

# Unlocking labour laws



## **Can you tell me how much you have to disclose to an employer in an interview or on being appointed to a job.**

In the case *Atkins v Datacentrix (Pty)* the person was offered employment after an interview. After accepting the job, the employee disclosed that he planned to undergo a sex change operation. The employer then terminated his job on the basis of non-disclosure and dishonesty.

The Labour Court held that there was no legal duty on the employee to disclose that he would undergo gender re-assignment surgery. This meant that the conduct of employer constituted unfair discrimination on the basis of sexual orientation.

The employee was awarded close to five months compensation and the employer was ordered to take steps to prevent discrimination in future although it did not say what steps are required

The question then arises as to when there is a legal duty to disclose information to an employer on appointment.

In *Mashava v Cuzens & Woods* the employee, a candidate attorney appealed against her dismissal because she had failed to disclose she was pregnant when taking on articles.

In the court's opinion this was unfair discrimination on the basis of pregnancy and she was given 18 months compensation. It would thus seem unlikely that there is any personal information that a person is liable to disclose on appointment.

## **I am a shop steward who is trying to get my company to draw up fair criteria for promotion as a number of people feel they have been unfairly passed over. Can you give me some guidelines to discuss with my employer.**

Here are some useful guidelines for drawing up a code of good practice in promotion.

The employer's advertisement must contain accurate information about both minimum requirements and

preferred experience and competencies, and these must be necessary for the job. The criteria should limit subjectivity, such as saying two or three or one and half years experience needed as this will exclude certain people; or stipulating an age such as 'mature woman wanted' which excludes younger woman who have the same competencies.

The assessment of the candidate at the interview must relate only to the competencies required for the job. The case *Du Preez v Minister of Justice* concerned the appointment of a senior magistrate where additional scores were given to designated people such as if you were black you started with an extra 10 points or a black woman an extra 20 points. The court queried whether this was a criteria for competency and asked 'Why not 60, 80, 100 points?'. It ruled that appointment on this basis was irrational. It argued that this would undermine a black female who does not have to perform to certain criteria and will never be taken seriously and it mocks employment equity. Such irrational criteria defeated efficiency.

The necessary qualifications or inherent requirements for the job should not be changed after the advertisement.

The successful candidate for promotion should be the person who meets the minimum requirements,

but should also be the person who scores highest in the assessment.

There is of course a problem with scoring when there is a list of questions with marks to allocate as the interviewer's response is subjective. If an applicant, for example, speaks well and articulates and knows the interview game they may get a higher score than someone who is more competent for the job.

In the case *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council & others* the candidate had achieved a higher score than the person who got the promotion. The court held that the failure to promote was unfair and that there was no evidence or reason to give the person with a lower score the job.

It argued that if there is deviation from the highest scored candidate, there must be a sound reason, either operationally or for employment equity, to justify this.

In *Solidarity obo Barnard v SAPS* a white policewoman applied for promotion and got the highest score in the skills test. The panel recommended her but the National Commissioner refused to appoint her on the basis she was white and the post was kept vacant and advertised again. She applied again, received the highest score and was again recommended by the panel.

The National Commissioner refused to appoint her again on the basis that the appointment should 'reflect representivity'.

The court ruled that representivity was a good motive but it was a question of how long she would have to wait. It argued that numerical Affirmative Action goals must not be applied rigidly. Employers must take into account all relevant facts, including that applicants from an 'overrepresented group' cannot be denied promotion if the post is not filled by a 'under-represented group'.

The Commissioner could only deny the white woman the appointment if he had appointed a suitable person from a designated group. If the candidates from the designated group were unsuitable, then the white policewoman should have been appointed.

The question is how much effort should you make to get a person from an under-represented group promoted. The court argued that this should be done rationally.

If there is a deviation from promoting the person with the highest score the person who is appointed must possess the necessary qualifications. This was made clear in the *FAGWUSA v Hibiscus Coast Municipality* where the judge stated that the employer is not simply required to appoint a person from a designated group, it must also appoint a person with the necessary qualifications and experience.

Further, an employer must be able to give the reasons why a particular candidate is unsuccessful.

In the case *Coetzer v Minister of Safety & Security* white police officers in the bomb squad argued that they should have been promoted into positions because no designated people applied for the jobs. The minister argued that they could not fill these posts and appoint white officers as they could not get the right affirmative action people for the job.

The court held that this was unfair discrimination and that the white officers should have been promoted as the efficiency and the good working of the bomb squad unit must be balanced with affirmative action measures.

### **Is the employer obliged to provide anything during the probation period?**

In Item 8 of the LRA's Code of Good Practice: Dismissals

it states that the employee's performance must be assessed during probation and that this must be done in the context of the employer being available to advise, train, guide and counsel the employee. The period of probation can also be extended. This training and guidance probably does not apply to senior management.

In *Boss Logistics v Phopi* the employee had misrepresented his qualifications at the interview. He was then dismissed for poor work performance and dishonesty. The employee was unhappy with this and argued that he did not get sufficient training from the employer as his training was only of a two-week duration.

The court held that the company was under no obligation to give training if the employee had misrepresented his qualifications. It held that if an employee says s/he can do the job then you don't need to be trained.

The LRA talks about unfair promotion and probation but this does not apply to applicants for a job who were not appointed because it would be an unviable situation for the CCMA if everyone approached it for justice. However, if an applicant can prove that there was discrimination in an appointment on the employer's side, the applicant can approach the CCMA. In all other circumstances there is no obligation on the employer to appoint if they do not wish to. <sup>18</sup>

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