



## **Is promotion based on equity, as opposed to merit, fair?**

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In the 2009 judgment of *South African Police Services v Inspector Zandberg & Others* the employer applied to have the award of a commissioner reviewed and set aside. In terms of the award the commissioner had held that the employer's failure to promote the employee constituted an unfair labour practice.

It was common cause that the interviewing panel had rated the employee the highest and the most suitable candidate for the job. The panel had recommended him for the promotion, but the employer rejected the recommendation. The commissioner held that "(M)erit should have been the dominant or prevailing requirement during the selection process. If the requirements of equity were intended to be applied then the post would have identified as a designated post. By identifying the post as a non-designated post means that the appointment is neither subject to nor determined by the equity plan...If equity were to prevail under all circumstances and during each and every selection process there would not have been a need to distinguish between designated and non-designated posts".

Based on the commissioner's interpretation of clause 5.3 of the employer's national instructions, she concluded that the best person should have been appointed based on merit, and that equity did not apply. The court held that where a post was advertised as non-designated, as in the present matter, it simply meant that anyone could apply. Distinguishing between designated or non-designated posts in clause 5.3 was only relevant for purposes of advertising the post and soliciting applicants. Clause 5.3 did not apply to short-listing, interviewing, selection and appointment. The commissioner therefore firstly misdirected herself in conflating the advertisement requirements with the requirements for other steps in the appointment process.

A second misdirection was the commissioner's interpretation of the meaning of equity. The court held that equity on the one hand, and merit and suitability on the other hand, were not mutually exclusive criteria. Equity was not only a workplace concern but also a community concern. Equity under the EEA could not be different from the equity which the Constitution promises. Promoting equity in the workplace could therefore not conflict with the constitutional promise of equitable delivery of goods, socio economic rights and benefits and services. In assessing merit and suitability, qualities relevant to ensuring delivery to the community therefore also had to be considered. To this extent, where a white applicant scored better on managerial ability, vision, leadership and appropriate experience and knowledge than the successful coloured candidate, the labour court in the matter of *Alexandre v Provincial Administration of the Western Cape Department of Health* (2005) 26 ILJ 765 (LC) upheld the appointment of the coloured individual who had better communication and interpersonal skills, as well as service delivery. The national instructions did not create a hierarchy of criteria.

All criteria for selection had to be considered cumulatively to balance both equity in the workplace and equity in the delivery of services. In this matter the demographics evident from the employer's equity plan weighed strongly in favour of appointing an African male. From the evidence it appeared as if equity considerations were not considered by the panel during their deliberations. As such the employer had to apply its employment equity plan to the recommendations of the panel. The deviation from the panel's recommendation was therefore rational and justified. The court concluded that no commissioner could reasonably have come to the conclusion the present commissioner reached.

In the result, the arbitration award was reviewed and set aside, no order as to costs.

*April 2010*