IN THE EDUCATION LABOUR RELATIONS COUNCIL

CASE NUMBER PSES 87-06/07

DATE 29 AUGUST 2006

J.J. ENGELBRECHT **APPLICANT**

WESTERN CAPE EDUCATION DEPARTMENT **RESPONDENT**

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

The arbitration took place at the offices of the Western Cape Education Department in Cape Town on 27 July 2006.

The applicant, Mr. J. Engelbrecht (Engelbrecht), was represented by Ms. S. Smart, an official with the National Union of Educators (NUE).

The respondent, the Department of Education Western Cape, was represented by M. H. Mazaca, an assistant director.
The parties agreed at the outset of the arbitration proceedings that they would argue the matter in writing. The parties agreed to submit heads of argument with the final rebutting arguments of the applicant being due on 15 August 2006. The award for this matter was accordingly due on 29 August 2006.

THE ISSUE IN DISPUTE

The applicant alleges an unfair labour practice regarding unfair suspension.

THE BACKGROUND TO THE DISPUTE

Engelbrecht works for the respondent as an educator at the President High School.

SUMMARY OF EVEIDENCE AND ARGUMENT

Engelbrecht had been given a final written warning valid for 6 months and suspended for three months without pay for misconduct in that he had addressed the 9A class as follows “Julle gedra julle as Kaffirs“.
He had not appealed this sanction as he may have done in accordance with the disciplinary procedures at the respondent’s.

Subsequently Engelbrecht had been offered a position by the school’s governing body for the duration of the suspension. The respondent had then refused him permission to take up the position with the school governing body.

The applicant argues that the respondent had directly linked such refusal to the aforesaid sanction in its explanation therefore.

In its written argument the applicant states further “As the Applicant had pleaded guilty, he accepted the fact that there would be some form of punitive sanction, and not dismissal, and we suggested a final written warning and a fine equal to one month’s salary, so that the Applicant could continue with his work.” It states further “We are disputing the Respondent’s interpretation of suspension of employment and the responsibilities that it has taken on itself as satisfying to public opinion and perception. This all relates to the sanction and the additional conditions attached to the sanction and that are not legislated.”

Mr Engelbrecht is disputing the substantive unfairness of a suspension of 3-months without pay and the terms attached to the sanction, regarding other employment that made the sanction much more severe and constitute a further disciplinary action against the employee.

The applicant demands compensation equivalent to the salary Engelbrecht would have earned for three months (R34 076.25 (thirty four thousand and seventy six rand and twenty five cents)) as contended by the applicant.

ANALYSIS OF EVIDENCE AND ARGUMENT:

In dealing with the applicant’s contention that the refusal to allow Engelbrecht to work for the school governing body(sgb) and linking this to the suspension constitutes a further sanction imposed on Engelbrecht.

I wish to state simply that if this were altered so as to meet with the demands of the applicant , it would still mean that the suspension for 3 months without pay would stand. Even if this were the case than the labour character attached to this administrative act would be void as it was not done at the time of the imposition of the sanction. For this reason I also do not agree with the argument of the applicant that the respondent’s refusal to grant Engelbrecht permission to work for the sgb can be said to be irrefutably linked to the suspension. Even if it were so then such was done within the exercise of an administrative function and not the imposition of a sanction as the consequence of disciplinary action taken by the respondent. This aspect would then clearly fall outside of the jurisdiction of the ELRC.

In respect of the respondent’s contention that the ELRC also lacks the jurisdiction to determine this matter on the basis that there exists no unfair labour practice I am of the view that this would be putting the cart before the horse as part of the unfair labour practice jurisdiction of the ELRC is to determine whether or not there exists an unfair labour practice.

In respect of the applicant’s argument that Engelbrecht did not appeal the sanction as he had already been offered a position by the sgb albeit at a lower salary which in turn permitted him to at least cover some of his living expenses and also because he did not want to run the risk of having the sanction of a final written warning and suspension without pay commuted to dismissal by the MEC on appeal, shows rather that

Engelbrecht made a deliberate choice and accordingly that he had in fact accepted the sanction of suspension without pay.

The applicant's argument too shows that Engelbrecht understood that as he would not be dismissed he would be subjected to some other form of punishment, it suggesting a fine of one month's salary itself. I am of the view that this in itself can reasonably be construed as Engelbrecht's having agreed to being given some form of punishment as an alternative to dismissal. It is also fair to say that a punishment imposed as an alternative to dismissal would by that fact be very harsh. The applicant cannot dictate the degree of severity that the employer would be entitled to impose but would be entitled to challenge the fairness thereof.

I find that the sanction which was imposed as an alternative to dismissal was not too harsh in the circumstances. In fact Engelbrecht's consideration of a post with the sgb at a lesser salary indicates his acceptance of the suspension without pay imposed by the respondent.

I also cannot accept the argument of the applicant that the sanction of suspension without pay was punitive and therefore unfair. It had itself suggested a sanction of a fine of one month's salary which in itself can reasonably be construed as punitive.

I am of the view that where such sanction is imposed as an alternative to a dismissal that it is more likely intended to be punitive and justifiably so given the fact that dismissal is the ultimate punitive sanction.

In respect therefore of the argument of the applicant that the sanction of suspension without pay is unfair as Engelbrecht had not consented to any deduction from his salary in terms of Schedule 2(8) of the Employment of Educators Act I am of the view that for the respondent to have commuted a sanction of dismissal to one of suspension without pay without Engelbrecht's consent is unfair. To do so is clearly in breach of a rule governing the employment relationship and therefore constitutes a substantive unfairness. Had the respondent argued that it had intended for Engelbrecht not to enter upon the school premises this might have been construed as a partial dismissal. The respondent had however argued that it had not intended for Engelbrecht not to come onto the school premises, but merely for him not to teach. The respondent had therefore suspended Engelbrecht in the technical sense of the word and therefore in accordance with a suspension in terms of the Labour Relations Act 66 of 1995 as amended (the Act). It had however done so unfairly when it unilaterally suspended him without pay without his consent.

Having considered all the evidence and argument presented at this arbitration I find that an unfair labour practice had been committed by the respondent in terms of section 186(2) of the Act.

AWARD

In making this award I have taken into account the provisions of the Act in particular sections 193 and 194.

I therefore order the respondent to pay Engelbrecht R34 076.25 (thirty four thousand and seventy six rand and twenty five cents) by no later than 30 September 2006 after which it will attract interest at the legal rate of interest.

L.O Martin
Commissioner.