

IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

Case No: J 4961/00

In the matter between:

Applicant

and

Respondent

JUDGMENT

Landman J:

I INTRODUCTION

1. The applicant, Mr JM Mehlo, referred a dispute to the Labour Court in terms of s 6(1) of the Employment Equity Act 55 of 1998 (the EEA). He alleges his employer, the Free State Education Department, has unfairly discriminated against him by grading him as a post level 3 employee while at the same time grading his counterparts from the Orange Free State Education Department and the QwaQwa Education Department as post level 4 employees and by failing to apply the doctrine of equal pay for equal work of value. Mr Mehlo prays for an order that his salary and post level be adjusted and upgraded to the same level as his counterparts with effect from 1 April 1996.

2.This judgment is occasioned by four points in limine raised by the respondent, viz. (1) The incorrect party has been cited by the applicant and there is no application for joinder; (2) the grading of the applicant is not a policy or practice of the respondent as contemplated in s 6(1) of the EEA; (3) the applicant's claim does not allege the basis of, or reasons or grounds of discrimination; and (4) the court has no jurisdiction as the dispute involves a matter of mutual interest and is a result of the collective bargaining process.

II BACKGROUND

3.Prior to 1 April 1996 the applicant was employed as a learning facilitator by the Department of Education & Training. On 1 April 1996 the then Department of Education & Culture which controlled the education of coloureds, the Orange Free State Education Department which controlled the education of whites, the Department of Education & Training which was responsible for the education of blacks, the QwaQwa Education Department as well as Bophuthatswana Education Department in respect of Thaba-Nchu amalgamated to form the Free State Education Department under the new political dispensation in terms of the Constitution of the Republic of South Africa Act 108 of 1996.

4.Following the amalgamation, the learning facilitators from the various departments were absorbed into one department. The facilitators were, however, graded into different post levels with the resultant disparity in salaries. Former post levels 3 & 4 were combined to become post level 3; former post levels 5 & 6 became post level 4; former post levels 7 became post level 5; and those learning facilitators employed at post level 2 were upgraded to post level 3. This process of grading, as well as the existing practice of employing learning facilitators at post level 3, was sanctioned by the Education Labour Relations Council and was the result of a collective bargaining exercise (Resolution 3 of 1996 appearing in *Government Gazette* No. 17226, Vol 371, 31 May 1996) which had been made binding on non-parties. See *Regulation Gazette* 5729 of 1 July 1996.

5.It is common cause that the applicant and some of post level 4 learning facilitators render services of equal or same value to the respondent, and that post level 4 learning facilitators earn a higher salary than their post level 3 counterparts.

III FIRST POINT IN LIMINE: THE INCORRECT PARTY HAS BEEN CITED BY THE APPLICANT

6. Mr Mehlo is employed by the Free State Education Department. The Head of that Department is, in terms of s 3(1) (b) of the Employment of Educators Act 76 of 1998 (the Educators Act), the employer of educators in that department. The department presumably resorts under the auspices of the Member of the Executive for Education. See s 132 of the Constitution of the Republic of South Africa Act 108 of 1996. The MEC for Education is not cited but this can be cured, if necessary, by an application for joinder. However, this is not the subject of the point in limine.
7. The respondent objects to the non-joinder of the Minister of Education. The basis for this submission is that it is the Minister who has the power to determine the salaries and conditions of service in the different provincial departments of education. Section 4(1) of the Educators Act reads:
- “Notwithstanding anything to the contrary contained in any law but subject to the provisions of this section, the Labour Relations Act or any collective agreement concluded by the Education Labour Relations Council, the **Minister** shall determine the salaries and other conditions of service of educators.”* (My emphasis).
8. Not only does this power reside in the Minister but in terms of s 3 (2) of the Educators Act the Minister is the employer of educators for the purpose of determining the salaries and other conditions of service.
9. To the extent that this case concerns discrepancies in salaries of educators performing the same work the Minister is an interested party. Moreover, it is not clear whether the grading of an educator or, more accurately, a class of educators is an act performed by the Head of the Free State Education Department or the automatic consequence of a legislative act by the Minister giving effect to a collective agreement. Accordingly, it is necessary that the Minister be joined as a respondent.
10. This being so it is undesirable to deal with the other points in limine as the Minister of Education must be afforded an opportunity to make representations regarding these points in limine. Moreover the points in limine may undergo change or fall away following the Minister’s intervention.

11. The respondent did not seek an order of costs.

12. In the premises the first point in limine is upheld. The applicant may apply for the joinder of the Minister of Education or any other party within 30 days of this order and may amend his statement of case within this period. There is no order as to costs.

SIGNED AND DATED THIS 19 TH DAY OF NOVEMBER 2001.

A A Landman

Judge of the Labour Court