



IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

Case No PSES 226-07/08WC

In the matter between

L J Muller

Applicant

and

Western Cape Department of Education

First Respondent

Ms Olivia Erasmus

Second Respondent

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. The arbitration hearing was initially held on 27 June 2008. The matter had to be postponed due to an interpreter not being present at the hearing. The parties however held a pre-arbitration meeting and agreed to postpone the hearing to 11 August 2008. The applicant L J Muller, was present and represented by an attorney, Ms Desere Barnard. The first respondent, the department of education was present and represented by D. Hendricks the Labour Relations Officer and

the second respondent, O Erasmus as also present and represented by V.F. Williams from SADTU.

2. MS G Maki was present to assist with interpretation in and from Afrikaans and proceedings were mechanically recorded.
3. Parties had until 22 August 2008 to submit closing arguments.

THE ISSUE IN DISPUTE

4. I am required to decide on whether the first respondent committed an unfair labour practice relating to promotion by appointing Ms Erasmus as well as to whether her appointment was in accordance with the general procedures. The remedy sought is the appointment of the applicant to the position of Deputy Principal.

THE BACKGROUND TO THE DISPUTE

5. The applicant applied for the position of Deputy Principal at Pacalsdorp Secondary School, post 0263 of Vacancy List 1 of 2007. He was nominated for the position but was not appointed. The applicant then referred an unfair labour practice dispute with the council.

SUMMARY OF THE EVIDENCE AND ARGUMENTS

6. I do not intend to summarise the evidence in detail but intend mentioning aspects raised in the evidence and head of argument in my analysis, this is intended to keep the award as short possible. Both the applicant and the first respondent submitted documentary evidence. The applicant's bundle will be referred to as bundle (1) and the first respondent's bundle as bundle (2).

APPLICANTS SUBMISSION

Mr L J Muller

7. He testified under oath that he qualified as a teacher and started teaching at Pacalsdorp Secondary School in 1983. He still holds the same post level one position at present.
8. Mrs Erasmus previously been promoted to Head of Department prior to her current promotion as Deputy Principal.
9. The school profile is as follows: there is 1 male, the principal on post level, 1 female on post level 3 and 3 males and 1 female on post level 2.
10. The advert for the position did not state that men are not allowed to apply and at the interview, men were not excluded.
11. It is common cause that he received the highest points at the interview (page 24 to 44 of bundle 1) He was also nominated first, on the governing body letter dated 18 May 2008, In the same letter the governing body noted that a female teacher already holds the other deputy principal position.
12. He believes that Ms Erasmus should have been appointed at Pacalsdorp Primary since she also applied there.
13. The governing body wrote a letter to the Department of Education dated 20 July 2008 requesting an explanation as to why he had not been appointed. They however did not receive any explanation and only after the matter was referred with the council, was some explanation given at the conciliation.
14. The Policy Implementation Directive for Compliance with Employment Equity at Education Institutions, states, *“males also need to be encouraged to enter education as a profession, especially at entry level”*.
15. The Policy further states that *“WCED also acknowledge that there are barriers or constraints in reaching these targets and the education sector (provincial, national, higher education institutions) must develop strategies to address, males*

who do not enter or remain in the education institutions) must develop strategies to address, males who do not enter or remain in the education profession.” (Page 57 of bundle on)

16. He believes that he should have been appointed as he was selected to be the best candidate for the position and received the highest points.

FIRST RESPONDENT’S SUBMISSION

Martinus Cronje

17. He is the Deputy Director: Human Resource Development. He testified under oath, that after the list of nominees is received from the governing body, the employment equity unit would consider the nominees by considering representation in terms of the Policy Implementation Directive for Compliance with Employment Equity. (page 57 of bundle 1), including the inherent requirements for the position.
18. They also consider the profile of males and females’ representation per post (page 19, bundle 2) to ascertain that the right person is appointed person is appointed. They consider targets regardless of whether a female or male person is already appointed. The second respondent was as such found to be suitable for the position.
19. The Governing body is aware that they required considering the departments equity plan. They have also been provided with training.
20. Under Cross-examination he testified that the fact that a candidate is nominated is regarded that the candidate is suitable for the post.
21. They considered all factors before them and representivity outweighed request from the Governing body to appoint the applicant. He has not seen the recommendation letter from the governing body.

Harry Wyngaard

22. He is a Deputy Director-Directorate: Internal Human Capital Administration and is responsible for recruiting and have been employed with the department for 15 years.
23. The normal procedure leading to appointment is that the governing body of the school will conduct the interviews. After which, they will forward a list of nominees and his department will forward the list to the equity department including all relevant documentation. The equity unit will consider the targets in terms of the equity plan and the Head of Education or someone delegated make the decision will make the final decision as to who should be appointed.
24. The department will need a good reason to deviate from the recommendation made by the Equity unit and any of the three nominees could be appointed.
25. The governing body is aware that they should inform all those that have been nominated and not to divulge the order of preference, as there is no guarantee that someone who is nominated first will be appointed.
26. Under cross examination he stated that the motivation letter from the governing body formed part of the documents forwarded to the equity unit as such he had not idea why Cronje indicated that he did not see the motivation letter.

SECOND RESPONDENT SUBMISSION

27. The second respondent, Ms Erasmus did not testify or call any witness and only submitted closing argument.

ANALYSIS OF THE EVIDENCE

28. I am required to decide on whether the appointment of Ms Erasmus, the second respondent was correct and in accordance with the general procedures. The remedy sought is the appointment of the applicant. The onus is on the applicant to prove the unfair labour practice.

29. The following facts were common cause:

1. The first respondent admits that the applicant received the highest marks during the interview process.
2. The first respondent admits that the applicant received a total of 154 points over a total of 160. Mr Hoorn obtained 134 points over a total of 160 and Ms Erasmus obtained 119 points over a total of 160.
3. The first respondent admits that the applicant was recommended first on the nominated list from the Governing body.
4. The employer conceded that the other appointed Deputy Principal at the school is female.

30. The applicant representative argued that the applicant scored the highest points and this should therefore have been considered. It is evident that clause (7) 7.2 of the policy implementation directive clearly states that in the “*case where candidates rated lower than the first candidate, but demonstrate the ability or potential and contributes to the employment equity targets of the WCED, then those candidates should be considered for nomination.*” Therefore, The fact that the second respondent was short listed regardless of her points is an indication that the governing body believed that she had potential regardless of the points she received.

31. The applicant representative referred to the Point High School judgement Case no 584/07, it is evident that the circumstances and merits in this matter are different from the merits in this matter. The judgement involved two white males in which case, appointment targets did not play a role.

32. Cronje testified for the first respondent and stated that he had not seen the motivation letter from governing body. The letter stated that the applicant was the preferred candidate because the governing body believes that the male appointee is required to instill discipline.
33. Though it is important for the equity unit to have seen the above mentioned letter, I do not believe that the letter in this instance could have impacted on the department's decision not to appoint the second respondent, as the reason the governing body of the school gives is merely the fact they would prefer male in order to instill discipline. There was no strong motivation to indicate what special skill the applicant holds that could make him the preferred candidate above the other two. Furthermore there was also no evidence presented to indicate that Ms Erasmus, the second respondent was incapable of this.
34. From the evidence presented, it is further evident that the decision to appoint Ms Erasmus was made after considering the employment targets of the province according to which, females in post level three are under represented.
35. The applicant representative further argued that the department failed to mention females will be given preference, clause 4.2 of the policy implementation directive clearly states that *"advertisement must not exclude any person on grounds of race, gender or disability and must reflect the inherent requirements of the position to be filled"* Therefore by stating that females alone should apply would have been a contravention of the implementation policy.

Section 6(f) of the Employment of Educator's Act states that *"despite the order of preference...., the head of department may appoint any suitable candidate on the list"* There was no evidence to indicated that Ms Erasmus was not suitable or that she does not meet the inherent requirements of the position.

I therefore cannot find that the department has committed an unfair labour practice.

AWARD

The following award issued:

1. The application is dismissed
2. There is no order as to costs.

Sarah Modise

Arbitrator/Panelist: ELRC