

**EDUCATION LABOUR
RELATIONS COUNCIL**



Panelist : Luvuyo Bono
Case Number : PSES230-08/09WC
Date of Award : 19 April 2009

In the **ARBITRATION** between

SAOU obo Visser L
(Applicant)

And

Western Cape Education Department
(1st Respondent)

And

Mostert R
(2nd 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 :

Case No: PSES230-08/09WC

In the matter between:

SAOU obo Visser L

Applicant

And

Western Cape Education Department

1st Respondent

Mostert Rita

2nd Respondent

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION

The arbitration concerning the alleged unfair labour practice: promotion, in terms of Section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended, committed on the Applicant by the 1st Respondent, was held at the 1st Respondent's premises on 19 March 2009.

Ms. L Bathgate represented the 1st Respondent, the 2nd Respondent appeared in person and Mr. D Lerm represented the Applicant.

ISSUE TO BE DECIDED

The issue to be decided is whether the 1st Respondent committed an unfair labour practice by failing to promote the employee, Lizbe Visser to the position in question.

BACKGROUND

The Employee applied for Post Number 3818 in the vacancy list 1 of 2008 that being a post level 1 educator. The employee was part of three recommended candidates by the School governing Body (SGB), and was the best scored candidates in the interviews. The Respondent appointed R Mostert, who was one of the three recommended candidates. The reason for the appointment of R Mostert was based on Employment Equity. The employee is a white female, and white females were over represented at the time of filling the said post.

The Respondent raised a preliminary point, that the dispute referred by the Applicant did not fall within the definition of an unfair labour practice promotion in terms of Section 186(2)(a). The preliminary point is based on the fact that the post in question which the employee applied for was a post level 1 position, and the employee, at the time of making the application for the post in question was on a contractual level 1 post. The difference is that the post in question was full time while the post the employee was occupying was a contract post.

SURVEY OF EVIDENCE AND ARGUMENT

The Applicant led no oral evidence.

Mymona Jacobs, the Human Resources Practitioner dealing with Employment Equity testified that her unit receives three names of the recommended candidates from the SGB. They look at the policy directive on Employment Equity (EE); the EE plan; the EE Act and the school's profile. In the present case emphasis was placed on representivity and the school's profile. Before the filling of the post in question, there were no coloured employees at this school. The 2nd Respondent was the first coloured employee to be appointed.

In relation to the preliminary point the Respondent argued in the arbitration that the dispute at hand was not a promotional dispute as the post the employee is contesting is at the same level as the one that the employee is occupying. In response the employee representative argued that while the post in question was at the same level, the full time post had benefits unlike the contract post the employee occupied. In reply the Respondent argued that the employee was paid 37% of her salary in lieu of benefits she was not receiving as a contract worker. I requested that parties address me on this issue in their closing arguments.

In its arguments the Respondent contended that in a case of a Promotion the candidate must be an *employee*, there must be an employment relationship between the employer and the employee at the time the process commences. In order for there to be a promotion, the promoted employee's *status, responsibility or authority* in the organisation must be greater or higher than that enjoyed by that employee prior to the promotion.

There may well, and usually is, an increase in remuneration and benefits as well, although it is suggested that this is not a *sine qua non* of promotion. Promotion results primarily in an increased status, responsibility and authority, and also results in greater remuneration and/or benefits because of the organisation's policy or practice or because of a promise or agreement between the employer and the promoted employee, then these should be granted by the employer, and if they are not could be part of, or central to, the unfair labour practice allegation. The department is of the view that the fact that Ms Visser is appointed on a contract basis on post level 1 and applied for a post level 1 post does not constitute a promotion, but an appointment.

In its arguments, the Applicant dealt with the main matter and argued that the question of whether the dispute was a promotion or not was irrelevant.

ANALYSIS OF EVIDENCE AND ARGUMENT

Given the gravity of the preliminary point raised by the Respondent, which affects the jurisdiction of the ELRC in entertaining this matter, I need to determine this point before entertaining the main matter.

It is common cause that:

1. The employee occupied a post level 1 position at the time of making the application for the post in question;
2. The only difference between the two above mentioned posts was that the post in question was a full time post and the contractual post the employee occupied did not have benefits.

Promotion ordinarily includes (but not always) an increase in salary and an increase in responsibilities and status. (**See Mashego & Another v University of the North (1998) 1 BLLR 73 (LC) and Jele v Premier of the Province of KwaZulu Natal & Others (2003) 7 BLLR 73 (LC).**

On the evidence before me it is common cause that there was no increase in salary, responsibilities and or status between the post the employee occupied and the one she applied for.

The only point left is the one relating to the benefits that go with the full time contract. The Respondent argued during the arbitration that the employee as a contract worker received 37% of her salary in leu of benefits. The Applicant failed to oppose this issue during the arbitration and or in its closing submissions.

Clause 11.4 of PSCBC Resolution 1 of 2007 provides for the 37% paid to the employee in leu of benefits as a contract worker.

On the evidence before me, I am of the view that the argument of benefit amounting to an advancement which means that the post in question would have been a promotion is dismissed owing to the fact that the employee received money in leu of the benefits she was not receiving as a full time employee.

Given my view that the post in question would not have been a promotion post, it follows that I have no jurisdiction to entertain the matter.

Accordingly I shall not determine whether the Respondent committed an unfair labour practice on the employee.

AWARD

I hereby find that the ELRC lacks the necessary jurisdiction to entertain this matter owing to the fact that the post in question was not a promotional post as contemplated by Section 186(2)(a) of the Labour Relations Act 66 of 1995 as amended.

The Applicant's case is therefore dismissed.

Signed on this 20 April 2009

Adv. Luvuyo Bono