In the Labour Court of South Africa

Held at Durban

Case No: D322/98
In the matter between:

Antoinette McInnes
Applicant

and

Technikon Natal Respondent

Judgment

Introduction:

1) The Respondent is an educational institution governed by its council in terms of the Higher Education Act. In 1995 the Applicant was an employee of the Business Studies Unit of the Respondent as its marketing manager. She aspired to academia and by chance heard that the Department of Marketing of the Respondent was looking for a lecturer. She then submitted her CV and made application. She was one of many who were interviewed and one of four who were employed. She was told that she could not expect to receive a salary equivalent to that she had been earning and she was willing to accept a lesser salary. This was because of her ambition to become a lecturer. She was employed on a one-year contract commencing on 1 February 1996 and

terminating on 31 January 1997. The letter of appointment described her contract as a “locum” and she was told by Pieter Raap, the acting Head of Department, that this was a locum post while Jonathan Ivy, the Head of Department, was away. He also told her that there was a possibility that her employment contract could be renewed, particularly if she obtained a B. Tech. degree.

2) Although appointed as a locum for the Head of Department, in reality the Applicant occupied a junior lecturer position and carried a workload significantly different to the one he would have carried had he been there. She was a staff member in the department pool and was allocated work on that basis. Ivy was on study leave for the calendar year January to December 1996. The Applicant was given a one-year contract commencing 1 February 1996 to the end January 1997. There was then an overlap in January 1997 when both she and Ivy were working at the same time. In a policy document initiated in November 1995 and formally accepted in October 1997 the Respondent defines a locum contract as being a contract for a period of less than one year. The significance is then that there is no need to advertise such a post or to interview candidates. The fact of the matter is that the Applicant was interviewed.

3) Later in the year the Applicant applied to stay on for another

year. She was told that she would have to be interviewed again, which she was. She was then appointed to post M410 as a junior lecturer for the year 1 February 1997 to 31 January 1998. The work the Applicant had performed during the 1996 academic year largely continued into the 1997 academic year. She was also given the function of co-ordinating the course known as Personal Selling. In 1997 she also obtained her B. Tech. degree.

0The renewal of the Applicant's post, M410, which was to become permanent, was advertised in November 1997. The Applicant and a number of other candidates applied. Three candidates were short-listed. A selection committee interviewed the candidates on 16 January 1998. After some debate two of the candidates, the Applicant and one Mpanza, were found to be "appointable" and the committee then debated which of them should be appointed. By a majority the committee recommended the Applicant. This recommendation was then sent to the Vice Principal Academic for his approval and onward transmission to the Human Resources Department. The Vice Principal however referred the recommendation back to the selection committee with a direction that it reconsider its recommendation in the light of the Technikon's Affirmative Action Policy. At the reconvened meeting the selection committee, although reaffirming its preference of the Applicant, recommended Mpanza to the

post. He was then appointed.

0At about this time and unbeknown to the Applicant an agreement was concluded with Mpanza by the Equity Manager in terms of which Mpanza was offered a salary much higher than the salary range for which the post had been advertised. This was done in order to get him to accept the post. When this salary was implemented he became the highest paid member of the Department, earning even more than the Head of Department.

0When it became clear that Mpanza was to be appointed, Pieter Raap set steps in motion to keep the Applicant on the staff. He formulated a proposal in terms of which two posts, one on the Durban campus and one on the Pietermaritzburg campus, would be combined and this post would be offered to the Applicant. He submitted this proposal to the Dean and Vice Principal, both of them supported it, and it was then referred the Human Resources Department. That is where it got stuck and the proposal was never implemented.

0These facts, on which I will elaborate, then form the basis of the Applicant seeking relief from this Court.

0Her main cause of action is premised upon the allegation that she was unfairly dismissed from her employment with the

Respondent. In respect of this claim she then seeks reinstatement with back pay. The dismissal the Applicant relies upon is based upon the extended statutory meaning of this term as defined in section 186 (b) of the Labour Relations Act of 1995 (the "LRA") which extends the meaning of this term to include a situation where an employee reasonably expects an employer to renew a fixed term contract of employment on the same or similar terms.

0The Applicant's alternative cause of action is based on item 2 (1)(a) of part B of schedule 7 to the LRA, her allegation being that, as Applicant for the same post, she was unfairly discriminated against on the basis of her race and/or sex.

Jurisdiction:

0The matter comes before this Court, as opposed to arbitration before the CCMA, because of the further allegation made by the Applicant that the reason for her dismissal is automatically unfair as provided for in section 187 (1)(f) of the LRA in that it was based on discrimination against her on the basis of her colour and/or sex. This allegation would then bring the Applicant's case within the ambit of section 191 (5) (b)(i) of the LRA.

0Jurisdiction depends on what the employee alleges is the reason for the dismissal in terms of section 191 (5)(b) and not

the employer's allegations. Education, Health and Allied Workers Union v Pressing Metal Industries (1998) 19 ILJ 1477 (LC). From this it follows, so Mr Antrobus argued, that if the dismissal is found to be unfair merely because the Respondent fails to prove that the dismissal was for a fair reason relating to the Applicants conduct or capacity or fails to prove that it was effected in accordance with a fair procedure, then it is not open to this Court to determine the dispute and grant the relief, for that is then the sole preserve of an arbitrator under the CCMA. SA Motor Industries Federation and Another v Numsa (1997) 18 ILJ 1301 (LAC) at 1305 F – G.

0It seems to me that once the Applicant makes the allegation that the dismissal, in this case within its extended meaning, was automatically unfair by reason of unfair discrimination, and provided the allegation was made seriously and in good faith, then this Court is the correct forum for the resolution of the dispute. Once it has jurisdiction this Court must resolve the dispute which it has before it. It must be able to do so without having to decide whether or not the allegation that the dismissal was automatically unfair has been proved if the determination of this issue will make no difference to the result or the remedy.

0The Applicant's claim that she did not get post M410 because

of her race was clearly bona fide. In fact, it is largely common cause that this was the reason why her employment with the Respondent came to an end.

Main cause of action:

0As the case developed and in respect of the Applicant's main cause of action the issue as to whether the dismissal was automatically unfair became somewhat peripheral. The main issues that crystallized in the evidence, and this was then also the main thrust of the cross examination of the Applicant, revolved around what the Applicant's subjective expectation was and whether or not such expectation was reasonable.

0Here the Court has to conduct a two-stage enquiry. The first stage is to determine what the Applicant's subjective expectation actually was in relation to renewal. This is a question of fact. Only once the subjective expectation has been established as a fact does the Court then go on to decide the second stage, namely whether this expectation was reasonable in the circumstances.

0As to the former, what is required is that the Applicant must subjectively have held the expectation that her contract of employment would be renewed on terms which are the same or are similar to the terms which prevailed during her fixed term contract. In her further particulars the Applicant pleads her expectation in this regard in the alternative. In the main

she pleads that she expected that she would be employed on the terms applicable to a permanent post. In the alternative she pleads that she expected that her employment would be renewed for another year, whereafter her post would be converted to a permanent post.

0Although alternative expectations can of course be pleaded, it is obviously not possible to subjectively entertain two or more subjective expectations at the same time. What then needs to be determined is what the Applicant's expectation was and whether or not this expectation related to the renewal of her contract on the same or similar terms. Mr Antrobus in this regard argued that the Applicant's subjective expectation was vague and contradictory in relation to the proposed terms which she expected would apply. He pointed out that the Applicant in her evidence did not clarify precisely when and at what stage she held the requisite expectation. He argued that if she had a coherent and proper expectation she should for instance have known whether the terms of the expected contract included the benefit of a pension or not, this being the most important factor which differentiates permanent posts from others. The Applicant also did not know whether a house owner's allowance would be a benefit in terms of the new contract, or whether she would be placed on probation or not. He also argued that the Applicant generally was vague as to whether she expected to obtain a

permanent post or remain on contract.

0Although the Applicant was somewhat vague as to precisely what she expected the renewed post to entail, in regard to benefits for instance, the crux of her evidence was that she genuinely thought that in February 1998 she would still be doing the same work as in January, albeit under a different contract, the main difference being that her appointment would now be a permanent one. The question then is whether this expectation, in the words of the section, is an expectation that her employment would be renewed on "similar terms".

0In Dierks v University of South Africa (1999) 20 ILJ 1227 (LC) Oosthuizen AJ at 1246 H to 1248 F considered whether a reasonable expectation as defined in section 186 (b) can ever include an expectation of permanent employment where the employee is engaged in a fixed term contract. His Lordship concluded, at 1248 F, that it cannot.

0I with respect fail to see why this should always be so. What section 186 (b) clearly seeks to address is the situation where an employer fails to renew fixed term employment when there is a reasonable expectation that it would be renewed. It is the employer who creates this expectation and it is then this expectation, created by the employer, which now gives the employee the protection afforded by this section. If then the

expectation which the employer creates is that the renewal is to be indefinite, then the section must be held to also cover that situation. See Wood v Nestle (SA) (Pty) Ltd (1996) ILJ 184 (IC), at 190 J to 191 A, and also Malandoh v SA Broadcasting Corporation (1997) 18 ILJ 544 (LC), at 547 D to E. I must accordingly conclude that in arriving at this finding His Lordship was clearly wrong.

0What should be focused on in my view is the nature of the expectation and whether in the particular situation this expectation was reasonable. In the normal course of events where fixed term contracts are renewed from time to time an expectation that the contract would be renewed indefinitely or made permanent would probably not be reasonable and, for that matter, would probably not be genuine. That does not mean however that such a situation cannot arise. Accordingly, if the Applicant genuinely believed that she would stay on in her post which was to become permanent and if this belief is such that it would have been shared by a reasonable person in her position, then I see no reason why this section should not be held to also cover her situation.

0I then turned to the question as to whether or not the Applicant's belief was indeed reasonable. In my view it was. The facts which I find to have been established and which in my view cumulatively establish the reasonableness of the

Applicants belief include the following:

0Although her first appointment was described as a locum, the Applicant did not really fill in for the person in whose place she was allegedly appointed. She occupied a junior position and carried a workload significantly different to the one Jonathan Ivy, the Head of Department, would have carried had he been there. She was one of many in the Department and was allocated work on that basis.

1As a locum one would have expected her to have been appointed until the end of the year and not until the end of January 1997, during which month both she and Jonathan Ivy were working at the same time.

2In terms of the Respondent's rules it was not necessary to interview an Applicant for a locum position such as this one. The Applicant was however interviewed, whereafter she was employed to do exactly the same type of work as the others who had been successful in their interviews and were then appointed on fixed term contracts.

3The Applicant was encouraged to study further to improve her qualifications to improve her chances of remaining at the

Technikon. She did this and in fact obtained her B. Tech. degree in 1997.

4Towards the end of 1996 the Applicant and the three others who had been employed in 1996 were told that they were going to stay in the Department in 1997. They were told that they would have to go through a further interview process, but that this would be the last one they would have to endure.

5The Applicant was then appointed to post M410 as a junior lecturer after attending this second interview. The work she had performed during the 1996 academic year merely continued into the 1997 academic year, even though the designation of her contract was different.

6The Applicant was treated as a member of staff who was expected to continue to do in 1998 what she had been doing in 1997. This expectation that she would still be there the following year was shared by for instance the Vice Principal, Dr Du Preez, and the acting Head of Department, Pieter Raap.

7This expectation is illustrated for instance by the fact that in October 1997 she was asked to present a paper at a conference to

be held in April 1998 on behalf of the Department.

8She was also arranging to appoint tutors for 1998 as instructed and set up further meetings in February for this purpose on 28 and 29 January 1998.

9The Applicant was reflected in the timetable as having a full load for the 1998 academic year and as the co-ordinator of Personal Selling.

10On 28 January 1998 she was introduced to students as the head of Personal Selling and the person to whom they should turn if they have any queries about the subject in the year ahead.

11She prepared the students' study guide for Personal Selling based on her course structure for the 1998 academic year, as she was requested to do.

12The Applicant's name appears in the Faculty of Commerce handbook as a lecturer in the Department for the 1998 academic year.

13She was in fact told to report for work on Monday, 2 February 1998.

1What did cause me some concern is the fact that the Applicant knew that the post was being advertised and that she was being interviewed together with other Applicants. In the normal course this would suggest that there was at least the possibility of another being given the post. The situation here was however quite unusual. Even Pieter Raap, who became Head of Department in 1998, conceded that it was reasonable for the Applicant to expect that her work in her Department would continue. He agrees that he introduced the Applicant to the students on the Thursday before her contract was due to expire as the co-ordinator of Personal Selling to whom they should turn for help if need be. This was well after the interview date. In this regard I accept the Applicant's evidence that she was told by Raap that provided she "did not mess up" the post was hers. This was after Jonathan Ivy, the then Head of Department, in October 1997 told her that her post was being converted into a permanent post and that as a matter of form she had to make application for it and that the post would be advertised. This was in the context of her being told that she could have a research assistant appointed to assist her with her research for her doctorate in the 1998 academic year. This assistant was in fact appointed.

2The advertisement was placed very late and the interviews were only held on 16 January 1998, only about 2 weeks before

the expiry date of her fixed term contract. This would have further reinforced the notion that what was taking place was a mere formality. If there was a serious intention to employ someone else then it made no sense at all for the interviewing process to take place as close to the commencement of the new academic year as it did. Perhaps this would then have reduced the process to somewhat of a charade, as argued by Mr Antrobus. But this would not have been the Applicant's charade, but the Respondent's, and this would not have affected the reasonableness or otherwise of her belief that she was going to get the post.

3After the interview the Applicant was left with the impression that all was well and that she would get the post. It was only on or about 22 January that she was told that there were "a few hitches". She was also told, however, that she should not worry and that everything was fine. On the Thursday before the fixed term ended she was told by Raap that she would be offered one notch up in salary and a contract post for one year which would be converted into a permanent post at the end of the year. He told her that the offer had been written up and was authorised by both the Dean of Commerce and the Vice Principal Academic, but that it was being held up on someone's desk. He went on to tell her to report for work on the 2nd February.

4Although the Applicant was initially told to collect her salary for January on the last day of the month, an indication that her employment would be terminated, she was then told by the Dean that there may be another position for her. Immediately after that she was told to go and collect her salary on 26th January, which in terms of the Respondents practise was an indication that she would remain in employment.

5My conclusion is then that, dispute the fact that the post was advertised and that there were competing Applicants, the Applicant reasonably expected to have her post renewed permanently. This expectation was focused initially on the post given to Mr Mpanza. When she was told that there were certain problems and Pieter Raap told her about being given a contract post for one year which would then be converted, she then believed, once again reasonably in my view, that she would at the very least get this post, which would also have allowed her to remain indefinitely.

6It appears quite clearly from a reading of sections 187 and 188 of the LRA, when read against items 2 (1)(a) and 2 (2)(a) and (b) of part B of schedule 7, that so-called “affirmative action discrimination” cannot constitute a fair basis for dismissing, as opposed to appointing, an employee. It is not

one of the exceptions to section 187 (1)(f) which one finds in section 187 (2), and item 2 (1)(a) is phrased in identical terms to what is defined as being automatically unfair under section 187 (1)(f).

7It is quite clear that the Applicant would have continued to be employed if she was Black rather than White and her dismissal was the result of the purported application by the Respondent of its Affirmative Action Policy.

8If follows then that the Applicant was dismissed in the extended sense of that term as used in section 186 (b) of the LRA and the Respondent has not discharged the onus resting upon it in terms of section 192 (2) to show that the dismissal was fair.

Alternative cause of action:

> 9The Applicant's alternative cause of action is premised on her being an applicant for post M410 and is based on item 2 (2)(1)(a) of part B of schedule 7. The residual unfair labour practice therein includes:
> "the unfair discrimination, either directly or indirectly against an employee on any arbitrary ground, including, but not limited to race, gender, sex, …"

10The topic of affirmative action has been

considered in Public Servants Association of South Africa and others v Minister of Justice and others (1997) 18 ILJ 241 (T) at 306H to 308I, Eskom v Hiemstra NO and others (1999) 20 ILJ 2362 (LC), Leonard Dingler Employee Representative Council (supra) and Department of Correctional Services v Van Vuuren (1999) 20 ILJ 2297 (LAC). None of these cases are directly in point.

11It is not disputed that the Applicant as an Applicant for employment was discriminated against on the basis of her race. In its response to the Applicants statement of case the Respondent admits that its Affirmative Action Policy was taken into account in the selection of Mr Mpanza for post M410. The Respondent then goes on to plead that the implementation of this policy was permissible in terms of item 2 (2)(b) of schedule 7. The onus is then on the Respondent to show that in preferring Mr Mpanza by reason of his race it was

> "adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms;"

(See Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and others (1998) 19 ILJ 285 (LC) at

299 G).

12What needs to be considered then is whether the discrimination against the Applicant is sanctioned by the LRA. This in turn requires an examination of the Respondent's affirmative action and employment policies in order to determine firstly whether these policies fall within the ambit of what is sanctioned by item 2(2)(b), and secondly whether the selection of Mpanza above the Applicant fell within the ambit of such policies.

13The events leading up to the selection of Mr Mpanza as well as what transpired when the selection committee met and what caused it to change its original decision are largely common cause. In any event and to the extent that there may be some dispute of fact I find that the following facts, over and above those I have already set out above, have been established.

> 0Of the Applicants who applied for post M410 three were short-listed. One of the Applicants, Mr Mpanza, did not meet the requirements of the advertisement because he did not have extensive lecturing experience. He was nevertheless short-listed, presumably because he was Black. Once a candidate is short-listed

it is then accepted that he has met the requirements of the advertisement. This issue would then not be raised again.

1A selection committee interviewed the candidates on 16 January 1998. The Applicant and Mr Mpanza were found to be "appointable" and the third candidate not. He then dropped out.

2The committee then debated the relative merits of the Applicant and Mpanza. This is clear from the interview review form which they all completed. From this form and also from the evidence it is clear that they also debated the Affirmative Action Policy. By a vote of four to two the committee then decided in favour of the Applicant. Having done so it had to justify her selection over Mpanza by reason of the fact that she was not from a "targeted group" while he was. This the committee did in the following terms:

"Actual subject knowledge, teaching excellence and sales experience ranked McInnes above Mpanza by the majority of the panel. 4 vs 2. McInnes is a T.N. (meaning Technikon Natal) B. Tech.

graduate."

3This recommendation was then forwarded to the Vice Principal Academic, Dr Du Preez. Dr Du Preez referred the matter back to the selection committee with an instruction that it reconsider the Applicant's appointment on the basis of the Respondent's Affirmative Action Policy. The policy as Dr Du Preez saw it was that if one of the appointable candidates was Black, then that candidate had to be appointed. This was then the approach that he conveyed to the Dean, Mr Dagnall-Quinn, who in turn placed it before the selection committee for its reconsideration. The endorsement by Dr Du Preez on the interview review form reads as follows:

"Apply AA principles. See notes by Dean(covering

page). Mr Mpanza to be offered position 1st. If he declines, then offer to Mrs McInnes."

> 4What the selection committee then did was in effect to rubber stamp the Vice-Principal's views in respect of the Affirmative Action Policy. It reversed its decision, but in doing so reaffirmed its original position, namely that it preferred the Applicant.

5At his interview Mpanza asked if the salary was negotiable and he was told that the range that was advertised was not negotiable. However, an agreement was concluded with Mpanza thereafter by the Equity Manager with the concurrence of the Vice Principal in terms of which Mpanza was offered a much higher salary than the one advertised or for that matter which the post justified. He then became the highest paid member of the Department, earning even more than the Head of Department. This apparently happened because he would not

otherwise have accepted the post.

14The relevant paragraphs in Respondent's Affirmative Action Policy provide as follows:

"1. DEFINITION OF AFFIRMATIVE ACTION

The Technikon defines Affirmative Action as the upliftment and advancement of all previously disadvantaged communities by seeking to address the imbalances of the past. The first disadvantaged community to be considered at Technikon Natal is the African community (indigenous peoples who were here before European colonisation). Other disadvantaged communities include, amongst others, Indians, Coloureds, women and disabled people.

The Technikon is committed to affirmative action as a policy to create a corporate culture of mutual acceptance, understanding, trust and respect amongst our people to redress the imbalances of the past. The initial aim is to reflect or achieve an acceptable representative distribution within all levels of the organisation.

2. PREAMBLE TO AFFIMATIVE ACTION

This concept does not encourage the promotion of disadvantaged employees regardless of skills and abilities, for the purpose of meeting defined targets. It encourages those with promise and potential, through accelerated training and development, to reach the performance standards required for positions of seniority. Consequently members of the disadvantaged groups are promoted to positions of seniority so that

every echelon eventually becomes more representative of the population of South Africa.

Technikon Natal views Affirmative Action as imperative and an investment in the future and should therefore include it in its Strategic Plan and consequently provide for it in its budget.
Technikon Natal believes that to maintain efficiency and enhance competitiveness it must broaden the diversity of its workforce across all disciplines and management levels. The Technikon also commits itself to a nondiscriminatory policy of awarding contracts and procuring services and utilities from the public.
Technikon Natal affirms its commitment to provide the highest standard of tertiary education and services to its students and needs to redress the inequalities in students' educational and social backgrounds to broaden student intake among all academic disciplines offered.
Although Technikon Natal recognises that there may be some resistance to this programme, attempts to hamper it will not be tolerated and even though it is recognised that the objectives of Affirmative Action will not be achieved overnight and will take time, Technikon Natal does not believe that this should be used as an excuse to delay the process. Technikon Natal expects to see a continuous change in the profile of its work-force, particularly at all levels of management and student intake in academic disciplines where disadvantaged students are under-represented.

3. EQUITY

Equity is the outcome of an Affirmative Action Policy. The ultimate aim is equal opportunity for all, irrespective of race, gender, creed, age, sexual orientation, national origin, marital status or physical disability. Technikon Natal commits itself to equity in all its operations including education and employment opportunities and non-discrimination in the provision of other services to the greater community.

To achieve equity, Technikon Natal will:

(a) recruit, hire, train and promote persons in all job classifications without regard to race, creed, gender, age, sexual orientation, national origin,

marital status or physical disability;

15 base decisions regarding appointment on factors which further the principle of equal employment opportunity:

16 ensure that criteria for promotion are in accordance with the principles of equal employment opportunity;

17 admit students in an equitable manner on the basis of academic potential, taking cognisance of previous financial, educational and social disadvantage;

18 provide appropriate support services (staff and student);

19 promote transparency, accountability, integrity and ethics to ensure that public funds are optimally and prudently used."

20 This document must be read against the general Appointments Policy of the Respondent, of which the first clause provides as follows:

"1. POLICY

In order to perpetuate excellence in the organisation, the Technikon, in appointing staff, commits itself to the following principles and practises:

.1 Not to discriminate on the basis of gender, race, or any other grounds.

.2 To fulfil the requirements of the Technikon's mission statement and Affirmative Action Policy.
.3 To ensure that all appointments are conducted in a transparent manner reflecting the new ethos of the Technikon."

21The policy as captured in these documents in my view meets the requirements of item 2(2)(b) of schedule 7. However, reading these two documents together it is quite clear that they do not advocate a policy of blatant racial discrimination in favour of Africans against all others. Whilst seeking to promote the upliftment and advancement of previously disadvantaged communities, in particular the African community, it also seeks to balance this against various other factors. Here the policy clearly has in mind the needs of the institution and the students in respect of any particular appointment.

22The fact that Mr Mpanza was a member of the African community gave him a distinct advantage. This was an important factor having regard to the policy. But this factor had to be balanced against the need to provide the highest standard of tertiary service to its students. This could hardly have been achieved by appointing someone at the eleventh hour where the incumbent was the far better candidate and

was able to continue with the work she was doing, particularly also where the appointee has no previous teaching experience.

23The policy also does not regard race as the sole criteria where two persons are “appointable”. It is far more subtle and sophisticated than that. An indicator that this is so is the requirement that reasons be given by the selection committee if the selected candidate is not from the targeted group. This would hardly be necessary where the person from the targeted group was to be appointed as long as he was “appointable”. In fact, it seems to me that there would be no need for a selection committee at all if that were the sole criteria.

24What the policy (and the form) clearly have in mind is the need to critically address all the relevant factors and if a reasoned and balanced decision results in the selected candidate not being from the targeted group reasons must be given. This is obviously what happened on the first occasion the selection committee met. They took into account the Affirmative Action Policy and weighed it against the respective merits of the two candidates. Having done so, they selected the Applicant. When the matter was sent back to them they repeated their preference for the Applicant but acquiesced, because they felt they had no choice, in the stand taken by

the Vice Principal.

25There is also no policy that candidates from a targeted group be paid more than other applicants or that they be offered more than the advertised salary. Indeed, this flies in the face of the policy document which requires the creation of a corporate culture of mutual acceptance, understanding, trust and respect, as well as emphasising the need to promote transparency and integrity and to ensure that public funds are optimally and prudently used. The agreement with Mr Mpanza to pay him more than what was advertised or indeed what the post justified was clearly in breach of the policy. Without this additional salary he would in all probability not have accepted the appointment.

26This Court should obviously be loath to second guess the manner in which an internal policy such as this is implemented by those charged in the first instance with doing so. See for instance Motala and Another v University of Natal 1995 (3) BCLR 374 (D) at 384 C. But the situation is quite different where it is found that the policy, read properly, was not applied at all.

27I accordingly find that the appointment of Mpanza was not in accordance with the Respondent's Affirmative Action Policy as read together with its Appointments Policy. From this it

follows that the Respondent has failed to justify the discrimination against the Applicant in terms of item 2 (2)(b) of schedule 7 to the LRA.

Conclusion:

> 28I accordingly find that the Applicant was unfairly dismissed as that term is described in section 186 (b) of the LRA and also that her dismissal was automatically unfair in terms of section 187 (1)(f) of the Act. Had I found that the Applicant had failed to establish a dismissal in the wider sense as defined, I would have found in her favour on her alternative cause of action.

29It appears to be common cause that the post in question is presently vacant, Mr Mpanza having resigned, and in any event the Applicant is capable of filling it. There is then in my view no reason not to order reinstatement.

30In the circumstances of this case I see no reason why costs should not follow the result.

31I am indebted to both Mr Pillemer and Mr Antrobus for their full and helpful arguments which greatly assisted me in the writing of this judgment.

32In the result I grant an order in the following terms:

1the Respondent is directed to reinstate the Applicant in her employment on terms and conditions no less favourable to her than those which apply in respect of post M410;

2the Respondent is directed to pay the Applicant back-pay being the remuneration she would have received had she been appointed under post M410, from 2nd February 1998 to date of reinstatement;

3the Respondent is ordered to pay interest on the aforesaid back-pay calculated at the legal rate from the date upon which

each month's salary

would have been

paid to date of

payment;

4the Respondent is

ordered to pay the

Applicant's costs.

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GH Penzhorn AJ
March 2000
Appearances:

1For the Applicant:
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Dates of hearing: 25, 26, 27, 28 and 29 October 1999, 9 and 10

December 1999 and 13 and 14 January 2000.