

EDUCATION LABOUR RELATIONS COUNCIL

IN THE MATTER BETWEEN:

CASE PSES579-04/05WC

SADTU obo M A DU PLESSIS

EMPLOYEE PARTY

and

DEPARTMENT OF EDUCATION – WESTERN CAPE EMPLOYER PARTY

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

The arbitration was completed in five sittings.

It commenced with a Con/Arb meeting which was held from 10h05 to 14h45 on 2 March 2005 at the offices of the EMDC - Southern Cape/Karoo, George. Present at the hearing for the employee party were Ms S Kwazi (SADTU official as employee representative), Mr M A du Plessis (Referring employee) and Mr K Langeveldt (Observer). Present for the employer party was Mr F H Scholtz (Senior Labour Relations Officer as employer representative). Mr Langeveldt recused himself during the conciliation proceedings.

Conciliation was unsuccessful and a certificate was issued declaring the dispute unresolved. Arbitration commenced but could not be completed.

The second sitting of the arbitration was held from 09h35 to 11h35 on 5 April 2005 at the same venue. The same parties were present as at the first sitting with the addition of Mr R Mahangu (Principal of Mizamo-Yethu Secondary School as witness) for the employee party. The arbitration could not be completed when it was established that two of the witnesses whom the employee party wanted to call, Mr M de Jager (Chairman of Erika Primary School Governing Body) and Mr E J Jacobus (Erika Primary School Governing Body member), would or could not attend the hearing to testify. Both the employer and employee parties tried to telephonically persuade them during the hearing to attend voluntarily, but were unsuccessful.

The matter was postponed so that the employee party could apply to the ELRC for the two witnesses to be subpoena'd to attend the next sitting of the arbitration, which was done.

The third sitting of the arbitration was held from 09h35 to 17h45 on 30 May 2005 at the same venue. The same parties were again present, with the exception of Mr Mahangu and the addition of the two witnesses who were subpoena'd to attend for the employee party, namely Mr Jacobus and Mr de Jager.

I requested the parties at this sitting to expedite the process and they dealt with the proceedings as efficiently as possible. The last witness for the employee party, Mr de Jager, became unwell during his cross-examination and was unable to continue with his testimony, as a result of which the proceedings were adjourned.

The fourth sitting of the arbitration was held from 09h45 to 17h00 on 10 June 2005. New witnesses present at this sitting for the parties was Mr S W Manuel (Principal of

Denneprag Primary School as witness) for the employee party, and Mr G D Briesies (Principal of Diaz Primary School and WCED representative on the Interview Committee as witness) and Mr B Deal (Principal of Erika Primary School as witness) for the employer party.

At the previous sitting the witness for the employee party, Mr de Jager, became unwell during his cross-examination and was unable to continue with his testimony and re-examination by the employee party. This resulted in it not being possible to conclude the employee party's evidence. A medical certificate was produced by the employer party's representative at the commencement of this sitting which stated that Mr de Jager had been declared medically unfit to participate further in the arbitration proceedings. It was agreed that Mr de Jager's testimony would be set aside under these circumstances.

New evidence was produced by the employee party at this sitting in the testimony of their witness Mr Manuel. The employer party gave notice that additional witnesses needed to be called in order to respond to this evidence, of which they had only become aware of then for the first time. The cross-examination of their witness Mr Deal could also not be completed due to insufficient time. A further day was requested by the parties to conclude the arbitration as a result of these events, with 18 July 2005 indicated as the most suitable date, which was then set down by the ELRC.

The fifth sitting of the arbitration was scheduled to commence at 09h00 on 18 July 2005. Only the employee party was present. I enquired telephonically as to the employer party's whereabouts. Their representative, Mr Scholtz, reported that he had not received confirmation of the hearing set down from the ELRC and that he was still waiting for this information. It was subsequently established that the employer party had received the notice but had failed to inform their representative.

Mr Scholtz contended that he was only informed that morning of 18 July 2005 that the matter would be proceeding on the same day and asked telephonically for postponement of the arbitration in order to complete the employer party's evidence, since he and his remaining witnesses would not be able to attend the hearing at such short notice. These witnesses would have included Mr Deal, whose cross-examination and re-examination still had to be completed and Mr P H Fillies, the successful incumbent of the disputed post.

I reminded both parties that the ELRC had expressed their concern about the duration of the arbitration and informed them that the arbitration had to be concluded at this sitting, with no postponement possible under the circumstances.

The parties consulted by telephone and agreed with me to exchange written closing arguments, with the employee party's rebuttal due on 21 July 2005 and the arbitration award due by 4 August 2005. These documents would be submitted to one another by the parties and to the ELRC for forwarding to the Arbitrator, which was done.

ISSUE TO BE DECIDED:

Whether the employer party had committed an unfair labour practice in terms of S186(2)(a) of the LRA by not promoting and appointing Mr du Plessis into the post of Deputy Principal at Erika Primary School, Mossel Bay, as advertised in Vacancy List Number 2 /2004 under Post Number 0370.

BACKGROUND TO THE ISSUE:

The following was common cause: Mr du Plessis was an Educator post level 1 at Hillcrest Secondary School in Mossel Bay. He commenced service with the employer at Hillcrest Primary School in 1986. He applied for the post of Deputy Principal at Erika Primary School in Mossel Bay, advertised as Post Number 0370 in Departmental Vacancy List 2 of 2004 dated 14 June 2004. The advertised position was a Post Level 3 position. There were sixteen applicants for this post. The short listing process was conducted on 20 September 2004 by the Nomination and Interview Committee (Interview Committee) appointed by the School Governing Body of Erika Primary School. The interviewing of the short listed candidates took place on 22 September 2004. Mr P H Fillies was nominated as the successful candidate on 23 September 2004 and was appointed in the post effective from 1 January 2005 after ratification by the employer party. Mr du Plessis was a member of the Governing Body of Erika Primary School and recused himself from the selection process. The advertising of the post and the sifting process was not disputed, but only when it reverted to the Governing Body and onwards up till the appointment of Mr Fillies.

The employee party's version and evidence was as follows: The employer party had acted in bad faith by appointing the present incumbent Mr Fillies before the dispute was dealt with. The employer was procedurally unfair during the short listing process in the use of the additional or secondary criteria for the post. According to the curriculum vitae (CV) put forward for Mr du Plessis, some of the criteria into which he fitted were not considered. The relief sought was for the short listing process to be repeated or reviewed and to provide all the applicants the opportunity to attend an interview. It was also asked that the incumbent of the post return to his previous school.

The employer party's version and evidence was as follows: They became aware that Mr du Plessis had grievances regarding how Post Number 0370 was filled and had alleged that the appointment was not done fairly. The Governing Body of the school had appointed a Nomination Committee that dealt with the nomination process. Mr du Plessis was however not short listed during that particular process. They contended that the procedure followed by the Governing Body was fair and correct and also in line with the relevant Resolutions.

SURVEY OF EVIDENCE AND ARGUMENT:

Documents were presented by both parties and admitted as evidence.

The parties were reminded that the employee party had the onus of proof in this matter.

Mr du Plessis, Mr Mahangu, Mr Jacobus, Mr de Jager, Mr Manuel, Mr Briesies and Mr Deal presented oral evidence for the parties after taking the oath. It was agreed that Mr de Jager's evidence be set aside due to his inability to continue his testimony. Mr Deal's cross-examination by the employee party could not be completed due to the employer party not being present at the final sitting of the arbitration.

The employee party submitted in argument that an unfair labour practice had been committed, for the following reasons:

1. The employer had acted in bad faith by appointing an incumbent into the post as the dispute was lodged before the schools reopened and within the time frames.
2. The employer had also acted in bad faith by their absence at the hearing that was scheduled for 18 July 2005, which was requested by them since they wanted to call more witnesses. The employer party was quite aware that the Arbitrator was under pressure to conclude the arbitration on that day as she had already gone beyond the time that was acceptable to the Council.
3. There was procedural unfairness with regard to the short listing as well as the interview process that resulted in Mr du Plessis being denied a chance to present himself for interviews at Erika Primary School.
4. The procedural unfairness was based on the following:
 - Mr du Plessis was scored as only satisfying one of the four core criteria whereas he actually satisfied three, which was the same as the nominated candidate Mr Fillies.
 - Mr Mahangu, the employee party's second witness had no personal knowledge of Mr du Plessis and had agreed with the Interview Committee before he saw Mr du Plessis' CV. When Mr Mahangu saw Mr du Plessis' CV at the arbitration he changed his stance and conceded that Mr du Plessis should have got a point for experience in management as his CV showed evidence that he had acted in a promotion post. Although Mr Briesies, the employer party's witness, disagreed with this, he could not attach time to the relevant experience required and there was no common understanding to the length of experience to be considered relevant.
 - Mr Mahangu also testified that Mr du Plessis was supposed to get a point for the core criteria of curriculum management, for according to the CV he was subject head at his school, which implied that he was a curriculum manager.
 - At primary school level there was no subject specialisation, which meant that Mr du Plessis, who passed matric mathematics at higher grade, would have no problem teaching mathematics at that level. The fact that he also passed business mathematics at tertiary level implied that he was capable of teaching mathematics at primary school level. It was also conceded by the witness Mr Jacobus that although the teaching style may change due to the introduction of OBE the basics of the mathematics did not change.
 - Although the successful candidate Mr Fillies was awarded a point for computer literacy, there was no evidence of such in all the documents submitted by the employer party. Mr Jacobus had also testified that the reason why he scored Mr Fillies on computer background was based on assumptions.
 - All of the members of the Interview Committee did not peruse all the applications due to time constraints. The Western Cape Chamber of the ELRC made provision for this by having a collective agreement that all Interview Committee members should have summaries of the applicants' documents before them. Mr Jacobus had testified that that the Interview Committee members worked in groups and as a result he did not see all the CV's, although they were available.
 - The additional criterion that applicants should have RNCS training was discriminatory as grade seven Educators who only went for

training during the past holidays were excluded. This eliminated possible candidates who did not qualify through no fault of theirs.

- Mr du Plessis was not given a point for leadership in organising sport although his CV showed that he was a sport coach for four sport codes at his current school. Mr Briesies had argued that coaching does not imply leadership, but he was not allocating points during the short listing process and was only the observer and resource person.
 - The fact that Mr du Plessis was responsible for the finances of the school as well as his own school was not considered, although that was one of the core duties of a Deputy Principal.
 - Mr Briesies had submitted a testimonial on behalf of Mr Fillies, which showed that he was biased since he was a friend as well as colleague of Mr Fillies in the Sport Trust.
 - The fourth witness for the employee party, Mr S Manuel, had no interest in the post but came to testify that Mr Fillies telephoned him prior to the interviews asking him how he would respond to some of the questions during the interviews. The questions asked by Mr Fillies over the telephone were the same questions that were asked during the interviews. Mr Manuel felt strongly that the playing field was not level since Mr Fillies had prepared his responses to the interview questions in advance, which would account for him receiving such high scores.
 - Although the employer party's witness Mr Deal testified that he had nothing against Mr du Plessis, it was clear that he saw him as a threat since Mr du Plessis had noted the mismanagement of school funds as stated in the School Governing Body (SGB) minutes. Due to this, they were of the view that Mr Deal would not like somebody in the management of the school who would question every financial mismanagement that would occur.
5. They submitted that the short listing process should be redone and that the Principal of Erika Primary School, Mr Deal, and the Departmental representative, Mr Briesies, should be excluded from the process. They also requested that the Union and the WCED agree upon a neutral Principal as resource person and Departmental representative. All suitable candidates, including Mr du Plessis, should then be given the chance to make their presentations during interviews.
 6. It was lastly requested that Mr Fillies be removed from the post with immediate effect as having him in the post further advantaged him.
 7. The employee party's reply to the employer party's closing arguments is summaries as follows:
 - There was evidence of Mr du Plessis being underscored, with Mr Mahangu's testimony regarded as being more objective since he was a neutral witness.
 - The fact that Mr du Plessis was presently a subject head as well as a senior teacher meant that he was a curriculum manager. His position as subject head was different from when he acted in general management as a Head of Department for three months.
 - It was incorrect to say that the contents of mathematics had changed with the change in curriculum, with the only thing having changed being the method of teaching which is presently outcome based.
 - The fact that the successful candidate was previously a Principal of a school did not necessarily mean that he was computer literate and possessed all the competencies.

- Although the employer party still affirmed that all candidates' applications were scrutinised, Mr Jacobus had testified that he did not see all the CV's of the applicants due to time constraints.
- Mr Briesies and Mr Deal did not teach at the same school as Mr du Plessis, yet they assumed that they knew about his leadership qualities in sport.
- Mr Briesies' testimonial for Mr Fillies as a colleague in the Sport Trust did not focus on sport issues but rather as an educational colleague where he was actually Mr Fillies' manager.
- Although Mr Manuel has no interest in the post his feelings were that righteousness must be served.
- There was leakage of interview questions before the candidates came for interviews which it was hoped would be investigated by the employer party. The employer party was given the chance to bring witnesses to testify to the contrary, but would not use it.
- Mr du Plessis studied school management at university level and passed the courses, he acted for three months at post level 2, was a subject head, did the financial books for his school and also for Erika Primary School, and is supposed to have the competencies of a deputy principal.

The employer party submitted in argument that an unfair labour practice had not been committed, for the following reasons:

1. There were two issues to be decided, firstly whether the employer had acted in bad faith by appointing an incumbent into the post as the dispute was lodged before the schools re-opened and within the time frames if a dispute of an unfair procedure. Secondly, it was whether the employer had acted in bad faith by its absence at the arbitration meeting of 18 July 2005.
2. The employer party maintained that no procedural unfairness regarding the short listing and interview process occurred at Erika Primary School, based on the following:
 - According to the core criteria of the post of Deputy Principal, Mr du Plessis was scored as only satisfying one of the four main criteria. The reason for this decision was based on the contents of his CV, which was inconclusive according to the SGB of Erika Primary School, with no evidence produced by any person that Mr du Plessis was ever underscored.
 - With respect to Mr Mahangu's testimony, the employer party pointed out that he was not part of the SGB Interview Committee conducting the short listing and nomination process. He had therefore just given his personal opinion and was not able to provide any logical explanation as to why the SGB decided not to short list Mr du Plessis for the particular post.
 - They differed from Mahangu's testimony regarding the allocation of a point for curriculum management experience, since the fact that Mr du Plessis only acted for three months approximately ten years ago was not a clear indication of his relevant experience as a curriculum manager.
 - The employer party pointed out that the contents of mathematics had changed since Mr du Plessis had completed mathematics at matric level and Business Mathematics at UWC, especially taking into account that schools already implemented the new curriculum a few years ago.

- Although it was not clear why Mr Fillies was scored for computer literacy, whilst his application documents could not give any indication of this, it must be borne in mind that the successful candidate was previously a Principal of another school and possessed over all the necessary competencies and experience.
 - When it was asked of the employer party's witnesses whether the SGB had to choose from a person who possessed the necessary experience to teach mathematics and a person who had not taught the same subject at all, their reply was that they would choose the person with the necessary experience.
 - All the candidates' applications for the post were scrutinised for short listing purposes by all SGB members, therefore it was clear that each of the candidates obtained a certain mark for this.
 - They were of the opinion that at no stage was any of the additional criteria discriminatory to any of the candidates for the particular post. It was testified by Messrs Jacobus, Briesies and Deal that the SGB did take into consideration the unique needs of the school. It was also common cause that it remained the prerogative of any SGB to add any additional criteria to its main criteria and that no discriminatory measures were used to exclude any of these candidates.
 - The reason why Mr du Plessis was not given any point for leadership in organising sport was based on the fact that his CV was inconclusive for the SGB of Erika Primary School. Both Messrs Briesies and Deal had testified that they were not aware that Mr du Plessis had any leadership abilities for organising sport events.
 - The fact that Mr Briesies submitted a testimonial for Mr Fillies did not mean that he was biased towards this applicant. Mr Briesies only acted as Departmental observer of the short listing and nomination process and never took part in any of these processes.
 - Mr Manuel had no interest in the post but found it fit to testify for the employee party in this matter. Both Messrs Briesies and Deal denied that any of the questions could have leaked out to any of the candidates before the actual interview took place and explained that all the questions were drawn up an hour before the interviews took place. Their explanations were sufficient and it was requested that their testimonies in this regard be accepted.
 - Mr Deal's testimony on Mr du Plessis was based on the fact that he did not see Mr du Plessis as someone on whom he could rely as the school's Deputy Principal, since he had no previous experience in a leadership position at a primary school and had never been exposed to any of these responsibilities in the past.
3. The employer party was of the opinion that the short listing and nomination process should not be redone as the SGB had acted fairly and objectively in line with the stipulations at Resolution 5/98. They therefore did not see any need why Mr Fillies the successful candidate should be removed from the post as the SGB nomination procedure was done in a fair manner.
 4. The Arbitrator was requested to find that no unfair labour practice occurred in this instance and to dismiss the matter accordingly.

ANALYSIS OF EVIDENCE AND ARGUMENT:

I am required to decide, on the balance of probabilities, whether the employer party had committed an unfair labour practice by not promoting and appointing Mr du

Plessis into the post of Deputy School Principal at Erika Primary School, Mossel Bay, as well as the appropriate relief if an unfair labour practice is found.

After considering the evidence presented, the following is found, on the balance of probabilities and under the circumstances of this case, with brief reasons provided as required by S138(7) of the LRA:

1. It is supported that the employer party had committed an unfair labour practice, with the main reasons being the following:
2. The employee party had discharged the onus to prove, on the balance of probabilities, that the process to identify the short list of candidates who would be nominated for interviews had contained unfair elements. One of these elements is that all the members of the Interview Committee did not peruse every applicant's CV, as confirmed by the School Governing Body member witness Mr Jacobus.
3. Another element was that it is probable that Mr du Plessis as an individual applicant was underscored on the various criteria, which is an indication that the members of the Interview Committee may not have been adequately guided or had not applied their minds correctly to the process.
4. A further element was the alleged leakage of the interview questions, as testified to by the witness Mr Manuel. The employer party was not in a position to challenge Mr Manuel's evidence as a result of their absence on the final day of the arbitration and the Arbitrator's reluctance to grant a postponement of the arbitration, due her and the ELRC's concerns about the extended duration of the proceedings and the circumstances of the employer party's non-attendance. Although these allegations, which deserve investigation by the employer party due to their gravity, do not pertain directly to the short listing process but to the interview and final nomination process, it strengthens the perception of the probability of bias towards a possible pre-identified candidate.
5. Furthermore, it was common cause that the School Governing Body of Erika Primary School were aware that Mr du Plessis had applied for the advertised post since he had to recuse himself from the selection process. It is probable, as contended by the employee party, that this foreknowledge could have influenced the formulation of the additional criteria that were later established for the post by the elected Interview Committee.
6. The relief that the employee party sought that the short listing and nomination process for the post of Deputy Principal at Erika Primary School be repeated will accordingly be granted in the circumstances of this case.
7. It would not be appropriate to accede to the request that Mr Fillies, the successful candidate from the previous process, be removed from the post with immediate effect. The outcome of the fresh process should be awaited whereafter the employer party would have to appropriately deal with Mr Fillies' position in the event that he is not confirmed as the successful candidate.
8. It would also not be appropriate to direct the employer party and School Governing Body as to whom should be part of this process other than provided for in the relevant Resolutions that guide the process, save to request that perceptions of bias and undue influence as to the outcome be guarded against in the appointment of the trade union and WCED representatives/observers and members of the Interview Committee and that all members of the Interview Committee are fully acquainted with their responsibilities and duties

AWARD:

The following award is issued:

1. The employer, the Western Cape Education Department (WCED), is ordered to instruct the School Governing Body of Erika Primary School, Mossel Bay, to repeat the short listing and nomination process for the post of Deputy Principal at that school, which process is to be repeated not later than 30 September 2005.
2. The appointment of the current incumbent, Mr P H Fillies, will either be confirmed or withdrawn by the WCED as a result of this new process.
3. No order as to costs is made.

DATED AT DE RUST THIS 4th DAY OF AUGUST 2005.

A C E REYNOLDS (MRS)
ARBITRATOR