

**COMMON LAW**

**PROMOTION AND APPOINTMENT**

**PREROGATIVE OF EMPLOYER**

**THE LABOUR RELATIONS ACT  
NO. 66 OF 1995 (THE LRA)**

**THE EMPLOYMENT EQUITY ACT  
NO. 55 OF 1998 (THE EEA)**

# **LRA : UNFAIR LABOUR PRACTICE**

## **SECTION 186(2)**

- (2) “Unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving –**
- (a) Unfair conduct by the employer relating to the promotion, ... of an employee ...**

## **UNFAIR LABOUR PRACTICE**

- **Arbitration**
- **CCMA**
- **Numerous judgments**
- **Cullin / Distel (Pty) Ltd (2001)(8) BALR 834 (CCMA)**

### **Commissioner's job:**

- **Ensure employers do not act unfairly towards candidates**
- **The fairness of the process**

## **EEA : PROHIBITION OF UNFAIR DISCRIMINATION SECTION 6(1)**

**No person may unfairly discriminate, directly or indirectly, against any 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.**

# EXCEPTIONS

- **Affirmative action measures consistent with the purpose of the Act**
- **Inherent requirements of the job**

# **EEA PSYCHOLOGICAL TESTING AND OTHER SIMILAR ASSESSMENTS**

**Section 8 – “Psychological testing and other similar assessment of an employee are prohibited unless the test or assessment being used –**

- (a) Has been scientifically shown to be valid and reliable;**
- (b) Can be applied fairly to all employees; and**
- (c) Is not biased against any employee or group.**

**EEA  
SECTION 10**

**DISPUTES CONCERNING THIS CHAPTER**

**LABOUR COURT**

# **PSYCHOMETRIC TESTING AND OTHER SIMILAR ASSESSMENTS**

**Prohibited unless:**

- **Shown to be scientifically valid and reliable**
- **Can be fairly applied to all employees**
- **Not biased against any employee or group**
- **In principle permissible provided they are scientifically proven**
- **Not tests of knowledge of a particular area or field**

## **SA CASE LAW**

- **X and SA Breweries Ltd (2006)27ILJ435(ARB)**
- **Promotion**
- **Psychometric test used**
- **X failed the test “not recommended”**
- **Did not dispute the validity, reliability or fairness of the psychometric tests**
- **Reasons for the inclusion of the psychometric testing in the criteria appear to be both rational and based on the valid operational requirements of the job (Cont)**

- **Employer competed globally**
  - **World class**
  - **Capability of people to improve**
  - **Correct people had to be appointed so they could move up**
  - **This team leader position critical for succession**
  - **Company had acted fairly and honestly**
  - **Decision to exclude him on the basis of poor psychometric test results in keeping with company's policies and strategic requirements**
- (cont)**

- **X did not attack the test itself X was Afrikaans speaking**
- **The test was applied in English**
- **If this was investigated the outcome might have been different**
- **He followed the CCMA process section 186(2)(a) which checks for *bona fides* a rational reason for using a test etc. Not the Labour Court process section 8 of the EEA**

# **HENDRICKS v SA AIRWAYS**

## **2002(JOL)10382 (LC)**

- **Dealt with the restructuring of posts and appointment to the new posts by SAA**
- **Section 189(7) of the LRA – selection criteria – fair and objective**
- **Selection criteria: competence or suitability**
- **Criteria used**
  - **Curriculum Vitae**
  - **The Thomas profile**
  - **Past performance**
- **Used the well-known Thomas tests**

**Cont**

- **The test itself was not investigated or challenged (ie not Sec 8 EEA)**
- **However the application of the tests was found to be wrong**
- **No opportunity to make representations regarding the results of the psychometric testing utilised**
- **The test was the only criterion instead of being only a 25% factor**
- **Unfair dismissal 12 month's salary awarded**

# USA

- **Fundamental differences in legislation**
- **But important lessons**

## **SECTION 703(h) OF THE CIVIL RIGHTS ACT**

**... nor shall it be an unlawful employment practice for an employer to give and act upon the results of any professionally developed ability test provided that such test, its use or action upon the results is not designed, intended or used to discriminate because of race, colour, religion, sex, or national origin.**

- **Statistical evidence**
- **A particular class or group is under represented or adversely affected by the selection procedures**
- **Assessing statistical evidence complex and highly technical**
- **Courts are left to define the degree of disparate impact**
- **Lack of clear legislative guidelines**
- **Some courts four-fifths of the rate or group with highest rate**
- **Objective standard for measurement**

**Cont**

- **Composition of base group**
- **EEA no guidelines**
- **Section 11 of the EEA rebuttable presumption of unfair discrimination**
- **More flexible approach in South Africa like Britain and Australia**
- **Judicial notice of social facts**
- **General knowledge and experience**

## **VALIDATING THE JOB RELATEDNESS OF TESTS**

- **Standards of test validation**
- **American Psychological Association**
- **“Predictive of or significantly correlated with important elements of work behaviour which are relevant to the job or jobs for which candidates are being evaluated”**
- ***Albemarle Paper Co v Moodie 422 US 405(1975) at 433***

# CONTENT VALIDITY

- **Sample of the work to be performed**

# **CONSTRUCT VALIDITY**

**Measures a necessary skill for the job**

## **CRITERION-RELATED VALIDITY**

- **Predictive validation method compared after some time**
- **“Concurrent validation”**
- **Represented a sample**
- **Current employees**
- **Testing**
- **Comparison**

**Cont**

- **Validity**
- **Supervisor's analysis must be objective**
- **Representative sample must be representative of the workforce ie sex and race composition**