Reddy v KZN Department of Education & Culture & others

(2003) 12 LAC 6.9.2

Case No.	DA13/02
Judgment Date	23 May 2003
Jurisdiction	Labour Court, Johannesburg
Judge	Zondo JP
Subject	Grievance/(Residual) Unfair Labour Practices Failure to appoint, promote, reinstate or re-employ

grievance/(residual) unfair labour practices - failure to appoint, promote, reinstate or re-employ - failure to appoint - discrimination based on political affiliation - respondent not liable for decisions taken by the governing body of school

Judgment

Zondo JP

Introduction

[1] This is an appeal from a judgment of Ngcamu AJ sitting in the Labour Court in a dispute concerning the failure of the governing body of the SM Jhavary School to recommend the appellant to the Department of Education, KwaZulu-Natal (the Department), which is the first respondent, for appointment as principal of that school. The second respondent is Mr Brian Currin who was cited in these proceedings in his capacity as the arbitrator who arbitrated the dispute that is the subject of these proceedings. The third respondent is the Education Labour Relations Council, a bargaining council which is accredited in terms of the Labour Relations Act, 1995 (the Act).The fourth respondent is the governing body of SM Jhavary School (the school).

[2] The second respondent issued an award to the effect that the failure by the governing body to recommend the appellant for appointment to the post of principal of the school constituted unfair discrimination against the appellant and that the Department was liable for that failure. The Department was ordered to pay the appellant compensation in an amount of R100 000,00. The Department brought an application in the Labour Court to review and set aside that award. The appellant opposed the application. The Labour Court reviewed the award and set it aside but made no order as to costs. It subsequently granted the appellant leave to appeal to this Court. This then is the appeal against that judgment.

The facts

[3] The appellant is employed by the Department of Education of the Province of KwaZulu-Natal as an educator at Burnwood Secondary School. In 1997 a post for the position of principal of SM Jhavary School was advertised. The appellant applied for appointment to the post. One Mr Persad, who was also employed as an educator, also applied.

[4] Subsequently interviews were conducted by a committee called the Staff Selection Committee (the committee). The process used by the committee in assessing candidates was to award them points. The appellant and Mr Persad achieved an equal number of points. This raised the question of which one of the two the committee should put forward as the recommended candidate. In terms of the collective agreement reached between the Department and various trade unions, including the South African Democratic Teachers Union (SADTU), of which the appellant is a member, the committee was required to send its recommendation to the governing body of the school. In turn the governing body would send its recommendation to the Head of the Department. After some discussions the committee decided to recommend the appellant.

[5] On 5 June 1998 the governing body of the school deliberated on the committee's recommendation. Some members of the governing body expressed the following concerns about the committee's recommendation:

(a) that the appellant was a level 1 educator which is an ordinary teacher as opposed to a head of a department or vice-principal; it was thought that, for this reason, the educators at the school might not accept the appellant as principal;

(b) that a conflict of interest could arise for the appellant as his wife was also employed at the school;

(c) that, as the appellant was an executive member of SADTU and a councillor of the African National Congress this could have a negative impact on the management of the school arising out of possible frequent absence from school to attend various meetings connected with those positions;

(d) that the appellant lacked managerial experience and expertise in school environment;

(e) that Mr Persad was a better candidate than the appellant because he was a Head of Department and, for that reason, was considered to have managerial experience; he was also at the time acting in the post of principal of a secondary school; Mr Persad was also considered to have specialised qualifications.

[6] Three members of the committee were also members of the governing body. In the light of the resistance by some members of the governing body to accepting the committee's recommendation of the appellant for the post, the three members of the governing body who were also members of the committee had a caucus meeting among themselves. This meant that other members of the committee who were not part of the governing body did not attend the caucus meeting. The three members of the committee then resolved to replace the appellant with Mr Persad as the committee's recommended candidate.

[7] Thereafter the governing body resolved to recommend Mr Persad to the Department for appointment to the post. It then sent certain documents relating to the matter to the Department. The resolution of the governing body recommending Mr Persad was intended to be among those documents. However, as it turned out, the resolution was not one of the documents sent. The Department did not appoint Mr Persad because at that time it could only make an appointment on the recommendation of the governing body which it had not received as yet. In due course Mr Persad in any event withdrew his acceptance of the nomination for appointment. The post remained unfilled.

Referral of the dispute to conciliation and arbitration

[8] The appellant felt aggrieved – not by anything done or not done by the Department – but by the governing body's decision not to accept the committee's first recommendation which was that he be appointed to the post. The appellant took the attitude that the failure by the governing body to accept the committee's initial recommendation that he be appointed to the post constituted an unfair labour practice as defined in item 2(1)(a) of Schedule 7 of the Act which took the form of unfair discrimination. This was a reference to the definition of an unfair labour practice in item 2(1)(a) of the Act (with regard to unfair discrimination) as it read at the time. Item 2(1)(a) read thus at the time:

> "2. Residual unfair labour practice.
>
> (1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving –
>
> (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;"

Item 2(2)(a) defined employee for the purposes of item 2(1)(a) to include an applicant for employment.

[9] The appellant referred to the third respondent for conciliation a dispute which he subsequently described in the answering affidavit in the Labour Court proceedings as arising from "the failure of the School Governing Body of the SM Jhavary Primary School to recommend [him] for appointment as the principal".

[10] The second respondent was appointed to conduct the conciliation process to try and resolve the dispute. When the conciliation process failed, an oral agreement was reached between the appellant and the Department to refer the dispute to the third respondent for arbitration instead of it being referred to the Labour Court for adjudication which is what would ordinarily have occurred. They also agreed that the second respondent would be the arbitrator.

[11] The appellant and the first respondent agreed that the following were the second respondent's terms of reference, namely:

(a) whether the process giving rise to the committee's recommendation of the appellant as its first choice for appointment to the post of principal was procedurally and substantively fair;

(b) whether the objections that were raised by the governing body when it referred the matter back to the committee were fair, reasonable and justifiable grounds for not accepting the committee's recommendation of the appellant;

(c) whether the appellant was unfairly discriminated against when the governing body did not accept the committee's recommendation of the appellant.

As can be seen from the terms of reference, the second respondent was not called upon to inquire into any conduct on the part of the Department. In particular the complaint of unfair discrimination was directed against the governing body's conduct in not accepting the committee's initial recommendation of the appellant for appointment to the post.

[12] The second respondent heard evidence and in due course delivered an arbitration award. He found that the process conducted by the committee before it recommended the appellant was both substantively and procedurally fair. He found further that the objections raised by the governing body against accepting the recommendation that the appellant should be appointed were not fair, reasonable and justifiable. In this regard it is important to highlight the fact that he did not give any reasons to support his conclusion that the concerns raised by the governing body were not fair, reasonable or justifiable. Also, he found that the appellant was unfairly discriminated against by the (governing body) in not recommending (him) to the Department of Education for the post of principal. The second respondent said that for purposes of (his) award (he would) base (his) finding solely on the arbitrary discrimination against (the appellant) on the grounds that he was an ANC councillor and an Executive member of SADTU. He said that, had this discrimination not taken place, the appellant would in all likelihood have been appointed by the Department. The second respondent also gave no reasons why he thought it constituted unfair discrimination against the appellant for the governing body to think that the positions he held as an ANC councillor and as an executive committee member of SADTU were likely to require so much of his time for meetings that this might impact adversely on his functions as principal if he was appointed.

[13] As to relief, the second respondent said that his powers were to determine the dispute on terms (he) deem(ed) reasonable including the ordering of reinstatement or compensation. In support of this statement he referred to item 4(1) of Schedule 7 to the Act. Item 4(1) provides that the Labour Court has the power to determine any dispute that has been referred to it in terms of item 3 on terms it deems reasonable, including, but not limited to, the ordering of reinstatement or compensation. He said that reinstatement did not come into play in the matter. He recorded that the Department made the point that the selection process was still incomplete as the governing body still had to send another recommendation to the Department – presumably because Mr Persad had withdrawn his acceptance of the nomination for the post – and until the governing body had made a recommendation, the Department could not make an appointment.

[14] The second respondent expressed the view that, although the behaviour of members of the governing body had left much to be desired, a reasonable outcome of the dispute would not be departmental intervention resulting in the appointment of (the appellant) to the post of principal of SM Jhavary Primary School. He gave no reason why that was supposed to happen. One would have thought that the remedy of appointment would have been the primary remedy in order to address a complaint of non-appointment if that complaint was found to be justified. He indicated that in his view an appropriate remedy was to order the payment of compensation. He then said that the question was whether he could order the Department to pay compensation to the appellant in (*sic*) the strength of discrimination perpetrated by (the governing body). He concluded that the Department was liable to pay compensation to the appellant against whom the (governing body) (had) committed an act of unfair discrimination.

[15] The second respondent then considered the question of the amount of compensation he could order. He decided to order the Department to pay an amount of R100 000,00 as compensation to the appellant. He said that compensation needed, in terms of item 2 of Schedule 7 to the Act, to be fair and reasonable. He pointed out that the amount of compensation should not be based on purely patrimonial or actual loss and that this was emphasised in the judgment of the Labour Court in the case *Whitehead v Woolworths (Pty) Ltd* (1999) 20 *ILJ* 2133 (LC)[*(1999) 8 LC 6.12.4]. He stated that (o)ver and above financial loss the Labour Court had, in *Whitehead*, taken into account the actions of the employer and the nature of the unfair labour practice.

[16] The second respondent enumerated three factors which he took into account in coming to the amount of R100 000,00. These were that:

(a) the appellant had lost some income during the past 2 years as a result of not being appointed to the post and the fact that he had been promoted to the position of Head of Department in 2000; he did not

say what effect these two factors had on the computation of compensation; in regard to this factor it is worth noting that the second respondent did not say how much the income was that the appellant had lost nor did he say how much his income went up by when he was appointed Head of Department at the beginning of 2000.

(b) the appellant had been in the employ of the Department for 25 years and, from all accounts, had been a loyal, conscientious and dedicated educator; he also said that the appellant had been treated appallingly by the (governing body) of SMJ Primary School; the second respondent went on to say that the appellant had been the victim of an incompetent, dishonest and hypocritical (governing body) which was tasked with the responsibility of managing a public school on behalf of the Department of Education;

(c) that the Department had failed to productively intervene, thereby bringing an end to an unnecessarily long period of professional uncertainty for (the appellant); he went on to say: as I have already mentioned, the SA Schools Act empowers the department to act against a (governing body) which is failing in its duties. This is particularly pertinent since the Department seems to be of the view that the [governing body] had been unlawfully constituted.

The appeal

Section 33 of the Arbitration Act or section 158(1)(g) of the Act?

[17] Notwithstanding the contention advanced by Mr *Stewart*, who appeared for the appellant, to the effect that the arbitration conducted by the second respondent was a private arbitration the award of which could only be reviewed and set aside in terms of the narrow grounds[1] of review set out in section 33 of the Arbitration Act 42 of 1965, I have no hesitation in finding that this was not a private arbitration. This arbitration was conducted under the auspices of the third respondent. This is what the parties said in paragraphs 4 of the founding affidavit and 51.1 and 51.2 of the appellant's answering affidavit. Accordingly, the second respondent was performing functions in terms of the Act when he conducted the arbitration and issued the award. This means that the arbitration proceedings, or, the award issued pursuant thereto, can be reviewed under section 158(1)(g) of the Act and is not confined to the narrow grounds set out in section 33 of the Arbitration Act. In terms of section 158(1)(g) the Labour Court is given power, despite section 145, "to review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law".

The merits of the appeal

[18] The Department attacked the second respondent's finding that the Department was liable for an act of unfair discrimination that the second respondent found had been committed against the appellant by the governing body of the school. The Department contended that this finding was grossly unreasonable when it is considered that the second respondent had found that it was the governing body and not the Department which had committed the act of unfair discrimination, that the discrimination contemplated under item 2(1)(a) can only be committed by an employer to his own employee and that the statutory provisions relied upon by the second respondent to justify his conclusion were not applicable. It is necessary to consider and evaluate the reasons that the second respondent gave for this finding.

[19] The first reason that the second respondent advanced in support of his finding is that a governing body is a statutory body elected to govern a school. This does not say why the Department is liable and is, accordingly, no reason on which to base the finding. A public school is itself a juristic person. The fact that a governing body governs a school does not and cannot on its own render the Department liable for the acts of the governing body.

[20] Another reason stated by the second respondent is that the purpose of a governing body is to perform efficiently its functions in terms of the Schools Act on behalf of a public school. If this statement is correct, not only does it not support the finding that the Department is liable for the actions of the governing body but instead it disproves that finding because it says the governing body acts on behalf of the school which means that, in such a case, since a public school is a juristic person in its own right, the school, and not the Department, is liable for the actions of the governing body.

[21] The next reason that the second respondent gives is that one of the functions of a governing body is to participate in the process of appointing educators (section 20). He then says that a governing body exercises this managerial duty on behalf of the Department. He does not refer to any statutory provision in support of this statement. If anything, the statement contradicts his earlier statement that a governing body performs its functions on behalf of the school. He also stated that sections 22 and 25 of the Schools

Act enable the Department to take action against a governing body which is not performing. That may be so but that does not mean that the Department is liable for the actions of the governing body.

[22] It is clear from what I have said above in relation to each one of the reasons given by the second respondent that I do not think that they provide any basis for the finding that he made. In my judgment those reasons leave his finding inexplicable. I now propose to consider the submissions made by Mr *Stewart* in defence of the second respondent's finding in order to determine whether there is anything in such submissions that can demonstrate that the finding or award is justifiable.

[23] In his argument before us Mr *Stewart* maintained his contention that the Department was liable for the conduct of the governing body and referred us to various sections of the South African Schools Act 84 of 1996 (the Schools Act) and of the Employment of Educators Act 76 of 1998 (the Educators Act). Mr *Stewart*'s submission seems to have been in response to paragraph 13 of the founding affidavit where it was contended on behalf of the Department that for conduct such as is contemplated in item 2(1)(a) must have been perpetrated by the employer in order to ground a cause of action. Mr *Stewart* conceded that there is no express statutory provision that renders the Department liable for the acts or omissions of a governing body. He submitted that the functions performed by a governing body are related to the employment relationship and relate to education and, because of that, the Department is liable. Mr *Stewart* referred to sections 1 (the definition of employer), 3(1)(b), 3(4) and 6(1)(b) of the Employment of Educators Act, 1998 (Act No. 76 of 1998) in support of his submission that the Department was the appellant's employer. It is not necessary to quote these sections because it was not in dispute between the parties that the appellant's employer was the Department.

[24] Relying especially on the words "arises between" in item 2(1)(a), Mr *Stewart* further submitted that the perpetrator of the unfair labour practice upon which the appellant relied did not necessarily have to be the employer of the victim of such practice. He submitted that it was enough if there was some employment connection. In this regard he relied on the decision of the Industrial Court in *Chamber of Mines of South Africa v Council of Mining Unions* (1990) 11 *ILJ* 52 (IC) and on the decision of the Labour Court in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & others* (1998) 19 *ILJ* 285 (LC) at 300F–H for this contention.

[25] In the *Chamber of Mines* case the unfair labour practice claim was brought to the Industrial Court in terms of section 46(9) of the now repealed Labour Relations Act, 1956 (the old Act) by an employer's organisation, the Chamber of Mines, against a body of trade unions representing employees employed on various mines, namely, the Council of Mining Unions. The definition of an unfair labour practice which governed the position at the time under the old Act contemplated that both an employee and an employer or their representatives could commit an unfair labour practice. In that case the *Chamber of Mines*' complaint was that the Council of Mining Unions was refusing to agree to an amendment of the rules of a pension fund (which had been created by both parties for employees employed by members of the Chamber of Mines) which precluded African, Indian and Coloured employees on racial grounds from becoming members of the fund. The Chamber of Mines contended that the refusal of the Council of Mining Unions to agree to such an amendment constituted an unfair labour practice (see (1990) 11 *ILJ* 52 (IC) at 60B–61A).

[26] At 69J–70A of its judgment in the *Chamber of Mines* case the Industrial Court expressed the view that it is not a requirement that an unfair labour practice which is directed at an employee or employees must be committed by their employer but it can also be committed by a third party outside this employment relationship provided that the labour practice has the effect envisaged by the unfair labour practice definition. This dictum appears to support Mr *Stewart*'s submission. However, it was, firstly, *obiter*, and, secondly, erroneous. It was *obiter* because the court did not have to decide that issue since the then existing definition of an unfair labour practice did contemplate that a representative of employees such as a trade union could commit an unfair labour practice – not against employees – but against an employer of employees who employed, among others, such union's members. Also the *Chamber of Mines*' complaint in that case was in effect that the conduct of the Council of Mining Unions constituted an unfair labour practice because it maintained or had the effect of maintaining terms and conditions of employment that constituted racial discrimination and an unfair labour practice. The complaint was not that a third party had committed an unfair labour practice against the employees. It was that the unfair labour practice had been committed by a representative of some of the employers/employees against the employers.

[27] The dictum is erroneous because neither an employee or a trade union nor an employer or employers organisation could bring an unfair labour practice claim to the Industrial Court in the absence of an employment relationship between itself as claimant and the other party or where the claim was brought by a trade union or an employers organisation, then between those represented by such organisations.

The Industrial Court would not have had jurisdiction to entertain such a claim. The employer or the employer's organisation felt in its own right aggrieved by the Council of Mining Unions conduct in not agreeing to its request to amend the rules of the pension fund. The African, Indian and Coloured employees could also have felt aggrieved by the conduct of Council of Mining Unions in not agreeing to the amendment of the rules of the pension fund. However, they could not bring an unfair labour practice claim against the Council of Mining Unions for lack of any employment relationship between themselves and the Council of Mining Unions.

[28] In the *Leonard Dingler* case an unfair labour practice claim was brought to the Labour Court by employees of Leonard Dingler (Pty) Ltd and by their union or a body representing them against Leonard Dingler (Pty) Ltd and others in terms of item 3 of Schedule 7 to the Act. The other respondents were the Leonard Dingler (Pty) Ltd Pension Fund and Leonard Dingler (Pty) Ltd Provident Fund. At 300D–H of the *Leonard Dingler* case the Labour Court dealt with a concession made by counsel for the employer that the act or omission that was, at the time, contemplated by item 2(1)(a), which was alleged to constitute an unfair labour practice, did not need to have been committed (or omitted?) by the employer of the employee concerned but that it could be committed or omitted be someone else. The Labour Court emphasised the phrase in item 2(1)(a) that refers to an unfair act or omission that arises between an employer and an employee, and concluded that the conduct referred to need not be that of the employer. It went on to say: If a third party's act or omission, involving discrimination against an employee, arises between an employer and an employee, the elements of an unfair labour practice, as contemplated in item 2(1)(a) of Schedule 7, are satisfied. This seems entirely appropriate in discrimination cases, particularly where there is a close nexus between the employer and a third party as in this case where the employer partly or totally manages the retirement benefit funds.

[29] It is true that the above passage from the *Leonard Dingler* case supports the contention advanced by Mr *Stewart*. I wish to make two points about it. First, like the passage in the *Chamber of Mines* case, above, it was *obiter*. There, as the court itself said in the paragraph that comes immediately after the above passage, the issue before the court was whether the conduct of the employer in interpreting and applying the rules of the benefit fund and provident fund constituted unfair discrimination, and therefore, an unfair labour practice. In other words it was the conduct of the employer – and not of a third party – that the employees and their representatives complained of as constituting an unfair labour practice. Second, for the reasons given above in respect of the *Chamber of Mines* case, I am, in any event, of the opinion that the dictum is, with respect, erroneous. No reason was given why the phrase that arises between an employer and an employee in item 2(1) should not be construed to mean what it says, namely, that the unfair act or omission has to arise between parties which are employer and employee. That phrase contemplates that the perpetrator and the victim of such unfair act or omission must be an employer and an employee. The phrase against an employee in item 2(1)(a) signifies that the victim of the unfair act or omission must be an employee. It cannot be an employer. It would have been unnecessary to have the phrase against an employee in item 2(1) if the perpetrator of the unfair act or omission did not have to be the employer of the victim of such unfair act or omission.

[30] If Mr *Stewart*'s proposition and the dicta in the *Chamber of Mines* and *Leonard Dingler* cases, quoted earlier, were correct, the employees of an employer would then be able to bring an unfair labour practice claim against another entity which does not employ them and, probably, employs other persons. The Industrial Court would have lacked jurisdiction under the old Act to entertain such a claim and the various statutory dispute resolution fora under the current Act, including the Labour Court and the CCMA, would lack jurisdiction to entertain such a claim under the Act. This would be because of the absence of an employment relationship between the two parties and because, in the case of item 2(1), the act or omission alleged to be unfair would not be one that, as item 2(1) requires, arises between an employer and employee – and the unfair act would not be against an employee in such a case.

[31] I note that paragraph (b) of item 2(1) refers to the unfair conduct of the employer . . . which is more specific and clearer than was item 2(1)(a) in terms of specifying that the conduct concerned is that of the employer. However, I do not think that this is one of those situations where it can be said that the failure of the statute to be as express in item 2(1)(a) as it is in 2(1)(b) means that in item 2(1)(b) it intended that there should be an employer-employee relationship between the perpetrator of an unfair labour practice and the victim but did not intend the same in item 2(1)(a).

The history of this type of legislation over decades has been on the basis that an unfair labour practice occurs between an employer and an employee or their representatives and that the dispute resolution fora do not have jurisdiction if there is no employer-employee relationship. If there was any intention to deviate from this long-established position, the Act would have made that clear which it did not do.

[32] Some of the sections in the South African Schools Act 84 of 1996 that Mr *Stewart* referred to are 15,

21, 20(10), 37(b), 60(1), 60(4). Section 15 provides that every public school is a juristic person with legal capacity to perform its functions in terms of the Schools Act. The argument in this regard was that the exclusion of the liability of the State in a case covered by section 20 meant that no such exclusion exists in respect of cases such as this one. I do not agree. In order for that argument to hold, the exclusion of the liability should have referred to the governing body and not a public school. Section 20(10) provides that the State is not liable for any act or omission by a public school relating to its contractual responsibility as the employer of staff employed as educators additional to the establishment in terms of section 20(4) and (5). Section 21 relates to the power of the Head of Department to allocate funds to a governing body. This does not on its own make the Department liable for the conduct of a governing body.

[33] Section 60 of the Schools Act reads:

> "The State is liable for any damage or loss caused as a result of any act or omission in connection with any educational activity conducted by a public school and for which such public school would have been liable but for the provisions of this section."

This provision cannot assist the appellant. The unfair discrimination found by the second respondent in this case – which we must assume in the absence of a challenge – was perpetrated not by the appellant's employer (the Department, or, strictly speaking, the head of department) but by the school's governing body. Since neither the school, which is a juristic person, nor its governing body was the appellant's employer, neither of them could commit the unfair labour practice complained of *vis-à-vis* the appellant. Accordingly, neither of them could be held liable to the appellant but for the provisions of section 60. That being so, there was no liability which by statutory extension attached to the State.

[34] What the various sections show is that the Schools Act makes provision for different juristic persons and functionaries to play different roles in relation to school education. They do not show that the Department is liable for the conduct of governing bodies. The fact that, for example, section 19 contains provisions which enable the Head of Department to establish programmes aimed at enhancing the capacity of governing bodies and the fact that under section 22 the Head of Department is given power to intervene in the business of a governing body and withdraw one or more of its functions if reasonable grounds exist to do so does not mean that the Department is liable for the conduct of the governing bodies. In the circumstances Mr *Stewart*'s reliance on the statutory provisions that he relied upon cannot be sustained.

[35] In his award the second respondent also referred to the contention advanced by the Department that it could not be held liable for the governing body's decision not to recommend the appellant for appointment because the governing body was still expected to make a recommendation after Mr Persad had withdrawn his acceptance of the nomination for appointment to the post. What the Department was seeking to convey with this contention was that it was premature for the appellant to complain and seek to be appointed or compensated where the governing body could still well recommend him since Mr Persad was out of the race for the post. This was not only a legitimate contention but, in my view, a correct one because the appellant still wanted to be appointed and he was still going to be entitled to stay in the race for the post so that, if and when the governing body made a recommendation, he would be available to be recommended. The second respondent did not deal with this contention in his award. This is very strange because he did refer to the contention.

[36] Dealing with this contention would have forced the second respondent to think the matter before him through very carefully because the question would probably have arisen as to what would happen, if he ordered that the appellant be paid compensation but later the governing body recommended him for appointment to the post and he got appointed. The fact that the second respondent's finding that the Department was liable was made in circumstances where the appellant could still be recommended by the governing body and be appointed demonstrates, in my view, how grossly unreasonable the second respondent's decision is.

[37] Before I conclude this judgment, I wish to refer to one matter of concern about the second respondent's award. In his award the second respondent severely criticised the governing body of the school for its decision not to recommend the appellant for appointment to the post. He accused it of having treated the appellant appallingly and of being incompetent, dishonest and hypocritical. Describing any body in these terms is very serious. An arbitrator should not describe anybody in these terms unless it is both justified and necessary to do so. In those cases – hopefully rare – where this is done, the person who does so should, at least, give reasons for such criticisms. The second respondent did not give a single reason for describing the governing body in these terms. I find this quite unacceptable. There is nothing in the record to suggest that, when members of the governing body took the view that Mr Persad was a better candidate than the appellant, they were doing so for any reasons other than that they honestly

believed that Mr Persad was a better candidate. As will be shown below, the picture that emerges from the record is that the governing body had legitimate reasons to justify at least some of their concerns about recommending the appellant for the post.

[38] Some of the concerns that had been raised by the governing body about the appellant are that:

(1) the appellant was a level 1 educator (an ordinary teacher) and had no managerial experience whereas Mr Persad already occupied a higher position, namely, that of a Head of Department which gave Mr Persad managerial experience;

(2) Mr Persad was acting in a position of principal already - and this in a secondary school whereas the appellant had not acted in a principal's position and this gave Mr Persad, on the face of it, managerial experience which the appellant did not have;

(3) Mr Persad had some specialised qualifications which the appellant did not have.

[39] The second respondent did not anywhere in his award deal with any of these concerns of the governing body about the appellant. If any one of these concerns was legitimate and justifiable, the fact that there were, or may have been, other concerns that may not have been legitimate and justifiable does not detract from the legitimacy and justifiability of some of the concerns. For example, the governing body's concern that the appellant had no managerial experience whereas Mr Persad had managerial experience was a legitimate and valid concern. I say all of this not to deal with the finding by the second respondent that there was unfair discrimination because this Court is not called upon to deal with that finding but I do so in order to show how unfair and unjustified the second respondent was in describing the governing body as dishonest, incompetent and hypocritical and as having treated the appellant appallingly. Members of a governing in any school give their time and skills to the governing body and the school without any remuneration (section 27(2) of the SA Schools Act) and I have no doubt most, if not all, do so out of a sense civic duty. Because of this, unjustified criticism of this kind is even more unacceptable. The second respondent's conduct in describing the governing body as having treated the appellant appallingly and as having been incompetent, dishonest and hypocritical just because it had reservations about recommending the appellant for the post and recommended Mr Persad, is incomprehensible, wholly unjustifiable and grossly unfair to the governing body.

[40] I have no hesitation in coming to the conclusion that not only was the Department not liable for the conduct of the governing body in not recommending the appellant to the Department but also that the second respondent's finding to the contrary was wholly without any basis and was grossly unreasonable. Gross unreasonableness is one of the grounds of review permissible in law and, therefore, it applies in a review that is brought under section 158(1)(g) of the Act. In the light of this the court *a quo* was justified in setting the second respondent's award aside.

[41] In the premises the appeal is dismissed with costs.

(Comrie and Jappie AJJA concurred in the judgment of Zondo JP

Footnotes