IN THE EDUCATION LABOUR RELATIONS COUNCIL

HELD AT CAPE TOWN

Case No PSES 377-08/09WC

In the matter between

N MHLANGA Applicant

and

WESTERN CAPE DEPARTMENT OF EDUCATION Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 9 April 2009

ARGUMENTS: 15 April 2009

DELIVERED: 20 April 2009

SUMMARY: ***Labour Relations Act 66 of 1995 – Section 186(2)(a) – Alleged unfair labour practice relating to promotion – employee claiming that she did submit an application and that employer lost it – whether this was proved***
Promotion – Post level 1 educator on fixed term contract – whether such educator "promoted" when appointed permanently as post level 1 educator;

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This dispute concerns an alleged unfair labour practice relating to promotion. The arbitration hearing in this matter took place in Cape Town on 9 April 2009. Applicant was represented by Mr. B Jacobs from SADTU, whereas respondent was represented by an employee Ms L Bathgate. The evidence was digitally recorded.

THE ISSUE IN DISPUTE

[2] I have to determine whether any unfair labour practice relating to promotion was committed in respect of applicant, and if so, the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[3] During 2008 respondent advertised post number 4697 at Manyano High School, being the post of educator at post level 1 in vacancy list 2/2008. Applicant has never been employed by respondent on a permanent basis. At the time when the post was advertised, applicant was employed by respondent as a post level 1 educator on a fixed term contract. She is still employed in that temporary capacity. Applicant claims that she has submitted an application for this post to respondent, but respondent claims that applicant did not submit an application. After applicant referred a dispute to the ELRC, respondent placed a moratorium on the filling of this post pending the outcome of this arbitration.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicant

[4] **Nozipho Portia Mhlanga**, the applicant testified that during August 2008 she personally came in to the offices of the respondent in Cape Town and placed her application together with her cv for this post in the box provided by respondent. She only applied for this one post. Post level 1 educators who are on fixed term contract do not get the same benefits (such as medical and pension benefits and housing subsidies) as permanent post level 1 educators. Sometimes their salaries are also paid late. She asked for an order that the process must be repeated.

. [5] **Manono Makhaphela** was employed by respondent at Manyano High School during 2008. He testified that he accompanied applicant last year when she came in to submit her application for this post in the box provided for by respondent.

Evidence on behalf of respondent

[6] **Nicholas John Bailey** is employed by respondent as acting assistant director. He has been involved in the processing of applications of educator posts for many years. He explained the procedure followed in dealing with applications deposited into the locked boxes provided for by respondent. He explained that there are so many checks and balances in place in the system that it is extremely improbable that an application that has been submitted, can become lost.

[7] The only manner in which an application can become lost is when an official deliberately and intentionally destroys or removes the application after it has been received by respondent. He has performed several searches on applicant's identity number, persal number and the post number in dispute, and can confirm that respondent has never received any application from applicant for any post in this province.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

[8] Applicant's cause of action is based on an alleged unfair labour practice relating to promotion. The statutory provision, in terms of which this tribunal may arbitrate promotion disputes, is to be found in section 186(2)(a) of the Labour Relations Act No 66 of 1995,[1] which defines unfair labour practices with regard to promotion as follows:

> " '***Unfair Labour Practice***' means any unfair act or omission that arises between and employer and an employee involving …unfair conduct by the employer relating to the promotion… of an employee"

[9] The onus is on an employee to prove that she is entitled to relief in terms of this section. In order to succeed under this section, an applicant needs to prove at least three things, namely:

[1] hereinafter referred to as "the LRA"

9.1 That the dispute which was referred does indeed concern conduct by the employer relating to “promotion” of the employee;

9.2 That there was unfair conduct on the part of the employer during the promotion process;

9.3 That the unfair conduct constituted an unfair labour practice and that she is entitled to the relief she seeks;

IS THIS DISPUTE A PROMOTION DISPUTE? [2]

[10] There is a difference between a “promotion” dispute and an “appointment” dispute. Promotion disputes are arbitrated by the CCMA or Bargaining Councils as unfair labour practices in terms of section 186(2)(a) of the LRA, whereas appointment disputes cannot be arbitrated.[3]

[11] At all relevant times applicant was employed by respondent on a fixed term contract as a post level 1 educator. In support of his argument that it would indeed have been a promotion for applicant to have been appointed permanently as a level 1 educator, Mr. Jacobs relied on the fact that as a permanent employee applicant would have significantly more benefits such as medical and pension benefits and a housing subsidy which she does not have whilst being on a fixed term contract. Furthermore she would have job security.

[2] as intended in section 186(2)(a) of the LRA
[3] Du Toit et al *Labour Law through the cases* (LexisNexis Butterworths, Issue 11) at LRA 8-19; Grogan *Dismissal Discrimination & Unfair Labour Practices* (2nd ed) 53- 54

[12] Grogan states that employees, like soldiers are promoted when they are **"elevated to higher posts"**.[4] The Labour Court has defined promotion as being "**elevated to a position that carries greater authority and status than the current position that the employee is in**".[5]

[13] The test to distinguish between an appointment and a promotion is an objective test and not a subjective one. Not by any stretch of the imagination can it be said that an educator who is employed on a fixed term contract on post level 1 is "elevated to a higher post" or "elevated to a position that carries greater authority and status" when she is appointed permanently on post level 1. The fact that applicant will have more benefits as a permanent employee than as an employee on a fixed term contract, and will also acquire job security does not mean that she is elevated to a higher post or that she will have greater authority or status.[6] Subjectively, the employee might perhaps incorrectly perceive it as a promotion. Objectively, it is not a promotion because the post level, authority and status remains exactly the same.

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[4] Grogan *Dismissal, Discrimination & Unfair Labour Practices* (2nd ed) 52
[5] *Mashegoane and another v University of the North* [1998] 1 BLLR 73 (LC)
[6] Status in the context of promotions refers to "prestige" or the employee's "professional standing" in relation to other employees with regard to seniority. It simply cannot be said that it is more prestigious to be a permanent level 1 educator as opposed to being a level 1 educator on a fixed term contract. As regards the educator's professional standing in relation to other educators it can also not be said that there is a difference between permanent post level 1 educators and post level 1 educators on fixed term contract. Both have exactly the same superiors and subordinates. A permanent post level 1 educator is not the senior of a post level 1 educator on fixed term contract.

[14] In the circumstances I am satisfied that the dispute before me does not involve a promotion dispute, but an appointment dispute that is not arbitrable in terms of section 186(2)(a) of the LRA. Accordingly applicant's claim should for this reason alone be dismissed even if she could succeed in proving that there was unfair conduct.

WAS ANY UNFAIR CONDUCT PROVED?

[15] An employee who alleges that she is the victim of an unfair labour practice bears the onus of proving the claim on a balance of probabilities. The employee must prove not only the existence of the labour practice, but also that it is unfair.[7] Mere unhappiness or a perception of unfairness does not establish unfair conduct.[8] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[9] The fairness required in the determination of an unfair labour practice must be fairness towards both employer and employee.[10]

[7]Grogan *Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 43; *Provincial Administration Western Cape (Department of Health & Social Services) v Bikwani & others* (2002) 23 ILJ 761 (LC) para 32

[8] *SAMWU obo Damon v Cape Metropolitan Council* [1999] 3 BALR 255 (CCMA); Du Toit et al *Labour Relations Law* (4th ed) 464

[9]*National Education Health & Allied Workers Union v University of Cape Town* (2003) 24 ILJ 95 (CC) par 33

[10]*National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 (4) SA 577 (A) 589C-D; *National Education Health & Allied Workers Union v University of Cape Town supra para* 38

[16] The alleged unfair conduct complained of by applicant relates to her allegation that respondent has lost her application that she has submitted and that she was accordingly unfairly deprived of the opportunity to compete for the post. As to whether respondent did indeed loose applicant's application, I am faced with two mutually constructive versions. Applicant claims that she did submit the application whereas respondent claims that applicant could not have submitted an application because then it would have been captured on respondent's system, which it is not.

[17] The onus is on applicant to prove all the allegations she has made on a balance of probabilities. If after having evaluated all the evidence, I find that the probabilities favour respondent or that the probabilities are evenly balanced, applicant would not have discharged the onus. The test for whether something has been proved on a balance of probabilities, is whether the version of the party bearing the onus(in this case applicant), is more probable than not.[11] The technique employed by courts and tribunals in resolving factual disputes involving two irreconcilable versions is well known. In resolving such factual disputes, a court of tribunal must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.[12]

[11] *Ocean Accident & Guarantee Corporation Ltd v Kock* 1963 (4) SA 147 (A) at 157D
[12] *Stellenbosch Farmers' Winery Group Ltd v Martell & Cie* 2003 (1) SA 11 (SCA) at 14I par 5.

[18] While it is true that that applicant's version that she did submit an application to respondent by depositing it in the box in Cape Town is corroborated by her witness Makhaphela, this does not mean that I must simply accept applicant's version merely because it is corroborated. Experience has taught us that untruthful witnesses will often corroborate each other even in respect of small details simply because they have discussed their fabricated version in detail prior to giving evidence. Corroboration of a witness by others and the numerical superiority of witnesses on one side to the witnesses on the other can never of itself be a ground for accepting the evidence of the former, because the proper way to decide between two opposing versions is by reference to probabilities, demeanour and credibility.[13] Witnesses must be weighed and not counted.[14] Indeed the evidence of one witness may in a particular case be more convincing than that of a number of witnesses.[15]

[19] What strikes me as inherently improbable about applicant's version is the fact that she claims that when she did apply for the post, she only applied for this one post. It seems inherently improbable that an educator who is employed on a fixed term contract and who wants to become permanent, would, if she did indeed take the trouble to apply for a post, only apply for one position. If she did take the trouble to apply for permanent appointment, one would have expected that she would have applied for more than one post. This suggests that applicant's version that she submitted the application is not the truth.

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[13] *Els v Herbert* 1952 2 PH L16 (N).
[14] *"Weight of Evidence"* March 1958 edition of *Die Landdros* at 269
[15] Wills *On Circumstantial Evidence* (7th ed) 32

[20] What seems further suspect about applicant's version is the fact that she claims that she marked her application for the attention of Ms. Geldenhuys before she dropped it in the box at the WCED walk-in center. However if one looks at the preface to the vacancy list it is clear that it was only necessary to mark the envelope for the attention of Mrs. Geldenhuys if the application was posted by registered mail and not if it was dropped in the box at in the walk in center. If the application is dropped in a box at the WCED which is only intended for applications for post level 1 posts, there is no need to go through the trouble of marking it for the attention of a particular person. To claim that one has done so for no reason at all as applicant does, is suspicious.

[21] Mr. Jacobs made much of the fact that respondent's system is fallible and that respondent cannot exclude the possibility that the application could have been lost or that an official could have stolen or destroyed it. Now I suppose that what Mr. Jacobs suggested is indeed "possible". Bailey also conceded this. But Courts and tribunals are not concerned with what is possible. We are concerned with what is probable and specifically what is more probable than not. It may for example indeed be possible that there is a man on the moon, a father Christmas, or a tooth fairy. These things are all possible, but they are not in the least probable.

[22] Bailey made a good impression on me. He has been employed in the department for many years and knows the process of appointing educators like the palm of his hand. There was nothing improbable in his version. He has no motive to fabricate evidence and was prepared to make concessions in favour of applicant.

[23] I believe him and I accept his evidence. He explained the system used by the department in detail. Without going into too much detail here, I am satisfied that while there is a slight possibility that an application form can be lost, it is highly improbable that this could occur. This is so because of all the security precautions which are in place and that Bailey has explained in his evidence.

[24] Proof of exactly how reliable respondent's system is, is Bailey's evidence that this is the first time that he has been unable to trace an application on the system where an educator has claimed that respondent has lost her application. I am satisfied that due to respondent's strict procedures and checks and balances as explained by Bailey, the chances that an application can be misplaced due to human error or negligence, are so remote that it is inherently improbable that this could occur.

[25] I am satisfied that the only manner in which an application can disappear after an educator has placed her application in the locked box provided for by respondent, is if an official of the WCED who has access to the applications, maliciously and intentionally removes the application. I accept that it is not entirely improbable that this could happen where an official who has access to the forms has a motive to destroy an application form of a particular educator. The onus is however on the educator to prove to an arbitrator that there is such an official with such a motive. Mere speculation about what is possible and what not and whether this could or could not occur is not sufficient to discharge the onus.

[26] In this case, there is no evidence before me to suggest that any official who has access[16] to the application forms had any motive to maliciously destroy applicant's application. I simply fail to see how any official could possibly benefit by destroying applicant's application for a post level 1 post. The baseless suggestion that this could have occurred, is therefore with respect absurd and amounts to no more than speculation. I am accordingly satisfied that if applicant did submit an application, then it would still be in respondent's possession and will be captured on its computer system.

[27] Bailey testified that after he had heard about applicant's allegation he performed several searches on the system. All applications which are received are captured on the computer system. In this regard once again there are checks and balances to ensure that all applications that are received, even ones which are defective, are captured on the system. Bailey first performed a search on the post number, but could not found an application for applicant. He also performed a search on the database where defective applications are captured but could not found anything. Finally he performed searches on applicant's identity number and persal number. These searches will show any applications ever submitted by applicant for any posts at any school in the province. These searches also showed that applicant had never applied for any post anywhere in this province.

[16] Bailey's uncontested evidence is that only certain officials have access to the application forms and that they are handpicked.

[28] In the circumstances, it appears to me that the version of applicant and her witness that applicant did submit an application, is not probable and accordingly her claim must be dismissed. If I am wrong in this regard, then at the most it can be said in favour of applicant that the probabilities are evenly balanced, because there is simply no basis for me to find that the probabilities favour applicant in this case. Our law is very clear as to what an arbitrator must do when the probabilities are evenly balanced. Where there are two mutually destructive versions and where the probabilities are evenly balanced, a court or tribunal may only find for the party upon whom the onus rests, if it is satisfied on a balance of probabilities that the version of the party upon whom the onus rests is true and the other is false.[17] I simply cannot make such a finding. Since applicant bears the onus, this necessarily means that she has not discharged the onus and that her version has not been proved. For this reason also, applicant's claim must fail.

IS APPLICANT ENTITLED TO THE RELIEF SHE SEEKS?

[29] The relief that applicant seeks is for the process to be repeated. In the event that I am wrong in my finding that this is not a promotion dispute and wrong in my finding that no unfair conduct was proved, then there is yet a further reason not to grant the relief that applicant seeks. Even if an employee does succeed in proving unfair conduct in a promotion dispute, this does not mean that she has proved an unfair labour practice or that she is entitled to any relief.

[17] *National Employers Mutual General Insurance Association v Gany* 1931 AD 187 at 189

[30] As a legal concept unfairness cannot exist in abstraction. Therefore, an applicant in a promotion dispute also needs to establish a causal connection between the alleged irregularity or unfairness and the failure to promote. To do that she needs to show that, but for the irregularity or unfairness, she would have been appointed to the post.[18] This necessarily means that she must show that she was the best of all the candidates who applied for the position.[19] This in any event appears to be the position where an employee asks for substantive relief such as for example appointment to the post or being placed on the same salary scale as that attached to the promotion post. [20]

[31] Where the relief requested is merely aimed at compensating the employee for a serious procedural irregularity in the promotion process where a collective agreement has not been complied with, it would appear that the employee need not prove that she was the best candidate. In such cases however only nominal compensation will be awarded and not substantive relief.[21]

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[18] *National Commissioner of the SA Police Service v Safety & Security Bargaining Council & others* (2005) 26 ILJ 903 (LC); *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) para 24 per Zondo AJP; *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC) para 35; *Public Service Association obo Dalton & Bradfield and Department of Public Works* (1998) 3 LLD 328 (CCMA) 329 per Grogan; *Minister of Safety and Security & others v Jansen NO* (2004) 25 ILJ 708 (LC) para 27

[19] *National Commissioner of the SA Police Service v Safety & Security Bargaining Council & others* (2005) 26 ILJ 903 (LC) para 10-12

[20] *KwaDukuza Municipality v SALGBC* [2008] 11 BLLR 1057 (LC).

[21] *KwaDukuza Municipality v SALGBC* [2008] 11 BLLR 1057 (LC). where R5000 was awarded because the terms of a collective agreement were breached during the selection process

[32] Whether an employee also needs to prove that she was the best candidate in order for an arbitrator to order that the process must be repeated, is unclear. In *KwaDukuza Municipality v SALGBC* [22]where a post was filled without following the collectively agreed to procedures for advertising, the Court did not order the process to be repeated but merely ordered R5000 compensation. The possibility of repeating the process was however never raised. In the absence of any direct Labour Court authority on the point, I am however prepared to accept that in the event of a serious procedural irregularity, it is indeed possible for an arbitrator to order that the process must be repeated, without it being necessary for the applicant to show that she is indeed the best candidate or that she would necessarily have been appointed had it not been for the irregularity. This however does not mean that such orders should be made indiscriminately simply because there was some form of procedural irregularity.

[33] In the education sector, it is the best interests of the child that is paramount; not the best interests of educators.[23] It cannot be in the best interests of learners that they are deprived for months or for years of the benefit of stability that is associated with the permanent appointment of educators to vacancies at the school. This is exactly what an arbitrator does when he orders that a selection process must be repeated. It is therefore an order that should not be made lightly.

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[22] *KwaDukuza Municipality v SALGBC* [2008] 11 BLLR 1057 (LC)
[23] Section 28(2) of the Constitution; *Settlers Agricultural High School v Head of Department of Education, Limpopo Province* [2002] JOL 10167 (T), case No 16395, delivered on 3 September 2002

[34] The High Court has in fact held that "….one does not go digging to find points to stymie the process of appointing suitable candidates to teaching positions…"[24] An arbitrator should accordingly exercise his discretion to order that the process be repeated on account of procedural irregularities, in a responsible manner, mindful of the inconvenience and disruption that it will cause.

[35] Ordering that a process must be repeated is a drastic remedy that disrupts the lives of learners and educators. It has therefore always been my view that in an unfair labour practice dispute relating to promotion, an arbitrator should not order that the process must be repeated unless he is persuaded that the applicant at least stood a realistic chance of being appointed.[25] This is a sensible approach because it not only protects the rights and interests of aggrieved educators, but also of educators who have gone through the selection process and have a realistic chance of being appointed. It also takes into account public interest and the best interests of learners. It simply does not make sense to order in a promotion dispute that a process is to be repeated if the applicant never even stood a realistic chance of being appointed, because then the relief that is ordered cannot serve any sensible purpose. The order will only disrupt the lives of learners and those educators who had applied for the post and who did stand a realistic chance of being appointed.

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[24] *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng*, Case No 02 / 15349, [2006] JOL 17802 (W) per Horwitz AJ

[25] The position may be somewhat different if the procedural irregularity constitutes a flagrant breach of a collective agreement which requires strict(as opposed to substantial) compliance and if the dispute is correctly referred as an interpretation and application of a collective agreement and not as an unfair labour practice

[36] In a recent case the Bisho High Court adopted a similar approach. The Court was not prepared to interfere in an appointment dispute where there were procedural irregularities, because the applicant could not show that she stood a realistic chance of being appointed had the proper procedures been followed.[26] If the High Court is not prepared to set aside decisions made during a selection process of suitably qualified candidates unless an applicant has proved that she stood a realistic chance of being appointed, then I am of the view that arbitrators should not approach the matter any differently when deciding whether or not to order that the process must be repeated.

[37] Since this dispute has been referred as an unfair labour practice relating to promotion, and since this case does not involve a material breach of a collective agreement which requires strict compliance, I would not have been prepared to order that the selection process must be repeated on account of a procedural irregularity, unless I was satisfied that the applicant stood a realistic chance of being appointed had it not been for the alleged irregularity.

[26] *Pityana vs MEC, Department of Education, Eastern Cape Province* (Case No 8033/2007) delivered in the Bisho High Court on 5 February 2009 by Kemp AJ

[38] I have no knowledge of applicant's qualifications and experience. I do not even know whether she complied with the minimum advertised criteria. Assuming in her favour that she does at least comply with the minimum advertised criteria, I would, in order to find that applicant stood a realistic change of being appointed, at least need to have some knowledge of the qualifications and experience of applicant and of the best candidates who applied for the post, because if applicant was too far down on the list of the best candidates, then she never stood any realistic chance of being appointed and it would be a futile exercise to order that the process must be repeated.[27] I know nothing about any of the candidates who applied for the post. Therefore it is simply impossible for me to assess applicant's suitability for the position in relation to the other best candidates. Accordingly applicant has failed to prove that she ever stood any chance (let alone a realistic chance) of being appointed to the post and for this reason too her request that the process is to be repeated, must fail because it would simply not serve any purpose to make such an order, apart from disrupting the lives of learners and other educators.

[27] This is exactly why the Court was not prepared to intervene in the *Pityana*- case

AWARD

In the premises I make the following order:

1. Respondent did not commit an unfair labour practice relating to promotion in respect of the process involving post number post 4697 advertised in Vacancy List No 2/2008, being the post of educator post level 1 at Manyano High School..

2. Applicant's claim is dismissed.

3. No order as to costs is made.

adv D P Van Tonder
Arbitrator/Panellist: ELRC
Chambers
Cape Town