

security and benefits. So far, the unity between the working class and the poor is less likely to build in the future. Instead, labour broking is often at the expense of the working class, and favours employers, who are the main beneficiaries in this triangular relationship. Increasingly, workers' income will continue decreasing if broking is left unregulated and labour laws left with current weaknesses. Then, companies will continue exploiting workers.

WHY PROTECT WORKERS?

The inclusion in the Bill of Rights of a special section on the rights of workers was an important development for most South African workers who had suffered under apartheid. Under apartheid, the majority of workers were marginalised and exploited, denied access to trade unions, and discriminated at the workplace. Workers need some protection because they are among the most vulnerable members of society. As members of society, they have families, dependents, and other responsibilities. Furthermore, workers form an important part of the economy.

The state should play a key role in promoting sustainability and welfare, and should be an important actor, setting the legal frame, enforcing standards of equity and human rights. Much remains to be done to protect workers, to redistribute wealth and maintain and nurture workers' rights, and empower the citizenry in a country where the gap between the rich and the poor is widening, and unemployment imposes major social and economic challenges. ¹⁸

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Unlocking labour laws



Promotions and benefits

At some point in a worker's employment promotion is sought or expected, and the benefits that come with it, such as higher wages and perks. However, in most instances promotions do not happen smoothly, and have been challenged, with some cases taken to the Commission for Conciliation Mediation and Arbitration (CCMA), whilst others have ended at the Labour Court or even the Labour Court of Appeal, writes **Benita Witcher**.

It is important for workers to look at the merits of their case in the event that they want to take one against their employer. Some lessons can be drawn from the cases that are discussed in this article.

In looking at the promotion cases there are legal terms that are often used and these include:

- Discretion: Act as one sees fit – conduct regulated by employer rules
- 'Gross' unreasonableness: Serious disregard for relevant facts, policy or rules
- Mala fide (bad faith): Dishonest and with intention to cheat or commit fraud
- Malice: Reckless and with intention to hurt
- Capricious: Subject to whim, thoughtless, and unpredictable
- Arbitrary: The absence of reason, not taking into account all the relevant facts and being inconsistent with no good reason
- Objective: Decision based on relevant, provable facts/criteria and not on personal feelings.

City of Tshwane Metro v SALGBC [2011] 12 BLLR 1176 (LC)

Where the selecting panel chooses a candidate that lacks the required qualifications and experience and thus fails either to apply the required criteria or provide good reasons for overlooking a very good candidate, the CCMA/BC may intervene and find the process unfair. Thus the decision of the panel can be said to be arbitrary.

City of CT v SAMWU obo Sylvster [2013] 3 BLLR 267 (LC)

Complainant acted in disputed post for five years and continued acting after being refused promotion. In these circumstances the employer's failure to provide a compelling reason for not appointing the complainant was unfair because decision was arbitrary. In this case there was an impressive candidate (*prima facie* good reasons to appoint the candidate) and a weak successful candidate (no compelling reason for rejecting good candidate). Therefore, decision was arbitrary and unfair.

Noonan v SSSBC [2012] 9 BLLR 876 (LAC)

In this case the policy obliged candidates to disclose adverse disciplinary records and required the employer to verify the information in the application forms. Complainant applied for post of superintendent and was ranked second. Candidate M was rated first and appointed but it later transpired that, unknown to the selection panel, he had not disclosed his adverse disciplinary record. According to the complainant M's non-disclosure resulted in the selection panel not being able to apply its mind to his suitability.

The Labour Court held that there is no right to promotion in the ordinary course, only a right

to be given a fair opportunity to compete for a post. If an employee is not denied the opportunity of competing for the post and the decision can be rationally justified, mistakes in the process do not constitute unfairness. Although the mistake led to the disputed ranking, the actual process was rational. There is no evidence that it was rigged or motivated by improper consideration.

The Labour Appeals Court held that fairness requires the selection panel to properly assess and compare the respective candidates' suitability. The effect of M's non-disclosure and the failure of the employer to properly verify the information in the application form meant that the selection panel was unable to do this. M's non-disclosure and the employer's negligence led to an unfair process.

The relief that the applicant got from the Labour Appeals Court was that he receive compensation for procedural unfairness in that he was not allowed to compete on equal terms.

Popcru obo Dhanarajan v SAPS (2013) 34 ILJ 235 (BCA): Lyster

Complainant met all requirements and scored well in the practical and theory tests, but K and P were appointed. K did not meet minimum requirements and failed the theory test. Reason for K's appointment was that he scored well at the interview and had management skills. P met the minimum requirements but was never practically assessed.

The process was unfair because employer relied on other requirements rather than advertised minimum requirements. The successful candidate had to be competent in the core functions of the posts and K did not meet these requirements.

It was wrong for the employer to rely on only the interview

performance to make the final decision. It is incorrect to use the application forms/CVs only for shortlisting, and thereafter treat all the shortlisted candidates as being on an equal footing. The employer must take into account the candidate's application form (CV) throughout the evaluation process.

The national instruction required the panel to take into account the candidate's experience, past performance record, positions held and track record. The best way to do this was to refer to the candidate's CV and application form and not just his interview performance. The process was found to be substantively and procedurally unfair.

The relief the complainant got was a promotion because evidence showed that but for the employer's unfair conduct, the complainant would have been promoted.

Sedibeng District Municipality v SALGBC [2012] 9 BLLR 923 (LC)

Not every consideration that is taken into account needs to appear in the advertisement, although it is preferable to state a factor that might completely disqualify a candidate. Polygraph testing may also be used as a legitimate assessment tool in considering promotions.

However, the real issue was whether the employer was entitled to rely on the polygraph results to disqualify the employees for appointment in circumstances where they would otherwise have been promoted based on their competency tests and interview scores. Considering the controversy surrounding the reliability of polygraphs, the exclusive reliance on polygraph test results to eliminate candidates for appointment in the absence of any other information placing a

question mark over their integrity, was unfair.

Workers were compensated based on the difference between their salaries and the salaries they would have received had they been promoted.

De Nyssen v GPSSBC (2007) 28 ILJ 375 (LC)

Complainant recommended by a selection panel but the MEC appointed M. However, MEC does not have free discretion, must have good reasons, and should follow proper procedure when deviating from recommendations.

As neither proper reason was given for deviation nor evidence given that M was the more suitable candidate, the appointment was the result of arbitrary reasoning.

Therefore employer was directed to pay complainant as if she had been appointed (protected promotion).

Peteni and SAPS (2013) 34 ILJ 228 (BCA): Lyster

The complainant was recommended for promotion by the selection panel but the national commissioner directed the panel to revisit their recommendations to achieve 50% female representivity per level.

However, the process was found unfair because clause 12(g) of the national instruction gave the national commissioner only two choices if she was not satisfied with a recommendation: she could promote someone of her choice from the recommended list or order that the post be re-advertised. K had not been on the recommended list. However, the national instruction did not contain a provision permitting the national commissioner to order the provincial panel to review or amend its decision.

The panel had relied on an equity model which provided for a 70/30 gender ratio and was told to review its decision on a totally

different ratio of 50/50. No basis had been offered for the apparent arbitrary change from 70/30 to 50/50. There was also no provision in the Employment Equity Act or the regulations which empowered the national commissioner to accelerate or fast-track the process in the manner in which she had directed.

The conclusion was that the employer's conduct was not permitted by its own policies and was thus arbitrary and therefore unfair. The process was procedurally and substantively unfair. Protected promotion was the relief because it was evident that the complainant would have been promoted had it not been for the unfair conduct.

Dumisa v University of Durban – Westville

Employer did not promote complainant on the basis that he did not meet the criteria laid down in the promotional policy. CCMA ordered the employer to consider the complainant for promotion because the employer had promised to consider him for promotion thereby giving him a legitimate expectation.

The CCMA was clearly incorrect. Even if the person who gave this promise had authority, the fact that the employer has a promotional policy with criteria should not give rise to a reasonable expectation of promotion where the complainant knows that they do not qualify.

Other factors

When considering applications from existing employees, the employer may take into account other factors such as their attendance record, disciplinary record, management skills if promotion is for management position, years of service, and efforts to contribute to the value of the company.

These considerations could in fact count in favour of the

existing employee. It is not unfair to appoint a person with a view not only to immediate needs, but also with a view to future development. To hold otherwise would place unreasonable restraints upon the employer's right to manage his/her business.

Fairness guidelines

It is important for the arbitrator not to 're-sit' as the selecting panel and decide on the best candidate, but should determine whether the employer acted fairly in the process. Arbitrator may also examine the procedure of reaching a decision and the decision itself. Wrong procedures can result in wrong decisions.

The advertisement must contain accurate information about the minimum and preferred requirements. Necessary requirements for the post may not be changed after the advert.

Assessment of the candidates must relate only to the competencies required for the post, even at interview.

The successful candidate should ordinarily be the person who scores the highest in the assessment. If there is a deviation from the highest scored candidate, there must be a sound reason, either operationally or for employment equity, to justify this. If there is a deviation from the highest scored candidate, the successful candidate must possess the competencies needed for the job.

The employer must be able to articulate the reasons why a particular candidate was unsuccessful. ^{LB}

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