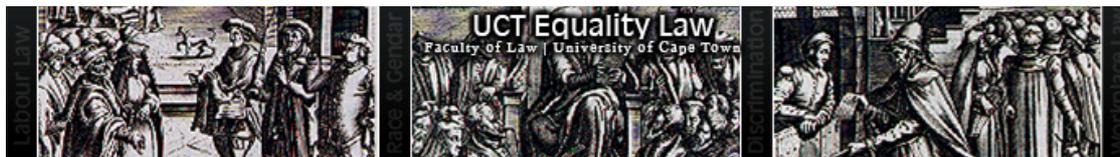




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UNISA v REYNHARDT

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YEAR: 2010PLAINTIFF / APPLICANT / APPELLANT: UNISADEFENDANT / RESPONDENT: REYNHARDTCOURT: LABOUR APPEAL COURTCITATION: (2010) 31 ILJ 2368 (LC); (2010) 12 BLLR 1272 (LAC)POST / PRIOR ACTION: REYNHARDT v UNIVERSITY OF SOUTH AFRICA (JS 1061/02) ZALC 96; (2008) 4 BLLR 318 (LC), available at <http://www.saflii.org.za/za/cases/ZALC/2007/96.html>JUDGE(S): DAVIS JAGROUND(S) OF DISCRIMINATION: AFFIRMATIVE ACTION, RACESTATEMENT OF FACTS:

The respondent, a white male, was the Dean of the Faculty of Science at UNISA, the appellant. On expiry of his term as Dean, nominations were received for the successor in title. The respondent and another professor, a coloured male, were nominated. The respondent was the favoured candidate. Despite a recommendation to appoint the respondent by the selection committee, the other nominated professor was appointed. The respondent claimed, in the Labour Court, that the appellant's failure to appoint him amounted to unfair discrimination on the grounds of race, as he was the most suitable candidate for the position. The appellant argued that the appointment of the other professor complied with its employment equity plan.

The Labour Court held that there was no justification for the appellant's appointment of the other professor. The Labour Court determined that at the time of the appointment of the other professor the appellant's target ratio (70% to 30% blacks:whites), as provided in its employment equity plan, had been attained (75% to 25% blacks:whites). The appointment of the other professor resulted in the target ratio being further increased (80% to 20% blacks:whites). As the equity targets of the appellant were not lacking, there was no justification for the appointment of the other professor. Therefore the failure to appoint the respondent amounted to unfair discrimination based on race.

The appellant appealed the decision of the Labour Court.

ISSUE OF LAW: Whether the failure to appoint the respondent amounted to unfair discrimination on the grounds of race.DECISION, RATIO AND OUTCOME (including minority judgment where applicable):

The Labour Appeal Court dismissed the appeal.

It stated that the key test in an unfair discrimination case was determined in the case of *Harkson v Lane*. *Harkson* employed a series of questions, the essence of the questions being:

1. Does the differentiation amount to discrimination? If so is it on a specified ground?
2. If the differentiation amounts to discrimination; does it amount to unfair discrimination?

On the facts the respondent had proved discrimination based on race. The onus rested on the appellant to prove, on a balance of probabilities, that the discrimination was fair.

The court examined the relationship between the general Constitutional principle of equity and the 'recognition of the need for remedial measures, perhaps inappropriately referred to as affirmative action.' Referring to applicable jurisprudence dealing with such relationship it stated that 'equality is the foundational principal but remedial measures are needed for its achievement.'

With reference to relevant jurisprudence, and having determined that race discrimination had occurred, the court cited a three fold inquiry in determining whether a measure falls within s 9 (2) of the Constitution:

1. Does the measure target personal categories of persons who have been disadvantaged by unfair discrimination?
2. Is the measure designed to protect or advance such persons or categories of persons?
3. Does the measure promote the achievement of equality?

The court focused on part 3 of the above mentioned inquiry. It held that while the appellant's employment equity plan survived Constitutional scrutiny in implementing targets to address representivity, it expressly provided for when the application of such measures were restricted, namely that once the employment equity targets were achieved, the appointment of a candidate was based on merit (no preferential treatment applied). The court held that the restriction complied with the achievement of the Constitutional idea of equality. On the facts the restriction was triggered in light of the appellant attaining its representivity targets prior to the appointment of the other professor. Coupled with the facts reflecting that the respondent was the most suitable candidate for the contested position, the court held that the appellant had incorrectly applied its employment equity plan, and as such the appeal was dismissed.

LINK TO FULL DECISION: <http://www.saflii.org.za/za/cases/ZALAC/2010/9.html>

LABELS: