EDUCATION LABOUR RELATIONS COUNCIL
Established in terms of the LRA of 1995 as amended

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EDUCATION LABOUR
RELATIONS COUNCIL

COLLECTIVE AGREEMENT NUMBER 3 OF 2016

23 August 2016

ELRC GUIDELINES: PROMOTION ARBITRATIONS

Education Labour Relations Council
261 West Avenue
CENTURION
0046

EDUCATION LABOUR RELATIONS COUNCIL

COLLECTIVE AGREEMENT NO. 3 OF 2016

ELRC GUIDELINES: PROMOTION ARBITRATION

1. PURPOSE OF THIS AGREEMENT

1.1 Ensure that parties and panellists understand what is expected of them in relation to unfair labour practice disputes concerning promotions

1.2 Promote consistent decision-making in arbitrations dealing with promotion disputes

2. SCOPE OF THIS AGREEMENT

This agreement applies to and binds:

2.1 The Employer, as defined in the Employment of Educators Act 76 of 1998 as amended.

2.2 All the employees of the employer as defined in the Employment of Educators Act, 1998 (as amended) whether such employees are members of trade union parties to this agreement or not.

3. THE PARTIES TO COUNCIL NOTE AS FOLLOWS:

3.1 Education Labour Relations Council Collective Agreement 1 of 2006.

3.2 Personnel Administrative Measures (PAM) Chapter B.

4. THE PARTIES TO COUNCIL THEREFORE AGREE AS FOLLOWS:

4.1 To issue Guidelines contained in Annexure A as an accessible source of reference for Panellists and parties on how to deal with substantive and procedural aspects of an arbitration process concerning an unfair labour practice related to promotions.

5. DATE OF IMPLEMENTATION

This agreement shall, in respect of parties, come into effect on the date it is signed in Council.

6. DISPUTE RESOLUTION

Any dispute about the interpretation or application of this agreement shall be resolved in terms of the dispute resolution procedure of the Council.

THUS DONE AND SIGNED AT CENTURION THIS THE 23rd **DAY OF** August **2016**

ON BEHALF OF THE STATE AS EMPLOYER

DEPARTMENT	NAME	SIGNATURE
DEPARTMENT OF BASIC EDUCATION	H.M. Mageli	

ON BEHALF OF THE EMPLOYEE PARTIES

TRADE UNION	NAME	SIGNATURE
SADTU	Mugwena Maluleke	
CTU – ATU	JC Klopper	

MJ H.M.

ANNEXURE A

ELRC GUIDELINES: PROMOTION ARBITRATIONS

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A: PURPOSE INTERPRETATION OF THE LAW AND NATURE OF THIS COLLECTIVE AGREEMENT

Purpose

1. These guidelines are issued by the ELRC in order to:
   1.1 Ensure that parties and panellists understand what is expected of them in relation to unfair labour practice disputes concerning promotions
   1.2 Promote consistent decision-making in arbitrations dealing with promotion disputes

2. To the extent that these guidelines concern issues that cannot be regarded as the law, but purely as policy issues, that is the official policy of the ELRC and panellists are expected to follow that policy.

3. It is beyond the scope of these guidelines to record and summarise all the relevant provisions of all the applicable legislation, collective agreements, PAM[1], regulations and case law. Panellists who arbitrate promotion disputes for the ELRC must ensure that they are familiar with all the relevant legislation, regulations, collective agreements and jurisprudence.

Interpretation of the law

4 To the extent that these guidelines advance an interpretation of the law, it is the policy of the ELRC and should be applied unless the arbitrator has good reason for favouring a different interpretation. An arbitrator who adopts a different approach must set out the reasons for doing so in the relevant award.

5. The ELRC has developed these guidelines in accordance with judgments that are binding on it. If any interpretation is reversed by a binding decision of a court, commissioners must apply that interpretation of the law.

Nature

[1] *Personnel Administrative Measures, as amended by collective agreements*

6. These guidelines are by their nature general in their application and cannot cover the full range of issues that may confront arbitrators in promotion arbitrations. An arbitrator must make decisions that are fair and reasonable in the light of the specific circumstances of the case.

7. These guidelines serve as an accessible source or reference point for Panellists needing guidance on how to deal with substantive and procedural aspects of an unfair labour practice: promotion arbitration process, including joinder issues, the pre-arbitration hearing and the contents of an award, more particularly the remedy.

B: GENERAL PRINCIPLES FOR CONDUCTING ARBITRATIONS

8. The Panellist is expected to determine whether the employer's failure to promote the aggrieved party (Applicant) was substantive unfair, meaning whether the Applicant was not appointed despite being the best candidate given the skills he/she possesses, and a candiate that does not possess the same / similar skills was appoitned. From a procedural aspect the Panelist must be satiesfied that the Applicant suffered prejudice during a recruitment and selection process for a promotion post.

9. Panelists must conduct proceedings impartially and not act in a manner that might reasonably give a party the impression of bias. The arbitration process cannot be expedited in a manner that is unfair to a party or is unreasonable

C: THE BEST INTERESTS OF THE CHILD AND PUBLIC INTEREST

10. Section 28(2) of the Constitution of the Republic of South Africa provides that the best Interests of the child are of paramount importance in every matter concerning the child. Our Courts have held that section 28(2) is also applicable in promotion disputes in the education sector.[2]

11. The Constitutional court[3] has held that section 28(2) of the Constitution imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions. Statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interest of children. Courts and arbitrators are bound to give consideration to the effect their decisions will have on children's lives.

12. Fairness requires an evaluation that is multidimensional.[4] The fairness required in the determination of an unfair labour practice must be fairness towards both employee and employer.[5] The public interest and needs of society must also be taken into account in determining the fairness of the conduct.[6]

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[2] *Settlers Agricultural High School v HOD, Limpopo* [2002] JOL 10167 (T)

[3] Governing Body of the Juma Musjid Primary School v Essay 2011 (8) BCLR 761 (CC)

[4] *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) par 127

[5] *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 UCT* (2003) 24 ILJ 95 (CC) par 33 *para* 38

[6] *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC) par 127

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D: PRE-ARBITRATION AND JOINDER

Pre-Arbitration meetings

13. The ELRC Constitution provides that in the event that a dispute remains unresolved after a conciliation hearing, the panellist conciliating the dispute must immediately facilitate a pre-arbitration meeting.[7]

14. The purpose of the pre-arbitration is to ensure that all parties know what is in dispute, so that they have sufficient time to prepare for the arbitration hearing, without being caught by surprise at the arbitration hearing. Invariably, when a pre-arbitration hearing has not been held, this results in a postponement on the first day of the arbitration because parties are then caught by surprise when they hear for the first time what is in dispute.

15. While the ELRC Constitution does provide that if for whatever reason the parties unable to engage in a pre-arbitration meeting directly after the conciliation, the onus is on them to do so on their own, this should not be the norm and should be resorted to only in exceptional circumstances. Invariably, when parties undertake or are directed to hold their own pre-arbitration meeting in the absence of a panellist, no pre-arbitration is held, or they are unable to effectively narrow issues in dispute, which in turn also leads to further postponements on the first day of the arbitration. This negatively impacts on the budgetary constraints of the ELRC.

16. The ELRC expects parties to be ready and fully prepared for the pre-arbitration meeting on the day that it is scheduled. In the event that a party is not ready or the parties both are not ready to deal with the pre-arbitration on scheduled date, the panellist must record the reasons that are advanced. Those reasons must then be reported in writing by the panellist to the General Secretary of the ELRC, so that it can be taken up with the principals of the representatives who were not ready to proceed.

17. When a party, or parties indicate that they are not ready to proceed with a pre-arbitration conference, and the panellist after having recorded their reasons, is of the view that the reasons are sound, then the panellist should instead of directing that the parties must hold a pre-arbitration conference on their own, rather consider postponing the pre-arbitration conference sine die, for a date to be determined by ELRC case management. In the event of such a postponement, the panellist must, in terms of the ELRC Constitution ask the party who was not ready to proceed with the pre-arbitration to advance reasons why a costs order, reimbursing the ELRC for the wasted costs occasioned by the postponement, should not be made against that party. In the event that a costs order is made against such party, costs must be apportioned in accordance with the number of matters that the panellist has on his or her role that day.[8]

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[7] Clause 19.1 of Annexure B to the ELRC Constitution

[8] *The ELRC generally sets down two pre-arbitrations for a panellist for one day. This would mean that should one of the pre-arbitrations be postponed, it is only half of the costs that the ELRC has incurred for that day, that would be wasted costs. In such a case the wasted costs would then be half of the panellist's day fees and half of his accommodation and travelling expenses.*

18. The matters that must be attended to in the pre-arbitration meeting are listed in clause 19.5 of the ELRC Constitution. This list is not a closed list. The panellist must facilitate the pre-arbitration meeting by asking questions. All issues that are common cause and all issues that are in dispute must be recorded in the pre-arbitration minute. During the pre-arbitration meeting, the issues in dispute must be narrowed by the panellists to such an extent, that there would be no need for the panellist who arbitrate the dispute, to narrow issues in dispute. Should it however appear to the panellist who is appointed to arbitrate the dispute, that the panellist who presided over the pre-arbitration conference, did not make a serious effort to narrow issues in dispute, and that the proceedings could be further shortened by narrowing more issues in dispute, the panellist arbitrating the dispute is entitled to make a further attempt to narrow issues in dispute and record further issues that are common cause.

19. On conclusion of the pre-arbitration meeting, the panellist must print the pre-arbitration minute that he or she has kept during the meeting.[9] In the absence of printing facilities, a handwritten minute must be prepared by the panellist.

20. After having read the pre-arbitration minute prepared by the panellist, the panellist must ensure that all the parties who are present, sign the pre-arbitration minute and initial each page.

21. A panellist who was appointed by the ELRC to preside over a pre-arbitration meeting, must, unless the pre-arbitration was postponed, ensure that he or she has a signed pre-arbitration minute before he or she leaves the venue where the meeting was scheduled. The panellist must before close of business of the working day, following the day on which the pre-arbitration hearing was scheduled, email of fax a signed copy of the pre-arbitration minute to the ELRC.

22. Only in exceptional circumstances may a panellist leave the venue where a pre-arbitration hearing was scheduled, without a signed pre-arbitration minute. In the event that such exceptional circumstances exist, the panellist must report those exceptional circumstances in writing to the General Secretary of the ELRC in a written outcome report before close of business of the working day, following the day on which the pre-arbitration hearing was scheduled.

Joinders

23. The panellist who presides over the pre-arbitration meeting, must enquire from the parties whether an appointment has been made in the post that the applicant contests. In the event that an appointment has been made, the panellist must obtain the name, surname, work address, fax number, telephone number and email address from the parties.

24. It is the duty of the panellist who presides over the pre-arbitration meeting, to issue a written joinder ruling in which he or she joins the successful candidate as a second respondent to the proceedings. That joinder ruling must be emailed of faxed to the ELRC before close of business of the working day, following the day on which the pre-arbitration hearing was scheduled.

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[9] *The venue that the ELRC chooses generally has printing facilities that can be accessed either by email or by means of USB or a CD.*

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25. In the event that the panellist who presided over the pre-arbitration meeting, neglects his or her duties and fail to issue a joinder ruling, then as soon as the panellist who is appointed to arbitrate the dispute, becomes aware of such failure, the panellist who is appointed to arbitrate the dispute, must make the ELRC aware of this failure. If the ELRC is so informed prior to the arbitration hearing, the ELRC must instruct the panellist who presided over the pre-arbitration meeting, to issue such a ruling forthwith. In the event that the ruling is served on a date that is later than the required notice that must be given to the joined party of the arbitration date in accordance with the ELRC constitution, the ELRC must remove the matter from the roll, and determine another arbitration date.

26. In the event that the panellist who presides over the arbitration only discovers on the day of the arbitration that the successful candidate has not been joined, then he or she must still report this failure to the ELRC, but the duty then shifts to the panellist who is appointed to arbitrate the dispute, to obtain the name, surname, work address, fax number, telephone number and email address of the successful candidate from the from the parties and issue a written joinder ruling. The arbitration must then be postponed in order for the successful candidate to be joined.

Neglect of duties by panellists

27. The failure of panellists who are appointed to preside over pre-arbitration meetings to facilitate such meetings at all or effectively, or to provide the ELRC with signed minutes of the meeting, or to issue joinder rulings where applicable, will be seen in a serious light, unless good cause in writing can be shown by the panellist, and the General Secretary of the ELRC will be entitled to take appropriate action on account of such failure.

Checklist for narrowing issues in dispute

28. In order to assist panelists to narrow and identify issues in dispute and issues that are common cause in a promotion dispute during pre-arbitration meetings, panelists can use the following checklist as a guideline:
    - 28.1 What is applicant's post level and job title?
    - 28.2 What is applicant's annual salary?
    - 28.3 Was there a vacant substantive post for which applicant applied? If so, state the post number, the vacancy list in which it was advertised, the date of the advertisement, the school at which the post was advertised, the post level of the post, and the job title of the post.
    - 28.4 Was applicant an employee of respondent when he applied for the post?
    - 25.5 Would it have been a promotion in relation to salary and status for applicant had he been successful in his application for appointment to the post?
    - 28.6 Was applicant shortlisted for the post?
    - 28.7 Was applicant interviewed?
    - 28.8 Was applicant's name one of the 3 names recommended by the governing body to the employer for appointment? If so, how was applicant ranked?
    - 28.9 Has the employer (HOD) already appointed another candidate? If so, please provide the date of appointment.
    - 28.10 If the HOD (employer) has not yet appointed another candidate, has the HOD already decided who he will appoint or has he decided that he will not repeat the process and will appoint one of the three nominees of the governing body?

28.11 On what basis does applicant claim that there was unfair conduct in relation to promotion? Please specify all the complaints in point form and indicate whether the employer accepts or disagrees with the complaints.

28.12 Does the employer claim that the successful candidate was appointed on the basis of affirmative action? If so, provide the basis (gender/race etc.) upon which affirmative action was applied. If so does the employee claim that affirmative action was applied incorrectly and/or unfairly?

28.13 Does applicant claim that he was the best candidate for the post? Does the employer admit that the applicant was the best of all the candidates who applied for the post?

28.14 Does the applicant claim that had it not for the irregularities he complains of, he would have been appointed to the post? Does the employer admit that had it not been for the irregularities he complains of, he would have been appointed to the post?

25.15 What relief does the applicant seek?

E: PREMATURE REFERRALS

29. It is only the conduct of an employer that can constitute an unfair labour practice. School governing bodies are not the employers of educators employed in terms of the Employment of Educators Act. Before a decision to appoint has been taken by the Head of Department as employer, based on the recommendation of the school governing body, the employer cannot be held responsible for any unfair conduct by a school governing body or interview committee committed during the recruitment and selection process. [10]

30. The referral of a promotion dispute before the Head of Department as employer has taken a final decision to appoint, is premature and should be dismissed. [11] Where the employer decides to re-advertise or repeat a process, the referral of a promotion dispute will also be premature.[12]Only once a final decision has been made not to appoint an aggrieved employee, can the employee refer an unfair labour practice relating to promotion. [13]

F: THE UNFAIR LABOUR PRACTICE RELATING TO PROMOTION

31. An employee who alleges that he is the victim of an unfair labour practice bears the **onus of proving the claim on a balance of probabilities.**[14] **The employee must prove** not only the existence of the labour practice, but also that it is unfair.[15]

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[10] *Reddy v KZN Department of Education & Culture (2003) 24 ILJ 1358 (LAC)*

[11] *Reddy v KZN Department of Education & Culture (2003) 24 ILJ 1358 (LAC); Department of Justice v CCMA & others (2004) 25 ILJ 248 (LAC); SAPS v SSSBC (2010) 31 ILJ 2711 (LC)*

[12] *Department of Justice v CCMA & others (2004) 25 ILJ 248 (LAC)*

[13] *Department of Justice v CCMA & others (2004) 25 ILJ 248 (LAC)*

[14] *Grogan Dismissal, Discrimination and Unfair Labour Practices (2nd ed) at 48; Ethekwini Municipality v SA Local Government Bargaining Council & others [2009] JOL 23625 (LC)*

[15] Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2nd ed) at 48; *Provincial Administration Western Cape (Department of Health & Social Services) v Bikwani* (2002) 23 ILJ 761 (LC) para 32

32. An employee who refers a promotion dispute must do more than just demonstrate that he has the minimum advertised qualifications and experience. He must allege and prove that the decision not to appoint him was unfair.[16] Mere unhappiness or a perception of unfairness does not establish unfair conduct.[17] What is fair depends upon the circumstances of a particular case and essentially involves a value judgement.[18]

33. Where an applicant in a promotion dispute, is unable to prove that he was the best of all the candidates who applied for the job, then in order for the employee to prove an unfair labour practice relating to promotion, he or she should generally, at least demonstrate that there was conduct that denied him or her a fair opportunity to compete for a post, or conduct that was arbitrary or motivated by an unacceptable reason, [19]or that the successful candidate was dishonest and misled the interview panel or employer.[20]

34. The arbitration of a promotion dispute entails a review of the employer's decision.[21] In applying the *Sidumo*test to promotion disputes, it has been held that the arbitrator is not given the power to consider afresh what he would do but to decide whether what the employer did was fair.[22]

35. A recommendation by a school governing body is an essential prerequisite for the promotion of an educator by the Head of Departmentas employer and without such a recommendation the promotion is ultra vires and unlawful. [23]

36. The conduct of the employer may be substantively and/or procedurally unfair.[24] Substantive unfairness relates to the reason for not promoting the employee whereas procedural unfairness relates to an unfair process applied by an employer during the course of the recruitment and selection process. As soon as the promotion has been made by the employer, the employer becomes responsible for any unfair conduct of the school governing body committed during the process leading up to the promotion.

G: HOW TO APPROACH SUBSTANTIVE UNFAIRNESS

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[16] *Ndlovu v CCMA* (2000) 21 ILJ 1653 (LC)

[17] Du Toit et al *Labour Relations Law* (5th ed) 488

[18] *National Education Health & Allied Workers Union v UCT* (2003) 24 ILJ 95 (CC) par 33

[19] *SAPS v SSSBC, Robertson NO and Noonan (unreported Labour court judgement by Cheadle AJ, Case Number P426/08, dated 27 October 2010);* Ngcobo v standard Bank of South Africa and Others (D439/12) [2013] ZALCD 33 (25 September 2013)

[20] Noonan v Safety & Security Sectoral Bargaining Council & others(2012) 33 ILJ 2597 (LAC)

[21] *Minister of Home Affairs v GPSSBC* (JR 1128/07) [2008] ZALC 35 (26/03/2008, Labour Court) par 14

[22] *Minister of Home Affairs v GPSSBC* (JR 1128/07) [2008] ZALC 35 (26/03/2008, Labour Court) par 14

[23] *Kimberley Junior School v The Headof the Northern Cape Education Department* [2009] 4 All SA 135 (SCA)

[24] Van Jaarsveld et al *Principles and Practice of Labour Law* (LexisNexis) para 778; *Ndlovu v CCMA & others (2000) 21 ILJ 1653 (LC); Department of Justice v CCMA 2001 ILJ 2439 (LC)*

37. There is no general right to promotion.[25] What employees do have, is a right to be fairly considered for promotion when a vacancy arises.[26] It is however expected that the employer should appoint the best candidate when selecting suitable candidates for promotion.[27] This expectation is subject to the employer's right to appoint a weaker candidate in the name of affirmative action in order to address imbalances of the past.[28]

38. An arbitrator or court is not the employer.[29] It therefore is not the task of the arbitrator or a court to decide whether the employer has arrived at the correct decision. [30] The role of the arbitrator is to oversee that the employer did not act unfairly towards the candidate that was not promoted.[31]

39. The decision to promote or not to promote falls within the managerial prerogative of the employer.[32] In the absence of gross unreasonableness or bad faith or where the decision relating to promotion is seriously flawed, an arbitrator should not readily interfere with the exercise of the discretion.[33]

40. Where the employee complains that another employee was promoted, he or she must show that:
    40.1 he or she has the necessary skills; and
    40.2 the person who was promoted does not possess the same or same level of skills.[34]

41. It is generally accepted that the manner in which candidates perform during interviews and other subjective impressions may be taken into consideration when making an appointment. There may be reasons for preferring one employee to another apart from formal qualifications and experience.[35] The employer may take

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[25] *Du Toit et al Labour Relations Law : A Comprehensive Guide (5th ed) 486*

[26] *Du Toit et al supra 486;*

[27] *Public Service Association of SA on behalf of Helberg v Minister of Safety & Security & another (2004) 25 ILJ 2373 (LC) para 12*

[28] *S 6(2) of the Employment Equity Act No 55 of 1998*

[29] *SAPS v SSSBC [2010] 8 BLLR 892 (LC)*

[30] *Head, Western Cape Education Department and others v Governing Body, Point High School and others 2008 (5) SA 18 (SCA)*

[31] *SAPS v SSSBC [2010] 8 BLLR 892 (LC); Administrator, Transvaal & others v Traub (1989) 10 ILJ 823 (A); De Nysschen v General Public Service Sectoral Bargaining Council & others [2007] 5 BLLR 461 (LC); SAPS v PSA [2007] 5 BLLR 383 (CC)*

[32] *SAPS v SSSBC [2010] 8 BLLR 892 (LC); Provincial Administration Western Cape (Department of Health & Social Services) v Bikwani & others (2002) 23 ILJ 761 (LC) at paragraph [29]–[32]*

[33] *SAPS v SSSBC [2010] 8 BLLR 892 (LC); PAWC (Department of Health & Social Services) v Bikwani & others (2002) 23 ILJ 761 (LC) 771*

[34] *SAPS v SSSBC [2010] 8 BLLR 892 (LC)*

[35] *PSA obo Badenhorst v Department of Justice [1998] 10 BALR 1293 (CCMA)*

into account subjective considerations such as performance at an interview[36] and life skills.[37]This however does not mean that appointments can be made solely based on subjective impressions. Merit always remains the most important factor to be considered.

42. The mere fact that the candidate who was eventually promoted did not score the highest marks or is not better qualified does not necessarily justify a conclusion that the decision not to promote was unfair.[38]

43. When making an appointment, both the qualifications and experience as recorded in the curriculum vitae submitted by candidates together with performance during interviews must be taken into account. It is irrational to make an appointment purely based on performance during interviews or to reason that the experience and qualifications as contained in curriculum vitae become irrelevant after shortlisting.

44. The Head of Department as employer must place significant weight on the recommendation of the school governing body who has interviewed the candidates.[39]The employer is however not bound by the recommendation of the school governing body and may deviate from their recommendation where there are sound reasons for doing so.[40]

45. The Head of Department as employer is expected to act reasonably in making an appointment.[41] His decision cannot however be interfered with by a court or arbitrator purely because there may be another, perhaps better decision which could have resulted by attributing more weight to some factor or factors and less to others.[42] If the decision arrived at by the Head of department is reasonable, then it must stand.[43]

46. The mere fact that an employee is already acting in a post, does not give him or her an automatic right to a promotion when the position becomes available[44]. See chapter B of PAM.

47. An arbitrator's findings must be rational and reasonable in light of the evidence

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[36] *PSA obo Dalton and another v Department of Public Works [1998] 9 BALR 1177 (CCMA)*

[37] *PSA obo Badenhorst v Department of Justice [1998] 10 BALR 1293 (CCMA)*

[38] *SAPS v SSSBC [2010] 8 BLLR 892 (LC)*

[39] *Head, Western Cape Education Department and others v Governing Body, Point High School and others 2008 (5) SA 18 (SCA)*

[40] *Head, Western Cape Education Department and others v Governing Body, Point High School and others 2008 (5) SA 18 (SCA)*

[41] *Head, Western Cape Education Department and others v Governing Body, Point High School and others 2008 (5) SA 18 (SCA)*

[42] *Head, Western Cape Education Department and others v Governing Body, Point High School and others 2008 (5) SA 18 (SCA)*

[43] *Head, Western Cape Education Department and others v Governing Body, Point High School and others 2008 (5) SA 18 (SCA)*

[44] *SAPS v SSSBC [2010] 8 BLLR 892 (LC)*

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before him/her.

Causal Connection

48. The courts have held that even if there was unfair conduct by an employer during a promotion process, this does not mean that there is substantive unfairness. As a legal concept substantive unfairness cannot exist in abstraction. Therefore in order to prove substantive unfairness that would entitle the applicant to substantive relief such as appointment to the post, an applicant in a promotion dispute also needs to establish a causal connection between the irregularity or unfairness and the failure to promote. To do that the applicant needs to show that, but for the irregularity or unfairness, she would have been appointed to the post.[45]

49. This necessarily means that the applicant must show that not only was he or she better qualified and suited for the post than the successful candidate who was appointed, but also that he or she was the best of all the candidates who applied for the position.[46]

H: HOW TO APPROACH PROCEDURAL FAIRNESS

50. The processes that must be followed during the recruitment and selection process of educators, are contained in the Employment of Educators Act, the PAM,[47] and Resolution 5 of 1998. Various provinces[48] have adopted provincial resolutions that govern the procedures to be followed in those provinces. Panellists who arbitrate promotion disputes must familiarise themselves with the procedures contained in the applicable legislation, national collective agreements, and provincial collective agreements.

51. Our courts have held that strict compliance with the guidelines for appointments provided for in PAM and ELRC Collective agreements is not necessary.[49]Substantial compliance is sufficient. The courts have further held that one does not go digging to find points to stymie the process of appointing suitable candidates to teaching positions.[50]

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[45] *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; Minister of Safety and Security & others v Jansen NO (2004) 25 ILJ 708 (LC) para 27; KwaDukuza Municipality v SALGBC [2008] 11 BLLR 1057 (LC).*

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

[47] *Personnel Administrative Measures*

[48] *For example Gauteng and Western Cape*

[49] *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng, Case No 02 / 15349, [2006] JOL 17802 (W); Douglas Hoërskool& 'n ander v Premier, Noord-Kaap&andere 1999 (4) SA 1131 (NC) at 1144I–1145I*

[50] *Observatory Girls Primary School & another v Head of Dept: Dept of Education, Province of Gauteng, Case No 02 / 15349, [2006] JOL 17802 (W); Douglas Hoërskool& 'n ander v Premier, Noord-Kaap&andere 1999 (4) SA 1131 (NC) at 1144I–1145I*

52. When deciding whether a procedure conducted in terms of a collectively agreed procedure involves any procedural unfairness, the arbitrator should examine the actual procedure followed. Unless the actual procedure followed results in unfairness, the arbitrator should not make a finding of procedural unfairness.[51]

53. Where an applicant in a promotion dispute, is unable to prove that he was the best of all the candidates who applied for the job, then in order for the employee to prove an unfair labour practice relating to promotion, he or she should generally, at least demonstrate that there was conduct that denied him or her a fair opportunity to compete for a post or conduct that was arbitrary or motivated by an unacceptable reason,[52] or that the successful candidate was dishonest and misled the interviewing panel or employer. [53]

I: HOW TO APPROACH REMEDIES

54. Unless an applicant can demonstrate some form of prejudice caused during a recruitment and selection process for a promotion post, there is no reason to grant any relief.

55. As long as the decision of the employer can be rationally justified, mistakes in the process of evaluation do not generally constitute unfairness justifying interference with the decision to appoint. [54]

56. Before granting any relief, the arbitrator must consider the effect that the relief that he or she intends to award, is likely to have on the school, the education department, and the learners. All awards must be in the best interest of the learners.

Relief provided for by legislation

57. The Labour Relations Act contains the following provisions in relation to the relief that can be granted by an arbitrator in a promotion dispute:

57.1 An arbitrator may make any appropriate arbitration award including, but not limited to, an award that gives effect to any collective agreement, that gives effect to the provisions and primary objects of the Labour Relations Act and that includes, or is in the form of, a declaratory order.[55]

57.2 An arbitrator may determine any unfair labour practice *dispute* on terms that the arbitrator deems reasonable.[56]

57.3 The compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than

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[51] Compare *Highveld District Council v CCMA & Others (LAC)* at paras 15-17.

[52] *SAPS v SSSBC, Robertson NO and Noonan (unreported Labour court judgement by Cheadle AJ, Case Number P426/08, dated 27 October 2010);* Ngcobo v standard Bank of South Africa and Others (D439/12) [2013] ZALCD 33 (25 September 2013)

[53] Noonan v Safety & Security Sectoral Bargaining Council & others(2012) 33 ILJ 2597 (LAC)

[54] *SAPS v SSSBC, Robertson NO and Noonan (unreported Labour court judgement by Cheadle AJ, Case Number P426/08, dated 27 October 2010);* Ngcobo v standard Bank of South Africa and Others (D439/12) [2013] ZALCD 33 (25 September 2013)

[55] *Section 138(9)*

[56] *Section 193(4)*

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the equivalent of 12 *months remuneration.*[57]

REMEDIES FOR SUBSTANTIVE UNFAIRNESS

58. Only where an employee has proved that he/she was the best of all the candidates who applied for the post and that he /she would therefore have been appointed, had it not been for unfair conduct of the employer, will there be substantive unfairness and may the arbitrator grant substantive relief. [58]

Appointing the applicant

59. Once the applicant has proved that he was the best of all the candidates who applied for the post, the arbitrator is entitled to appoint him or her to the post.[59] It is a gross irregularity for an arbitrator to appoint an applicant in a promotion dispute where the applicant has not proved that he was the best of all the candidates who applied for the post and that he would in fact have been appointed had it not been for unfair conduct by the employer.[60]

60. In cases where affirmative action was applied, and where a weaker candidate was appointed by the employer, it is not necessarily sufficient that the applicant proves that he was the best of all the candidates. In such cases the legislation and jurisprudence governing affirmative action and employment equity will determine whether or not the applicant is entitled to appointment.

Setting aside the appointment of the successful candidate

61. Provided that the successful candidate has been joined as second respondent,[61] the arbitrator has the discretion, irrespective of the relief requested by the applicant, to set aside the appointment of the successful candidate. [62]

The effect of an arbitrator's award on the successful candidate

62. Our courts have held that even where an arbitrator does not set aside the appointment of a successful candidate, then, provided that the successful candidate

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[57] *Section 194(4)*

[58] *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; Minister of Safety and Security & others v Jansen NO (2004) 25 ILJ 708 (LC) para 27; KwaDukuza Municipality v SALGBC [2008] 11 BLLR 1057 (LC).*

[59] *Minister of Home Affairs v General Public Service Sectoral Bargaining Council and Others (JR 1128/07) [2008] ZALC 35 (26 March 2008); Minister of Safety and Security v Safety and Security Sectoral Bargaining Council and Others (2010) 31 ILJ 2680 (LC)*

[60] *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; *Minister of Safety and Security & others v Jansen NO* (2004) 25 ILJ 708 (LC) para 27; *KwaDukuza Municipality v SALGBC* [2008] 11 BLLR 1057 (LC).

[61] *Gordon v Department of Health, KwaZulu-Natal* (2008) 29 ILJ 2535 (SCA)

[62] *South African Police Services v Inspector Zandberg and others* (2010) 31 ILJ 1230 (LC) Manana v Department of Labour and Others [2010] 6 BLLR 664 (LC)

has been joined, and provided that the arbitrator has held that the successful candidate was not the best candidate and should not have been appointed, the successful candidate is bound by the award of the arbitrator and the employer can based on the award of the arbitrator remove the successful candidate from the post. 63

Compensation

63. When awarding compensation for substantive unfairness in cases where the arbitrator is of the view that the applicant was the best of all the candidates who applied for the post, the maximum amount of compensation that may be awarded is the equivalent of 12 month's remuneration,[64] calculated at the remuneration of the job in which the applicant was employed when the unfair labour practice was committed and not the remuneration attached to the promotional position for which the employee has applied.[65]

64. Arbitrators must ensure that before they finalise an arbitration hearing, they obtain all the information that they may require to quantify their awards of compensation in rands, and where applicable, cents. Without exception, all awards of compensation must be quantified by arbitrators in rands (and where applicable cents) in their awards. Reasons for the amount of compensation arrived at must be provided in the award.

REMEDIES FOR PROCEDURAL UNFAIRNESS

Setting aside and repeating the process

65. Where an employee who has demonstrated unfairness, but who was unable to prove that he was the best of all the candidates who applied for the post, the most appropriate remedy is generally to set aside the process and direct that it must be repeated. [66] However, this is a remedy that must be applied with great caution in the education sector as indiscriminate use of it may result in instability at schools, which in turn may negatively impact on the best interests of the learners at that school.

68. Unless an applicant can demonstrate that he has a realistic chance of being appointed should the process be repeated in a fair manner, it is pointless to set aside the process and direct that it must be repeated. [67] Where an applicant, based on his qualifications and experience as contained in his job application and curriculum vitae, clearly is not one of the best candidates but in fact one of the weakest candidates, he does not stand a realistic chance of being appointed should the process be repeated. It would then be pointless to repeat the process.

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[63] *PSA v Department of Justice & others* [2004] 2 BLLR 118 (LAC) at par 33

[64] Section 194(4) of the LRA

[65] See the definition of remuneration in section 213 of the LRA

[66] *SAPS v SSSBC, Robertson NO and Noonan (unreported Labour court judgement by Cheadle AJ, Case Number P426/08, dated 27 October 2010); Ngcobo v standard Bank of South Africa and Others (D439/12) [2013] ZALCD 33 (25 September 2013)*

[67] *Compare Pityana v MEC, Department of Education, Eastern Cape Province (2009) 30 ILJ 2664 (Ck)*

69. Where an arbitrator decides to set aside the process and repeat it, the arbitrator should also make an order setting aside the appointment of the successful joined candidate, as it would be senseless to repeat a process when the appointment is not set aside. Where the arbitrator did not join the successful candidate, he should generally not set aside the process and direct that the process must be repeated.

70. When an arbitrator decides to set aside the process, he must direct whether the process must be repeated from advertising, shortlisting or interviews.When directing that the process must be repeated, arbitrators should not in their awards impose obligations on school governing bodies, as the ELRC does not have jurisdiction over school governing bodies.

Compensation

71. Where an arbitrator decides to award compensation, and the applicant has not proved that he was the best of all the candidates, then compensation is solely aimed at compensating the employee for non-patrimonial loss.[68] Where the loss in an unfair labour practice dispute is of a non-patrimonial nature, compensation is in the form of a *solatium* (meaning solace money to salve injured feelings and sentimental loss) for the loss of a right,[69] or put differently, to compensate for the *injuria* of being treated unfairly.[70]

72. Courts have always been very conservative when awarding solatium for non-patrimonial loss. The principle of conservatism in making such awards is well established.[71]

73. The social status and income of individuals are not generally taken into account when quantifying a solatium as it is not fair to award more to the rich than to the poor for injured feelings.[72] The Labour Appeal Court has confirmed that high earning individuals should not be awarded more compensation as a solatium than those that earn less where both suffered the same injury.[73]

74. Arbitrators must ensure that before they finalise an arbitration hearing, they obtain all the information that they may require to quantify their awards in rands and where applicable cents. Without exception, all awards of compensation must be quantified

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[68] *Patrimonial (or pecuniary) loss is where an individual directly or indirectly suffers financial loss (i.e through damage to his property, loss of profit, theft of money etc) whereas Non-patrimonial (non-pecuniary) loss is where the individual does not actually suffers financial loss, but where damage is caused to his personal interests (i.e through impairment to his dignity or feelings in cases such as defamation and injuria for example).*

[69] *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC) para 37-41*

[70] *KwaDukuza Municipality v SALGBC [2008] 11 BLLR 1057 (LC) par 11*

[71] *SAA v V [2014] 8 BLLR 748 (LAC); Minister for Justice and Constitutional Development v Tshishonga[2009] 9 BLLR 862 (LAC); Pitt v Economic Insurance Co Ltd 1957 3 SA 284 (D) 287E-F; Haywood v Parity Insurance Co Ltd 1964 (CPD) in Corbett and Buchanan The Quantum of Damages in Bodily and Fatal Injury Cases Vol 1 at 188*

[72] *Richter v Capital Insurance Co Ltd 1963 (4) SA 901 (A); AA Onderlinge Assuransie Assosiasie Bpk v Sodoms 1980 (3) SA 134 (A)*

[73] *SAA v V [2014] 8 BLLR 748 (LAC)*

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by arbitrators in rands (and where applicable cents) in their awards. Reasons for the amount of compensation awarded must be provided in the award.

75. It is not reasonable and rational to quantify compensation intended as a solatium, by simply multiplying the weekly or monthly salary of the applicant with a specific number of weeks or months. [74] In quantifying a solatium courts and arbitrators should consider previous awards in comparable cases because an award will be fair if it is consistent with awards made in previous similar cases.[75] Case studies involving compensation awarded in comparable cases serve as a useful guideline.[76]

76. Currently, awards of compensation intended as a solatium for serious infringements range from R5000 to R20 000.[77] In cases where the employee was discriminated against unfairly during the promotion process, awards higher than R20 000 could be considered, but generally not more than R50 000.[78] In cases that cannot be regarded as serious, but nevertheless not trivial, compensation of up to R5000 can be considered, provided that the applicant was prejudiced.

FINDING UNFAIRNESS AND NOT GIVING A REMEDY

77. An Arbitrator who finds minor procedural errors, which do not amount to prejudice or non patrimonial loss on the Applicant, the Arbitrator may elect not to grant any relief.

78. In such cases the Arbitrator is required to provide a full explanation in his/her award on why no relief is given.

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[74] *SAA v V [2014] 8 BLLR 748 (LAC)*

[75] *SAA v V [2014] 8 BLLR 748 (LAC); De Jongh v Du Pisani [2004] 2 All SA 565 (SCA) at 682I*

[76] *Minister of Safety and Security v Seymour [2007] 1 All SA 558 (SCA)*

[77] *In KwaDukuza Municipality v SALGBC [2008] 11 BLLR 1057 (LC)R5000 was awarded for serious procedural unfairness in a promotion dispute*
In Munsany v SSSBC and Others (D437/09) [2012] ZALCD 5 (25 May 2012) the Labour Court held that R10 000 was fair compensation for serious procedural unfairness in a promotion dispute
In Mogale and Others v Seima 2008(5) SA 637(SCA) the Court reduced an award of R70 000 for defamation on appeal to R12000
In Minister of Safety and Security and Another v Phooko (A474/06) [2008] ZAGPHC 205 (16 May 2008) the Court on appeal reduced an award of R15000 to R8000 where a policeman called an attorney a "boy" and told him that he still has much to learn
In Ndaba and Others v Minister of Police (48208/2012, 48209/2012,49490/2012) [2014] ZAGPPHC 180 (2 April 2014) the Court awarded R10 000 for unlawful arrest and detention
In Minister of Safety and Security v Tyulu [2009] 4 All SA 38 (SCA) the Court awarded R15 000 for unlawful arrest and detention

[78] *In Anyikwa v Cubana Havana Lounge/Cafe (E2982/2010) [2014] ZAECPEHC 58 (5 September 2014) the Equality Court awarded R40 000 for unfair discrimination where the applicant was refused entry to a club because of his nationality*
In SAA v V [2014] 8 BLLR 748 (LAC) the Labour Appeal Court on appeal reduced an amount of more than R1000 000 to R50 000 for unfair discrimination based on age