

16 January 2006

TO: LESIBA SESHOKA

CC: CINDY FOCA

CC: BERNIE TATAW

AWARD

Enclosed herewith find an award as per the details below.



All correspondence should be addressed to:

The General Secretary,
elrc, Private bag x126, Centurion,
0046, RSA

Enquiries: Hellen Hlatshwako

Tel: (012) 663 0436
Fax: (012) 643 1601
e-mail: dispute.res.wc@elrc.co.za
Website: www.elrc.org.za

Physical address:

elrc Building
261 West avenue, Centurion, 0046,
RSA

PARTY NAMES:	Hartzentberg ID v/s DOE Western
---------------------	---------------------------------

Hartzenberg award 160105.doc

The information contained in this facsimile is confidential and is intended only for the use of the individual named above. If the reader of this message is not the intended recipient you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original document to us at the above address. Thank you.

PARTY NAMES:	Hartzentberg ID v/s DOE Western Cape
CASE NUMBER:	PSES 254-05/06WC
ISSUE IN DISPUTE (main) ud, ulp etc:	Unfair Labour Practice
ISSUE IN DISPUTE (sub issue) promotion, misconduct etc:	Benefits
DATE OF AWARD:	19 December 2005

Kind Regards

Hellen

IN THE EDUCATION LABOUR RELATIONS COUNCIL

PSES 254-05/06WC

DATE 19 DECEMBER 2005

I.D. HARTZENBERG

APPLICANT

WESTERN CAPE EDUCATION DEPARTMENT

RESPONDENT

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

The arbitration took place at the offices of the Western Cape Education Department in Cape Town on 2 September 2005 and continued on 17 November 2005 and 2 December 2005. The applicant, Mr. I.D Hartzenberg, was represented by Mr. C. Jacobs, an official with SADTU. The respondent, the Department of Education Western Cape, was represented by Mr. F.H Scholtz, a labour relations officer in its employ.

THE ISSUE IN DISPUTE

The applicant alleges an unfair labour practice regarding the non payment of benefits.

THE BACKGROUND TO THE DISPUTE

The applicant is an educator who occupied a post at the John Ramsey Secondary School in Bishop Lavis from January 2004 until June 2005. He occupied the post as an educator substituting for another educator who has been seconded to the trade Union.

SUMMARY OF EVIDENCE AND ARGUMENT

It was common cause between the parties that Harzenberg did not receive a service bonus while in the said post.

Don Jacques Pasquallie and Isaac David Hartzenberg testified under oath for the applicant. Harry Wyngaard and William Frank Julies testified under oath for the respondent.

Pasquallie testified that he had been seconded into the position of provincial secretary of the trade union and that the respondent was still paying his salary together with all the benefits he is entitled to including a service bonus. The respondent then deducted this amount from the trade union in accordance with the Public administration measures of the Employment of Educators Act.

He said that there was no link between himself and the person seconded into his post. While he was seconded he remained an employee of the respondent and his vacant post could be filled temporarily or permanently. If the respondent did not give all the benefits

attaching to that post to the substitute teacher it would be saving on the post. He was aware of other temporarily appointed teachers who are receiving the service bonus.

Under cross examination he testified that in terms of the Employment of Educators Act the substitute teacher could be appointed permanently, temporarily or on a contract basis. A teacher appointed on a contract was appointed for a specific purpose and for a specific time and the salary was not negotiable. With reference to annexure C of the bundle he testified that Hartzenberg did not qualify for the service bonus in terms of that circular.

Hartzenberg testified that he does get leave as a consequence of the manner in which he is appointed. He confirmed under cross examination that his appointment is on a six-monthly basis since January 2004. His first appointment ended in June 2004 and he was subsequently reinstated on 1 July 2004.

Harry Wyngaard said he is the director of personnel management. Since 1 January 1998 until the end of 2003 temporary and substituted teachers were not entitled to benefits. Hartzenberg had been appointed as a substitute teacher into Pasquallie's post. As Pasquallie was the current incumbent in that post the appointment was not into a vacant post. Hartzenberg had therefore not qualified for the benefit. The respondent had issued the aforesaid circular consequent upon an agreement with the trade unions on 20 November 2003.

While the respondent paid Pasquallie's salary it claimed from the union only the amount paid as Hartzenberg's salary. The respondent therefore did not gain anything but in fact lost on the benefits paid to Pasquallie.

He said that Hartzenberg had previously taken a voluntary severance package and hence was not allowed back into the system unless there was motivation therefore by a school in which event the teacher would be appointed on a fixed term basis. Where however such teachers had been appointed into a substantive vacant post they had been paid the service bonus.

Julies testified that Hartzenberg was paid a lower salary than Pasquallie and in terms of circular 0233/2003(the circular). The respondent then claimed from the trade union that amount paid to Hartzenberg.

It is the argument of the applicant that Hartzenberg is entitled to the service bonus by virtue of the status he enjoys with the respondent. It argues that in terms of S4.3 of the Personnel Administrative Measures (PAM) he qualifies for the service bonus. The respondent argues that in terms of an agreement it had concluded with the trade union and in terms of the circular Hartzenberg is not entitled to receive the service bonus.

In terms of 4.3(b) of the PAM, as argued by the applicant, the trade union pays back to the respondent the amount claimed by the respondent. It argues that if the respondent is not claiming the full amount as stipulated in terms of section 4.3 then Hartzenberg cannot be held liable for that because he is an ordinary educator aggrieved for not getting the service bonus.

The applicant argues further that he does get leave and therefore qualifies for the service bonus as the Employment of Educators Act disqualifies only those educators who do not get leave.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

The evidence shows that the respondent is claiming from the trade union an amount no more than that which it is paying to Hartzenberg. It is common cause that this does not include an amount equivalent to the service bonus which is being paid to Pasquallie. The contention therefore on which Hartzenberg's allegation is premised as reflected in his referral document is incorrect viz. that the respondent claims from the trade union the full package that is paid to Pasquallie.

The respondent has however argued that in terms of the dispensation under which Hartzenberg resorts that he is not entitled to a service bonus. In this regard the evidence adduced by the respondent is that Hartzenberg is an educator appointed on a fixed term contract of 6 months duration at a time. Hartzenberg concedes that this is the case. This dispensation has further been arrived at as a consequence of Hartzenberg's falling into that category of educators who had at some previous time taken a voluntary severance package and who are not in a substantive vacant post and who are accordingly precluded from being employed by the respondent as full time employees. Pasquallie is still the incumbent in the post in which Hartzenberg is substituting. The post is not a substantive vacant post.

In terms of the current position the respondent is therefore claiming back less than it would have, had it claimed back the amount of money disbursed in terms of Pasquallie's salary. It argues further that it is paying correctly to Hartzenberg the amount of salary that it is as he is employed on the basis of the aforesaid fixed term contract.

Pasquallie's testimony that the salary of a fixed term contract teacher is not subject to negotiations therefore supports the respondent's argument. A teacher in this position is employed on the terms of the respondent. In this regard the testimony shows that the respondent has a policy that teachers who had taken a voluntary severance package are not allowed back into its system. A teacher therefore in the position of Hartzenberg has his salary dictated to by the respondent viz. without the benefits such as the service bonus and in accordance with the circular.

The Employment of Educators Act is also not clear as to whether an educator in the post of which another is the incumbent qualifies for the service bonus. The mere fact that Hartzenberg qualifies for leave while educators who do not qualify for leave are excluded, does not assist in arriving at a conclusion.

In the circumstances therefore I find that the respondent is paying Harzenberg his salary in accordance with what probably had been agreed upon between himself and the respondent.

By therefore not paying Hartzenberg a service bonus the respondent cannot be said to be engaging in unfair conduct for the purposes of establishing an unfair labour practice.

AWARD

This application for relief in terms of the provisions of the Labour Relations Act 66 of 1995 as amended is dismissed.

L. MARTIN
PANELIST