

IN THE ARBITRATION UNDER THE AUSPICES OF THE EDUCATION
LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

Case No.PSES 12-05/06

In the matter between :

A.J.Sigudla

Applicant

And

Western Cape Education Department

Respondent

ARBITRATION AWARD

Details of Hearing and Representation

The arbitration hearing took place on the on the 27 May 2005 and 27 July 2005 at the offices of the WCED in Cape Town. The Applicant was represented by Bongani Maggaza , a representative of the union SADTU. The WCED was represented by Zanele Mazosiwe .

Background and issues in dispute

Mr Sigudla is employed as an educator by the Western Cape Education Department (WCED). He claims that he submitted an application to the WCED for a headmaster's post at Rainbow Primary. The WCED , denies that it received the application. Mr Sigudla claims that the WCED was negligent in failing to acknowledge receipt of his application and of failing to process his application which resulted in him not being part of the selection process for the post. He claims that the conduct of the WCED amounts to unfair labour practice, and has requested that I order a repeat of the entire process.

Evidence

What follows is a summary of salient points raised during evidence.

Applicant presented the evidence of :-

1 .Virginia Sowazi

She is a parent and member of the SGB. She overheard, whilst observing the process for the principals post that an application had been entered in the wrong place. The conversation that she overheard was being conducted by Nadia and Stevens. She does not know whose application they were referring to because she did not see it.

Under cross examination she testified that she had seen the application of a lady that was deceased that should not have been in the envelope containing the applications . Nadia and Stevens had spoken of another application that was in the wrong place. She does not know Mr Sigudla and was also not aware that he had applied for the post.

2. Basil Stevens is the chairperson of the SGB . After completion of the shortlisting process for the principal post, they began the process for the HOD post. During the shortlisting process for this post, they found an application for the principal post. The application was that of Mr Sigudla. It was decided to disregard the application because the shortlisting process for the principal post was already complete. He was not sure whether this was recorded in the minutes. Mr Sigudla's name was not listed in any of the envelopes There was no stamp or markings on the application. The post number on the application form was for the principal post. They did not report this incident to the WCED because the application was disregarded by the panel. The SGB did not inform Mr Sigudla and he was not sure how Mr Sigudla became aware of the incident. The Department representative was not present for the shortlisting process for the HOD post. He assumed that the principal would take up the incident with the WCED.

3. Nadia Stevens testified , vice chairperson of the SGB, testified that during the shortlisting process for the HOD post, Stephens found the application of Mr Sigudla. There were no red marking or stamps on the application.

Under cross examination, she testified that this was the first time that such an incident had occurred. When questioned about why the incident was not reported to the WCED, her response was that she reported the incident to the principal. The incident should be minuted because it happened during shortlisting. The application was found in the envelope containing the applications for the HOD post, but Mr Sigudla's name did not appear in any of the control sheets.

4. Sigudla testified that he applied for the principal post by taking the application form personally to the offices of the WCED . He had placed the application in a box indicated for this purpose. He became aware that the interviews had taken place because he overheard people talking about the interviews. He then telephoned Ms Solomons at the WCED to enquire whether his application had been received. She said that his name had not been captured on the computer database and that therefore he had not applied. When he insisted that he had applied, he was told that he should telephone the school to find out about his application . The principal of Rainbow primary said that his name was not on the list. He had also applied for a post at Milnerton High School at the same time that he submitted his application for a post at Rainbow Primary. He had received an acknowledgement from Milnerton High School that his application had been received, but that he had not been shortlisted.

Under cross examination, he testified that he did not report the fact that he had become aware that his application had been found in the wrong envelope to the WCED because Ms Solomons was tired of his telephone calls.

WCED

1. Nazili Solomons

She is the chief personnel officer. She testified that after the closing date for the application for any post is reached, all envelopes are opened and a stamp together with an application number is affixed to the application. All the information is then punched into the computer. The applications are then sorted out and put into a file and a control sheet is printed. The control sheet is then checked and re-checked against the number of applications, until a final control sheet is printed.

Mr Sigudla's application is not recorded against his persal number. Mr Sigudla claims that his application was found in the envelope containing the applications for the HOD post. If this were so then his name ought to have been recorded in the list containing the applications for the HOD post , but this was not so. If Mr Sigudla had reported to her that his application had been found amongst the applications for the HOD post, she would have investigated and checked for his name against the invalid and late applications. They did not receive any application from Mr Sigudla for any post.

2. Karen Engels is the principle personnel officer for the WCED . Her testimony with regard to the procedure once applications are received was the same as that of Ms Solomons. In addition, she testified that once the final control sheet is published, the sheet, together with all the applications, are sent to the relevant school. The fact that Mr Sigudla's name did appear on the control sheet meant that he did not apply. All applications are checked very carefully.

Under cross examination she testified that the WCED does not always acknowledge receipt of applications received. Recently they have started acknowledging receipt. If an application was not stamped and signed, it meant that it was not received. The SGB of Rainbow Primary did not telephone to say that they had received an application that was not on the list. It is possible that mistakes can happen, but the SGB should have informed them. They had not received any application form Mr Sigudla for any post. His name did not appear on the control sheet for the applications at Milnerton High School.

Analysis of evidence and argument

The main factual and legal disputes during this arbitration centred on the processing of the application of Mr Sigudla for the principal post at Rainbow Primary. Mr Sigudla is alleging that his application was mishandled by the WCED which resulted in him not having been given an opportunity to compete for the post with the other applicants. The Personnel Administration Measures (PAM), Chapter B, Clause 3.2(a)(i) directs the employing department to acknowledge receipt of applications by informing the applicant in writing. Witnesses for the WCED testified that due to logistical problems receipt of applications is not always acknowledged, and that they have only recently attempted to try and acknowledge receipt of all applications . In any event , the WCED denies that it received any application form Mr Sigudla for any post. In order to succeed in his claim of unfair labour practice the onus rests on Mr Sigudla to prove that his application did reach the WCED , and that he was treated unfairly by WCED's failure to properly process his application.

Mr Sigudla testified that he personally delivered his application to the WCED.

The key witnesses for Mr Sigudla , namely the chairperson of the SGB and one other member of the SGB testified that Mr Sigudla's application was found in the envelope containing applications for the HOD post, after the process for the filling of the principal's post had been completed. Their evidence was not refuted by the WCED and I have no reason to doubt their testimony. No departmental representative was present during the filling of the HOD post. PAM directs that a departmental representative is to be present during the process, and that such person can be the principal of the school if he is not an applicant to the post. The witnesses testified that the principal was present during the filling of the HOD post. Since the principal could not have been an applicant to the lesser HOD post, I can assume that he was present as the departmental representative. The incident was not reported to the WCED by the principal, despite the fact that it was brought to his attention by the two members of the SGB. The WCED claims that if the incident been reported to them by the SGB or by Mr Sigudla, then the matter would have been investigated. I am of the view that the incident ought to have been reported by their own representative, the school principal. Indeed , the witnesses testified to the fact that they expected the principal to do just that. The WCED has a statutory duty to ensure that procedures set out in the Employment of Educators Act of 1998, South African Schools Act of 1996 and the Labour Relations Act 66 of 1995 are complied with.

Although the witnesses for the WCED emphasised stringent procedures that are followed once applications are received, they did concede that mistakes can happen. Mr Sigudla testified that he also applied for a post at Milnerton High School and that he received a letter from Milnerton High School confirming that his application had been received. A copy of such letter was produced. The WCED denies that it received any application from Mr Sigudla for this post and produced a copy of its control sheet to confirm that his name was absent from their records. It is evident that both applications for the respective principal posts at Milnerton High School and Rainbow Primary, did reach the respective schools, without having been properly or adequately processed by the WCED. In the case of Rainbow Primary, Mr Sigudla was clearly prejudiced by the conduct of the WCED in this regard. The conduct of the WCED amounts to unfair labour practice as defined in Section 186(2) of the Labour Relations Act 66 of 1995.

Mr Sigudla has requested me to order a repeat of the process. I must also consider whether the rights of any third person would be infringed should I order a repeat of the process. At the conclusion of the arbitration, I was informed by the WCED that an appointment has been made in the principal post as from the 1 July 2005. Having decided that there was unfair conduct on the part of the WCED, I must now decide whether the unfairness warrants a repeat of the process. Save for the fact that applicant was denied an opportunity to compete for the post, the filling of the principal's post at Rainbow Primary could very well have been procedurally fair in all other respects. The procedural correctness or details of the shortlisting and interview process was not the subject of this hearing and accordingly I do not deem it appropriate to order a repeat of the process.

Section 194 of the Labour Relations Act 66 of 1995 grants me a discretion to determine an unfair labour practice dispute on terms that I deem reasonable, which may include compensation. In regard to compensation as penalty for an employers procedurally unfair conduct, the courts have, in decisions both prior to and subsequent to the 2002 amendment to section 194, consistently taken into account the seriousness of the unfairness and extent to which the employer deviated from the norms of fairness (*Numsa v Dorbyl Ltd (2004) ILJ 1300 (LC)* ; *Scribante v Avgold LTD (2000) 21 ILJ 1864 (LC)*).

In considering compensation in the present matter, I have taken into account the applicant's constitutional right to fair labour practices as well as the provisions in the Labour Relations Act 66 of 1995. In determining the amount of compensation, I take into account the fact that the WCED was grossly negligent in failing to process his application and that Mr Sigudla was deprived of his right to compete fairly for a post for which he had applied.

Accordingly I make the following award:

Award

1. In accordance with section 194 of the Labour Relations Act, the WCED is ordered to pay to the applicant the sum of R3 500,00 as compensation.

2. The WCED must pay the said amount on or before the 15 September 2005.

Arthi Singh-Bhoopcahnd

ARBITRATOR

23/08/05