IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN CASE NO **C37/97**

In the matter between:

MICHAEL LOUW Applicant

and

GOLDEN ARROW BUS SERVICES (PTY) LTD Respondent

JUDGMENT

LANDMAN J :

Introduction

1. Initially Mr Louw and Mr Fredericks, both coloured males, or, as Mr Louw may

prefer, black males in the broad sense of the term, jointly launched an application complaining that Golden Arrow Bus Services (Pty) Ltd (Golden Arrow), their employer, had committed an unfair labour practice by discriminating against them on the grounds of their race.

2. A point *in limine* was taken by Golden Arrow that the dispute arose before the commencement of the Labour Relations Act 66 of 1995 (the LRA of 1995) and that consequently this court did not have jurisdiction to entertain the matter. A statement of agreed facts, for the purpose of the point *in limine,* was placed before Basson J. Basson J held that this court has the necessary jurisdiction to entertain a dispute concerning an unfair labour practice still "being perpetrated". The ruling was based on the allegation that Mr Beneke, a white warehouse supervisor receives a higher pay than the two applicants on the basis of racial characteristics and contrary to the doctrine of equal pay for work of equal value. See **Louw and another v Golden Arrow Bus Services (Pty) Ltd** (1998) 19 ILJ 1173 (LC).

3. Thereafter, Mr Fredericks dropped out of the picture. The statement of claim was amended as was the statement of defence. The matter proceeded to trial before me. Mr M H Cheadle, assisted by Mr A J Steenkamp, appeared for the applicant. Mr A J Freund, instructed by Mr P Farber, appeared for the respondent.

The issues

4. The applicant alleges, in his pleadings, that Golden Arrow has committed an unfair labour practice in terms of item 2(1)(a) of the 7th Schedule to the Labour Relations Act 66 of 1995 (the LRA of 1995) because -

(a) At all material times the work performed by the applicant and Mr Beneke was and is of equal value; alternatively

(b) The difference in salaries is disproportionate to the difference in the value of the two jobs.

5. The applicant defines the legal issues as the following:

1. The difference in salaries constitutes direct discrimination against the applicant on the grounds of race, colour or ethnic origin because there is no justification for the difference.

Alternatively

2. The difference in salaries constitutes indirect discrimination against the applicant on the grounds of race, colour or ethnic origin because the respondent applied facts in its pay evaluation that had a disparate impact on black employees. These factors were performance, potential, responsibility, experience, education, attitude, skills, entry level and market forces.

3. By virtue of s 9(5) of the Constitution read with item 2 of Schedule 7 of the LRA of 1995, the discrimination against the applicant is unfair.

Alternatively

The discrimination against the applicant is unfair.

6. He seeks compensation in the amount of the difference between the total salary packages paid to the him and Mr Beneke for the period 11 November 1996 (the date on which the LRA of 1995 came into operation) to date of judgment and interest. He also seeks an order compelling his employer to pay the difference in salaries until the job of buyer and warehouse supervisor have been evaluated by an independent job evaluator and the salaries for the jobs have been determined.

7. Golden Arrow agrees that there is a wage differential between the salary paid

to Mr Louw and that paid to Mr Beneke but avers that the jobs of the two men are not of equal value and that the differential is attributable to a number of considerations, none of which involve racial discrimination. In this judgment the terms pay, wage, salary and remuneration are used as synonyms.

The law

A residual unfair labour practice

8. Item 2(1)(a) sets out the requirements of a residual unfair labour practice. An unfair labour practice is any-

· unfair act or omission;

- that arises between an employee and an employer;
- involving unfair "discrimination";
- which is unfair;
- either directly or indirectly;
- against an employee;
- on any arbitrary ground;
- including, but not limited to race, gender, sex, ethnic or social

origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

9. It is necessary to comment on some of the elements constituting a residual unfair labour practice. I also intend to say something about Mr Freund's submission on

culpability which does not feature in the wording of item 2(1)(a).

10. The item refers to an act or omission. The applicant alleges an omission. Mr Cheadle expressed it this way when I sought clarity on the applicant's cause of action:

"Our case will be that [Golden Arrow] inherited racial discrimination in the past and that they have done nothing about it to date. Their responsibility starts and their failure and their unfair labour practice and their unfair discrimination may well be no more than not correcting an historical, inherited racial discrimination situation."

11. The unfair omission must be one "involving" unfair discrimination. The word "involve" is not one with a particularly precise meaning. The **Shorter Oxford Dictionary** (leaving out portions and symbols) gives the following meanings:

involve 1. Wrap, surround, enfold, envelop.

2. Make obscure or difficult to understand; complicate, entangle.

3. Bring (a person) into a matter; embroil (a person) *in* trouble, difficulties, perplexity, etc. **b** Commit emotionally; concern closely *with* another, *in* a matter.

4. Wind spirally; wreathe, coil. **b** Join as by winding together; intertwine *with.*

5. Include covertly *in* or *under* something; wrap up. **b** Include, contain, comprehend. **c** Contain implicitly; include as essential; imply, call for, entail. **d** Affect, concern directly.

6. Absorb completely; envelop, overwhelm. **b** Engross; occupy (a person) fully.

7. Implicate in a charge or crime; cause or prove (a person) to be concerned.

8. *Math*. Raise (a quantity) to a power. Now *rare* or *obs*.

9. "Involving" is not the same as having the effect of discrimination as was used in the definition of an unfair labour practice in the repealed Labour Relations Act 28 of 1956 (the LRA of 1956). The former definition of an unfair labour practice, as it stood at the date of the demise of the LRA of 1956, did not expressly require intention or negligence. It would seem that it has conventionally treated by the Industrial Court, the Labour Appeal Court and the Appellate Division, now termed the Supreme Court of Appeal, as a concept that does not require culpability.

10. It has been held that it is not necessary to show any intention to discriminate for discrimination to be established. Intention or motive of the employer may however be relevant to the remedy which the court may impose. See **Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others** (1998) 19 ILJ 285 (LC) at 289 G - H and 293 A. See also: **R v Birmingham City Council, ex parte EOC** [1989] IRLR 173 (HL) and **James v Eastleigh Borough Council** [1990] 1 IRLR 288 (HL).

Intention or motive

11. Mr Freund sought to persuade me that intention or motive was an integral part of a residual unfair labour practice. He urged me to follow the strands of discrimination law applied in the United States. In **Watson v Fort Worth Bank and Trust** 487 US 977 (1988) Justice O'Connor stated at 839:

"Several of our decisions have dealt with the evidentiary standards that apply when an individual alleges that an employer has treated that particular person less favourably than others because of the plaintiff's race, color, religion, sex, or natural origin. In such `disparate treatment' cases, which involve `the most easily understood type of discrimination,' **Teamsters v United States**, 431 US 324, 335, n15, 52 L Ed 2d 396, 97 S Ct 1843 (1977), the plaintiff is required to prove that the defendant had a discriminatory intent or motive."

12. See also the "Developments in the Law- Employment discrimination" 1996 **Harvard Law Review** (May 1996, Vol 109 No 7) where it is stated (at 1580):

"There are two main types of discrimination cases: disparate treatment and disparate impact. Disparate treatment cases concern employment practices or incidents that intentionally subject people to impermissible discrimination. Disparate impact cases involve neutral employment policies, such as competency tests, that have the unintended effect of discriminating against individuals who belong to a protected class."

13. Mr Freund submitted that the applicant must prove that Golden Arrow had the motive or intention to discriminate.

14. The matter before me concerns an alleged residual unfair labour practice. The concept of an unfair labour practice was received into our labour law on 1 October 1979 and has undergone several mutations (not all of them happy ones) until the repeal of the LRA of 1956 with effect from 11 November 1996. The LRA of 1995 retained the essentials of the concept of an unfair labour practice, termed a residual

unfair labour practice, in item 2(1)(a). Du Toit *et al* **The Labour Relations Act 28 of 1995** 2nd ed 430 - 431 comment that:

"Discrimination on the basis of sex, race or colour was outlawed in 1981 by amendments to the previous Act and the Wage Act. Over the same period, discrimination on these and other grounds became vulnerable to attack under the unfair labour practice jurisdiction of the Industrial Court.

Discrimination on the grounds of age and gender was found to be unfair under certain circumstances. It was also held that unequal pay for work of equal value is unfair. The new Act sets out to incorporate these principles into a comprehensive framework which, while specifically prohibiting certain prevalent forms of employment discrimination, can be used to strike down unfair discrimination."

15. It does not seem that the LRA of 1995 intended to change the basic fabric of the concept of an unfair labour practice, although it trimmed its ambit to the bare essentials pending the enactment of more comprehensive legislation. This has materialised as the Employment Equity Act 58 of 1998. The Employment Equity Act of 1998 provides in Schedule 3 that pending disputes should be determined in terms of the repealed Act.

16. I could trace no case which required an applicant to prove culpa (intent or negligence) on the part of an employer or employee. This is probably because the

definition of an unfair labour practice was an effect based one. See the observations in **Media Workers Association of South Africa and others v The Press Corporation of SA Ltd** (1992) 13 ILJ 1391 (A) at 1399 H - I. See also A Rycroft **"Preventing and Proving Work-Place Discrimination"** 1991 (Vol 12) ILJ 722 at 729 who says :

"The ambiguity in the concept of 'intent' suggests that South African law should likewise decline to rely on intent but should look at the impact of the alleged discrimination."

17. The definition of an unfair labour practice and its successor, the residual unfair labour practice, is not based on delict which would require culpa. Nor is the concept deemed to be a term or an implied term of the contract of employment. There is some analogy between an unfair labour practice and a breach of contract in so far as a breach of contract is largely viewed as an event which need not be accompanied by fault. This is so even as regards repudiation of contract. See **Van Rooyen v Minister van Openbare Werke** 1979 (2) SA 835 (A) at 845. See also the discussion in A J Kerr **Principles of the Law of Contract** 4th ed 427 - 433.

18. The answer to the question of culpa lies in the interpretation of the statute. The statute creates, in my view, a form of strict liability. An applicant need not prove culpa although the act in question may, in the ordinary course of events, be accompanied by intention, negligence and motive. Cf the discussion on strict

liability for criminal offences in **Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council** 1994 (3) SA 170 (A) at 175. As far as strict civil liability is concerned see **Telkom (SA) Ltd v Duncan** 1995 (3) SA 941 (W). It follows, in my opinion, that a defence of lack of intent or motive will receive short shrift.

19. In order to discover whether there has been an unfair labour practice involving unfair discrimination the elements of item 2(1)(a) must be proved. The logic of proving or demonstrating unfair discrimination may be drawn from the approach of the Constitutional Court in **Harksen v Lane NO** 1998 (1) SA 300 (CC) at 325 A - D. The court must first ask itself:

(a) Does the act or omission constitute differentiation between people or categories of people?

(b) If the answer is positive, the court embarks on a two stage analysis:-

"(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then the discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation."

20. The concept of the unfair labour practice also caters for indirect discrimination. This form of discrimination is often disguised and difficult to detect. This court has made some preliminary observations on indirect discrimination in **Kadiaka v Amalgamated Beverage Industries** (1999) 20 ILJ 373 (LC). A useful survey of the concept of indirect discrimination in the law of the United States (there termed "disparate impact") and countries in Europe is to be found in Titia Loenen "The Equality Clause in the South African Constitution: Some remarks from a Comparative Perspective" 1997 **South African Journal of Human Rights** 401 at 419-429.

21. Mr Cheadle did not seek to rely on indirect discrimination in his closing argument. Of course he did not abandon the point. Nevertheless, without the benefit of argument, I do not intend deciding this issue.

Equal pay for equal work or work of equal value

22. Fairness requires that persons doing equal work should receive equal pay. See **National Union of Mineworkers v Henry Gould** (1988) 9 ILJ 1149 (IC) and **SA Chemical Workers Union v Sentrachem** (1988) 9 ILJ 410 (IC). This principle which asserts equality has been distorted in the past in this country. See M A du Toit **South African Trade Unions**, 1976 at 133:

"The principle or slogan of equal pay for equal work has long been heard in South Africa. It is often quoted as a better and more reasonable measure of protection for Whites than statutory job reservation.

This principle can be applicable to many things but applies particularly in respect of race and sex. Thus it is argued that remuneration should be according to responsibility, in which case economic factors as regards race and sex are equal. In South Africa, however, the emphasis is on the racial aspect and the talk is often of equal pay for equal work, irrespective of race or colour.

This is not an unfamiliar principle. Basically, it is applied in South African legislation by way of determination in respect of wages, in that there may be no discrimination on the grounds of race or colour. In fact, it is usually coupled with the standard of living, and though certain minimum standards are laid down, Whites generally receive higher wages than non-Whites. This is considered wrong in principle because the wages actually received should be the same. According to the argument of equal pay for equal work, the White will be protected automatically, because no employer will employ Blacks at the

same wage when Whites are available."

23. The principle "equal work should receive equal pay" in its true form may be extended to an analogous situation namely that work of equal value should receive equal pay. These premises have not been enshrined as principles of law in the unfair labour practice definition. They are principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed, eg the payment of unequal pay for equal work or work of equal value in the context of unfair discrimination. In other words it is not an unfair labour practice to pay different wages for equal work or for work of equal value. It is however an unfair labour practice to pay different wages for equal work or work of equal value if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds or the listed grounds eg race or ethnic origin. A van Niekerk "Equality Rights and the new Act" in M H Cheadle *et al* **1995 Current Labour Law** 76 at 88 categorises these principles of equity as tests which potentially might be applied to determine whether discrimination exists.

24. This view finds resonance in the comments proffered by Sarah Christie and others who say, in the context of gender discrimination, in "Submissions on the promotion of equal opportunities draft bill" in M H Cheadle *et al* **1993 Current Labour Law** 123 at 134:

"We recommend that the provision relating to pay equity form part of the general prohibition on discrimination, rather than exist as a separate clause, for the following reasons:

(i) there is no logical or conceptual reason why the clause requiring equal remuneration for work of equal value should exist separately from the general prohibition on discrimination. The failure to pay equal remuneration for work of equal value is merely one instance of the broader evil of discrimination...."

25. It follows, in our law, that an employer may therefore discriminate, even unfairly, on any grounds or for any reasons which are not proscribed by item 2(1)(a).

Causation

26. It is necessary to distinguish clearly between discrimination on permissible grounds and impermissible grounds. An unfair labour practice is only committed (even by omission) if the impermissible grounds are the cause of the discrimination. Discrimination on a particular "ground" means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people of, for example, different races is

not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less than Mr Beneke's salary because of his race. Cf **Association of Professional Teachers & another v Minister of Education and others** (1995) 16 ILJ 1048 (IC) at 1051: " In simple terms sex discrimination may be described as the less favourable or differential treatment of a woman solely on the basis of her sex." at 1081; **Prinsloo v Van der Linde & another** 1997 (3) SA 1012 at 1026 D-F; **TGWU v Bayete Security Holdings** [1999] 4 BLLR 401 (LC) at 402; **Harksen v Lane NO & others** (*supra*) at 321- 323.

27. The English courts rely, *inter alia,* on the standard causation test, described shortly as the "but for test". In **James v Easteigh Borough Council** [1990] 228 Lord Goff held at 294 that

"... cases of direct discrimination under s.1(1)(a) can be considered by asking the simple question: would the complainant have received the same treatment from the defendant but for his or her sex? This simple test possesses the double virtue that, on the one hand, it embraces both the case where the treatment derives from the application of a gender-based criterion, and the case where it derives from the selection of the complainant because of his or her sex; and on the other hand it avoids, in most cases at least, complicated questions related to concepts such as intention, motive, reason or purpose,

and the danger of confusion arising from the misuse of those elusive terms."

28. But as Bourne and Whitmore **Race and Sex Discrimination** 2nd ed par 2.06 point out: "A simple juxtaposition of a woman and man who have received different treatment or two persons of different racial groups who have been treated differently, is insufficient." See **Bullock v Alice Ottley School** [1991] IRLR 324 (EAT).

29. This raises the question whether impermissible unfair discrimination, in our law, must be the sole cause of the discrimination nor whether it is enough that it be a cause. At least three possibilities present themselves.

30. The first is to say that any contamination by impermissible unfair discrimination is sufficient to find that the act or omission complained of is caused or attributable to it. This approach concentrates on the consequences of discrimination. See J Kentridge "Measure for measure: Weighing up the costs of a feminist standard of equality at work" 1994 **Acta Juridica** 84 at 105.

31. The second approach is to say that an immaterial contamination is tantamount to no contamination. This approach is expressed as a defence in section 1(3) of the English Equal Pay Act 1970 which permits a defence of "material difference (other than the difference of sex)". In **Clay Cross**

(Quarry Services) Ltd v Fletcher [1978] IRLR 361 Lord Denning MR referred to **Shields v E Coomes (Holdings) Ltd** [1978] IRLR 263 that s 1(3) applies when `the personal equation of the man is such that he deserves to be paid at a higher rate than the woman'. Thus the personal equation of the man may warrant a wage differential if he has much longer length of service, or has superior skill or qualifications; or gives bigger output or productivity... An employer cannot avoid his obligations under the Act by saying: `I paid him more because he asked for more'."

32. In **Rainey v Greater Glasgow Health Board** [1987] IRLR 26 (HL) 29 Lord Keith of Kinkel said in his speech:

"The difference must be `material', which I would construe as meaning `significant and relevant', and it must be between `her case and his'. Consideration of a person's case must necessarily involve consideration of all the circumstances of that case. These may well go beyond what is not very happily described as `the personal equation', ie the personal qualities by way of skill, experience or training which the individual brings to the job. Some circumstances may on examination prove to be not significant or not relevant, but others may do so, though not relating to the personal qualities of the employer (sic). In particular, where there is no question of intentional sex discrimination whether direct or indirect (and there is none here) a difference which is connected with economic factors affecting the

efficient carrying on of the employer's business or other activity may well be relevant."

33. Lord Keith found support for his view in two decisions of the European Court of Justice: **Jenkins v Kingsgate (Clothing Productions) Ltd** [1981] IRLR 228 and **Bilka-Kaufhaus GmbH v Weber von Hartz** [1986] IRLR 317.

34. The third approach seems to be that there will be unfair discrimination to the extent that the discrimination in the case under investigation is caused or contaminated by it. This exercise is unlikely to be easy. It is akin to an attempt to unscramble an omelet. But, I believe, it is the only way to give effect to the injunction not to discriminate on the impermissible grounds leaving permissible discrimination intact. The task is not made easier when the first eggs for the omelet were cracked in 1990 or earlier.

35. In **Enderby v Frenchay Health Authority** [1993] IRLR 591 (ECJ) 595 the court held :

"In its third question, the Court of Appeal wishes to know to what extent - wholly, in part or not at all - the fact that part of the difference in pay is attributable to a

shortage of candidates for one job and to the need to attract them by higher salaries can objectively justify that pay differential.

The Court has consistently held that it is for the national court, which has sole jurisdiction to make findings of fact, to determine whether and to what extent the grounds put forward by an employer to explain the adoption of a pay practice which applies independently of a worker's sex but in fact affects more women than men may be regarded as objectively justified economic grounds (judgments in Case 170/84 ***Bilka-Kaufhaus,*** cited above at paragraph 36 and Case C-184/89 **Nimz**, cited above, at paragraph 14). Those grounds may include, if they can be attributed to the needs and objectives of the undertaking, different criteria such as the worker's flexibility or adaptability to hours and places of work, his training or his length of service (judgment in Case 109/88 **Danfoss**, cited above, at paragraphs 22 to 24).

The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground within the meaning of the case law cited above. How it is to be applied in the circumstances of each case depends on the facts and so falls within the jurisdiction of the national court.

If, as the question referred seems to suggest, the national court has been able to

determine precisely what proportion of the increase in pay is attributable to market forces, it must necessarily accept that the pay differential is objectively justified to the extent of that proportion. When national authorities have to apply Community law, they must apply the principle of proportionality.

If that is not the case, it is for the national court to assess whether the role of market forces in determining the rate of pay was sufficiently significant to provide objective justification for part or all of the difference."

36. Any remedy would have to be proportionate to the extent of the discrimination. This may be difficult but it is in my opinion imperative to do this lest legitimate conduct and its effects be impinged. In the case of doubt the onus will play its usual role.

The onus or burden of proof proper

37. Both Mr Cheadle and Mr Freund urged me to consider carefully the question of the onus of proof in regard to discrimination claims framed as residual unfair labour practices. This also requires consideration of the evidential burden or, as it is technically known in this country in the Afrikaans tongue, the "weerleggingslas".

38. The Industrial Court, which, in spite of its name, was an administrative body held that it was not bound by the strictures of onus in deciding whether an unfair labour practice was committed in terms of the LRA of 1956. See **Medupe v Golden Spur** (1987) 8 ILJ 376 (IC).

39. The Labour Court, as a court of law, functioning as such applies the onus in deciding whether an applicant is entitled to relief. See **Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and others** (supra).

40. The Labour Court has held that the onus of proof for a claim based on item 2(1)(a) is on the applicant. See **TGWU and another v Bayete Security Holdings** (supra). The onus is acquitted in this court on a balance of probabilities.

41. I believe it is correct that the onus or burden of proof lies on the applicant claiming relief. I use the term onus or its equivalent, burden of proof, in the sense used in **Pillay v Krishna** 1946 AD 946 at 952 to mean the duty upon the litigant, in order to be successful, of finally satisfying the court that he or she is entitled to succeed on the claim, or defence as the case may be. See too Hoffman and Zeffert **The South**

African Law of Evidence 4th ed 495.

42. The incidence of the onus of proof is a rule of substantive law. See Hoffman and Zeffert at 509. In order to discover the rule, where the law is laid down by statute, one examines the instrument. The 7th Schedule is silent on the question of onus. However s 3 of the LRA of 1995 makes it plain that this court must interpret the Act, including Schedule 7 -

"(a) to give effect to its primary objects;

(b) in compliance with the Constitution; and
(c) in compliance with the public international law obligations of the Republic."

43. The Constitution of the Republic of South Africa, 1996 provides in s 9(5) that "Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair". The grounds listed in subsection (3) include race, colour and ethnic origin.

44. The common law, though Hoffman and Zeffert are doubtful whether it is of any great assistance, is instructive. I take the liberty of paraphrasing Davis AJA's summary of the Roman law principle in **Pillay v Krishna** (*supra*) at 951-952. If one person claims something from another in a court of law, then he or she has to satisfy the court that he or she is

entitled to it. But there is a second principle which must always be read with it. Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he or she is regarded *quo ad* that defence as being the claimant and for the defence to be upheld he or she must satisfy the court that he or she is entitled to succeed on it.

45. It must also be appreciated that the rules of the incidence of the burden of proof, as Davis AJA pointed out, are derived from "broad and undefined reasons of experience and fairness".

46. In the case of direct discrimination the true explanation for an unfair differentiation is usually, although not always, known to or discoverable by the perpetrator of the differentiation. See G Bindman "Proof and Evidence of Discrimination" in B Hepple and E M Szyszczak **Discrimination: The limits of the Law** (1992) 50 at 57. See also S Engles "Problems of proof in employment discrimination: The need for a clearer definition of standards in the United States and the United Kingdom" 1994 (Vol 15) **Comparative Labor Law Journal** 340-370 at 368.

47. It may be that the onus remains on the applicant but that less evidence

will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the perpetrator. See Innes J in **Union Government (Minister of Railways) v Sykes** 1913 AD 156 at 173-174.

48. Mr Cheadle and Mr Freund are agreed that the onus proper is on the applicant. This is undoubtedly so. They are also agreed that the mere averment of discrimination does not constitute proof of discrimination. See **Abbot v Bargaining Council for the Motor Industry (Western Cape**) [1999] 2 BLLR 115 (LC) and **Swanepoel v Western Region District Council and another** (1998) 19 ILJ 1418 (SE).

49. Mr Cheadle, with his customary eloquence, sought to persuade me to adopt the United States three stage approach formulated in **McDonnell Douglas Corp v Green** 411 US 792 as follows :

(a) the employee must establish a *prima facie* case;

(b) the employer must offer a legitimate non-discriminatory reason for its action (or omission); and

(c) the employee must then prove that this supposedly legitimate

non-discriminatory reason was a pretext to mask an illegal motive.

50. The **Harvard Law Review** "Developments in the Law - Employment Discrimination" (May 1996, Vol 109 No 7) comments as follows at 1581: "The *McDonnell Douglas* route is designed for plaintiffs who cannot adduce such elusive incriminating evidence, and consists of a tripartite burden-shifting framework. In the first stage, the plaintiff has the burden of showing a prima facia case to create a presumption of discrimination. Once shown, the burden shifts to the defendant to articulate a legitimate, business-related reason for the difference in treatment. The Supreme Court has held that this second-stage burden is merely one of production and is thus easy for the defendant to discharge. The burden then shifts back to the plaintiff for the third stage, sometimes called the pretext stage, in which the plaintiff must show that the defendant's proffered reasons are unworthy of credence, that is, merely pretexts for an underlying discriminatory motive."

51. Mr Cheadle submitted that the jurisprudence developed by the US courts have placed a relatively light burden on the plaintiff to establish a *prima facie* case by altering the traditional standard of proving all the required elements of the claim to ruling out the most common reasons for adverse job actions. "The *prima facie* case serves an important function in the litigation, it eliminates the most common non-

discriminatory reasons for the plaintiff's rejection." See **Texas Department of Community Affairs v Burdine** 450 US 248 (1981).

52. The burden then shifts to the employer to produce legitimate reasons for the difference in treatment - a so-called "burden of production". In other words the employer has to do no more than advance reasons. It does not have to prove that they were in fact the reasons for the difference in treatment. The employer's obligation is simply to frame the factual issues with sufficient clarity to give the plaintiff a fair chance to demonstrate the pretext.

53. The overall burden of proof remains however on the employee. The employer's sole obligation at the second stage is to articulate a legitimate non-discriminatory reason rather than establishing by a preponderance of the evidence that its proffered reason was the real reason. See **Board of Trustees of Keene State College v Sweeney** 439 US 24 (1978) and **Furnco v Walters** 438 US 667 (1978) and **Burdine** (supra) 253-254.

54. In **Hicks** (supra) (at page 148 of Zimmer et al **Cases and Material on Employment Discrimination** (1994)) it is said:

"It is important to note, however, that although the **McDonnell Douglas** presumption shifts the burden of production to the defendant, `the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff'".

55. I do not think it will be helpful to go down the American road of the burden of production particularly where the applicant in a claim involving a residual unfair labour practice need not prove intention. The burden of production seems to involve the setting up of a skittle which if knocked down may have no appreciable effect. Nor is a consideration of the shifting onus useful. Our law appears, correctly, to have turned its back on piecemeal adjudication and the shifting sand of shifting onuses. As Hoffman and Zeffert point out at 520: "The only stage at which the court will give a ruling is after it has heard all the evidence, and then it will simply decide whether the party who bore the onus has discharged it."

Judicial reasoning

56. There is a role for concepts such as a prima facie case and a failure to rebut it (the failure to acquit an evidentiary burden - the weerlegingslas) in the process of evaluating evidence and in reasoning directed at determining the final decision. In **Ex parte Minister of Justice: re R v**

Jacobson and Levy 1931 AD 466 at 478 Stratford JA said:

"*Prima facie* evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his onus."

57. Hoffman and Zeffert say at 596:

"In this sense, prima facie evidence means evidence capable of being supplemented by inferences drawn from the opposing party's failure to reply. Whether such inferences may legitimately be drawn depends upon the nature of the case and the evidence which has been adduced. Most important, it depends upon `the relative ability of the parties to contribute evidence on that issue'. If the evidence adduced by one party can reasonably support an inference in his favour, and it lies exclusively within the power of the other party to show what the true facts were, his failure to do so may entitle the court to infer that the truth would not have supported his case. On the other hand, if there is no reason to expect a party to be able to throw light upon the facts, his silence can add nothing to the evidence adduced by his opponent."

58. Holmes JA said in **Ocean Accident and Guarantee Corporation Ltd v Koch**

1963 (4) SA 147 (A) at 159 B-D :

"As to the balancing of probabilities, I agree with the remarks of Selke, J., in *Govan v Skidmore*, 1952 (1) S.A. 732 (N) at p. 734, namely

'. . . in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence*, 3rd ed, para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one.'

I need hardly add that "plausible" is not here used in its bad sense of "specious", but in the connotation which is conveyed by words such as acceptable, credible, suitable (*Oxford Dictionary,* and Webster's *International Dictionary).*"

The facts

59. Michael Louw joined MultiSuppliers (Pty) Ltd, a wholly owned subsidiary of City Tramways (Pty) Ltd, as a buyer on 1 May 1984. He was moved to a division established as Multimech but transferred back to MultiSuppliers. On 1 April 1992 Golden Arrow Bus Services (Pty) Ltd purchased the businesses of City Tramways and MultiSuppliers and conducted these

businesses as trading divisions of Golden Arrow. Golden Arrow carries on business in the passenger transport industry in Cape Town and its surrounds. Mr Louw describes himself as a black person. In terms of the definitions of the pre-1994 political dispensation he would be described as a “coloured” person.

60. Mr Louw complains in this court that Golden Arrow, which is still his employer, has committed an unfair labour practice as contemplated by item 2(1)(a) in that it directly or indirectly unfairly discriminates between him as a coloured male and a Mr Beneke, a white male, previously a buyer and currently a warehouse supervisor.

61. When Mr Louw joined MultiSuppliers in 1984 he was paid a salary of R 750 per month. He was earning R1500 pm in 1990 when Mr Beneke was appointed as a buyer in the same company. Mr Beneke was appointed on a salary of R2300 pm.

62. The monthly cash earnings of Mr Louw and Mr Beneke are common cause. These earnings can be tabulated in abbreviated form as follows:

YEAR	MR LOUW	MR BENEKE
1990	R1500	R2300
1991	R1690	R2575

1993	R1990	R3135
1994	R2130	R3385
1996	R2540	R4050
1998	R3335	R5390

63. The significance of these years is the following:

· 1990 Mr Beneke joins MultiSupply as a buyer.

- 1991 FSA conducts pay survey - classified by race.
- 1993 Mr Beneke acts as warehouse supervisor.
- 1994 Mr Beneke appointed warehouse supervisor.
- 1996 LRA of 1995 comes into operation.
- 1998 Expert evaluation by Ms Scholtz for purpose of this case.

64. The wage gap between Mr Louw and Mr Beneke expressed as a percentage of Mr Louw's pay for the years in question shows the following:

· 1990 53,3%

- 1991 52,4%
- 1993 57,5%
- 1994 58,9%
- 1996 61,6%
- 1998 61,6%

65. The 1991 Peromnes pay survey of FSA clients using this system of job evaluation who took part in the survey shows that in the Cape Town

area white males earned on average 6,1% more than coloured males. This is Mr Steer's (an expert called by Golden Arrow) calculation. It may be that this is conservative and that the wage gap was higher. I raised this with the parties but no other figures were formally proved.

66. Only Mr Louw gave evidence before closing his case. He described in detail and gave examples about his job, his job description, the nature and extent of his job, the tasks and functions he performed, the level of responsibility, the technical knowledge required and its complexity. He also stated that in his opinion the job of a warehouse supervisor was of equal value to the job that he did as a buyer.

67. Mr Louw's complaint and that of Mr Fredericks was raised in August 1991. It was raised on other occasions also by NUMSA.

68. Golden Arrow led the evidence of four witnesses. Mr Steer an expert on job evaluation and salaries, Mr Brice a former managing director, Mr Gie the present executive director and Mr Human, a former manager.

69. Mr Steer is a director and a remuneration consultant of FSA Contact (Pty) Ltd. It is said to be South Africa's largest remuneration and salary

survey consultancy. He has degrees in Industrial Chemistry, Psychology and Economics. In his 15 years with FSA Contact he has worked with a large range of public and private sector organizations in all areas of remuneration practice, in particular, remuneration analysis, performance systems and job evaluations. Prior to joining FSA Contact Mr Steer worked at senior management level in the mining, chemical and food industries in both production and human resource functions. He has extensive experience at both practical and theoretical levels in the development and implementation of remuneration systems.

70. Mr Steer explained the Peromnes job evaluation system and how it is applied. He made references to a report prepared by one Ms Scholtz. I draw from this document.

71. The Peromnes job evaluation method is a points assessment technique which examines each job on eight factors and weights each of these factors according to a predetermined scale. The scores, when totaled, determine the position of the job in the grade ranking. This method is in wide usage and is particularly suited to the evaluation of jobs in a skilled, knowledge worker environment. The factors analyzed are:

¬ Problem Solving

- Consequences of Judgements
- Pressure of work
- Knowledge
- Job Impact
- Comprehension
- Educational Qualification
- Training Experience

72. The typical questions asked focus on the degree to which the job incumbent would be required to solve complex problems: the types of information used and the range of reasonable solutions to select from making decisions or recommendations; whether the job requires the individual to exercise judgement and what precedent or controls and checks exist; the extent and consequences of any errors of judgement (assuming competence) at varying levels in the organization and the external environment; the types of information, data and documentation that would be used in the job: the level of understanding of operational systems and professional knowledge requirements; the degree of disparity and competing demands in time and attention inherent in the tasks in the job which generate pressure (excluding repetition of straight forward short-cycle tasks against the clock): the minimum essential level

of qualification required for the entry to the job; and, the minimum period of time- based experience to achieve competence in this position.

73. For each factor there is a range of points to be allocated. The process is computerized and the questions asked are standardized. This minimizes inconsistency in the type, depth and amount of information required to allocate any score and that the process is as systematically done as is possible.

74. Mr Steer notes that the positions of buyer and warehouse supervisor, which are the subject of this case, have already been evaluated by an expert witness, Ms Scholtz, using the Peromnes Job Grading System and have been found to be two grades apart. The job grades determined and the job and grade differential are within established parameters and are accepted by Mr Steer as the basis for his evaluation.

75. Mr Steer is of the opinion that theoretically, it can be expected that there may be pay differentials of at least 30% to 55% between the average pay for two jobs that are two grades apart. This differential, which is widely documented, is a mathematical concept that results from the

development of smoothed pay provisions linking the pay level of the most junior position to the most senior within an organisation.

76. In practice, pay differentials between job levels and the incumbents are subject to very wide variations. The following are examples of factors that will influence pay differentials:

· The performance, experience, skills and potential of the various incumbents;

· The market factors which would influence supply and demand and consequently the remuneration for the particular position;

· The employer's judgement as to the position's relative importance and value to the organization. A position that is regarded as particularly critical to the well-being of the organisation would often attract a pay premium with the view of maintaining a competitive advantage in retaining valued employees;

· The influence of collective bargaining, minimum pay levels, bargaining councils and industry agreements.

77. In this case, the current pay differentials between the two incumbents is

61,6%, a situation which could result from all or some of the following:

"2.4.1 Superior performance, skills or potential of the incumbent in the senior position could increase the pay differentials by at least 10% to 20%;

2.4.2 Market factors would have a similar influence on the remuneration levels;

2.4.3 The organization may have placed a higher value in terms of value or importance to the more senior position and therefore decided to award a premium to the position;

2.4.4 The differential may reflect the organization's pay policy in respect of hierarchical relationships, ie they have a steeper pay progression than the theoretical."

78. To illustrate the variations that occur Mr Steer noted that another buyer in the organization, Mr Vember, who is also of " coloured" origin, has a much lower pay differential of 19,3% in relation to the warehouse supervisor.

79. It can thus be seen that there are numerous factors influencing remuneration levels and differentials between different positions and at different levels within organizations and that size of the differential can vary greatly as a result of these influences.

80. In the opinion of Mr Steer, the size of the differential in this matter is well within what could be expected as are the result of normal organizational and market forces.

81. In addition Mr Steer attested that the fact Mr Vember has a much lower salary differential in relation to the warehouse supervisor, very much removes the likelihood that respondent has practiced racial or ethnic discrimination.

82. Mr Steer was provided with a transcript of the evidence-in-chief of Mr Louw which he analyzed taking into account his consultation with Mr Farrel and Mr Gie and his assessment of the length of time necessary to train a buyer. He made an evaluation of the job of a buyer based on this data (called buyer one) and concluded that it ranked at grade 10 on the Permones scale.

83. Next Mr Steer examined the above mentioned data in the light of the

cross-examination of Mr Louw. Precisely how he did this is open to some doubt. It would seem that he made, as it were, credibility findings and accepted partially that material put in cross-examination was evidence and preferable to some replies by Mr Louw regardless of whether it was conceded or not. The result of this evaluation (called buyer two) was that Mr Steer placed the job of buyer on grade 9. Apparently this was also the conclusion reached by Ms Scholtz.

84. Mr Steer was subjected to intense cross-examination. An object of the cross-examination was to wring a concession that Mr Louw's evidence-in-chief should have been used as the basis for the evaluation. Mr Steer accepted that should I find that his own cross-examination was successful it would mean that the job of a buyer should be evaluated at grade 10 which was a one grade difference between that job and the job of a warehouse supervisor.

85. Mr Brice was formerly a managing director. The main import of his evidence is that Mr Beneke was employed as one of two persons employed as part of a succession plan. He was to be groomed for management and thus started his career with MultiSuppliers as a trainee buyer. He was hired for his potential. He was also hired at the rate of R2300 pm because he wanted more than he was currently earning,

namely R2200. MultiSuppliers did not discriminate on racial grounds between its employees.

86. Mr Gie, at the time of giving evidence, was the Executive Director of Golden Arrow. He gave wide ranging evidence. He stated that Golden Arrow was opposed to racial discrimination and that if it was brought to his attention he would have put it right. Golden Arrow serviced a mainly black customer base. Its management is composed of black and white persons.

87. He explained that Mr Beneke was employed at the salary of R2300 because the company wanted his services and that was the salary that he needed to be attracted to the company. It was not race based.

88. Mr Beneke was moved out of the buying function into the warehouse in September 1993. He took on additional responsibilities. He was not awarded a pay increase. He was content to do this job without an increase as he understood that Golden Arrow was engaged in a restructuring process.

89. Mr Gie explained that there are no two persons who earn the same salary in the buyer's department. All the buyers earn in excess of the

minimum rates that are applicable in terms of a collective agreement applicable to them. The rate paid to each buyer is influenced by a number of factors which are not racially based. These factors are the rate at which the individual started. The performance of the employee, the attitude of the individual concerned and the increments that had been given to the employee over a period of time.

90. Usually management would set a guideline for the allocation of increases. The line manager would be entitled to deviate a few percentage from the norm; either upwards or downwards. Top management was required to approve the increases. Race was not taken into account in approving increases.

91. During the course of cross-examining Mr Gie, Mr Cheadle was in possession of an undisclosed document. While addressing me on the right to put the document to Mr Gie, Mr Cheadle disclosed the content of an undisclosed document to me in such a way that I was left in no doubt as to its contents and its potential relevance to the case.

92. In the result I deferred my decision to hand in the document although the prejudice had been caused, and allowed Mr Cheadle to cross-examine on the issue whether Golden Arrow had conducted a formal job

evaluation akin to the Peromnes job evaluation. The document now forms part of the record but the objection stands.

93. Mr Gie stated that in 1996 there had been a grading of senior staff. The system that had been used was the "JE-Manager". It follows a similar process to the Peromnes system. It permits a conversion into Peromnes, Hay or the Paterson systems. The results were not used in relation to payment of salary. The system was not applied to Mr Beneke nor to Mr Louw.

94. Mr Gie stated that there was a similarity between what Mr Beneke was earning in January 1991 and white males who worked in companies who used the Peromnes system and who participated in the FSA survey.

95. The JE manager evaluation covered 33 managers. The subjects ranged from the human resources manager at grade JE154 (Peromnes 6) to the assistant foreman mechanical, grade JE 47 (Peromnes 14). The evaluation was done, says Mr Gie, to address unhappiness about the allocation of company vehicles, ie the "perk car", the company car and company bakkies. Messrs Louw and Beneke do not feature in the document setting out the JE job grading. Mr Gie said that the JE

evaluation was not disclosed because it was not relevant.

96. Mr Gie was taken through the assessment forms relating to Mr Louw and Mr Beneke and conceded that there was little difference but said that Mr Louw's attitude counted against him.

97. Mr Jurgens Human was employed by City Tramways in 1979. He was entrusted by Mr Brice to do a variety of jobs. In 1990 he was involved in the appointment of Mr Beneke and a Mr Muller. It started when he was given a mandate to employ two persons. He was instructed that the company required a warehouse supervisor/buyer and a warehouse supervisor.

98. The buyer was to be trained in all aspects with the prospect of moving to management level. The company sought a neat person with higher education, people skills and integrity. The personnel department engaged an outside recruitment agency. The names of 3 or 4 persons, on a short list for the buyer's job, were given to Mr Human. He interviewed them. After consideration, Mr Human offered the job of buyer to a coloured man whose name he does not recall. The man laughed at the offer of a salary of R2500 pm and turned the job down. The job was then offered to Mr Beneke at R2300. Mr Beneke was

prepared to start at this salary. Mr Beneke had no experience in the motor industry. Mr Human said under cross-examination that he did not have more details about the career path or the prospects intended for Mr Beneke.

Evaluation

Equal pay for work of equal value

99. Has it has been established objectively by the applicant that the jobs of a buyer and a warehouse supervisor are jobs of equal value and that the failure, at least since 11 November 1996, to pay the applicant the same salary as that paid to Mr Beneke amounts to unfair discrimination on the basis of race as contemplated by item 2(1)(a)?

100. First as to onus. Golden Arrow has put up no defence, excuse, special pleading or justification for paying Mr Beneke a different wage to that paid to Mr Louw. An explanation is provided in the alternative but not as the main defence. This being so Golden Arrow does not attract an onus proper.

101. To succeed the applicant must convince this court on a balance of probabilities that the job of a buyer and a warehouse superviser at

Golden Arrow, not necessarily elsewhere, are of equal value. This presupposes that they are not the same job.

102. Are the two jobs of equal value? Mr Louw stated that he believed that they were of equal value. Mr Gie stated that they were not of equal value. The job of a warehouse supervisor was larger than a job of a buyer. It involved supervisory and management functions. It was regarded as more valuable to Golden Arrow. Mr Gie is supported by the assessment practice which evaluated a warehouse supervisor's supervisory and development skills. It is not entirely clear why the assessment practice was said not to be linked to remuneration but little turns on it.

103. I find that on the probabilities I prefer the evidence of Mr Gie to that of Mr Louw essentially because Mr Gie has a better, although also a self interested, perspective of Golden's Arrow's operations as a whole and is able to make a well-informed assessment of job sizes.

104. But I need not, and do not, rely entirely on Mr Gie's testimony on the relative values of the jobs of a buyer and warehouse supervisor. I may properly rely on the evidence of the independent expert, Mr Steer. See **Hatward v Cammell Laird Ship Builders Ltd** [1984] IRLR 463 (IT). I

should mention that in seeking to measure jobs of equal value we are not looking for absolute precsion. Cf **Capper Press Ltd v J B Lawton** [1976] IRLR (EAT) 366 and Roger Benedictus and Brian Bercuson **Labour Law and Materials** 200.

105. Mr Steer's evidence is open to slight criticism. I have made mention of some aspects. His conclusions as regards Mr Vember and its import on Mr Louw's treatment does not constitute expert opinion. But Mr Steer's testimony stands on firm ground regarding his expert opinion on the application of the Permones test and its implications. At best for Mr Louw there is at least one Peromnes grade difference between the size of a buyer's job and a warehouse supervisor's job.

106. I conclude that the applicant has not succeeded in demonstrating that the two jobs, on an objective evaluation, are jobs of equal value. It is therefore unnecessary to delve into the reasons, causes or motivation for the difference in wages. It does not mean that the difference is not attributable to race discrimination. It does mean that racial discrimination has not been proven.

107. I turn to consider whether the applicant may show and whether he has shown that the two jobs, valued subjectively, were as jobs of equal

value. In doing so I am aware that there may be a fine line between objective and subjective assessment. See also the comments by L Meintjies-Van der Walt “Levelling the `Playing’ Fields” 1998 (Vol 19) ILJ 22-33 at 29.

108. In his closing arguments, Mr Cheadle, who is ever resourceful, proffered an argument which must receive serious consideration. He submitted that even if the jobs of buyer and warehouse supervisor were objectively different, Golden Arrow, subjectively regarded them as of equal value and therefore, for purposes of this case, the applicant has shown them to be work of equal value.

109. The factual backing for this submission is the common cause facts that Beneke did not receive an increase in wages (and I assume that he also did not receive additional benefits in kind) when he acted as warehouse supervisor nor when he was formally confirmed in this post. Assuming that it is permissible to do this, I am immediately confronted by the problem of subjectivity. If one is going to value jobs on the basis of subjective criteria can one draw objective conclusions from them? Should one not accept that if there is illogic or subjectivity one side of the equation, one may expect the same on the other side. This may explain the difference in wage of the two incumbents.

110. Equal pay for equal work and equal pay for work of equal value are methods of logically making inferences that (or so the applicant alleges) the difference between two jobs is due to unfair racial grounds. Destroy the logical basis of this exercise and the result becomes random and unreliable for proving that the difference is based on race.

111. I accept the evidence of Mr Gie concerning the value which Golden Arrow places on the jobs viewed from the subjective perspective of those who manage the company. Mr Cheadle submitted that I should not accept the credibility of Mr Gie. Mr Gie was rattled by the discovery of the JE manager evaluation. But the JE manager evaluation did not have the explosive content which might have been expected. I accept the evidence of Mr Gie generally.

112. No evidence was led as to the reliability of the JE manager system. Nor were its apparent divergence from the Peromnes system explained. Its apparent unreliability merely makes it more difficult to doubt Mr Gie's subjective assessment of the value of the two jobs.

113. There is no evidence to support the inference that subjectively the two jobs concerned are of equal value in the eyes of Golden Arrow.

Disproportional salaries

114. Mr Cheadle sought to persuade me to draw an inference of racial discrimination from the difference in salaries and their alleged disproportionality regarding the value of the two jobs. See para 2.8 of the applicant's statement of case.

115. For present purposes I will assume that the alleged disproportionality came into existence on the date that Mr Beneke was confirmed in the post of warehouse supervisor. Both he and Mr Louw occupied the same job or job description prior to this event.

116. On the date of Mr Beneke's confirmation 15th June 1994 he was paid R 3385. R 2130 was paid to Mr Louw. The difference amounts to R1255. Calculated as a percentage of Mr Beneke's salary it amounts to 58,9%.

117. I also assume that the basis of the alleged unfair labour practice is the failure of Golden Arrow to close the alleged disproportionate gap to one which is proportionate and that the difference may constitute impermissible discrimination on the basis of race.

118. In order to consider drawing any appropriate inference one needs to know what was “proportional” ie what did the employer objectively or subjectively regard as appropriate wages for its buyer and its warehouse manager. I have Golden Arrow’s view. I do not have evidence of another appropriate wage.

119. I also assume that this argument is advanced on the premise that the jobs of buyer and warehouse supervisor are different. Assuming this line of reasoning is appropriate is there evidence from which I can draw an inference of racial discrimination? Mr Steer attested, which I accept, that there can be up to 105% difference between a job two grades apart, this applies with the same or more force here. Even if the jobs are one grade apart it cannot be said that the salaries for the warehouse supervisor’s job is disproportionate. At least not on the evidence presented to me.

120. I accept the testimony of Mr Human. He was an honest, candid witness - a straight arrow. Although the passage of time left its mark. The fact that City Tramways was prepared to offer R 2500, that is

R 200 more to a coloured man for the position of buyer than Mr Beneke indicates that the question of potential was taken into account here. It also indicates that

there was no prejudice against the appointment of a coloured man with potential. However it does not mean that MultiSuppliers did not discriminate against Mr Louw as regards his salary on the ground of race.

121. I am unable to find that the salary paid on 15 June 1994 to Mr Beneke as warehouse supervisor and that paid to Mr Louw was disproportionate. I am therefore unable to draw any inference of racial discrimination.

Other proof?

122. A South African jury of reasonable men and women would, I think, find that Mr Louw has been subjected to discrimination at an early stage of his career. This court may take judicial knowledge of a system of institutionalised racial discrimination which also permeated the world of employment and influenced the levels of jobs and the rate of pay. The threshold salary, if there was discrimination, would dog an employee for years. Mr Steer says as much as does Mr Brice.

123. That there was discrimination and its extent is to be seen from the Peromnes pay survey for some clients of FSA using this system in Cape Town in February 1991. The pay survey was the last FSA pay survey to

distinguish between employees on the grounds of race. Doubtless this practice will be resumed following recent legislation. The difference between white male employees and coloured male employees in the Cape Town area was 6.1%, at least according to Mr Steer. Mr Steer says that the group of employers surveyed would have been the more sophisticated employer but they clearly discriminated on the basis of race.

124. Is it permissible in our law for a grievant to compare himself with the hypothetical “Peromnes man”? MultiSuppliers did not use the Peromnes system nor were they clients of FSA. But was MultiSupplier an island of equality in a sea of inequality? Did the FSA pay survey give rise to any prima facie inference about the underlying foundation of MultiSuppliers’s remuneration policy in 1991? If so, is there any explanation which rebuts such a prima facie inference? And, if there was discrimination on racial grounds, was it still subsisting when Golden Arrow took over operations and was it present on 11 November 1996 when the LRA of 1995 came into operation? Were steps taken to close and eliminate the gap?

125. I am precluded from deciding whether there is any merit in this line of attack. First because it was not the applicant’s case although it could possibly have been put forward. The applicant was competently

represented in every respect but did not seek to plead nor pursue this line of attack. The broad basis of his claim was the residual unfair labour practice jurisdiction but he narrowed the issues down to equal pay for work of equal value and the alleged disproportionality of Mr Beneke's salary.

126. Secondly although the FSA pay survey danced tantalisingly like an attractive fly above the trout waters, the inhabitants lurking below were disdainful of it. The applicant did not seek to exploit the possibilities, assuming that he could have done so with a suitable amendment to his pleadings, when the boon fell into his lap. The evidence elicited from Mr Steer about the FSA pay survey under cross-examination was cautious and tentative. The matter was not explored with Messrs Brice and Human.

127. It was the applicant's right to confine the issues well within the boundaries of the unfair labour practice definition. There was ample time and opportunity to deal with the FSA pay survey as proof of discrimination but it was not ventilated.

128. Golden Arrow did not rise to the FSA bait. They were not obliged to as it was not the applicant's case. See the remarks in **Administrator,**

Transvaal, and others v Theletsane and others 1991 (2) SA 192 (A) at 196H-J which, although they relate to motion proceedings have, in my view, some application here. Golden Arrow likewise was not obliged to "anticipate and counter possible unstated contentions" concerning the applicant's complaint.

129. It would not be fair to Golden Arrow to decide the matter on the FSA pay survey basis. I am, for good and proper reasons, restricted to trying the lis raised by the applicant.

130. In the circumstances I find that the applicant has not acquitted the onus of proof resting on him. Justice however requires that I order absolution from the instance and not finally dismiss the applicant's application.

131. The parties were *ad idem* that in this case costs should follow the result. The applicant will be ordered to pay the respondent's costs.

132. I would be greatly remiss if I did not express my gratitude to Mr Cheadle (and Mr Steenkamp) and Mr Freund on the other side for their incisive and helpful arguments in this matter and for sharing their insights into the law of discrimination of foreign jurisdictions with the court.

133. In the premises:

134. Absolution from the instance is ordered.

2. The applicant is ordered to pay the respondent's costs.

DATED AND SIGNED ON THIS ..... DAY OF NOVEMBER 1999.

.....
JUDGE A A LANDMAN

LABOUR COURT OF SOUTH AFRICA

Date of Hearing : 2, 3 & 4 February 1999;

24, 25, 26, 27 & 28 May 1999;

8, 9, 11 & 12 November 1999

Date of Judgment : 23 November 1999

For the Applicant : Mr M H Cheadle (assisted by Mr A J Steenkamp) of Cheadle Thompson and Haysom.

For the Respondent : Adv A J Freund instructed by Mr P Faber of Sonnenberg Hoffman and Galombik Inc.