfair conduct relating to promotions in terms of s186(2)(a) of the LRA of 1995.

The applicant, although a member of a designated group for the purposes of the Employment Equity Act 55 of 1998, did not meet the numeric goals as set by the hospital, as coloured women were over-represented in that occupational class.

However, in terms of a collective agreement, no absolute bar was established to the employment or advancement of applicants who were not from the designated groups, and this equally applied to the designated numeric groups. The arbitrator stated that the EE plan set goals and objectives, not quotas.

The arbitrator thus found that to deny the applicant the appointment now was to tell her that she was absolutely barred from the position until the numeric goals were met. This, the arbitrator concluded, was not fair and awarded the applicant protective promotion.

### 7 4 ACTUAL PROMOTION

Sometimes the post advertised has not yet been filled at the time the aggrieved employee challenges the conduct of the employer. At the time the award is made, the post might still not be filled. In such cases arbitrators and commissioners, on a finding of unfair conduct by the employer relating to promotion, will with little hesitation make an award of actual promotion to the post and many a time with retrospective effect, for practical reasons, and in keeping with the requirement that

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154 2003 24 *ILJ* 1631 (BCA).
155 1632C-H. For another example see the *Rafferty* case.
the award be “just and equitable”. Actual promotions were granted in the Classen case, Bosman v South African Police Service\textsuperscript{156} and Du Toit v SAPS.\textsuperscript{157}

7 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 position before and after the 2002 amendments to the LRA will be considered.

In \textit{Lötter & Fourie v SAPS}\textsuperscript{158} the applicant applied for a promotional post but for reasons unknown his application was not processed before an appointment was made. The respondent conceded that this was procedurally unfair.

Arbitrator Brand held that the respondent’s failure to consider the application constituted an unfair labour practice. However, he was not able to find that the applicant would have been promoted if the application had been processed, and thus the respondent could not be ordered to promote the applicant. Because the dispute had arisen prior to the amendments to the LRA, relief had to be determined as if item 4(2) of Schedule 7 to the LRA had not been repealed. Although the provision did not expressly provide for an award of compensation, such relief was encompassed in the requirement that an unfair labour practice must be determined on “reasonable terms”. Reasonableness in turn required compensation to be quantified according to the principles of justice and fairness.

Where the unfair labour practice is of a procedural nature, it is impossible to determine patrimonial loss. Compensation, the commissioner said, must accordingly be determined by the exercise of a discretion, having regard to the objectives of the LRA.

\textsuperscript{156} 2003 5 BALR 523 (SSSBC).
\textsuperscript{157} 2003 12 BALR 1337 (SSSBC).
\textsuperscript{158} 2002 10 BALR 1003 (BC). See also Beukes v South African Post Office 2002 11 BALR 1102 (CCMA), where the employee had subsequently been dismissed, and was awarded compensation.
An employer’s failure to ensure that an employee’s application for promotion is placed before the relevant decision maker constitutes a serious procedural irregularity, for which compensation is justified.\textsuperscript{159}

In \textit{Westraat v SAPS},\textsuperscript{160} a case dealt with in terms of the amended LRA, the applicant applied for the post of Director of Chemistry in the SAPS, but was not short-listed. He claimed that the employer had not complied with several of its standard operating procedures relating to promotions and that had he been short-listed and able to compete fairly, he would have got the job. The arbitrator found it trite that the applicant had no right to promotion, but only to be fairly considered for promotion. An employer’s exercise of its own discretion to appoint, assign, or promote might be reviewed if it showed some very serious flaw.

The unfair labour practice jurisdiction does not permit an arbitrator to replace an employer’s determination of the job requirements and of the applicant’s with the arbitrator’s personal assessment. Arbitrator Christie held that although the decision not to promote the applicant was properly taken in the interests of the SAPS, the way in which it was done was not fair.\textsuperscript{161}

As to what relief to award, the commissioner found that the parties had not submitted arguments on this point, and stated that:

\begin{quote}
"There is extensive jurisprudence from the Industrial Court that compensation is intended to be restitution generally for financial loss..."\textsuperscript{162}
\end{quote}

The applicant was awarded R12 000 – an award the arbitrator found “...just and equitable, but not more than twelve months remuneration s193(4) read with s194(4)...".\textsuperscript{163}

\begin{flushright}
\textsuperscript{159} 1003E-I.
\textsuperscript{160} 2003 24 \textit{ILJ} 1197 (BCA). Hereinafter referred to as the \textit{Westraat} case.
\textsuperscript{161} 1198B-G.
\textsuperscript{162} 1210G.
\textsuperscript{163} 1210H.
\end{flushright}
The *Westraat* case is illustrative of the fact that commissioners will very closely adhere to the new legislative provision\(^{164}\) dealing with the granting of compensation as a remedy sought by an aggrieved employee.

\(^{164}\) s193(4) read with s 194(4) of the LRA 66 of 1995.
8 CONCLUSION

It seems clear from the discussion dealing with the definition of promotions that in the first instance, one has to establish a *nexus* between the employer and the employee. Once this relationship is established it becomes necessary to compare the employee’s current job with the job applied for in order to establish whether a promotion is involved. All the cases referred to in this regard indicate that an enquiry into the above-mentioned aspects are necessary if one attempts to define what a promotion is.

In dealing with unfair conduct by an employer insofar as such conduct relates to promotions, one necessarily has to consider aspects dealing with both procedural and substantive fairness. This article has made extensive reference to various cases adjudicated upon by the Labour Court and the CCMA. Most of these cases deal with legal principles relating to promotions. With regard to procedural and substantive fairness the cases referred to seem to indicate that the prerogative of an employer to appoint whom it pleases will not readily be impinged upon by either the Labour Court or the CCMA, provided that the employer adheres to set company procedures and policies, and at all material times, applying its mind when dealing with promotions. This of course is not sufficient when one considers the injustices that might befall an employee as a result of company policies and procedures that do not conform to the percepts of South African labour relations and labour laws as well as percepts of fairness.

Commissioners and judges have quite a number of remedies that they may grant to an aggrieved employee claiming unfair labour practices relating to promotions.

The remedies include declaratory orders, remittal, protective promotions, actual promotions and compensation. The remedies in terms of section 194 of the amended LRA\textsuperscript{165} have brought some certainty with regard to the issue of compensation.

\textsuperscript{165} 66 of 1995.
In the words of Garbers\textsuperscript{166} one might strongly advise an employer to “stick to your procedures and apply your mind”.

\textsuperscript{166} Garbers 1999 \textit{CLL} 30.
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