



IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT CAPE TOWN

Case No: PSES554-06/07WC

In the matter between:

NAPTOSA obo Koeleman & Venter

Applicants

And

Western Cape Department of Education

1st Respondent

Phike XP

2nd Respondent

Emjedi S

3rd 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 Applicants by the Respondent, was held at the Respondent's premises on 10 December 2007.

ISSUE TO BE DECIDED

The issue to be decided is whether the Respondent committed an unfair labour practice by failing to promote the applicants to the positions in question.

BACKGROUND

Mrs. Koeleman applied for a Post Number 565, that being the post of Deputy Chief Education Specialist: Post level 5 (Campus Manager) at Northlink;, she had been acting on the post for three (3) years. Mrs. Venter applied for post number 0567: Senior Education Specialist: Post level 3: Faculty Head at Boland FET College; she had been acting on the said post for 3 years. Both Applicants were nominated as first preferred candidates in the list of three candidates for the respective posts. The 2nd Respondent was number three (3) on the recommendation list for the Northlink post, and the 3rd Respondent was number two (2) in the recommendation list for the Boland post.

SURVEY OF EVIDENCE AND ARGUMENT

The Applicants led no evidence through witnesses but submitted a bundle of documents and written arguments. The Respondent called Allan John Meyer, who is in the Employment Equity Unit of the respondent.

Allan testified that his unit evaluates each and every vacancy. The Governing Councils nominates three names, and the Employment Equity Unit looks at the three names and determines which candidate fits the profile which is part of the Employment Equity Plan. The Unit has targets for posts and target levels for each post. In determining a suitable candidate, they used policy directive 1 of 2006. This policy was presented to the PELRC and was adopted by all unions including NAPTOSA. In relation to post 0565, where in the 2nd Respondent was appointed, three names were shortlisted, that being Koeleman; Maggot and the 2nd Respondent. At the time, there were no African males at the college, and in order to address this issue as well as the global representativity problem, he signed and endorsed the appointment of the 2nd Respondent to the post in question. In post 0567, three names were nominated, those being, Venter who is a white female; Emjedi who is a coloured female; and Cronje who is a coloured male. At the time, coloured females were under represented at the college. Representativity is the main reason why the 2nd and the 3rd Respondents were

appointed to the posts in question was to address representativity in line with their Employment Equity Plan.

ANALYSIS OF EVIDENCE AND ARGUMENT

It is the Applicant's case that the main reason why the applicants were not appointed was because of their race, which it believes is unfair discrimination as the applicants already held the posts for 3 years and were nominated as the preferred candidates for the post. The Applicant further questioned what it termed the numbers driven exercise (representativity), arguing that the Respondent chose less experienced candidate over more suitable candidates.

In its arguments the Applicant alleged that the Respondent was unreasonable in not promoting the applicants as it ignored and gave no regard to the preference of the College Council. The Applicant also argued that affirmative action cannot be met at all costs and at the expense of all other considerations and fair labour practices as this goes against the intentions of the Employment Equity Act.

The Respondent argued that many people applied for the posts in question. The Governing Councils conducted the shortlist and the shortlisted candidates were interviewed. The applicants were not appointed mainly as a consequence of representativity. Further that in line with its Employment Equity Plan it had to address representivity. The Respondent argued that its decision is in line with Chapter 3 of the Employment of Educators Act which provides that in considering of an application for a position, the governing body or the council **must** ensure that the principles of equity, redress and **representivity** are complied with. Also that, Chapter 3 (20)(1) & (2) provides that - a designated employer **must** prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce objectives to be achieved for each year of the plan, measures to be implemented, where under representation of people from designated groups has been identified timetable for each year of the plan. The Respondent also argued that there were extensive consultations undertaken with all relevant parties, in

finalising 'A Policy Implementation Directive for Compliance with Employment Equity Targets at Educational Institutions', which contain equity targets, and methods for achieving these targets, for both the educator sector and public service sector. The employment equity targets set by the WCED were based upon the economically active population of the Western Cape.

There are no procedural challenges on the posts in question and this leads me to accept that the shortlist is also not disputed. I am therefore of the view that all the candidates that were shortlisted and interviewed met the requirements and were therefore legible for appointment.

Under common law, employees have no legal entitlement to be promoted, unless they can prove a contractual right or legitimate expectation. It is trite law that the prerogative of promoting employees is that of the employer. It is also trite law that the mere fact that one has successfully acted in a position does not itself create an entitlement to appointment [See **Meyer v Iscor Pension Fund (2003) 5 BLLR 439 (LAC)**]. I do not intend to take this point any further, save to say that no evidence of any kind was put before me to suggest how else the Respondent could have created this legitimate expectation of promotion. In this regard, the Applicants case must fail.

A lot of evidence and argument was tabled on the fact that more experienced candidates were sacrificed for less experienced candidates. I assume this is premised on the fact that the two applicants had acted on the posts in question for about three years, and that they scored better in the interviews. I have already dealt with the fact that their acting did not give them any legitimate expectation of appointment. I shall not concentrate on the other issues. In **Benjamin v University of Cape Town (2003) 12 BLLR 1209 (LC)**, the Court remarked that the mere fact that one person looks better on paper than another does not necessarily mean that the promotion of the other person is unfair, at least in the sense in which that word was intended by the legislature.

Section 20(3) of The Employment Equity Act defines a suitably qualified person as a person who has one or a combination of:

- a) formal qualifications;
- b) Prior learning;
- c) Relevant experience; and
- d) Capacity to acquire within a reasonable time, the ability to do the job

As evident from Section 20 of the Employment Equity Act, to qualify as a suitable candidate, one needs one or more of the listed qualities. Clearly experience is but one of them. There is no doubt that some level of subjectivity is involved in appointments/promotions because the employer has to choose from a number of candidates who meet the requirements of a job. In the matter before us, the employer's subjectivity is based on Employment Equity Act and more particularly, representativity. What puzzles me in the dispute in this regard is the not so well substantiated allegation that the 2nd and 3rd Respondent's are less capable to do the job, the basis of which seems to be the fact that the applicants acted for three years on the posts in question and the fact that they scored better than the 2nd and 3rd Respondent in the interviews. In my view, what further complicates the matter is the fact that NAPTOSA now contests the targets set in the policy directive despite having been part of the PELRC wherein the policy was tabled and agreed to. Surely there is some discord in that regard. It cannot be that the one of the parties to a policy to set targets now argues that affirmative action cannot be met at all costs and that target setting discriminates against certain employees.

The Applicant argued that Mrs. Koeleman is also an EE candidate and she was the only female Campus Manager in North Link which has 8 Campuses. It is undisputed that at the post level of Campus Manager there was no black male at any of the FET Colleges, and while Mrs. Koeleman was the only white female campus manager in North Link, she was not the only white female in the campus manager post level. In my view, the essence of the Applicant's inquiry in this regard, is the order of preference when one is dealing with previously disadvantaged individuals. In my view, there is a sequence at which one should apply preference in previously disadvantaged individuals. That process should be guided by the needs of the particular College looked at in line with the post level of the sector within which the appointment / promotion is made, i.e. in the FET Colleges sector. This would mean

that one would address representativity in the one college bearing in mind the global picture of the FET's at the same time. Failure to do this might result in some obscurity where, a college might be well represented but there is over representativity in FET sector at large. The fact that two of the challenges identified by the WECD Employment Equity Plan talk about the need to affirm women does not mean that a blind eye should be turned on African and or coloured men.

On the evidence before me, I am of the view that the 2nd and the 3rd Respondents met the requirement of the job hence they were shortlisted. Further that employer applied its Employment Equity plan and policy to address past imbalances in the colleges in question as well as with in the FET College sector. Due to the nature of the contest, certain candidates were left dissatisfied with the outcome. However, I cannot find anything unfair and or irrational from how the 1st Respondent handled the appointments of suitably qualified candidates for the posts in question.

Lastly, the fact that the applicants were nominated as best candidates by the Governing Councils, does not change the fact that the appointment is made by the Respondent. After all it is the Respondent that is the employer and not the Governing Council and hence the status of the Council is merely to recommend. Where a recommendation that is not inline with the laws and policies governing the filling of posts is made, the Respondent is expected to step in and correct such irregularity, and provide an explanation that is fair and reasonable for its deviation from the recommendation of the council. In this case the Respondent's case is one of representativity. In **Alexandre v Provincial Administration of the Western Cape Department of Health (2005) 26 ILJ 765**, the noted that judicial restraint is called for when it comes to reviewing state actions designed to redress past imbalances.

AWARD

I hereby find that the Applicant failed to discharge their onus of proving that the employer had committed an unfair labour practice by not promoting them, and or that the employer unfair discriminated against them owing to their colour and or gender.

The Applicant's case is therefore dismissed.

Signed on this 25th day of February 2008

Adv. Luvuyo Bono