

25 March 2022

Enquiries : Nkhensani Mabunda
Tel : 012 663 7446
Fax : 012 643 1601
Email : NkhensaniM@elrc.org.za

TO : PSA obo Edross (Applicant)
agedross@gmail.com

TO : Western Cape Department of Education (Respondent)
Colin.Esau@westerncape.gov.za

Dear Sir/ Madam

RE: ARBITRATION AWARD

**CASE NAME: PSA obo EDROSS vs WESTERN CAPE DEPARTMENT
OF EDUCATION**

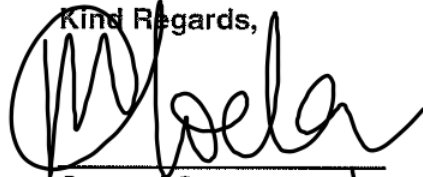
CASE NUMBER: ELRC702-21/22WC

I transmit herewith a copy of the Arbitration Award for the above-mentioned matter for your attention and information.

The matter is considered closed by the Council.

We thank you for your co-operation in this regard.

Kind Regards,



General Secretary
Education Labour Relations Council

PP 25/3/22



elrc

EDUCATION LABOUR
RELATIONS COUNCIL

**OFFICE OF THE GENERAL
SECRETARY**

*All correspondence should be
addressed to:*

The General Secretary
ELRC
Private Bag X126
Centurion
0046
Gauteng
RSA

Enquiries:

Foca N.O

Tel: 012 663 7446

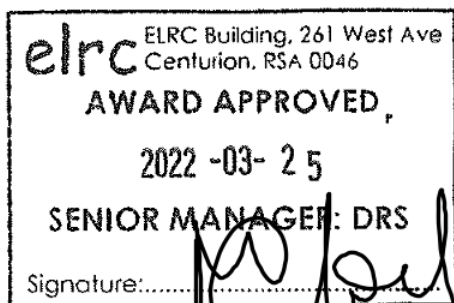
Fax: 012 643 1601

E-mail: cindyfoca@elrc.co.za

Website: www.elrc.org.za

Physical Address:

ELRC Building
261 West Avenue
Centurion
0046
Gauteng
RSA



**IN THE EDUCATION LABOUR RELATIONS COUNCIL ARBITRATION MEETING HELD VIRTUALLY ON
24 FEBRUARY 2022 AND 04 MARCH 2022**

Case Number: ELRC702-21/22WC

In the matter between: -

PSA obo Edross Abdul Gamiet

Applicant

And

Education Department of Western Cape

Respondent

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION

- 1 The arbitration hearing was held virtually on 24 February 2022 and 04 March 2022. The employee was present and represented by Ms Natalie Adams, a full-time shopsteward of PSA. The Respondent was represented by Ms Matshaya Deborah, a Labour Relations Officer of the Respondent.
- 2 The Respondent submitted two (2) bundles of documents which were marked as **Annexure PSA1** (pages 1-68) and **Annexure PSA2** (pages 69-113). The Respondent submitted a bundle of documents marked **WCED1**.
- 3 The proceedings were digitally recorded. Both parties filed written closing arguments, which have been taken into consideration in arriving at the conclusions herein. I am indebted to both

representatives for their comprehensive and persuasive submissions, which included extensive reference to the relevant case law.

ISSUES TO BE DECIDED

- 4 I was called upon to determine whether the Applicant's prolonged suspension constituted an unfair labour practice for the purposes of section 186(2)(b) of the Labour Relations Act 66 of 1995 (LRA), and if so, I must determine the appropriate relief.
- 5 Whether the Applicant's temporary placement at Beauvallon Secondary School constitutes a new dispute which arose on 24 January 2022. If not, whether it constitutes an extension of the impugned precautionary suspension.

INTRODUCTION AND BACKGROUND

- 6 At the beginning of the proceedings I requested the parties to revert to the pre-arbitration meeting after being made aware that there were no pre-arbitration minutes. I was advised that PSA had prepared and sent draft pre-arbitration minutes to the Respondent on the day of the arbitration. The signed pre-arbitration minutes were sent to the ELRC.
- 7 Both parties agreed that the *facta probanda* in this matter are generally common cause issues, and they may be summarized as follows:
 - 7.1 The Applicant was, after being given the opportunity to make written representations, placed on a precautionary suspension effective from 13 May 2021. He was charged on 21 July 2021. The disciplinary hearing was held on 28 July 2021 and 18 October 2021. The Applicant was found guilty and demoted from the position of Deputy Principal to that of a Departmental Head.
 - 7.2 Both the Applicant and the Respondent lodged appeals against the sanction imposed by the Presiding Officer, and they were still waiting for the outcome of their appeals, at least as at the last date of the arbitration hearing.
 - 7.3 The Applicant referred a dispute of unfair labour practice in terms of section 186(2) (b) of the LRA on 3 December 2021. The matter was referred to arbitration on 19 January 2022.

- 7.4 He was issued with a letter dated 28 January 2022 in terms of which he was informed about the upliftment of his suspension, and that he would be temporarily placed at Beauvallon Secondary School with effect from 01 February 2022.
- 8 At the end of the proceedings on 04 March 2020, I issued directives to both parties on specific questions of law which must be addresses in their heads of arguments. Ms Matshaya was requested to indicate the empowering provision(s) relied on by the Respondent with regard to both the prolonged suspension and temporary placement of the Applicant. Ms Adams was requested to indicate the legal basis for seeking a relief of compensation in the light of the fact that the Applicant was suspended with full pay. She was also requested to deal with quantification of the compensation being sought.

SURVEY OF THE APPLICANT'S EVIDENCE AND ARGUMENTS

Abdul Gamiet Edross (the applicant employee) testimony can be summarized as follows:

- 9 He is the deputy principal of Cravenby Combined School ("Cravenby Combined") and that at the time of being charged with misconduct he was the acting principal. He acted from 01 January 2020 until 30 December 2020. On 31 December 2020 he was replaced by three persons who were appointed by the Respondent as Administrators.
- 10 Before his suspension, he made an appeal to the Department that he no longer had any bearing on the finances of the school. The three Administrators placed him in a classroom. He also informed to the Department that he would not interfere with anybody. He would be in his class.
- 11 He was suspended on 13 May 2021 and subjected to the disciplinary hearing three months thereafter. He remained on suspension throughout the investigation and even after conclusion of the disciplinary hearing at the end of October 2021. During the period of suspension, he suffered a lot mentally. He went through depression and even sought counselling.
- 12 On 01 November 2021 he received the outcome of the disciplinary hearing in terms of which he was given a final written warning. The Presiding Officer recommended that the entire school should go for financial management training. On 03 November 2021 he received the second outcome for the same disciplinary hearing in terms of which he was demoted. He appealed the second outcome. The Department appealed the first outcome.

- 13 He received notification in January 2022 informing him that the matter was set down for arbitration on 24 February 2022. When he received notice of arbitration, he also received a notice that his suspension will be lifted. He was instructed to report for duty at Beauvallon Secondary School ("Beauvallon").
- 14 He met with the Circuit Manager, Mr Hendricks, on 03 February 2022, who informed him that he has been placed at Beauvallon Secondary School as an ordinary PL1 teacher, and that he is not part of the management of the school. Mr Hendricks told him that he had no say in the matter and that he must just report for duty and teach. The Department's intention is to constructively dismiss him.
- 15 He never intimidated any educator throughout his entire teaching career. He has seen and met the same educators who testified against him on numerous occasions. He never intimidated them. Even to date the Department has never received any complaint where he is accused of having intimidated any person.
- 16 He is the deputy principal of the school responsible for curriculum. He was given this responsibility by the retired principal, Mr Singh, because the school's results had dropped to 72% during 2017 and 2018. There was a steady growth in matric results for 2019 and 2020 where the pass rate was 85.5%. In 2021 the matric results dropped down to 74% because there was no curriculum manager at the school.
- 17 He was placed at Beauvallon against his wishes. He was never consulted about it. Beauvallon is not only an Afrikaans medium school, but it is in a high-risk area. In 28 years of his career as a teacher he has been teaching at an English medium school. He has never taught any subject in Afrikaans. He is not the only one who is suffering but even the learners are suffering as he finds it difficult to teach in Afrikaans.
- 18 Under cross examination, he testified that there was no need for him to provide medical evidence because he was on suspension. He did not request for any medical certificate because he was not reporting for duty. He experienced depression during the time of his disciplinary hearing, and that he informed Ms Matshaya about this situation. He was not admitted at any hospital about his depression. He only consulted his medical doctor and got counselling, but he does not have any medical certificate. He conceded that it would be difficult for the employer to accept that he was suffering from mental illness as a result of the disciplinary enquiry.

- 19 He further testified that WCDE did not issue him with any letter indicating that he must return to work or that he remained on suspension. The only evidence he has is a WhatsApp message send by Lee-Ann Bathgate, the Assistant Director: Labour Relations to his NAPTOSA representative, Mr Xolile, indicating that he may not return to work because he was still on suspension. His understanding is that he had the right to return to work immediately after conclusion of the disciplinary hearing.
- 20 He is a PL1 educator at Beauvallon Secondary School. He has a PL1 educator timetable. He is not part of management even though he is the deputy principal. He is placed at Beauvallon Secondary School against his wishes and consent. He informed the Circuit Manager on 03 February 2022 in the Office of the principal that he was concerned about his safety at school and that he was struggling to teach in Afrikaans. The Circuit Manager's response was that he needed to buy time until the date of his arbitration.
- 21 He does not agree with the Department's reasons that he could not be allowed to go back to Cravenby Combined because there will be two managers at the school. He was not the school manager in 2021 when he was charged. He had three managers to whom he reported. He had no dealings with the school finances after his replacement by the Administrators. Even now he would not pose any risk of accessing the financial records of the school because there is an acting principal in the name of Mr Barnes.
- 22 As to whether he would be comfortable in being placed at another school until the school is no longer under administration as well as the appeal process is finalized, his response was that the school ceased to be under administration with effect from 17 December 2021. The fact that the school is no longer under administration is public knowledge. There is a newsletter which he got from his son who is in Grade 10 at Cravenby Combined where it is written that the school is no longer under administration.

SURVEY OF THE RESPONDENT'S EVIDENCE AND ARGUMENTS

- 23 **Wendy Deirdre Horn**, just like the Applicant, testified under oath. Her testimony could be summarized as follows. She is the District Director of Metropolitan North Education District . In April 2022 she would be completing two years as the District Director.
- 24 As to the reasons why Cravenby Combined ended up being placed under administration, she testified that when arriving at the District Office the school was in disarray. Submission of the information was

- always submitted late. Documents were not correctly completed. She was inundated with complaints from the Acting Principal, Mr Edross, the governing body, SMT members and teachers, as well as the Circuit Manager.
- 25 She visited the school where she, amongst others, found that there were problems with acting appointments, filling of posts, conversion of temporary employment to permanent employment, and an acrimonious working relationship between the Acting Principal and the Circuit Manager.
- 26 There were many challenges, from management, curriculum, governance, and service providers' contracts. There were irregularities of marking of learners' scripts. These problems were affecting teaching and learning. She held several meetings with the governing body, Acting Principal, and the Circuit Manager in order to get the school back on track.
- 27 There were also labour issues going on involving Mr Edross, which brought further instability at the school. She then requested the former HOD, as a last resort, to put the school under administration, which was approved. Mr Edross went back to his position as the deputy principal and was expected to provide support to the Administrators. He did not give cooperation to the Administrators. He was giving different instructions to the staff.
- 28 The Administrators were at the school for a year and their contract had been completed. Most of the posts have been filled on permanent basis through conversion, others have been advertised, and contracts with services providers have been cleaned up. The second Deputy Principal has been appointed as the Acting Principal. The school is functional.
- 29 As to the prolonged suspension of Mr Edross, she testified that Mr Edross was suspended to prevent possible meddling in the investigations and the work of the Administrators. She further testified that it was because of the pending appeal lodged with the MEC.
- 30 She is aware that Mr Edross had been placed at another school. As to why Mr Edross cannot be allowed to return to Cravenby Combined , she testified that when he was at the school the staff and the governing body were divided, and that the camps are still in existence. While he was on suspension last year, Mr Edross wrote her an email as a parent, making a lot of allegations concerning certain irregularities. This made her to realize that as a precautionary measure Mr Edross should not be allowed to go back to Cravenby because if that were to happen the situation may go back to the period before the school was placed under administration.

- 31 Under cross examination, Ms Horn conceded that the investigations into Mr Edross' misconduct was done and concluded around March 2021. In response to the Presiding Officer's finding that Mr Edross had not deliberately committed financial mismanagement, but it was because of being out of depth in keeping with the administrative aspects of financial management at the school, her response was that the Department has taken the Presiding Officer's findings on appeal. The same answer was given as to why Mr Edross remained suspended even if the directive of the Presiding Officer was that he should return to his workplace.
- 32 She further testified that if Mr Edross were to return to Cravenby he may influence members of the governing body and the SMT when it comes to certain decisions on financial matters. He may also be given responsibilities relating to financial management. Mr Barnes, who is the Acting Principal, informed her that he was prepared to act as long as Mr Edross does not return to the school because he used to place him under undue pressure.
- 33 Ms Horn conceded that Mr Edross has been on suspension for longer than three months, and that the disciplinary hearing was concluded after one month of the suspension. She further conceded that it was no longer necessary for Mr Edross to be on suspension because the investigation has been concluded. She testified that, to her knowledge, Mr Edross had never endangered the well-being or safety of any person at the workplace. She also conceded to the version that the two reasons why an educator may be placed on a precautionary suspension or transferred have been addressed in the case of Mr Edross.
- 34 She testified that Mr Edross has been temporarily placed at another school because of the instability that he will bring if he could return to the school. He had been temporarily transferred because of the type of charges that are under appeal. This is the reason the suspension is continued. She does not know whether the Presiding Officer has ever decided on a further postponement of the disciplinary hearing. She did not see any provision in item 6(3) (a) to (d) which says that this matter may only be concluded after conclusion of the appeal.
- 35 She conceded the fact that Mr Edross had written an email, as a parent, complaining about certain academic issues at Cravenby cannot be one of the reasons why he cannot return to the school.

ANALYSIS OF EVIDENCE AND ARGUMENTS

- 36 This matter, as correctly contended by both the Respondent and the Applicant, does not raise real factual disputes. There may have been one or two factual disputes about the question whether the Applicant was charged and found guilty of a serious misconduct contemplated in section 17 of the Employment of Educators Act 76 of 1998 ("EEA"). I do not think it is necessary for me to resolve such factual disputes for the following two reasons: both the Applicant and the Head of Department have only appealed the sanction and elected not to appeal the findings made by the Presiding Officer.
- 37 Secondly, and perhaps more importantly, the dispute before me is not really about the seriousness of the charges that were ultimately preferred against the Applicant and decided by the Presiding Officer. The real dispute is whether there was any valid justification for the Respondent to have placed the Applicant on a precautionary suspension for a period in excess of 90 days, and subsequent thereto place him temporarily at another school pending finalization of the appeal process.

The applicable legal framework

- 38 Both the impugned suspension and the temporary transfer of the Applicant are regulated by item 6 of Schedule 2: Disciplinary Code and Procedures for Educators , to the EEA, which provides as follows:

" 6. Suspension.—(1) In the case of serious misconduct in terms of section 17, the employer may suspend the educator on full pay for a maximum period of three months.

(2) In the case of misconduct in terms of section 18, the employer may suspend an educator in accordance with the procedure contemplated in subitem (1) or transfer the educator to another post if the employer believes that the presence of the educator may jeopardise any investigation into the alleged misconduct or endanger the well-being or safety of any person at the workplace.

(3) (a) If an educator is suspended or transferred, the employer must do everything possible to conclude a disciplinary hearing within one month of the suspension or transfer.

(b) The presiding officer may decide on any further postponement. Such a postponement must not exceed 90 days from the date of suspension.

(c) If the proceedings are not concluded within 90 days, the employer must enquire from the presiding officer what the reasons for the delay are and give directions for the speedy conclusion of the proceedings.

(d) At the time of the enquiry contemplated in paragraph (c) the employer may, after giving the educator an opportunity to make representations, direct that the further suspension will be without pay”.

39 It is clear that the employer has a discretionary power to suspend or transfer an educator as a precautionary measure in circumstances set out in item 6(2) of Schedule 2. In *Mogotlhe v Premier of the North-West Province and Another*¹, the Labour Court, per Van Niekerk J at para 39, held that whenever an employer contemplates imposing a preventative suspension, such an employer will be required to have a justifiable reason to believe, *prima facie* at least, that the employee has engaged in serious misconduct. Secondly, there must be some objectively justifiable reason to deny such an employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interests of affected parties in jeopardy.

40 The net effect of the Applicant's version, as I understand it, was not intended to dispute the fact that the suspension which was imposed on 13 May 2021 and the temporary placement of the Applicant at Beauvallon Secondary are precautionary measures which may be invoked pending disciplinary proceedings. What the Applicant appears to be aggrieved about is the continuation of these precautionary measures even after conclusion of the investigation and the disciplinary enquiry.

41 The Respondent's version on the other hand sought to suggest that the phrase “ the employer may suspend or transfer the educator to another post” in both sub-items (1) and (2) of Schedule 2 gives the employer a wider discretion to either suspend or transfer an educator for a period the Respondent deems to be appropriate in any given case.

¹ *Mogotlhe v Premier of the North-West Province and Another* (J 2622/08) [2009] ZALC 1; [2009] 4 BLLR 331 (LC); (2009) 30 ILJ 605 (LC) (5 January 2009).

- 42 In the instant case, the 90 days period regarding the Applicant's precautionary suspension expired after 11 August 2021. The available evidence suggest that the investigations may have been concluded during March 2021. The disciplinary hearing commenced on 28 July 2021 and concluded on 18 October 2021, with the outcome being communicated to the parties on 01 and 03 November 2021. I am of the view that the Applicant was entitled to challenge his continued suspension, immediately after expiry of the 90 days period or after the Presiding Officer's findings and sanction were communicated.
- 43 It appears to me that sub-item (3) (d) gives the employer the power to place an employee such as the Applicant on a further suspension but after compliance with the procedural requirements in sub-item (3) (c). The employer is also, by virtue of sub-item (3) (a), obliged to do everything possible to ensure that a disciplinary hearing is concluded within one month of the educator's suspension.
- 44 There is overwhelming evidence, which was never disputed by the Respondent, that the procedural factors in sub-item (3) (a) and (c) have not been complied with, probably because of a believe that the Respondent has an unfettered discretion when it comes to the suspension or transfer of an educator for the purposes of item 6.
- 45 The Applicant has been on a precautionary suspension for a period in excess of 9 months, which is by far more than the prescribed 90 days. The real problem, in my view, is not necessarily about the fact that the Applicant has been placed on some kind of an indefinite precautionary measures. It is more about the fact that the prolonged suspension has, particularly after expiry of the 90 days period, become completely inconsistent with the relevant provisions of item 6 of Schedule 2. It should be borne in mind that the suspension and temporary placement of the Applicant are the result of the exercise of a statutory discretionary power by the Respondent. Khampepe J, in *Head of Department, Department of Education, Free State Province v Welkom High School & Others*² , said the following about the proper exercise of a discretionary power:

" State functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law..."

² *Head of Department, Department of Education, Free State Province v Welkom High School & Another: Head of Department of Education, Free State Province v Harmony High School & Another* (CCT103/12) [2013] ZACC25.

- 46 In as far as substantive fairness is concerned, the question to be answered is whether there were allegations that the Applicant had committed serious offence(s). Secondly, whether the employer reasonably believed and still believe that the Applicant's presence at Cravenby Combined might jeopardize the investigation or **endanger the well-being or safety of any person or property**. In *POPCRU obo Masemola and Others v Minister of Correctional Services* (2010) 31 ILJ 412 (LC), the Labour Court held that an employee may be placed on a precautionary suspension if the employer has a justifiable reason to believe, *prima facie* at least, that the employee has engaged in serious misconduct; and that there is some objectively justifiable reason to deny such an employee access to the workplace based on the integrity of pending investigation into the alleged misconduct or some other relevant factor that would place the investigation or the interest of the affected parties in jeopardy³.
- 47 In the present case, the only question that may have to be answered is whether the employer reasonably believed and still believe that the Applicant's presence at Cravenby Combined might endanger the well-being or safety of any person or property, because it is the only question which is relevant to the period after conclusion of the investigation and the disciplinary hearing. The essence of the Applicant's evidence, which was never challenged, was that when making the written representations as to why he should not be suspended, he made a commitment that he will not intimidate any person. Even after suspension he never intimidated any person. There has never been any complaint to the Department about him in this regard. This was also confirmed by Ms Horn under cross examination.
- 48 The real reason why the Applicant remained suspended even after the outcome of the disciplinary hearing was communicated to both the Applicant and his union representative, Xolile of NAPTOSA, through a WhatsApp message received from Ms Lee-Ann Bathgate. The message is to the effect that the Applicant was not supposed to return to work because his suspension was not lifted. Secondly, it was communicated through the letter uplifting the Applicant's suspension, where it is stated that the Applicant's suspension is lifted and that he is placed, as an interim measure, at Beauvallon Secondary School pending finalization of the appeal process and the ELRC dispute.
- 49 Ms Horn has, in addition to the pending appeals, attributed the Applicant's prolonged suspension from Cravenby Combined to the reasons and circumstances which precipitated the placing of the

³ *POPCRU obo Masemola and Others v Minister of Correctional Services* (2010) 31 ILJ 412 (LC).

school under administration during January 2021 to 31 December 2021. I agree with Ms Adam's argument that there is no legal basis supporting the view that the uplifting of the Applicant's suspension is dependent upon finalization of the appeals lodged by the Head of Department and the Applicant.

- 50 It is not necessary for me to deal with the other reasons advanced by Ms Horn as to why she believed that it would not be in the public interest for the Department to allow the Applicant to return to Cravenby. These reasons appear to be based on some kind of imaginary fears and an exaggerated influence which it is believed could be exerted by the Applicant on the governing body, the school management team and the entire staff of Cravenby Combined School. Secondly, these allegations were never put to the Applicant when he was testifying. They may as well be an afterthought, and as such stand to be rejected.
- 51 Ms Matshaya, in the Respondent's heads of argument, also reiterated the fact that the prolonged suspension is attributable to the appeals of both parties. She also asserted that "*it was not in the best interest of the learners and a functional school to place Mr Edross back at the school to interfere with the work that has been done by the administrators*". Reliance on the appeals and the fear that Mr Edross' return to Cravenby would result with reversal of the good work done by the administrators must be rejected for the reasons advanced with regard to Ms Horn's evidence.
- 52 The assertion that the return of Mr Edross would be detrimental to the best interest of the learners fails to appreciate the fact that Mr Edross had led evidence, which was never disputed, to the effect that he was assigned curriculum responsibilities after the school results dropped to 72%. The intervention contributed to the results improving to 85.5%, and that after his suspension the matric results dropped to 74%. The evidence that he is not the only one being frustrated at Beauvallon Secondary, but the learners as well are experiencing the same frustration, was also never challenged. Unlike what Ms Matshaya seeks to suggest, the evidence before me suggests that the return of Mr Edross to Cravenby Combined would be in the public interest.
- 53 The only real reason which remains is a believe that the appeal by the Head of Department has not only stayed the sanction imposed by the Presiding Officer, but it had also extended the precautionary suspension. I agree with Ms Adams that there is absolutely no legal basis supporting a view that the prolonged suspension should be attributable to the appeal noted either by the Head of Department or the Applicant,

- 54 It is my finding that there is no objective rational basis for justifying the prolonged suspension of the Applicant, especially after conclusion of the investigation and the disciplinary hearing in November 2021. In fact, at that stage, there was no longer any factual and legal foundation to sustain continuation of the precautionary suspension.
- 55 Turning to the interim placement, Ms Adams suggested that the interim placement is a disguised precautionary suspension which was imposed on 13 May 2021. I do not think Ms Adams' contention, at the level of fact and law, is entirely correct. The suspension of the Applicant was clearly imposed in terms of item of 6(1) or (2) of Schedule 2. It is this suspension which was uplifted in terms of the decision of January 2022. By placing the Applicant temporarily at Beauvallon Secondary, it suggests that the Respondent had decided to opt for the transfer which is another precautionary measure contemplated in item 6(2). Unfortunately, there is no explanation as to why the precautionary suspension was being uplifted, because such an explanation could have shed more light as to why a temporary transfer has suddenly become preferable.
- 56 I am not convinced that the interim placement at Beauvallon Secondary raises a new dispute which is not properly before me. It is a precautionary transfer which may also be invoked in terms of item 6(2). I am of the view that this temporary transfer must suffer the same fate because it is inextricably linked to the impugned precautionary suspension. In fact, the temporary placement was for all intents and purposes invoked to achieve the same objectives, which was to continue preventing the Applicant from reporting at Cravenby Combined School in circumstances where there is no valid justification for such a precautionary measure.
- 57 In the circumstances, both the suspension and temporary placement of the Applicant are against the purpose for which a precautionary measure is supposed to be imposed, which include allowing the employer to conduct an investigation unhindered and to ensure that the employee who is alleged to have committed a serious misconduct does not interfere with the investigation or influence witnesses.
- 58 Consequently, it is my finding that both the suspension and the interim placement were substantively and procedurally unfair for the purposes of section 186(2) (c) of the LRA.
- 59 The remedies available to an employee against whom an unfair labour practice was committed, are provided for in section 193(4) read with section 194(4) of the LRA. Section 193(4) confers an arbitrator with the power to determine any unfair labour practice dispute referred to him or her on

terms which the arbitrator deems reasonable, which may include ordering compensation. I am inclined to grant the Applicant compensation.

- 60 In *Long v South African Breweries (Pty) Ltd and Others* [2018] ZACC 7, the Constitutional Court in supporting the approach and reasoning of the Labour Court in determining whether the precautionary suspension was permissible and prejudicial to the suspended employee, said the following:

"In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place, cannot be faulted. Generally, where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound".

- 61 My respectful view is that the present case is distinguishable from the Long case and any other case where a prolonged precautionary suspension may be deemed permissible and not prejudicial to the suspended employee. As already indicated, the Applicant's suspension ceased to be a legitimate precautionary measure once the findings of the Presiding Officer were pronounced, and the resultant sanction imposed and communicated to both the Applicant and the Respondent. The purpose for which the suspension was imposed, in the first instance, had been achieved. As already indicated, continuation of the Applicant's precautionary suspension was no longer necessary.

- 62 The Applicant's evidence about the conditions and circumstances surrounding his temporary placement at Beauvallon Secondary School was not disputed, and it is therefore accepted. The Applicant's evidence was that he was not only placed at Beauvallon Secondary against his wishes, but he was also placed as an ordinary post level 1 educator. I am of the view that the Applicant has in fact been placed in an untenable situation worse than the sanction imposed by the Presiding Officer, and perhaps even worse than the situation he found himself in before upliftment of the suspension.

- 63 The Applicant has, in fact, been arbitrarily demoted. The Respondent did not even bother to give reasons why a Deputy Principal should be excluded from the school management team altogether and be given duties and responsibilities of a post level 1 educator. I am of the view that the Applicant

was not only confronted by an unjustifiable prolonged precautionary suspension, but he was also subjected to a demeaning and humiliating experience.

- 64 Ms Adams prays for the award of a compensation of **R465 570.00**, which is the equivalent of 12 months' remuneration, calculated at the Applicant's monthly basic salary of **R 38 797.50**. Ms Adams gave the following reasons as a justification for seeking a maximum compensation:

"...Mr Edross has been unfairly suspended / transferred for more than 9 months, the prejudice suffered by Mr Edross which included his dignity and social standing, mental health, as well as demotion in job status (English educator in an Afrikaans based school), but also the complete lack of response or instruction from the department and deliberate punitive delaying tactics..."

- 65 The Applicant's prayer for a maximum compensation appears to be founded on a contention which seeks to suggest that the interim placement is an extension or continuation of the 13 May 2021 precautionary suspension, which resulted with Mr Edross Mr being placed on a precautionary suspension for 9 months and 1 week as at the date of the first sitting of the arbitration hearing.

- 66 I am not prepared to grant a compensation equivalent to the Applicant's 12 months' remuneration because I am, in the first instance, not convinced that the prolonged suspension and the temporary transfer were imposed as a result of an ulterior purpose on the part of the Respondent. I am mindful of the fact that the Applicant alleged that his working conditions were deliberately made intolerable with the hope that he would ultimately resign. I do not agree with the Applicant in this regard, and I do not think it is necessary for me to give any reasons.

- 67 It is true that the Applicant has been subjected to precautionary measures for a period of more than 9 months. As already indicated, the Applicant was entitled to challenge his precautionary suspension once it had exceeded 90 days, but he chose to refer an unfair labour practice dispute about five months after expiry of the 90 days period, and a month after conclusion of the disciplinary enquiry. I have therefore decided that the period which must be taken into account for purposes of quantification of compensation, is December 2021 until March 2022.

- 68 I am of the view that a compensation equivalent to the Applicant's 4 months' remuneration will be just and equitable in the circumstances of this case. The Applicant has submitted a salary advice dated 2022/03/07 which proves that he was, at the time of arbitration, earning **R38 797.50** per month.

AWARD

- 69 The Respondent is ordered to pay the Applicant compensation equivalent to his 4 months' remuneration amounting to **R155 190.00** on or before 30 April 2022. This amount shall attract interest at the prescribed rate from 30 April 2022.
- 70 The Respondent is also ordered to terminate the Applicant's temporary placement at Beauvallon Secondary School and to allow the Applicant to report for duty at Cravenby Combined School at a date to be determined by the Respondent but not later than 14 days after reopening of the schools for the second term of 2022.



MORAKA ABEL MAKGAA
ELRC PANELIST

25 March 2022

DATE

