



ARBITRATION AWARD

Panellist/s: Firgil Philips

Case No.: GPBC 1032/2024

Date of Award: 18 October 2025

In the ARBITRATION between:

PSA obo Kim Jones

(Union / Applicant)

And

Department of Correctional Services

(Respondent)

Union/Applicant's representative: Ms Eileen Mosetic

Respondent's representative: Ms Zoleka Majuba



AWARD

Details of Hearing and Representation.

1. The arbitration hearing was scheduled to be heard on 21 February, 23 June, 01 September, and 01 October 2025 at the Respondent premises of the Department of Correctional Services in Paarl, Western Cape. The Applicant, Miss Kim-Lee Jones was represented by Ms Eileen Mosetic a duly appointed representative from the trade union PSA. The Respondent was initially represented by one Mr M.E. Ndarana. The matter was occasioned by two postponements on the first two sittings due to medical reasons on the part of Mr Ndarana. At the last two sittings the Respondent was represented by Ms Zoleka Majuba from its Employee Relations component. Ms Majuba for the purposes of this finding will be cited as the Respondent representative.

Issue to be determined.

2. I must determine whether the Applicant was subjected to an unfair Labour Practice relating to a promotion.

Background to issues.

3. The Applicant has been employed with the Department of Correctional Services since 01 June 2021. At the time of the arbitration hearing the Applicant was and is still employed as an educationist during weekdays and alternatively as custodial member (arsenal, gate duties and escorting offenders) on weekends. She applied for a post for Section Head Formal Education during September 2022. The shortlisting was approved and she was interviewed on 27 January 2023. She was subsequently recommended as the most suitable candidate. The proposal to appoint was, however, withdrawn because the Respondent considered her experience as insufficient after it tallied the years she physically taught. She is on salary level 5 with a scale of R218 778,00 per annum.
4. The Respondent's case was centered around the fact that the Applicant party did not meet the minimum requirements after they discovered that her years of service was not sufficient. The Applicant was recommended by the interview panel but the relevant teaching experience was not met. The post was advertised for Allandale management area,



Havequa. It was on this basis that the Respondent withdrew her recommendation and then re-advertised the post. At the time of the conclusion of the arbitration hearing the post was still not filled.

Survey of Evidence.

5. I have considered all the evidence and argument. Section 138(7)) requires an award to be issued with brief reasons for the findings. It is against this backdrop that I have only referred to the evidence and argument that I regard as necessary to substantiate my findings. It is therefore not an exhaustive account of what was testified in the proceedings.

Applicants Testimony

6. The Applicant testified that she was placed as educationist by the Respondent, which was not part of her original appointment. During the week she would be an educationist teaching English and life orientation. When she was not performing educational duties she would be working in the capacity of custodial member on weekends. As custodial member her duties include guarding offenders, escorting them and gate duties. Her placement letter stated how she needed to perform these duties interchangeably. She applied for the post of Section Head formal education. She has matric and a four-year degree in formal education which complies with the advertisement. She has more than four years' teaching experience which also complies with the job advertisement.
7. After her offer was withdrawn she lodged a formal grievance with regards to her non-appointment. She was shortlisted and interviewed along with other candidates. She was also asked to complete forms for appointment which was just to declare that she did not have any criminal offences. She does not agree with the fact that she missed the experience by two months as she feels that her teaching experience should be relevant to the post applied for. She was responsible for classes on her own. A summary of the relevant experience is outlined as follows:
8. Ebenezer Primary School in total it was 2 months. Then at Ebenezer primary it was another 3 months in a separate year. New Orleans secondary school was 2 months. Department of correctional services it was one year and 3 months. Paulus Joubert Primary School was 2 years and 2 months. Paulus Joubert Secondary was 3 months. That totals 4 years and 3 months altogether which is what she worked for. The ELRC handbook policy states that whatever experience you have and have developed yourself should be considered as such. She got a response to state that the Recruitment and



selection process was not yet finalized. A month after that she asked Mrs. Reddy what happened and she was informed that the selection process was still not finalized.

9. She went back to Mr Ntigana who said she must complete another grievance which was stopped by the head of center. She was informed to contact the union and resort to external remedies. Danielle Johnson from the trade union PSA then said she must apply for PAIA to see scoresheets and all other documents. She went back to Mr Ntigana who suggested another grievance based on a promotion. Mrs Mosetic from PSA then contacted her and they discussed all the details of the case. The dispute was based on the two months that she was short of experience. The post was re-advertised and still not filled. None of the candidates shortlisted either did not meet the requirements or there were issues with the criteria applied to them.
10. Under cross-examination the Applicant stated that she received a response that she was not appointed. When put to her that no person may be employed as an educator unless registered with SACE she stated that she had practical experience as a student teacher as well as having been a substitute teacher. During the fees must fall protests she looked after classes on her own. She was not yet registered as an educator. You can only get full registration with SACE upon completion of qualification which she got in 2018 in April. She believed that she had 4 years and 3 months because she calculated all her experience from substitute teaching up until she completed her qualification.
11. When put to her that she only had 3 years 10 months experience she said she disagreed as her experience should count as she was exposed to a classroom. She had a supervisor when they had to report resources or disciplinary issues like all grades had a grade head. Under re-examination the Applicant stated that the provisional admission to SACE allowed her to teach while she did not have a degree yet. Whenever a teacher is off sick or on leave a substitute teacher needs to be called in. It nowhere stated that the 4-year experience should be post registration. Her SACE fee was up to date at the time.



Respondent Witnesses

12. Noluthando Alice Mdladlamba (Mdladlamba) testified for the Respondent: Mdladlamba holds the position of Regional Coordinator Human Resources for the Western Cape region. Her role includes that of recruitment and selection. Filling of positions is one of her key responsibilities. She also needs to ensure that proper checks are done as she is the first recommender in terms of the memorandum. It also includes crafting of the advertisement, issuing thereof and then sending it to head office to confirm. In terms of Qualifications and experience was the Applicant's matric, 4-year degree with teaching experience and registration with SACE. A valid driver's license and computer literacy were also key requirements. Every step of the shortlisting and appointment had to be verified.
13. When she reviewed the CV she observed that the documents that were submitted by the Applicant which were attached for practical experience was not in line with the requirements of the advertisement. The Applicant indicated on her Z83 application what her practical experience was but did not match with her actual experience. New Orleans secondary school was from 07/2016-09/2016 which included the end of her student teaching practical. Letters from Ebenezer 04/2015 – 05/2015 was also end of student teaching practical. So did the experience from Ebenezer primary school from 07/2015 to 08/2015. This is therefore not permanent working experience but what a person is expected to undergo training as an educator. The letters which were submitted were therefore in direct contrast with what was put on Z83.
14. Recognised teaching experience counts from registration of educator's association (SACE). Section 21 and section 22 of the South African Education Council Act states that one must be registered with the council prior to be appointed as an educator. Subsection 2 of section 21 means to be exact experience and you cannot take practical and say its actual. Appropriate experience shall be working experience. When you are still a student and doing your practical's, it is part of you being trained to become an actual educator. You are still a trainee while you are a student. They may have made errors at the initial stages but upon verifying they picked up the errors in the length of service. This is very critical since erroneous appointments and wrongly granted remuneration could adversely affect her situation with the Respondent and vice versa.



15. Somebody must come and monitor you which is not actual experience but assists you to obtain your qualification. Student teaching is done under supervision as you are a trainee and not qualified. A substitute teacher is when the incumbent teacher of the actual teacher is subsisting in the place of the person that is absent. There were the second and third highest qualified candidates which had pending investigations and therefore it was decided to re-advertise the post. Appointment is when you are appointed with salary implication and placement is when you are already appointed. This as per the post establishment where you could be shifted where the employer has indicated such. When it comes to the panels, they only have recommending statuses informing the decision maker. If one would inflate your experience, it would be totally unfair which would not equate to actual experience.
16. Under cross-examination Mdladlamba stated that when the Applicant recorded that she worked as a substitute teacher it meant that she contradicted herself and falsified information. When put to her that the Applicant did in fact work as a substitute teacher, she stated that when you are doing practical's you do not get paid. It was Ebenezer and New Orleans that she was not an actual educator which made her short of 1 month or whatever they calculated 3 years and 10 months. When put to her that even if they discounted those days, she would still have qualified she conceded that if they counted the additional two months, she would have qualified. Students do not get paid to do their practical.
17. When asked where it says that the advertisement requires says 4 years' experience post registration, she said that they verified all information against policy prescripts. What mostly assisted them is the results of the PSC the actual results when she got her degree as well as the Council and they counted from there. Even if there is an erroneous appointment it gets recalled. Once an educator went on reporting for 11 days in Overberg and when they tried to effect it, they found out that there was a block on persal. It was only then that they discovered there was a dismissal at the Department of Education the previous employer. They asked for representations and through litigation the Applicant was unsuccessful.

Closing Arguments

18. In having drafted this decision was closing Arguments considered extensively. Both parties submitted arguments and complied timeously. For the sake of brevity and unnecessary repetition of evidence I am not going to record them here. They are however available on file for scrutiny for any subsequent proceedings, if any.



Analysis of Evidence and Argument.

The legal principles and the law as it stand.

19. Section 186(2) of the Labour Relations Act 66 of 1995 as Amended defines an unfair labour practice as: *means any unfair act or omission that arises between an employer and an employee involving— (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or reemploy a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act. [S. 186 amended by s. 41 (a) of Act No. 12 of 2002. Subs. (2) added by s. 41 (c) of Act No. 12 of 2002.]*

The factual matrix

20. It is common cause that the Applicant applied for the post of Section Head Formal Education in 2022. She along with the remaining two other job applicants competed eagerly for this post. Most of the facts of this arbitration hearing bear the hallmarks of a process which ran seamlessly up to a point where the Respondent made an about turn in appointing the Applicant. On the verge of having been appointed the Respondent as per its contention appeared to have misread the situation which simply came down to one thing, her years of experience. It was testified by all parties concerned that the Applicant had the appropriate qualification which was an undergraduate. She had matric and a driver's license. She was certainly an educator. The only single criteria the Respondent believed was her shortcoming was the amount of experience she possessed for this post.

21. Mdladlamba eloquently explained in painstaking detail why it is important to retract a post that was erroneously awarded to an incumbent. She presented an actual example of an appointment which had to be rescinded in another matter. Even the other two qualifying members in the facts of this case were excluded due to factors outside the scope of the appointment which no doubt may have questioned the lawfulness if one of them were appointed.



Not much turns on this but it holds some significance to illustrate why an appointee must meet all the qualifying criteria. This is all good and well and an extremely healthy way of ensuring that the State employs people which are fit and proper.

Experienced or not?

22. The vexed question is whether the Applicant in fact met the benchmark the Respondent set through one element of the qualifying criteria, experience. The Applicant without question was a cut above the rest in that she was the preferred person to do the job. The Applicant testified that she altogether had 4 years and 3 months' experience. The Respondent conversely argued that it was actually two months shy of what they were looking for which was 3 years and 10 months. The Applicant's evidence bearing the onus to prove that an unfair labour practice was committed by the Respondent shall be examined first.

The periods in question.

23. The testimony, evidence and closing arguments of the Applicant reveal the following: At Ebenezer Primary School she worked as a substitute teacher during the periods of April to May 2015, which was 1 month, July to August 2015 was 1 month, September to December 2015 was 3 months. Then at New Orleans secondary school July to September 2016 it was 2 months. At Paulus Joubert Primary School October to December 2016 which was 3 months. Then from January 2017 until March 2019 it amounted to 2 years and 2 months. Then the last bit for the Respondent placed as an educationist and not disputed was for one year and three months. This effectively translates into four years and three months on the totals easily having achieved the targets. This is the one contention bearing the heaviest weighting of the quarrel.
24. As stated the impasse was brought on because as per the Respondent a certain portion of her experience was not as it were, real teaching experience. Part of the argument in closing was that the Performance management assessment for the role she (Applicant) occupies does not equate to, or replace, the minimum entry requirements



for the appointment to another post. This argument in my view serves to be a convenient excuse to suggest that the KRA performance bears no relevance to the determination of whether she met the prescribed minimum experience. On the one hand the Applicant served in the placement (as an educator) as a definite asset to the Respondent but when she wants to use this service she provides on behalf of the State, it cannot assist her in a promotion application. I have found the thinking hard to follow and am unable to align myself with the observations made.

25. A crucial segment of the Applicant's case also focused on the belief that nowhere in the initial post advertised did it state that experience was supposed to be post qualification. This was indeed the case. Had the Applicant known this, surely she would from the word go have known that her attempt may have been in vain. The proposition Mosetic argued hinged squarely on the fact that even though she (Applicant) was a student that this should count as actual experience. Can a person who either replaces a substitute teacher or educates learners without supervision while studying towards a qualification regard such interaction as experience? This is the question which cries out for an answer. The short answer to this question is yes. To my mind the long answer can be found in the following explanation.
26. The plain interpretation is that when one draws parallels to an acting post which you are not qualified for it cannot for the sake of not having been qualified suggest "ex post facto," that no experience was acquired during the period of acting. Not only is it inherently unfair to suggest same but it would also be exploitative. Both learner and educator gain something out of an interaction either as a student or substitute teacher whether she be a partial or a fully SACE accredittee. There must be some form of recognition. In doing so it creates an obligation by an employer to acknowledge the person in the "unqualified" post. I take judicial notice of the "fees must fall" protest which the Applicant demonstrated (not placed in dispute) how the State benefitted during this turbulent period. Yet she was not fully qualified.
27. To expect a substitute or student teacher to impart knowledge to learners where the information is extracted from a reliable and lawful source (curriculum developed by the Department of Basic Education) should in my view be regarded as experience. There is a difference between a qualified teacher and someone studying towards a formal qualification whilst rendering a service to the Department of Education. I acknowledge that the Department of Correctional services and the Western Cape Department of Education are two distinct state entities but one cannot be selective about when it counts and when it does not. The interesting part of the testimony included the detail that the Applicant received a provisional registration from the South African Council of Educators (SACE). This accreditation was formally bestowed in April 2018. This argument by the Respondent too is at best, opportunistic.



28. Again, this too is not in dispute but the question lingers around whether the two months the Respondent claims she did not make the cut counts as actual experience. This would mean that short of four years the Applicant achieved 95.83% of the period the Respondent requested of her to be active in the class. If one should use plain mathematics what the Respondent was really saying is that she missed the mark by 4.17%. This just provides a unique perspective. In any event the non-appointment was further bedeviled by the fact that she stood out above the rest. The advertisement placed specifically stated that the post is in line with the requirements of the Occupational Specific dispensation. The Applicant does have 4 years and 3 months contact with learners in a classroom setting. This is an undisputed fact. Surprisingly, the Respondent ignored the tally which means she actually exceeded the years of experience instead of having fallen short.
29. Even if she were legitimately two months short (which is now established that she is not) it was not that substantial to claim that the position could not be filled. She did not have a criminal record, a questionable cv or any historical problematic conduct which would call into question her suitability for the post. Both her comparators to the contrary did in fact have internal issues and their exclusion was understandably fair in the circumstances. In fact, she doubled up on both Security and Education. To the Respondent this did not even count for something. Then there was the argument that the post applied for was an OSD post which specifically required that four years post registration be a deal breaker if it did not come with the other requirements. I could not locate this anywhere in the OSD provisions for the Respondent employees. Consider any person studying towards a qualification but being granted the opportunity to have on the job experience.
30. Even though one has not been given the official title it does not take away the fact that the functions were physically performed which enhances the abilities and routine responsibilities in an "ordinary" setting. The argument of student experience as a means not to award the post to the Applicant does not add up to a rationale decision. Besides, OSD means revised salary structures that are unique to each identified occupation in the public service. It has no bearing on her experience. There was no expert testimony led on the SACE partial and full registration but it can be safely inferred that this legislation addresses the issue of having some form of legitimacy allowing you to stand in front of an audience eagerly awaiting someone to give directions. With respect, the Respondent seemed to have devised increasingly sophisticated means to circumvent the appointment of the Applicant.
31. Moreover, the *Education Labour Relations Handbook* specifically Clause 11 (1) states that: (a)(b) appropriate experience shall include experience which in the opinion of the Minister develops the candidate, directly



and appositely, in all respects regarding the knowledge, skills and attitudes for holding an educators post (c) The types of experience and the extent of recognition of such experience on the appointment of an educator shall be as follows: other experience shall include experience other than actual educators experience and appropriate experience recognized by the Minister.

32. Subclause (b) in my assessment is a self-standing ground insulated from any interference by the Respondent. Concomitantly logic dictates that the actual developmental experience as demonstrated in the Applicant's curriculum vitae along with the discretion afforded to the Minister, provided that it is neither unlawful nor inappropriate. The decision not to appoint the Applicant is without any basis in fact or law. The most natural inference, consistent with all the proved facts, is that the Applicant was subjected to an unfair labour practice, promotion.
33. Then what brings me which lies at the heart of the matter. The Respondent submitted into evidence a document which purports to show why the post was re-advertised. The Chairperson of the interviewing panel in an internal memo signed on 14 February 2023 recommended that the Applicant be appointed into the post with effect from 01 March 2023. Both the Acting Area Commissioner ZP Ncamazana and Area Commissioner SR Dlokweni signed this approval on 15 February 203. Then in a letter on 19 May 2023 approximately two months later Ms AN Mdladlamba wrote a report suggesting that the Applicant did not meet the requirements in terms of her experience.
34. Then a few months has passed where on 21 and 22 February 2024, both Ms Reddy and Mdladlamba drafted a request for the re-advertising of a position which the Applicant did not qualify for. In the request for re-advertisement, it recorded that the approved candidate (with the name blotted out) was subjected to a formal investigation. One would have thought that this recommendation would have included the Applicant in this matter, the reasons why she was excluded and then the other two remaining competitors and the reasons they were excluded thereby justifying the re-advertising of the post. Since this would have been why the post was never filled in the first place.
35. Lastly the new post advertised again on 04 April 2025. This time the goal post shifted. The requirements were not relaxed but tightened. Instead of 4 years it now became 6 years after having achieved a SACE requirement. The previous advertisement said nothing about this. The Applicant did achieve her full registration with SACE 20 April 2018 and the post was re-advertised on 04 April 2024. It is not clear whether she would this time be excluded again on the 6-year period strictly observed. I do not mean to suggest that goal post was deliberately shifted because it may still be that the Applicant is eligible to apply. Whether she did is not subject to this enquiry but it has much to do



with the fact that she was unfairly treated based on criteria which I am of the considered view she met in the first place.

36. *On occasion the Labour Court in Department of Rural Development and Agrarian Reform v General Public Service Sectoral Bargaining Council and Others (PA3/18) [2020] ZALCPE 2; [2020] 4 BLLR 353 (LC) (6 January 2020) found that the Department's contention that restraint and deference are called for is not entirely misplaced, though somewhat overstated in the context of this case. Courts and arbitrators should be reluctant to interfere with an employer's decision to refuse promotion. They will do so only when the decision or reasoning is assailable because there is evidence that the employer acted on the basis of some unreasonable, irrelevant or invidious consideration; or the decision was arbitrary, capricious or unfair; or the employer failed to apply its mind to the promotion or acted in bad faith.¹ But equally, where there is no rational relationship between the decision not to promote, the purpose of the promotion and the information upon which the impugned decision is based, interference with the decision will be justified. Because there is ordinarily no right to promotion, arbitrators and courts should hesitate before appointing the aggrieved employee to the post. Such deference, however, will be less compelling where the employer has unfairly discriminated against an employee or acted otherwise egregiously. Likewise, the remedy of reinstatement might be appropriate where it will cause no prejudice to another successful candidate because the post is vacant; or the employee proves that but for the unfair conduct he, or she, would have been appointed.²*

37. This brings me to the issue of remedy. Section 193 (4) of the LRA provides that (4) An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment, or compensation. As stated, at the time of the conclusion of this arbitration hearing the position was still not filled. There is no reasonable and compelling evidence before me which suggests why the Applicant should not be promoted into the post. I therefore find that since the Applicant was deprived of an opportunity to progress in her career that a clear case of unfairness has been made out.

² *SAPS v Safety and Security Sectoral Bargaining Council & others* [2016] JOL 35883 (LC) para 41.5



Award

38. The applicant Kim-Lee Jones has been subjected to an unfair labour practice related to promotion.
39. The Respondent, The Department of Correctional Services is ordered to appoint Applicant Ms Kim-Lee Jones into the position of Section Head Formal Education at the rate of pay of R354 666, 00 per annum effective 01 December 2025.
40. The Applicant referred the matter to the GPSSBC on 11 June 2024. The matter was first heard on 21 February 2025. As stated, it was occasioned by two postponements for medical reasons. As these reasons were valid can the Respondent not be prejudiced for reasons outside its control neither could it be held to ransom for the delay in having the matter set down from the date of referral. It is highly unlikely at the time of issuing this order that anyone has been appointed into the post. I am therefore of the considered view that the Applicant shall not be entitled to back pay.

F Philips

Firgil Philips

GPSSBC Panellist