

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

Case No.: PSES 529-05/06 WC

In the matter between:

F.L.WILLIAMS

Applicant

And

WESTERN CAPE EDUCATION DEPT. 1st Respondent

N.ISAACS 2nd Respondent

AWARD

Details of hearing and Representation

The arbitration hearing was held on 28 February 2006 and 9 May at the offices of the WCED in Cape Town. Respondent (WCED) was represented by K.Petersen , and Applicant (Williams) was represented by Sandy Smart, a representative of the National Union of Educators (NUE). Both parties submitted bundles of documents, which shall be referred to where necessary.

Background

Williams applied for a principal's post, Post No.2430 /03. She was shortlisted and interviewed for the post and was placed second on the list. A dispute was lodged by another applicant regarding the filling of the post , and during arbitration a settlement agreement was reached wherein the WCED agreed to a repeat of the process. The repeated process took place during October 2005, and this time Williams was not shortlisted and therefore not interviewed for the post. Mrs Williams then lodged a dispute to this repeated process, which is the subject of this arbitration. Although a candidate, N.Isaacs (1st respondent herein), has been nominated for the post, no appointment has been made.

It must also be noted that 1st respondent had also been nominated for the post during the first process for the filling of this post. Isaacs had also lodged a dispute after the first process in which he challenged the validity of the settlement agreement because he had not been joined to the process.

At the conclusion of this arbitration hearing , upon careful consideration of the history of this matter, I considered it prudent to issue a ruling joining Issacs to the process. Isaacs has chosen not to respond.

Issue in Dispute

I was asked to decide whether the process for the filling of post number 2430/03, which was conducted by the School Governing Body of Floreat Primary, was procedurally fair. Applicant has requested that the post be advertised under new legislation, and that the entire process be repeated.

Evidence

The union led the evidence of Williams, John Rogers, Newman and Gloria Simpson. A short summary of salient points raised is recorded hereunder.

1. F.L.Williams

The educator component of the SGB was prejudiced towards her. Mrs Du Plessis and De Ming had been part of the process. Both of them had been reprimanded and disciplined by her. The secretary had also been reprimanded by her. They had not taken this very well.

Mr Van der Westuissen had also been reprimanded by her because he had spoken to a teacher about a post. She had also investigated the fact that he did not pay school fees. He had made negative comments about her at a Governing Body meeting.

She felt that she should have been shortlisted because she had met the criteria for shortlisting.

Under cross examination she testified that she had a feeling that the educator component of the SGB had not been objective. There were no permanent male educators on the staff. There was only one contract male educator.

They had had a workshop on one occasion on Employment Equity.

2. John Rogers

He was a member of the SGB and had taken part in the selection process during October 2005. He was not satisfied with the process because there had been some discrepancies, which he had tried to highlight to Daniels. After the candidates had been scored, Daniels took the scoring sheet and displayed it on the board. At this stage not all members of the SGB had completed their scores. Changes were made to scores after some members scores had been displayed.

Three candidates that were nominated withdrew from the process. He then suggested that we call other persons. This was not done only the remaining three persons were interviewed.

There was no explanation as to why the process was being repeated. There was also no direction on what had to be done. Daniels, the circuit manager, did not provide any guidance or training, nor did he speak to the SGB about how the process should proceed.

Although the meeting was chaired by Newman, most decisions were made by Daniels.

The same criteria were used in the repeated process as was used previously. There were vast discrepancies in the scores allocated by the members. It was clear to him that the members did not understand how to score.

He was not happy with the process. Daniels ought to have allowed all the members scores to be handed in before displaying them on the board.

He had reason to believe that some members had ill feeling towards Mrs Williams. Van Der Westuissen had made a statement to the effect that they needed to get Mrs Williams off the school.

Some teachers had said to him that they could not have a woman running the school. He had told Daniels that the Department should handle the process of

appointment because there was a problem with the teachers and the principal.

3. Newman

He is the chairperson of the school governing body and was the chairperson of the interview committee during the process.

The SGB was not clear as to why the process was being repeated. They were concerned that they could make the same mistake again. The issue of how points were to be allocated was vague.

Daniels wrote the scores on the board as the members finished scoring.

Changes were made to scores after this. He had not been in control of the process as Daniels took over the floor.

Mrs Du Plessis did not like Mrs Williams. Mr Van der Westuissen had made a remark to the effect that Mrs Williams would never get a post at Floreat.

He would have liked to have had clear guidance on how to allocate scores.

Under cross examination he testified that there had been a brief discussion on the morning of 17 October about the process. There was also a short discussion about scoring and members were given a copy of a sheet containing WCED guidelines on the process.

4. Gloria Simpson

She is a shop steward with the National Union of Educators , and was an observer to the process of the filling of the post. Daniels had taken over the meeting as if he was the chairperson, and this had made her uncomfortable.

When Daniels raised the issue of criteria for scoring, she handed over a handbook on criteria in order to assist the process. Copies were made of the extract on criteria and handed to the members.

Daniels did not give an adequate explanation as to why the process was being repeated. He also gave an incorrect explanation of one of the criteria.

Daniels started writing scores on the board before all the members had finished scoring. It was possible for those members who had not finished scoring to change their scores.

She felt that all the applicants had not been treated fairly. The members had deviated from agreed upon procedures. It had been agreed that if a candidate who had been shortlisted withdrew, then the next candidate would be added to the list in order that there would always be five candidates . However this did not happen when two of the candidates withdrew, which resulted in only three candidates being interviewed for the post. More candidates ought to have been shortlisted.

The criteria was not fair . They did not take into account the fact that they were dealing with a primary school. They also did not take into account employment equity.

There was too huge a discrepancy in the scores that were allocated in the first process and in the repeated process.

The WCED led the evidence of three witnesses, namely, Mrs De Swart, Mrs Bendi and Mr Daniels.

5. Mrs De Swart

She had been part of the first process as well as the repeated process. They had received training for the first process . It was agreed to use the same criteria that was used for the first process in the second process. Gloria Simpson provided them with guidelines that assisted with scoring. She was satisfied with the process.

The issue of employment equity was not discussed.

Scores were allocated on the bases of guidelines for the appointment of principals. She had not questioned why the scoring of candidates was so diverse. She could not remember whether Daniels had written the scores on the board after all the candidates had been scored. It did not strike her as odd that the top five candidates were different from the first process. The second process had been easier. There had been no guidelines in the first process. They had not been told why the process was being repeated and what was wrong with the first process.

Daniels did not give them any guidelines on employment equity.

They had been told by Mr Job and Mr Rogers that when a person lodges a dispute, they have to be removed from the post. The SGB felt that Mrs Williams should remain in the post.

The two candidates that withdrew from the process, withdrew on the day of the interviews. The idea had been that they would call other people from the list if candidates withdrew at the time that they were informed of the interview, which was seven days before the date of the interview.

6. Bernard Daniels

He is the circuit manager, and part of his work entails the nomination of school principals. He had conducted a workshop in this regard at Floreat Primary. All aspects of the process were discussed. There was a general consensus that the same criteria that was use in the previous process would be used once again and that there would be no additional criteria. The criteria were discussed in detail and there was also a discussion about how scores would be allocated. They agreed to chose five candidates with the highest scores. A decision was taken that if any one of the chosen candidates declined when they were telephoned about the interview, then we would chose the next candidate.

At a very late stage, on the day of the interview , two candidates withdrew.

There was then a discussion on whether we should continue, and although there was some disagreement, they did not call any more candidates.

There had been no discussion on employment equity.

Under cross examination, he testified that the discrepancy in the sores did not concern him . He could not get involved with the final allocation of scores.

He had decided to veto the decision to call more candidates on the advise of the Labour Relations Department.

There had been no directive from the Department on how to implement any employment equity plan.

7. Muriel Bendi

She was the SADTU representative and was present as an observer during the process. A workshop was held, and it appeared that the SGB understood the process. Everybody had an opportunity to look at all the CV's. No one had been influenced to mark candidates up or down. She felt that the process had been fair and she reported this to the union.

Under cross examination she testified that she did not think that the mark allocation in relation to the criteria was vague.

Analysis of evidence and argument

8. The employee bears the onus to prove that the employer's conduct amounted to an unfair labour practice. (*J.Grogan Workplace Law*, page 229 7th edition). In *(Cullen and Distell (Pty) Ltd (2001) 10 CCMA 693*, the arbitrator said on authority of *SAMU obo Damien v Cape Metropolitan Council (1999) 3 BALP 259 (CCMA)*, that "the onus rests on employees who allege that they have been victims of unfair labour practice to prove their case on a balance of probabilities."
9. The three main issues raised by applicant are that some members of the interviewing committee were prejudiced towards applicant; that the criteria set to determine the scores was vague; that the SGB failed to give consideration to employment equity in terms of the Department's Employment Equity Plan.
10. Applicant alleges that Mr Daniels, the representative of the Department did not assist the process. Daniels testified that he held a workshop to explain the process and that in his view the SGB was better prepared this time around. Evidence that a workshop was held was corroborated by other witnesses. It is also evident from the minutes, as well as from the testimony of witnesses, that criteria were discussed and were then formally adopted. It was also decided, as suggested by Ms Samson to use the guidelines set out in the Personnel Administration Measures (PAM). It would appear therefore that there had been discussion and input on the question of criteria in order to assist the members of the interview committee in understanding the criteria.
11. Active input from a union observer is a deviation from procedure, but I do not view this deviation as a serious procedural lapse since it did not in any way prejudice applicant.
12. Despite the adoption of set criteria it is no doubt clearly evident from the allocated scores that there was a considerable discrepancy in the scoring. Allegations of bias have been raised against Van der Westuysen by applicant. Her evidence in this regard was corroborated by Newman, the chairperson of the governing body. It is evident that the scores allocated to applicant by Van der Westuysen differed considerably from the scores allocated to her by other members. This does not necessarily mean that a repeat of the process is warranted on this basis. In ordering a repeat of the process I am required to take into account the gravity of procedural lapse and the seriousness of the prejudice suffered by applicant.
13. When dealing with the substantive aspects of the applicant's, *Goliath v Medscheme (Pty) Ltd* is authority for the proposition that the applicant must show *mala fides*.

"Inevitably, in evaluating various potential candidates for a certain position, the management of an organisation must exercise a discretion and form an impression of these candidates. Unavoidably this process is not a mechanical or mathematical one, where a given result automatically and objectively flows from the available pieces of information. It is quite possible that the

assessment made of the candidates and the resultant appointment will not always be the correct one. However, in the absence of gross unreasonableness which leads the Court to draw an inference of *mala fides*, this Court should be hesitant to interfere with the exercise of the managements discretion.”

There is evidence of bias or *mala fides* on the part of at least one member of the interviewing committee, which cannot be ignored. It is further evident that the members were not clear as to the application and weighting of the criteria in relation to the scores . This is particularly important in view of the fact that the shortlisting was based solely on scores and not on consensus and discussion .

14. The WCED has an obligation to ensure that its own procedures have been followed before an appointment can be made. Applicant has raised the issue that no consideration was given to the WCED'S gender policy or Employment equity plan. The argument of the WCED that the collectively agreed upon Employment Equity Plan had not been implemented at schools, does not hold water. In terms of the Employment of Educators Act 76 of 1998, Section 7(1), the WCED is obliged to give consideration to employment equity, and in this instance, clearly no such consideration was given. In this regard I am not making a finding on whether applicant was discriminated against or whether she ought to have been considered on the basis of her gender, as this is not the appropriate forum to do so. My finding is merely that consideration ought to have been given to the issue of employment equity.
15. I am of the view that the procedural lapses are of a sufficiently serious nature to warrant a repeat of the process.

AWARD

1. The process for the filling of post no.2430/03 is to repeated from shortlisting, and such process is to be conducted by a new interviewing committee.
2. The WCED must ensure that the guidance and training provided to the SGB and the Interviewing Committee for such process, is clear, transparent and unambiguous.
3. The entire process must be completed by 15 September 2006

Arthi Bhoopchand
Panelist
24/07/06