

Ruling clarifies discrimination due to criminal history in the employment process

An April 2024 decision by the South African Labour Appeal Court in *O'Connor v LexisNexis* serves as a reminder to employers that the statutory protection against unfair workplace discrimination extends to employment applicants, and that employers should carefully consider the grounds for making decisions regarding the recruitment of staff.

 By Johan Botes 14 May 2024



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The case concerned a matter of unfair discrimination under the Employment Equity Act and the refusal to employ a job applicant because of their criminal history. The court ruled that the unfair discrimination in this instance was based on arbitrary grounds and that the applicant's criminal history was not relevant to the inherent requirements of the role.

This case highlights the risks of rote reliance on factors used by employers to select or reject staff. Businesses should constantly scrutinise the reasons for seeking applicant information and whether reliance on such information will pass legal muster. There is often less than convincing evidence of the link between a factor considered to have a direct bearing on recruitment selection and the true, inherent requirements of a vacancy or role.

Past impressions

For example, if an applicant for a position of trust has a history of dishonest behaviour, this may serve as a disqualification for the role. When considering applications for roles for prescribed officers, statutory positions that require the incumbents to be fit and proper persons (for instance, attorneys, estate agents,

auditors), and positions with heightened requirements of integrity (financial directors, compliance, persona protection), it may warrant disqualification of candidates with recent convictions that impugn their integrity c who have been dismissed from service for workplace misconduct involving any form of dishonesty.



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However, expunged convictions of fraud dating back more than 20 years, for instance, should not automatically prevent an applicant from being employed in a role where there is little else other than the normal requirements of trust and fidelity expected of every employee. By the same token, refusing to employ a person as a driver because they had a drunk driving conviction 20 years ago as a teenager but have kept a clean record since is hardly going to survive a legal challenge.

Arbitrary grounds

The judgment builds on a number of previous cases to unpack what constitutes arbitrary grounds in the context of unfair discrimination. While South Africa's employment equality legislation lists a wide range of protected grounds, it also allows for protection against unfair discrimination on grounds that may not be listed in the legislation but are nonetheless arbitrary.

The court confirmed that for such a claim to succeed, the discrimination must be proven to be based on "attributes or characteristics that have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a manner that is comparably as serious as discrimination on a listed ground, such as race, gender and culture."

The applicant's criminal conviction is an inherent attribute intimately connected to how society perceives them. The court concluded that by not permitting people convicted of criminal offences to eventually be allowed back into society, we deny them their right to freely participate in society with dignity. This resulted the ground being treated as if it were listed, carrying the same weight as discrimination based on race, ethnicity, gender, sexual orientation and other protected grounds.

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