New Light on Old Questions?
University of Cape Town v Auf Der Heyde (Lac) (2002) 23 ILJ 658

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The Background [1]

Thomas Auf der Heyde responded to an advertisement for a position of senior lecturer in chemistry at the University of Cape Town (UCT), the duration of which was 'initially for three years with a possible extension to five years'. On 8 May 1995 he was appointed in terms of a 'three-year contract' which stated that it 'does not carry any commitment to a permanent appointment'. Two other lecturers, both black, were appointed at the same time on similar terms. Just over two years later UCT advertised a permanent position of lecturer in the Department of Chemistry. Auf der Heyde applied unsuccessfully. Both of his abovementioned colleagues were, however, appointed to specially created permanent positions which had not been advertised. Auf der Heyde contended that UCT's failure to appoint him or to renew his fixed-term contract amounted to an automatically unfair dismissal, alternatively, that UCT was guilty of direct discrimination against him, alternatively, that his dismissal was unfair due to UCT's failure to comply with the requirements for a fair dismissal on operational grounds. UCT denied that Auf der Heyde had been dismissed or that it had unfairly discriminated against him.

The Labour Court held that an employee cannot rely on an expectation that he will be permanently appointed to a position in order to establish dismissal as a result of the non-renewal of a fixed-term contract. It found, however, that Auf der Heyde had proved that he had a reasonable expectation of the renewal or extension of his fixed-term contract and that his dismissal was for operational reasons. Because UCT had conceded that the appropriate retrenchment procedure had not been followed, the dismissal was procedurally unfair.

Turning to the question of unfair discrimination, the court found that there was no basis for finding that UCT had departed from its affirmative action policy to the detriment of the applicant. Although one of the black appointees was not a South African, and could not accordingly have been favoured in terms of the respondent's affirmative action policy, his race had not been an overriding consideration in

his appointment. Auf der Heyde's claim that he had been unfairly discriminated against was accordingly unfounded.

Auf der Heyde was awarded compensation equivalent to 12 months' remuneration. UCT appealed against the finding that Auf der Heyde had been dismissed and Auf der Heyde cross-appealed, maintaining that the dismissal had been substantively unfair and that UCT's action amounted to unfair discrimination.

The critical events in this matter happened during November and December 1997. [2]

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In August 1997 Auf der Heyde raised the question of extension of his contract with his head of department. He was told that the university 'could not commit itself either way'. [3] In late November, after having applied unsuccessfully for a permanent appointment, Auf der Heyde approached the dean of the faculty with the same question. The answer he received 'was unequivocal: Due to financial constraints [his] contract could not be renewed'. [4]

During the same period a (black) colleague of Auf der Heyde, a Dr Naidoo, was querying the terms of his own appointment. Like Auf der Heyde he had been appointed for three years, albeit to a 'contract development post' in terms of the university's equal opportunity employment policy. [5] In October 1997 it was decided to extend his contract for a further two years. Naidoo objected to being offered a further temporary appointment and, on 17 December 2001, the university offered him a permanent 'supernumerary' position without advertising it.

The sole reason given for non-extension of Auf der Heyde's contract at this point, thus, was 'financial constraints'. A month previously, however, it had been possible to offer Naidoo an extension, [6] and the following month it was possible to offer him a permanent position.

Under cross-examination the dean of the faculty added that '*after* the appointment of Chibale and Naidoo, there were no funds for further appointments' (emphasis added). The appointment of Dr Chibale, like Naidoo's, had been made without advertising the position. The university's argument, therefore, was that the latter two appointments left it in a position where 'financial constraints' prevented it from extending Auf der Heyde's contract.

In a sparse judgment, with little reference to previous decisions and even less analysis thereof, Du Plessis AJA did not consider this point. Dealing with the university's lack of funds the Acting Judge of Appeal said the following:

'The evidence does not mean that, had there been funds, the respondent would have been appointed. Had there been funds, they may well have been used for other purposes.' [7]

In fact, the university had stated the contrary. If lack of funds was the reason for not extending Auf der Heyde's contract, it would seem to mean that but for the lack of funds his contract would have been extended. The LAC judgment does not resolve the anomaly.

'Reasonable Expectation' of Renewal

A central finding of the LAC, in contrast to the Labour Court, was that Auf der Heyde could have had no reasonable expectation of an extension of his contract or of a permanent appointment. [8] Dismissal in terms of s 186*(b)* of the LRA therefore did not take place and the question of unfairness did not arise.

This finding is essentially based on the wording of the advertisement, [9] which spoke of an '*initial* ' three-year period '*with the possibility* ' of extension (emphasis added). In fact, extension of a temporary contract is always a possibility and, in itself, requires no mention. The fact that it was specially mentioned in the advertisement indicates that it was more than a mere possibility; it was an eventuality that might be expected to take place upon the fulfilment of certain conditions rather than at the employer's whim. The advertisement,

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however, gave no indication of what those conditions might be. Auf der Heyde's letter of appointment, while stating that it carried 'no commitment to permanent appointment', [10] was silent on the question of renewal. At face value the appointment was for three years with the possibility of renewal for a further two years conditional upon unspecified factors relevant to the possibility as well as the desirability of renewal.

This was the view adopted by the Labour Court. 'It seems to me', Jammy AJ held, 'that the criteria governing that possible extension, in the absence of any wording to the contrary, might reasonably be inferred to be the standard of the incumbent's performance during the initial three-year period, the need for the rendition of his academic

services for the extended period and the logistical ability of the institution to maintain the post in question.' [11] The evidence furthermore suggested that the university had initially released funds for the full five years.

In the event it is the last of these implicit conditions which the university chose to rely on in motivating its decision not to renew Auf der Heyde's contract rather than an untrammelled discretion (which would, presumably, have been expressed as a denial of the need to provide a reason).

Is it permissible to imply a limitation of this nature on the employer's discretion to renew a temporary contract? It is submitted that it is. An employer has a duty to act fairly towards applicants for employment once there is a vacancy and a person applies for it. [12] By expressly holding out the possibility of renewal the employer is presumably seeking to appeal to a wider pool of applicants, ie, also those who would not have been interested in more than a three-year position with no specific prospect of renewal. It is in the employer's interest to disclose all attractive aspects of the vacant position, including the degree of job security, in order to attract more applicants. In return the applicant should, in fairness, be entitled to rely on the explicit and implicit assurances held out by the employer.

The LAC, while referring to 'many factors' governing the employer's decision to renew a contract, offered no analysis of the case law dealing with the circumstances when a temporary employee may acquire a 'reasonable expectation' that her or his contract will be renewed. Had it done so it is possible that a different finding might have been arrived at.

For example, in *Mediterranean Woollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union* [13] the Supreme Court of Appeal found that certain 'assurances by the managing director of the appellant clearly conveyed to the workers that, despite the strict wording of the temporary contract to the effect that they were to have no expectation of the contract being renewed, they could in fact entertain such an expectation if they behaved themselves so well during the three-month period that management felt happy about them. In fact, not only would their contract be renewed, but appellant would ''come out with a new contract' offering them permanent employment'.

The following passage from *Dierks v University of South Africa* [14] is also apposite:

> '[133] A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeal

Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer or practice or custom in

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regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed-term contract, inconsistent conduct, failure to give reasonable notice and nature of the employer's business . . . .

[134] These factors are not a numerus clausus . Indeed, in my view, the identified approach of an evaluation of all the surrounding circumstances entails an analysis of the facts in any given situation for the purpose of establishing whether a reasonable expectation has come into existence on an objective basis.' [15]

The approach outlined above enjoins a more careful consideration of whether or not a 'legitimate expectation' has been created. The LAC is, of course, not bound by decisions of the Labour Court or the previous LAC. In the interests of legal certainty, however, it is important that departures from precedent should be clearly signalled and explained.

The Status of Irregular Appointments

Little attention was given to the fact that the appointments of Chibale as well as Naidoo were not in accordance with the university's policy. Yet these appointments were said to be the reason for the financial constraint that made it impossible to extend Auf der Heyde's contract. Can an irregular action provide justification for not performing an action that might otherwise have been mandatory?

The question went largely unanswered. In essence, both the Labour Court and the LAC confined themselves to the fact that the positions to which Naidoo and Chibale were appointed were not positions for which Auf der Heyde had applied. 'The appointments of Drs Chibale and Naidoo', in the words of the LAC judgment, 'did not have any effect on the appointment or otherwise of [Auf der Heyde].' [16] Since Auf der Heyde, on the one hand, and Chibale and Naidoo, on the other, were not competing for the same positions, it meant that the question of unfair discrimination did not arise.

On closer examination there are inconsistencies in this seemingly symmetrical reasoning. Again the LAC made very little reference to the copious body of case law on the subject and again one cannot help but wonder if a different finding might not have been arrived had the court followed the approach enjoined by the Constitutional Court in *Harksen v Lane NO.* [17] This approach is contained in the following much-cited passage:

'The determination whether differentiation amounts to unfair discrimination . . . requires a two-stage analysis. Firstly, the question arises whether the differentiation amounts to ''discrimination' and, if it does, whether, secondly, it amounts to ''unfair discrimination'. It is well to keep these two stages of the inquiry separate. That there can be instances of discrimination which do not amount to unfair discrimination is evident from the fact that even in cases of discrimination on the grounds specified in s 8(2), [18] which by virtue of s 8(4) are presumed to constitute unfair discrimination, it is possible to rebut the presumption and establish that the discrimination is not unfair.' [19]

In the present matter the test was applied only partially. Differentiation was acknowledged between the treatment received by Auf der Heyde on the one hand and Chibale and Naidoo on the other consisting of '[t]he granting to Chibale and Naidoo of access to a process that would eventually (and inevitably) lead to their appointment to permanent positions, while [Auf der Heyde's] position was relegated to be considered in accordance with the ordinary staffing policy'. [20] The court did not clarify whether such differentiation amounted to

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discrimination, unfair or otherwise. Instead it proceeded to the conclusion that it was not an unfair labour practice on two somewhat contradictory grounds.

As already noted, the underlying reasoning appeared to be that Auf der Heyde was not in competition with his two colleagues and that the question of discrimination therefore did not arise. Reference was made to the finding of Zondo JP in *Woolworths (Pty) Ltd v Whitehead* [21] to the effect that, to establish 'unfairness', '[t]here must be a causal connection between the act or omission complained of and an adverse effect on the rights or expectations of the person complaining of the unfair labour practice'. [22] On this basis Du Plessis AJA went on to find, apparently, that no causal connection existed between the admittedly irregular appointment of Dr Naidoo and Auf der Heyde's non-appointment.

In fact, the 'causal connection' referred to in the *Woolworths* judgment was of a different nature from that suggested by Du Plessis AJA. What Zondo JP had said was the following:

'The respondent is unable to show that, but for her pregnancy, she would have been appointed to the position despite the appellant having another candidate who was better suited for the job than herself. The result of this is that, in my view, there is no causal connection between her not being appointed and her pregnancy. The reason why in the end she was not appointed was simply that there was a stronger candidate than herself. It is true that her pregnancy was taken into account against her but there is no evidence that, if it had not been taken into account, she, and not Dr Young, would necessarily have been appointed.

Accordingly I can find nothing unfair about the appellant's decision not to appoint the respondent to the position but to appoint a better candidate than her.' [23]

Thus, a causal connection must be established not between 'the act or omission complained of and an adverse effect on the rights or expectations of the [complainant]' but between *an unfair ground or reason for discrimination* and an adverse effect on the complainant's rights or expectations. It was common cause that the differential treatment accorded to Auf der Heyde and his two colleagues was racially motivated. Chibale was offered a permanent position at least partially on account of his race and Naidoo, apparently, essentially for this reason. In both cases the posts were specially created. The applicant was not accorded similar treatment because he was not black. The differentiation was discriminatory in that it operated to the detriment of Auf der Heyde and adversely affected his right or expectation to equal treatment. Because it was based on race it was, moreover, prima facie unfair. [24]

The onus thus rested on UCT to establish that the discrimination was fair. This it sought to do on the grounds that the appointments of both Chibale and Naidoo were justified in terms of its affirmative action policy. [25] In fact, neither of the two appointments fell within the scope of the policy. As regards Chibale, the Labour Court found, [26] and the LAC was prepared to assume, [27] that affirmative action measures cannot validly be applied to non-South Africans. Secondly, the employment policy contemplated two categories of 'equal opportunity' posts, the first of a developmental nature and the second of 'strategic appointments' against future vacancies. The 'supernumerary' posts created for Chibale and Naidoo fell into neither category. Thirdly, the fact that both posts were filled without being advertised was squarely in conflict with the university's policy that, subject to 'equal opportunity' appointments, '[t]he university will adhere *without exception* to a policy of searching thoroughly for good applicants in respect of all its vacancies'. [28]

On these grounds the LAC assumed that 'the appointments [of Chibale and Naidoo] did not qualify as affirmative action appointments in terms of the policy'. [29] This left the prima facie unfairness

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of the discrimination against Auf der Heyde undisturbed. The court went on, however, to consider two different reasons why, in its view, the appointments of Chibale and Naidoo were justified.

Chibale, the LAC found, had been appointed not only because of his race but also because of his merit. Since Auf der Heyde was 'not rated as highly ... [it] follows that the appointment of Dr Chibale and the failure to appoint the respondent did not constitute an unfair labour practice'. [30] This reasoning, it is respectfully submitted, would have made sense if Auf der Heyde and Chibale had been competing for the same post. Since they were not (as the court emphasized) it has little bearing on the fact that the university adopted different processes in respect of their appointment. If anything, Chibale's superior merit would have made it unnecessary to exclude Auf der Heyde or other potential applicants from competition.

In addition, the university alleged that departure from its policy of advertising all positions was justified 'in exceptional circumstances and after strong motivation'. [31] Though this was manifestly in conflict with the university's employment policy the LAC accepted, without explanation, that the necessary motivation existed for Chibale's special treatment in terms of merit as well as race.

In fact, the difference in merit between Auf der Heyde and Chibale appears to be less than clear-cut. [32] Even accepting the difference, however, the argument itself is highly questionable. Appointing persons on merit does not in itself call for irregular procedures or racial discrimination against persons of less merit. Differential treatment would be permissible if race played no material role - in other words, if Chibale had been singled out for special treatment without regard to race. But this was not so. The court accepted that race was part of the reason, though not the only one. In *Louw v Golden Arrow Bus Services* [33] it was found that discrimination is unfair to the extent that it is 'caused or contaminated' by an impermissible reason. [34] This, it is submitted, is correct. The implication is that the differential treatment meted out to Auf der Heyde and Chibale respectively was discriminatory and unfair to the extent that it was premised on race.

In the case of Naidoo the LAC found justification of a different nature. His appointment was characterized as 'an affirmative action one, albeit not made regularly in accordance with the policy'. It is

submitted that a measure cannot both be contrary to an employer's affirmative action policy and at the same time valid. [35] If it was 'not in accordance with the policy', then what did it accord with? The answer can only be: the ordinary rules of employment and the principle of equal treatment.

The LAC, instead, reverted to the lack of a causal nexus between Naidoo's appointment and Auf der Heyde's non-appointment [36] and found on this basis that no unfair labour practice had been committed.

The absence of a causal nexus between Naidoo's appointment and Auf der Heyde's non-appointment, it may be noted, was not unconnected with the irregularity of the procedure. The facts suggest that Auf der Heyde might well have succeeded (as in 1995) in obtaining appointment to an advertised position in preference to Naidoo. Competition was avoided by failing to advertise the post.

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The differential treatment complained of therefore did not consist simply of Naidoo's appointment and Auf der Heyde's non-appointment per se . Unfairness is not limited to circumstances where a person is deprived of an existing right or benefit. The essence of unfairness consists of favouring one person or group over another on an impermissible ground. Thus, in *City Council of Pretoria v Walker* [37] the differential treatment consisted of a policy 'to require the (white) residents of old Pretoria to comply with the legal tariff and to pay the charges made in terms of that tariff on pain of having their services suspended or legal action taken against them, whilst residents of certain black townships were not held to the tariff, were called upon to pay only a lower rate and were not subjected to having their services suspended or legal action taken against them'. [38] Though intended as an affirmative action measure, the majority of the court found that the policy constituted indirect racial discrimination against white residents despite the fact that they suffered no derogation from their rights or privileges.

The implication is that discrimination consists not only of a denial of existing rights but, essentially, of unequal treatment on an impermissible ground in the absence of a valid reason for such treatment.

In the present case the differential treatment consisted of setting up a special process for Naidoo's appointment (the creation of an unadvertised post) on account of his race while requiring Auf der Heyde to follow the ordinary route. Had this measure fallen within the scope of the university's employment policy it might well have been justified. Since it did not, it could not rebut the presumption of unfairness attaching to discrimination on grounds of race.

It was furthermore suggested that lack of funds following Naidoo's irregular appointment not only justified Auf der Heyde's non-appointment but removed the stigma of unfairness from the differential treatment accorded to Naidoo and Auf de Heyde. [39] In previous decisions the Labour Court, [40] the LAC [41] and the Constitutional Court [42] went no further than accepting commercial rationale as one of the factors that may be considered in deciding whether discrimination is permissible. In the present matter Du Plessis AJA appeared to accept alleged financial constraints without any qualification as justification for discrimination on grounds of race. It is respectfully submitted that this cannot be correct.

Unanswered Questions

A perplexing aspect of the LAC judgment, as indicated previously, is its general failure to consider existing precedent while arriving at findings that are at odds with such precedent. In the result it is unclear whether or to what extent the court intended to overturn the earlier judgments.

The following two findings create particular uncertainty:

- An irregular appointment (not in accordance with the employer's affirmative action policy) was nevertheless considered an affirmative action appointment and, hence, a permissible form of differentiation on the grounds of race. On the face of it this reverses a consistent line of High Court and Labour Court decisions requiring affirmative action measures to be in accordance with a policy or plan as a condition for

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their validity. While it is questionable in the light of the Employment Equity Act whether a pre-existing policy or plan can still be said to be a requirement, it has thus far been accepted that, where such a policy does exist, measures in conflict therewith do not qualify as affirmative action measures. This approach is captured in the Employment Equity Act, requiring employment equity plans that embody consensus seeking between

employers, unions and employees in the workplace in the shape of enforceable rights and duties. The contrary ruling of the LAC in this matter threatens to open the door to ex post facto ratification of ad hoc measures by employers which violate employees' right to equal treatment.

- Prima facie unfair discrimination, in the form of irregular appointments on grounds of race, was accepted as fair in circumstances where *(a)* the appointee possessed 'conspicuous merit' and *(b)* there was no evidence that the complainant would have been appointed to any other position but for the irregular appointment. While it is debatable whether the two statutory defences [43] to complaints of unfair discrimination are exhaustive, the two additional grounds accepted in the present matter are so broad and undefined as to severely undermine the constitutional right to equality.

Conclusion

The decision of the LAC in *UCT v Auf der Heyde* leaves the law of unfair discrimination in a state of less certainty than before and introduces elements that are potentially deeply problematical. The ostensible effect is to uphold appointments which, though irregular, were intended as affirmative measures. The unsuccessful litigant belonged to a group which, historically, was the major beneficiary of racial discrimination. A measure of judicial activism, even some rough justice, may not seem inappropriate in redressing historical imbalances.

There may, however, be unintended consequences. The law of employment equity (now embodied in the Employment Equity Act) represents both an experiment in social engineering and a finely balanced set of socio-economic and political compromises. On the one hand it makes affirmative action mandatory at least for medium and large employers. On the other hand it prohibits dismissal or 'absolute barrier[s]' to the employment or advancement of 'people who are not from designated groups', [44] ie white males without disabilities. The compromise is by no means ideal and will no doubt undergo development and refinement. This very process, however, presupposes ongoing commitment by all role-players to make it work. The national consensus needs to be replicated at enterprise level in affirmative action policies providing a degree of certainty to all concerned. Not only should they offer adequate prospects of advancement to potential beneficiaries; they should offer sufficient security for those who feel threatened by affirmative action (and often possess a disproportionate share of technical expertise) to ensure continued cooperation. Where

such policies have been arrived at, they need to be implemented carefully and sensitively.

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This did not happen in the present matter. The agreed policy was disregarded. Whatever sense of common purpose may have been invested in it can only have been weakened. The LAC, rather than upholding the policy, effectively sanctioned its breach.

Any precedent which this may have set should be corrected. In *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* [45] Wallis AJ concluded that he was not obliged to follow an LAC ruling because it rested on a finding which had been rejected by the Constitutional Court. It is suggested above that the findings of the LAC in the present matter may likewise be at odds with the approach of the Constitutional Court to the prohibition of unfair discrimination. To this extent the Labour Court may be at large to consider the issues afresh.

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[1] this Introduction is Based on the Editors' Summary of *Auf Der Heyde v University of Cape Town* in [2000] 8 Bllr 877 (Lc); See Also (2000) 21 ILJ 1758 (Lc).

[2] Unless otherwise indicated, all facts are taken from the judgments of the Labour Court (*Auf der Heyde v University of Cape Town* (n 1) referred to below as 'Labour Court judgment') and Labour Appeal Court *(University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC) referred to below as 'LAC judgment').

[3] para 13 LAC judgment.

[4] para 17 LAC judgment.

[5] See para 8 LAC judgment, for a fuller explanation of the procedure.

[6] The first year of a 'contract development' appointment is paid from a special fund; thereafter it is paid from the faculty's regular budget: para 5 LAC judgment.

[7] para 36 LAC judgment.

[8] The LAC noted the conflicting interpretations of s 186*(b)* in *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) and *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) but found it unnecessary to resolve the question (at para 20). For the record, it is submitted that *McInnes* offers a 'purposive' interpretation in accordance with s 3 of the LRA and is therefore preferable to the literal interpretation relied on in *Dierks.*

[9] See para 22 LAC judgment.

[10] para 23 LAC judgment.

[11] For an illustration of conditions of renewal, see *Dierks v Unisa* (n 8) at para 22.

[12] *Kadiaka v Amalgamated Beverage Industries* (1999) 20 ILJ 373 (LC); [1998] JOL 4069 (LC).

[13] (1998) 19 ILJ 731 (SCA) at 734C.

[14] (1999) 20 ILJ 1221 (LC).

[15] See also *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC); *Malendoh v SABC* (1997) 19 ILJ 544 (LC); *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC); *Morag v Dortech (Pty) Ltd* [2001] 8 BLLR 917 (LC).

[16] para 38. This, despite UCT's evidence that the appointments of Chibale and Naidoo were the direct reason for not appointing Auf der Heyde for a further two years.

[17] 1998 1 SA 300 (CC); as argued by counsel for Auf der Heyde and alluded to by the court at para 30.

[18] of the interim Constitution (Act 200 of 1993).

[19] at paras 46 ff.

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[20] at para 30.

[21] 2000 (3) SA 529 (LAC); (2000) 21 ILJ 571 (LAC) at para 24.

[22] LAC judgment at para 35.

[23] *Woolworths v Whitehead* (n 21) at para 24.

[24] In terms of s 9(5) of the Constitution (Act 108 of 1996).

[25] Labour Court judgment at para 19.

[26] at para 70.

[27] at para 32.

[28] Clause 2.1 Equal Opportunity Employment Policy, cited at para 3 of Labour Court judgment. Emphasis added.

[29] The second statutory defence to a claim of unfair discrimination, ie 'an inherent requirement of the particular job' (item 2(2) schedule 7 to LRA), was - understandably - not canvassed.

[30] para 33.

[31] LAC judgment at para 13.

[32] Auf der Heyde was originally appointed to an advertised post in preference to Naidoo (LAC judgment at para 8) and his subsequent work was described as being 'of the highest standard and acknowledged as such' (LC judgment at para 44). Chibale initially failed to obtain an appointment to an advertised position and was thereupon selected for what appears to have been a 'strategic appointment' - ie of 'fully qualified' persons against a future vacancy (LAC judgment at para 10).

[33] (2000) 21 ILJ 188 (LC).

[34] para 37 with reference to *Enderby v Frenchay Health Authority* [1993] IRLR 591 (ECJ) at 595.

[35] See, for example, *Public Servants Association of SA & others v Minister of Justice & others* (1997) 5 BCLR 577 (T); *Independent Municipal & Allied Workers Union v Greater Louis Trichardt Transitional Local Council* (2000) 21 ILJ 1119 (LC); *Walters v Transitional Local Council of Port Elizabeth & another* (2000) 21 ILJ 2723 (LC); John Grogan *Workplace Law* (5 ed 2000) at 204. In *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC) a purported affirmative action appointment that was similarly at odds with the employer's affirmative action policy was found to constitute unfair discrimination against an unsuccessful applicant. Though obiter , it is submitted that the finding was correct in the context of item 2(2)*(b)* of item 7 to the LRA and probably also in terms of s 6 of the Employment Equity Act 55 of 1998.

[36] Notwithstanding the university's argument that financial constraints following Naidoo's appointment had left it unable to appoint Auf der Heyde for a further two years: see above.

[37] 1998 2 SA 363 (CC); 1998(3) BCLR 257 (CC).

[38] per Langa DP at para 33.

[39] para 36.

[40] For example*, Ntai & others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC) at para 61.

[41] Minority judgment of Willis AJA in *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) at para 134.

[42] *Hoffmann v SA Airways* (2000) 21 ILJ 2357 (CC) at para 34.

[43] ie affirmative action and inherent requirements of a job.

[44] s 15(4) of the Employment Equity Act.

[45] (2000) 21 ILJ 1232 (LC) at para 91.

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