AFFIRMATIVE ACTION: ONLY A SHIELD? OR ALSO A SWORD?

Harmse v City of Cape Town (2003) 24 ILJ 1130 and Dudley v City of Cape Town (2004) 25 ILJ 305 (LC)

1 Introduction

The Employment Equity Act 55 of 1998 (hereinafter "the EEA") which gives more detailed content to the right of equality enshrined in section 9 of the Constitution of South Africa, compels employers to promote equality in the workplace by eradicating unfair discrimination in employment policies and practices. Unfair discrimination against any employee, whether directly or indirectly, based on that employee's race, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language or birth is prohibited (s 6(1)).

However, it is not unfair discrimination to take affirmative action measures consistent with the purpose of the EEA (s 6(2)). If an employee is therefore differentiated against due to affirmative action measures of the employer, such an employee will not succeed in an action based on unfair discrimination, provided that the employer acted within the permissible bounds of affirmative action. It has in fact been held by the South African Constitutional Court that any action in accordance with permissible affirmative action policies does in fact not amount to unfair discrimination (*Minister of Finance v Van Heerden* (2004) 25 ILJ 1593 (CC)).

Affirmative action is therefore raised by employers as a justification for apparent unfair discrimination. If the justification is successful the particular court will conclude that there was no unfair discrimination. Affirmative action in this context is used as a shield, not a sword (see Dupper and Garbers "Commentary: Affirmative Action" in Thompson and Benjamin (eds) *South African Labour Law Vol 1* (2002) 1-59).

But can affirmative action be used as a sword? Can an employee (as envisaged in the EEA) argue that he or she is a victim of discrimination because his or her employer did not apply affirmative action measures consistent with the EEA? Is such a person also the victim of unfair discrimination? Can such a person base an application on section 6 of the EEA?

This question may seem strange (see Grogan *Dismissal, Discrimination and Unfair Labour Practice* (2005) 93) and will in all probability not arise where only formal discrimination is at issue. In South Africa, however, where the ultimate goal is the achievement of substantive equality however, the issue needs consideration. Substantive equality can only be achieved if the distortions created by apartheid are removed and employers are compelled to give preference, at least for a while, to members of groups that were disadvantaged by unfair discrimination in the past. This question was addressed in two cases (*Harmse v City of Cape Town* (2003) 24 ILJ 1130 and *Dudley v City of Cape Town* (2004) 25 ILJ 305 (LC)). Both cases brought were against the City of Cape Town in the Labour Court. The purpose of this note is to analyse and evaluate the opposing judgments in these cases.

2 *Harmse v City of Cape Town*

The applicant referred a dispute with his employer, the respondent, to the Labour Court by way of a statement of claim. In his statement the applicant alleged that the decision of the respondent not to shortlist him for any one of three posts to which he had applied constituted unfair discrimination. This unfair discrimination, he said, was prohibited by section 6 of the EEA. The respondent raised an exception against the standard of claim.

The court pointed out that, when an exception is raised against a statement of claim, the court must consider whether the matter presents a question to be decided which, at that stage, will dispense of the case in whole or in part. If not, then the court must consider whether there is any embarrassment that is real and cannot be met by making amendments or providing particulars at the pre-trial conference stage.

The applicant's claim was that having regard to section 20(3)-(5) of the EEA:

- he was suitably qualified for the post for which he applied;
- the respondent failed to comply with its obligations to review all factors when determining whether or not he was suitably qualified; and
- the respondent, in contravention of section 20(5) of the EEA, unfairly discriminated against him on the ground of his lack of relevant experience.

The respondent's contention contained *inter alia* the suggestion that the applicant's claim entailed that the employer had discriminated against the applicant because it had not given effect to affirmative action measures and, as such, had discriminated against the applicant. This allegation, the respondent suggested, was untenable, because the prohibition of unfair discrimination in section 6 allows for justification of apparent unfair discrimination based on affirmative action measures. It does not allow for an applicant to allege unfair discrimination, because the respondent did not give effect to affirmative action measures.

The respondent accordingly contended that a failure by a designated employer to prepare and/or implement an employment equity plan cannot in law constitute unfair discrimination in terms of section 6(1) and (2) of the EEA.

The applicant's claim was based on both section 6 of the EEA and a right to be preferred arising from the obligation of the respondent as a designated employer to promote equality in employment as envisaged in section 20 of the EEA.

The first question that the court had to determine was whether the designated employee who had been overlooked for employment due to a lack of expertise establishes a basis for an unfair discrimination claim.

This issue arose, because the respondent had informed him that he had not been shortlisted, and the sole eligibility criterion had been past accomplishments in similar circumstances with more recent and longer standing accomplishments carrying greater weight. The promotion panel was of the opinion that the applicant's exposure at strategic level management, with policy and strategy as a portfolio, was lacking and the applicant's broad-based management of diverse functions was somewhat limited, both in terms of time and scope of complexity. It was therefore clear that a lack of relevant experience was the actual reason for his non-promotion.

Section 20 of the EEA reads as follows:

"**S20 Employment equity plan.–**

(1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.

(2) An employment equity plan prepared in terms of subsection (1) must state –

a. the objectives to be achieved for each year of the plan;

b. the affirmative action measures to be implemented as required by section 15(2);

c. where underrepresentation of people from designated groups has been identified by the analysis, the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, the timetable within which this is to be achieved, and the strategies intended to achieve those goals;

d. the timetable for each year of the plan for the achievement of goals and objectives other than numerical goals;

e. the duration of the plan, which may not be shorter than one year or longer than five years;

f. the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made towards implementing employment equity;

g. the internal procedures to resolve any dispute about the interpretation or implementation of the plan;

h. the persons in the workforce, including senior managers, responsible for monitoring and implementing the plan; and

i. any other prescribed matter.

(3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of that person's –

a. formal qualifications;

b. prior learning;

c. relevant experience; or

d. capacity to acquire, within a reasonable time, the ability to do the job.

(4) When determining whether a person is suitably qualified for a job, an employer must –

a. review all the factors listed in subsection (3); and

b. determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.

(5) In making a determination under subsection (4), an employer may not unfairly discriminate against a person solely on the grounds of that person's lack of relevant experience.

(6) An employment equity plan may contain any other measures that are consistent with the purposes of this Act."

It was the court's view that there was a link between sections 6 and 20(5), and explained that:

"section 20(3) to (5) are an integral part of steps to be taken by an employer to promote equal opportunity in the workplace by eliminating unfair discrimination. One way in which employers could unfairly discriminate is by elevating 'lack of relevant experience' to a *sine qua non* for the purpose of appointment, or indeed, promotion. This mischief has been identified and addressed by the EEA. The EEA in section 6 lists a number of grounds on which an employer (whether designated or otherwise) may not discriminate. The grounds referred to in section 6 do not constitute an exhaustive list. This is illustrated by the use of the word 'including' just before the listed (specified) grounds" (par 41).

In addition the court added:

"The history of deliberate discrimination in our country provides a harrowing and almost limitless range of discriminatory policies and practices in employment and other spheres of our society. If an employer's conduct falls within this category of unfair discrimination (solely on the grounds on lack of relevant experience), what may the employer do? The employee may refer the instance of unfair discrimination to this court (whether or not one regards it as an independent prohibition). This would be consistent with one of the purposes of the Act, namely, 'promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination'. To hold otherwise would place a restriction on the jurisdiction of this court which is warranted neither by the express language of the Act nor by its purpose" (par 42).

The court agreed with the respondent, however, that if regard is had only to section 6 of the EEA the conclusion might be drawn that affirmative action is no more than a defence to a claim of unfair discrimination. In the sense that affirmative action is a defence it serves as a shield. However, having regard to the fact that the EEA requires an employer to take measures to eliminate discrimination in the workplace it also serves as a sword (par 44).

It was the court's view that employment equity is not only about providing equal opportunities, but also to provide preferential treatment to suitably qualified persons falling within the designated groups, by designated

employers (par 38). This is apparent from the definition of section 15 of the EEA which reads as follows:

> "**Affirmative action measures** –
>
> (1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.
>
> (2) Affirmative action measures implemented by a designated employer must include –
>
> 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.
>
> (3) The measures referred to in subsection (2)(d) include preferential treatment and numerical goals, but exclude quotas.
>
> (4) Subject to section 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.

The court pointed out that section 20(3)-(5) outlines factors to be taken into account in the determination of whether a person is "suitably qualified". Section 20(3) begins with the phrase: "For the purpose of this Act". The court held accordingly that the concept applied to the whole of the EEA, and not only to chapter III. It followed, in the view of the court, that the prohibition against unfair discrimination solely on the grounds of a person's lack of relevant experience as contained in section 25 of the EEA, accordingly applied to all employers and was not limited to designated employers only. This conclusion was based on section 15 of the EEA, which obliges every employer "to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice".

It was the court's view that if an employer fails to promote the achievement of equality through following affirmative action measures then the employer has violated the right of the employee who falls within the designated groups not to be unfairly discriminated against (par 47). Similarly, if an employer discriminates against an employee in the non-designated group by preferring one employee from the designated group who is not suitably qualified as contemplated in section 20(3) to section 20(5) of the

EEA, then the employer has violated the right of such an employee not to be discriminated against unfairly (par 47).

Furthermore it was the court's view that whether or not employees have a right to affirmative action arising out of an employment plan is a different issue. A positive answer to that question does not only arise from the language of section 20(1) and section 20(2) of the EEA. It arises from the section, as well as the EEA and the Constitution (par 48). The court concluded that the Constitution, the EEA and specifically section 20(3) to (5), read with Chapter II, do indeed provide for a right to affirmative action.

The court accordingly dismissed the exception raised by the respondent. The effect of this judgment is accordingly that the failure to implement affirmative action reasons in accordance with section 15 and 20 of the EEA can lead to a claim for unfair dismissal in terms of section 6 of the EEA. Failure to adhere to affirmative action measures can therefore, according to the court, be used as a sword.

3 *Dudley v City of Cape Town*

In February 1998 the applicant, a black female, was appointed to the position of Specialist: Health Service Support on the staff of the Cape Metropolitan Council (CMC). In December 1999 she was seconded to the position Acting Head: Municipal Health Service within the CMC. Her responsibilities embraced a number of policy, planning and research matters.

In February 2001 the applicant was appointed to the post Interim Manager: Health. This was one of 16 posts which together formed the interim executive management team of the city. She was the only woman in the team, and was also one of its four black members. Her responsibilities included *inter alia* the overall management and strategic direction of the medical services of the city, as well as budget and business planning processes.

In November 2001 the position of Director: City Health was advertised. The principal function of this post was described as being "to ensure the efficient management of health services through an effective district management system"; this was, according to the statement of case, in all material respects the same as the position of Interim Manager: Health which was occupied by the applicant at that time.

After her unsuccessful application of Director: City Health, the applicant wrote to the City Manager on 24 December 2001 setting out her case that she was not only properly qualified, but also that she had demonstrated the required level of competence whilst in her previously held positions. In this letter she requested that a number of details relating to the appointment process be set out, more specifically:

"1 What were the competencies for the position?
- Which of these competencies did I lack?

2 What were the required qualifications for the position?

- In which respects do my qualifications not meet the requirements?

3 What were my scores for the psychometric assessment?

- Were my scores higher or lower than the successful candidate?

4 Was due consideration given to the provisions of the EEA in terms of this appointment?

- If yes, why were these provisions not followed?

5 Were the guidelines provided by the Human Resources Department for this appointment followed? If not, then kindly provide reasons for this.

In addition, please provide me with a copy of the recruitment policy which guided this appointment."

The City Manager replied to this letter on 8 January 2002 in which he set out the position of the city as follows:

> "It is evident that from the panel interview that you did not lack in any of the areas assessed: the scores obtained are all on a competent level. The city has targeted safety and health as critical deliverables; consequently the requirement for the behavioural competencies in the health portfolio demanded a level above competence. Drawing on the exensive research in the field of competency assessment, it is accepted that, at strategic managerial level, all applicants need professional/ technical competence, qualifications and prior experience. It is the behavioural competence component that serves as the distinguishing factor in selection at this level. Compared to the appointed candidate, your ratings were consistently lower."

The city then went on to answer the specific questions posed by the applicant:

"1 The competencies/ criteria identified, as well as assessed for this position are as outlined in the application pack.

- It is evident from the panel interview that you did not 'lack' in any of the areas assessed; the scores obtained are all on a competent level.

2 As stated in the advertisement an 'appropriate tertiary qualification' was asked for.

- Your qualification most certainly met the required standard.

3 In terms of the psychometric assessment, a one-on-one feedback session will be held with yourself.

4 It is very important to stress an organisational approach to transformation rather than looking at a post in isolation. Appointments for the entire directorate were looked at in respect of reaching the equity target and here four out of six appointments are from previously disadvantaged groups.

5 A copy of the said document is attached as per your request."

Several of the recruitment and selection policy criteria were set out in the applicant's statement of case; this policy was adopted from August 2000 and included a number of provisions relating to affirmative action and employment equity. It stated that all aspects of staffing, structuring, recruitment, selection, interviewing and appointment of employees will be non-discriminatory and will afford applicants equal opportunity to compete for vacant positions, except as provided in this policy with reference to affirmative action and employment equity. It went on to say that the City of Cape Town is an employment equity employer and, as such, preference will be given to suitably qualified persons who are members of designated groups as defined in section 1 of the EEA. The applicant contended

therefore that the City of Cape Town had failed to adhere to its affirmative action policy, where she was not promoted and that she accordingly had been discriminated against in terms of section 6 of the EEA.

It was the court's view that these were points of distinction between Chapters II and III of the EEA. The prohibition against unfair discrimination was directly enforceable by a single aggrieved individual or numbers of an affected group. Parts of Chapter V of the EEA deal with monitoring and enforcement. Section 10 governs only disputes that concern Chapter II, unfair discrimination. Any issue arising in respect of Chapter III, affirmative, action falls within the framework of Chapter V. If it had been the intention of the legislature that individuals could bring affirmative action claims directly to the Labour Court, it would have been included in the powers set out in section 50(1). The court accordingly declined to follow the ruling in *Harmse (supra)* that an applicant has an individual right to affirmative action justiciable in the Labour Court.

The structure of Chapter III on the other hand was such that it was intended to, and could be brought into operation only within a collective environment. This was inherent in the nature of the duties of an employer outlined in section 13(2) which referred to the consultation, analysis, and preparation of an employment equity plan as well as reports to the Director-General. Each of the phases is given statutory content. The provisions of Chapter III were therefore systematic and programmatic. The respondent accordingly succeeded in its exception, to the effect that failure to adhere to affirmative action measures regarding the EEA cannot lead to an unfair discrimination in claim in terms of section 6 of the EEA. The court accordingly held that the failure to give effect to affirmative action measures need to be challenged in terms of section 50. There is no individual right in this regard in terms of section 6.

4 Discussion

When the two judgments are considered, it is submitted that the arguments proposed by the court in *Dudley* are to be preferred. The collective nature of affirmative action and the absence of an individual right to claim an appointment is recognised in *Stoman v Minister of Safety and Security* (2002) 23 ILJ 1010 (T) 1035H-I:

> "The emphasis is certainly on the group or category of persons, of which the particular individual happens to be a member, or, more starkly put in the negative, of which a specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination. The aim is not to reward the fourth respondent as an individual but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS as an important component of the South African society."

This is also the position in the United States of America. In Local 28, *Sheetmetal Workers Industrial Association v EEOC* 478 US 421 the court held as follows:

> "The purpose of affirmative action is not to make identified victims [of past discrimination] whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief and the beneficiaries need not show that they were victims of discrimination."

Section 9(2) of the Constitution states the following:

> "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or catagories of persons, disadvantaged by unfair discrimination may be taken."

The objective of this section is to promote substantive equality, which is equality of outcome. There are two other approaches to equality as well. These three notions of equality are aptly explained by Dupper and Garbers in "Affirmative Action" in Dupper and Garbers *Essential Employment Discrimination Law* (2004) 281, are formal equality (equality in treatment).) This means that discrimination exists where differentiation occurs for a discriminatory reason. It does not recognise the redress of past disadvantage. The "equal opportunity" approach recognises the danger of structural discrimination and the need to raise interim remedial measures. Dupper and Garbers (281) point out, however, that "this is only allowed to operate to equalize starting points of, for example, applicants for employment. In terms of this view, equality in outcome remains unacceptable, unless it is the natural result of equal employment".

True substantive equality (equality of outcome) envisages a duty on the state to redress past disadvantage, "is expressly asymmetrical (in favour of disadvantaged groups), expressly approves a group-based approach (and not individualism) in redressing past disadvantage and has, as its primary purpose, the elimination of such disadvantage" (Dupper and Garbers 281).

Section 9(2) of the Constitution also provides that "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or catagories of persons, disadvantaged by unfair discrimination, may be taken". When *Harmse* is considered it appears that the court recognised affirmative action as part of the right to equality. In the Constitutional Court case of *Minister of Finance v Van Heerden* ((2004) 25 ILJ 1593 (CC)), the court held that if restitutory measures, even based on any of the grounds of discrimination listed in section 9(2) existed, they could not be presumed to be discriminatory, and to hold otherwise would mean that the scheme of section 9 was internally inconsistent or that the provisions of section 9(2) were a mere interpretative aid, or even surplus usage. Although this case negates the notion that affirmative action measures can only justify presumed unfair discrimination it does not follow that the provision makes affirmative action part and parcel of the right to equality (see too, Dupper and Garbers 281).

Equality is a value and affirmative action a measure. They are not the same, and "affirmative action is a means to an end and not an end in itself" (*George v Liberty Life Association of Africa Ltd* (1996) 17 ILJ 571 (IC) 592F).

It is submitted that *Van Heerden* did not affect the arguments advanced by the court in *Dudley*, and does not lend greater support for the views expressed by the court in *Harmse*.

The Constitution allows for a duty to implement affirmative action measures, but does not impose it itself. It falls on the EEA to impose the measures on designated employers. The measures contained in Chapter III of the EEA are collective and programmatic in nature. The EEA provides specific enforcement mechanisms for these measures. These mechanisms include self-regulation, administrative procedures under the auspices of the Department of Labour (ss 35-45 of the EEA) and ensuring compliance through the Labour Court (s 50 of the EEA).

It does not include the referral to the Commission for Conciliation Mediation and Arbitration for conciliation and to the Labour Court for adjudication as envisaged in section 10 of the EEA.

In *Cupido v Glaxosmithkline SA (Pty) Ltd* ((2005) 26 ILJ 868 (LC)) the Labour Court confirmed the view held in *Dudley* and held that the EEA does not provide for a right to affirmative action. Murphy AJ relied on the reasoning in *Dudley* and held that when affirmative action measures had not been applied by a designated employer this established the right to an enforcement dispute under Chapter III by the Director-General of the Department of Labour and not to an unfair discrimination claim under Chapter II (875). This judgment caused McGregor to point out that "[a]ffirmative action is not a right but a means achieve the equality end as set out by the EEA" ("No Right to Affirmative Action" 2006 14(1) *Juta's Business Law* 16 19).

An employee may of course allege that he or she was discriminated against on a listed or unlisted ground (in s 6 of the EEA). The applicant in *Harmse* could have alleged that the ground was (lack of) experience. This will not amount to direct discrimination, because the dignity of the applicant is not affected.

The employee may, however, attempt to establish indirect discrimination. In South Africa, it is submitted, the ground of indirect discrimination will be race (or perhaps sex). In our view evidence will show that black persons (and possibly women) are discriminated against if the ground of differentiation of experience is used, since it will have a disproportionate impact on black (and female) employees who, in the past, did not enjoy the same opportunities to gain experience as their white male counterparts.

In order to escape the Labour Court finding that the applicant was unfairly discriminated against in such an instance, the employer will have to show that the inherent requirements of the job demanded the criterion of the required experience.

5 Conclusion

The jurisprudence of the Labour Court is steadily developing to give content to the ambit of the EEA and to interpret the provisions of that Act.

It is inevitable that conflicting interpretations will emerge from the court. *Harmse* and *Dudley* are examples of such divergent interpretations. Both judgments are considered and grappled with. The obligation lies on employers to adopt affirmative action measures in accordance with the EEA, and the consequences of non-compliance.

The issue in dispute is whether a failure to comply with the EEA in this regard gives rise to an individual claim of unfair discrimination.

In *Harmse* the Labour Court concluded that such a right does exist, but the contrary was held in *Dudley*.

In this note reasons are advanced as to why the *Dudley* judgment is the judgment that should be followed. In essence it is clear that affirmative action measures are imposed in Chapter III of the EEA, that the provisions are programmatic and collective in nature, and that section 50 provides for enforcement mechanisms. There is no provision that suggests that sections 6 and 10 can be used to enforce the Chapter III rights. It follows therefore that there is no individual right to affirmative action.

However, should the reason for differentiation be a lack of experience, the employee may allege indirect discrimination based on race (and possibly sex), and in such a case the employer will have to justify discrimination based on the inherent requirements of the job.

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