

EDUCATION LABOUR RELATIONS COUNCIL



Panelist : Luvuyo Bono
Case Number : PSES149-08/09WC
Date of Award : 30 June 2009

In the **ARBITRATION** between

Esau
(Applicant)

And

Western Cape Education Department
(Respondent)

Union / Applicant's representative :
Union / Applicant's address :
Union / Applicant's Telephone No's :
Union / Applicant's Fax No's :

Respondent's representative :
Respondent's address :
Respondent's Telephone No's:
Respondent's Fax No's :

In the matter between:

Esau

Applicant

And

Western Cape Education Department

Respondent

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION

The arbitration concerning the alleged unfair dismissal of the Applicant by the Respondent was held at the Respondent's offices on 6 February, 4 and 5 April and finalized on 6 and 7 May 2009. Mr. G Nortjie an attorney represented the Applicant while the Respondent was represented by Ms. D Ntetana.

ISSUE TO BE DECIDED

The issue to be decided is whether the Applicant's dismissal was fair.

BACKGROUND

The Employee worked for the Respondent at the Lentegour Special School. The employee was charged with six counts, three of assault, one relating to pornography, another relating

to using a stick and imitating masturbation; and the last one relating to the use of vulgar language. In his disciplinary hearing, the employee was represented by SADTU and he pleaded guilty to the assault charges. The employee was found guilty and dismissed.

SURVEY OF EVIDENCE AND ARGUMENT

Jeremy Daniels testified that he was a student at Lentegeur Special School. He cannot read properly. He was in the employee's class. On a day he cannot remember, the employee threw him on the head with a wooden block. He had hit another learner that had made him angry. He went to report the matter to the Principal's office and the Principal said the employee must apologise. He had no blood where the block hit him but it was sore. The employee also brought pictures of women in bra's and panties and he showed these pictures to the class. On another occasion the employee took a stick and made as if he was masturbating with the stick in front of the class. When the employee did this, he covered his head with his hands. The employee also insulted the learners and called them names.

Alfonso Samuels testified that he was a student at Lentegeur Special School. He reads slowly hence he was at this school. The employee showed them pictures of naked women. These pictures came from the employee and Donovan. The employee also called the learners in insulting names. The learners would laugh when the employee called them with the said names, but he did not like what the employee did. On the one day, the employee threw a wooden block on Jeremy Daniels. On one Monday in 2006, he employee assaulted him with a stick on the bum.

Terrence Peters testified that he was a student at Lentegeur Special School. He is a slow thinker hence he is at the school. The employee was his teacher. The employee swore at the learners and called them insulting names. The employee also wrote on the board the insulting names he called them by. On one day the employee took a stick and made as if

he was masturbating. The employee also threw a block of wood at a fellow learner. Donovan brought pictures of naked women and the employee showed the class those pictures. On one day the employee took a stick and made as if he was masturbating with it. Mrs. Blundin told him to come and tell the truth of what happened and what the employee did. The one day, the employee dragged him by his ear and that was painful. He went to the Doctor and was given eardrops. On another occasion, the employee hit him on his arm and he grabbed him as if he was going to hit him back.

Henriette Erasmus the presiding officer in the employee's disciplinary hearing testified that she followed the standard procedure in conducting the employee's hearing. In this hearing there was an unusual request where the employee's witness was to testify before the employee. This witness testified on the procedure and not on the merits of the incidents. The employee pleaded guilty to the first three charges. It was evident to her that the trust relationship was broken down. The employee or his representative never sought clarity about the assault charge.

Eric Jacobs testified that he was the class assistant in the employee's class. As a class assistant he was in the class with the employee at most times. He picked up the kids from home to school and after school delivered them home. If an incident occurred he would have known about it. Charge 4 is a lot of lies. The children are the ones who brought the pictures to the class. The employee never demonstrated the pictures to the learners all he did was to take the photos to the Principal. The employee never used swear words to the learners. Mrs. Blundin is the one who is the main culprit. She said she would make sure that the employee loses his job. The employee is a good teacher and the learners that testified in the arbitration are being influenced by Mrs. Blundin. The employee only touched Alfonso with a stick, he does not know how that would amount to an assault. There were no marks of blood. His understanding of assault is that there should be blood. The employee never pulled Terrance by the ear.

The employee testified that he never showed learners pornographic pictures. He showed them pictures of a calendar of the Sports Illustrated Magazine. He did not force the learners to look but was asking who had brought the magazine. He showed the learners the calendar about three times and he paged it while showing it to them. The pictures in the magazines were of ladies in bathing costumes. He never used a stick to imitate masturbation in the class. On one occasion the kids reported to him that Donovan had been showing kids pornographic material in the bus. Jeremy also reported that Donovan had hid the pornographic pictures in his bench. He went to take them and reported the matter to the Principal. This became a big joke. Donovan's father was called to the school and advised of the pornographic pictures brought by Donovan to the school. He never used swearing words to the learners. The only time he used insults in the class was when he was telling the learners to refrain from using the words, and he used them as an example of the words that are unacceptable. He never wrote insulting words or asked the learners to write such words on the board. After the incident on charge 1, Alfonso's mother came to the school. What had happened is that Terrence approached him saying Terrence had hit another learner with a broom stick on the face. He was later told that it was an accident. He said he would sort him out when he comes back to the class. As the kids walked into the class, he gave Alfonso two spanks with his stick on his legs. The other kids laughed and Alfonso did not like it and he said he would report the incident to his mother. He called Alfonso's mother first to report the incident. Later he was called to the office with Alfonso's mother and the matter resolved. Mr. Strip from the department was also advised of the matter. Regarding the charge 2 incident, on the day in question he heard the spindle molder machine running. The machine is very dangerous and he turned back and saw Jeremy running away. He was upset as he did not know who had switched it on. He took one of the off cuts and threw it at him. The off cut hit Jeremy on the head. He now knows that he should not have done this, but he was angry. He did not intend to assault him.

ANALYSIS OF EVIDENCE AND ARGUMENT

It is common cause that in his disciplinary hearing, the employee pleaded guilty to the first three charges which relate to the assault of learners. These charges relate to hitting Alfonso Thomas with a stick on the behind of his legs; throwing a block of wood on Jeremy Daniels; and pushing Terence Peters in his face close to his ears.

The employee testified in the arbitration that he did not know what assault meant, and that by his understanding assault means that there must be blood. What is not clear is if this is the understanding of the employee's definition of assault, then why did he plead guilty when there was no blood involved.

The employee's representative argued that In Snyman's book, fourth edition on page 455 defines 'assault' as follows:

' Assault consists in an unlawful intentional act or omission:

[a] which results in another person's bodily integrity being directly or indirectly impaired, or

[b] which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place'

I want to deal with the charges individually.

On the first charge, the employee testified that it had been brought to his attention by his colleague that Alfonso had hit another child with a broom stick. The employee's colleague did not deem it fit to hit Alfonso back when Alfonso had allegedly hit another learner, but the employee felt that, well after the alleged incident by Alfonso, he must give Alfonso a spank in his legs. When Alfonso said to the employee he would report the matter to his mother, the employee decided to go report the incident first. These are by all means the actions of someone who did something wrong. The employee testified that he did intend hitting Alfonso but did not intend hurting him. I do not intend on laboring this matter with

technicalities of the definition of assault, save to say that in simple terms assault is the unlawful and intentional application of force to a person. The employee testified that what he did was unnecessary but he wanted to make sure that Alfonso does not do it again. The employee's actions were clearly a form of punishment on Alfonso. Corporal punishment is punishment inflicted on one's body. It is trite that corporal punishment is outlawed in our schools. This in my view makes the employee's actions unlawful. In conclusion about this charge, I am convinced that the employee's actions were unlawful and intentional, and therefore he is guilty of assault.

The employee gave much the same evidence in charge 2. The employee testified that he heard the machine going on, when he turned back, there was no one on the machine and he saw Jeremy Daniels running away. Clearly at this stage, if Jeremy was the one who had switched the machine on, he was running away and was no danger to the machine nor was it going to serve any deterring purpose to do anything to him at that stage. The employee chose to pick up an off cut block of wood and throw it on Jeremy's head. The employee concedes that he would have injured Jeremy. The employee further testified that he did not intend on hurting Jeremy but intended on hitting him. Much in the same way as in charge 1, the employee's actions were unlawful and intentional and therefore he is guilty of assault as the force was applied to Jeremy.

In charge 3, the employee pleaded some degree of self defense as he testified that Terrence Peters shaped as if he was going to hit him after he had told him to pull up his pants, and in retaliation, he pushed Terrence away in his face close to his ears. Even in this case there was unlawful and intentional application of force on Terrence.

It is my view that individually on the first three charges, the employee's dismissal was fair. In so far as the defense of a grudge or vendetta by Mrs. Blundin relates to these three charges, it is my view that such defense has no basis.

For completion I shall deal with the last three charges.

The employee's charge four, related to him showing the learners pornographic material. The employee denied showing the kids pornographic material, and conceded to showing them the Sports Illustrated 2007 calendar which had women in bathing costumes. The employee testified that he showed the learners this calendar three times, and paged it when he showed it to them. The employee conceded that showing the learners the 2007 sports illustrated calendar was inappropriate. Alfonso and Terrence testified that the employee showed the pornographic pictures and Jeremy testified that the employee showed them pictures of women in bathing costumes. While it is common cause that at some point there was pornographic material in the class, which the employee testified to have been brought by Donovan, I am not convinced that the employee showed this pornographic materials to the learners. This however does not condone the employee's actions of showing the learners the sports illustrated calendar with half naked women.

On charge 5, the employee denied ever using a stick and imitating masturbating with it. On the balance of probabilities of the evidence before me, I am also not convinced that the employee is guilty of this offence.

On charge 6, the employee testified that he never directed the swear words at the learners but used them when he was telling the learners not to use such words. I must admit that this is a very strange way of speaking to the learners even if he was telling the learners not to use these words.

It is my view that on charge 6 and 4 the employee deserved a serious reprimand about his conduct in the incidents in question. As for charges 1, 2 and 3, as stated above, these charges individually justify as dismissal in my view.

On the evidence before me, I am convinced that the employee's dismissal was fair.

AWARD

I hereby find that the employee's dismissal was fair.

The Applicant's case is therefore dismissed.

No order as to costs is made.

Signed on this 30 June 2009

Adv. Luvuyo Bono