



IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD IN CAPE TOWN

Case No PSES 202-06/07WC

In the matter between

S.Adams

Applicant

and

Western Cape Education Department

Respondent

ARBITRATOR: Arthi Bhoopchand

HEARD: 22 August 2006

Delivered: 4 September 2006

Summary: *Unfair labour Practice relating to demotion- Section 186(2)(a) of Labour Relations Act 65 of 1995. Does change in status and responsibility amount to a demotion if salary and benefits remain the same?*

Summary: *Employment of Educators Act Act76 of 1998-Principals not excluded from being declared in excess.*

Summary: *Functions of School Governing Body not excluded when educators declared in excess or transferred. Procedure in terms of Personnel Administration Measures still has to be complied with.*

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. The con-arb meeting took place on the 22 August 2006 at the offices of the Western Cape Education Department (WCED), in Cape Town. Applicant was represented by Sandy Smart, a representative of the Union National Union of Educators (NUE). The WCED was represented by V. Phillips and F. Scholtz.
2. One bundle of documents was handed in by applicant's representative.
3. Both parties submitted closing arguments to me on the 25 August 2006.

THE ISSUES IN DISPUTE

4. I was requested to decide whether applicant ought to have been declared in excess, and/or transferred to another school in accordance with relevant prescripts and legislation.
5. I was also asked to decide whether the placement of applicant at another school in a temporary capacity as a deputy principal amounted to a demotion.
6. The relief sought by applicant is that he be placed in a suitable principal's post in a permanent capacity, as well as compensation for unfair labour practice.

THE BACKGROUND TO THE DISPUTE

7. Applicant was the principal of Elsie's River Primary School, and has been an educator in the employ of the WCED since 1988. The Elsie's River Primary School was closed by the WCED on 31 December 2005
8. Mr Adams has not been appointed as a principal at another school, but is currently in a temporary on going position at another school.
9. Applicant has applied for several permanent principal posts that were advertised, but has been unsuccessful.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicant

10. Applicant testified under oath that the Elsie's River Primary School was closed on the 31 December 2005, but that he remained at the school until 31 March 2006. He was told by the circuit manager that he would be placed the EMDC North. With the exception of one staff member, all other staff members have been placed at other schools.

11. After the 31 March 2006, he reported every morning to the EMDC North and then went home because he had not been placed in any position at the EMDC. On the 8 June 2006, he was told by the senior circuit manager that it was unfortunate that he had to report to the EMDC every morning. He then asked the circuit manager to assist him in placing him at a school – there were two posts available, one principal post and one deputy principal posts. He expressed his interest in the principal post at Eurecon Primary. The circuit manager promised to revert to him.
12. On the 5 July 2006 he was informed that he would be placed in the Deputy Principals post at J.S.Klopper. He reported for duty at the school on the 18 July 2006. He was told that he had to teach grade 7. The school already has a deputy principal. He has no decision making powers at the school and spends a lot of time in the classroom.
13. He was not well received at the school and he had to make a great effort to be accepted.
14. He had applied for several principal posts but had been unsuccessful. He was very disappointed with the way in which he had been treated because he had not been told at the stage when he was informed of the closure of the school that he had to apply for another position .He had been told that he would be accommodated at the EMDC.
15. Under cross examination he testified that his goal had been to climb the ladder of success and that he now felt that he was moving backwards. He now has to look for someone else for leadership after having been in a leadership position

Evidence on behalf of respondent

The WCED presented the evidence of one witness, H. Wyngaard, their assistant director of personnel.

16. Wyngaard testified under oath that Principals cannot be declared in excess. According to personnel records, Mr Adams is still a principal. His salary has not changed. The procedure with regard to the filling of principal posts is that all posts have to be advertised. Mr Adams bears the onus to apply for a post. He cannot be

matched and placed at another school since all posts have to be advertised. The rule declaring educators in excess does not apply to principals. Mr Adams has been placed in an additional position-he has not been demoted.

17. Under cross examination he testified that Mr Adams was placed as an additional educator at his current school-he was neither a deputy principal nor a principal at the school. The rule that principals cannot be declared in excess is contained in a circular, and the WCED follows this rule consistently.

CLOSING ARGUMENTS

18. Applicant's representative argues that there is no justification for the employer's contention that principals cannot be declared in excess. Mr Adams ought to have been declared in excess just like any other employee. Mr Wyngaard's interpretation of the rule contained in Circular 095/200 is incorrect. The rule confirms that principals whose schools are closed are in excess.
19. Being in excess is a 'no fault' situation , and the employer has an absolute obligation to these permanently employed educators, and therefore such educators are either transferred to vacant substantive posts or given preferential treatment when applying for posts.
20. The purpose of this 'preferential treatment' is to ensure the continued employment of serving employees, before people are employed from outside the system and to force the SGB to consider such employees first. This applies to all employees employed in terms of the Employment of Educators Act. There is no indication in any of the prescripts or legislation that Principals are excluded from the process.. By applying the prescripts of the collective agreements and legislation, the powers of the SGB are not diluted or disregarded.
21. There is no rationale in Mr Wyngaard's statement that Mr Adams cannot be transferred or placed in a vacant principal's post. In a transfer situation the SGB must still recommend the transfer before it takes place and therefore their rights are not infringed.

22. A transfer or matching and placing employees who are in excess is not only a well used process but is legislated in terms of Chapter B (2.4)(c)(i)(ii) of the PAM.
23. In education salary is not definitive of promotion as Deputy Principals can earn more than Principals since the defining fact is the post level of the post. Principals are on post level 4 and Deputy Principals are on post level 3. The duties and responsibilities as well as the levels of responsibility and status differ and as salary is not a determination in promotion, any change to duties responsibility and status would therefore be considered a demotion.
24. In essence, the WCED argues that Principals cannot be declared in excess. This has always been the WCED's understanding of the prescripts and legislation. The issue was addressed in a departmental circular.
25. Mr Adams has not been demoted but has been placed in a deputy principal's post in a temporary capacity. He is still earning the salary of a principal and as such enjoys the status of a principal. To be demoted is to be allocated a lower rank or grade. Demotion involves a relocation in or amendment of an employee's terms of employment to the extent that he or she is requested to fill a different position to the one normally fulfilled, with a reduction in status.
26. Principal posts have to be advertised and therefore Adams cannot be matched and placed in a suitable post. The WCED cannot force any School Governing Body to accept any candidate as a principal that has been sent to them by the Department.
27. Excess educators do not get preference over educators who are not in excess when it comes to the filling of these posts. The only way in which Mr Adams can be suitably placed is if he applies for an advertised post.
28. Mr Adams has not been demoted. According to the persal system he is still considered a principal . He still receives a principal's salary and enjoys the status of a principal.

29. No unfair labour practice has occurred.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

30. The issue of educators that are in excess or additional to a schools establishment is dealt with in the Employment of Educators Act 76 of 1998. Ms Smart argues that the Act does not differentiate between categories of educators, and that Principals and educators on other post levels ought then to be treated in the same manner. It is indeed so that the Act does not specifically exclude Principals from being declared in excess. The WCED is adamant that Principals cannot be declared in excess. The main witness for the WCED testified that it is a general rule that Principals cannot be declared in excess. He pointed me to a Departmental circular, 0095/2003. It must be stated at this point that Departmental circulars cannot replace or override existing legislation or collective agreements. The WCED was unable to point me to any legislation or collective agreement that specifically excludes Principals from being declared in excess.

31. I would surmise that the purpose of the Departmental Circulars is to bring to the attention of employees new regulation, and the logistics and internal procedures that have to be followed in dealing with those issues. It does not, and indeed, should not, create new rules. Nevertheless, it is interesting to note that in clause 2.4 of the said circular it is stated that only principals who have been declared in excess as a result of the closure of their schools may apply for severance packages. The WCED's insistence that principals can never be declared in excess is therefore contradictory. I see no reason why Mr Adams should not be declared in excess.

32. I have noted the WCED's argument that Principals posts have to be advertised and that the process for the filling of vacant posts has to be followed. However, should Mr Adams be declared in excess, it would not obviate the need for this process followed, but would merely place him in an advantaged position within the ambit of the Personnel Administration Measures which deals with the filling of

posts. The School Governing Body is obliged to give consideration to educators who have been declared in excess, prior to the shortlisting of other candidates. The Personnel Administration Measures , Chapter B (2.4)(c)(iii), states:

“When governing bodies exercise its functions in terms of section 20(1)(i) of the South African Schools Act and Chapter 3 of the Employment of Educators Act, they must accommodate the obligations of the employer towards serving educators”

33. The WCED uses the same argument to justify its refusal to transfer or match and place him at another school, a process which is provided for in the Personnel Administration Measures. I once again see no reason why Mr Adams, as a serving educator and having been displaced by the operational needs of his employer should not be transferred by matching and placing him at another school. This would however have to depend on a suitable vacancy being available. Furthermore, as in the case of an educator being declared in excess, the procedures put in place, as contained in the Personnel Administration Measures would have to be followed.

Has Applicant been demoted?

34. Ms Smart argues that Mr Adams has been demoted even though his salary and benefits have not been reduced, because his status and responsibilities have changed. An employee who complains of unfair demotion must prove that they have actually been demoted. It is common cause that Mr Adams has been placed in a temporary capacity in a Deputy Principals post. I accept that in terms of status and responsibility, the position of a Deputy Principal is inferior to that of a Principal. However this does not necessarily mean that Mr Adams has been demoted or that he has been unfairly treated.
35. There have been instances where our Courts have held that downgrading in status constitutes a demotion even though salary and benefits remain unchanged. In this instance it must be borne in mind that Adams placement is temporary and came about as a result of the operational needs of the WCED. In *A-B v SA Breweries Ltd (2001) 22 ILJ 495 (CCMA)* it was held that demotions may be deemed fair if they

are aimed at avoiding retrenchmen . Mr Adams would only be able to be permanently accommodated in terms of the prescripts pertaining to educators declared in excess, when a suitable vacancy becomes available and after due process is followed. I do not view his temporary accomodation in a lesser position with the same salary and benefits as unfair treatment.

36. Mr Adams is also claiming compensation for unfair labour practice. I have already indicated that I am of the view that Mr Adams ought to have been declared in excess and/or transferred to another suitable post. However, even if this process had been followed by the employer from the very outset, Mr Adams would not necessarily have been placed in a permanent position immediately. Due process would still have to followed after a vacancy is identified . The element of uncertainty due to the unfortunate circumstances that Mr Adams finds himself in could not have been totally eliminated. Furthermore, Mr Adams has not suffered any financial loss as his salary and benefits has been maintained. I am therefore of the considered opinion that he is not entitled to any monetary compensation.

In the premise I make the following order:

AWARD

1. The WCED is to declare Mr Adams in excess.
2. The WCED must accommodate Mr Adams in a suitable, equivalent vacant post within the procedure provided for in the Personnel Administration Measures.
3. There is no order as to costs.

Arbitrator/ELRC Panelist

Arthi Singh-Bhoopchand

04/09/06