

IN THE ARBITRATION UNDER THE AUSPICES OF THE EDUCATION  
LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

Case No.: PSES 243-05/06

In the matter between:

Windvogel

Applicant

And

Western Cape Education Department

Respondent

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**ARBITRATION AWARD**

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**Details of Hearing and Representation**

The arbitration hearing was held on the 19 July 2005 at the offices of the Western Cape Education Department(WCED) in Cape Town. Applicant was represented by M/s Gloria Samson, a representative of the National Union of Educators. The WCED was represented by Mr M.Viljoen.

Closing arguments were submitted to me in writing, the last of which was received on the 2 August 2005. Both parties handed in a bundle of documents each which were admitted into evidence.

**Background and issues not in dispute**

Applicant is employed as an educator in a Post Level 1 post at the Delft Primary School. She applied for a Head of Department post, post number 0121 of vacancy list 1 of 2005. She was not shortlisted for the post and was therefore not invited to an interview.

**Issues in Dispute**

I was asked to decide whether the conduct and actions of the School Governing Body of the Delft Primary school in the filling of post number 0121, amounted to unfair labour practice. In particular I was asked to decide on the fairness of the criteria used to shortlist the candidates for the post. I was also asked to decide whether the School Governing Body was properly constituted.

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This dispute was lodged in terms of Section 186(2)(a) of the Labour Relations Act.

### **Summary of Evidence**

Applicant's representative led the evidence of Nico Dan Jansen, an observer to the process from the union Neptosa. He testified that no additional criteria were used in the process and that no one had explained to him the difference between core criteria and additional criteria.

Under cross examination, when questioned with reference to the bundle of documents, he testified that there were primary criteria as well as further criteria that they had decided on. He knew Mrs Davids and did not lodge any objection to her presence.

Welda Carelse testified that she had been an educator at Delft Primary for a period of eleven years and had left the school in June 2004. Shortly before leaving the country, she received a telephone call from the Headmaster. He talked about finding a replacement teacher for her position, and stated that he had someone in mind for the position. The name of the teacher that he had in mind was Lizelle Hendricks. She does not benefit in any way by coming forward with this information.

Under cross examination she testified that she did not report to anyone that the Headmaster had suggested a replacement teacher.

Applicant testified that she felt that she had met all the criteria to enable her to be shortlisted. At the grievance meeting she was told by Mr Colin Arendse that she was not shortlisted because she had not met the criteria and that her CV had not been detailed enough. She felt that even though her CV lacked detail when compared to some of the other CV's that she was shown, she nevertheless felt that her CV did indicate that she had met the requirements. The post had been advertised internally twice before. Both she and Mrs Hendricks as well as other candidates had applied. Mrs Hendricks was nominated for the post on both occasions as well as when the process was disputed and had to be repeated. She spoke to the headmaster and

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expressed her concern that no one else was being given an opportunity to apply for the post.

Under cross examination she testified that she felt she had been prejudiced because a candidate had already been chosen.

The WCED led the evidence of Colin Arendse, a labour relations officer for EMDC North. He was present at the grievance meeting and had made information about the process available to Mrs Windvogel. He had also explained to Mrs Windvogel that before all the envelopes containing the names of the candidates are opened, certain additional criteria are introduced in order to assist the shortlisting process. He had examined the minutes of the process and felt that there had not been any procedural irregularities. He felt that Mrs Windvogel's CV was lacking in detail and he had explained that decisions can be made only on information contained in the CV and not on information that might be known to members of the panel. He did not believe that Mrs Windvogel had been prejudiced in any way and that all candidates had received the same treatment.

Under cross examination he testified that candidates are shortlisted on the basis of information contained in the CV, the application form, as well as the motivating letter. It is possible that members of the panel can overlook some of the information as mistakes can happen, although the chances are very slim

With regard to additional criteria, he testified that this should be mentioned in the minutes.

The Headmaster of the school, Mr Glen Douglas Matlons testified that he had been part of the process and that he was satisfied with the process. The interview committee had discussed additional criteria. This was then put to the union members that were present, who agreed with them. All parties discussed the procedure that would be followed during the process, and the union and the department signed a document to indicate acceptance of the procedure and the criteria to be used. Thirty four candidates had applied for the position and five were shortlisted. Mrs Windvogel was not shortlisted because her CV was vague. Mrs Windvogel was not prejudiced in

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any way. He acknowledged that he had had a conversation with Mrs Carelse about the post, but denied that he had mentioned the name of any candidate for the post.

With regard to Mrs Davids, he testified that Mrs Davids had a child at the school but that when the child had left she still had a grandchild at the school and that she is the legal guardian of the child.

Under cross examination, he testified that any criteria which is not part of the core criteria is additional criteria. It is the prerogative of the SGB to determine additional criteria. He testified that he did not feel that the post had to be rotated and that one could not insist on a particular person for the post, but that a suitable candidate had to be nominated through due process.

Rachel A.Collins also testified on behalf of the WCED. She is the secretary of the SGB. With regards to criteria, she testified that when a post is advertised, the advertisement contains the core criteria for the post. Thereafter the SGB determines certain additional criteria for the purposes of shortlisting. This has to happen because there are usually a large number of applicants , which number has to be shortened. Mrs Windvogel was not shortlisted because she did not meet the criteria. When questioned as to why the minutes did not mention that there were additional criteria, she testified that it is possible that mistakes can be made and that even though it is not mentioned in the minutes, additional criteria were agreed upon. The interview process had been fair and Mrs Windvogel was not prejudiced in any way. Mrs Davids was an elected member of the SGB. When her daughter left school, Mrs Davids remained on the SGB because she has a grandchild at the school.

Under cross examination, she once again confirmed that although the minutes did not mention the words additional criteria, that additional criteria were agreed upon after being put to the union.

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### **Analysis of evidence and argument**

#### **Was there procedural unfairness?**

The main body of evidence and argument in this regard centred on the setting of additional criteria. The advertising and filling of educator posts are dealt with in Resolution 5 of 1998. Clause 2.8.1 and clause 2.8.2 of Resolution 1 of 2002 ( *A common understanding on the interpretation of ELRC Resolution 5 of 1998 and guidelines for interviews*) read as follows:-

“ The shortlisting criteria may be drawn up prior to the shortlisting meeting, but such must be tabled for adoption at the shortlisting meeting and comply with set

guidelines; Consultation with the departmental representative and union observer is strongly encouraged where additional criteria are concerned.”

It is evident from the minutes, as well as from the testimony of witnesses that in addition to the core criteria that were contained in the advertisement, certain additional criteria were agreed upon for the purposes of shortlisting. In terms of the required procedure the union member present was consulted. It is also evident that the union member as well as the departmental representative agreed with the criteria. Applicant's representative suggests that the minutes do not record that additional criteria were used as is required by the prescripts and that applicant was prejudiced by the use of additional criteria. I have examined the minutes that were handed in and have noted that although the minutes do not record the words “additional criteria”, it is clear that there was proper consensus that certain additional criteria would be used for the purposes of shortlisting. There was clear and unanimous testimony from all the witnesses that there were criteria agreed upon in addition to the core criteria and that this was done before the envelopes containing the applications were opened. It is my view, however, that there is confusion amongst the witness themselves as well as applicant's representative as to the terminology to be used for what is in my view, simply shortlisting criteria. I do not find any procedural flaw on the issue of criteria.

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It is not the task of the arbitrator to decide whether a particular candidate is the best person for the post. Generally, in the context of unfair labour practices , we can say that unfairness implies “failure to meet an objective standard” and that it includes “arbitrary, capricious or inconsistent conduct”-regardless of whether it is intentional or negligent (*SACCAWU v Garden Route Chalets (Pty) Ltd (1997) 3 BLLR 325(CCMA) at 332 F*) Mere unhappiness on the part of the employee does not equal unfairness – selection inevitably involves one candidate being disappointed at not being appointed to the post . Nor do perceptions of unfairness necessarily mean that there was unfairness. (*Essential Labour Law 2<sup>nd</sup> edition 2000 P257 Basson ,Christianson, Garbers*)

The allegation of unfairness must be measured against this legal background. Applicant presented the testimony of Welda Carelse to suggest that the headmaster of the school had already chosen a particular candidate for the post. Applicant’s representative then argues that sufficient proof exists that the nomination of a particular candidate was based on undue influence. The headmaster denies that he had a particular candidate in mind for the post. However, even I were to accept that the headmaster did have a particular candidate in mind for the post, there is no evidence to suggest that the Headmaster influenced the other members of the SGB. No members of the SGB were called to testify in this regard. The decision to nominate a particular candidate does not rest solely with the headmaster, and in the absence of any evidence to suggest otherwise, I must accept that the decision of the SGB was fair in this regard. Applicant’s representative concludes that the nominated candidate scored well because she knew exactly what criteria would be set or that someone on the interviewing committee knew the content of the particular CV or assisted with it’s drawing up. There was no direct evidence to support this conclusion. It is my view that this is mere speculation on the part of the applicant. On a balance of probabilities, it is likely that the nominated candidate scored well simply because she was the best candidate.

Applicant submits that she ought to have scored at least 9 out of 10, instead of the 6 out of ten that she did score, because in her view she had met all the criteria to be

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shortlisted. It would be extremely difficult, and indeed improper, for anyone, including an arbitrator, to assume the role of the panel and to attempt to allocate scores. Testimony provided by the witnesses for the WCED suggest that applicant's CV was lacking in detail when compared with that of the other applicants that were shortlisted. I have no reason to reject this testimony. The mere fact that applicant feels aggrieved by the manner in which scores were allocated is insufficient to render the whole process invalid.

Section 23(2)(a) states that elected members of the school governing body shall comprise *inter alia* of parents of learners at the school. It is common cause that Mrs Davids is not a parent of the school. The witnesses did testify, however that Mrs Davids has a grandchild at the school; that she did have a child at the school who had recently left the school; that the grandchild lives with her; that she was responsible for the payment of the school fees of the child and that she was an elected member of the school governing body. I have no reason to doubt that Mrs Davids was a *bona fide* member of the school governing body and that although she is not strictly speaking, a parent, she is nevertheless involved in the life of her grandchild, who is a learner at the school. In any event, I cannot see how this technicality in any way prejudiced the applicant. Furthermore, this technicality is not of a sufficiently serious nature to render a repeat of the process.

## **AWARD**

On the evidence and argument before me, applicant's case is dismissed.

**Arthi Singh-Bhoopchand**  
**10 August 2005**

