

**IN THE EDUCATION LABOUR RELATIONS COUNCIL**

**CASE NUMBER PSES 118-06/07**

**DATE 24 AUGUST 2006**

**S.A. HERMAN**

**APPLICANT**

**WESTERN CAPE EDUCATION DEPARTMENT**

**RESPONDENT**

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**ARBITRATION AWARD**

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**PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

The arbitration took place at the offices of the Western Cape Education Department in Cape Town on 30 June 2006. The applicant, Mrs. S. Herman, was represented by Ms. S. Smart, the executive officer of the National Union of Educators. The respondent, the Department of Education Western Cape, was represented by Mr. H. Mzaca, an assistant director and Ms. N.A Tsadu, its labour relations officer.

**THE ISSUE IN DISPUTE**

The applicant alleges that the issue in dispute pertains to the Interpretation and application of a collective agreement regarding appointment.

**THE BACKGROUND TO THE DISPUTE**

Herman is currently employed by the respondent in a vacant substantive post at Bosmansdam primary school. In 1994 she was in the employ of the respondent but applied for early retirement due to severe ill health when she suffered a nervous breakdown. In 1999 Herman was appointed into a school governing body post at Bosmansdam primary school when the respondent advertised post 2334 in vacancy list 2 of 2005 Herman applied to be appointed into this post which is at Bosmansdam primary school.

The school governing body nominated Herman for the post and recommended her to the respondent for appointment. The respondent rejected the recommendation on the grounds that Herman had taken early retirement for reasons of ill health and therefore did not qualify for the post.

After much correspondence and meetings between the parties the respondent approved Herman's request for permanent reappointment in April 2006. It was also agreed between the parties that Herman qualifies for any post from a medical perspective.

While the school governing body still recommends Herman for the post the respondent notified the principal of the school on 3 May 2006 that it had rejected the recommendation

on the basis that Herman does not qualify for appointment as she did not qualify for appointment at the time she qualified for the post.

### **SUMMARY OF EVIDENCE AND ARGUMENT**

Leon Ernest Rousseau testified under oath for the applicant. As the chairperson of the school and legal advisor to and parent at the school he was involved in the process that led to the school governing body's recommendation of Herman for the post. The school governing body was entitled to accept that Herman was medically fit for the post when it received her application from the respondent. At the stage at which the school governing body performed its function, proof of Herman's medical status was not a requirement. The school governing body had also not re-advertised the post as it had in turn not accepted the respondent's rejection of its recommendation. The respondent was in a better position than the school governing body to determine various aspects of an application for a post for example determining the authenticity of documents in the application form. He had no idea what the respondent's function was in respect of the appointments.

With reference to 4.3 he testified that the policy was unconstitutional as it was discriminatory. The applicant was to be tested against a younger applicant. He testified further that he had rejected the reason for Herman's non-appointment as the respondent should prove that she was medically unfit at the time. He conceded that the school governing body would not be in possession of documents such as annexure A and the correspondence between Herman and the respondent. He conceded too that there is a difference between a psychologist and a general practitioner and that the letter from Dr. Truter appears to be an opinion and that he would have to comment thereon.

Harry Wyngaard, the deputy director for personnel management of educators testified under oath for the respondent. He confirmed that annexure A was a report from the medical board which shows that Herman was declared medically unfit for duty.

He said that Herman was the first person that the respondent had reinstated after having been retired for reasons of a medical nature. This was done on appeal and on humanitarian grounds as it was in fact the policy of the respondent not to reappoint persons who had been so retired. Even if Herman were medically fit the respondent need therefore not appoint her as she had been medically boarded. He said that there were sound reasons for in fact appointing Herman into the post and that it was as a consequence of this that the respondent had then in fact reinstated Herman.

Wyngaard testified further that the respondent had appointed Herman in a temporary capacity as the principal of Bosmansdam primary had advised the respondent that the school had no one else to appoint into the position and also because the school governing body was unsure of its position.

He said that Herman's application was turned down in terms of the Personnel Administration Measures(PAM) chapter B 2.3 which states that preference must be given to young people and teachers who have been declared in excess and in terms of the respondent's policy which says that the respondent does not employ permanently persons who had been medically boarded. There were currently two hundred and fifty teachers in excess.

He said that although there was no undue influence in the appointment of Herman, the head of department might decline a nomination for reasons of non compliance.

## **ANALYSIS OF THE EVIDENCE AND ARGUMENT**

It is clear from the evidence presented at this arbitration that Herman had applied for the advertised post and that she was then the sole nomination of the school governing body. While the respondent argues that the school governing body had not complied with democratic principals in the Employment of Educators Act there was no evidence to this effect led at the arbitration. It was in fact clear from the argument of the applicant that there had not been any objection to the process when nominating Herman.

Although it was further argued by the respondent that there were numerous posts that the respondent had advertised between 1999 and 2005 and for which Herman had not applied because she had been waiting for the post at Bosmansdam, there was no evidence to support this contention led at the arbitration. Even if it were the case that Herman had waited for a post at Bosmansdam there is in itself nothing wrong with that. Any applicant is free to choose which job to apply for or not.

Although the respondent argues in the conclusion of its closing arguments that Herman's reinstatement is subject to her submitting a certificate from a psychiatrist a letter from the respondent dated 29 March 2006 shows clearly that her reinstatement has been unconditionally approved. The respondent argues of course that such was not the position in which Herman was at the time of application for the post.

I however cannot see what the purpose would be of re-advertising the post now that Herman's reinstatement has in fact been approved. Such re-instatement had also clearly come about as a consequence of there having been good reasons that she should be appointed. There is therefore no logic apparent in the respondent's having reinstated Herman as a consequence of her being suitable for the post and then not appointing her into the post.

As the applicant has pointed out there was no challenge to the nomination of Herman from any of the other applicants for the post. This leads me to the respondent's contention or statement of its preference pertaining to young entrants to the profession and teachers who had been declared in excess. There is no evidence presented by the respondent as to how this policy would be implemented in this case. Were the post to be re-advertised and Herman to be nominated again, how and when would the respondent apply this policy? It begs the question as to what prevented the respondent from applying this policy in the first place. There is no indication of any young entrants to the profession or any excess teachers having applied for the post. In any event it cannot be said that Herman had had an opportunity of an extensive career in teaching. She had in fact been in the respondent's employ for only a short while when she was medically boarded in 1994.

The applicant agreed however that the WCED has the right to verify and request further documents and information, after nominations are received from the school governing body, in order to make the appointment. This also happened in Herman's case where her medical status was questioned. This is however no longer relevant as the reinstatement of Herman is now a fait accompli and as Wyngaard testified, she is now eligible for consideration in the respondent's making appointments.

The applicant argues further that in order to be considered for re-appointment, a person who had retired on pension prematurely, has only to apply for re-appointment to a specific, vacant post and that there is no reference to first applying for "re-instatement" in order to be allowed to apply for re-appointment in such a vacant post. It is the contention of the

respondent that this is a matter of policy to give preference over medically boarded teachers who have had an opportunity of an extensive career in teaching to excess teachers and young entrants to the profession. It was therefore the contention of the respondent that even if an applicant who had been medically boarded were medically fit that such applicant need not necessarily be appointed.

With reference to preference given to young teachers suffice it to say that Herman should not fall foul of this aspect of the respondent's policy as she herself cannot be said to have had an opportunity of an extensive career in teaching.

In respect of the respondent's contention that it would give preference to excess teachers there is no evidence before me of any excess teachers having applied for the post.

The respondent in my view, relies solely on the technical issue of Herman's not having been reinstated at the time of her application and as a consequence of her medical status. Given the fact that Herman's reinstatement is no longer an issue I find that it would be unfair to now expect the school governing body to redo the process for filling the post.

Furthermore, the respondent's attitude in appointing Herman into a temporary post at the school prior to her reinstatement indicates that the respondent itself had probably considered the issue regarding Herman's medical status to be resolved. Even if this were not the case it would be hard to understand how Herman could be medically fit to teach in a temporary capacity and not in a permanent capacity. But, as stated above I am of the view that the reinstatement came about as a consequence of the respondent's having considered her to be suitable for the position

I am therefore of the view that by virtue of the respondent's having appointed Herman, albeit in a temporary position, that it had considered Herman capable of being appointed as a teacher together with all that goes with it. To now suddenly revert back to the need for a psychiatrist's report is unfair conduct on the part of the respondent. The respondent's conduct therefore in failing to appoint Herman into a permanent position and particularly in the position in question is unfair. Although this failure to appoint is not in violation of any collective agreement as alleged by the applicant (our caselaw has shown that the PAM is not a collective agreement) the respondent has clearly failed to appoint Herman as it is obliged to do in terms of the Personnel Administration Measures which are the terms and conditions of employment which in turn must be part of the employment contract (an agreement) between the respondent and its educators.

### **AWARD**

I order that the respondent immediately appoint Herman into the position she applied for at Bosmansdam primary school and that such appointment be without loss of remuneration or benefits backdated to 1 January 2006 with the necessary adjustments made taking into account salary paid to Herman in respect of her holding the position in a temporary capacity. Any payment of monies to Herman in terms of this award must be made by no later than 30 September 2006 after which it will attract interest at the legal rate of interest. monies.

L. MARTIN  
PANELIST