Legal limits on the employer's freedom of choice in recruiting and selecting employees

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by

Vusumuzi Francis Mthethwa
22814175

Supervisor: Professor PH Myburgh

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Abstrakte

Onder die gemene reg 'n werkgewer geniet volledige vryheid van keuse wanneer die werwing en seleksie van werknemers. 'N werkgewer het onbelemmerde diskresie in die werwing en seleksie van werknemers. Daar was geen wetlike beperkings op die prerogatief van die werkgewer werknemers aan te stel.Ontwikkelings in arbeidswetgewing het egter geleidelik die werkgewer se vryheid van keuse afgeneem tydens die werwings-en keuringsproses. Die Wet op Gelyke Indiensneming 55 van 1998 en die Kode van Goeie Praktyk oor die integrasie van gelyke indiensneming in Menslike hulpbronne-beleid en-praktyke, 2005, sowel as die dreigende arbeidswetgewing sekere beperkings op die werkgewer se vryheid van keuse tydens die werwings-en keuringsproses. Die res van die probleem is dus: Wat is die omvang van die beperking op die werkgewer se vryheid van keuse in die werwing en keuring van werknemers? Die studie sal gedoen word deur middel van 'n literatuurstudie van relevante boeke, tydskrifartikels, wetgewing, regspraak en internet bronne met betrekking tot beperkings wat deur wetgewing en regspraak geplaas word op die werkgewer se vryheid werknemers tydens die werwing en keuring van te kies. Hierdie navorsing ondersoek dus die mate waarin ontwikkelings in arbeidswetgewing het die prerogatief van 'n werkgewer werknemers aan te stel verweer. Hierdie ondersoek sal help om te verduidelik die grense waarbinne 'n werkgewer gedurende die werwing en keuring van sy keuse van 'n werknemer uit te oefen.

Sleutelwoorde: Regstellende aksie maatreëls, aanstelling, aangewese groepe, diskresie, gelyke indiensneming, inherente vereistes, werk aansoeker, prerogatief, werwing, keuring, onregverdige diskriminasie.

Abstract

Under common law an employer enjoyed complete freedom of choice when recruiting and selecting employees. An employer had unfettered discretion in recruiting and selecting employees. There were no legal restrictions on the prerogative of the employer to appoint employees. Developments in labour law have, however, gradually diminished the employer's freedom of choice during the recruitment and selection process. The Employment Equity Act No. 55 of 1998 and the Code of Good Practice on the Integration of Employment equity into Human Resource Policies and Practices, 2005 as well as impending labour legislation impose limitations on the employer's freedom of choice during the recruitment and selection process. The remaining problem therefore is: What is the extent of the limitations on the employer's freedom of choice in the recruitment and selection of employees? The study will be conducted by means of a literature study of relevant books, journal articles, statutes, case law and internet sources relating to restrictions which are placed by legislation and case law on the employer's freedom to choose employees during recruitment and selection. This research therefore investigates the extent to which developments in labour law have eroded the prerogative of an employer to appoint employees. This investigation will help clarify the limits within which an employer has to exercise its choice of an employee during recruitment and selection.

Keywords: Affirmative action measures, appointment, designated groups, discretion, employment equity, inherent requirements, job applicant, prerogative, recruitment, selection, unfair discrimination.

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List of Abbreviations

EEA	Employment Equity Act No 55 of 1998
EEP	Employment Equity Plan
LRA	Labour Relations Act No 66 of 1995

Definitions

In this mini-dissertation, unless the context otherwise indicates -

"Candidate" means a job applicant who has been shortlisted for interviewing and other selection techniques.

"Department" means the Department of Labour.

"Director-General" means the Director-General of the Department of Labour.

"Job applicant" means a person who has submitted an application in response to a job advertisement.

"Minister" means the Minister of Labour.

"Recruitment" means the process that employers use to attract job applicants. It consists of advertising positions and may involve the use of application forms.

"Selection" means the process that employers use to determine the suitability of job applicants for a position. It involves various techniques such as short-listing, scoring, interviews, assessments and reference checks.

1 Introduction

1.1 Problem statement

Under common law an employer had freedom of choice in recruiting and selecting employees. The principle of freedom of contract prevailed; allowing an employer complete freedom in deciding who to appoint. Under the 1956 Labour Relations Act an employer still had freedom of choice regarding employee appointments, except where it had to comply with a few statutory requirements for certain jobs.

Employers could thus decide not to appoint an applicant for any reason they pleased, since job applicants were not protected by legislation. Currently job applicants are protected against, among others, unfair discrimination. The protection of job applicants consequently has a bearing on the recruitment and selection of employees by an employer.

The employer's freedom of choice in recruiting and selecting an employee has been curtailed by developments in the labour law, among others the *Employment Equity Act* No 55 of 1998 (hereinafter the EEA), the *Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices*, 2005 (hereinafter the Code), and stands to be further curtailed by proposed amendments to labour legislation, namely the *Employment Equity Bill* 2010, *Employment Services Bill* 2010 and *Labour Relations Amendment Bill* 2012 which pose restrictions on the employer's right to choose an employee during the recruitment and selection process.

Furthermore, numerous forums that are created by statute as well as the courts are empowered to scrutinise, among other things, the conduct of employers when recruiting and selecting employees.

In *George v Liberty Life Association of Africa Ltd*[1] the applicant, who was already an employee of the respondent, applied for another post within the company. The post was described as a 'corporate only' position in accordance with the respondent's policy of appointing internally before recruiting externally. However the post was also advertised externally before the internal recruitment and selection process could be finalised. The applicant was found to be a suitable candidate for the position; but an external affirmative action candidate was appointed. The applicant then argued that the respondent's failure to appoint him amounted to an unfair labour practice as he was unfairly discriminated against and that the respondent had breached its own procedures by appointing an external candidate. The applicant's submission was that the post should not have been advertised externally seeing that he was a suitable internal candidate. The applicant also argued that the appointment of the affirmative action candidate ahead of him was tantamount to an unfair labour practice[2].

The court found that the failure by Liberty Life to follow its recruitment and selection policy and procedure constitutes an unfair labour practice. The court was not requested to make a general determination whether the application of affirmative action measures to redress discrimination suffered by a designated employee constitutes unfair labour practice. Such a determination would clarify whether the application of affirmative action in those circumstances does afford a non-designated individual an unfair labour practice claim for the discrimination he suffers as a result thereof.

1 [1996] 8 *BLLR* 985 (IC).
2 This case was decided before the 2002 amendments to the *LRA*. It was therefore referred in terms of Schedule 7 to the *LRA* and not section 186(2).

The respondent's case was merely that the external affirmative action candidate had not been appointed on merit. Hence the court did not make a formal determination on the application of affirmative action in the employer's defence.

The court remarked that the employer's prerogative to appoint an employee is circumscribed by developing principles of labour, constitutional and common law. The court observed that the exercise of discretion is an integral part of exercising the managerial prerogative to recruit and select for a vacancy. In exercising this wide freedom of choice it may be necessary for the employer to discriminate, or make a choice or election between candidates. The court went on to comment that employers are no longer free to appoint employees using discriminatory or unfair criteria. The court added that the development of labour, constitutional and common law principles had gradually eroded "*the managerial prerogative to appoint an employee.*" The basis for the erosion of the employer's freedom of choice in appointments is the changed social standing of employees as well as the gradual democratisation of the workplace.[3]

The exercise of discretion is inherent in the exercise of the managerial prerogative in respect of recruitment and selection of employees. The court explained that in the exercise of such discretion the employer may discriminate out of necessity by way of making a choice or selection between candidates. The court observed, *per* Landman J, that originally the managerial prerogative of an employer was significantly wide and could even be regarded as unfettered. The employer's unfettered discretion has been gradually eroded or reduced by the development of modern labour law. The limits or restrictions on the managerial prerogative in the South African context may be found in a range of sources, including the contract of employment, collective bargaining agreements, constitutional, statute and common law.

3 [1996] 8 *BLLR* 985 (IC) 997.

This paper therefore investigates the extent of the effect of the developments in labour law on, and the role of the courts and other forums in, limiting the freedom of the employer in recruiting and selecting as well as retaining an employee of its choice.

1.2 Research question

This paper seeks to provide an answer to the following question: To what extent is the employer's freedom of choice in recruiting and selecting and retaining an employee of its choice limited by South African law?

2 Impact of the Employment Equity Act No 55 of 1998

The Act poses restrictions on the employer's freedom in choosing an employee during the recruitment and selection process. The aim of the EEA is to eliminate unfair discrimination and to make provision that the employer must take certain affirmative action measures. Grogan[4] asserts that whereas the EEA[5] is not intended to strip employers of their general discretion to select employees they deem suitable, it seeks to ensure that employers do not adopt unacceptable criteria to exclude applicants.

2.1 Elimination of unfair discrimination and prohibition of unfair discrimination

The Act provides for elimination of unfair discrimination and requires that employers must take steps to promote equal opportunity in the workplace by eliminating unfair

4 Employment Rights 226.
5 S 6 of the *Employment Equity Act* 55 of 1998 (hereinafter the EEA).

discrimination in any employment policy or practice[6]. This provision is couched in mandatory terms. The Act enjoins an employer to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. The Act thus places a positive duty on the employer to eliminate unfair discrimination in any employment policy or practice.

The EEA[7] prohibits direct or indirect unfair discrimination against an employee in any employment policy or practice on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

The Act provides that an employment policy or practice includes, but is not limited to:

(a) Recruitment procedures, advertising and selection criteria;
(b) Appointments and the appointment process;
(c) Job classification and grading;
(d) Remuneration, employment benefits and terms and conditions of employment;
(e) Job assignments;
(f) The working environment and facilities;
(g) Training and development;
(h) Performance evaluation systems;
(i) Promotion;
(j) Transfer;
(k) Demotion;
(l) Disciplinary measures other than dismissal; and
(m) Dismissal.

Only (a) and (b) above are applicable to this paper since they relate to the recruitment and selection of an employee by an employer. In *Gordon v Department of Health*

6 S 5 of the EEA.
7 S 6 of the *EEA*.

KwaZulu-Natal & another[8]*,* the court explained that "practice" denotes "*something much more than mere ad hoc or random action*."

An employment policy or practice therefore entails consistently typical action by the employer when it recruits and selects employees. The implication of requiring an employer to eliminate unfair discrimination in any employment policy or practice is that the employer is no longer completely free to exercise its choice in recruiting and selecting employees. The employer is obliged to take steps towards elimination of unfair discrimination in its employment policy or practice. In the first place it means that the employer must scrutinise its policies and practice to establish whether there are any discriminatory practices. These steps further consist in the employer actively implementing employment equity measures that dictate who should be preferred when recruiting and selecting employees by removing barriers which may limit access to certain positions[9]. The said measures evidently have a restrictive effect on the employer's freedom to choose an employee of its choice during recruitment and selection.

The EEA[10] thus prohibits unfair discrimination against job applicants, and protects them against unfair discrimination, during the recruitment and selection process. Direct discrimination may be easy for the employer to detect but the employer may be faced with a more serious problem in the case of indirect discrimination. Indirect discrimination occurs when criteria, conditions or policies are applied that appear to be neutral, but which adversely affect a disproportionate number of a certain group in circumstances where they are not justifiable.

Unfair discrimination, unlawful medical as well as psychological testing and other similar assessments are prohibited to cover job applicants. The EEA therefore has a significant bearing on the manner in which an employer recruits and selects an employee. The

8 [2008] 11 *BLLR* 1023 (SCA) 1035.
9 Employers must state the specific barrier and the subsequent measure instituted in their reports to the Department of Labour in terms of s 21 of the EEA.
10 S 6 of the *EEA*.

employer may therefore be bound to appoint persons that are unfit for work due to a medical condition. Only if the employer is allowed for health and safety purposes to test the applicants, then the employer may question the health issues of an applicant for work.

The current employment equity jurisdiction, however, allows job applicants to dispute their non-selection on grounds of unfair discrimination; despite the fact that the employer acted *bona fide* and in compliance with its appointment procedures. The EEA has thus revolutionised the manner in which an employer recruits and selects an employee. *Stockwe v MEC Department of Education Eastern Cape Province & another*[11] is a classic case of an appointment dispute based on unfair discrimination. In *casu* a black female teacher applied for promotion to the position of principal. The interviewing committee recommended her for the position. The school governing body rejected the interviewing committee's recommendation and recommended a coloured candidate instead, seemingly because they doubted that the black teacher was fluent in Afrikaans.

The Department declined the governing body's recommendation on the ground that it discriminated against the black female teacher on the ground of language. The department then constituted a review committee comprising three primary school principals. The review committee wanted the interview to be conducted in Afrikaans but she refused and agreed to speak in English. During the interview, members of the review committee told her that she should not have applied for the position since the school's medium of instruction was Afrikaans. They also asked her if she was 'bold enough' to compete for the post against a man. She submitted a letter of complaint to the review committee the following day. The review committee did not reply to the letter

11 [2005] 8 *BLLR* 822 (LC).

and forwarded a letter of recommendation to the Acting Regional Director for the appointment of the coloured candidate. On the basis of the review committee's recommendation the Acting Regional Director approved the Coloured male candidate's appointment. The black female applicant then filed an unfair discrimination claim.

The court observed that the issue of language only arose after the interviewing committee had decided to nominate the applicant. The advertisement merely stated that the school's medium of instruction was Afrikaans. The interviewing committee was content with the applicant's command of Afrikaans. The language issue only surfaced when the school governing body realised that the applicant was a black woman. The court found that, on a balance of probabilities, the applicant's race and language had been the major reason for her rejection. The court noted that the issue of language had not arisen before the interviewing committee decided to nominate the applicant. The advertisement had merely stated that Despatch Primary was an Afrikaans-medium school.

The court also took notice that the reviewing panel's recommendation materially influenced the decision not to appoint the applicant. As the reviewing panel was noticeably biased against the applicant in respect of her sex and race, its recommendation could not be used as a valid basis for a legitimate decision. The court further ruled that the school governing body had been influenced by race and language considerations and consequently it had no rational grounds to reject the recommendation of the interviewing committee.

The court also decided that establishment of the reviewing committee was not in line with the applicable legislation. It was held that, unlike private employers who may be exonerated for slight departures from their disciplinary and other codes, public sector employers are under an obligation to comply with regulations governing their procedures.

The parties negotiated a settlement agreement, which was made an order of court, before conclusion of the matter. The applicant would be transferred to an equivalent post at another school. The case indicated that an employee may challenge the employer in its exercise of choosing an employee for appointment if the employer's choice amounts to unfair discrimination against a job applicant.

Unfair discrimination against job applicants from non-designated groups is also prohibited. Designated job applicants' protection against unfair discrimination is not to be exercised in a manner that results in the unfair discrimination of non-designated job applicants. In *Du Preez v Minister of Justice and Constitutional Development & others*[12] the exclusion of a white job applicant during short listing was ruled to constitute unfair discrimination. The *ratio* for the court's decision was that during short listing, the respondent applied affirmative action measures in such a manner that white males could never score higher than black males and white females. The court will, however, not grant an unfair discrimination claim in favour of an applicant in the absence of proof. In *Swanepoel v Western Region District Council & another*[13] Ms Swanepoel claimed that she had been discriminated against and that she had been the victim of an unconstitutional affirmative action policy. The court rejected Ms Swanepoel's claim as there was no evidence that the employer had acted *mala fide* or in breach of its appointment procedures. The true test of unfair discrimination, however, is the following: (i) does the differentiation amount to discrimination; if so (ii) is the discrimination unfair? The onus to prove the existence of discrimination is on the employee. Once the employee has established that there was discrimination, the onus is on the employer to prove that the discrimination was fair. The court held that the mere assertion that the applicant was white, female and better qualified than the appointed black candidate was not sufficient proof of discrimination against Ms Swanepoel.

The employer has to conduct an interview and keep records; thus enabling the courts to have access to his decision-making documentation and opening himself to possible

12 (2006) 27 *ILJ* 1811 (SE).
13 [1998] 9 *BLLR* 987 (SE).

invalidation of his choice of employee. The EEA compels an employer not only to consider formal qualifications in determining the suitability of an applicant; but also to take into consideration the applicant's prior learning, relevant experience or the capacity to acquire within a reasonable time the ability to do the job. The difficulty of trying to ascertain the candidate's ability to do the job by conducting an interview places a limitation on the employer's choice of an employee. An added requirement of subjecting a newly employed person to a probationary period in terms of the Code poses a further limitation on an employer's choice. The demands of managing an employee's probation are designed to ensure that the employee acquires abilities and skills to make him suitable for the position. They are, however, onerous. The Code[14], for example, requires an employer to ensure that probationary employees from designated groups do not suffer unfair discrimination. The employer has to ensure that managers treat them fairly and consistently. There has to be a written probation policy clearly setting out the roles and responsibilities of the probationary employee and company policies and procedures.

Expected performance standards; the frequency and form of performance reviews; the procedures the probationary employee should comply with when raising problems or grievances as well as the nature of support, mentoring, training and development must all be stated. The employer thus has limited discretion in deciding whether the employee is suitable, even during probation. Furthermore, the Code enjoins the employer to provide an employee from a designated group with reasonable accommodation if the need arises during the probationary period. An employer's refusal to provide such reasonable accommodation may be viewed as unfair discrimination. The employer must accordingly comply with the requirements of the Code; thereby diminishing his freedom to choose an employee who he considers to be suitable.

An employer is furthermore precluded from discriminating against an applicant solely on the basis of his lack of relevant experience. The EEA requires an employer to review all

14 S 9.3.1 of the Code of Good Practice.

the above factors when determining whether a person is suitably qualified for a job. When reviewing the above-listed factors an employer must also determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors. In making the said determination an employer may not unfairly discriminate against a person based only on that person's lack of relevant experience. The Labour Appeal Court in *Dudley* in *Dudley v City of Cape Town & another*[15], though, held that an employee does not have an unfair discrimination claim on the basis of being overlooked for lack of previous experience. Grogan[16], on the other hand, asserts that the employer is barred from discriminating against an applicant only on the basis of his lack of experience.

An employer's freedom to choose an employee during recruitment and selection is further limited by the statutory duty to eliminate unfair discrimination. The duty of an employer to eliminate unfair discrimination in its employment policies and practices is illustrated by the decision of the Labour Court in *Aitkins v Datacentrix (Pty) Ltd.*[17] Mr Aitkins was offered employment as an information technology technician subsequent to a successful interview. He accepted the offer in writing, and thereafter informed the respondent that he was undergoing a gender-alteration medical procedure that would convert him from male to female.

Datacentrix regarded Mr Aitkins' failure to disclose this information during the interview as a material misrepresentation that amounted to dishonesty. Datacentrix thus exercised its contractual remedy of cancellation and terminated Mr Aitkins's employment. Mr Aitkins argued that the employer's actions amounted to a repudiation of his contract of employment, which was concluded on acceptance of the Datacentrix's offer of employment. Mr Aitkins lodged an unfair discrimination dispute at the CCMA for conciliation, and subsequently to the Labour Court for adjudication.

15 [2008] 12 *BLLR* 1155 (LAC).
16 Workplace Law 112.
17 (2010) 31 *ILJ* 1130 (LC).

Mr Aitkins founded his claim in the provisions of both the EEA and the LRA. He pursued relief in terms of sections 50(1) and (2) of the EEA for a declaratory order that the employer had unlawfully and unfairly discriminated against him on the grounds of sex, gender and/or sexual orientation. He further sought an award for compensation and/or damages, a public written apology and/other relief. The court reasoned that Datacentrix would not have employed Mr Aitkins had he disclosed his intention to undergo a gender re-alignment operation. In addition the court held that there was no legal duty on Mr Aitkins to disclose his intentions regarding the gender re-alignment operation. The court came to the conclusion that Datacentrix dismissed Mr Aitkins essentially because the latter wanted to undergo a gender re-alignment process. Datacentrix was found to have unfairly discriminated against Mr Aitkins on grounds of sex, gender and/or sexual orientation. The dismissal was ruled to be automatically unfair. The court awarded compensation to Mr Aitkins.

Designated employers are thus obliged to eliminate unfair discrimination in their employment policies and practices. The EEA[18] prohibits unfair discrimination against employees, including job applicants, on specified and non-specified grounds. The EEA[19] provides two specific defences against unfair discrimination, namely "*affirmative action measures consistent with the purpose of the Act*" and "*inherent requirement of a job*". In *Whitehead v Woolworths (Pty) Ltd*[20] the applicant was interviewed for a permanent position after which the respondent made an offer of employment to the applicant. The respondent subsequently became aware that the applicant was pregnant; and then withdrew the original offer of permanent employment, replacing it with a new offer of a fixed-term contract for five months. In the unfair labour practice dispute that ensued, the respondent argued that it was a requirement of the job that the appointed employee had to remain in the job for at least twelve months. The respondent submitted that the reason for this requirement was that the position had been established to deal with the personnel implications of a merger. In dismissing the respondent's argument, the court explained that if an attribute is to be considered an

18 S 6(1) of the *EEA.*
19 S 6(2) of the *EEA.*
20 [1999] 8 BLLR 862 (LC).

inherent requirement of a position, it had to be related to the performance of the job. The necessity to get a job done within a specific time could not be an inherent requirement if it was not shown that time was of the essence. The court ruled in favour of the applicant and awarded her nine months compensation.

Therefore, unless an employer shows that it discriminated against an employee because the employee did not meet the inherent requirements of the job, the employer will be held to have subjected the employee to unfair discrimination. The employer's decision not to appoint a candidate may accordingly be challenged in court, leaving the employer with extremely limited freedom in recruitment and selection. The EEP[21], for instance, requires an employer to apply affirmative action measures relating to appointment of members from designated groups which include targeted advertising. Advertising which is targeted towards people from designated groups limits the employer's freedom in choosing employees during recruitment and selection in that the choice is restricted to applicants from designated groups. An employer may therefore not discriminate against job applicants unless it does so in order to implement affirmative action measures or the inherent requirements of the particular job warrant such discrimination. An example of discrimination which is warranted by the inherent requirements of a job is age discrimination in the recruitment and selection of police officers.

2.2 Affirmative Action Measures

An employer's affirmative action policy must give preference to members of a designated group. That preference, as expressed particularly in the EEP, takes away the freedom of an employer to appoint an employee of his choice. The EEP, for instance, provides that the following affirmative action measures must be applied:

21 S 8.3.1 of the Code of Good Practice EEP.

(a) Appointment of members from designated groups,
(b) Increasing the pool of available candidates,
(c) Training and development of people from designated groups,
(d) Promotion of people from designated groups,
(e) Retention of people from designated groups,
(f) Reasonable accommodation for people from designated groups,
(g) Steps to ensure that members of designated groups are appointed in such positions that they are able to meaningfully participate in corporate decision-making processes,
(h) Steps to ensure that the corporate culture of the past is transformed in a way that affirms diversity in the workplace and harnesses the potential of all employees, and
(i) Any other measures arising out of the consultative process.

It is nonetheless unfair to entirely exclude applicants from other race groups from consideration. This principle was stated in *IMATU obo Gounden v Ethekwini Municipality; Metro Electricity*[22]*.* The EEA[23] provides that a designated employer is not required to take any decision regarding an employment policy or practice that would create an absolute barrier to the prospective or continued employment or advancement of people who are from non-designated groups. *In Coetzer & Others v Minister of Safety & Security & Others*[24] the court described an absolute barrier as an insurmountable obstacle. An insurmountable obstacle in the context of *Coetzer & Others* was the re-advertising of posts as designated posts, since non-designated employees were not allowed to apply for those positions.

In *Harmse v City of Cape Town*[25] the court held that one of the ways in which an employer can eliminate unfair discrimination is by taking affirmative action measures consistent with the purposes of the EEA. Affirmative action measures incorporate measures to "*eliminate employment barriers*", to "*further diversity*" in the workplace and to ensure "*equitable representation*". Hence affirmative action consists in more than just a ground of justification when an employer faces discrimination claims arising from

22 [2003] 10 *BALR* 1101 (SALGBC).
23 S 15(4) of the *EEA*.
24 [2003] 2 *BLLR* 173.
25 (2003) 24 *ILJ* 1130 (LC).

recruitment and selection. It requires pro-activeness and self-activity from the employer. For that reason the EEA enjoins an employer to take steps to eliminate unfair discrimination in the workplace.

The court in *Harmse v City of Cape Town*[26] limited the employer's freedom in choosing an employee by prescribing that an individual from a designated group has a right to affirmative action. The employer is therefore compelled to prefer a designated individual when making an appointment. In *Harmse*, the applicant referred a dispute claiming unfair discrimination since he had applied for three posts but he was not shortlisted for any of them. Two white males were appointed to three of the advertised posts. Mr Harmse argued that he was not shortlisted because he is a black person. He challenged the decision not to shortlist him as constituting unfair discrimination on the grounds of race. He contended that such unfair discrimination is proscribed by section 6 of the Employment Equity Act 55 of 1998. Mr Harmse submitted that he was discriminated against on the bases of race, political belief, lack of relevant experience and other arbitrary grounds. Mr Harmse alleged that the City of Cape Town also unlawfully discriminated against him by failing to apply certain subsections of section 20 of the Act.

The court held that 'affirmative action' is more than a mere defence or a shield. The court held further that an employer is not allowed to discriminate unfairly against an employee. The right of an employee not to be unfairly discriminated against is for the benefit of all employees including those that do not fall within any of the designated groups. An employee may thus found a cause of action based on affirmative action. To this end affirmative action is therefore a sword; not merely a shield. Furthermore, where an employer has an employment equity plan an employee may have a legitimate expectation that the employer will act consistently with the plan. The court was satisfied that there is a right to affirmative action based on section 20(3)-(5) read with chapter II of the Act. The *Dudley* decision has, however, overturned *Harmse*.

26 (2003) 24 *ILJ* 1130 (LC).

Even where the court supported the appointment of an employee, the appointment had nevertheless to be tested for compliance with employment equity principles. The freedom of the employer to choose an employee for appointment had to be subjected to scrutiny, though it was ultimately endorsed. Such scrutiny is in itself a limitation on the employer's choice of an employee during recruitment and selection. In *SA Police Service v Zandberg & others*[27], for example, a white male police officer applied for a promotion and the selection panel recommended him as the most suitable candidate for the position. In spite of the recommendation the Divisional Commissioner appointed a black male police officer whom the panel had rated second. Mr Zandberg, the white male officer, referred an unfair labour practice dispute to the bargaining council. The matter was decided in his favour and the SAPS were ordered to pay compensation to Mr Zandberg. The *ratio* for the decision was mainly that the post had been advertised as "non-designated" and thus the choice of employee should have been dictated only by merit. The award was set aside as the court found that the Divisional Commissioner's deviation from the panel's recommendation was lawful, rational and justifiable. The demographics strongly supported the appointment of a black person. The difference in scores between Mr Zandberg and the appointed person was minor. Furthermore, the selection panel had not taken into account equity factors in their recommendation.

In *Makibinyane v Nuclear Corporation of South Africa (NECSA) and another*[28] the court examined the appointment of a white employee and found it to be fair. In *Mabikinyane*, a black male, applied unsuccessfully for appointment as the Managing Director of Pelchem (Pty) Limited. A white male candidate was appointed instead. The parties reached consensus that the court only had to decide which of the two candidates was more suitable. Mr Makibinyane contended that as a black candidate who met the minimum requirements Pelchem ought to have affirmed him. The court, however, declared that there is no right to affirmative action. The court added that it would have amounted to race discrimination to appoint Mr Makibinyane instead of the white candidate.

27 [2010] 2 *BLLR* 194 (LC).
28 [2009] *ZALC*.

Despite that the respondent had a recruitment and selection policy that affirms designated groups, the respondent employer considered Mr Makibinyane unsuitable for appointment. Mr Makibinyane's claim was thus dismissed. In *Stoman v Minister of Safety & Security & others*[29] the court confirmed the principle that the appointment of a candidate who is incapable of doing the work attached to the post cannot be justified as affirmative action.

The employer's choice of an affirmative action candidate is limited by the requirement that an affirmative action policy must be in place. In *Gordon* the SCA recognised that the application of affirmative action measures require the existence of an affirmative action policy that is rationally connected to the achievement of representativeness. A haphazard, random or overhasty policy cannot be described as measures designed to achieve equitable representation of designated groups in all occupational categories and levels in the workforce. There must be a rational connection between the affirmative action policy and the aim it seeks to achieve, that is the equitable representation of designated groups in all occupational categories and levels in the workforce.

In *Minister of Finance v Van Heerden*[30], the court declared that the requirement that affirmative action measures must be designed to protect or advance those disadvantaged by unfair discrimination involves a rational relationship test. A policy thus has to be reasonably capable of achieving protection and advancement of individuals from designated groups. This requirement will not be met if the measures are "*arbitrary, capricious or display naked preference*," or if it is clear that they are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been so disadvantaged. An affirmative action policy must promote the achievement of equality and must be fair. An employment policy or practice is not required to establish an absolute barrier to the prospective or continued employment or advancement of

29 (2002) 23 *ILJ* 1020 (T).
30 [2004] 12 BLLR 1181 (CC) 139.

people who are not from designated groups[31]. A compliant recruitment and selection policy should be in writing and must outline the employer's approach to recruitment and selection. The recruitment and selection policy must indicate the values and goals of the employer's employment equity policy; and contain a statement concerning affirmative action and the employer's intention to remedy past inequalities.[32]

The EEA provides that for purposes of taking affirmative action measures, "employee" includes an applicant for employment.[33] The EEA therefore extends the application of affirmative action measures to job applicants. The EEA accordingly regulates recruitment and selection.

The court in *Reynhardt v University of South Africa*[34], accordingly, interfered and held that the employer's choice of a coloured candidate ahead of a superior white candidate constituted unfair discrimination of the white candidate and awarded him punitive damages. Prof Reynhardt, a white male, had served in the position of Dean of Science for two years at UNISA. On expiry of the two years he applied to serve a second term. He was unsuccessful and a coloured science professor was appointed. Prof Reynhardt resigned and claimed unfair discrimination on the basis of race. The university, although admitting that Prof Reynhardt was more qualified and experienced than the coloured candidate, argued that the appointment of a black candidate was desirable for purposes of employment equity.

The court formulated the test for unfair discrimination as follows: (i) does the differentiation amount to discrimination; if so (ii) is the discrimination unfair? The employee bears the onus to prove that there was discrimination. Once the discrimination has been proved, the employer must prove that the discrimination was fair. The court acknowledged that the university's employment equity policy and

31 S 15(4) of the EEA.
32 GN 1358 of 4 August 2005.
33 S 9 of the *EEA*.
34 [2008] 4 *BLLR* 318 (LC).

guidelines were consistent with the Constitution of the Republic of South Africa and the EEA. The issue was, nevertheless, the application of those guidelines. The university's policy stated that merit would be the only selection criterion after equity targets had been attained in the departments or operational areas. As there were already more black deans than required by the university's equity formula the non-appointment of Prof Reynhardt consequently amounted to unfair discrimination on the basis of race.

The court granted Prof Reynhardt punitive damages equivalent to 12 months' remuneration on the dean's salary scale in addition to the agreement which had been concluded by the parties on the actual losses suffered Prof Reynhardt.

An employer who recruits and selects an employee may discriminate against other job applicants provided that it seeks to effect affirmative action measures in line with the EEA or if the discrimination of other job applicants is necessitated by the inherent requirements of the job. In addition the LRA provides that discrimination of an employee may be justified if that employee has reached the agreed or normal retirement age. In the present context an employer may justify the non-selection of a job applicant for appointment if that applicant is of, or above, the employer's agreed or normal retirement age. A claim of unfair discrimination on the basis of age will not lie, or will not succeed under those circumstances.

An employer is thus barred from unfairly discriminating against an employee save for instances where the three grounds listed above exist. In the context of recruitment and selection the employer may therefore not overlook a job applicant because he or she is too old or too young, for example. The decision to overlook a young or old job applicant must be justifiable by the employer's need to implement affirmative action measures, inherent requirements of the job or retirement age.

2.3 Medical and psychological testing

The EEA[35] limits the employer's freedom of choice in selecting and recruiting an employee by also prohibiting medical and psychological testing of job applicants. An employer is not allowed to subject job applicants to medical testing unless such testing:

> is permitted by legislation or if the testing is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.

HIV testing of job applicants may only be conducted if it is authorised by the Labour Court. Psychometric testing and other similar assessments of job applicants are prohibited unless the test or assessments being used:

> (a) have been scientifically shown to be valid and reliable;
> (b) can be applied fairly to employees; and
> (c) are not biased against any employee or group.

An employer is therefore barred from conducting psychometric testing of a job applicant except if it is conducted in accordance with the provisions of the EEA.

In *IMATU & Murdoch v City of Cape Town*[36]*,* the City of Cape Town had imposed a blanket ban on the employment of diabetics as fire-fighters. On that basis the City of Cape Town refused to appoint the second applicant, Mr Stuart Murdoch, to the position of fire-fighter. He was an insulin dependent diabetic with Type 1 diabetes. Mr Murdoch was employed by the City of Cape Town as a law enforcement officer in the Directorate:

35 S 7 of the *EEA*.
36 (Unreported case number C521/2003. Murphy AJ).

Protection Services. He had been in the employ of the municipality since 1 July 1997 while it was still known as the South Peninsula Municipality.

Mr Murdoch had been a volunteer reservist fire-fighter for the Fish Hoek Municipality and its legal successors since 1991 when he was still in high school. In 2002 Mr Murdoch applied for a transfer from law enforcement to fire services. Both Law Enforcement and Fire Services fall within the Directorate of Protection Services. He underwent physical testing and an assessment at a recruitment interview. He passed and was then subjected to medical testing. After being assessed as part of a large group of new applicants Mr Murdoch was found to be medically unsuitable for appointment as a fire-fighter. The medical testing consisted of taking a brief medical history and referring to a self-evaluation form filled in by Mr Murdoch. The conclusion that Mr Murdoch was unsuitable for appointment was reached after having regard to job functions of a fire-fighter, various documents, some medical literature, occupational health guidelines and discussions with colleagues, fire protection officials and medical experts. The doctor who conducted the medical testing on behalf of the company felt that a blanket ban was still justified in spite of conceding that Mr Murdoch was a well-controlled diabetic and that most of the literature espoused the idea that well controlled diabetics, individually assessed, should not be refused entry into the fire fighting occupation.

Furthermore, he accepted that Mr Murdoch was fit, well exercised and exhibited good vision. The doctor reasoned that the unpredictable emergency working conditions in the fire fighting job posed a risk to an insulin dependent diabetic. Moreover, he feared that Mr Murdoch's sudden incapacitation could prove risky to other team members because fire-fighters essentially have to work as a team. The doctor submitted that in light of the occupational requirements for the job, the appointment of Mr Murdoch as a fire-fighter would have caused an undesirable risk to Mr Murdoch himself, to fellow employees, to the general public and to the City of Cape Town on account of his medical condition as an insulin-dependent diabetic. It is significant to note that fire-fighters who were already

in the employ of the city were not medically examined for diabetes. Neither was there a written policy nor a collective agreement on the employment of diabetics as fire-fighters. Mr Murdoch's medical fitness as a reservist fire-fighter, in light of his insulin dependent diabetes, had never been assessed.

The City of Cape Town was declared to have unfairly discriminated against Mr Murdoch by failing to transfer him from his position as Law Enforcement Officer to that of Firefighter within the Directorate: Protection Services. The City of Cape Town was ordered to second Mr Murdoch to Fire and Emergency Services (or the current equivalent) in the position of Learner Firefighter. The employer's choice of an employee for recruitment and selection was therefore limited.

2.4 The provisions of the LRA

The LRA[37] provides protection to all applicants for employment in its protection of freedom of association and no employer is allowed to refuse to employ an employee because of his union membership.

When the employer has entered into a closed shop agreement with a majority union the employer cannot appoint a person that is not a member of that union unless the person is a conscientious objector.[38] A closed shop agreement is a collective agreement which requires all employees covered by the agreement to be members of the majority trade union at the workplace. An employer who is party to the closed shop agreement may only employ members of that trade union. The closed shop agreement has severe consequences. Employees who do not join, or cease to be members of the trade union

37 S 5 of the *LRA.*
38 S 26 of the *LRA*.

party may be dismissed; and such dismissal is deemed to be fair. The employer's prerogative to appoint an employee is therefore restricted by the operation of the closed shop agreement. The employer may only appoint applicants who will become members of a trade union party to the closed shop agreement.

The LRA provides that the trade union party may only refuse an employee membership or expel an employee if the refusal or expulsion complies with the trade union's constitution; and the reason for refusal or expulsion is fair. It is therefore fair to dismiss an employee who refuses to become a member of the trade union which is party to a closed shop agreement. Similarly, it is fair to dismiss an employee who has been validly refused membership of the trade union party; or who has been validly expelled from the trade union. The closed shop agreement must not demand membership of trade union party prior to commencement of employment.[39] Grogan[40] asserts that the LRA only approves post entry closed shop agreements. Such closed shops require union membership as a term of the contract of employment, not a pre-requisite for entering into it. The closed shop agreement thus has a limiting effect on the employer's freedom in recruiting and selecting an employee.

2.5 Retention of affirmative action candidates during retrenchments

It is appropriate at this point to consider whether an employer owes an employee from a designated group the duty to affirm them during retrenchment. In the normal course of events newly recruited affirmative action employees stand to be retrenched first, in line with the LIFO (last in first out) principle. This goes against the central tenet of the EEA which is to transform the South African workplace. Unless there is a legal claim for departing from the LIFO principle so as to retain employees from designated groups during retrenchment, the central tenet of the EEA will be undermined.

39 S 26(2)(c) of the *LRA*.
40 Collective Labour Law 27.

In *Thekiso v IBM South Africa (Pty) Ltd*[41] the court faced the issue whether the employer contravened the duty to implement affirmative action measures when it failed to consider affirmative action measures in order to retain a black female employee. The court had to answer the question whether the employer's disregard of specific affirmative action measures to retain the black female employee constituted substantively or procedurally unfair dismissal of the employee.

The said retrenchment was necessitated by the non-renewal of a contract between Anglo Gold and the employer. The employer thus contemplated retrenching employees as a result of the loss of that contract. The employer decided that all those employees who were identified as spending above 50% of their working time performing duties relating to work obtained from the Anglo Gold contract had to be informed of the likelihood of retrenchments. The employer also decided that a consultative process in line with section 189 of the LRA had to be conducted with those employees. The employer initiated the consultation process by means of a letter to all the employees in the Asset Management Division informing them that their positions had become redundant. They thus had to apply for a position or positions to be created; and selection criteria based on the required skills going forward would be applied. The employer accordingly called upon all the Asset Managers to apply for a newly created position based on the newly required skills as contemplated above. A selection process ensued and a white male was appointed to the new position. The applicant was consequently retrenched.

The applicant's claim was that the employer had failed to consider requirements of the EEA in identifying employees for retrenchment. The applicant contended that the employer was enjoined to have regard to the provisions of the EEA[42] when deciding whether to retrench the applicant. The said provision stipulates that an employer must

41 (2007) 28 *ILJ* 177 (LC).
42 S 15(2)(d)(ii) of the *EEA*.

implement affirmative measures which seek to retain and develop individuals from designated groups. The applicant therefore maintained that the employer was required to retain her rather than any white male as long as she was suitably qualified for the available position. The applicant contended that the EEA[43] regards a person as suitably qualified if she has the "*capacity to acquire, within a reasonable time, the ability to do the job*". Accordingly, the applicant submitted that she had the capacity, within a reasonable time, to acquire the ability to do the new Asset Management job.

The applicant argued that the employer was required to consider its obligations in the EEA[44] when it decided to dismiss the applicant and to retain the white male. The applicant submitted that the employer's obligation to consider her for retention came about as a result of the LRA.[45]

The court, however, observed that the applicant's argument regarding the meaning and effect of section 15(2)(d)(ii) of the EEA was not consistent with the decision in *Dudley v City of Cape Town*.[46] In *Dudley* the court decided that the EEA[47] does not provide an individual right to affirmative action; and that there is no right of direct access to the Labour Court to claim affirmative action. The court reasoned that the EEA is designed for, and can only serve its purpose within, a collective context. The court held that the import of *Dudley* is that the EEA does not entitle a retrenched employee to claim that the employer is breaching its affirmative action obligations if it retrenches her. The EEA does not have a mechanism for prosecuting a claim of that nature. The EEA requires an employer to prefer suitably qualified employees from a designated group for retention when making dismissal decisions. The EEA does not, however, afford a designated employee the right to claim retention at the expense of white employees who meet the

43 S 203(3) of the *EEA*.
44 S 15(2)(d)(II) of the EEA.
45 S 189 of the LRA.
46 (2004) 25 *ILJ* 305 (LC).
47 Chapter III of the *EEA*.

employer's needs better. The EEA does not, therefore, provide an employee from designated groups a claim to compel a designated employer to dismiss a needed white employee during retrenchment.

The court observed that while the EEA clearly prescribes legal obligations, those obligations are programmatic and systematic. The prescribed obligations require consultation on, and the implementation of, an employment equity plan. Those obligations do not, however, grant legal rights to preferential treatment on individuals regarding specific appointment or dismissal decisions. The court held that if an employee does not have a direct claim on the EEA she accordingly does not have an indirect claim on the LRA alleging unfair dismissal in that the employer has failed to consider its obligations under the EEA. On that basis an individual employee does not have an enforceable right under the EEA. The court pronounced that failure of the employer to consider its obligations under the EEA does not render a dismissal decision unfair.

The court observed that the Labour Court followed *Dudley* in a recent decision namely *Public Servants Association on behalf of Kariem v SA Police Service & another*[48]. The court further confirmed its decision by referring to the following remark made by Revelas, J. in *Robinson & others v Price Waterhouse Coopers*[49]:

> Affirmative action is not and never has been a legitimate ground for retrenchment.

This remark was made in the course of declining an employer's argument that the selection of a white employee for retrenchment had been fair. The court approved this

48 (2007) 28 ILJ 158 (LC).
32 [2006] 5 BLLR 504 (LC) 511.

remark in its *ratio* for concluding that the EEA does not compel an employer to retrench white rather than black employees.

Thekiso demonstrates that case law is currently rejecting the *dictum* of *Harmse* that affirmative action is an enforceable right, a sword in the hands of an employee from a designated group; and not merely a shield in the hands of an employer to defend itself when it applies affirmative action measures. *Dudley* provides the following undeniable logic: The EEA affords an employee a legal challenge against discrimination in terms of chapter II; but it does not avail employees of a legal claim in alleging breach of a chapter III obligation by an employer. An employee seeking to challenge an employer on an alleged breach of a chapter III obligation may only rely on the EEA[50] which authorises labour inspectors to seek compliance with a policy or the Act. Those labour inspectors evidently lack the power of an arbitrator or a judge to reverse the challenged appointment or retrenchment or to grant compensation. This has underscored the point that an employer's failure to consider the affirmative action obligations of retrenchment by not retaining employees from designated groups is subject to be addressed systemically and not at the instance of an individual in a court of law.

This issue has proved to be significant in foreign law as well. The US Supreme Court has taken unkindly to the application of affirmative action criteria in layoff programmes. In *Firefighters Local Union No 1784 v Stotts* 467 US 561 (1984), the court held that there was no requirement to override seniority systems so as to remedy employment discrimination against blacks. In *Wygant v Jackson* 476 US 267 (1986) the court overturned a teacher's union collective bargaining agreement which sanctioned race-based layoffs. The basis for rejection of the said provision was that it infringed the Fourteenth Amendment's equal protection clause.

Dudley and *Thekiso* currently provide the correct legal position in respect of affirmative action implications of retrenchments.

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50 Ss 34 to 37 of the *EEA*.

3 Impact of the Code of Good Practice

The Code[51] was issued in terms of the EEA[52]. The Code describes recruitment and selection as *"the process that employers use to attract applicants for a job to determine their suitability."* The Code further clarifies that recruitment and selection entails a variety of selection techniques such as short listing, scoring, interviews, assessment and reference checking.

The Code directs that recruitment and selection has to be carried out fairly and devoid of unfair discrimination. The Code seeks to review numerous areas in recruitment and selection with a view to eliminate unfair discrimination. Such areas include advertising and head hunting, the job application form, the short listing process, interviews, job offers, record keeping and reference checking.

The Code requires the recruitment process to be guided by the employer's employment equity plan as well as recommended affirmative action provisions. Employers are expected to have written policies and practices that summarise their approach to recruitment and selection. Such a written document must indicate the values and goals of the employer's employment equity policy or ethos; and include a statement relating to affirmative action and the employer's intention to redress past inequalities. An employer who makes use of a recruitment agency should make such recruitment agency aware of its employment equity policy.

The Code restricts the employer's choice of an employee by laying down the following prescriptions:

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51 *GN 1358* of 4 August 2005.
52 S 54 of the *EEA*.

3.1 Recruitment

3.1.1 Advertising positions

The freedom of an employer in recruitment of employees is restricted right from the outset when the employer designs the job advertisement. An employer is required to refer to its employment equity policy or values and indicate its position on affirmative action when advertising positions. An employer must formulate job advertisements such that they emphasise suitability for the job and accurately reflect the inherent or essential requirements of the job and competency specifications.

A job advertisement that attracts an excessive number of applicants requires an employer to select the most suitable candidate among the applicants. The manner in which the employer deals with applications in those circumstances is discussed under the section Shortlisting of Job Applicants below.

Despite the positions being advertised externally, the Code advises internal advertising of positions so as to make current employees aware of the employer's intention to recruit and select in respect of such positions. In advertising positions, an employer may state that preference will be given to members of designated groups. A statement to that effect, however, does not imply that members from non-designated groups are excluded from the recruitment process. An employer must, as far as possible, place its job advertisements so that they are accessible to under-represented groups. An employer must also inform employees who are on maternity leave about positions advertised in the workplace.

3.1.2 Job Application Forms

The freedom of an employer in recruiting an employee is also limited by the Code's guidelines on the designing of application forms. The Code advises that a job application form must be designed in such a way that it elicits from job applicants' information focusing on the requirements and that it does not lead to unfair

discrimination. The job application form must also be designed to obtain biographical information to enable an employer to monitor applications from various designated groups.

3.2 Selection

3.2.1 Shortlisting of Job Applicants

Provisions regarding shortlisting in the Code have a restrictive effect on the employer regarding the selection of employees. The Code provides that members of the short-listing panel must be appointed to reflect balance in terms of representativeness. The shortlist must include as many suitably qualified applicants from designated groups as possible. Shortlisted job applicants must, however, be suitably qualified and must meet the essential job requirements. In the shortlist an employer my include applicants from designated groups who meet most, but not all the minimum, requirements. These applicants with potential may be considered for development to meet all the job requirements within a specified period.

In *Dudley v City of Cape Town & another*[53], however, the court ruled that an employee may not claim to have been unfairly discriminated against if he has been overlooked on the basis of lack of relevant experience. The court reasoned that the prohibition of discrimination on the basis of lack of relevant experience cannot therefore found an individual claim for discrimination. Grogan[54], on the other hand, submits that the employer may not discriminate against an applicant only on the basis of his lack of experience.

3.2.2 Interviews

The employer must train the interview panel on employment equity and affirmative action; as well as matters relating to diversity, among other things. An employer should regularly review its interview questionnaires in order to avoid questions that are potentially discriminatory. The measuring system utilised for measuring applicants' responses should ensure that that the weightings allocated to matching of job requirements, numerical targets and the needs of the employer are balanced.

Grogan[55] advises that selection criteria by which job applicants are assessed may indicate an intention to discriminate if they seek to elicit information which is not immediately relevant to a candidate's abilities. Examples of such criteria are questions regarding a female candidate's intention to have children or questions relating to a candidate's disabilities, private habits or beliefs. Grogan specifically cautions employers against asking candidates questions relating to their private lives during interviews. Questions concerning, for example, an applicant's disabilities, marriage plans or a female candidate's intention to have children may provide a ground for an applicant to argue that his or her answers created a bias against him or her.

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53 [2008] 12 *BLLR* 1155 (LAC).
54 Workplace Law 112.
55 Workplace Law 111.

3.3 Record keeping

The Code advises an employer to keep copies of all documents relating to all stages of the recruitment process for a reasonable period of time after the appointment has been made. These documents will be important in case an applicant challenges the recruitment and selection process. A documentary record of the recruitment and selection process is thus required to be kept as an aggrieved applicant is entitled to challenge his non-appointment.

The record keeping provision clearly indicates that an employer does not enjoy an unrestricted freedom in recruiting and selecting an employee.

3.4 Reference checking on job applicants

The Code recommends that an employer must conduct integrity checks, such as contacting credit references and investigating whether the applicant has a criminal record, only if this information is relevant to the requirements of the job. The practical implication of this, among others, is that an employer may only exclude an applicant from recruitment and selection on the basis of a criminal conviction if the nature of the job requires that applicants must not have a criminal conviction.

To exclude an applicant from the recruitment process because he has a criminal record is therefore prohibited, unless the information about criminal convictions of an applicant is relevant to the requirements of the job. When conducting checks on previous convictions and criminal records an employer must not do so with the intention to ban people with previous convictions and criminal records from employment.

The intention of an employer must be to assess the nature of the applicant's previous conviction or criminal record in relation to the inherent requirements for the job. In 2009 the Public Service Commission issued a report, namely *Management of Job Applicants with a Criminal Record*[56] in order to guide government departments in dealing with job applicants who have a criminal record or previous conviction. In the Public Service the following factors are taken into account when determining whether a job applicant with a criminal record is suitable for appointment:

(a) Nature of transgressions/criminal acts committed;
(b) Risk posed by the transgression in relation to the requirements and nature for the job to be performed;
(c) Frequency of similar/correlating transgressions;
(d) Time that has elapsed since the job applicant was convicted;
(e) Employment history and previous performance assessments of the job applicant;
(f) Misrepresentation of criminal status or withholding of information

Selection committees in the Public Service may motivate the appointment of a person with a criminal record by stating some of the following factors:

(a) All the requirements of the advertised post were met;
(b) The criminal record does not relate to the requirements for the post, and does not impact on the nature of the job;
(c) The individual already served his/her sentence or paid a fine;
(d) The crime committed is considered to be minor; and
(e) Sufficient time has elapsed since the crime was committed for the person to have been rehabilitated.

One of the considerations regarding the assessment of employability of a job applicant who has a previous criminal conviction or a criminal record in the Public Service is whether the previous conviction or criminal record relates to the inherent job

56 RP: 20/2009.

requirements. Another consideration is whether the applicant concealed the criminal conviction when applying for the job. The fact that a job applicant has a previous conviction or a criminal record should not be a bar to his employability, unless the previous conviction or criminal record relates to the inherent job requirements; or the job applicant concealed it. Employers may thus take guidance from the Public Service in dealing with job applicants who have a previous criminal conviction or a criminal record.

4 Impact of South African case law

The limits posed by legislative measures on the employer's choice of an employee are well known and have been a subject of litigation in the courts. The courts have interfered with the freedom of the employer to choose an employee where an employer disregarded employment equity considerations. The courts made a ruling that an employee who had been overlooked due to the employer's disregard of employment equity prescripts be appointed. The courts in those circumstances limited the employer's choice of an employee, because it constituted unfair labour practice to overlook a particular employee.

The courts have also interfered with the employer's choice in the recruitment and selection of an employee where there had been *ad hoc* application of employment equity prescripts. The courts decided that employment equity prescripts had to be applied in accordance with a clear plan and policy. The employer's choice of an employee based on *ad hoc* application of employment equity prescripts is therefore limited by the requirement to follow a clear plan and policy.

The role of the Affirmative Action Policy and the EEP in recruitment and selection is to guide an employer in achieving reasonable progress towards employment equity in that

employer's workforce. The EEP states the affirmative action measures that the employer will implement. Affirmative action measures stated in the EEP must include the following:

> (*a*) Measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
> (*b*) Measures designed to further diversity in the workplace based on equal dignity and respect of all people;
> (*c*) Making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;
> (*d*) Subject to subsection (3), measures to—
>> (i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and
>> (ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

The Affirmative Action Policy and EEP thus guide an employer when making recruitment and selection decisions. An employer is consequently restricted by commitments expressed in its Affirmative Action Policy and by affirmative action measures contained in the EEP when it makes decisions regarding appointment and retention of employees.

An employer may not decide to prefer a black candidate over a white candidate in the name of affirmative action or the duty to promote employment equity if such a decision is not based on a defensible policy or plan. The Supreme Court of Appeal in *Gordon* held that *ad hoc* or indiscriminate preference of black candidates over white candidates is not protected by the right or duty to promote employment equity.

Therefore an employer may decide to prefer a black candidate if its decision is made in accordance with an affirmative action policy or employment equity plan. An employer who wishes to appoint a black candidate ahead of a white candidate may only do so if it has an affirmative action policy or EEP. The choice of the employer in those circumstances is limited by the requirement to have a policy or plan.

Furthermore, an employer may not continue preferring black candidates over white candidates if it has attained its target of black employees in terms of the employment equity plan. The Labour Court in *Reynhardt* decided that the appointment of a black candidate ahead of a superior white candidate even though equity targets had been exceeded in the particular category was unfair.

An employer contemplating the implementation of affirmative action during the recruitment and selection process must ensure that it implements affirmative action correctly and following the employment equity plan. The Labour Court in *Baxter v National Commissioner: Correctional Services & another*[57] declared that arbitrary and erroneous application of an employment equity plan is unfair.

The freedom of an employer to appoint an employee of its choice is limited when the employer has laid down minimum requirements for an advertised position. The employer's choice of an employee is to be exercised within the pool of candidates who meet the minimum requirements set by the employer. In *Manana v Department of Labour & others*[58] the court ruled that the Department had committed an unfair labour practice by appointing a candidate who did not meet the minimum requirements that were decided upon and advertised by the Department.

57 (2006) 27 ILJ 1833 (LC).
58 (2010) 19 (LC).

The principle was also illustrated in *NUTESA v Technikon Northern Transvaal*[59] where the employer had appointed a dean who did not meet the minimum requirements set by the employer in advertising the position. One of the advertised minimum requirements was that an applicant had to have been employed by the employer for at least three years in order to qualify. The appointed dean had only been employed by the employer for two months prior to appointment as Dean. The employer was found to have unfairly discriminated on an arbitrary ground against potential applicants who might otherwise have applied for the position.

The freedom of an employer in choosing an employee during the recruitment and selection process is therefore restricted by the minimum requirements that the employer sets in the job advertisement. In *casu* certain other employees were appointed into positions without those positions being advertised by the employer. The conduct of the employer was found to constitute a violation of the agreed procedures. The disputed appointments were consequently set aside and the employer was ordered to re-advertise the positions and follow the proper procedure thereafter.

In *City of Tshwane Metropolitan Council v SA Local Government Bargaining Council & Others*[60] the respondent employee had been unsuccessful in applying for the position of Manager: Bulk Services in the electricity division of the applicant municipality. He then referred an unfair labour practice dispute to the respondent bargaining council. The employee's claim was that the successful candidate did not have the required qualification of a degree in electrical engineering; while he possessed it. In addition, the employee submitted that the successful candidate did not have relevant experience as well as that members of the selection panel were unqualified to assess candidates for this particular post. The commissioner observed that affirmative action had informed the selection, despite the fact that the municipality at that moment did not have an

59 [1997] 4 *BLLR* 467 (CCMA).
34 (2011) 32 ILJ 2493 (LC).
35 (2010) 31 ILJ 742 (LC).

employment equity plan, that the appointed candidate neither had relevant experience nor the required qualification, and that the allocation of the scores by various members of the panel revealed a bias in favour of the successful candidate and against the respondent. The commissioner found that the failure to promote the respondent amounted to unfair labour practice and directed the municipality to promote him retrospectively from the date on which he should have been promoted, three odd years before the date of the award. The municipality argued that the commissioner acted *ultra vires* by ordering the appointment of the respondent to the post which had long since been filled and by replacing the decision of the interview panel with his own and that the commissioner was biased.

The court dismissed the municipality's allegation of bias as devoid of any factual foundation. The assertion that the commissioner replaced the decision of the selection panel with his own decision was based on the idea that commissioners must not tamper with administrative decisions solely because they believe they are incorrect. The court declared that unfair labour practice proceedings do not lend themselves to such an approach. The LRA[61] directs statutory arbitrators to decide on the fairness of the employer's conduct and accords them specific powers to remedy unfair labour practices. Arbitrators are directed to inquire into substantive and procedural components of fairness. Nonetheless, when deciding on the merits of promotions, arbitrators must keep in mind that such decisions ordinarily have a subjective aspect, and that they do not have the benefit of first- hand experience of interviews. The court found that the claim for unfair labour practice was valid but replaced the award with an order directing the municipality to pay the employee the difference between the salary he had earned since the date he would have been promoted, and the salary he actually earned.

An employer is hence limited by the existence of agreed procedures in his freedom to choose an employee during the recruitment and selection process.

60 (2010) 31 ILJ 742 (LC).

The courts also regard recruitment policies as mere guidelines. In *National Education Health & Allied Workers Union & another v Office of the Premier: Province of the Eastern Cape & another*[62] the court held that the government's recruitment policy was simply a guideline, and thus, need not be strictly followed. The applicant was an African employee who had applied for one of three senior manager positions in the legal support division of the Office of the Premier. The third respondent, a coloured female, was invited to apply after the closing date for applications. The interview panel ranked the second applicant third on the shortlist. The second respondent, a coloured female candidate, was ranked fourth. The panel recommended the first, second and fourth ranked candidates for appointment. The coloured female candidate was appointed so as to rectify the gender imbalance in the division. The applicant claimed unfair discrimination on the basis of sex or gender; and sought the setting aside of the second respondent's appointment and his appointment to the position.

The court declared that the case was about balancing the applicant's right to equal treatment against the first respondent's duty to apply affirmative action measures. The court also observed that measures to remedy the injustices of the past are not immune to legal scrutiny. The applicant's case, however, turned on the argument that the department acted irregularly by inviting the second respondent to apply late. It was not in dispute that the department had an employment equity plan and was accordingly justified to implement remedial measures so as to address gender discrepancies. The applicant therefore failed to prove his claim of unfair discrimination.

The court, when adjudicating on the procedural complaint, found that the government's recruitment policy was merely a guideline. Moreover the policy did not bar the department from inviting applications post the advertised deadline. The policy was therefore not required to be followed inflexibly. The applicant's contention that the government should have stopped the process and re-advertise the positions if it wished to include female candidates thus did not have merit.

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62 (2011) 32 *ILJ* 1696 (LC).

The court has declared the principle that the employer, in exercising a choice during recruitment and selection, must not deny a candidate from non-designated groups appointment if there is no suitable candidate from designated groups. In *Solidarity on behalf of Barnard v SA Police Service*[63] the applicant employee had applied for the post of Superintendent, attended the interview and was recommended for appointment by the interview panel since she had obtained the highest score. She scored 17.5% higher than the highest scoring black candidate and the interview panel submitted that her appointment would improve service delivery. The panel's recommendation was declined on the basis that the applicant's appointment would not enhance the ratio of black employees in the particular division. The post was re-advertised a year later. The applicant applied once more, was interviewed and again recommended for appointment because she obtained the highest score, surpassing the second and third rated black candidates by 7% and 11% respectively. The recommendation was again declined on the basis that it would not address representativeness and that the post was not "critical." The applicant then referred dispute to the CCMA and then to the Labour Court, claiming unfair discrimination and seeking promotion to the rank of superintendent.

The court held that the SAPS were required to apply the provisions of the EEA and of the SAPS equity plan fairly; and that due regard must be had to the affected employees' rights to equality and dignity in applying those provisions. The extent to which employment equity plans may discriminate against non-designated employees is subject to limitation. The EEA directs that its stipulations are to be applied rationally and fairly, and that the rights of affected employees have to be recognised. Therefore, if the employer cannot find a suitable candidate from the under-represented group to fill the post, a person from another group must not be refused appointment without a clear and adequate explanation. There has to be a rational connection between the provisions of an employment equity plan and the measures applied in the implementation of the plan. The application of affirmative action measures must therefore be consistent with the provisions of the EEP. The court held that the SAPS must also take into account the

60 (2010) 31 ILJ 742 (LC).

efficient operation of the public service when it implements provisions of the employment equity plan. The provisions of the EEA and an EEP must be applied in line with the principles of fairness as well as due regard to the affected individual's constitutional right to equality. The rigid application of numerical goals in the EEP is therefore inappropriate. The particular circumstances of potentially adversely affected individuals must be duly considered. The need for representativeness must therefore be weighed against the affected individual's rights to equality with a view to making a fair decision.

Therefore the law limits the extent to which the implementation of EEP's may discriminate or adversely affect individuals. To that end, at least the following relevant factors are to be taken into account. First, the EEA require rational and fair application of its provisions. Then, the affected individual's rights to equality must be duly recognised. Finally, the implementation of an employment equity plan must be accompanied by the due recognition of an affected person's right to dignity.

The court also declared that once the employee has proved discrimination, the employer bears the onus to prove that the discrimination was fair. The applicant led sufficient evidence to prove that she had been discriminated against. The respondent, on the other hand, presented insufficient evidence regarding the decision not to appoint the applicant; and thus failed to establish that the discrimination was fair or rational. In addition, the respondent did not establish that it had considered the applicant's right to equality or her work history in its decision not to appoint her.

The court furthermore declared that the SAPS was also guilty of serious procedural failures in that they failed to earnestly participate in the internal mediation and conciliation mechanisms stipulated in the employment equity plan and that they were absent from the CCMA conciliation. The court also took notice of the applicant's evidence that service delivery was adversely affected by the respondent's decision not

to appoint her. The SAPS's response thereto was merely to state that the post was not "critical". The court inferred that the post must have been deemed at least necessary since it had been advertised twice.

The SAPS EEP requires service delivery to be taken into consideration in the filling of positions. It was thus incomprehensible how the failure to fill a necessary post with any suitable candidate could be rationally defended in light of the need to consider service delivery. Considerations of efficient service delivery, albeit not conclusive, persuaded the court to conclude that there was, therefore, no rational connection between the failure to appoint the applicant and the overall objects of the EEP. The court ordered the SAPS to promote the applicant to the rank of Superintendent with effect from the date on which the National Commissioner made the decision not to appoint the applicant. The court also ordered the SAPS to pay the applicant's legal costs.

Even where the employer is recruiting and selecting on the basis that the advertised position is not targeting affirmative action applicants its employment equity obligations still require to be fulfilled. In *SA Police Service v Zandberg & others*[64] the respondent white male police officer applied for a promotional post. The selection panel recommended him for appointment. The Divisional Commissioner, however, rejected the recommendation and appointed a black male police officer, whom the selection panel had rated second. An arbitrator at the bargaining council ruled that the conduct of the SAPS constituted unfair labour practice and ordered payment of compensation to the employee.

The court observed that the arbitrator had based her decision mainly on the fact that the post had been advertised as non-designated, and that in her view the successful candidate should have been selected solely on merit. The arbitrator found, on this basis, that the selection process was both substantively and procedurally unfair.

64 (2010) 31 ILJ 1230 (LC).

Had the selection process been procedurally unfair, the appropriate remedy would have been to set the appointment aside and direct that the selection process be started afresh. Substance and procedure were, however, inseparably entangled in this case. The court found that the arbitrator had erred in assuming that the directive empowering the SAPS National Commissioner to advertise posts “designated” or “non-designated” removed the SAPS’s employment equity obligations after the advertising stage. In addition, the arbitrator had erred by assuming that the appointment of candidates on the basis of equity meant that they were less commendable.

Whereas equity is not to be achieved by appointing second-best candidates, experience and technical competence are not the sole criteria for identifying the best candidate. Therefore measures aimed at ensuring the selection of candidates who promote representativeness are also relevant since equity is guaranteed by both the Constitution and the EEA.

The court also observed that the SAPS national directive on promotion required that various criteria must be considered, including the capacity of a candidate to acquire the ability to do the job and the equity plan of the particular business unit. The various criteria must be considered cumulatively; and they apply similarly to designated and non-designated posts.

In so far as the facts were concerned the court observed that demographic considerations supported the appointment of a black officer. There was no marked difference between the scores of the respondent employee and that of the successful candidate. The selection panel had apparently not taken equity considerations into account. The Divisional Commissioner was compelled to take such considerations into account. The Divisional Commissioner’s rejection of the interview panel’s recommendation was hence lawful, rational and justifiable.

The court also observed that the commissioner's error went to the core of the dispute. The court thus had to set the award aside; otherwise a gross irregularity would be perpetuated at the expense of the SAPS. The award was accordingly set aside.

5 Anticipated impact of proposed labour legislation amendments

The free hand which an employer had in recruitment and selection of an employee under common law will soon be diminished further by impending labour legislation amendments. The Employment Equity Bill, Employment Services Bill and Labour Relations Amendment Bill pose more restrictions on the already restricted employer freedom in recruiting and selecting employees.

5.1 Employment Equity Bill

The Employment Equity Bill will diminish the employer's freedom in recruiting and selecting employees from designated groups. The Bill limits the employer's choice by confining the meaning of designated groups to South African citizens as explained hereunder.

5.1.1 Meaning of "designated group"

The Bill defines "designated group' so as to include only people who were citizens of the Republic of South Africa before democracy, or would have been citizens but were denied citizenship by discriminatory policies of the past.

The Employment Equity Bill will therefore have a limiting effect on the employer's freedom in recruiting and selecting employees from designated groups. For example, foreign black applicants will not be regarded as beneficiaries of affirmative action for purposes of employment equity. An employer who is faced with a choice between a black citizen and a black foreigner during selection will be obliged to select the black citizen. The Bill will hence dictate the employer's choice of employee, if there are black citizens and black foreigners during the recruitment and selection process.

5.1.2 Employment equity plan

The Director General will be empowered to apply to the Labour Court to impose a fine on an employer who fails to prepare or implement an employment equity plan[65]. The Bill will compel employers even more to prepare and implement employment equity plans. An employment equity plan directs an employer on who should be employed in order to attain the numerical goals stated in the plan and to comply with affirmative action measures stated therein. An EEP thus poses restrictions on the employer's choice during recruitment and selection of employees. Compelling the designing and implementation of the EEP will therefore limit the employer's choice in the recruitment and selection of employees.

5.1.3 Report

The Bill will curtail the freedom of an employer during recruitment and selection by providing for designated employers to submit reports on the implementation of their affirmative action plans annually instead of bi-annually as is the situation currently. The

65 S 6 of the Employment Equity Bill, 2010.

Director General will be empowered to apply to the Labour Court to have a fine imposed on an employer who, without a valid reason, fails to file an annual report.

5.2 Employment Services Bill

The Employment Services Bill will affect the employer's appointment decisions even more than the Employment Equity Bill. It will involve the Department of Labour in recruitment and selection, an area which has always exclusively involved job seekers and prospective employers.

5.2.1 Public employment services

The Bill establishes the provision of free Public Employment Services[66]. Public Employment Services will provide the following services free of charge to the public:[67]

(a) Match work seekers with available work opportunities;
(b) Register work seekers;
(c) Register job vacancies and other placement opportunities; and
(d) Facilitate the placement of work seekers with employers or in other placement opportunities.

The Department may also facilitate the matching of work seekers to employment opportunities by assessing work seekers to determine their suitability.[68] The conclusion

66 S 5 of the Employment Services Bill, 2010.
67 S 5(1)(a)to(d) of the *Employment Services Bill*, 2010.
68 S 5(2)(b) of the *Employment Services Bill*, 2010.

of a contract of employment between an employer and an employee will no longer be a matter facilitated by, and exclusively involving, an employer and a work seeker. The Department will be actively involved in the matching of work seekers to available work opportunities. It is therefore self-evident that an employer will not reject as he pleases, a work seeker who matches a vacancy in that employer's establishment. His choice of an employee will thus be influenced by, or exercised within, the pool of matched work seekers. The Department will also facilitate the placement of work seekers with employers. With the Department facilitating the placement of work seekers with employers the choice of an employee for appointment will no longer be the exclusive preserve of an employer. Furthermore, with the Department facilitating the matching of work seekers to employment opportunities by assessing work seekers to determine their suitability, it will be difficult for an employer to choose a work seeker who has not been assessed and approved, or to reject a work seeker who has been assessed and approved, by the Department.

5.2.2 Employment of foreign nationals

The Bill circumscribes an employer's choice of an employee even more when it considers employing a foreign national. The Bill requires an employer to take the following steps before it resorts to employing foreign nationals:

> (a) Make use of the public employment services;
> (b) submit reasons to the Director-General, within 14 days of appointment of a foreign national, as to why the employer cannot employ among the persons with relevant profiles referred to them by the Department; and
> (c) provide proof to the Director-General that they have tested the local labour market through recruitment campaigns.[69]

The Bill thus places restrictions on the employer's choice in recruiting and selecting a

69 S 9(4) of the Employment Services Bill, 2010.

foreign national. Failure by an employer to comply with the above requirements is an offence[70] and is punishable by a minimum fine of R15 000 as well as double the salary paid to an illegally employed foreign worker since appointment and/or a minimum of two years imprisonment[71].

5.2.3 Reporting on vacancies and filling of positions

The Bill provides that employers must report existing and new vacancies to the Department within 14 days of the vacancy becoming vacant or being created[72]. Employers are thus mandated to report and register existing or new vacancies with the Public Employment Services. An employer is furthermore compelled to notify the Director-General of the filling of any vacancy within 14 days[73].

Albeit not specifically stipulated, the employment of job seekers referred by the Public Employment Services is, by intimation, obligatory. An employer will have to take into consideration the job seekers that are referred by the Public Employment Services when choosing an employee during the recruitment and selection process. The Bill will hence limit the employer's freedom in choosing an employee during recruitment and selection by providing him with a list of job-seekers when he makes his choice.

5.2.4 Offences

The Bill will furthermore limit the employer's freedom in choosing an employee during

70 S 35(1)(d) of the *Employment Services Bill*, 2010.
71 Clause 4 of Schedule 3 to the *Employment Services Bill*, 2010.
72 S 10(1) of the *Employment Services Bill*, 2010.
73 S 10(3)(a) of the *Employment Services Bill*, 2010.

recruitment and selection by imposing penalties on employers who do not comply with certain requirements. The Bill, for example, provides that it is an offence to furnish false information in any prescribed document knowing it to be false[74]. An employer who is found guilty of this offence is subject to a penalty that will be determined by the court[75]. Recruitment of foreign workers without following the prescribed steps is punishable as described above. Failure to notify the Department of any new or existing vacancy[76] renders an employer liable to a minimum fine of R10 000[77].

5.3 Labour Relations Amendment Bill, 2012

The employer's prerogative to appoint an employee will be diminished further by amendments to the LRA in regard to the use of labour sourced from Temporary Employment Services (hereinafter a TES). The advent of the said amendments will result in clients not being able to make decisions in appointing employees from the TES since certain categories of workers sourced from TES will be deemed employees of the client on expiry of a six-month period. The proposed amendments to the LRA will hence further restrict the employer in exercising a choice during the recruitment and selection process. An employer will hence lose the prerogative to appoint since the amended LRA will confer employee status on workers from the TES who have been assigned to a client for more than six months. An employee who is employed for six months or more is accordingly deemed to be employed for an indefinite period, except where the work is of a limited or indefinite duration or the employer can show a justifiable reason for fixing the term of employment. The deeming provision in the Bill therefore has a pronounced impact, and a severe limitation, on the freedom of an employer in recruitment and selection of employees.

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74 S 35(1)(b) of the *Employment Services Bill*, 2010.
75 Clause 3 of Schedule 3 to the *Employment Services Bill*, 2010.
76 S 35(1)(g) of the *Employment Services Bill*, 2010.
77 Clause 5 of Schedule 3 to the *Employment Services Bill*, 2010.

In the event that an employer renews fixed term contracts in an attempt to evade the envisaged provisions, the employees' fixed term contracts will be deemed to have changed to indefinite contracts of employment.[78] What is more, an employer who employs an employee for a fixed term or who renews or extends a fixed-term contract has to do so in writing and has to give a reason for providing employment on a fixed-term basis[79]. Without exercising any choice an employer may thus be compelled to take over a worker provided by a TES as his employee just because that worker has worked for the employer for more than six months.

The TES's termination of the assignment of an employee with a client before six months so as to avoid deemed employment by the client amounts to a dismissal.[80]

Strydom[81] correctly observes that it is welcome news for employers that the Bill does not entirely ban the use of TES as they still make substantial use of labour obtained from a TES. TES and their clients will, however, be subject to increased regulation. He further submits that amendments to the LRA, however, will have profound implications for employers who use workers obtained from a TES. Strydom suggests that an employer may hence decide to employ a worker sourced from a TES in order to ensure compliance with the LRA. In agreement with Strydom, it is therefore maintained that the effect of such a decision is that the employer's freedom to choose an employee is diminished as it has to employ a person so as to comply with the law; not out of free choice.

78 S 198B(5) of the Labour Relations Amendment Bill, 2012.
79 S 198B(6) of the Labour Relations Amendment Bill, 2012.
80 S 198A(4) of the Labour Relations Amendment Bill, 2012.
81 Strydom "Comments".

5.4 Women Empowerment and Gender Equality Bill

The Women Empowerment and Gender Equality Bill (the Equality Bill) is another proposed legislation which will limit the freedom of the employer in choosing an employee for appointment. The Equality Bill was presented by the Department of Women, Children and People with Disabilities in September 2012. The purpose of the Equality Bill is to create a statutory framework for the empowerment of women and to adopt and implement gender mainstreaming. The Bill contains detailed provisions in respect of these issues. For instance, it encourages the recognition of the economic value of the role played by women in various sectors of life. The Bill also encourages the attainment of at least 50% representation and participation of women in decision-making structures in all entities.

The Equality Bill will consequently impose an additional limitation on the freedom of the employer in choosing an employee during the recruitment and selection process. The Bill will, for example, compel government departments and companies to fill a minimum of 50% of all senior and top management positions with women[82]. Therefore the employer will have limited choice in filling senior and top management positions since it will have to comply with the statutory provision to appoint women to at least half of these positions.

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In addition, government contemplates introducing stern enforcement measures to drive gender transformation compliance in the public and private sector. The envisaged enforcement measures include measures such as allowing the state to fine and/or imprison executive heads who contravene the Act.

82 S 11 of the *Women Empowerment and Gender Equality Bill*, 2012.

6 Conclusion and recommendations

An employer no longer has unfettered freedom in choosing an employee during the recruitment and selection process. The EEA and the Code limit the freedom of an employer in choosing an employee for appointment. Impending legislative amendments will soon restrict the employer's freedom of choice during the recruitment and selection process. An employer chooses an employee within the parameters set by legislation.

Regulations regarding head hunting and dealing with job applicants with previous criminal convictions or criminal records may help bring about standardisation in those areas of recruitment and selection. Alternatively, amendments to the Code may provide clearer guidance regarding the manner in which head hunting may be conducted. Such amendments may also clarify how an employer may deal with a job applicant who has a criminal conviction or a criminal record.

The Code[83] provides that advertising and head hunting should be reviewed to eliminate unfair discrimination during recruitment and selection. The Code[84] then provides guidelines on how an employer must advertise vacant positions. It does not, however, provide guidance on how head hunting must be conducted. The legal limits on an employer's freedom when choosing an employee by means of head hunting are therefore not clear.

The Code[85] provides that reference checks such as investigating whether the applicant has a criminal record must be conducted if this is relevant to the requirements of the job. It appears that the Code herewith attempts to prevent the unfair discrimination of job applicants who have a criminal record. The only justifiable investigation of whether a

83 GN 1358 of 4 August 2005.
84 GN 1358 of 4 August 2005.
85 GN 1358 of 4 August 2005.

job applicant has a criminal conviction is that information about the criminal record must be relevant to the requirements of the job. That investigation falls within the parameters of justifiable or fair discrimination under the EEA[86]. Neither the EEA nor the Code provides clear guidance to employers on how to deal with job applicants who have a criminal record. The Public Service Commission has issued a report containing guidelines to the state as employer on how to process job applications submitted by people with a criminal record. There is no similar document in the private sector. Guidance is therefore required in order to bring about standardisation of recruitment and

selection practices in respect of job applicants with a criminal record. Such guidelines will provide clarity on the extent of the legal limits imposed by law on the employer's freedom in recruitment and selection with reference to job applicants who have a criminal record.

There is a corresponding limitation in an employer's exercise of choice in the dismissal of an employee. At common law an employer could dismiss an employee for a good reason, for a bad reason or for no reason at all, provided it complied with the contractual notice requirements. This means that an employer could choose to terminate an employment contract of a particular employee as he pleased. The common law freedom of an employer in choosing an employee for appointment has been curtailed by developments in labour law. So does the freedom of an employer in choosing an employee for dismissal. The LRA requires the dismissal of an employee to be for a fair reason based on misconduct, incapacity or operational requirements and to be effected following a fair procedure.[87]

86 S 6(2)(b) of the *EEA*.
87 S 188(1)(a) and (b) of the *LRA*.

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