

## DISPUTE RELATING TO PROMOTION OR NON-APPOINTMENT

**NB:** The law does NOT require that each and every factor set out below apply in all cases. The law encourages the minimum of legal formality. This checklist is merely a guide and should be used with care and flexibility.

### JURISDICTION

- 1 Is this an appointment or promotion dispute?
- 2 Did the ER in fact fail or refuse to appoint / promote the applicant?
- 3 If the applicant was successful, would her move to the new position have been a promotion? (eg salary increase, more responsibility, higher status and greater authority)
- 4 Is this dispute about a claim for higher remuneration; or that a post be re-graded; or that the applicant be retained in an upgraded post without increased remuneration; or that a higher post be created? If so that is not a promotion or non-appointment dispute and there is no jurisdiction.
- 5 Is this dispute relating to the ER's promotion policy? If so, there is no jurisdiction.
- 6 Does the applicant claim that the decision to appoint was grossly unreasonable, or made in bad faith, or irrational, or arbitrary or capricious? If not, then one cannot interfere with decision.
- 7 Is this dispute between the applicant and her own ER (in the case of a promotion dispute)?

### GENERAL

- 8 Is there a collective agreement that regulates any of the issues? If so, which provision of the agreement has not been complied with?
- 9 At what stage was the applicant's application eliminated? When was the decision to appoint / promote made? Is the applicant / appointee an internal or external candidate? If internal how did the applicant/appointee perform in their previous posts?
- 10 Does the applicant claim that but for the claimed irregularity she would have been appointed? What is the claimed irregularity?
- 11 Does the applicant claim that she is the best candidate? Or does she admit that the appointee is the best candidate? If not, why not? (If the applicant cannot prove that she is the best candidate then there has not been any substantive unfairness. No substantive relief can be granted in such circumstances even if there has been some or other procedural lapse.)
- 12 Is the applicant a temporary, fixed term, or part-time EE who is applying for an indefinite position? If so, how long has the applicant been in such position?
- 13 Is the applicant applying to be promoted to the post in which she has been acting? If so, how long has she acted? Did the applicant perform her duties competently? If not, have there been any complaints about her performance? Did the applicant have a reasonable expectation of being appointed? How did that expectation arise?
- 14 What reasons, if any, have been furnished for the failure or refusal to promote / appoint?

### DETAILS OF POST

- 15 Was there a vacancy in an existing substantive post? Or was this a newly created post? Is the post funded? How many posts need to be filled?

- 16 Actual title of the post, level or grade of post, and the site where applicant was to be posted.
- 17 What is the job description? What are the essential requirements of the job its qualifications & experience? Are the essential requirements related to the job? Does filling the post advance & promote critical service delivery objectives?

### ADVERTISEMENT

- 18 Was the post advertised? Which medium was used? Date of advert? Was the advert designed to target the applicant or similarly placed persons?
- 19 Are there agreed procedures for advertising posts internally and externally? If so, were such procedures followed?
- 20 Was this appointment made as a result of targeted recruitment process (ie headhunting)? If so, did the normal advertising process fail to produce any suitable candidate?

### APPLICATION FOR THE POST

- 21 Did the applicant / appointee apply for the post?
- 22 Were the respective applications of the applicant / appointee complete and did they include the required documents?
- 23 Was the information furnished in either application form truthful? Was there any failure to make disclosure of important information? Would either applications have gone further if these requirements were not met?
- 24 Were the respective applications of both applicant / appointee received before the closing date?
- 25 Do the applicant / appointee satisfy the essential requirements for the job its qualification & experience?

### SIFTING & SHORTLISTING

- 26 Was the short-listing panel correctly constituted?
- 27 Were the applicant / appointee short-listed?
- 28 What were the criteria for short-listing? Were they applied to both applicant / appointee?
- 29 Was there any irregularity / unfairness in the short-listing? If so, what is it?

### INTERVIEW

- 30 Was the interviewing panel correctly constituted?
- 31 Were the applicant / appointee interviewed?
- 32 Were the interviews of the applicant / appointee fair and procedural? If not, what was the lapse?
- 33 What was the applicant's / appointee's ranking?
- 34 Does the panel recommend or appoint? Did the ER ignore the recommendation of the panel and appoint another candidate and furnish reasons for such appointment?

### APPOINTMENT OF APPOINTEE/S

- 35 Was the appointee ranked number 1? If not number 1, what is the reason for appointing him? If there is more than 1 post, what was the ranking of all the appointees? (Have they been joined in these proceedings if applicant seeks setting aside appointment.)
- 36 Date of appointment? Has the appointee commenced to perform in his post?
- 37 If an appointment has not been made, what stage has the recruitment process reached?

### EMPLOYMENT EQUITY ACT (EEA)

**Does the ER claim that the appointee was appointed on basis of affirmative action? If so, then only proceed to consider factors below.**

- 38 Is there an employment equity plan (EEP) for relevant period? Are there reports its s 21? If there are no s 21 reports, has the ER made appointments from date of EEP without filing s 21 reports? How is it measuring its own progress?
- 39 Which category of person is most under-represented in the organisation or department?
- 40 What is the numerical target and timeline for equitable representation?
- 41 Is the applicant / appointee a member of designated group? If so, which? (African, coloured, Indian, woman or disabled person.)
- 42 Did the advert invite applications from all and sundry, or members of designated group, or specified members of designated group? If so, which?
- 43 If the appointment was not made its EEP then what was the reason for deviating from EEP?
- 44 Is there a barrier to appointment? If so, who is excluded by the barrier?
- 45 Does the applicant / appointee satisfy the inherent requirements of the job both its qualifications and experience? If not, give details.
- 46 Is the appointee suitably qualified? (Suitable qualification can arise as a result of either formal qualifications, prior learning, relevant experience, or the capacity to acquire within a reasonable period of time the ability to do the job, or any combination of the above.) Set out grounds on which the appointee is claimed to be suitably qualified.
- 47 Is the applicant contending that reasonable accommodation ought to have been made? If so, for what reason? What would have been the nature thereof? Did the applicant suggest to the ER that reasonable accommodation be made? If so, what was the response?
- 48 If reasonable accommodation was made for appointee, what was the nature thereof, and reason? Why was the same accommodation not considered for applicant?
- 49 The following further issues must be considered in an arbitration: a) If the applicant's complaint is about direct discrimination, what is the prohibited ground its s6? b) Is the complaint one of indirect discrimination? Indirect discrimination occurs when a policy or practice appears to be neutral but has a discriminatory effect or outcome for a particular group of employees and cannot be justified. The ER's motive and intent is generally irrelevant. If it is indirect discrimination, is reasonable accommodation possible without imposing undue hardship on ER? c) Is there an attack against the policy or practice, on the grounds of either unfair discrimination, validity, consistent application, and compliance with legislation? If so, check on jurisdiction.

### RELIEF

- 50 Is this a clear case for ordering the promotion? Is the arbitrator well placed to determine which candidate is most suitable for the ER? What has been the delay since the appointment? Would there be disruption in the workplace if the incumbent was removed? Is the incumbent competent? If there has been an irregularity is it substantive or procedural? An arbitrator should interfere in the appointment / promotion only if there has been a substantive lapse.