IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: JS 194/01

In the matter between:

Applicant

and

FIRST FRIENDS NURSERY SCHOOL AND
Respondent

JUDGMENT

MOERANE A.J

[1] In this matter the Applicant seeks the following relief:

(1) Severance pay for the Applicant equivalent to two weeks' salary per year of service.

(2) Compensation in an amount equivalent to 24 months' salary.

3)An order rectifying the certificate of outcome of conciliation by deleting the words "S64" and substituting therefor with the words "S189, dismissal based on operational requirements".

Costs of the suit.

THE FACTS

[2] The Applicant states that she was employed by the Respondent during or about 1997 until 1998, then during January 2000 till 30 November 2000(amended in evidence to 31 October 2000).

[3] The Respondent carries on business as a nursery school and after care centre.

[4] On 16 August 2000 Anne Williams and Penny Peides acting on behalf of the Respondent advised the Applicant and other staff members that the Respondent had made a decision to close the nursery school and that the last day of the school year was 30 November 2000.

[5] Prior to the decision having been made to close the school, the Respondent had given the Applicant no indication of the intended closure and had not consulted with her in any way regarding same.

[6] On the said date(16 August 20000) a letter was written to the Applicant by the Respondent, which letter was also sent to the parents of the children attending the nursery school advising that *"... the Board has made the decision to close the First Friends Nursery school as at the last day of the school year on 30 November 2000".*

[7] After the decision aforesaid was made , various meetings were held between the Applicant and the other staff members and the Respondent with a view to resolving the issue. Despite the attempts, the matter could not be resolved and accordingly the nursery school closed on 30 November 2000 and the Applicant was dismissed from her position on the said date(later amended in evidence to 31 October 2000).

[8] Prior to the decision to retrench the Applicant the Respondent failed to comply with the provisions of Section 189 of the Labour Relations Act 66 of 1995 and failed to consult or in any way negotiate the proposed retrenchment.

[9] The matter was thereafter referred to the CCMA for conciliation and remained unresolved as at 29 November 2000. A certificate of outcome of the conciliation was issued by the Commissioner, N. Raffee, presiding at the conciliation. The certificate incorrectly reflects the nature of the dispute as "S64" whereas it should read "section 189 dismissal based on operational requirements." The Applicant attached a schedule of documents which according to her are material and relevant to the issue.

[10] The Court has been favoured with copies of the said documents.

LEGAL ISSUES

[11] The legal issues for determination are the following:

(1) Whether the dismissal of the Applicant for operational requirements was substantively fair?

(2) Whether the dismissal was procedurally fair?

(3) Whether the Respondent complied with section 189 of Labour Relations Act 66 0f 1995?

(4) Whether the Applicant is entitled to severance pay?

(5) Whether the Applicant is entitled to compensation?

CHRONOLOGY

[12] From the documents produced the following chronology may be established:

1. On 16 August 2000 the Applicant received a letter dated 16 August 2000 from the Respondent informing her of the decision of the Board of the Respondent to close the school on 30 November 2000 and giving notice of termination of her services.

2. On 24 August 2000 the Applicant received a letter from the Respondent dated 24 August 2000 in an apparent response to her letter of the same date addressed to the Board of the Respondent in which there is mention of "recent consultations" between the Applicant and the Respondent. The letter from the Applicant dated 24 August 2000 has not been produced.

3. A Parents' meeting was held at the school on 24 August 2000 at which the Applicant was elected (with nine others) to represent the parents and to meet with the Board(it is not clear whether this is a reference to the Board of the North Riding Ministries or the Board of Directors of the Respondent).

4. On 28 August 2000 a meeting of " concerned Parents First Friends Nursery School" elected on 24 August 2000 was held where, *inter alia*, parents agreed to increase fees by R90,00.00 per child per month and various other options were explored.

5. On 31 August 2000 a meeting described as " Consultation Process" was held between a human resources consultant retained by the Respondent, three members of the Board of the Respondent (including the principal Carol Langman), five teachers including the Applicant, the Secretary of the school, a cleaner and a cook. The main proposal at this meeting was that the school be kept open for one year - that parents will take over premises until after a new school is built- July August 2001. It was decided that the proposal would go to the Board.

6. On 7 September 2000 Applicant received a letter dated 5 September 2000 from the Respondent which refers to *"recent discussions and consultations regarding the possible closure"*of the school. The following is also mentioned: *" it is anticipated that any possible termination of employment would take effect on 00 (sic) September 2000. If termination of employment becomes inevitable then severance benefits which conform to the Labour Relations and Basic Conditions of Employment Acts will be paid as follows: Notice pay as per your contract of employment. All outstanding leave pay. Severance pay equal to one week for each completed year of continuous service"*. Furthermore, the Applicant was invited to meet the Respondent on Friday 8 September 2000 at 12h45 to discuss the contents of the letter; in the interim, the Applicant was *"urged to submit any proposals or ideas regarding the above or any measures to avoid, minimize or change the number of dismissals in order that meaningful consideration may be given to any such proposal"*.

7. On 21 September 2000 Applicant received a letter from the Respondent dated 21 September 2000 wherein she was offered a retrenchment package with effect from the end of September 2000. She was further advised that she would be required to work her notice during the month of October 2000 for which she would receive notice pay. She was further informed that for the month of November 2000 the Respondent would seek to rehire on a fixed term contract as many teachers as would be required to run the school until the end of the last term. She was finally informed that she would receive the following payments at the end of October 2000:
   * any outstanding leave pay due to her
   * severance pay equal to one week per completed year of service and that *"this offer is tendered as full and*

final settlement of all claims ensuing from your employment with the First Friends School both now and in future and in any forum".

8. On 29 September 2000 Walker & Associates, acting on behalf of the Applicant and others, addressed a letter to the Respondent alleging that the Applicant(and the others) had been unfairly retrenched in that the Respondent had failed to consult or reach consensus with her on any of the issues mentioned in Section 189 of the Labour Relations Act and, in particular, had failed to disclose relevant information. The Respondent was also threatened with litigation in the Labour Court.

9. On 4 October2000 FRRW Human Resources Consulting (Pty) Ltd, acting on behalf of the Respondent, addressed a reply to Walker & Associates to the letter of 29 September 2000 wherein they disputed all the contentions of the Applicant and stated that the Respondent had complied with the procedural and substantive conditions of section 189. They added that the books of account were made available to the Applicant and were open to review in the office of the financial officer and were inspected by an accountant designated for that purpose. Mention was also made of the reason of the closure of the school - namely, a desperate cash flow situation.

10. On 16 October 2000 the Respondent addressed a letter to the parents of the children attending the nursery school which , *inter alia*, referred to the *" many consultations and meetings about the closure of the nursery school"* and to the fact that the Respondent *"have had to come to the final decision that the school will close on the 30th November 2000. The prime reason being that the school has run at a consistent financial loss since inception and we can no longer carry the deficit. We have been in consultations since August and various other options have been considered. Because of the financial situation it was necessary to retrench the teachers with effect from the 1st October 2000".*

11. On the same date, i.e, 16 October 2000, the Applicant and three others referred a dispute to the Commission for Conciliation, Mediation and Arbitration(CCMA) for conciliation, alleging procedurally and substantively unfair termination of their services by the Respondent. The Applicant and the others alleged that the dispute arose on 21 September 2000. The outcome that the Applicant desired was that:

1 the Respondent should admit that her dismissal gave rise to an unfair dismissal
2 the Respondent compensate her for the alleged unfair dismissal in terms of the Labour Relations Act 66 of 1995
3 that the Respondent compensate her for her loss of income as well as her future losses which were as a result of her unfair dismissal.
4 that the Respondent award her her severance pay in terms of the Labour Relations Act.

12. On 18 October 2000 the Respondent addressed a letter to the Parents and Staff of the school as a result of *" a number of rumours concerning NorthRiding Ministries and the Directors of the Nursery School being voiced by certain parents and staff of First Friends Nursery School"*. Amongst the matters mentioned in the letter are the following:

a) North Riding Ministries is in no way connected to the Nursery School other than the school's rent free use of the property and the Directors being members of North Riding Ministries. The School is a Section 21 company with its own accounts and management. At present no-one employed by the Section 21(sic) is a member of North Riding Ministries.

b) The decision to close the school was due to lack of finances and proper legal retrenchment procedures have been followed at which professional consultants assisted.

c) North Riding Ministries is not responsible for any spending on any items for the Nursery School. The school has its own accounts, and expenditure is authorized by the Head of the School in consultation with the Directors. All accounts are open and transparent and are audited by a reputable firm of auditors.

d) With regard to the R90,00.00 additional fees agreed by the parents, this was a voluntary payment agreed to by the parents and staff at a meeting held on 28 August 2000, the minutes of which were given to all parents. The Directors of the Respondent were not involved in this decision. The proposal was then presented at a meeting on 8th September between all of the staff, two of the Directors and a Human Resources representative, and it was agreed and minuted that this money would be carefully recorded and set aside for salaries. This was duly done. Not all parents made this voluntary contribution but there can be no "refunds" as the money has been used for the minuted purposes.

13. On 27 October 2000 the Respondent addressed a letter to parents advising them that only children whose fees had been paid in full would be accepted on Wednesday 1 November 2000, that *"due to the apparent negative perception of the Nursery School presented by certain members of staff to the parents, a number of children have been withdrawn"*, that the *"finances therefore do not allow us to employ any extra teachers at this point unless sufficient finances are paid by the 1st November. Carol and Terry Lee will remain until the end of term."* The letter continues *"we wish to state that First Friends Nursery School is in no way responsible in any way(sic) for the children that have been withdrawn and are attending other Nursery School/Creche facilities"*.

14. On 30 October 2000 the Respondent wrote to the Applicant in the following terms:
"Dear Shirley- RE: OFFER OF TEMPORARY EMPLOYMENT

Further to your application/ our offer, to re-employ you on a Fixed term Temporary Contract should there be vacancies and a requirement for teachers for the remainder of the school year. We regret to inform you that due to the decline in student numbers we will be unable to offer you temporary employment when your notice period ends on 31 October 2000. As you are no doubt aware the school will close at the end of term and arrangements are being made to accommodate the School's December obligations. Should you wish to be advised of any possible temporary positions that may become available please leave your latest contact details with Carol or Annaballe

Yours sincerely".

[13] On 29 November 2000 the CCMA issued a certificate of outcome of the dispute to the effect that the dispute remains unresolved and referred it to this Court. The dispute was described as "concerning S64".

[14] For completeness' sake the remaining documents produced by the Applicant were the financial statements of the Respondent for the year ended 29 February 2000 and the 14 months ended 28 February 1999 and the memorandum of Association of the Respondent.

APPLICANT'S CASE

[15] In her Statement of Claim the Applicant is relying on the decision of the Respondent communicated to her on 16 August 2000, to close the Nursery School on 30 November 2000. Applicant alleges that prior to that decision being taken the Respondent had given no indication of the intended closure and had not consulted with her in any way regarding the matter. If that were the case that I had to decide, the matter would have been

relatively simple as there is no evidence of any consultation having taken place before 16 August 2000. However, in my view, the relevant date is not 16 August 2000 but, as will appear below, 21 September 2000. Firstly, in its letter of 24 August 2000 the Respondent makes it clear that the decision reflected in the letter of 16 August 2000 was a *"principle decision based on the current financial status of the school. It is the intention of the Board of Directors to consult fully on all matters and effects that this proposal may have in relation to all staff as prescribed by Section 189 of the Labour Relations Act"*. Secondly, when the Applicant and others referred the matter to the CCMA, they gave the date on which the dispute had arisen as 21 September 2000. Thirdly, the date of 21 September 2000, as being the date on which the dispute arose, is consistent with all the evidence, oral and documentary, before me. Fourthly, in terms of section 190(2) (a) of the Labour Relations Act 66 of 1995, the date of 21September 2000 may be regarded as the date of dismissal.

[16] Section 190 of the Labour Relations Act is headed " Date of dismissal" and proceed as follows:

(1) The date of dismissal is the earlier of–

(a) the date on which the contract of employment terminated; or
(b) the date on which the employee left the service of the employer.

(2) Despite subsection (1)--

(a) if an employer has offered to renew on less favourable terms, or has failed to renew, a fixed-term contract of employment, the date of dismissal is the date on which the employer offered the less favourable terms or the date the employer notified the employee of the intention not to renew the contract;

(b) if the employer refused to allow an employee to resume work, the date of dismissal is the date on which the employer first refused to allow the employee to resume work;

(c) if an employer refused to re-instate or re-employ the employee, the date of dismissal is the date on which the employer first refused to reinstate or re-employ that employee.

[17] The issue therefore resolves itself into the question whether or not between 16 August 2000 and 21 September 2000 the Respondent complied with the provisions of section 189 of the Act.

[18] Before answering that question, I deem it necessary to deal with the status of the documents before me. In compliance with the provisions of Rule 6 (1) (e) of the Rules of this Court the Applicant must deliver a schedule listing the documents that are material and relevant to the claim. The relevant subrule provides as follows:

6. Statement of claim

(1) A document initiating proceedings known as a "statement of claim" may follow the form set out in form 2 and must–

(e) be accompanied by a schedule listing the documents that are material and relevant to the claim;

[19] It is clear that the Applicant regards the documents listed in schedule "B" as material and relevant to her claim. On 10 August 2000 I requested that copies of the said documents be produced, which was duly done. As the Applicant had not had an opportunity of addressing me on the status of the documents I issued a direction to the

Applicant to indicate in writing the manner in which the documents in Annexure "B" were to be dealt; what their status was and whether the documents or parts thereof would serve as evidence of what they purport to be . In the reply furnished by the Applicant's attorneys they stated that *"The status of the documents are (sic) as follows : - the Applicant admits that the documents are what they purport to be but does not admit the veracity of the contents thereof"*. A perusal of the documents whose contents have been mentioned above, confirms the Applicant's belief that they are indeed material and relevant to her claim. I admit the documents as evidentiary matter to which I may have regard. I also accept the documents for what they purport to be. With regard to the letters written by or on behalf of the Respondent I accept their contents as what was said by or on behalf of the Respondent.

FACTS FOUND PROVED

[20] I find that the dispute arose not on 16 August 2000 but on 21 September 2000 when the Respondent finally decided to retrench the Applicant. Such decision was communicated by the letter of the same date referred to in paragraph [12] (7) above. In terms of the said letter the Applicant was offered a retrenchment package with effect from 30 September 2000. She was required to work her notice during the month of October 2000 for which she would receive notice pay, whereafter her services would terminate. For the month of November 2000 the school would seek to rehire on a fixed term contract, as many teachers as would be required to run the school until the end of the last term. That decision would be based on the number of children, the arrangement of classes, the level of teaching skill required and the availability of funds. In addition to the above, the Applicant was to receive at the end of October 2000 any outstanding leave pay due to her and severance pay equal to one week per completed year of service. This offer was tendered in full and final settlement of all the Applicant's present and future claims arising from her employment with the Respondent. It appears that she unsuccessfully applied for the temporary employment on a fixed term contract mentioned in the letter of 21 September 2000. The reply to the said application is the letter dated 30 October 2000 mentioned in paragraph [12](14) above. With regard to the severance pay it appears that the Applicant was holding out for two weeks' pay rather than the one week's pay offered by the Respondent .

(Did the Respondent comply with s 189 of the LRA?)

[21] The Applicant contends that the Respondent has not complied with the provisions of section 189 of the Act. I t is common cause that on 24 August 2000 the Applicant received the letter referred to in paragraph [12] (2) above wherein, *inter alia*, reference is made to " our recent consultations and your letter to the Board of Directors dated 24th August 2000", and where the following is stated *" It is the intention of the Board of Directors to consult fully on all matters and effects that this proposal may have in relation to all staff as prescribed by the section 189 of the Labour Relations Act."* Furthermore the following appears; *" we will in future conduct whatever consultations are necessary to address any relevant issues raised by the staff flowing from our initial announcement. We wish to advise all staff that no decisions regarding the termination of employment will be taken until such proper consultations have been entered into"*. With regard to the Applicant's apparent request for disclosure of information the Respondent said the following: *"we wish to advise that our books of accounts, including our last audited accounts to date will be made available for your inspection in the offices of Wendy Siebert as of 13h00 Friday 25 August 2000. We regret that as our most recent accounts are as yet unaudited, we will not be in a position to allow their removal from Wendy's office. However, should you wish them to be available for review by any certified external accountant, who (sic) you may appoint for this purpose, such person will be entitled to view the accounts by arrangement with Wendy"*.

[22] The Respondent concludes the letter by stating: *" In order to continue the consultation process, we would*

request that all staff of the Nursery school attend a meeting at 12h00 on Monday 28th August 2000 at the school offices". On the same day ,i.e, 24 August 2000 a parents' meeting was held wherein the principal Carol Langman, and the Applicant, among others were present. According to the minutes of that meeting, which minutes were approved and signed by the principal and the Applicant on 30 August 2000, a parent, one Dirk Coetzee *"shared that he and Carol had met with Wendy Siebert and Ann Williams on the 22nd of August 2000 at 14h00 at Northriding Ministries to look at the books and discuss the reasons for the closure of First Friends Nursery School and the following was noted:*

(a) the school was originally started as an aftercare facility for 120 children, which then grew into a nursery school and aftercare
(b) the school was running at a loss with North Riding Ministries subsidising FFNS at approximately R60,000.00 per annum, the expenses exceed the income
(c) FFNS does not pay rent
(d) The school fees do not adequately cover costs, there are not enough children enrolled
rent leadership and Board of North Riding Ministries do not have a vision for a Nursery School and would like to use the facility for their children's ministry
(f) FFNS is to be closed on the 30TH of November 2000.

It is further recorded that the meeting was then opened to questions and suggestions from parents. The following suggestions were made:

(a) Look at increasing school fees- to break even an increase of R90,00.00 per month per child was necessary(as of 1/9/2000)
(b) Fundraising could be done- raffles, recycling paper, cans
(c) The proposed new premises would be completed in July 2001- the Board of Directors would need to be approached to request an extension of the closure date
(d) FFNS is registered as a Section 21 company and we cannot pay rent but we could make donation to the church in lieu of rent
(e) Parents wanted the security of knowing that it be possible to remain open as long as it took for the proposed move to new premises as problems and delays could arise on the building site
(f) Would the new school cost a lot more- it would have to be seen as a community effort, economically viable, the parents being involved in fundraising etc.
(g) Parents felt they should have been adequately informed that FFNS was in financial difficulties in 1999 and up till now they were not aware of the extreme nature of the financial situation, this should have been put to the parents and solutions could have been looked for at that time
(h) Parents felt that the manner in which they were informed of the closure FFNS was not handled correctly and left too many unanswered questions.

[23] It is further recorded that parents unanimously agreed that a meeting should be held with the Board, and that a group of 10 representatives (parents and 1 teacher) was elected to represent the parents and to meet with the Board. The one teacher that was elected was the Applicant. It appears that 15 persons were actually elected (See Minutes of the Parents' meeting held at First Friends Nursery School on the 24th August 2000 at 17h30).

[24] On 28 August 2000 it appears that eleven (including the Applicant) of the people elected on 24 August 2000 to represent the parents attended a meeting at the School premises. According to the minutes the following matters were discussed or agreed upon:

* *parents agreed to increase fees by R90.00 per month starting September 2000*

* *opinions were voiced that there seemed to be a breakdown in communication with the church body and the school as to the seriousness of the finances. This was never discussed with the parents*
* *some children were being subsidised at present by the school. It did not pose a problem as long as it was done in reason and vetoed by the parent*
* *suggestions were made that we submit to the church various proposals regarding the situation at present which are as follows:-*

1. *Sign a lease with the church for the premises sum of R....per month to be agreed, and the school remains as is with our bookkeeper keeping control.*
2. *Or we are given the opportunity to stay for a period of 12 months from Sept while a new school is being built to house the existing toddlers and teachers causing little disruption.*
3. *The ethos of the school has impacted the parents and the children alike. The sudden closure of the school and the spirit in which the situation has been handled has been difficult to absorb. We seriously request a period of grace to make this a smooth transition.*
4. *We would like to meet you and come to a compromise and solution to this problem.*

[25] As mentioned above a meeting was held on 31 August 2000 between representatives of the Respondent on the one hand and teachers and employers on the other. It appears that at that meeting a proposal from parents and staff that the R90,00.00 additional fees be paid agreed upon at the meeting held on 28 August 2000 was presented to representatives of the Respondent. It also appears that it was agreed and minuted that money would be carefully recorded and set aside for salaries. It appears that the next thing that happened was the letter of 21 September 2000 mentioned above.

[26] It is common cause that after 16 August 2000 *"various meetings were held between the Applicant and other staff members and the Respondent with a view of resolving the issue"*(See paragraph 11 of the Applicant's Statement of Claim). In the absence of evidence or any indication to the contrary, it is more probable than not that these meetings dealt with the issues contained in the relevant letters and minutes produced by the Applicant. On this view it is clear that the Respondent consulted with among others, the Applicant with regard to the matters mentioned in section 189 of the Act. In particular, the Respondent complied with the provisions of section 189(2) (a),(b) and (c) of the Act. The letters and minutes bear ample testimony to this. The Respondent also complied with the provisions of section 189(3) (a)-(h) in that it disclosed to the Applicant (a) the reasons for the proposed dismissals; (b) the alternatives that it considered before proposing the retrenchments and the reasons for rejecting those alternatives; (c) the number of employees likely to be affected; (d) the proposed method for selecting which employees to retrench; (e) the time when or the period during which, the retrenchment are likely to take effect; (f) the severance pay proposed; (g) any assistance that the Respondent proposes to offer to the employees to be retrenched ; and (h) the possibility of the future re-employment of the employees who are to be retrenched .

[27] The Respondent complied with the provisions of section189(4) read with section 16 of the Act. In particular the Applicant was granted access to the financial statements of the Respondent and allowed to have her own accountant inspect the Respondent's books of account. The Respondent also complied with the provisions of subsection (5) and (6) of section 189 of the Act in that it allowed the Applicant to make representations about any matter on which they were consulting and responded with reasons to the representations made by the Applicant with which it did not agree. Insamuch as the retrenchment was the result of a decision to close the Nursery School all the employees including the Applicant were to be retrenched. Consequently the Respondent effectively complied with the provisions of section 189 (7) of the Act. Consequently I find that the termination of the Applicant's services was procedurally fair.

Was the retrenchment substantively fair ?

[28] The reason for the closure of the School was financial. The School was no longer financially viable. The letters, minutes and financial statements attest to this fact. For the year ended 29 February 2000 the school made a loss of more than R80,000.00 and owed North Riding Ministries an unsecured interest free and no-fixed term-of-repayment amount of approximately R60,000.00.

[29] The Respondent was a section 21 company which was incorporated not for gain. The North Riding Ministries were no longer prepared to carry the school. I find that the retrenchments were substantively fair.

Severance pay

[30] It is common cause that the Respondent tendered to the Applicant one week's severance pay for each completed year of service. This is the minimum rate prescribed in section 41 of the Basic Conditions of Employment Act 75 of 1997. The Applicant is claiming two weeks' severance pay. There is no indication in the papers why the Applicant should be granted more than the minimum rate of one week's severance pay. She does not point to any agreement to that effect or any policy or special circumstances warranting such. I find that there is no dispute between the parties with regard to the one week's severance pay offered by the Respondent and the Applicant has not made out a case for the payment of two weeks' severance pay.

[31] Even if I am wrong in finding that the dismissal was procedurally fair, I would still have not made any order for compensation in that any departure by the Respondent from the requirements of section 189 of the Act would, at most, have been minimal and, on the authority of ***Alpha Plant and Services (Pty) Ltd v Simmonds & Others*** [2001] 3 BLLR 261(LAC), I would have exercised my discretion against awarding any compensation.

Conclusion

In the light of the aforegoing I come to the conclusion that the Applicant's dismissal by the Respondent was both substantively and procedurally fair. I make no order for compensation. I make no order for severance pay and no order as to costs.

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MOERANE A.J
Acting Judge of the Labour Court of South Africa

08 August 2001

31 August 2001

Brian Kahn Inc. Attorneys

No appearance