



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH
JUDGMENT

Not Reportable

Case no: P175/2015

BULELWA MENDU

Applicant

And

**MEC, DEPARTMENT OF EDUCATION-
EASTERN CAPE PROVINCE**

First Respondent

**THE HEAD OF DEPARTMENT, DEPARTMENT OF
EDUCATION, EASTERN CAPE**

Second Respondent

THE MINISTER OF BASIC EDUCATION

Third Respondent

**THE DIRECTOR-GENERAL, DEPARTMENT
OF BASIC EDUCATION**

Fourth Respondent

Heard: 04 March 2016

Delivered: 31 January 2017

JUDGMENT

TLHOTLHALEMAJE, J

[1] The Applicant approached the Court to seek mandatory relief, directing the Respondents to consider a grievance she had instituted on 13 February 2014 in respect of an incident which occurred earlier on 5 February 2014. The Respondents opposed the application.

[2] The background to the application is as follows;

2.1 The Applicant is an Educator at Newell High School, Port Elizabeth. She had filed a grievance with the Department following upon what she considered to be

victimization, humiliation, intimidation, ridicule, bullying and abuse at the hands of her superior, one Mrs Mdangayi;

2.2 She had followed her grievance with letters, and referred the matter to the Second Respondent directly. Despite further letters through her attorneys of record, she had not received any response from the Department, and it was in the light of these factors that sought the intervention of the Court, as she contended that Mdangayi had continued to insult and demean her;

2.3 The Principal of the school had not taken any action despite the matter being reported. She had also addressed a letter to Mdangayi seeking to resolve the matter which she had ignored. She also wrote a letter to her superior, the Education Development Officer, and submitted a formal grievance without any response;

2.4 On 29 January 2015, the Department sent her a letter informing her that she was declared as excess, and she was to be transferred to Morningside Senior Secondary School. She had submitted another grievance in this regard, which was followed up by correspondence from her attorneys. However, her grievances remained unattended to.

[3] Cedric Andrew Pillay, the Assistant Director (Labour Relations of the Department, Port Elizabeth, had deposed to the answering affidavit on behalf of the First and Second Respondents. He had raised a preliminary point to the effect the Applicant failed to properly follow the standard grievance procedure as set out in schedule 1 of the Public Service Act of 1994 (The PSA), and to that end she was not entitled to any relief. It was further contended that based on that reason, the Court lacked jurisdiction to entertain the application;

[4] The above preliminary point was raised in view of the Applicant having filed a 'grievance' in the form of a letter addressed by her to the Circuit Manager and the school, despite being aware that a formal grievance procedure was to be followed, which included completing a grievance form as set out in Annexure 'A' to schedule 1 of the PSA;

[5] On 22 April 2015, the Applicant had completed Part B of the grievance form, but this was outside of the 90 days from which her complaint arose. Since there was no agreement between the Applicant and the Department to extend the 90-day period stipulated in paragraph 3 of part D of schedule 1 of the PSA. This grievance was therefore out of time;

- [6] It was further submitted that even if the Applicant had followed the correct procedures and adhered to the time limits in lodging her grievance, rather than approaching the Court, the Applicant was at liberty to lodge a grievance with the Public Service Commission, or where she had a case of an alleged unfair labour practice, to have referred a dispute to the Education Labour Relations Bargaining Council;
- [7] In addition to the above, it was further submitted that upon receipt of the Applicant's reminder of her letter of 13 February 2014, there were responses thereto, and that she had thereafter absented herself from school from August 2014 to September 2015, and thus no purpose would be served to have further regard to her belated grievance.

Evaluation:

- [8] In argument, it was submitted on behalf of the Applicant that the grievance code as contained in the PSA was not applicable to Educators, and that the Employment of Educators Act of 1998 (EEA¹) was applicable. Thus, the EEA in respect of the terms and conditions of employment of Educators found application in the Respondents' Personnel Administration Measures (PAM), and Chapter H thereof contained the grievance code which was applicable to Educators.
- [9] Central to this dispute is whether it should have been before the court. The starting point is to examine the applicable procedures in circumstances where an Educator has a grievance to be resolved. There is a dispute in regards to which grievance procedure is applicable in the education sector. The Applicant's contention was that the applicable procedures are to be found in the EEA, which provides for the employment of educators by the State, the regulation of the conditions of service, discipline, retirement and discharge of educators and for matters connected therewith, read together with Chapter H of the Personnel Administration Measures (PAM)².

¹ No. 76 OF 1998

² G.N. 222 of 1999 published in Government Gazette No. 19767 dated 18 February 1999, which provides that;

CHAPTER H - GRIEVANCE PROCEDURE

1. OBJECTIVE

- 1.1 The objective of this grievance procedure is to seek to resolve a complaint at the personal level as quickly and as close to the source of the complaint as possible. It is aimed at avoiding a grievance becoming a dispute. In the case where a grievance cannot be resolved through this process and is consequently registered as a dispute in terms of the provisions of the constitution of the Education Labour Relations Council, such registered dispute shall be dealt with in terms of the dispute resolution procedure as set out in the said constitution.

2. DEFINITION

- 2.1 A grievance is a complaint by an employee or employees affecting the employment relationship of the person or persons concerned, or where there is an alleged misinterpretation, or violation of his or her, or their rights.

3. DEALING WITH GRIEVANCES

3.1 Grievances shall be dealt with in the following manner.

(a) Oral interview

- (i) A sincere attempt should be made to resolve any grievance by oral interview between a grievant or grievants and the head of a school or college (herein after referred to as "the head"), and in the case of an educational institution outside a school or college or the head of a school or college, the supervisor (hereinafter referred to as "the supervisor"), before differences become formalised grievances.
- (ii) During this process no records will be kept of proceedings which will be without prejudice to either of the parties.

(b) Formal written grievance: Institutional level, (school/college) and departmental level

- (i) A grievant or grievants may lodge a grievance or grievances with the head or the supervisor in writing within a reasonable period of time, but in any event not later than 90 calendar days following on the time and date on which the alleged grievance or grievances occurred. Full details of the nature of the grievance or grievances must be relayed to the head or the supervisor, as the case may be. The grievance or grievances must bear the signature or signatures of the grievant or the grievants and a copy thereof shall be filed with the relevant office of the provincial department of education by the head or supervisor, as the case may be, which office shall be identified by the relevant head of a provincial department in each province.
- (ii) The head or the supervisor, as the case may be, shall confer with the grievant or grievants, and others involved, within 3 working days of receipt of the formal written grievance in order to resolve the grievance. At this meeting the facts shall be presented and considered and an effort shall be made to resolve the matter to the satisfaction of all parties.
- (iii) The head or the supervisor, as the case may be, shall communicate the outcome to the relevant office of the provincial department of education within 5 working days of the resolution or non resolution of a grievance.
- (iv) If an action or lack of an action, or a decision or lack of a decision, concerns the head or the supervisor, the grievant or grievants may refer the matter directly to the regional/district level in respect of a school/college and departmental level in respect of an institution outside a school/college, provided that a sincere attempt has been made to resolve the grievance or grievances in terms of the provisions of paragraph 3 (a) above.

(c) Regional/district level in respect of a school/college and departmental level in respect of an institution outside a school/college

- (i) If the grievant or grievants is/are not satisfied with the outcome referred to in sub-clause (b) above, the grievant or grievants may refer the matter in writing, by hand or registered mail, together with the decision of the head or the supervisor, as the case may be, to the regional/district head of education in the case of an educator at a school/college and in the case of an educator outside a school/college to the office referred to in sub-clause (b)(i), within 5 working days of the parties failing to resolve the grievance or grievances. A copy of the referral must be presented to the head or supervisor, as the case may be, and where applicable, to the grievant or grievants' trade union.
- (ii) The head or the supervisor shall forward his or her comments together with all relevant information on the grievance or grievances to the regional/district head or the office referred to in sub-clause (b)(i), as the case may be, within 5 working days after receiving the referral mentioned in sub-clause (c)(i) above.
- (iii) The head of the region/district or the head of the relevant provincial education department, or his or her delegate in respect of an educator outside an educational institution, shall within 5 working days from the date of receipt of all the parties' referrals, attempt to resolve the grievance or grievances and communicate his or her decision in writing to all parties.
- (iv) Should the grievant or grievants not be satisfied with the outcome, he or she may register a formal dispute with the Executive Officer of the Education Labour Relations Council (hereinafter referred to as the "Council") in terms of the provisions of the Council's constitution.

3.2 A trade union registered with the Council may register a grievance with the head or supervisor or the head of a relevant department of education, as the case may be, on behalf of its members individually or collectively and represent such member or members during any stage of this grievance procedure. A non-member or non-members may be represented by another employee.

3.3 The parties to a grievance or grievances may by agreement extend the periods referred to in sub-clauses (b)(i) and (c)(ii) and (iii) above.

[10] The PAM, as per its clause 1.1 is applicable to all Educators as defined in the EEA. In terms of the provisions of Chapter H, and to the extent that a written grievance was lodged, the procedure to have been followed would have entailed it being directed to the head or direct supervisor within 90 days, which was done in this case. Furthermore, a copy of that grievance would then have been filed with the relevant office of the provincial department by the head or supervisor. This was also done in this case. The provisions are however silent in circumstances where a grievance is not attended to at all. However, where a grievant is not satisfied with the outcome, a formal dispute must be registered with the Executive Officer of the Education Labour Relations Council (ELRC) in terms of the provisions of that Council.

[11] As correctly pointed out on behalf of the Applicant, these procedures do not prescribe any forms to be used when lodging a grievance, and thus the grievance as lodged by her in the manner that she did ordinarily complied with these provisions. Significant however in this case is that to the extent that the grievance was not dealt with, should the Applicant have approached the Court directly, or should she rather have referred the dispute to the Executive Officer of the Education Labour Relations Council as prescribed in clause 3.2 of the Code?

[12] The answer to the above question is to be found in objectives of PAM grievance procedure, which are that;

“The objective of this grievance procedure is to seek to resolve a complaint at the personal level as quickly and as to the source of the complaint as possible. It is aimed at avoiding a grievance becoming a dispute. In the case where a grievance cannot be resolved through this process and is consequently registered as a dispute in terms of the provisions of the constitution of the Educators Labour Relations Council, such registered dispute shall be dealt with in terms of the dispute resolution procedure as set out in the said constitution.”

[13] In line with the above, Educators must therefore lodge their grievances departmentally, and should the Department be unable to resolve their grievance, they should lodge a dispute with the ELRC as stipulated in clause 3.1 (iv) of the PAM. This is irrespective of whether the Department made attempts to resolve that grievance or failed to do so. Accordingly, the Applicant was obliged, in view of her grievance not having been attended to departmentally, to have referred it in accordance with the dispute resolution mechanism in terms of the provisions of the Constitution of the ELRC. To that end, there is no substance in the contention that the Applicant ought to have dealt with the grievance in accordance with the provisions of Schedule 1 of the PSA, nor is there any merit in the contention that she was

entitled, in view of the grievance not having been attended to departmentally, to directly approach this Court. She was obliged to exhaust any applicable procedures provided in the Constitution of the ELRC prior to approaching this Court.

[14] In the light of the above conclusions, it follows that this application ought to be dismissed. Further having had regard to the requirements of law and fairness, a cost order in this case is not warranted.

[15] In the premises, I make the following order;

Order:

1. The Applicant's application is dismissed;
2. There is no order as to costs.

Edwin Tlhotlhemaje

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

Adv. M. Grobler

Instructed by:

Michael Randell Attorneys

On behalf of the Respondents:

Adv. GJ Gajjar

Instructed by:

State Attorney

LABOUR COURT