**IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD IN CAPE TOWN**

Case No PSES 360-06/07WC

*In the matter between*

**NUE obo Bains MRM & 2 Others** Applicant

and

**WESTERN CAPE EDUCATION DEPARTMENT** Respondent

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**ARBITRATOR:** **L Matshaka**

**HEARD:** **17 January & 20 February 2007**

**DELIVERED:** **14 March 2007**

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**ARBITRATION AWARD**

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**Summary: Labour Relations Act 66 of 1995 – Section 64(4) – alleged unfair conduct relating to unilateral change to terms and conditions of employment.**

## PARTICULARS OF PROCEEDINGS AND REPRESENTATION

The matter was set down for arbitration hearing on 20 February 2007 at the offices of the Western Cape Education Department in Cape Town at 09h00. Ms Sandy Smart, Chief Executive Officer of NUE (National Union of Educators), represented the Applicants namely: Mr

MRM Bains, Mr R Wilson and Mr S Allie. In turn Mr. Frederick Scholtz, Labour Relations Practitioner attached to the Department, represented the Respondent.

Initially the hearing was held on 17 January 2007 and was adjourned due to non-availability of some of the Respondent's witnesses.

The proceedings were mechanically recorded.

## ISSUE TO BE DECIDED

Whether the Respondent's conduct constituted an unfair labour practice in effecting the unilateral change to terms and conditions of employment in terms of section 64(4) of the LRA 66 of 1995 read together with clauses 14.1.4 and 27 of the annexure B of the ELRC constitution.

## BACKGROUND TO THE ISSUE

The Applicants are employed as full-time post level 1 (one) educators in the Engineering Studies at the Wingfield Campus of Northlink College for Further Education & Training.

The NUE, on behalf of the Applicants, Wingfield, registered a grievance with Western Cape Education Department regarding a change to the contact hours at the said Campus. The Union took the view that the Department's actions contravened the collectively agreed to prescripts of the Resolution of 1 of 2000.

The Applicants at Wingfield used to have 30 hours of contact time per week with students, which consisted of 25 hours as per Resolution 1/2000 and an optional additional 5 hours, which the College Council remunerated them.

The College Council decided to no longer remunerate the lecturers for the additional 5 hours, which meant that the hours fell away, but the lecturers have been instructed to increase their normal contact time to 30 hours per week. The Union regards the Department's action as *ultra vires* to Resolution 1/2000: Workload of Educators (College Based) paragraph 3, Scheduled Contact Hours.

On the other hand the Department relying on its Departmental legal opinion has taken a view that its actions do not violate the prescripts of Resolution1 of 2000. At the time the Applicants' services were utilised against vacant posts that had now been filled. This was the basis on which the overtime engagement was effected.

## SURVEY OF EVIDENCE AND ARGUMENTS

### Evidence on behalf of the Applicants

Mr Wilson, one of the Applicants, testified as follows:

He is lecturer in Light Current Electronics at Wingfield Campus since 1997. The course has two components i.e. Applied Theory and Practical Course. The latter is backed up by theory explanation. He further testified that negotiation talks on extra 5 (five) hours per week with the Department, one the hand, and the College, on the other, had been in progress since 2001. The lecturing program had to be structured so that it adhered to 25 hours time in a 35 hours week schedule. The extra 5 hours time schedule was brought in as an overtime stretching to 40

hours. The Applicants' expectation in terms of actual contact hours for post level 1 (one) and as per PAM (Personnel Administration Measures) Chapter A, paragraph 5 ranged between 22.5 and 25 hours per week.

In October 2006 the situation took a different turn. At the beginning of trimester all lecturers were called to a meeting, whereat Mr Neil Maggot, Senior Manager at the College, advised that all overtime payment will be stopped. He further brought to the attention of staff that the Campus Manager, Mr Victor Winn, would restructure the program accordingly. They were then presented with a timetable constituting a 25-hour contact per week. After the first week they were informed that due to certain reasons students required a 30-hour contact week. His direct superior, Mr AM Van Wyk, was instructed to relieve for 1 hour on a daily basis. This enabled Mr Wilson to do a 27-hour contact per week.

However, the way things were structured made it difficult to plan the work. The Senior Manager then informed them that they would have to work a full 30-hour week with no remuneration. No consultation was held with the staff in this regard. Despite attempts to make management aware of the unfolding unfavourable situation, they were required to stick to the 30 hour contact week sessions. This meant that when he entered the College, he had to give a class the entire day excluding breaks, until the bell rang for the day when it was time for lecturers as well as students to go home. There was no time for extra- and co-curricula activities except for lecturing. Also there was no time for test planning or marking or other activities as stipulated in PAM Chapter A Para 5.

Mr Wilson further testified that when he was approached for the extra 5 (five) sessions, he completed a form and submitted it to the Department. He was then paid for these hours via the College in a lump sum and at the end of trimester. All suggestions from their side were turned down on the basis of financial implications.

In cross-examination Mr Wilson confirmed the following:

- The actual contact time should be between 22.5 and 25 hours and nothing more.
- In the past a compromise was reached in the payment of overtime.
- The student requirement still stood at 30-hour contact per week.
- Between 2001 and 2006 within the 30-hour contact the 5 (five) extra additional hours was for overtime payment.
- The slot allocated to Mr Van Wyk made it difficult for the lecture as it was not purely of practical nature, theoretical explanation had to be provided
- For the education to take place they had to be there all time.

The second Applicant, Mr Bains, testified as follows:

He has been a lecturer since 1998 in the following disciplines:

1) Soldering Electronics Circuits;
2) PC Board Manufacturer and Fault Finding;
3) Electronic Theory and Experiment; and
4) Radio divided into Military and Fault Finding.

He started at the College on the 30-hour contact period and got paid for overtime after submitting a claim form duly completed. There were no problems until October 2006. In a meeting held Mr Maggot informed them that all overtime payment had been cancelled. They were all informed to arrange their 25-hour contact period on their own. This to them came out

clear as a unilateral decision. That Mr Van Wyk would take the extra 5- (five) hour contact per week did not work. They then had to stand in for the 30 hourly weekly sessions. Later the Applicants were informed that if they did not work the 5- (five) extra hour work, disciplinary action would be taken against them.

In cross-examination Mr Bains confirmed that the overtime was discontinued. He further knew that the money came from the Western Cape Education Department and that authority for overtime must be obtained in advance.

**Evidence on behalf of the Respondent**

The first Respondent's witness, Mr Ebrahim Pieters, testified as follows:

He holds the position of a Senior Manager for the Engineering Studies in all the Campuses. Most of the staff renders render their services within a 30-hour contact period respectively. In terms of Resolution No. 1 of 2000 actual hours for post level 1 (one) educators should be between 22.5 and 25 hours per week. Overtime of 5 (five) extra hours became part of Northlink College. This was as a result of vacant posts. When this overtime engagement was taken away, there was no increase of contact time.

Mr Pieters further testified that the Department as well as senior management of the College explained the whole issue to the staff. The latter was unhappy and felt that it was unfair. It was further explained that other campuses were following non-payment policy. Only Wingfield Campus benefited from extra 5- (five) hour overtime payment. Thus, there was no increase in the contact time of 30 hour contact per week that lecturers were instructed to give. The 5- (five) hour period has been deemed necessary for preparation. Duties as per PAM Chapter A, paragraph 5 can be done within 30 hour contact time. Further, management was informed according to its departmental legal opinion that it was within the prescripts of the Resolution 1 of 2000.

In cross-examination Mr Pieters confirmed that the management determines the Wingfield program. He further confirmed that the Applicants did receive the overtime payment. Vacant posts available at the time were utilised for overtime engagment. The said posts have now been filled and no longer available.

At this point due to non-availability of some of the Respondent's witnesses the proceedings were adjourned to 20 February 2007.

The second Respondent's witness, Mr Neil Maggot, Acting Deputy Chief Executive Officer of Northlink College (Administration) testified as follows:

His duties entail attending to and being accountable for HR management, Finance, Information Technology and Physical Resources. He was at one time based at the Central Office of the Wingfield Campus. He also acted as the Principal of the Campus as well as being the Senior Manager of Human Resources of Northlink College.

Mr Maggot further testified that he was well aware of the Applicants' overtime payment. The said overtime was carried against the substantive posts that were vacant. This was the legitimate reason for overtime payment. It was later withdrawn because the vacant posts were no longer there. Further, the workload for engineering campuses necessitated standardisation

that had to be put in place. It was therefore important to bring all campuses in line including Wingfield. The members of staff were informed through the Head of the Education and Training.

The Respondent views the withdrawal of the overtime payment as a correct decision in bringing Wingfield Campus within the prescript of the working document.

In cross-examination Mr Maggot confirmed the following:

- Overtime payment was part of the agreement in 2001.
- He does not agree with the document reflecting contact hours of between 22.5 and 25 hours for the Wingfield Campus.
- Wingfield Campus agreed to operate within 40-hour instead of 35-hour program.
- Form his position as HR manager he was not aware of any consultation that took place between staff and management.
- The communication was effected through the Head of Education and Training.
- He did not see the withdrawal of the overtime payment as a huge detrimental change to the conditions and terms of employment.
- Further in terms of the curriculum needs they have had to maintain 30-hour contact with the students at no extra cost.
- He had no idea why the disciplinary hearing was instituted.

The third Respondent's witness, Mr Keith Lyones, Chief Educator Specialist for Further Education and Training Colleges testified as follows:

His duties entailed attending to and being responsible to policy, planning and resources. The nature of his duties was slightly different from school-based students particularly in the engineering field. Also the guide Resolution 1 of 2000 in terms of operational requirements of the particular campus was the key. Further, the College had not received permission from the Department of Education. In his view it was rare that approval was granted for overtime payment. An educator has to be on site for 7 hours a day and 35 hours a week. Not all this is contact time. Lecturers could be performing other duties. He was further not involved in the drawing up of the timetable. Campuses were not expected to submit their timetables for approval. He never had the opportunity to address the staff of the College. Only management could have been involved.

In cross-examination Mr Maggot confirmed the following:

- ✓ Fraudulent actions of the former Principal led to his convictions
- ✓ Officials of the Respondent, namely: Mr Darwood and Mr Fredeircks took over the management of the College. They then endeavoured to bring stability and order to the situation that had gone out of control.
- ✓ Whatever decisions the two officials took, the intention was to stabilise the situation.
- ✓ Claims for overtime engagement were utilized against vacant posts.
- ✓ Mandate was given at the time to systematically address the irregularities.
- ✓ He regretted that an irregular practice had continued for such a length of time.
- ✓ No consultation took place.

## ANALYSIS OF EVIDENCE AND ARGUMENT

As a point of departure, Grogan (**Dismissal, Discrimination & Unfair Labour Practice, 1st Ed, 2005**) states that the employer often find it necessary to alter terms and conditions of employment to make more efficient or economical use of their labour. He goes on to say that if

employees accept the variation, no problem arises; the change is consensual. However. If the employees refuse to abide by the new conditions of employment, the question arises whether the employer can unilaterally implement the new conditions and if so, under what circumstances, and how.

Grogan further takes the view that unilateral amendment of contractual terms was declared an unfair labour practice by the labour courts under the 1965 Act, and the amended definition of 'unfair labour practice' listed among specific examples 'unfair unilateral amendment of the terms of employment of an employee or employees, except to give effect to any relevant law or wage regulating measure'. The industrial court even held that in certain circumstances a unilateral alteration of an employee's terms and conditions of employment could constitute an unfair labour practice when the alteration was to the advantage of the employees, provided that the change varied the employee's contractual rights (**National Union of Mineworkers v Goldfields of SA Ltd & others (1989) 10 ILJ)**

Under the current LRA Grogan is of the view that the Labour Court's power to deal with the unilateral changes to terms and conditions of employment is uncertain. This is on the basis that unilateral changes are only mentioned in the Act once. Section 64(4) permits employees or trade unions who refer disputes over unilateral amendments to a bargaining council or the CCMA to 'require' the employer not to implement or to reverse the unilateral change for the mandatory period that must elapse before a strike can be called in respect of the dispute. After that, the dispute over unilateral change must be determined by industrial action.

Grogan further highlights a question as to whether section 64(4) means that employees are deprived of any remedy other than strike action if the employer unilaterally amends the contract of employment. He goes on to state that the Labour Court has expressed doubts about whether this is the intention behind the Act. In **Monyela & others v Bruce Jacobs t/a LV Construction** (1998) 19 ILJ 75 (LC) it was held that at least in the case of a variation that takes the form of non-payment or underpayment of remuneration, the employees retain their common-law right to seek enforcement of the contract in the High Court. If they do so, fairness does not enter the equation. In **MITUSA v Transnet Ltd** (2002) 23 ILJ 2213 (LAC) the Labour Appeal Court held that where unilateral amendments to terms and conditions of employment also constitute conduct falling under the definition of unfair labour practice, the affected employees may choose between strike action or referring the matter to arbitration. If they choose arbitration, the employer can raise the defence that the unilateral amendment, though unlawful, was implemented for a fair reason, which will invariably be some legitimate operational requirement.

In **A Mauchle (Pty) Ltd t/a Precision Tools v NUMSA & others** (2003) 24 ILJ 338 (SCA) it was held that an employer's instruction to its machine minders to operate two machines instead of one to meet a temporary increase in orders did not amount to unilateral change to the employee's terms and conditions of service. The court observed that employees 'do not have a vested right to preserve their working conditions completely unchanged as from the moment they first work'. It was only if the changes were 'so dramatic as to amount to a requirement that the employees undertake to do an entirely different job' that they could refuse an instruction to abide by the new working rules or, self-evidently, claim that the employer has breached their contract by introducing the new working practice.

Turning to the facts of the present case, the Applicants are employed on a full-time in Engineering Studies at Wingfield Campus of the Northlink College for Further Education and Training. According to the Applicants on 3 February 2000 parties to the ELRC collectively agreed to the workload of Educators (College based, excluding Colleges of Education) as per

Resolution 1 of 2000. The latter indicated a workload (on site) of 35 hours during which the lecturers should have between 22.5 and 25 hours of contact time with the students. Form January 2001 to October 2006 the Applicants lectured for 25 (twenty five) hours per week and an additional 5 (five) hours per week for which they were paid an agreed hourly rate. This then led to the Applicants' hours extended to 40 (forty) instead of the regulated 35 (thirty five) hours. The Applicants further submitted that at the start of the fourth term in 2006 they were informed that they would no longer be paid for the additional 5 (five) hours and that they had to fit in the curriculum within the 25 (twenty) regulated time per week. In the end after some unsuccessful interventions, the Applicants' contact time was unilaterally changed to 30 (thirty) hours per week without additional remuneration.

In turn the Respondent submitted that the Government Gazette, Vol. 426, dated 29 December 2000 no. 21950 as well as WCED Circular 88/2000 confirmed the contents of Resolution 1 of 2000 as highlighted above. However, the Respondent's interpretation relates to the minimum contact hours being 22.5 hours for Engineering Studies and 25 hours for Business Studies educator staff. No mention is made of any maximum contact and therefore the College management's interpretation is that staff can have more contact hours in accordance with its operational requirements. In view of the lecturers' (Applicants) refusal to adhere to an instruction to a 30-hour contact week, it was then decided to institute a disciplinary action in terms of progressive disciplinary measures.

The Respondent further submitted that all courses offered at the Wingfield Campus are more practically-orientated meaning that all students receive practical training in workshops. As a result of this, the 30 hour per week was therefore implemented after consultation with these lecturers, with the clear understanding that they would be willing to work for between 22.5 -25 hours per week and that they would then receive compensation for an additional 5 hours per week as overtime, which totalled 30 hours per week. Mr Pieters, the Respondent's witness, also testified that, after some vacant posts were filled at the campus, it led to the College management deciding to re-consider its earlier decision. The outcome of the College management's new decision was that all lecturers at the Wingfield Campus were instructed that they had to work for 30 hours per week, and that they would not receive any compensation for the additional 5 hours. This enabled that the same tuition, structured curriculum, was offered to students as before and in accordance with the College operational requirements.

The Respondent further pointed that the engineering students would remain at the campus and not receive any classes from any other lecturer of the Campuses of the Northlink College. The instruction to the Applicants to adhere to a 30-hour contact time per week should not been seen as unreasonable.

The Applicants are of the view that the Respondent has disregarded the collective binding agreement that governs the terms and conditions of employment. Relying on Grogan (**Workplace Law, 8th, Edition, 2005**) they regard the Respondent's actions as amounting to a unilateral variation.

In my own view, Resolution 1 of 2000 distinctly accepted and endorsed as a guide, states that contact time for lecturers (Applicants) on post level 1 (one) should be between 22.5 and 25 hours per week. It does not say that contact time "must be" or "shall be" because it is only a guide and not a prescription. That the agreement makes it clear that a formal college day should comprise no fewer that 7 hours (35 hour work week) illustrates in any event that the Applicants' still fell within the accepted ambit. The withdrawal of the overtime obviously impacted on overall the service delivery bearing in mind that the Applicants' contact hours increased to 30 hours.

But looking at the total picture in its entirety, the Respondent's actions, in my view, were not out of proportion. There is doubt about the fact that the question of overtime engagement would always be a factor to contend with and in all likelihood would be determined by the Respondent's operational requirements. That the Applicants did not deem fit and proper to respond or address me on the issue of vacant posts that arguably enabled their utilisation for the overtime engagement, has left me to infer nothing else but the justification of the overtime that the Applicants have referred to and relied on. Based on the above exposition, I am unable to agree with the Applicants' interpretation of the Collective Agreement as enshrined in the Resolution 1 of 2000.

Further, I have noted that the Respondent if not solely, to a great extent relied on a document entitled "OPINION" (legal opinion). On the other hand, the Applicant's representative objected to its submission as evidence. I have further noted that the said legal opinion relates to Westlake Campus and False Bay College. I have to put on record that the conclusions I have arrived at have not been determined or based on the untested opinion. I do recall that these proceedings had had to be adjourned to enable the Respondent to call the author of the document to testify. Needless to say that this was no avail.

Taking the evidence presented in this forum into consideration, I am inclined to follow **Manchle** decision (**supra**). That the court observed that the employees 'do not have a vested right to preserve their working conditions completely unchanged as from the moment they first work', seems applicable and fitting in the present case as well.

Further, as stated in **Mtusa** (**supra**) the Labour Appeal Court held that the affected employees may choose between strike action or referring the matter to arbitration. If they choose arbitration, just as in the present case, the employer can raise the defence that the unilateral amendment, though unlawful, was implemented for a fair reason. The Respondent defended its actions on the basis that the vacant posts, existing at the time, were utilised for the overtime engagement of the Applicants. The Applicants went at great length in everything else other than responding or commenting on this important or significant aspect.

Further, from what Grogan has spelt out, that unlike the common law, the current LRA places no limitation on employer's rights to vary their employees' terms and conditions of employment. He goes further and states that if the variation affects wages and salaries alone, the employees' remedy is to strike or to sue for breach of contract. In the light of section 64(4), it would seem that under the LRA the Labour Court cannot restrain an employer from implementing a change, or compel it to restore the status quo for more than 30 days after the employees have referred a dispute, as required by section 64(1) (**Mukhwevo & others v ECCAWUSA** [1999] 4 BLLR 358 (LC)).

**AWARD**

In the premises I make the following order:

1. The Applicants have failed to discharge the onus of proving that the Respondent's conduct constituted an unfair labour practice in terms of section 64(4) of the Labour Relations Act No. 66 of 1995 read together with clauses 14.1.4 and 27 of the Annexure B of the ELRC constitution.
2. The matter is hereby dismissed.
3. No order as to costs is made.

**Lungile Matshaka**

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**Conciliator/Arbitrator/Panelist: ELRC**