

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

NOT REPORTABLE

CASE NO: C151/2006

DATE: 13 FEBRUARY 2007

In the matter between:

FRANS MARSH Applicant

And

EDUCATION LABOUR RELATIONS First Respondent

COUNCIL

BASHIER VALLY Second Respondent

THE MINISTER OF WESTERN Third Respondent

CAPE DEPARTMENT OF EDUCATION

J U D G M E N T

PILLAY D, J:

[1] This is a lengthy dispute which commenced with the dismissal of the applicant on 3 July 2001. The applicant was demoted from a post level 4 to a post level 2 educator on that day as a result of a disciplinary enquiry. He challenged the sanction. During the course of the arbitration, the arbitrator recused himself.

- [2] A new arbitrator, the second respondent in this review, was appointed. It was agreed that the record of the proceedings under the first arbitrator would stand as part of the record in the arbitration under the second respondent. The review is unopposed on the merits.
- [3] Mr Kahanovitz, who represented first respondent, the Education Labour Relations Council (“the ELRC”), had a brief to object to the matter being referred back for a re-hearing. There is no basis for the Court to do that in light of the agreement between the parties to include the record of the proceedings under the first arbitrator as part of the record of the arbitration under review. Moreover, the applicant has since abandoned this relief.
- [4] The crux of the applicant’s case is that the arbitrator erred in law in holding that the offences for which the applicant was dismissed were serious enough to warrant dismissal. The applicant was charged with seven counts of misconduct. Along the way several counts fell away. Only counts 4 and 5 need to be considered in this review as those are the counts that he was found guilty of by the second respondent. These charges were:

“Charge 4 – you are guilty of misconduct as defined

in section 18(1)(b) of the Act in that you wilfully or negligently mismanaged the finance of the State in that you filled out an application form of a substitute teacher for 4 April knowing fully that the educator only started on 14 April 2004 and subsequently requested of the educator that she pay you R700 which you then, upon receipt of the said money, allegedly used to remunerate parents who had supervised the classes of educators who were absent on a particular day.

Charge 5 – you are guilty of misconduct as defined in section 18(1)(b) of the Act, in that you wilfully or negligently mismanaged the finance of the State in that you filled out an application form of a substitute teacher, namely Mrs J Petersen, with a date 18 February knowing full well that the educator only started on 18 April 2000 and requested of the educator that she pay you the amount of money for the period that she did not work”.

- [5] The applicant admitted to the act constituting the offence. His explanation in respect of charge 4 was that he used the extra money claimed from the Department to pay parents who substituted for educators. He did this in the

interest of the learners and the school so that the learners would not be left unattended. This was especially necessary in an area where gang violence was rife.

- [6] With regard to charge 5 he explained that he used the money to pay for an educator who had not been paid. He did not use any of the money falsely extracted from the Department for himself. He also did not prefer particular parents to serve as substitutes. He simply invited assistance via the caretaker, amongst others. The inference to be drawn from this is that he did not use the employment of substitute teachers to benefit himself.
- [7] The applicant's reasons for committing the act were not challenged at the arbitration. The section under which he was charged falls under the heading "misconduct". It is distinguishable from "serious misconduct" in section 17. Fraud falls into the category of serious misconduct. A range of sanctions, starting with counselling and ending with dismissal are permissible for contraventions of section 18. The arbitrator correctly assessed the applicant's conduct to amount to fraud. If that is what he was charged for then it would have been a serious misconduct. However, he was charged for misconduct for

which a sanction short of dismissal is permissible. The sanction imposed by the chairperson of the disciplinary enquiry was accepted by the third respondent, the employer. The applicant rejected it, he was agreeable to being demoted to deputy principal.

[8] In the opinion of the Court, the appropriate sanction is demotion to a level 3 educator for the following reasons:

1. There are strong mitigating factors that favour a sanction short of dismissal.
2. The applicant requires further training to fill the position of headmaster. He has not acknowledged his wrongdoing unequivocally. To the extent that he believes he was justified in conducting himself in the way that he did he needs to be corrected. As a leader of a school he has procedures to follow.

[9] A penalty less severe than demotion is not appropriate. The applicant delayed for seven weeks in launching the review. This is factored into the order that I make with regard to back-pay. So the order I make is the following:

1. The award of the second respondent is reviewed and corrected as follows:
 - (a) The applicant is demoted to the position

of level 3 educator with effect from the date of his dismissal, that is 3 July 2001.

- (b) The applicant is awarded back-pay from the date of his dismissal on the scale applicable to that level since his dismissal, less seven weeks pay calculated at the current scale of pay for level 3 educators.

2. There is no order as to costs.

PILLAY D, J

EDITED 14 JUNE 2007