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INVESTIGATING FAIRNESS IN PROMOTIONS: A SOUTH AFRICAN STUDY

BY

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DECLARATION

I Lehlohonolo Hector Manyathela, declare that this mini dissertation is my own original work and it has not been presented to any other University or Institution for a similar or any other degree award.

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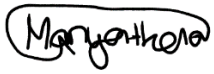

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Almighty God- Let me extol the Alpha and the Omega, the beginning and the end, the first and the last for infiltrating wisdom and knowledge in my mind. Without the guidance of the Holy Spirit, I wouldn't be where I am now. JESUS CHRIST IS THE LORD.

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ABSTRACT

Over the past few years, promotion has become the center of discussion. This matter is sensitive and imperative to both employees and employers as it will always involve conflicting interests and rights of both parties. Promotion of employees in the workplace gives the employer the discretion to fill vacant posts and it also helps some employees to move up the ranking by getting promoted and thereby improving their livelihood. Employees have shared their unpleasant experiences with their employers during this process, as a result, they challenge the employer's decision through a grievance procedure and take the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) or their respective bargaining councils.

The main objective of this dissertation is to establish fairness concerning promotion in the South African workplace. The research has been extensively conducted and supplemented accordingly by incorporating the latest case law in promotional disputes. This research deals with promotion in the workplace in general and the manner in which employers should handle them to avoid unnecessary promotion disputes which are often delayed and costly.

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List of acronyms and abbreviations

CCMA – Commission for Conciliation Mediation and Arbitration

ConCourt- Constitutional Court

DD - Deputy Director

DWCP- Decent Work Country Programme

EEA - Employment Equity Act

GPSSBC- General Public Service Sectoral Bargaining Council

IC - Industrial Court

ILO - International Labour Organisation

JP - Judge President

J - Judge

LAC - Labour Appeal Court

LC - Labour Court

LRA - Labour Relations Act

NEDLAC – National Economic Development and Labour Council

PSCBC- Public Sector Coordinating Bargaining Council

SA - South Africa

SAPS - South African Police Service

SCA - Supreme Court of Appeal

ULP - Unfair Labour Practice

CHAPTER ONE

1. INTRODUCTION AND BACKGROUND OF THE STUDY

1.1 Introduction

Promotion in the workplace in South Africa (SA) involves the consideration and application of human resources practice, policy and applicable legislation. The *Labour Relations Act* 66 of 1995 (henceforth referred to as the LRA) addresses the unfair labour practice concerning promotions in the workplace and it affords protection against unfair labour practice (ULP) to the employee. It is essential to define an employee clearly and precisely because the definition is the starting point in determining the nature and scope of the protection afforded by most of the labour Statutes. In terms of the LRA, an employee is defined as any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration and any other person who in any manner assists in carrying on or conducting the business of an employer.[1]

Knowing and understanding the term 'employee' is essential, especially in the context of promotion, because the LRA prescribes that the ULP may be perpetrated through the employee. The LRA precludes independent contractors from the definition of an employee. Van Niekerk et al. contemplate that the origin of this exclusion can be traced to early cases that dealt with determining who is an employee.[2] The LRA accepts the following difference between an employee and an independent contractor: an employee 'makes over his or her capacity to produce to another' whereas an independent contractor is someone 'whose employment is the production of a given result'.[3]

This chapter in essence identifies the problem statement and gives a brief description of the research context. It also identifies the questions that suffice on this study and the legislation which addresses the legal questions. The chapter summarizes the rationale for this study and outlines the methodology which is going to be employed in conducting the research.

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1 *Labour Relations Act*: sec.213.
2 Van Niekerk *et al*. 2019:63.
3 *Labour Relations Act*: Item 34 of the code.

1.2 Research problem

Addressing many workplace disputes about promotions has proven difficult. Numerous workers believe that they have the right to be promoted or given precedence over other applicants since the establishment currently employs them or have worked there for several years; however, that is not the case because Promotion complies with the managerial prerogative. Additionally, it was discovered that there is no right to promotion established under the *Labour Relations Act*.[4] Employees have the right to be fairly considered for promotion when a vacancy occurs.[5] Nonetheless, the employer is obligated to treat the employee equitably during the selection and promotion process.[6]

The common law appears to be inefficient in dealing with unfair work practices including promotion. Consequently, in the absence of a contractual agreement that provides substance to promotional opportunities, at common law, an employee has no legal right to allege that the employer behaved unfairly in not advancing such an individual.[7] Therefore, it is challenging to demonstrate that an employer behaved unfairly regarding promotions.[8] The burden of proof is entrusted to the employee who alleges that he has suffered from unfair labour practice (ULP), and the claim must be proven on a balance of probabilities. The employee must demonstrate not only the presence of the labour practice but also that it is unfair.[9] It seems that three problems typically come up in most cases brought before the CCMA and bargaining councils regarding promotions. The first is the definition of 'promotion' and what does it really involve; the second is what constitutes 'unfair conduct' on the employer's part; the third pertains to the remedies that may be awarded when an employer's actions are deemed unjust.[10] The first problem is that some employers use the terms interchangeably when referring to promotions and appointments, while other employers separate appointments from promotions. The second problem is the unfair conduct of the employer becomes problematic when it comes to managerial

4 Du Toit *et al.* 2006:486; *Department of Justice v CCMA & Others* [2004] 4 BLLR 297 (LAC) par. 40.
5 Du Toit *et al*. 2006:486.
6 *Labour Relations Act*: sec. 186(2).
7 Van Jaarsveld *et al*. 2001:8.
8 Mcgegor & Dekker (eds.) 2021:80.
9 *Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani* (2002) 23 ILJ 761 (LC) par. 32.
10 Basson *et al*. 2017:213.

prerogatives and the last problem relates to the remedy to be issued especially a remedy like protective promotion and the arbitrators imposing their candidate on the employer.

The other dilemma that arises in ULP instances involving promotions is the involvement of arbitrators and courts. An arbitrator or court is not considered the employer.[11] Thus, it is not the obligation of the arbitrator or the court to ascertain whether the employer has rendered the appropriate decision.[12] The arbitrator is tasked with ensuring that the employer does not act unjustly towards the candidate who is not promoted.[13] Grogan mentioned that the courts have emphasized that arbitrators are not permitted to impose their own preferences on employers regarding who to promote.[14] In *Dlamini and Toyota SA Manufacturing*, the court determined that it does not function as a 'recruitment agency' to aid the employer in selecting the most suitable candidate.[15] The court will be reluctant to intervene in the employer's discretion unless the employer acted with gross unreasonableness or in bad faith.

1.3 Research questions

In light of the above-mentioned research challenges, the following inquiries will serve as a roadmap for the study's execution.

- Main research question: Are South African legal instruments sufficient to ensure fair promotions?
- What is regarded as a promotion in SA labour law?
- How does the ILO guide fairness in promotions?
- What are the legal instruments governing promotions in South Africa?

1.4 Motivation/ Rationale

The study investigates this topic after noticing that most disputes were sparked by promotions in my capacity as a shop steward and the secretary of the Public Servants Association of South Africa in the Department of Employment & Labour Gauteng National branch. This sentiment was also expressed by Basson who noted that many

[11] *SAPS v SSSBC* [2010] 8 BLLR 892 (LC).
[12] *Head, Western Cape Education Department and others v Governing Body, Point High School and others* 2008 (5) SA 18 (SCA).
[13] *SAPS v PSA* [2007] 5 BLLR 383 (CC).
[14] Grogan 2020:59.
[15] *Dlamini and Toyota SA Manufacturing* (2004) 25 ILJ 1513 (CCMA).

unfair labour practice issues that reach the CCMA or bargaining councils involve promotion.[16] The study could help to reduce the number of grievances filed as a result of not being promoted and provide a strategy and procedure that employers can follow to avoid having so many instances escalated to the CCMA or bargaining council. Another issue often encountered in the context of promotions is the idea or principle of managerial prerogative, which will be conceptualised in this research and be dissected within the principle of fairness. One of the most contentious concerns involving unfair labour practices in respect to promotions is how arbitrators and courts should interfere in such cases without interfering with management's decisions. Protective promotions will thus be referred to as well.

1.5 Method / Approach

The proposed study will use a qualitative approach to determine whether South African legal instruments adequately and efficiently promote fair workplace promotions. As Taylor noted, research that generates descriptive data—people's own written or spoken words and observable behaviour—is referred to as qualitative technique.[17] Qualitative approaches are utilised to investigate topics with subjective complexities and provide insights into how specific entities connect to a phenomenon within their context.

This research paper will analyse fair promotions and look at the elements of fairness in light of unfair labour practices. The study content will investigate the actions of employers who engage in unfair labour practices related to promotion and further conceptualise the management prerogative. Given that this study's objective is to ascertain the viewpoints, stories, and impressions of court cases and legal experts' publications addressing fair labour practices in relation to workplace promotions, a deductive approach is applicable, and qualitative research is suitable. The paper will employ desktop research, using material freely available in the public domain. This is a literature study, and I will use primary and secondary sources such as journals, books, case law of South Africa and ILO conventions.

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[16] Basson *et al*. 2017:213.
[17] Taylor *et al*. 2016:07.

1.6 Chapter outline

In this chapter, the study set out what the problem is and how to address the issue at hand and share the methodology and rationale. In the next chapter, the study will investigate the concept of what a promotion is and explain the principles of fairness. In chapter 3, the study will provide guidelines issued by the ILO to deal with fairness and discrimination in the world of work. In chapter 4, the study will deal with key South African legislative provisions, governing (un) fair promotions, and I will also provide for the remedies that may be granted. In chapter 5, the study will close by addressing the research questions and providing recommendations for the research problem.

CHAPTER TWO

2. EXPLORING THE CONCEPT OF PROMOTION AND FAIRNESS

2.1 Introduction

In this chapter the study will discuss what a promotion is and how fairness is viewed. The study will thus answer the first subsidiary research question to ensure that the concept of promotion and fairness have been addressed, which will form the background to the rest of the study.

The Oxford Dictionary[18] defines “promotion” as a “raise” to a higher rank or office. A promotion occurs when an individual is transferred from one job to another that pays more, has more responsibilities, or is at a higher organizational level.[19] It was argued in the case of *SACSAAWU obo Nguyuza v Premier Loss Control CC*[20] that promotion ought to come with perks like increased pay. According to Grogan’s interpretation, employees are promoted when they advance to a higher position. Promotion usually, but not always, results in a wage raise; it always implies an increase in responsibility and position.[21] However, it is argued that an elevation that includes, for example, a greater status but no higher compensation could be considered a promotion.[22] In *Mashegoane & Another v University of the North*[23] the LC alluded to the fact that an appointment to a position that conveys higher power and status amounts to promotion. However, one ought to be mindful of the fact that a disputed remissness of appointing an applicant to a different position—even one with a higher status—won't always be considered in a promotion dispute. Promotions can involve a combination: of a new job title; a pay raise; more responsibilities; recognition for their contributions; decision-making power; leadership roles and responsibilities.[24]

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18 The Oxford English Dictionary is the principal historical dictionary of the English language, published by Oxford University Press, a University of Oxford publishing house.
19 Nel *et al*. 2001:272.
20 *SACSAAWU obo Nguyuza v Premier Loss Control CC* [1998] 9 BALR 1190 (CCMA).
21 Grogan 2019a:144.
22 Fouche & du Plessis (eds.) 2019:358.
23 *Mashegoane & Another v University of the North* 1998 1 BLLR 73 (LC).
24 Fouche & du Plessis (eds.) 2019:385.

"Promotion" can be stated in terms of two fundamental mechanisms that most businesses use to allow people to advance or progress in a company.[25] The first is a level progression system in which employees are reviewed regularly and advance from one grade to the next based on the results of the evaluation. Most staff are examined regularly before moving from one job level to the next. In other words, based on the conclusion of their evaluation, employees are promoted by their employers, resulting in higher remuneration or perks in relation to their job relationship. In the second system advertises vacancies and invites current employees to apply for the positions.[26]

2.1.1 Level progression

Employees are assessed frequently and advance to a higher level while staying within the constraints of the particular work (subject always, of course, to the outcome of the evaluation).[27] The principle that level advancement constitutes a promotion system has been addressed in at least two cases before the CCMA.[28] This system has not been problematic as applications for vacancies when dealing with promotions. When it comes to level progression, the CCMA has been eager to assume jurisdiction to determine whether an employer's actions are fair or not.[29] The facts in *Misra v Telkom* are illustrative, in this case, to decide if the candidate employee should be promoted, he was assessed using a set process that the business and many trade unions had agreed upon.[30]

The summary in *Msira v Telkom* is as follows:

"The evaluation was based on assessment points rating the employee's productivity, personal qualities and qualifications in the past year. The original assessment 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

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[25] Garbers 1999:21.
[26] Fouche & du Plessis (eds.) 2019:385.
[27] Basson *et al*. 2017:213.
[28] See In *Misra v Telkom* 1997 6 BLLR 794 (CCMA) par. 153 and SATA obo *Van der Mescht v Telkom SA (Pty) Ltd 1998 6 BALR 732* (CCMA) where the Commissioner expressed the view that "level progression is clearly a system of promotion".
[29] Garbers 1999:22; Basson *et al.* 2017:213.
[30] Basson *et al*. 2017:213.

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".[31]

2.1.2 Application for vacancies system

Here some posts are presented and both serving employees and external applicants are requested to make an application for these posts. This system has been more problematic.[32] In *Public Servants Association v Northern Cape Provincial Administration*,[33] the CCMA ruled that this would not represent a promotion at all and that the employee is nothing more than a job applicant, and the LC originally agreed with the view in *Department of Justice v CCMA and Others*.[34] However, the LAC in *Department of Justice v CCMA & Others*,[35] decided that it would be considered a "promotion" (for current employees) even if current employees compete with outside candidates for better positions that were posted outside. Is it possible to say that an internal candidate who is hired has been promoted or appointed to the position?

Some ingenious arguments emerged in support of a narrower reading, but the majority of verdicts favoured a broader view in which an external candidate is appointed and an inside one is promoted.[36] The LAC in the *Department of Justice v CCMA & Others* eventually resolved the conflict between promotion and appointment, ruling that an internal candidate for a more senior position is promoted while an external candidate is appointed to the position. Whether an employee who applies for a higher post is an applicant or a candidate for promotion depends on the facts of each case.[37] Without a doubt, the claimant must be employed by the employer before he can depend on Schedule 7 item 2(1)(b) of the LRA, which addresses unfair labour practices pertaining to promotion disputes. In other words, 'there cannot be a dispute relating to promotion unless there is an employment relationship between the parties concerned'.[38] Once the required nexus between an employer and employee has been established, the

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31 *Misra v Telkom* 1997 6 BLLR 794 (CCMA):794E-G.
32 Basson *et al*. 2017:213.
33 (1997) 18 ILJ 1137 (CCMA).
34 (2001) 22 ILJ 2439 (LC).
35 (2004) 4 BLLR 297 (LAC).
36 Fouche & du Plessis (eds.) 2019:385.
37 Grogan 2019a:143.
38 *MEC for Transport; Kwazulu-Natal & Others v Jele* [2004] 12 BLLR 1238 (LAC) par. 8.

employee's existing position must be compared to the job applied for in order to assess whether or not a promotion was at stake.[39]

2.1.3 Post upgrade

The upgrading of posts also has been viewed as a promotion.[40] However, Grogan states otherwise by saying that a dispute relating to upgrading was therefore a matter of mutual interest rather than promotion, and the bargaining council lacked jurisdiction to arbitrate the matter as a dispute concerning an alleged ULP.[41] This proposition was also held in *Polokwane Local Municipality v SALGBC & Others*[42] where the LC expressed the view that this does not imply a promotion, because promotions are about people moving between occupations or different levels allocated to a position, not about people changing employment. In the case of *Minister of Labour v Mathibeli*[43] the court argued that retaining an employee in a newly upgraded post without increasing his salary or benefits does not constitute a promotion, but if the employee's salary is increased, it does.[44] A claim that an employee had been incorrectly placed on a lower grade has been held in principle to be a dispute about a promotion.[45] Although not an essential requirement for promotion, a wage increase may signal a promotion.[46] In most cases, post-upgrade occurs when employees are routinely reviewed by their superiors or assessors via internal processes before any promotion or growth may occur.[47]

2.1.4 Acting position

Employees may be requested to act in positions higher than the ones they occupy for a certain period. The simple fact that an employee acts in such a manner does not entitle the employee to be selected for the position.[48] However, Grogan contemplates that failure to appoint permanent employees who have been performing in positions to their posts represents promotions.[49] These sentiments were supported by the case

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39 Garbers 1999:22.
40 Basson *et al.* 2017:213.
41 Grogan 2019a:145.
42 *Polokwane Local Municipality v SALGBC & Others* [2008] 8 BLLR 783 (LC).
43 *Minister of Labour v Mathibeli* (2013) 34 ILJ 1548 (LC).
44 Grogan 2020:60-61.
45 Grogan 2019a:145.
46 *Jele v Premier of the Province of KwaZulu-Natal & others* (2003) 24 ILJ 1392 (LC).
47 Odeku 2013:867.
48 Basson *et al.* 2017:215
49 Grogan 2019a:148.

of *Van Blerk and Tshwane University of Technology* which decided that When employees operate in a position but are not substantively assigned to the role, the disagreement may also fall under the terms of section 186(2)(a) of the LRA.[50] In *SAPS v SSSBC & Others*[51] the LC held that acting in a position for which employees apply for the job does not guarantee that they will be given preference. The court determined that employees who have been acting in a more senior position do not automatically have the entitlement to be promoted to that role when it opens up. However, employers may act unfairly by not considering one of the employees who has been acting.

Employees frequently allege that their actions in a higher position create a "legitimate expectation" of advancement.[52] Even where there is a “legitimate expectation” of the employee, typically based on a promise of being permanently promoted to the post in which the employee has been acting, this simply implies that before a final decision is made, the employee must be heard. According to Cheadle ‘if an employer has by word or deed led an employee to expect that she will be promoted, the failure to promote that employee may ground a case challenging the employer’s decision’.[53]

According to the court's ruling in *Classen & Others v Department of Labour*, certain acting employees have been successful in contesting the employer's actions as unfair promotion-related practices, although these instances are the exception rather than the rule.[54] In *Imatu obo Coetzer v Stad Tygerberg*,[55] even while there may be a reasonable expectation of promotion, it was decided that an employee's simple acting at a higher level does not grant them the right to be assigned to that position. Furthermore, it was decided that a legitimate expectation only gives an employee the right to be heard prior to a decision being made. In *Kotze v Agricultural Research of SA*,[56] the commissioner decided that the employer behaved in bad faith by letting the employee to work in a position for two years before informing him that he did not meet the formal qualifications for the job. The employer was obliged to promote the applicant and compensate him. The LC also ruled that a failure to promote was unjust when a

50 *Van Blerk and Tshwane University of Technology* (2012) 33 ILJ 1248 (CCMA).
51 *SAPS v SSSBC & Others* [2010] 8 BLLR 892 (LC).
52 Fouche & du Plessis (eds.) 2019:384.
53 Cheadle 2006:22.
54 (1999) 10 BALR 586 (PPSSBC) at 1266 G-H.
55 (2006) 28 ILJ 375 (LC).
56 (2007) 28 ILJ 261 (CCMA).

worker spent five years in an acting capacity without explaining the interview panel's determination not to promote.[57]

The question in *HOSPERSA and another Northern Cape Provincial Administration* was whether an employee, a nurse, who had been appointed to a more senior position in an acting capacity was entitled to be rewarded for the additional work accomplished during this period. The CCMA determined that the employer's failure to pay the nurse throughout this time constituted an unfair labour practice. Upon review, both the LAC and the LC decided that the staff member had not demonstrated her entitlement to a greater compensation.[58] Grogan believes that the post in which an employee is acting happens to be regraded but does not mean that the employee is promoted.[59]

2.1.5 Appointing casual/temporary employees to a permanent position

Van Niekerk suggests that refusing to assign a temporary worker to a permanent role could be considered a promotion disagreement.[60] These sentiments are also echoed by Grogan, who suggests that failing to appoint temporary employees to permanent positions can give rise to a dispute concerning promotion.[61] This view was further illustrated in the case of *Joint Affirmative Management Forum v Pick n' Pay Supermarket,*[62] according to the employer's policy, temporary workers were first hired as part-time staff members before being promoted to permanent staff members. The CCMA determined that these developments constitute a 'promotion' and an accepted jurisdiction. In *NUCCAWU v Transnet Ltd t/a Portnet*[63] it was decided that Casual employees will enjoy the protection offered by the provision of the *Constitution* even while there are instances where they are protected under the *Labour Relations Act*.

2.2 A dispute of right / a dispute of interest

The LRA draws no direct distinction between rights and interests disputes,[64] however, disputes of rights are disputes concerning the alleged infringement of a party's rights in terms of a contract, collective agreements or legislation and the disputes of interest

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57 *City of Cape Town v Municipal Workers Union obo Sylverster, Mngomeni and Akiemdien and Others* [2013] 3 BLLR 267 (LC).
58 *HOSPERSA & another Northen Cape Provincial Administration* (2000) 21 ILJ 1066 (LAC).
59 Grogan 2019:145.
60 Van Niekerk *et al.* 2019:204.
61 Grogan 2019:147.
62 (1997) 18 ILJ 1149 (CCMA).
63 (2000) 21 ILJ 2288 (LC).
64 Van Niekerk *et al*. 2019:456.

concern changes to the status quo.[65] The distinction between disputes of right and disputes of interest is not as neat as it tends to suggest. Acting allowances aside, an employer's refusal to accord an employee a benefit to which he is not contractually entitled could well constitute a dispute of right.[66]

Interest disputes involve negotiation and power play, with parties resorting to strikes and lock-outs if an agreement isn't reached to achieve their undeserved desires. Examples of issues that are disputes of interest are wage disputes – for example, a wage demand for a 10% increase; and a dispute over a change to terms and conditions of employment.[67] In section 65(1)(c), the LRA prohibits strikes and lock-outs when the issue in dispute is one that a party has the right to refer to arbitration or the LC in terms of any employment law. All of these are disputes about matters of mutual interest, but none of them may be the subject of a protected strike.[68] It ought to be noted that the LRA does not confine legitimate industrial action to one category or the other and that was elaborated further in *NUM obo Snyders & others and Sonop Delwery* in which the union argued that their conflict did not amount to a strike because the dispute related to payment and not to a matter of mutual interest as required by the definition of strike in Section 213 of the LRA.[69]

Section 134 of the LRA refers to 'matters of mutual interest', a phrase which is widely misunderstood to be synonymous with disputes of interest.[70] As a result, the interpretation of this concept has raised some challenges as it will be seen from *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa.*[71] In this matter, the court was required to determine whether certain matters were matters of mutual interest for purposes of strike action.

Can we accommodate the requirements that our courts have laid down that to be justiciable under the ULP definition, the unfair act complained of must be a dispute of rights? The answer is yes, in an absolute sense if we accept the principle of legitimate

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65 Nel *et al.* 2016:174.
66 Grogan 2019b:133.
67 https://smelaboursupport.org.za/download/what-is-a-dispute-of-right-v-what-is-a-dispute-of-interest/
68 Van Niekerk *et al*. 2019:456.
69 *NUM obo Snyders & others and Sonop Delwery* [2005] 8 BLLR 858 (CCMA).
70 Grogan 2019b: 132.
71 *Vanachem Vanadium Products (Pty) Ltd v National Union of Metalworkers of South Africa* [2014] 9 BLLR 923 (LC).

expectations.[72] One of the controversial issues surrounding the provision of unfair labour practice in the LRA is whether this provision falls within the dispute of right or interest. Unless a deal is in place or a statute granting the employee this right, the employee's anticipation of promotion constitutes an "interest" dispute. In this view, because section 186(2) of the LRA provides a legal entitlement to fair labour practices., a dispute over whether an employer's promotion-related conduct is an unfair labour practice or not is a matter of right rather than an interest. Van Niekerk also holds the view that the provision of unfair labour practices under the LRA is classified as a dispute of right.[73]

2.3 Juxtaposing Promotion and Appointment

It will depend upon each case's facts to determine whether an employee is appointed or promoted.[74] One needs to contrast the worker's existing position with the job or position they are applying for in order to establish whether a dispute concerns a promotion or not. External applicants are “appointed” while internal applicants are promoted.[75] Grogan is of the view that where employees apply for vacant posts advertised by their own employers, a dispute may be treated as relating to promotion.[76]

The matter was resolved in the *Department of Justice v CCMA & Others* litigation. In this instance, two white men applied for the two senior assistant state attorney posts that were open in the Cape Town branch. Both of them failed. The respondent argued that since the posts they applied for had been posted externally, the issue did not involve a promotion. Additionally, the respondent argued that the phrase "appointment," not "promotion," was used in the advertisement. The respondent further argued that since they had to apply and show up for the interviews, the problem was not a promotion but rather a lack of appointment. Zondo JP when he commenced in his Judgement referring to a decision not to appoint Mr Nortier and Mr Duminy, and the Judge was not referring to a decision not to promote them and the Judge was doing it just for convenience, as Zondo JP accepted that had they been appointed, such appointment could have been a promotion for them. The Judge was in effect

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72 Van Niekerk *et al*. 2019:482-483.
73 Van Niekerk *et al*. 2019:201.
74 Grogan 2019a:146.
75 *Department of Justice v CCMA & Others.*
76 Fouche & du Plessis (eds.) 2019:395

supporting the decision of the Commissioner in *Vereeniging van Staatsamptenare on behalf of Badenhorst v Department of Justice* who held as follow:

"It 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… While I accept that this was not a promotion an ordinary sense of the word, I do believe that the peculiar nature of the rationalisation 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 new structure, nor was it suggested 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 remodelled structure in conformity with the rationalisation. It is specious to suggest that the applicant was a job applicant, in the sense of being an outsider job seeker".[77]

The case of *Public Servants Association v Northern Cape Provincial Administration* further elaborated the distinction, and the Commissioner held as follows:

"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 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".[78]

It must be noted that the LRA does not protect job seekers (applicants). However, Appointments, or rather non-appointments, are handled in the *EEA*, but only if unfair discrimination is alleged.[79] In its original form, the statutory definition of ULP included disputes relating to applications for appointment, provided the applicant pleaded unfair discrimination. That provision has now been repealed and re-enacted similar in the EEA.[80]

2.4 Principle of Fairness

The courts didn't start developing labour jurisprudence based on equity and fairness until they introduced the legislative idea of unfair labour practices.[81] In the *Murray*

[77] *Vereeniging van Staatsamptenare on behalf of Badenhorst v Department of Justice* :256G-I.
[78] *Public Servants Association v Northern Cape Provincial Administration*: 1141B-D.
[79] Fouche & du Plessis (eds.) 2019:395.
[80] Grogan 2019a:142.
[81] Van Niekerk *et al*. 2019:197.

case, Cameron JA reasoned that 'the law and the Constitution impose a continuing obligation of fairness towards the employee on… the employer when he makes decision affecting the employee in his work'. The requirement includes both formal procedural and substantive components, which are now incorporated in the constitutional right to fair treatment in the workplace.[82] These sentiments were also echoed by the court in *Osche Webb & Pretorius (Pty) Ltd v Vermeulen*[83] where the court recognised that fairness in labour legislation includes two basic requirements: substantive and procedural fairness. Fairness was never mentioned explicitly, and it was not one of the goals of the 1995 LRA.[84] In the case between *NEHAWU v UCT and Others*,[85] the Constitutional Court ruled that the concept of fairness cannot be defined in a conventional way that applies to every individual case, and that what is fair is established by facts and a value judgment of a specific case and circumstances. In both *Boxer Superstores Mthata v Mbenya*[86] and *Murray v Minister of Defence,* it was determined that all employment contracts include an implied term requiring employers to treat employees equitably. In *Metal & Allied Workers Union v Filpro (Pty) Ltd*,[87] the president of the Industrial Court, Dr DB Ehlers, has pertinently stipulated that the only way to determine if there is unfairness is to take into account every aspect of a certain claimed ULP.

Additionally, there is no fundamental right to fairness under the common law of employment.[88] Concepts like just, reasonable, equitable, balanced, honest, and in accordance with the law can all be used interchangeably with this idea of fairness. Fairness is also determined by the cumulative effect of all relevant concerns, including the extent to which the measures harm the complainant's rights and interests.[89] Fairness is necessary in administrative justice, labour legislation, and contracts. And fairness is closely related to equality, dignity, and freedom, which are among the foundational pillars of our Constitution.

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82 *Murray v Minister of Defence* (2008) 29 ILJ 1369 (SCA) par. 11.
83 (1997) 18 ILJ 361 (LAC).
84 Van Jaarsveld *et al.* 2001:689.
85 (2003) ILJ 95 (CC).
86 (2007) 28 ILJ 2209 (SCA).
87 Unreported Industrial Court case no 11/2/52 dated 17 August 1984: par. 28.
88 Van Niekerk *et al.* 2019:197.
89 *Du Preez v Minister of Justice & Constitutional Development & others* (2006) 27 ILJ (SE) par. 40.

Fairness concerning promotion requires the employer to act fairly towards the employee in the selection and promotion process. When promoting or not promoting an employee, an employer must act equitably on both a procedural and substantive basis.[90] In this context, fairness implies that all applicants must be given equal and fair opportunities in order to comply with the established promotion policies and procedures.[91] Grogan contemplates that the employer must follow the agreed policies and procedures and adhere to the advertised criteria for the process to be fair.[92] Regardless of whether an employer chooses to promote or not, the choice must be fair both in terms of procedure and content; otherwise, it would be deemed invalid.[93]

2.4.1 Procedural fairness

Procedural fairness refers to how equitable management choices are, as well as how organisational policies and processes affect decision-making. Specific requirements need to be satisfied for the procedure to be determined as a fair procedure. According to Nel *et al*., the credentials needed for a job should be determined by job descriptions that precisely outline the duties, responsibilities, and nature of the position rather than by intuition or conventional ideas about the kind of person or people who should be doing the job.[94]

In order to guarantee that every applicant is given a fair chance to advance their candidacy, it was intended in *Mthembu & Another v SA Police Service & Another*[95] case that procedural fairness would require the employer to follow the "bottom line" for a fair promotion procedure. The element of procedural fairness consists of a proper consultation process. Garbers suggests that several principles govern procedural fairness; namely, Firstly, an employer must generally adhere to its procedures. Secondly, an employee may question the composition and ability of a selection panel, thirdly, the treatment of employees in acting capacities, and finally, dealing with promotions without compensation.[96] An objective and well-defined approach should be followed to obtain a quantitative score on an individual's suitability.

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90 Fouche & du Plessis (eds.) 2019:383.
91 Odeku 2013:867.
92 Grogan 2020:59.
93 Odeku 2013:871.
94 Nel *et al*. 2016: par. 10.
95 *Mthembu & Another v SA Police Service & Another* (2010) 31 ILJ 1014 (BCA).
96 Garbers 1999:24-26.

Failure to comply with an employer's rules and regulations for dealing with promotions could, but does not necessarily, lead to a finding of procedural unfairness.[97] It has been held to be procedurally unfair to construct a position for a particular person without publicising it internally following agreed procedures.[98] In *Coetzee v South African Police Service,*[99] the court found it unfair when the employer failed to adhere to advertised criteria, and in *Goliath v Medscheme (Pty) Ltd*,[100] the employer's disregard for established promotion standards and processes, the court ruled that it made the process unfair. Additionally, it has been deemed unjust for a company to post a job opening, specify a minimal requirement, and then hire someone who didn't meet that requirement.[101] It will be procedurally unfair If an employer considers unrelated factors while selecting a more qualified applicant over a less qualified applicant, it could also be unjust to not promote the more qualified applicant.[102]

Employers are required to follow procedures that are outlined in laws, collective bargaining agreements, established practices, equity plans, or directives. It is only acceptable to deviate from such a method if the employer can provide a valid justification.[103] In *Vereeniging Van Staatamptenare obo Badenhorst v Department of Justice,* the court held that the employer could deviate from the promotional procedure under specific conditions, as long as the deviation in question is not deadly or does not cause a substantial flaw in the overall process output.[104] However, there will typically be negative repercussions if proper procedures are not followed. Hence, an employer must get it right and refrain from blundering. The case of *Monaheng v Westonaria Local Municipality and another* was one such example[105]. The arbitrator determined that the failure to advance the applicant constituted unfair practice because the municipality had diverged from their policy when selecting candidates.

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97 Basson *et al*. 2017:216.
98 *George v Liberty Life Association of Africa* (1996) 17 ILJ 571 (IC).
99 [2004] 2 BALR 139 (SSSBC).
100 (1996) 17 ILJ 760 (IC).
101 See *Public Servants Association obo Steenkamp v South African Police Services* [2003] 7 BALR 786 (CBC); *NUTESA v Technikon Northern Transvaal* [1997] 4 BLLR 486 (CCMA).
102 *Rafferty/ Department of the Premier* [1998] 8 BALR 1017 (CCMA).
103 Du Toit *et al.* 2006:463-464.
104 *Vereeniging Van Staatamptenare obo Badenhorst v Department of Justice* (1999) 20 ILJ 25 (CCMA) at 262 F-G.
105 (2006) 27 ILJ 1081 (ARB).

The ramifications and justification for such an order should be thoroughly evaluated before repeating the process. Before repeating the process, the particular facts of the case should be carefully considered. When there are significant irregularities and the applicant demonstrates that he would have a great chance of being appointed if the process had not been unfair, a repeat of the procedure should be taken into consideration.[106] A new procedure may be carried out to rectify any flaws if the employer finds that the process has not been followed appropriately. This could entail re-advertising a job or accepting an interview that was turned down at first.[107]

The court in *City of Tshwane Metropolitan Council v SALGBC & others*[108] suggested that taking affirmative action criteria into account when the employer has no equity plan renders the procedure unfair.

2.4.2 Substantive fairness

When it comes to promotions, substantive fairness describes the reasons why the company gives one employee preference over another.[109] The LAC in *Ncane v Lyster NO & others*[110] it was held that the requirement of substantive fairness, which typically entails selecting one or more candidates, addresses the merits of the choice to promote or not promote someone. The employer should guarantee that the promotion decision is based on sound ideas and reasons by effectively proving that the promoted applicant is qualified for the post.[111] According to Du Plessis, there must be a logical connection between the actual reason and the conclusion made. The CCMA will evaluate the reasons provided by the employer (often through the selection panel's "deliberation process") to verify a logical connection between the actual reasons supplied and the conclusion made.

In the *Mashegoane & Another v University of the North*[112] case, the court contends that it may take work to explain why one applicant has been chosen over another. Still, at the very least, the employer needs to be able to justify its choice. It was also held in

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[106] *Pityana v MEC, Department of Education, Eastern Cape Province* (2009) 30 ILJ 2664.
[107] Fouche & du Plessis (eds.) 2019:384.
[108] *City of Tshwane Metropolitan Council v SALGBC & others* (2011) 32 ILJ 2493 (LC).
[109] Fouche & du Plessis (eds.) 2019:384.
[110] *Ncane v Lyster NO & others* (2017) 38 ILJ 907 (LAC).
[111] Odeku 2013:871.
[112] *Mashegoane & Another v University of the North* 1998 1 BLLR 73 (LC).

Van Rensburg v Northern Cape Provincial Administration[113] that one of the factors for determining the substantive fairness of promotion is whether the employer applied its thinking. The employer was compelled to provide a reasonable explanation in a situation where the first and second-rated candidates declined to accept the post, and the employer failed to appoint the third-rated candidate.[114]

It is commonly accepted, however, that if an employer or its selection panel considers any factor that demonstrates that it has ceased to apply its intellect to the subject at hand, the flaw will be incurable and the decision therefore irrational. Perhaps the most obvious example of this is when the panel's judgment is influenced by external factors, such as the preferences of more senior members of the company.[115] Van Niekerk advises that the employer must act in good faith, apply its mind to the selection, and supply reasons for its decision.[116] In the *National Commissioner of the SA Police Service v Safety & Security Sectoral Bargaining Council & Others,* the court found that it was unfair to invite applications for a promotional post and then to appoint one applicant without considering the others.

In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*, the Constitutional Court ruled that the following constitutes a reasonable method for determining reasonableness:

"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstance of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, identity and expertise of the decision maker, the range of factors relevant to the decision, the reason given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and wellbeing of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions fall within the bounds of reasonableness as required by the Constitution."[117]

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[113] *Van Rensburg v Northern Cape Provincial Administration* 1997 18 ILJ 1421 (CCMA).
[114] *Minister of Safety & Security v Safety & Security Sectorial Bargaining Council & others* [2010] 4 BLLR 428 (LC).
[115] Odeku 2013:872.
[116] Van Niekerk *et al.* 2019:204.
[117] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).

2.5 Summary of the chapter

The chapter, in essence, deliberated on the different kinds of promotions; it outlined the meaning of promotion and further elaborated on what constitutes promotion in South African law. Only employees can be promoted according to South African legal instruments. The confusion confronted during promotion was when an employee applied for a vacancy in his or her employer's organisation in competition with outsiders. At glance, these employees were characterised as applicants for employment until the LAC issued out a ruling and made a fundamental distinction between an appointment and promotion. According to the LAC, accepting that posting a position that excluded internal applicants from the definition would make it easier to circumvent section 186(2)(a) of the LRA. A dispute concerning an appointment occurs when an employer refuses to hire someone who is not currently working.

The chapter also dissected fairness when dealing specifically with promotions in ULP. Fairness connotes both procedurally and substantively. Being fair is abiding by the established guidelines, policies, and procedures that govern and guide the process. Fairness concerns also play a significant role in promotion instances. Therefore, it is assumed that the panellists who decide on promotions will be impartial. A certain type of moral obligation that emerges when particular conditions are fulfilled is explained by the fairness principle. It is therefore evident that the employer when promoting, must apply a fair procedure and give reasons for its decision to promote. The posterior chapter will deal with the role played by international organisations and fairness at the international level.

CHAPTER 3

3. THE ILO AND PROMOTIONS

3.1 Introduction

Over the past two centuries, international organisations have become key players in international society and are now measured as subjects of international law. In the year 1919, the Treaty of Versailles was signed, and it established the International Labour Organisation (ILO).[118] For several years now the ILO has been investigating the scope of the employment relationship, and several technical documents have been produced by the ILO on this subject. Since its establishment in 1919, the ILO core policy considerations have been acknowledged as an instrument for improving workers' terms and state of work thereby fostering social justice.[119]

The international law is granted a particular status by the *Constitution* of the Republic of South Africa. Secondly, the *Constitution* requires the application of international law when interpreting South African legislation, particularly the Bill of Rights.[120] Section 39(1) of the *Constitution* refers to the use of public international law and foreign law. In *S v Makwanyane,*[121] the court stated that both binding and non-binding public international law may be used as tools of interpretation. The court held that the ILO may guide as to the correct interpretation of provisions.[122] South Africa is a member state of the ILO, and the ILO is an imperative source of labour standards in many countries. This chapter will deal with the crucial enactment by the ILO in providing decent work and fair promotions.

3.2 South Africa's participation in the ILO

Van Niekerk holds the view that before the constitutional dispensation, international standards played only an indirect role in the progress of South African labour law.[123] 1994 saw the introduction of a new political dispensation and the adoption of a Supreme Constitution,[124] the pressure for change was further heightened by two

[118] Van Niekerk *et al*. 2019:23.
[119] Van Eck 2021:1375.
[120] Van Niekerk *et al.* 2019:32.
[121] *S v Makwanyane 1995* (3) SA 391 (CC).
[122] *S v Makwanyane*: par. 37.
[123] Van Niekerk *et al*. 2019:23.
[124] The *Interim Constitution* of 1993.

factors. At the same time in 1994, South Africa re-joined the ILO. Due to the continuous practice of apartheid, South Africa's membership in the ILO was suspended in 1964.[125] It has never, however, been officially disbarred. South Africa just did not take part in the ILO instead.[126] It was in 1961 when the International Labour Conference adopted a resolution calling for the withdrawal of South Africa from the ILO due to its apartheid policies which were adopted by the regime.[127]

Regarding labour law, ratified ILO agreements and associated guidelines serve as the basis for South Africa's primary international law duties. Before the adoption of the *Labour Relations Act,* the Ministerial Task Team confirmed its views that the new dispensation should give effect to the decision of policy makers to commit the South African government to the principles contained in the ILO's Conventions.[128] As quite correctly pointed out in *Free Market Foundation v Minister of Labour and Others,* South Africa is compelled to give effect to the obligations placed on it as a member state of the ILO when considering the extension of collective agreements locally.[129] South Africa is required by its constitution to abide by the rules of international law. The most important of these standards, as seen from the standpoint of labour, comes from ILO conventions and recommendations.

3.3 The Role of the ILO

In the 30 years that South Africa did not belong to the ILO, the organisation was crucial to the fight against apartheid.[130] The ILO's achievements in standard-setting are undeniably a success story that dates back more than 90 years and cannot be overstated. Through a huge number of Conventions and Recommendations, such as freedom of association, discrimination, employment policy and industrial relations it has built up a system of principles that govern a big number of labour matters.[131] Almost 200 conventions and even more recommendations, covering all kinds of aspects of labour law, are impressive outputs.[132] The ILO provides an apparatus as one of its primary objectives to protect workers against the adverse effects of

[125] Christie 2001:346.
[126] Christie 2001:346.
[127] Van Niekerk *et al*. 2019:24.
[128] Kriek & Van Eck 2020:83.
[129] *Free Market Foundation v Minister of Labour and Others* (13762/13) [2016] ZAGPPHC 266: par.112.
[130] Van Niekerk *et al*. 2019:24.
[131] Basson *et al.* 2017:17.
[132] Olivier *et al*. 2013:4.

international conflict.[133] It was in 1998 when the ILO attempted to make sure by employing the Declaration on Fundamental Principles & Rights at Work,[134] that irrespective of ratification the member states have to adhere to at least four fundamental rights contained up to then in eight core conventions.[135]

Labour law can be influenced by the provisions of an ILO convention or recommendation in a variety of ways. The most common instance is when a nation chooses to enact laws incorporating the terms of a convention or recommendation. For instance, this has occurred in South Africa with the ratification of the LRA and the EEA, which aim to implement ILO agreements pertaining to discrimination, unfair dismissal, and freedom of association. Another method is when a court chooses to refer to the principles found in the ILO's Conventions and Recommendations for advice when it is confronted with a labour dispute without any clear guiding principles.[136]

Conventions are protocols that are legally binding international treaties that may be ratified by the member states and Recommendations are guidelines that are not binding. In many circumstances, a Convention establishes the essential principles to be followed by ratifying countries, whereas a related Recommendation expands on the Convention by offering more precise guidance on how it should be applied. Recommendations can also be autonomous, for example, unrelated to a convention.[137]

3.4 The ILO's Decent Work Agenda

The "Decent Work Agenda" was started by the ILO in 1999. Four pillars support this ambitious program: promoting employment by creating a sustainable institutional and economic environment; bolstering social protection; encouraging social discourse; and advancing workers' rights at work.[138] A development approach that acknowledges the crucial role that work plays in everyone's life is promoted by the ILO's Decent Work Agenda. Through integrated Decent Work programs created at the national level in

[133] Van Niekerk *et al*. 2019:30.
[134] The Declaration on Fundamental Principles and Rights at Work is a commitment by governments, employers, and workers to uphold basic human values in the workplace. The declaration was adopted in 1998 by the International Labour Organization (ILO) and amended in 2022.
[135] Olivier *et al*. 2013:6.
[136] Basson *et al*. 2017:17
[137] "Conventions, Protocols and Recommendations", https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations. (accessed on 16 November 2024).
[138] Olivier *et al*. 2013:6.

collaboration with ILO members, the organisation offers assistance. These initiatives establish goals and priorities within national development frameworks and seek to address significant deficiencies in Decent Work through successful initiatives that also fulfil each of the four ILO strategic objectives listed below: to deepen tripartism and social discourse; to increase the scope and efficacy of social protection for all; to improve possibilities for men and women to achieve respectable jobs and wages; and to promote and implement the standards, fundamental principles, and rights at work.[139] The ILO launched the DWCP with the goal of combating unfair labour practices and establishing a decent work, which included quality jobs, equity, dignity, and a fair wage, as well as a workplace that aims to develop everyone and build a sustainable and inclusive future.[140]

The ILO Decent Work Agenda is implemented at the country level through Decent Work Country Programmes that have been established as the main vehicle for delivery of ILO support to Member States. On the basis of the diagnostics of the country's situation, the national stakeholders, in collaboration with ILO experts, will draft a DWCP document to be discussed and agreed on in the tripartite process of the country.[141] The South Africa Decent Work Country Programme is a culmination of a highly consultative process between the ILO and the Social Partners through the mechanism of the National Economic Development and Labour Council (NEDLAC).[142] The second-generation South Africa DWCP covers the period 2018-2023 and its formulation is a culmination of consultative engagements by the tripartite-plus constituents within the structures of the NEDLAC which is a statutory National Social Dialogue structure.[143] The ILO DWCP is based on problem analysis leading towards the identification of priority areas of cooperation between the ILO, its social partners and other international development partners within the national development policy framework of a country.

Part of the strategic focus of the DWCP has been to lend support to national initiatives aimed at mitigating the impact of the global financial and economic crisis and that fall

[139] Rantanen *et al.* 2020:3-4.
[140] Rantanen *et al*. 2020:5.
[141] Rantanen *et al.* 2020:6.
[142] file:///C:/Users/lhman/Downloads/wcms_227655.pdf
[143] https://www.ilo.org/sites/default/files/2024-04/SouthAfrica-DWCP.pdf (accessed on 21 January 2025).

within the priorities identified by the social partners for the DWCP.[144] The South Africa DWCP expresses the best possible intersection between the country's policies and development agenda, constituents' priorities and the ILO's mandate and strategic objectives. The South Africa DWCP is based on fundamental principles and values, safeguarding citizens' rights and freedoms as outlined in the Constitution of the Republic of South Africa.[145] To-date South Africa has ratified 28 ILO Conventions of which only 23 are in force.[146] Amongst the conventions that are ratified by South Africa and are also binding, there fundamental conventions which play a pivotal role in enforcing a decent work agenda and inter alia, is C100,[147] C138,[148] and C111.[149]

3.5 Statutory recognition and incorporation of ILO standards

The International Labor Organization was formally recognized by the *Constitution* as the primary source of its labour laws.[150] In the area of labour law and labour relations, the LRA also attempts to implement certain international legal duties that South Africa has accepted and that comes from the country's ILO membership.[151] Section 3 of the LRA states that anyone who applies the Act must interpret its provisions in order to achieve its principal goals while also adhering to the Constitution and the Republic's public international law commitments. It is proposed that the LRA be changed to meet all of the ILO guidelines. In *SA National Defence Union v Minister of Defence & another*[152] case, section 23 of the Constitution was the subject of a challenge, and the Concourt referred to ILO standards. The SCA and the labour courts frequently turn to ILO norms in labour disputes and have emphasized their relevance as points of reference.[153] In *Minister of Defence & others v SA National Defence Force Union & others*[154] sections 39 and 223 of the Constitution were specifically mentioned by SCA, while the terms of ILO Conventions 87, 98, and 154 were examined in some depth.

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144 file:///C:/Users/lhman/Downloads/wcms_227655.pdf (accessed on 20 January 2025).
145 file:///C:/Users/lhman/Downloads/wcms_227655.pdf
146 https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888 (accessed on 21 January 2025).
147 Equal Remuneration Convention, 1951 (No. 100).
148 Minimum Age Convention, 1973 (No. 138).
149 Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
150 Cheadle 2006:4-5.
151 Basson *et al.* 2017:270.
152 *SA National Defence Union v Minister of Defence & another* (1999) 20 ILJ 2265 (CC).
153 Van Niekerk *et al.* 2019:34.
154 *Minister of Defence & others v SA National Defence Force Union & others* (2006) 27 ILJ 2276 (SCA).

3.6 The ILO on the principle of fairness and promotions

The ILO plays an important role in developing fairness in the world of work. The ILO adopts ILO Conventions and one of the essential conventions is the Discrimination (Employment and Occupation) Convention 111 of 1958, ratified by South Africa in March 1997.[155] In order to eradicate any discrimination, South Africa was required under this Convention to establish and implement a national policy that promotes equal opportunities and treatment in terms of employment and profession. Under Article 2 of the Convention[156], each member is required to 'promote and, insofar as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value'.

The emphasis on employment promotion is one of four themes or strategic objectives outlined in the ILO Declaration on Social Justice for a Fair Globalization that guide the organization's "decent work" agenda.[157]

One of the calls made by DWCP is a fair income and striving to place people at the middle of improvement and establish an inclusive and sustainable future.[158] Discrimination in the human resource practice has manifested most profoundly during the selection and recruitment process and the international experience has proven that. This challenge prevents suitable and qualified workers from accessing jobs. For this reason, achieving an equal workplace requires making sure that hiring procedures and regulations are devoid of discrimination. Employers gain greatly from fair hiring procedures. Because fair employers understand that the proper person on the job will require less monitoring and training, hiring the correct person for the job is crucial.[159]

3.7 Skills Mismatch

Addressing skills mismatch is also fundamental to creating relevant skills for employees to be able to be promoted. Eight years I have been employed in the Department of Employment & Labour executing responsibilities irrelevant to my qualifications and my employer providing irrelevant training not in line with my career

[155] The Discrimination (Employment and Occupation) Convention 111 of 1958.
[156] Equal Remuneration Convention, 1951 (No. 100).
[157] Van Niekerk *et al*. 2019:31
[158] Rantanen *et al*. 2020:5
[159] Practical guidelines for employers for promoting equality and preventing discrimination at work in Indonesia (Code of practice and practical guide in five parts) Jakarta, International Labour Organization, 2013:3.

path. This skill mismatch was also mentioned by the International Labour Organization in 2023, which stipulated that evidence from microdata shows a high degree of mismatch in semi-skilled occupations in many countries worldwide.[160] South Africa's economy is rapidly changing, and businesses require highly specialist knowledge and talent. Unfortunately, certain academic programs and curricula at universities have not evolved to meet these changing expectations, resulting in a mismatch between industry needs and graduates' competencies. Hence, it is also difficult for some employees to be promoted, it is on the basis that some do not hold relevant qualifications for the post they want to be promoted.

In 2019 the ILO adopted a Convention titled ‘Eliminating Violence and Harassment in the World of Work.’ This expressed a clear commitment to a world of work free from violence and harassment. For the first time, an international treaty has codified the right to a work environment devoid of violence and harassment. For the first time, there is a clear and consistent framework for preventing and addressing violence and harassment, based on an inclusive, integrated, and gender-responsive strategy. Workplace violence and harassment remain ubiquitous, affecting all countries, occupations, and work arrangements. It takes several shapes and circumstances. It deprives people of their dignity and conflicts with good labour and social justice. Persistent disparities, demographic transitions, and changes in work structure and technology can all intensify violence and harassment, including gender-based violence and harassment. The Convention upholds the Philadelphia Declaration, which asserts that all human beings, regardless of race, creed, or gender, have the right to seek both their material well-being and their spiritual growth in conditions of freedom and dignity, economic security, and equal opportunity.[161]

Recognising that workplace violence and harassment have an adverse effect on an individual's psychological, physical, and sexual well-being, as well as their dignity and family and social environment; acknowledging that these issues also have an impact on the quality of public and private services; and acknowledging that they can hinder individuals, especially women, from accessing, retaining, and progressing in the workforce; and acknowledging that these issues are incompatible with the promotion

[160] International Labour Organisation 2023:
[161] Convention Concerning the Elimination of Violence and Harassment in the World of Work 2019:1-2

of sustainable businesses and have a negative impact on workplace relations, worker engagement, productivity, and enterprise reputation.[162]

3.8 Summary of the chapter

Summing up this chapter, it is evident that effective and efficient international labour standards are pivotal in shaping South African labour law. It should be emphasised that labour standards should be regarded primarily in the context of human dignity as contemplated in the actual program of the ILO concerning decent work for everybody. Decent Work is a unique social innovation with global coverage. In keeping with the continuity and consistency of the ILO Decent Work Agenda, the ILO has worked with its constituents to promote and implement it for 20 years. The ILO, along with other UN agencies, offers direction and assistance to the workplace in handling the worldwide crisis. In this chapter an exposition of the structure and role of the ILO and the application and relevance of international labour standards for South African labour law is discussed and the Conventions that play a critical role in shaping the labour standards of South Africa are outlined.

The influence of the ILO Conventions is still being felt. For example, in *NUMSA & Other v Bader BOP (Pty) Ltd & Another*.[163] The Constitutional Court needed to decide whether the LAC's narrow reading of the LRA was correct. The Labour Appeal Court had held that a minority union does not have the right to strike to compel the employer to recognise its representations or shop stewards. The Constitutional Court confirmed that the proper approach to interpreting the LRA was by international law and the Constitution. The LAC ruling was overturned by the Concourt after considering the Right to Organise and Collective Bargaining Convention 98 of 1949, as well as the ILO's Freedom of Association and Protection of the Right to Organise Convention 87 of 1948.

[162] Convention 190 of 2019:3-4.
[163] [2003] 2 BLLR 103 (CC).

CHAPTER 4

4 South African Legal Instruments Governing Promotions in South Africa

4.1 Introduction

Chapter 4 outlines the protection against unfair conduct by the employer concerning promotions accorded by the South African legal instruments. This chapter highlights the employer's conduct, which constitutes unfair labour practice concerning promotion and the remedies for unfair conduct. The Labour Court believes that to win in an action based on an alleged unfair labour practice, employees must prove that the conduct or practice complained of comes within the parameters of one of the forms expressly stated in the definition.[164] This definition is expressed in section 186(2)(a) of the LRA. However, the Constitution, as the supreme law of the land, plays a pivotal role in establishing fair labour practices.[165] Hence, the exposition of the right to fair labour practice will be dealt with in the chapter. The chapter will further conceptualise the idea of managerial prerogatives and provide a complete explanation of how arbitrators can intervene without infringing on managerial powers. A comparison between the ULP in the private sector and the public sector will also be made.

4.1.1 Protection in terms of the Constitution

Section 7(1) of the *Constitution* states that "the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom". The State is entrusted with ensuring that it respects, protects, promotes, and fulfils the rights in the Bill of Rights.[166] It should be noted that the Bill of Rights applies to all laws and binds both natural and juristic individuals, depending on the nature of the right and the responsibility imposed.[167] One of the most imperative rights contained in the Bill of Rights and central to the topic is section 23.

Section 23 confers several autonomous, if related, rights to 'fair labour practices'.[168] The relationship between the constitutional right in section 23(1) and the provision in

[164] See *Nawa & another v Department of Trade & Industry* [1998] 7 BLLR 701 (LC).
[165] Sec. 2 of the *Constitution.*
[166] Sec. 7(2) of the *Constitution*.
[167] Sec. 8(1) and (2) of the *Constitution*.
[168] Currie & De Waal (eds.) 2013:473-474.

section 186(2) of the LRA relating to unfair labour practice is controversial.[169] However, from a more comprehensive constitutional standpoint, the Concourt's strategy in *Chirwa* indicated a 'compartmentalised' approach to section 23 instead of handling these rights in a smooth, coordinated manner.[170] Grogan provides a concrete example by stating that Section 23 of the Constitution establishes the right to fair labour practice in broad strokes but is supported by many national statutes aimed to carry out these rights.[171] In determining the meaning of the provision of the constitutional right to fair labour practice, the Concourt in *NEHAWU v University of Cape Town* held that guidance should be from the 'equity-based jurisprudence generated by the unfair labour practices provisions of the 1956 LRA as well as the codification of unfair labour practice in the LRA'.[172] To assess the scope of Section 23(1) of the Constitution, it is necessary to define fairness, as the Constitution does not clearly define the idea of fair labour practice. This concept of fairness is interchangeable with just, reasonable, equitable, balanced, honest, and following the rule of law.

The LC in *Jonker v Okhahlamba Municipality & Others*[173] agreed that a typical violation of the contract may violate the employee's broader constitutional right to fair labour practices; but, a direct appeal to the constitutional right entrenched in the *Constitution* is not permitted. The constitutionally guaranteed protection is not only restricted to employees or those with employment contracts but to everyone.[174] The term 'everyone' indicates that the drafters wanted the right to fair labour practice to extend beyond the customary impression of 'employee', that is, a party to a contract that entails providing personal services in exchange for compensation.[175] It was held in the SCA that the development of the common law, 'to import into contracts of employment generally rights flowing from the constitutional right to fair labour practices…' can only be possible where there is no existing statutory provision that already gives effect to the *Constitution* and which already regulates the matter in dispute.[176] As the law stands, if an employee's rights can be enforced under one or

[169] Van Niekerk *et al*. 2019:203.
[170] See *Makhanya v University of Zululand* 2010 1 SA 62 (SCA): par.8.
[171] Currie & De Waal (eds.) 2013:473.
[172] *National Education Health & Allied Workers Union v University of Cape Town & Others* (2003) 24 ILJ (CC) par. 111.
[173] *Jonker v Okhahlamba Municipality & Others* (2005) 26 ILJ 782 (LC).
[174] *Pretorius and Another v Transport Pension Fund and Others* 2018 ZA (CC) par. 48.
[175] Currie & De Waal (eds.) 2013:474-475.
[176] *SA Maritime Safety Authority v Mckenzie* (2010) 31 ILJ 529 (SCA) para 55.

other of the Statutes, that employee cannot rely directly on the Constitution.[177] It suffices here to refer to *NAPTOSA & others v Minster of Education, Western Cape Government & others,* where the High Court held that direct reliance on the Constitution to enforce labour rights should be avoided because such a course of action would lead to two streams of jurisprudence.[178]

4.1.2 Protection in terms of the common law

The common law of South Africa is an amalgamation of principles drawn from Roman, Roman-Dutch, English, and other jurisdictions. These principles were accepted and applied by the courts in colonial times and during the period that followed British rule after the Union in 1910. The general principles of contract, delict, and administrative law are all of common law origin. Like any other contract, the contract of employment is founded on agreement, and the law of contract, applies in so far as it regulates the formation of contracts and the broad limits on the freedom to contract.[179] Regarding the standard law contract, the parties must conform to the requirements of *location conductio operarum* to conclude an existence agreement.

Location conductio operarum or the ordinary contract of employment may be defined as a reciprocal contract in terms of which an employee places his services at the disposal of another person or organisation- the employer- at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercise supervision regarding the rendering of the employee's services.[180]

In the case of *SA Broadcasting Corporation v McKenzie,* the court concluded that the first paragraph of the definition of an employee in the *LRA* refers to people rendering services in terms of the common law contract of service.[181] Therefore, under the common law, employees have no legal entitlement to be promoted to higher posts unless they can prove a contractual right or, perhaps, a legitimate expectation based on some prior practice or promise.[182] Common law places the individual employee in

[177] *Fredericks v MEC for Education & Training, Eastern Cape* (2002) 23 ILJ 81 (CC).
[178] *NAPTOSA & others v Minister of Education, Western Cape Government & others* (2001) 22 ILJ 889 (C).
[179] Van Niekerk *et al*. 2019:89.
[180] Fouche & du Plessis (eds.) 2019:9.
[181] SA Broadcasting Corporation v McKenzie 1999 20 ILJ 585 (LAC): par 7.
[182] *Administrator of the Transvaal v Traub* (1989) 10 ILJ 823 (A).

a weak position with regard to his employer and offers little or no protection to the employee.[183] It seems safe to state that the common law did not expressly provide for fair labour practices in the employment relationship.[184]

SA Maritime Safety Authority v Mckenzie,[185] affirms the traditional common law position: provided that it does not breach the contract, there is no 'general duty of fair dealing' between employer and employee and no general implied right to fair labour practice. The court went further to stipulate that the development of the common law, "to import into contracts of employment generally rights flowing from the constitutional right to fair labour practices…", can only be possible where there is no existing statutory provision which already gives effect to the constitution and which regulates the matter in dispute.[186] However, suppose the parties expressly include procedural rights in their contracts or incorporate the provisions of disciplinary codes into them. In that, the employee may claim breach of contract if the employer unfairly treats the employee. It appeared as if the courts were willing to develop the common law in order to import, in contracts general, rights flowing from the constitutional right to fair labour practice into contracts of employment.[187] It also needs to be noted that the common law principles applicable to contracts of employment form part of individual Labour Law, which indicates that the parties to the agreement, the employer and employee, negotiate the terms of their contract individually and freely.[188] In *K v Minister of Safety and Security*,[189] the Constitutional Court adapted existing principles to accord more fully with the normative framework established by the Bill of Rights.

4.1.3 Protection in terms of the LRA

The Labour Relations Act is the most fundamental employer and employee relationship legislation. Section 3 of the LRA presupposes that in applying the LRA, its provisions must be interpreted to give effect to its primary objects in compliance with the Constitution and in compliance with the public international law obligations of

[183] Fouche & du Plessis (eds.) 2019:3.
[184] Conradie 2016:178.
[185] *SA Maritime Safety Authority v Mckenzie* (2010) 31 ILJ 529 (SCA).
[186] *SA Maritime Safety Authority v Mckenzie*: par.55.
[187] Conradie 2016:178.
[188] Fouche & du Plessis (eds.) 2019:9.
[189] [2005] 8 BLLR 749 (CC).

South Africa. Therefore, the rights of every employee in the LRA give content and effect to the right to fair labour practice contained in section 23 of the Bill of Rights. The new concept of ULP consequently refers to only a few specific practices and does not include labour practices as was the case under the old LRA. The *Labour Relations Act* of 1995 has abolished the broad definition of the 1956 Act. Instead, it codified some of the jurisprudence that had emerged from the Industrial Court's interpretation of the unfair labour practice. In *Nawa & Another v Department of Trade & Industry,* the LC confirmed that the LRA does not provide for a general unfair labour practice definition and concluded that an employee must show that the practice complained of falls within the description of "residual unfair labour practice" as envisaged in the then item 2 of Schedule 7. ULP of a collective nature is also conspicuously absent from the definition.[190]

The LRA protects employees against any unfair conduct by the employer relating to the promotion.[191] Section 185(b) of the LRA states that every employee has the right not to be subjected to unfair labour practices. Section 186(2) of the LRA defines an unfair labour practice as any unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to the promotion. An unfair labour practice relating to promotion, as defined in section 186(2) of the LRA, consists of at least the following elements, namely: An act or omission constituting a labour practice between an employer and an employee, committed by the employer; involving unfair conduct; and relating to the promotion.[192]

The wording of section 186(2) of the LRA using the word "involving" rather than "including" to the actual type of conduct listed in section 186(2) suggests that unfair labour practices are limited to those mentioned in the list.[193]

From the terms of the definition, it seems that specific unfair labour practices mentioned in paragraphs (a) to (d) are a *numerus clausus* and that the list is closed.[194] This provision is illustrative that It is only employees as defined who enjoy protection under this section. Van Niekerk echoes this sentiment by stating that only an employee

[190] Currie & De Waal (eds.) 2013:478.
[191] *Labour Relations Act*:sec. 186(2)(a).
[192] Grogan 2019a:127-129.
[193] *Nawa v Department of Trade and Industry* [1998] 7 BLLR 701 (LC).
[194] Van Niekerk et al. 2019:200.

may be the victim of an unfair labour practice.[195] In *Reddy,*[196] the court held that to constitute an unfair labour practice concerning promotion, the act or omission complained of relates to an employee who is in the employer's service. The question of the existing relationship between the employer and applicant was considered in *Vereniging van Staatsamptenare obo Badenhorst v Department of Justice,*[197] and the court decided that a *nexus* between the employer and employee must exist. This requirement becomes problematic in the context of the movement of employees within a group of companies or where the State is the employer of different departments.[198]

4.1.4 Protection in terms of the EEA

The *Constitution* prohibits unfair discrimination by any person on certain specified or analogous grounds and provides that national legislation must be enacted to prevent or prohibit unfair discrimination.[199] In *Minister of Finance & others v Van Heerden,* Moseneke J justified the need for substantive equality to redress existing inequality. This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist.

Another statute that plays a vital role in protection against ULP and gives effect to this constitutional obligation is the *Employment Equity Act,*[200] which deals with discrimination and various employment equity strategies. In terms of the EEA, every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.[201] The court in *Piliso* held that there is no doubt that employers are required to take steps in advance and be proactive in eliminating and preventing unfair discrimination.[202] An employee may claim discrimination that manifests itself in refusal to promote.

The EEA prescribes that a dispute for failure to appoint an applicant to a different position which is not classified as a dispute concerning promotion, such an applicant

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[195] Van Niekerk *et al*. 2019:199.
[196] *Reddy v KZN Department of Education & Culture* (2003) 24 ILJ 1358 (LAC) par. 18.
[197] *Vereniging van Staatsamptenare obo Badenhorst v Department of Justice* 1999 20 ILJ 253 CCMA.
[198] Basson *et al*. 2017:214.
[199] *Constitution*: sec. 9(4) read with sec. 9(3).
[200] Act 55/1998.
[201] *Employment Equity Act*: sec. 5.
[202] *Piliso v Old Mutual Life Assurance Co (SA) Ltd & others* (2007) 28 ILJ 897 (LC) par. 77.

may seek relief under the provision of section 6 of the EEA. Job seekers might have recourse against the 'would-be' employer in terms of the EEA.[203] However, it ought to be proved that the reason for non-appointment was unfair discrimination or confirmed by way of review that the employer's failure to appoint them was unlawful.[204] The LAC in *Phera v Education Labour Relations Council*[205] provides that an application by an 'outsider' for a position does not constitute an unfair labour practice relating to the promotion. However, Grogan contemplates that applicants only have a remedy if they can prove that they have been discriminated against in a manner covered by the EEA. Grogan further assumes that if candidates are rejected based on the EEA criteria specified in section 6(1), failure to promote them would be unfair.[206]

It was held in *Guraman v South African Services*[207] that employees may raise the issue of discrimination in promotion and appointment under two guises: Individuals claiming discrimination based on race, gender, or disability and individuals claiming that they should have received preference and appointed because they belong to a particular racial or gender group. In 2016, when I applied at the Department of Labour for the position of Client Services Officer, we attended the interview and one of the black males was scored as the first candidate to receive the post, the Employment Equity official based in our provincial office declined the submission and stated that a white male or female is needed in the office as they were underrepresented. The office was instructed to start afresh the selection and recruitment process and the office was instructed to look for white counterparts.

Section 15(3) of the *Employment Equity Act* allows preferential treatment but excludes quotas from the affirmative action measures it endorses. The EEA exculpates any claim of unfair discrimination because it is not unfair to take affirmative action measures consistent with the purposes of the EEA or to "distinguish, exclude or prefer any person based on an inherent requirement of a job".[208]

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[203] Grogan 2020:61.
[204] *SA Municipal Workers Union obo Members v Kopanong Local Municipality* (2014) 35 ILJ 1378 (LC).
[205] *Phera v Education Labour Relations Council* (2012) 33 ILJ 2839 (LAC).
[206] Grogan 2019a:147-148.
[207] *Guraman v South African Services* (2004) 4 BALR 586 (GPSSBC).
[208] *Employment Equity Act*: sec.6(2)(b).

4.1.5 Affirmative action

Affirmative action plays a pivotal role in promotion as it is aimed at increasing workplace and educational opportunities for people who are underrepresented in various areas of society. Affirmative action is a policy intended to allow a measure of discrimination in support of employees disadvantaged by discrimination in the past.[209] Affirmative action accords preferential treatment to a group of people on the basis of some common characteristic. Section 15 of the EEA defines affirmative action as 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer'. The EEA aims to correct the demographic imbalance in the nation's workforce by compelling employers to remove barriers to the advancement of blacks, coloureds, Indians, and people with disabilities and to actively advance them in all categories of employment by affirmative action.[210]

The EEA obliges all *designated* employers to adopt and implement affirmative action plans. However, it was held in *Minister of Finance & another v Van Heerden* that measures taken by the employer must comply with section 9(2) of the Constitution and section 6(2)(a) of the Employment Equity Act.[211] The court in *Stoman v Minister of Safety and Security*[212] raised an imperative concern on whether an alleged affirmative action policy or practice was justifiable and acceptable within the context and wording of the Constitution.

The majority and minority judgments in the Constitutional Court represent rather divergent approaches to the normative contextualisation of affirmative action disputes.[213] In 2003, the case of *Harmse v Cape Town Municipality*[214] raised the question of whether a designated employee could plead unfair discrimination based on the employer's failure to promote affirmative action. Affirmative action is defensible for its protagonists because it seeks to make good the effects of past discrimination.[215] There is a fascinating case of *South African Police Service v Solidarity obo Barnard,*

[209] Currie & De Waal (eds.) 2013:512.
[210] Grogan 2019a:334.
[211] *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC) par. 32.
[212] *Stoman v Minister of Safety and Security* (2002) 23 ILJ 1020 (T).
[213] Pretorius 2017:270.
[214] *Harmse v Cape Town Municipality* (2003) 24 ILJ 1130 (LC).
[215] Grogan 2019a:334.

which concerned an inter-designated group dispute; the case raised an imperative question on whether a stricter standard of review of affirmative action measures is called for in instances where the complainants themselves are the victims of past discrimination.[216]

The affirmative action plan must be aimed at achieving reasonable progress towards employment equity, which in this context means fair representation of members of designated groups.[217] Any qualification or condition that restricts a position primarily and typically to persons from a non-designated group must be considered only in exceptional circumstances and be clearly justifiable as job-related and essential before being applied. Non-job-related qualifications and higher-than-necessary qualifications, such as degrees or length of service, should not be used to justify the selection of a person from a non-designated group over a person from a designated one.

A critical aspect of our law relating to promotion is how it interacts with the legal duty placed on employers to implement affirmative action measures. The case of *Barnard* brings to the face difficult, if not emotive, questions of equality, race, and equity in the workplace.[218] The majority judgment written by Moseneke J upheld as lawful a decision by SAPS not to promote a white woman because her advancement would not promote the achievement of employment equity targets.

4.1.6 Onus of proof

Before its amendments, neither the 1995 LRA nor the LRA deals with who bears the onus in disputes relating to ULP. Curiously, the legislature remains mum about the onus in ULP.[219] In the case of unfair dismissals, the LRA casts the onus of proving the existence of unfair dismissals to employees. So, if apply logic, the same approach should be followed in all cases precisely because unfair dismissal can be considered a form of ULP. The onus rests upon the employee to prove that the employer refused to promote her.[220] *PSA obo Williams v Department of Correctional Services* cast the onus of proving the unfair labour practice on the union on behalf of its members.[221] Grogan also contemplates that an employee who alleges that he is the victim of an

[216] *South African Police Service v Solidarity obo Barnard* 2014 11 BLLR 1025 (CC): par.31
[217] *Employment Equity Act*: sec. 20.
[218] *South African Police Service v Solidarity obo Barnard*: par.1.
[219] Grogan 2019a:134.
[220] Van Niekerk *et al.* 2019:203; Basson *et al*. 2017:215.
[221] *PSA obo Williams v Department of Correctional Services* (1999) 20 ILJ 1146 (CCMA).

unfair labour practice bears the onus of proving the claim on a balance of probabilities.[222] The employee must prove the existence of the labour practice and that the act or omission was unfair.[223]

Therefore, to show unfairness relating to promotion, an employee needs to show that the employer, in not employing him, acted in a manner that would ordinarily allow a court of law to interfere with the decisions of a functionary by proving, for example, that the employer had acted irrationally, capriciously or arbitrarily, was actuated by bias, malice or fraud, failed to apply its mind or unfairly discriminated.[224] The employee needs to prove that had it not been for the unfair conduct, he would have been promoted, and this can be done by proving that he was the best candidate of all candidates who applied for the post.[225] However, one has to be cognisant that it is not enough for an employee who complains of unfair conduct about promotion simply to allege and prove that he or she was better qualified or more 'suitable' than the successful candidate.[226] The case of *Ndlovu v CCMA* is very illustrative, citing that it is crucial that the person, who lodges a dispute and alleges unfairness must prove that the decision which was made not to appoint was unfair.[227] This is thus a hefty burden to carry, especially if one keeps in mind the managerial prerogative and the burden of proof.

4.2 Managerial prerogative

The term "prerogative" is commonly understood to relate to the 'discretionary authority' held by a particular institution, group or persons and the connected rights and privileges flowing from this authority.[228] In the context of labour relations, managerial prerogative relates to an employer's right to decide on the persistence of operational objectives and determine how these objectives will be executed. It is most relevant when dealing with promotions, as will be seen below.

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[222] Grogan 2007:48; Grogan 2020:59.
[223] *Provincial Administration Western Cape (Department of Health and Social Services) v Bikwani* (2002) 23 ILJ 761 (LC) par. 32; Van Niekerk *et al*. 2019:204.
[224] *Benjamin v University of Cape Town* [2003] 12 BLLR 1209 (LC) 1223-1224.
[225] *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC): par.24.
[226] See *Cullen v Distell (Pty) Ltd*; *Woolworths (Pty) Ltd v Whitehead.*
[227] *Ndlovu v CCMA* (2000) 21 ILJ 1653 (LC) par. 11-12.
[228] *Sachs v Donges*, NO 1950 (2) SA 265 (A) at 275.

The managerial prerogative is thus limited to both the procedural and the substantive, meaning that the employer must act procedurally and substantively fair in the promotion or non-promotion of an employee.[229] The decision to promote or not falls within the management prerogative, and the employer's exercise of its discretion to promote is only reviewable if it is seriously flawed.[230]

Employees generally have no right to promotion or legal entitlement to be promoted to a higher post, and the employer has the right to appoint or promote employees they consider the most suitable.[231] Just as employers are free to choose whom to appoint, they are free to decide which posts to create and whom to appoint to vacancies.[232] Promotion, in short, falls squarely within the generous area of prerogative left to employers by the common law.[233] Although promotion falls within the managerial prerogative, such a prerogative ought to be justifiable; as Van Niekerk articulates, where the employer cannot justify its decision, the failure to promote may be found unfair.[234] The court in *Dlamini v Toyota SA Manufacturing* echoed the same sentiment.[235] This advanced to the point that if an employer cannot justify its decision not to promote, or if the process leading to the promotion proves to be seriously flawed, the possibility that the employer committed ULP may arise. Thus, the employer must act fairly when promoting or not promoting an employee; unfair conduct in this regard constitutes ULP.[236]

Once every candidate is treated equally, the decision is not corrupt or inept, and any agreement or procedure relating to promotion has been followed, there is no justification for interfering with the employer's decision to promote or not to promote an employee. The CCMA and the LC are reluctant to interfere with employer prerogative. However, the CCMA has occasionally shown a willingness to scrutinise 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.

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[229] Fouche & du Plessis (eds.) 2019:384.
[230] *Ncane v Lyster NO & others* (2017) 38 ILJ 907 (LAC).
[231] Du Toit *et al*. 2006:463; Fouche & du Plessis (eds.) 2019:384.
[232] Grogan 2019a:143.
[233] *SAPS v SSSBC* [2010] 8 BLLR 892 (LAC): par.15.
[234] Van Niekerk *et al*. 2019:205.
[235] *Dlamini v Toyota SA Manufacturing* (2004) 25 ILJ 1513 (CCMA).
[236] Fouche & du Plessis (eds.) 2019:384.

In the case of *PSA obo Thorne v Department of Community Safety (Western Cape)*,[237] The court held that the employer has a prerogative to determine the educational qualifications they think are required for the post. It has been held that an employer is entitled to decide whether it prefers practical experience to formal academic qualifications.[238]

4.3 Unfair Conduct by an employer

Unfair conduct used to be known as conduct that was arbitrary and inconsistent.[239] Now, the definition of unfair labour practice includes unfair conduct by an employer relating to the promotion of employees. Section 186(2)(a) of the LRA characterises ULP as unfair conduct by the employer about the promotion. In this context, ULP is not limited to discriminatory treatment; an employer may perpetrate ULP relating to promotion in various ways, whether undreamed or under common law.[240]

Unfair conduct currently entails failing to meet an objective standard and may include arbitrary, capricious, or inconsistent conduct, whether negligent or intended.[241] Grogan has also suggested that ULP relating to promotion may be perpetrated through procedural irregularities.[242] In a nutshell, it is generally held that, to succeed in an unfair labour practice claim about a promotion, the employer must be shown to have exercised its discretion capriciously, for unsubstantiated reasons, or that the decision was taken on a wrong principle or in a biased manner.[243] In *Ekurhuleni Metropolitan Municipality v Mabusela*,[244] it was held that employees may also claim that they were overlooked for promotion because an official decided not to promote them without the power to do so. Most cases dealing with allegations of unfair conduct by an employer relating to promotion concern refusals to promote the claimant.[245] The

[237] [2018] 12 BLLR 1173 (LAC).
[238] *PSA obo Badenhurst v Department of Justice* (1998) 3 LLD 425 (CCMA).
[239] Van Niekerk *et al.* 2019:198.
[240] Grogan 2019a:143.
[241] Fouche & du Plessis (eds.) 2019:383.
[242] Grogan 2020:60.
[243] *Department of Rural Development & Agrarian Reform, Eastern Cape v GPSSBC* (2020) 41 ILJ 1321 (LAC) par. 23; Msobo and IMATU (2008) 29 ILJ 459 (CCMA).
[244] (2023) 44 ILJ 137 (LAC).
[245] Van Niekerk *et al.* 2019:203.

apparent requirement of this form of ULP is that the conduct complained of must relate to promotion,[246] and employer's conduct should be directed to an employee.[247]

The relative strengths and weaknesses of candidates for a position cannot prove that an employer committed an unfair labour practice by failing to appoint or promote an inferior weaker candidate.[248] Employees who did not satisfy the advertised criteria for a post can never complain about not being promoted.[249] It has been ruled unfair for an employer to advertise a position, set a prescribed minimum qualification, and then appoint a person who does not possess that qualification.[250] Consequently, the employer's failure to conform to its policy constituted an unfair labour practice.[251] The court in *IMATU/Greater Pretoria Metropolitan Council* decided that without a satisfactory explanation from the employer, an arbitrator may assume that the employer acted in bad faith and, therefore, unfairly.[252]

Applied in the context of promotions, this means that disappointment because of an employer's decision, mere unhappiness or a perception of unfairness does not establish unfair conduct.[253] However, employers may also be guilty of unfair conduct regarding promotions if they give employees a reasonable expectation that they will be advanced and then, without adequate reason, frustrate that expectation.[254] In the *Eskom v Marshall & others*[255] case, the LC decided that if an employee can prove that there was a reasonable expectation of being promoted, it could create a right and the employer may also be guilty of unfair conduct for creating such a reasonable expectation but subsequently frustrate such expectation without adequate reason. An award in *Kruger v SA Police Service*[256] also confirmed this reasoning. Van Niekerk

[246] Grogan 2019a:144.
[247] Section 186(2) of the LRA prescribes that ULP means any unfair act or omission that arises between the employer and an employee.
[248] *Cullen / Distell* [2001] 8 BALR 834 (CCMA).
[249] *Mashaba v University of Johannesburg* (2023) 44 ILJ 137 (LAC).
[250] *PSA obo Tlowana v MEC for Agriculture* (2012) 33 ILJ 2675 (LC).
[251] *George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC).
[252] *IMATU/Greater Pretoria Metropolitan Council* [1999] 12 BALR 149 (IMSSA).
[253] Fouche & du Plessis (eds.) 2019:383; Du Toit *et al.* 2007:488; *Nelson Mandela Bay Metropolitan Municipality v Mkumatela & others* [2016] 6 BLLR 585 (LAC).
[254] Grogan 2020:59.
[255] *Eskom v Marshall & others* (2002) 23 ILJ 2251 (LC).
[256] *Kruger v SA Police Service* (2003) 24 ILJ 477 (BCA)

also echoes this proposition as he alludes that failure to promote may be unfair when the employer cannot justify its decision.[257]

In the *City of Cape Town v Municipal Workers Union obo Sylvester, Mngomeni and Akiendien and Others*,[258] it was held that a failure to promote was unfair in circumstances where an employee was left in an acting position for five years without explaining the decision of the interview panel not to promote. Grogan suggested that a dispute concerning an employer's promotion policy does not fall within the definition of ULP. He mentioned that ULP arises only when the employer fails or refuses to promote a particular employee.[259] In this context, 'unfair conduct' is not limited to discriminatory treatment. Although employees may allege a discriminatory reason for such treatment, section 186(2)(a) does not require this.

4.4 Unfair labour practice in the public sector

Insofar as *Fredericks v MEC for Education & Training, Eastern Cape*[260] suggests that public sector employees may pursue claims arising from their right to fair administrative action against their employers in the civil courts; that suggestion needs to be noticed by events. Four judgments by the Constitutional Court of South Africa have considered whether employment-related decisions in the public sector domain do or could amount to administrative action and whether administrative law and/or labour law should be applicable for purposes of dispute resolution; legal uncertainty remains the order of the day due to a combination of factors.[261] The decision in *Chirwa v Transnet Ltd* also appears to adopt a more restrictive approach than the approach of the Constitutional Court which was adopted in the case of *Sidumo v Rustenburg Platinum Mines Ltd.*[262] In this case, the court found that arbitration decisions of CCMA commissioners constituted administrative action in terms of section 33 of the Constitution. The court in *Administrator, Transvaal v Zenzile,* as influenced by policy considerations, emphasised ensuring that public-sector employees were not unfairly

[257] Van Niekerk *et al.* 2019:205.
[258] *City of Cape Town v Municipal Workers Union obo Sylvester, Mngomeni and Akiendien and Others* [2013] 3 BLLR 267 (LC).
[259] Grogan 2019:145-146.
[260] *Fredericks v MEC for Education & Training, Eastern Cape* (2002) 23 ILJ 81 (CC).
[261] See *Fredericks v MEC for Education & Training, Eastern Cape*; *Gcaba v Minister of Safety and Security*; *Chirwa v Transnet Ltd.*
[262] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC)

advantaged in a manner that would encourage forum shopping and would result in developing a dual system of law.[263]

The legal position of public sector employees who challenge employment decisions taken by the state or organs of the state in their capacity as an employer in South Africa has long been problematic. Before 1999, there were different systems in the public service; in terms of the public service code, employees were promoted internally based on specific criteria, and appointments were occasional and based on advertisement.[264] Generally, employment and labour relationship issues do not amount to administrative action within the meaning of *PAJA*. Section 33 of the *Constitution* does not regulate the relationship between the State as an employer and its workers. When a grievance is raised by an employee relating to the conduct of the State as an employer, and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action. Although there is a condescending argument that contemplates that both administrative and labour law is aimed at the promotion of social justice and that 'even though different rights are expressed in separate provisions of the Bill of Rights, the normative web of the *Constitution* dictates against an interpretation that views fundamental rights as forever unconnected regardless of the circumstances of a case.[265]

In some cases, the identity of the employer may be disputed. In *MEC for Transport Kwa-Zulu Natal & Others v Jele,* an employee in another provincial department applied for a more senior post in another department but was unsuccessful. The employer contended that there was no employment relationship between the employee and the department where he had applied and as such, there could be no unfair labour practice. Van Tonder believes that promotion disputes in the public service are regarded as public interest.[266]

4.4.1 Selection and Recruitment Processes

Selection is defined as the process of determining which individuals will best match particular jobs in the organisational context, taking into account individual differences, the requirements of the job and the organisation's internal and external environments-

[263] *Administrator, Transvaal v Zenzile*: par.65.
[264] *Jele v Premier of the Province of KwaZulu-Natal and Others* (2003) 24 ILJ 1392 (LC).
[265] *Sidumo v Rustenburg Platinum Mines Ltd*: par.135.
[266] Van Tonder 2014:7.

in other words, who provides the most significant potential for performing well in a particular job.[267] Selection criteria should be objective, related to the inherent requirements of the job and consistently applied to applicants, irrespective of race, gender, etc.

Unlike discrimination cases, the legislature does not explicitly stipulate the grounds an employer may not consider when selecting candidates for promotion. The existence of a prior detention, arrest or criminal record should not, in general, constitute sufficient grounds for refusal to select any applicant for employment. It is also advisable to incorporate the recognition of prior learning in the selection process. In the *Cullen / Distell*[268] case, the arbitrator has remarked that the reasons for the decision to overlook an employee when selecting a candidate for promotion are relevant only insofar as they shed light on the fairness of the process.

4.4.2 Procedure to follow and the regulating council

Public servants who apply unsuccessfully for posts anywhere in the public service may refer disputes regarding promotion to the applicable bargaining council under s 186(2)(a). In *MEC for Transport; Kwazulu-Natal & Others v Jele,* it was held that an unsuccessful application by a public-sector employee for appointment to a higher position in another department could, for purpose of section 186(2)(a), constitute a dispute about promotion.[269] The most significant group bargaining on behalf of public sector employees is the Public Sector Coordinating Bargaining Council. In terms of the PSCBC Resolution 1 of 2024, a referral of a dispute for conciliation must be made on the prescribed referral form(s) of the Council or through the PSCBC Portal or the e- Referral platform. The Council must give the parties at least fourteen (14) days' notice in writing for a conciliation hearing. The Council or a commissioner may contact the parties by telephone or other means, before the commencement of the conciliation to seek to resolve the dispute. If it appears during a conciliation hearing that a jurisdictional issue has not been determined, the commissioner must require the referring party to prove that the Council has the jurisdiction to conciliate the dispute.

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[267] Nel *et al* 2016:445.
[268] *Cullen / Distell* [2001] 8 BALR 834 (CCMA).
[269] See also *Health & other Service Personnel Trade Union of SA & another v Public Health & welfare Sectoral Bargaining Council & others* [2014] JOL 31963 (LC).

In terms of section 135(5) of the LRA, a certificate of outcome, stating whether the dispute has or has not been resolved, must identify the nature of the dispute as described in the referral document or as identified by the commissioner during a conciliation hearing. In a conciliation hearing, a party to the dispute may appear in person or be represented only by an office bearer or official of that party's registered trade union or by an employee of any national department or provincial government.

4.4.3 Juxtaposition of promotion between private and public sector

As opposed to the private sector, promotion in the public sector is regulated by the *Public Service Act*, 103 of 1994. In 2001, the South African Government passed a regulation that regulated the procedures for appointment, promotions and termination of service in the public sector. The principles outlined in the regulation contemplate that employment practices shall ensure employment equity, fairness, efficiency, and the achievement of a representative public service. Before creating a post for any newly defined job, or filling any vacancy, an executing authority shall confirm that she or he requires the post to meet the department's objectives and ensure that sufficient budgeted funds, including funds for the remaining period of the medium-term expenditure framework, are available for filling the post.

Employees, like soldiers whom the State hires, are promoted when they are elevated to higher posts. A job evaluation policy governs promotion in the public sector. Also a vacant post on the approved establishment must be advertised, and the prescribed recruitment and selection procedure must be followed.[270] Because an employment decision in the public service is regarded as administrative action and accordingly judicially reviewable, the administrative law doctrine of legitimate expectation has been applied in disputes concerning promotion.[271] The LAC in *Khumalo v MEC for Education, KwaZulu-Natal*[272] accepted that unlawful promotions in the public sector may be set aside on application by the employer.

Apart from the legal requirements through contracts, private sector management can hire and terminate employees at their discretion. They can create new positions and hire new team members if more money is available. If a situation requires limiting the

[270] Grogan 2019a:143-144.
[271] *Administrator Transvaal and Others v Traub and Others* (1989) 10 ILJ 823 (A); *IMATU v Stad Tygerberg* (1999) 20 ILJ 971 (CCMA).
[272] *Khumalo v MEC for Education, KwaZulu-Natal* (2013) 34 ILJ 296 (LAC).

workforce, they can furlough, lay off, or release employees with the least amount of tenure. There may also be more opportunities for advancement within private-sector companies. Upon hiring, private sector employees can stay in their positions for the rest of their careers if they choose. They earn their positions or promotions based on skills and quality of work. They have no reason to lose their jobs if they're doing a good job and the company is stable.[273]

4.5 The Labour dispute resolution structure and procedure

In South Africa, different sectors have different dispute resolution mechanisms and systems; these control mechanisms have been implemented to guide the dispute resolution process. South Africa's labour dispute resolution elevates mediation as the primary means of resolving conflict. The *LRA* has established specialised tribunals to monitor and implement the legislation. These are the Labour Court and Labour Appeal Court, the Commission for Conciliation, Mediation and Arbitration, and bargaining councils. The LRA establishes CCMA as an independent juristic person with jurisdiction in all the provinces of the Republic. The CCMA is governed by a governing body consisting of the Director of the CCMA and ten members nominated by NEDLAC and appointed by the Minister.[274] Van Niekerk says CCMA is the 'centrepiece' of the statutory dispute resolution system.[275] CCMA is a statutory body exercising public power. Its decisions and awards are reviewable in terms of 'justifiability'.

Bargaining councils replace the old industrial councils. Bargaining councils have, as their predecessors, collective bargaining and dispute resolution as their main functions but enjoy extended powers and functions under the Labour Relations Act of 1995.[276] Regarding the provisions of the LRA, particularly section 28(1)(C), one of the most imperative functions of bargaining councils is to prevent and resolve labour disputes through conciliation and arbitration. Bargaining councils do not have jurisdiction to resolve all labour disputes.[277] Councils must provide for dispute resolution in their

[273] "Public vs. Private Sector Management: What's the Difference?" https://www.indeed.com/career-advice/finding-a-job/public-vs-private-sector-management. (accessed on 24 October 2024).
[274] Fouche & du Plessis (eds.) 2019:248.
[275] Van Niekerk *et al*. 2019:485.
[276] Fouche & du Plessis (eds.) 2019:244.
[277] Van Niekerk *et al.* 2019:492.

constitutions. If parties to a council are in dispute, they must resolve their dispute in accordance with the dispute resolution procedures contained in the constitution.[278]

The labour dispute resolution procedures are designed to provide the means through which such conflict can be administered to analyse its sources and causes and determine what process would yield the most suitable remedies.

The procedure for resolving ULP disputes is similar to the dispute resolution for unfair dismissals.[279] The dispute must first be referred for conciliation by a bargaining council having jurisdiction or, if there is none, to the CCMA in terms of section 191(1) of the *LRA* within 90 days of the date on which the act or omission giving rise to the alleged unfair labour practice was 'committed', or within 90 days of the date on which the employee first became aware of the act. If conciliation has failed and the council or the CCMA has certified that the dispute remains unresolved, or if thirty (30) days or any more extended period agreed to by the parties have elapsed since the council or the CCMA has received the referral, the matter must be arbitrated by the council or CCMA at the request of the employee.[280]

In *Louw & another v Golden Arrow Bus Services (Pty) Ltd,*[281] the court was of the view that deadlines may create problems when it comes to establishing when exactly an unfair labour practice of a continuing form, such as an alleged refusal to promote, occurred or came to the employee's attention. The Labour Appeal Court in *SABC Ltd v CCMA & others*[282] has held that where an unfair labour practice has 'ongoing' effects, the employee may refer a dispute at any time while those effects continue. However, in *SA Broadcasting Corporation v CCMA,*[283] the court accepted that the date of a promotion dispute was the date on which the employees demanded that they be promoted, not the date on which the decision not to promote them had occurred.

The LRA prescribes forms for referrals to the CCMA but does not prescribe to the council. By implication, a dispute may be referred to a council in any format as long as it is in writing. However, most councils have developed forms similar to those used for

[278] *Labour Relations Act*: sec. 51.
[279] Grogan 2020:303.
[280] *Labour Relations Act*: sec. 191(5)(a)(iv).
[281] *Louw & another v Golden Arrow Bus Services (Pty) Ltd* (1998) 19 ILJ 1173 (LC).
[282] *SABC Ltd v CCMA & others* [2010] 3 BLLR 251 (LAC).
[283] *SA Broadcasting Corporation v CCMA* [2010] 3 BLLR 251 (LAC).

CCMA referrals for both conciliation and arbitration; a referring party will have to use those forms.

4.5.1 Conciliation

Conciliation is an intervention by an independent third party that assists parties in arriving at a mutually agreed outcome in a dispute. Although similar in many respects to inquiry and mediation, conciliation relies on an institution in the form of a commission to assist parties in resolving their dispute. The conciliator assists parties in reaching their agreement and makes no binding determination on them.[284] The conciliation process may encapsulate mediation, fact-finding, and advice in the form of an advisory arbitration award.[285] Conciliation proceedings are confidential and conducted on a 'without prejudice' bias.[286] This process can be viewed as a formalised form of mediation, which is why conciliation is often undertaken by commissions set up for the purpose. The conciliating process is challenging, and it is very robust, and sometimes this process is also about forcing people to consider.[287]

4.5.2 Jurisdiction

The first tribunal in South Africa which was established to deal with unfair labour practices was the Industrial Court. The Court had the legislative or quasi-legislative powers as well as determinative powers.[288] The Industrial Court of South Africa is a court that deals with employment law disputes, including issues between employers and employees, trade unions, industrial relations, and remuneration requests. The court was established in 1979 and has jurisdiction across the country.

There is no reported case in which employees have successfully pursued ULP claims failing within the statutory definition of that term with a direct constitutional claim. However, the Constitutional Court has recognised that residual claims may be pursued in the High Court.[289] The court in *Fredericks v MEC for Education & Training, Eastern Cape*, found it quite clear that the overall scheme of the LRA does not confer a general

[284] Van Niekerk *et al.* 2019:486.
[285] *Labour Relations Act*:sec. 135
[286] *Hofmeyr v Network Healthcare Holdings* (Pty) Ltd [2004] 3 BLLR 232 (LC).
[287] Christie 2001:351.
[288] Christie 2001:345.
[289] Currie & De Waal (eds.) 2013:478.

jurisdiction on the LC to deal with all disputes arising from employment, despite the decision in the matter of *Administrator, Transvaal v Zenzile*[290] where the court concluded that issues such as dismissal and ULP, the Labour Court enjoyed exclusive jurisdiction in such matters. However, the contrasting issue raised in *Fredericks* is that the purpose of section 157(2) of the LRA was not to take away the original jurisdiction of the High Court but instead to confer concurrent jurisdiction on the Labour Court.

Section 191 of the *Labour Relations Act* stipulates that if a dispute about ULP remains unresolved after conciliation, the CCMA or a bargaining council must arbitrate the matter. The bargaining council has jurisdiction in dealing with unfair labour practices but excludes unfair labour practices concerning occupational detriments in terms of the *Protected Disclosure Act*. In some instances, the council has jurisdiction to conciliate a dispute, but should conciliation fail, the dispute must be referred to the LC for adjudication; it cannot be arbitrated.[291]

Chirwa v Transnet Ltd[292] and *Gcaba v Minister of Safety and Security*[293] closed the doors of the High Court to applications by public servants for review of dismissals and unfair labour practices under either PAJA, the common law, or the Constitution. However, under s 158(1)(h) of the LRA, the LC still has the power to 'review any decision taken or any act performed by the state in its capacity as the employer on any grounds that are permissible in law'. Section 157(2) of the *LRA* acknowledges the jurisdiction of the High Court in respect of a violation of a fundamental right arising from employment or labour relations or 'any dispute over the constitutionality of any executive or administrative conduct … by the state as an employer'.[294] In *Gcaba v Minister of Safety and Security* the High Court ruled that it lacked jurisdiction to entertain a claim based on administrative law by a police officer who had been refused promotion to the post in which he had been acting. The Labour Court also has broad powers when it comes to granting relief in cases of unfair discrimination.

[290] 1991 1 SA 21 (A).
[291] Fouche & du Plessis (eds.) 2019:406.
[292] *Chirwa v Transnet Ltd* (2008) 29 ILJ 73 (CC).
[293] *Gcaba v Minister of Safety and Security* (2010) 31 ILJ 296 (CC).
[294] Currie & De Waal (eds.) 2013:479.

4.6 The Arbitrators & Courts intervention in granting remedies

When finding that ULP has been committed, an arbitrator may determine the dispute on any terms the arbitrator deems reasonable. The phrase 'on terms deemed reasonable' confers significant discretion on arbitrators. However, it does not render remedies granted by arbitrators immune from review.[295] The powers of arbitrators in respect of unfair labour practices disputes are set out in section 193(4) of the LRA. The correct view, which was stated in *Burman Katz Attorneys v Brand NO & others*, seems to be that an employee who complains, for example, that they were not promoted because of race may refer the dispute for arbitration- the issue for decision is whether the failure to promote is unfair; the reason for the failure is a collateral issue.[296]

Under the *Arbitration Act*, parties must agree to arbitrate in writing, identify all parties, define the dispute, and define the powers.[297] The steps of a typical arbitration are as follows: step one consists of pre-arbitration, Housekeeping, Postponements, and points *in limine*. Step two consists of opening and narrowing issues; step three consists of evidence-in-chief; step four consists of cross-examination; step five consists of re-examination; step six consists of closing statements; and the final step is writing the Arbitration Award.

The courts have warned that arbitrators are not permitted to impose their own decisions on employers concerning whom to promote.[298] The arbitrators may interfere only if the employer has acted procedurally unfairly or in bad faith. They may order 'instatement,'[299] only where it is manifestly obvious that, but for the unfair labour practice, the employee would have been promoted.[300] Without a satisfactory explanation from the employer, an arbitrator may assume that the employer acted in bad faith and, therefore, unfairly.[301] The court in *Dlamini v Toyota SA Manufacturing* expressed the view that in the area of promotions, the court or CCMA should be hesitant to interfere with management's discretion in the absence of gross

[295] Grogan 2019a:140.
[296] *Burman Katz Attorneys v Brand NO & others* (2001) 22 ILJ (LC):134A-C
[297] *Arbitration Act* 42/1965: sec.1 and 14.
[298] Grogan 2020:59.
[299] See Grogan 2020:59-61 on the order of 'instatement'.
[300] See *SAPS v Safety & Security Sectoral Bargaining Council & others* [2010] 8 BLLR 892 (LC).
[301] *Du Plooy and National Prosecuting Authority* (2006) 27 ILJ 409 (BCA); *IMATU/ Greater Pretoria Metropolitan Council* [1999] 12 BALR 963 (IMSSA).

unreasonableness, which may lead to an inference of mala fides.[302] In *City of Cape Town v SAMU,* the Labour Court offered helpful guidelines on the role of arbitrators dealing with disputes concerning promotion.

Arbitrators have been prepared to interpret the term 'promotion' widely. Promotion almost always entails competition between employees, and the losers will often feel aggrieved because, in their view, they are the more deserving candidates. Arbitrators in such cases, should be slow to choose for the employee.[303] A commissioner's function is 'not to ensure that employers choose the best or most worthy candidates for promotion but to ensure that, employers do not act unfairly towards candidates when selecting employees for promotion.[304] The arbitrators are thus cautioned not to assume the roles of employment agencies.

4.7 Remedies that may be granted

Arbitrators and Commissioners can grant relief such as declaratory orders,[305] compensation of not more than the equivalent of twelve (12) months' remuneration,[306] and protective promotions.[307] In the context of the common law, a party to a contract of employment who fails to comply with the obligations imposed by the contract is guilty of a breach of contract.[308] Promotion is sometimes coupled with an order of back-pay, the setting aside of defective promotions and remittal to the employer for re-consideration.[309] The LAC in *PSA v Department of Justice*[310] held that whenever the suitability of a successful candidate in a promotion dispute is being challenged, irrespective of the relief sought, such successful candidate should be joined as a party in the arbitration proceedings. Failure to do so will impair the entire arbitration proceedings and constitute grounds to have the award reviewed and set aside.

4.7.1 Declaratory order

The provision of the *Labour Relations Act*, particularly section 138(9), is explicitly clear that the commissioner may make any appropriate arbitration award in terms of this

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[302] Van Niekerk *et al*. 2019:205.
[303] Grogan 2019a:147.
[304] *SAPS v Security Sectoral Bargaining Council & others*: par. 15.
[305] *Labour Relations Act*: sec. 138(9).
[306] *Labour Relations Act*: sec. 194(4).
[307] Grogan 2020:305.
[308] Van Niekerk *et al*. 2019:100.
[309] Basson *et al*. 2017:227
[310] *PSA v Department of Justice and others* (2004) 2 BLLR 118 (LAC).

Act, including, but not limited to, an award that includes, or is in the form of, a declaratory order. In the *Independent Municipal and Allied Trade Union obo Coetzer v Stad Tygerberg* case, the court illustrated how the application of this section should unfold. The commissioner in this case, having found that the employer had acted unfairly by not granting 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 propose remedies in the event of findings of ULP, and item 4(2) only provided that a dispute in terms of item 2 had to be determined on reasonable terms, nonetheless found that section138(9) provided that an award could take the form of a declaratory order.

4.7.2 Compensation

Compensation for unfair labour practice must be 'just and equitable' in all circumstances but may not exceed the equivalent of 12 months' remuneration.[311] However, the court in *Reynhardt v UNISA*[312] decided that the gravity of discrimination remains the decisive factor, thus, there is no boundary to the damages or compensation that may be granted to the victims of unfair discrimination. The LAC has issued a warning against merely multiplying the employee's pay to quantify damages in discrimination cases.[313]

Whether 'back pay' accompanying a retrospective reinstatement order will be deemed compensation in the ULP matter has not been finally determined and this is because an order reinstating former employees to their former positions or instating them to promotional posts may exceed the 12-month limit on compensation.[314]

4.7.3 Protective promotions

This is a remedy granted to the employees who can effectively demonstrate that if the employer did not act unfairly, they could have been promoted. Protective promotion is a form of relief or remedies customarily granted when the employer's unfair decision-making has jeopardised an employee's promotion opportunity. It has been decided that protected promotion is simply a disguised form of compensation, which may not be granted without proof that the employee has been subjected to an actual loss and

[311] *Labour Relations Act*: sec. 194(4).
[312] *Reynhardt v UNISA (*2008) 29 ILJ 725 (LC*).*
[313] Grogan 2019a:330.
[314] Grogan 2019a:330.

is unlawful if it exceeds one year.[315] Grogan believes that the option of protected promotion may also be inappropriate if the result is to grant the employee compensation in excess of that permitted by the Act.[316]

In *SAPS v Gebashe*,[317] a bargaining council arbitrator granted an employee a protected promotion after finding that the employer had provided no reasons for withdrawing the disputed post. In the case of *the Minister of Safety and Security v Safety and Security Sectoral Bargaining Council,* the arbitrator granted protective promotion as relief upon the findings that the Minister had committed unfair labour practice by not promoting the aggrieved complainant. In this matter, the aggrieved employee was dissatisfied with the Minister of Safety and Security's decision not to promote him to the rank of superintendent. The employee referred the matter to the relevant forum.[318]

Arbitration commissioners should only issue protective promotion as a relief if they have enough evidence showing that the aggrieved employee would have been appointed because of the unfairness in the process. This kind of remedy to a promotion dispute is often used in the public sector but is still very controversial and subject to the approval of the Labour Courts.

4.8 Summary of the Chapter

In layman's terms, when determining whether or not the employer acted fairly in failing or refusing to promote the employee, the following factors should be considered: the employer acted in bad faith; the employer exercised its discretion inconsistently; the reason provided cannot be substantiated; the decision was made on the wrong principle; or the decision was made in a biased manner. Grogan's proposition is so profound as he outlines that employees may have a valid complaint if they can show that they have been overlooked for promotion where they possess objective attributes, like experience or qualifications, which the person who was promoted does not possess, and their employers cannot explain why they were overlooked. However, in Dalton,*[319]* it was concluded that the fact that an employee is better qualified or has

[315] *KwaDukuza Municipality v SALGBC & Others* (2009) 30 ILJ 356 (LC).
[316] Grogan 2019a:329.
[317] *SAPS v Gebashe* (2015) 36 ILJ 1620 (LC).
[318] *Minister of Safety and Security v Safety and Security Sectoral Bargaining Council:* par.1-2.
[319] *PSA obo Dalton & another v Department of Public Works* [1998] 9 BALR 1177 (CCMA).

achieved a higher recommendation from a selection committee does not prove unfair or arbitrary conduct on the employer's side.

Even if the post requirements are clearly and objectively stated, the employer may still have to choose between equally qualified candidates. Inevitably, a measure of subjectivity enters the selection process at some stage. Hence, the employer must apply his mind and fairly conduct himself. Employers must train and develop personnel in the context of affirmative action. This indicates that denial of promotion due to a lack of an attribute that could have been remedied by training may constitute unfair promotion practice.

CHAPTER 5

5 Conclusion and Recommendations

5.1 Conclusion

To determine the solution to the research problem, it ought to be noted that the *Labour Relations Act* does not create a right to be promoted. However, most cases that have dealt with this matter have indicated that the law and the *Constitution* impose a continuing obligation of fairness towards the employee when the employer exercises its managerial prerogative. The employer has an obligation in terms of section 186(2)(a) of the LRA to act fairly towards the employee in the promotion process. Although, in common law, the obligation is not conferred as an inherent right. The employer has a common-law duty to deal fairly with the employee. This duty is so interesting because it states the concept of 'employee' in an unequivocal term. Strangely, the term is defined under section 213 of the LRA and excludes certain persons.

In addressing the main question of whether the South African legal instruments are sufficient to ensure fair promotion, the LRA, in section 185, creates a right for employees not to be subjected to ULPs. This right is accorded to persons defined under section 213 of the LRA. If any employer practices are specific and mentioned in the list contained in section 186(2), the employee will enjoy the protection of the LRA. Thus, if an employee complains that the conduct of the employer in not promoting him is unfair. After exhausting internal remedies, they will have to lodge the matter with the CCMA, if they are not under the jurisdiction of any bargaining council. The employee will have to prove that the employer failed to meet an objective standard and the employer's conduct was arbitrary, capricious, or inconsistent, whether negligent or intended. Disappointment because of an employer's decision, mere unhappiness or a perception of unfairness does not establish unfair conduct.

The obligation of fairness imposed by the LRA is only towards the employees against the unfair conduct of the employer, but the Constitutional obligation extends beyond the traditional impression of 'employee' and everyone is ensured fairness when promotion is at issue. The principle of fairness which comprises both procedural and substantive fairness is dealt with extensively in Chapter 2. The case law has proven

that both the LRA and the *Constitution* require fairness to be two dimensions; substantively and procedurally. Substantive fairness in this context of promotion will deal with the merits of the decision to promote or not to promote the candidate and procedural fairness refers to the organisational policies and procedures that influenced the decision-making. My view is that indeed the legal instruments in South Africa do ensure fair promotions, and I hitch my view with the fact that fair labour practices are encouraged under the supreme law of the land and are buttressed by several national statutes, which give effect to the primary right contemplated in section 23 of the *Constitution.* The other national statute which plays an essential role in the promotion dispute is the EEA. The Act deals with discrimination and various employment equity strategies. In terms of the EEA, every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

Addressing one of the most fundamental research questions on what promotion entails, it is illustrative in Chapter 2 that promotion normally but not necessarily, involves a salary increase and always involves an increase in responsibility and status. There is no dispute with Grogan's interpretation that employees are promoted when they are elevated to a higher post. It is evident that when dealing with the issue of promotion we ought firstly to establish a 'nexus', that is a connection between the employee and the employer; secondly, we ought to compare the employee's current job with the job that the employee is seeking for promotion and then we will be able to conclude that indeed the matter involves promotion. However, the EEA also covers disputes that are not classified as a dispute concerning promotion, any dispute for failure to appoint an applicant to a different position can be covered by the EEA. The requirement of connection between the employee and the employer is not applicable in this instance.

The ILO plays a significant role in developing fairness in the workplace, the organisation adopts Conventions from time to time and has built up a set of principles that regulate many labour matters. The most important Convention of the ILO is the Discrimination (Employment and Occupation) Convention, and the interesting part is that South Africa has ratified the Convention, and it is binding to our legal system. In order to eradicate any discrimination, South Africa was required under this Convention to establish and implement a national policy that promotes equal opportunities and

treatment in terms of employment and profession. The Convention can be intertwined with the *Employment Equity Act* when it comes to a fight against discrimination in the workplace. The guidelines to ensure the principle of fairness are dealt with extensively in Chapter 3.

All the legal instruments that govern promotions in South African workplaces are provided in Chapter 4. If the employer's conduct is found to be unfair, in my situation as a public servant, I will have to refer the dispute to the bargaining council called the GPSSBC, for conciliation within ninety (90) days. Private sector employees who do not have any bargaining council will have to refer the matter to the CCMA. If the unfair conduct involves discrimination, the dispute is conciliated by the CCMA and adjudicated by the Labour Court.

It's challenging to demonstrate that an employer was unreasonable when dealing with the matter of promotion. The employee who claims he has been the victim of unfair labour practices carries the burden of demonstrating the allegation on a balance of probabilities. In practice, the employee must prove an omission on the part of his employer. After proving that the employer failed to advance the employee, the employee must demonstrate that the act or omission complained about was unjust. It's crucial to grasp that only if the employer acted in bad faith will the courts get involved in a dispute over a promotion and that will include a discretionary exercise that is inconsistent; the given justifications are unsupportable; the choice was made based on an incorrect principle; or otherwise. If an employee successfully proves the unfair conduct of the employer, remedies like protective promotions, compensation of no more than the equivalent of twelve (12) months' salary, and declaratory orders can be granted. According to the findings, the only time a protected promotion can be provided to relieve dissatisfied employees is when there is sufficient proof that such a person might have secured a promotion had it not been for the employer's unfair conduct during the promotion process.

5.2 Recommendations

Employers should assess their complete employee promotion system, including procedures (such as vacancy notification, performance evaluation, interviews, and so on) as well as promotion criteria. As it is evident that the system of application of vacancies has been problematic, it will be recommended that before the employer

advertises the post externally, internal staff members ought to be given priority first, and if the kind of skill which is sought is not obtained internally, then the employer can advertise the post externally. This will limit a lot of grievances, which derive mostly from internal employees.

The principles that emerged from the case of *Dlamini v Toyota SA Manufacturing* are very pivotal and they could act as rules for settling disagreements concerning promotion. The guidelines contemplate that if the court or arbitrators should be reluctant to override management's judgment unless there is egregious unreasonableness, as this could be interpreted as mala fide, this principle serves as a guideline to comply with the common law generous area of prerogative left to employers. It is very essential for the employer always to follow the company's policies and procedures in the process of selection and recruitment to avoid unfair conduct and if needs be the employer must review the policies and procedures from time to time and in this process of review, employees must play a central role. To reduce these complaints and grievances in terms of promotion, it will assist the company if priorities are afforded to the internal staff members when doing recruitment and selection.

Trade unions will have to work very hard to influence the policy direction in terms of promotion in the workplace and make sure that they fight for their members to have an entitlement or right to promotion especially those employees who work very hard but are not being recognised, a person serve for too long in one position and at the ultimate end they got to be discouraged. So, Trade Unions must unite and influence the direction of the LRA and the policies of the companies to guarantee a right or preference of their members when it comes to promotion.

Without promotion, something terrible happens… nothing![320]

[320] https://www.brainyquote.com/quotes/p_t_barnum_539959?src=t_promotion (accessed 20 Nov 2024).

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