

EDUCATION LABOUR RELATIONS COUNCIL



Panelist: Adv. C de Kock
Case No.: PSES508-08/09 WC
Date of Award: 3 August 2009

In the ARBITRATION between:

NFC POGGENPOEL

(Union / Applicant)

and

WESTERN CAPE EDUCATION DEPARTMENT

(Respondent)

Union/Applicant's representative: Mr J Piedt
Union/Applicant's address: 13 Highmoor Avenue
Northpine
Brackenfell, 7560
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Respondent's representative: Mr. W T Wilkonson
Respondent's address: Private Bag X9114
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DETAILS OF HEARING AND REPRESENTATION

- [1] The dispute came before me as an arbitration process and was scheduled for and heard on 20 July 2009 at the respondent's offices in Cape Town. Mr J Piedt represented the applicant and Mr W T Wilkonson represented the respondent. The arbitration proceedings were finalised in the allocated time and the award needs to be issued on or before 3 August 2009. The proceedings were digitally recorded.

BACKGROUND TO THE DISPUTE

- [2] The applicant applied and was shortlisted for the position of Head of Department. She was thereafter invited to attend an interview. Following the interviews, it was recommended that, in order of preference, TJ Van Wyk, RA Noble and NR Andrews be appointed to the position. The nomination of Van Wyk as the preferred candidate was accepted and he was appointed to the advertised position of Head of Department. The applicant thereafter lodged an unfair labour practice dispute, alleging that the respondent committed an unfair labour practice in not promoting her to the position of Head of Department.

ISSUE TO BE DECIDED

- [3] I am required to determine whether the respondent committed an unfair labour practice in not promoting the applicant.

SURVEY AND ANALYSIS OF THE EVIDENCE

- [4] The applicant did not dispute that Van Wyk, Noble and Andrews scored higher than her during the interviews held. The applicant's challenge to her non-promotion to the post of Head of Department was that a Mr Van Niekerk caused her not to get the post because of a feud between them. The applicant, in support of this allegation relied on the hearsay evidence of a Mrs P Rooi, who allegedly told her that Mr Van Niekerk stated on the morning of the interview that he was not going to give the applicant good marks.
- [5] The applicant was afforded more than a reasonable opportunity to subpoena Mrs Rooi, which they failed to do. I therefore have no hesitation in rejecting this hearsay evidence, as Mr Van Niekerk

personally came to testify and he denied that he said so or that he tried to influence the interview panel not to appoint the applicant. It is common cause that the applicant, in a second interview for a similar post was successful and that she was to commence duties in that position as from 1 July 2009. Mr Van Niekerk was also in that interview and the applicant was nominated as the preferred candidate. I therefore reject the applicant's submissions that Mr Van Niekerk was the cause of her not getting the promotion during the initial advertisement of the post.

- [6] Insofar as the applicant alleged that Mr Vercuil was influenced by Mr Van Niekerk, I also reject this allegation. Mr Vercuil denied that he was influenced by anyone and he scored the candidates as he saw them. I was impressed with the evidence of Mr Vercuil and I therefore find that there were no irregularities during the interview process and the resultant nomination of preferred candidates. It is clear from the interview scores that the applicant was not even in the list of the first three preferred nominations and I am therefore unable to agree with the applicant that an unfair labour practice was committed insofar as she did not get the post when it was first advertised.
- [7] Insofar as the applicant indicated that she got the post the second time round, I agree with the respondent that the applicant could very well have been the preferred candidate the second time round because she already had the benefit of attending the previous interviews. The applicant also came up against different candidates for the post the second time round. I am inclined to believe that, the fact that the applicant was appointed after the second advertisement is indicative of the fact that the respondent had nothing against the applicant in the first interview process. The interview panel appeared to have scored the applicants as they saw it and the applicant has failed to prove that there were any irregularities during the process.
- [8] The applicant also challenged the fact that Van Wyk was appointed and that he remained in the Senior Phase. Mr Vercuil testified that this was based on an operational decision and I am unable to find any irregularity insofar as this was concerned. Even if there were some irregularities with Van Wyk's appointment, there were still two other preferred candidates above the applicant who should then have been considered for the job.
- [9] I have also considered the fact that the applicant had continued to act in the position until 1 July 2009. I do not believe that the fact that the applicant continued to act amounted to any irregularity, as Van Wyk was used by Mr Vercuil based on operational requirements at the time. The fact that the applicant continued to act in the position does not entitle her to the position. I have already stated above that there were two other preferred candidates above the applicant for the position. It is well

known that the fact that an employee acted in a position does not entitle that employee to appointment to that position.

AWARD

[10] The applicant failed to prove that the respondent committed an unfair labour practice in not promoting her to the position of Head of Department during January 2009.

[11] I therefore make the following order:

[11.1] The application is dismissed.

A handwritten signature in black ink, appearing to be 'Adv C de Kock', with a stylized flourish extending to the right.

Panellist: **Adv C de Kock**