NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: JR 1482/01

In the matter between:

ATHOLHURST SCHOOL	**Applicant**
And	
KOORTS, ME N.O	**First Respondent**
CCMA	Second Respondent
BERGER, TERESA	Third Respondent

JUDGMENT

MASERUMULE AJ:

1. The applicant seeks an order in terms of section 145 of the Labour Relations Act. 66 of 1995, (Athe Act@) to set aside an award made by the first respondent in favour of the third respondent, ordering payment to the latter in an amount of R17 5000, based on a salary of R3500-00 per month.

2. The applicant is a school that caters for children with learning disabilities and special needs. The majority of these children suffer from one syndrome or another.

3. The third respondent applied for a position as a teacher at the school. She was interviewed and was offered the position. She worked for the applicant from 17 January 2001 until 22 or 23 February 2001.

4. On review, the applicant has alleged that the third respondent was employed on a fixed term contract for a period of two weeks, which was then extended to three weeks, as a A*trial period*@ and not a probationary period. The record of the proceedings at the CCMA indicates that the applicant=s legal representative dealt with the matter on the basis that the third respondent was in fact on probation.

5. Third respondent employment with the applicant terminated on 13 March 2001. The applicant contends that her fixed term contract expired whereas the third respondent claimed that she was dismissed, and unfairly so.

6. The first respondent concluded that the third

respondent had been dismissed and that her dismissal was both procedurally and substantively unfair. He found that applicant=s evidence with regard to its reasons for terminating third respondent=s employment was vague and that he was consequently unable to determine what the precise reasons for her dismissal were. However, he suspected that it was related to third respondent=s alleged poor work performance, which he found not have been proved. Lastly, he found that the third respondent was not given an opportunity to respond to whatever the reasons were for her dismissal, which made the dismissal procedurally unfair.

7. The first ground of review relates to the submission that the first respondent failed to make a finding as to whether or there was a dismissal. There is no merit in this submission. Nowhere in the record of the arbitration proceedings does it appear that the applicant disputed the existence of the dismissal. On the contrary, in her opening address at the CCMA, Ms Salojee, incorrectly referred to as Selicky in the record, dealt in a fair amount of detail with what is required of an employer before dismissing an employee who is on probation and set out applicant=s case as being that the third respondent was indeed on probation, that this was for a

period of three weeks and that this period was reasonable in the circumstances.

8. The applicant=s contention that there was a trial period based on a fixed term contract of employment is fanciful in the extreme. The label that the applicant now seeks to attach to the Atrial@ period does not change its true nature. Indeed, Mrs Atkinson, the principal at applicant, made no reference to a fixed term contract. Her evidence clearly indicates that the three-week period was meant to enable the applicant to determine third respondent=s suitability as a teacher t the school. That is a probationary period. Termination of the employment contract constitutes a dismissal. This first ground of review must accordingly fail.

9. The applicant does not attack the first respondent=s finding that having found that there was a dismissal, such dismissal was both procedurally and substantively unfair. In the light of the evidence, the implied acceptance of the correctness of this finding is well made.

10. The second ground of review relates to the amount of compensation awarded to the third respondent. The first respondent awarded compensation in accordance

with the strict terms of the provisions of section 194(2) of the Act, read with section 194(1). The award was made prior to the promulgation of the amendments to section 194 of the Act.

11. In passing, I need to commend the CCMA for having conciliated and arbitrated this dispute within a period of five months. This is in keeping with the spirit of the Act to have disputes finalized as expeditiously as possible.

12. The applicant alleges that the third respondent was in applicant=s employ for a period of three weeks only. This is incorrect. It is clear from the evidence that the third respondent continued teaching after 31 January 2001 and only stopped on 22 or 23 February 2001. The decision to terminate her services was only taken later, after another applicant for the position that had been offered the third respondent had completed her probationary period and was appointed on a permanent basis. The third respondent was thus employed for a period of at least six weeks and not three, as alleged by the applicant.

13. Applicant=s evidence at the arbitration hearing that the school is a non-profit institution was not disputed.

14. The first respondent concluded that in his view, A*compensation would be the appropriate remedy*.@ Whilst the award does indicate that it is but a summary of the evidence and argument, the first respondent indicated in the Rule 7A notice that he did not wish to add anything to the reasons already given in the award.

15. It is now trite that a person in the position of the first respondent needs to exercise his discretion on whether or not to award compensation, before actually awarding compensation in terms of the formula prescribed by section 194. There is nothing in the award to indicate that the first respondent considered first, whether or not to exercise his discretion in favour of awarding compensation, before he actually did so. The factors that would have been relevant for the exercise of his discretion, as established in evidence, including the fact that:

15.1 the third respondent had only been in applicant=s employ for a period of six weeks;

15.2 in discussions between Mrs Atkinson and the third respondent, Mrs Atkinson offered to re-employ the third respondent in the event that the school could find enough children to create an extra-class for younger

children whom she felt the third respondent would be able to cope with;

15.3 the applicant is a non-profit educational institution, with limited resources.

16. I am in agreement with applicant=s submission that the first respondent did not properly apply his mind to the available evidence in making the award that he did. In particular, he failed to consider whether or not he should exercise his discretion in favour of granting compensation, before he actually did so. In the light of the factors that would have been relevant in the exercise of his discretion, the only conclusion that can be arrived at, in view of the compensation awarded, is that he failed to take them into account.

17. The amount of compensation awarded is out of proportion to the harm inflicted on the third respondent, *cf Roux v Rand Envelope (Pty) Ltd* (1999) 20 ILJ 2183 (CCMA) at 2188. This warrants interference by the Court.

18. It was common cause during the arbitration hearing that the third respondent was not paid any notice pay. She was entitled to such notice pay. In the absence of

an agreement providing for a notice period, section 37(1)(b) of the Basic Conditions of Employment Act, 75 of 1997, (Athe BCEA@), prior to its amendment, provided for a notice period of two weeks for employees who have been employed for a period of four weeks or more, but less than one year. The third respondent was such an employee. In terms of section 74 of the BCEA, a commissioner or this court is entitled to also order the payment of any monies which may be due to an employee in terms of any of its provisions when considering a dispute about the fairness or otherwise of a dismissal..

19. I accordingly make the following orders:

19.1 the award made by the first respondent, in so far as it orders the applicant to pay third respondent compensation in the amount of R17 500-00 is hereby reviewed and set aside and substituted with an order that the applicant must pay the third respondent two weeks= notice pay in the amount of R1750-00;

19.2 there is no order as to costs.

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MASERUMULE AJ

On behalf of applicant: Adv HM Viljoen instructed by Jeff Donenberg & Co.

Date of Hearing: 6 August 2002

Date of Judgment: 8 August 2002