IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **Case No: J 2644/98**

In the matter between:

GAUTENG DEPARTMENT OF EDUCATION Applicant

and

PATELIA, EBRAHIM First Respondent

COETZEE, S.M. Second Respondent

THE EDUCATION LABOUR RELATIONS COUNCIL Third Respondent

JUDGMENT

SEADY,AJ

[1] This is an application to set aside an arbitration award made by the First Respondent (the arbitrator) on 13 August 1998. The application is brought under section 33 of the Arbitration Act, 42 0f 1965. Section 157(3) of the Labour Relations Act, 66 of 1995 ("the Act") gives the Labour Court jurisdiction to hear the application.

[2] The arbitration was conducted under the auspices of the Education Labour Relations Council ("the ELRC"), a body deemed to be established as a bargaining council in terms of section 37(3)(b) of the Act. A collective agreement concluded by the ELRC, Resolution 7 of 1977, prescribes that disputes about unfair dismissals must ultimately be resolved by arbitration. The arbitrator is appointed from an approved panel and the arbitration is conducted in terms of an agreed set of rules. The parties before this Court were in agreement that this being a private

arbitration, the award falls to be reviewed in terms of section 33 of the Arbitration Act.

[3] I am not called upon to decide whether the traditional, narrow grounds for review articulated in section 33 have been expanded by operation of the Constitution of the Republic of South Africa, 108 of 1996 ("the Constitution"). In the circumstances I need not decide whether the ELRC or any other bargaining council is an organ of state as defined in section 239 of the Constitution. Neither must I decide whether arbitrations over unfair dismissals conducted under the auspices of a bargaining council are voluntary or compulsory in nature. Whether they are judicial proceedings or administrative action within the meaning of section 33 of the Constitution is similarly irrelevant to a determination of the issues before me. The Applicant does not rely on the test articulated by the Labour Appeal Court in **Carephone (Pty) Ltd v Marcus NO and Others (1998) 191 ILJ 1425** to set aside the arbitrator's award. Its submission is that the award should be set aside on the grounds that the arbitrator exceeded his powers as contemplated by section 33(1)(b)of the Arbitration Act, narrowly construed.

[4] The background facts to this application are as follows. The Second Respondent was employed as a therapist by the Gauteng Department of Education (the Applicant). For four years she was engaged in terms of a temporary contract of employment. Every three months the contract was renewed on the same terms and conditions. Although appointed on a post level 1 position she performed the tasks of a post level 3 employee, for which she received an acting allowance. In September 1997 the Second Respondent unsuccesfully applied for a permanent post level 3. Thereafter she continued to perform as a post level 3 employee. Prompted by the abolition of the acting allowance, Second Respondent lodged a grievance in which she claimed entitlement to a permanent appointment at post level 3. In response to this grievance, the Applicant offered her permanent

employment (to which she was entitled in terms of Resolution 6 of 1996, an agreement of the ELRC). However, the employment offered was at post level 1. The Second Respondent was dissatisfied, resigned, claimed to have been constructively dismissed and processed her unfair dismissal dispute in terms of Resolution 7 of 1977.

[5] The arbitrator's terms of reference were formulated in accordance with the standard rules recorded in Resolution 7 of 1977. They are widely formulated, calling upon the arbitrator "to arbitrate any dispute referred to him and to award a remedy which he considers fair and/or appropriate in order to settle the dispute".

[6] The arbitrator found that the Second Respondent had been dismissed by the Applicant and that the dismissal was unfair. He determined that the Second Respondent be appointed to a level 3 post on a permanent basis.

[7] The Applicant's submission is that the arbitrator failed to take into account the processes by which posts are established and filled in the Gauteng Department of Education. Sections 3 and 4 of the Educators Employment Act, 1994 provides that posts for educators will be established by the executive council. An agreement of the ELRC, Resolution 1 of 1996, records the process by which appointment to these posts must be made. This failure, submits Applicant, resulted in a gross irregularity in the proceedings or, differently put, the arbitrator exceeding his powers.

[8] I appreciate the Applicant's concerns about a person being appointed to a post without compliance with the agreed procedures. I also understand that difficulties may arise concerning the establishment of a post to accommodate a person so appointed. However, I do not regard these concerns as limiting the arbitrator's jurisdiction in the sense suggested by Mr Cassim. They are not legal impediments to a determination of the kind made by the arbitrator

(**Amalgamated Clothing and Textile Workers Union v Veldspun Ltd 1994 (1) SA 162**). This formulation of the submission concerning the arbitrator having exceeded his powers arose for the first time in an *aide memoire* filed by Mr Cassim on the afternoon before the hearing. In its founding affidavit the Applicant's contention (that the arbitrator failed to take into account whether the Applicant could accommodate the Second Respondent at post level 3) was directed at demonstrating a gross irregularity in the proceedings.

[9] It was common cause that the employer led no evidence at the arbitration about these difficulties. It did not say, as Mr Cassim did in this Court, that it was "against the law for" an appointment to be made in this way. The Applicant was present throughout the arbitration proceedings but led no witnesses. Despite being cautioned in this regard, it was content to have a bundle of documents placed before the arbitrator and to present him with legal argument. Resolution 1 of 1996, concerning the filling of established posts, formed part of the bundle, but its impact on permissible or appropriate remedies was not raised by the Applicant. The Education Employment Act was not part of the bundle. The Applicant raised several objections to the employment of the Second Respondent in a level 3 post, but said nothing of its inability to accommodate such a determination.

[10] I accept Mr Buirski's submission that the Second Respondent had made out a prima facie case for employment in a permanent level 3 post. The arbitrator was satisfied that she had the necessary qualifications for the job, she had competently performed at level 3 for four years, she had a legitimate expectation of employment at that level and that the employer had no objection to employing her in a permanent position. The employer did nothing to disturb the Second Respondent's case. In the circumstances it cannot be said that the arbitrator prevented a fair trail of the issues and in this way committed a gross irregularity. Likewise the employer was not prevented from having his case fully and fairly determined (**Goldfields Investment Ltd & Another v City Council of**

Johannesburg & Another 1938 TPD 551).

[11] The arbitrator did not act outside of his terms of reference when he required the Applicant to employ Second Respondent in a permanent level 3 post. To have ordered employment at a lower level post would not have resolved the dispute between the parties. Applicant's failure to offer Second Respondent employment at level 3 was the very crux of the dispute. It led to her resignation. Second Respondent's resignation, because of the Applicant's refusal to employ her at level 3, was found to be a constructive dismissal. The dismissal was found to be unfair. It seems more than reasonable for the arbitrator to have required the employer to employ Second Respondent at level 3 in the absence of any demonstration that to do so would be unlawful. It cannot be said that the award is lacking in objective justification or that it is not justifiable in terms of the arbitrator's reasons. Even if I had been asked to apply the broader, so-called constitutional grounds for review, I do not think there is a basis on which to set aside the award.

[12] The application is dismissed. The Applicant must pay the Second Respondents costs.

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Seady,AJ

Date of hearing	:	21st of May 1999
Date of Judgment	:	26th of May 1999
Appearing on behalf of the Applicant:		Adv N.A. Cassim SC instructed by

The State Attorney

Appearing for the Second Respondent: Adv B. Buirski instructed by M.T. de Bruin Attorneys