IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD AT RIVERSDALE

Case No PSES 300-05/06WC

In the matter between

EEG PIETERSEN Applicant

and

DEPARTMENT OF EDUCATION WESTERN CAPE Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 9 JUNE 2006

DELIVERED: 28 JUNE 2006

SUMMARY: Labour Relations Act 66 of 1995 –Section 186(1)(b) – Refusal by employer to renew fixed term contract – whether employee had a reasonable expectation of renewal – Factors to be taken into account to establish whether employee has such reasonable expectation

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ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This is a dispute concerning an alleged unfair dismissal in terms of section 186(1)(b) of the Labour Relations Act No 66 of 1995(hereinafter referred to as the "LRA"), referred to this tribunal for resolution in terms of section 191 of the LRA.

[2] The arbitration hearing in this matter took place at the Oakdale Agricultural School in Riversdale on 9 June 2006. Applicant was represented by Ms. Kwazi of SADTU(South

African Democratic Teachers Union), a registered trade union of which applicant is a member and respondent was represented by Mr. F Scholtz, an employee of its Labour Relations Department in Cape Town. The evidence was mechanically recorded on one cassette tape. Due to power failures in the Western Cape, the opening statements as well as the last part of cross-examination of the last witness, Dr Galant, could not be mechanically recorded, but was indeed manually recorded in my notes. The proceedings were finalised on 22 June 2006 when the last written heads of argument were received. On behalf of applicant only one witness being applicant himself was called, whereas respondent also only called one witness. Several documents were handed and marked exhibits A to C.

THE ISSUES IN DISPUTE

[3] I have to decide whether the non-renewal of applicant's fixed term contract constituted a dismissal in terms of section 186(1)(b) of the LRA or not, and if so, whether the dismissal was substantively and procedurally fair or not and, if not, the appropriate relief.

THE BACKGROUND TO THE DISPUTE

[4] Between 1 January 2004 and 30 June 2004, applicant was employed by respondent on two 3-month fixed term contracts in a substantive vacant position, as an educator at Vondeling Primary School, a small rural school with 50 learners and 3 educators in Witsand, a coastal village near Heidelberg in the Western Cape. His last fixed term contract for the period of April 2004 until 30 June 2004 was not renewed beyond 30 June

2004 and applicant alleges that he had a reasonable expectation that the contract would be renewed until 31 December 2004. At the time of the alleged dismissal, applicant's monthly salary was R6800,00. Applicant did not seek reinstatement in these proceedings, but asked for compensation equal to six month's salary, calculated at the rate of remuneration at the time of the alleged dismissal.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicant

[5] ***Enver Eric Jerome Petersen***, the applicant, testified that he initially became aware of the vacant position at Vondeling Primary School, when the circuit manager Dr Galant, phoned him and advised him that the position was vacant and that the school needed to appoint an educator on a fixed term contract pending the permanent filling of the position. At that time he had been teaching for approximately eight years at various schools on fixed term contracts. He applied for the position by completing the A2 application form and was indeed appointed in the position on a fixed term contract as from 1 January 2004. Nobody advised him of the length of his contract at the school. On the basis of information obtained from SADTU, he however presumed that he was appointed for a whole year until the end of 2004. SADTU in fact advised him that an agreement had been reached between respondent and SADTU that educators who are appointed on fixed term contracts would be appointed for a whole year. During June 2004, the position in which he acted was advertised for permanent filling as from 1 January 2005.

[6] After the end of the first school quarter of 2004, he was not required to complete any forms to reapply for his position. When he arrived back at school at the start of the second school quarter during April 2004, he was however, to his surprise, required to once again apply for the position by completing the form A2. The reason why he was surprised, was because he was under the impression that his contract was for a year. Once again nothing was said about the duration of his fixed term contract and he assumed that he would be employed at the school until the end of December 2004.

[7] Up until the last day of the second school quarter, being 30 June 2004, when he was indeed at school, nobody gave him any indication that his services would not be required during the third quarter of 2004. He in fact attended a course for educators during the June school holidays. Only 5 days before the re-opening of the schools for the third school quarter of 2004, he received a letter from the school governing body, advising him that they would not require his services for the third quarter. A copy of this letter was handed in as exhibit C11 and although it is dated 1 July 2004, he only received it on approximately 17 July 2004, which is approximately 5 days before the commencement of the third school quarter of 2004.

[8] What he finds upsetting, is that at the grievance meeting, the school principal admitted that the decision not to re-employ him again was already taken by the school governing body on 28 June 2004. Had they advised him at that stage that his services would not be required during the third quarter, he would have been able to seek alternative employment for the third school quarter. Fortunately he succeeded in finding alternative employment as an educator in a governing body post for the full duration of the fourth quarter of 2004 at Gerrit Du Plessis Secondary school at a salary of R2500 per month.

[9] During cross-examination he admitted that he had a meeting with Dr Galant, the circuit manager on 30 March 2004. At that meeting Dr Galant advised him that he had received complaints from the school principal that applicant was under the influence of alcohol on a particular Monday morning. He was extremely shocked when he heard this because the allegations were false. Accordingly he denied the allegations. He was never disciplinary charged and no corrective discipline was every taken against him.

Evidence on behalf of respondent

[10] ***Fernholdt Henry Michael Galant*** holds a PhD degree in education psychology and is employed by respondent as a circuit manager for circuit 1. Vondeling Primary school falls within his jurisdiction. He knows applicant very well. Many years ago, applicant was a pupil at a school where he was a teacher. He was in fact very proud when applicant became a teacher and he wanted applicant to succeed as an educator. Over the years he and applicant had a very good relationship. When teaching posts were scare, he used to assist applicant to get posts, by recommending him to schools which required teachers on a contract basis. In this manner he had assisted applicant to obtain fixed term contract positions at numerous schools in the region. When the position at Vondeling became

available during 2004, he phoned applicant, advised him about the position, and once again recommended applicant for the position.

[11] Unfortunately applicant has a problem. That problem is alcohol abuse and related to that is absenteeism. As a result of that, applicant's work history shows a pattern in that he very rarely succeeded in staying at a school for more than one or two quarters, after which the schools normally simply refuse to renew his contract due to alleged alcohol abuse and absenteeism.

[12] Prior to applicant's employment at Vondeling, Galant had in fact received complaints from 4 to 5 schools where applicant had taught, alleging that applicant smelt of liquor and also occasionally failed to report for duty. He had spoken to applicant many times about this problem. He wanted applicant to succeed and in fact advised him to prove that he can be a good teacher. After applicant started working at Vondeling, the principal complained that applicant had been smelling of liquor. He went to the school and in fact spoke to applicant very sternly and warned him that if he is not going to change, he should not expect any further help from him.

[13] On 30 March 2004, whilst paying a visit to Vondeling Primary, he again had to speak to applicant about his behaviour. Once again the principal complained that applicant had smelt of liquor and also reported absenteeism. Applicant denied this. He however believed the principal and he has several reasons for believing the principal. Firstly, the complaints of the principal fitted in with the complaints which he received from other schools where applicant had taught. Secondly, he could see signs of alcohol abuse on applicant's face. His skin was dehydrated and full of the type of wrinkles which people who abuse alcohol has, his lips were dry and he had an injury on his one eyelid. He believes that he is qualified to say that applicant's face showed signs of alcohol abuse, not only because he learnt about this as part of his studies, but also because he has in fact dealt with many people who abused alcohol and who showed the same signs.

[14] None of the schools including Vondeling, ever resorted to corrective discipline. Their way of dealing with applicant's problem, was simply not to renew his fixed term contract once he started displaying signs of alcohol abuse and absenteeism. At Vondeling, it was exactly the same and the school governing body decided not renew applicant's fixed term

contract for the third quarter, as a result of his alcohol abuse. He knows that applicant was employed on two 3 month fixed term contracts, the last one being until 30 June 2004, because the principal had told him this.

[15] Given applicant's history, applicant himself should have known that due to his tendency to abuse alcohol, the chances that he would be able to behave for a whole year, would be slim. Accordingly, he cannot see how applicant could have had a reasonable expectation that he would really be employed at Vondeling for a whole year, because renewal of a fixed term contract is obviously linked to performance and good conduct.

CLOSING ARGUMENTS

[16] Extensive written heads of argument were handed in by both applicant and respondent, the last of which I received on 22 June 2006. I am not going to repeat these arguments here in detail and will refer to them during my analysis of the evidence, where relevant.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

THE FACTS WHICH ARE COMMON CAUSE

[17] Most of the crucial facts in this case, are common cause. It is not in dispute that applicant was indeed employed at Vondeling Primary school at a monthly salary of R6800,00 for the first two quarters of 2004 on two 3-month fixed term contracts and that the last one ended on 30 June 2004. It is also not in dispute that applicant's last fixed term contract which ended on 30 June 2004, was indeed not renewed. It is also common cause that at no stage was anything said to applicant by respondent or the school governing body with regard to the length of period of his fixed term contracts. At the end of the first quarter of 2004, nothing was said to applicant about the renewal or non-renewal of his fixed term contract and when he returned to Vondeling at the beginning of the second quarter, he was asked to sign another application form, presumably for the fixed term relating to the second quarter. Once again however, he was not advised with regard to the length of this fixed term contract.

[18] It is also not in dispute that the school governing body, as a result of alleged alcohol abuse and absenteeism (which is denied by applicant) decided not to renew his fixed term contract for the third quarter. Although they already took this decision on 28 June 2004,

the letter which informed applicant of this, was only drafted on 1 July 2004 and only reached applicant 5 days before the commencement of the third school quarter. Prior to that, nobody had informed applicant that his services would no longer be required for the third quarter. Lastly, it is common cause that the position in which applicant acted, was indeed still available during the third quarter and that an educator was indeed employed in that position on a contract position during the third quarter on a fixed term contract in order to replace applicant. Applicant's evidence that the position was advertised during June 2004 for permanent filling as from 1 January 2005, is also uncontested.

THE FACTS WHICH ARE IN DISPUTE

[19] The most important factual and legal disputes, are whether applicant had a reasonable expectation that his contract would be renewed beyond 30 June 2004 as well as his alleged abuse of alcohol and absenteeism.

[20] With regard to the allegation that applicant abused alcohol whilst at employed at Vondeling, I am faced with two mutually destructive versions. Applicant alleges that he never abused alcohol and never smelt of liquor whilst the version of respondent is that he did indeed. I have had the unique opportunity of seeing and hearing both applicant and Galant testify before me. Based on the probabilities, as reinforced by the demeanour of these two witnesses, I was able to make credibility and factual findings. Galant impressed me as a very honest and reliable witness. During his evidence it became clear to me that he is very fond of applicant and accordingly he has no reason to fabricate false evidence against applicant. I accept his evidence that over the years, he had received the same complaints about applicant from different schools where applicant had taught and that he once again received the same complaints from Ms September, the school principal of Vondeling. These complaints were that applicant abused alcohol, smelt of liquor at school and was sometimes absent without leave. Incidentally these complaints correspond with what Ms September had told the school governing body according to the minutes of the school governing body meeting held on 28 June 2004, which minutes were handed in as exhibit "C36". According to those minutes, one of the children of one of the members of the school governing body had also complained that applicant had been drunk at school. All these allegations by different people regarding applicant's alcohol abuse, certainly leans support for respondent's version in this regard.

[21] Applicant's version in this regard on the other hand, is not plausible. He expects me to believe that different principals would all fabricate false allegations of alcohol abuse against him for no reason at all. It is completely improbable that so many principals at so many different schools where applicant had taught, would on different occasions, independently from each other, all have lied about applicant's behaviour. It is even more improbable that they all would have lied about exactly the same thing and would all, coincidently have falsely accused applicant of alcohol abuse. The coincidence is just too great to be possible.

[22] In addition, Galant was able to motivate why he said that he saw signs of alcohol abuse on applicant's face. His evidence in this regard, would on its own, not necessarily have carried that much weight. This evidence must however be seen against applicant's history and pattern of alcohol abuse, as reported to Galant by various principals. When these two aspects of the evidence namely the signs of alcohol abuse which Galant saw on applicant's face, and the complaints received from various principals about alcohol abuse, are viewed in conjunction, the probabilities against applicant's version are indeed strong and compelling.

[23] It is true that respondent's version that applicant was abusing alcohol and sometimes under the influence at school, is based on hearsay evidence. However, the hearsay rule, which is applicable in courts of law, is not applicable in proceedings before employment tribunals such as the CCMA and the ELRC(see *Naraindath v CCMA & others* [2000] 6 BLLR 716 (LC) per Wallis AJ). Evidence which consists of hearsay statements is therefore not inadmissible simply because it amounts to hearsay. In any event, even in Courts of law, the presiding officer always has a discretion to admit hearsay evidence in terms of section 3(1)(c) of Act 45 of 1988 if he is of the opinion that such evidence should be admitted in the interests of justice. Where there are guarantees for the trustworthiness of hearsay statements, it is admissible and may play a decisive roll in making factual findings and even in convicting an accused person during a criminal trial(see *S v Ndhlovu* 2002 (6) SA 305 (SCA) para 44-47 per Cameron JA). Having regard to the various independent sources from which the hearsay statements originated in this case, being Ms September, other school principals as well as pupils, as well as the observations which Galant made regarding signs of alcohol abuse on applicant's face, I am satisfied that the

guarantees for the trustworthiness of September's hearsay statement regarding applicant's alcohol abuse, is indeed high. Therefore, even if one does apply the law pertaining to hearsay evidence as set out in section 3(1)(c) of Act 45 of 1988, the hearsay evidence tendered in this case, is still admissible.

[24] Although the statement of Ms September, the school principal of Vondeling to the effect that applicant was abusing liquor, smelt of liquor at school and was sometimes absent, is hearsay evidence, I am satisfied that it is indeed sufficiently reliable to find on a balance of probabilities, that the version of the school principal is indeed the truth and that applicant's denial is false.

THE ALLEGED DISMISSAL

The legal principles

[25] The Labour Relations Act provides for various forms of dismissal. Section 186(1) of the LRA defines 'dismissal' as meaning that -

> *(a) an employer has terminated a contract of employment with or without notice;*
> *(b) an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;*

[26] Because applicant was employed on a fixed term contract which automatically terminated at the end of June 2004, this case does not concern a dismissal in terms of section 186(1)(a) of the LRA. In order to prove the existence of a dismissal, applicant relies on section 186(1)(b) of the LRA and alleges that he had a reasonable expectation that her fixed term contract would have been renewed beyond 30 June 2004.

[27] Although one cannot generalize, one of the most important reasons why some employers resort to employing employees on fixed term contracts, is to evade labour legislation. Where an employee is employed on a fixed term contract, an employer can easily get rid of him if he is dissatisfied with his conduct or performance, by simply failing to renew the contract when it expires, without having to comply with the burdensome requirements which labour legislation require employers to follow in the case of dismissals for misconduct and poor work performance. To discourage evasion of labour legislation,

article 3 of Convention 158 of 1982 of the ILO require signatory States (of which South Africa is one) to provide adequate safeguards against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from labour laws. In terms of article 1 of that convention, signatory States must give effect to the terms of that convention through legislation, court decisions, arbitration awards and collective agreements. It is against the background of these obligations of South Africa's in terms of International Law, that section 186(1)(b) of the LRA, was enacted:

> "Section 186(b) was included in the LRA to prevent the unfair practice of keeping an employee on a temporary basis without employment security until it suits the employer to dismiss such an employee without the unpleasant obligations imposed on employers by the LRA in respect of permanent employees"(see *Biggs v Rand Water* (2003) 24 ILJ 1957 (LC) at 1961A-B).

[28] Section 186(1)(b) of the LRA allows for a radical departure from the application of general principles of contract in terms of which the employee would have no claim to future employment, unless specifically agreed to by the employer. It essentially is an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of the law would not foresee a remedy (see *Marius Olivier* "Legal Constraints on the Termination of Fixed Term Contracts of Employment: An Enquiry into Recent Developments" (1996) 17 ILJ 1001at 1027). It is based on a doctrine which was incorporated into our law from English Law during the 1980's. The doctrine of legitimate (or reasonable) expectation is well known in English Law. *Everett v Minister of Interior* 1981 (2) SA 453 (C) was the first South African case in which this doctrine was considered. In 1989 the former Appellate division in *Administrator Transvaal v Traub* 1989 (4) SA 731 (A) explicitly recognized and applied this doctrine. Since then, our Courts have applied this doctrine to protect a person's legitimate expectations regarding procedural fairness, but not readily to protect substantive expectations. Section 186(1)(b) of the LRA however explicitly allows for substantive protection of reasonable expectations within certain boundaries.

[29] It should however be realised that this doctrine, cannot be applied indiscriminately to force contracts onto an unwilling party, who never consented to the contract. Unless there are strict limitations and boundaries to this doctrine, it could easily lead to abuse by opportunists, with unrealistic expectations. Accordingly, Corbett CJ in *Traub*, observed as follows:

> "whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled, it could become an unruly horse"(see *Administrator Transvaal v Traub supra* 761F-G)

[30] Consequently, Corbett CJ emphasised that a legitimate expectation, must have a reasonable basis and in considering what conduct would give rise to a legitimate expectation, he cited with approval the remarks of Lord Roskill in *Council of the Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) 954g, to the following effect:

> "Legitimate, or reasonable expectation may arise either from an express promise … or from the existence of a regular practice which the claimant can reasonably expect to continue"

[31] For an employee to rely successfully on section 186(1)(b), the employee must establish that (a) he had subjectively, an expectation that the employer would renew the fixed term contract on the same or similar terms and (b) the expectation was reasonable and (c) the employer did not renew it or offered to renew it on less favourable terms (see *SA Rugby (Pty) Ltd v CCMA* [2006] 1 BLLR 27 (LC) 30 para 9). It is not required that the employee's subjective expectation has to be shared by the employer (see *Olivier* (supra) at 1030). On the other hand, in assessing the reasonableness of the expectation, the subjective believes of the employee are irrelevant, because reasonableness must be determined objectively(see *Grogan* Workplace Law (8th ed) 110-111). In order for the expectation to be reasonable, the employee must prove an objective basis for the creation of this expectation, apart from the subjective say-so or perception of the employee(see *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC) para 26; *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) at 1246). The test to determine whether the employee's expectation was reasonable, is therefore an objective test in terms of which it should be determined whether a reasonable employee in the circumstances prevailing at the time would have expected the contract to be renewed on the same or similar terms(see *SA Rugby (Pty) Ltd v CCMA* [2006] 1 BLLR 27 (LC) 30 para 11).

[32] A reasonable expectation must be based on some conduct by the person who according to the claimant, has created the reasonable expectation in the mind of the claimant. The

conduct may consist of a clear and unambiguous promise which provides the strongest foundation for a claim. It may however also consist of a representation(such as for example past practice), which may arise from words or conduct or from a combination of the two(see *Craig* Administrative Law (5th ed) 651 and the authorities cited by the learned author in footnotes 62 and 63).

[33] Where the conduct relied on to found a reasonable expectation, is a representation, the requirements for liability, have been summarised as follows:

> "(i) The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification...
> (ii) The expectation must be reasonable...
> (iii) The representation must have been induced by the decision-maker...
> (iv) The representation must be one which it was competent and lawful for the decision-maker to make without which reliance cannot be legitimate..."
> (per Heher J(as he then was) in *National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 (W) para 280; approved in by the Supreme Court of Appeal in *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) para 19)

[34] In order to determine when a reasonable expectation of renewal exists, it is necessary to enquire into the circumstances surrounding the contract (see *Malandoh v SABC* (1997) 18 ILJ 544 (LC)). In this enquiry, any of the following factors or a combination, may be relevant: **the surrounding circumstances, the terms of the contract; agreements or undertakings by the employer; assurances that the contract would be renewed; the amount of times and periods in respect of which the contract was renewed in the past; past practice or custom in regard to renewal; arranging employee's work schedule for future; the continued availability of the post; continued availability of funds to renew the contract; the purpose of or reason for concluding the fixed-term contract; the reason why the contract was not renewed, inconsistent conduct; failure to give reasonable notice of non-renewal; the nature of the employer's business; conduct of the employer both at the time of concluding the contract and during the employment relationship**(see *Olivier (supra)* at 1030; *Dierks v University of South Africa supra* para 133; *SA Rugby (Pty) Ltd v CCMA supra* para 12; *Grogan* Dismissal, Discrimination and Unfair Labour Practices (Aug 2005) page 149 – 153; *Du Toit et al* Labour Relations Law: A Comprehensive Guide (4th ed) 368)

[35] A factor such as past practice of renewal or a failure to give reasonable notice of non-renewal, will however rarely if ever, on its own, give rise to a reasonable expectation. However, when both these factors are present and co-existent with other relevant factors, these two factors may indeed be compelling reasons for concluding that a reasonable expectation of renewal existed.

Did applicant have a reasonable expectation of renewal ?

[36] I do not regard the last sentence of paragraph 1 of WCED circular 0248/2003, which is contained in exhibit "C1", as being of any assistance to applicant in trying to establish a reasonable expectation of renewal, beyond 30 June 2004 until the end of December 2004. The relevant sentence reads as follows: *"Please note that the WCED has decided that substantive vacant posts may now be filled for a full year".*

[37] The word "may", in my view clearly suggests that the WCED would as from the date of the circular, consider the appointment of contract educators for periods up to a maximum of one year at a time, whereas it is common cause that in the past it was not prepared to consider such lengthy appointments on fixed term contracts. The document makes it clear that it is in the WCED's discretion to do so. There is no undertaking that educators would automatically be appointed for one year at a time. To suggest that this sentence could have given rise to a reasonable expectation of appointment for one year, is simply extremely opportunistic, if not absurd. Semantically, this is simply not what is being said in the circular. To suggest so, would be to twist the words used in the circular.

[38] Similarly, the information which applicant received from his union that fixed term contracts should be renewed for one year, cannot assist applicant. It is common cause that applicant's last fixed term contract at Vondeling was for a period of 3 months and ended on 30 June. The fact that he believed that his contract was actually for a year, is irrelevant. Contracts are not based upon what one of the parties may erroneously belief. There is a wealth of authority to the effect that a contract is a meeting of the minds between parties. Put differently, *consensus* is the basis of a contract(see *Christie* The Law of Contract In South Africa (5th ed April 2006) page 22 This means that the parties must be in agreement with each other with regard to all the particulars of the contract, which would in the case of a fixed term employment contract include its duration. A binding contract (or

meeting of the minds) is as a rule constituted by the acceptance of an offer(see *Reid Bros (SA) v Fisher Bearings Co Ltd 1943 AD 232 at 241*).

[39] There is no evidence before me that a binding contract was entered into between the parties for the entire year of 2004. Applicant himself never saw any documents where the duration of his contract was stipulated and the only reason why he assumed that he was appointed for the whole year was due to a statement made to him by his union SADTU. SADTU told him that in terms of an undertaking which respondent gave, fixed term contract educators would be appointed for periods of one year at a time. SADTU cannot enter into contracts on behalf of respondent. Whatever SADTU told applicant and whatever applicant believed as a result of that statement, is completely irrelevant. We now know that no contract was concluded for the whole of 2004 but that instead two 3-month contracts, the first ending on 31 March 2004 and the second one ending on 30 June 2004, were concluded(see Exhibit C12-13). Respondent made no representation to applicant which could possibly have induced a reasonable expectation that the contract would be for one year.

[40] Furthermore the Labour Courts have held that in terms of section 186(2)(b) an employee can only have a reasonable expectation of temporary employment and not of permanent or indefinite employment(see *Dierks v University of South Africa* [1999] 4 BLLR 304 (LC); *Auf der Heyde v University of Cape Town* [2000] 8 BLLR 877 (LC); *contra McInnes v Technikon Natal* [2000] 6 BLLR 701 (LC)). Since section 186(1)(b) provides that the renewal must be "on same or similar terms", an employee can only have a reasonable expectation that the next period of renewal will endure for the same period as the last fixed term contract (see Oosthuizen AJ in *Dierks v University of South Africa* (1999) ILJ 20 1227 (LC) para 134 – 144; *Marius Olivier* "Legal Constraints on the Termination of Fixed Term Contracts of Employment: An Enquiry into Recent Developments" (1996) 17 ILJ 1001 and further). In other words, even though an employee might have been employed on various fixed term contracts for many years by the same employer, the last fixed term contract of which had only been for three months, he cannot, in terms of section 186(1)(b) have a reasonable expectation of renewal for a period longer than three months.

[41] Since applicant's last fixed term contract was only for 3 months, he could not in terms of section 186(1)(b) have had a reasonable expectation of renewal of more than 3 months. Whatever undertakings the respondent might have given to SADTU regarding the

employment of educators on fixed term contracts for one year, and whatever SADTU might have said to applicant in this regard, is therefore really irrelevant for purposes of establishing whether a reasonable expectation has been created in terms of section 186(1)(b). Even if one accepts that applicant had an expectation that his contract would be renewed for a further six months until the end of December 2004, that expectation was not the type of expectation which section 186(2)(b) regards as reasonable or enforceable.

[42] There are indeed several other factors which I regard as important and which I have taken into account in order to establish whether applicant had a reasonable expectation of renewal in terms of section 186(1)(b) of the LRA:

42.1 The fixed term contract was renewed by respondent at least on one occasion in the past without any demur;.

42.2 At no stage was applicant informed, either in writing or verbally of the duration of his fixed term contracts;

42.3 At no stage was applicant cautioned, either verbally or in writing that he should not have any expectations of renewal;

42.4 The position was still available on a fixed term contract basis after 30 June for the remainder of the year;

42.5 Although the position was advertised for permanent filling during June 2004, the permanent appointment was only advertised for filling as from 1 January 2005;

42.6 Funds were still available to fill the position on a contract basis because another educator was indeed employed on a 3-month contract for the third quarter in applicant's place;

42.7 At the end of the first quarter, nothing was said to applicant about the renewal and or non-renewal of any fixed term contract and only during the first week of the second quarter was he required to complete application forms for a further fixed term contract position. In the absence of any communication in this regard from respondent or the school, it was reasonable to assume that the same situation would apply in respect of the third school quarter;

42.8 At no stage prior to the end of the second quarter, was applicant advised that the same procedure and practice which was followed during the second quarter, would not be followed during the third quarter;

42.9 Applicant was not given reasonable notice that his fixed term contract would not be renewed beyond 30 June;

[43] Although non of these factors, when taken in isolation, may necessarily establish a reasonable expectation of renewal, I am satisfied that when viewed in conjunction, the cumulative effect of these factors, would indeed have caused any reasonable person in applicant's position to have formed a reasonable expectation that his fixed term contract would be renewed for a further 3 months.

[44] Given the fact that applicant knew that the position would still be available during the third quarter, the fact that applicant was never advised regarding the duration of his fixed term contract as well as the manner in which the contract was renewed at the beginning of the second quarter, it was simply unreasonable of the school governing body to give applicant notice of non-renewal only 5 days prior to the commencement of the third school quarter. Any reasonable person in applicant's position, would under such circumstances have believed that he would still have a job during the third quarter. If the school governing body was unhappy about applicant's conduct and contemplated not to renew his contract because of his conduct, they should have advised applicant about this immediately when they reached this decision. Grogan observes as follows:

> "When a court finds that the termination of a fixed term contract constitutes a dismissal, it is in effect saying that the employment relationship would have endured had it not been for the employer's failure to renew the contract; the decision not to renew the contract was a pretext for terminating the employment relationship"(see *Grogan* Dismissal, Discrimination and Unfair Labour Practices (2005) Juta 150).

[45] I am indeed satisfied that had it not been for applicant's alcohol abuse, it seems certain that the contract would indeed have been renewed. The sole reason why applicant's fixed term contract was not renewed as from 1 July 2004, is because of his alcohol abuse and not really because it has expired. In the process, the employer abused the purpose of the fixed term contract as a device to evade labour legislation which require employers to follow certain cumbersome procedures before dismissing an employee for poor work performance. Dr Galant's evidence that applicant should have realised that his contract would not be renewed again during the third quarter of 2004 because of his alcohol abuse, is not convincing. Despite the fact that applicant had already abused alcohol during the first quarter and Galant had already spoken to him in this regard on 30 March

2004, he was still re-appointed for the second quarter, despite his drinking problem. Under these circumstances, applicant's continued alcohol abuse could not have frustrated the reasonable expectation of renewal he had, based on past practice of renewal and the school's failure to give him reasonable and timeous notice of non-renewal. I am also satisfied that the conditions for liability based on reasonable expectation, as set out by Heher J(as he then was) in *National Director of Public Prosecutions v Phillips and others* 2002 (4) SA 60 (W) para 280, approved in by the Supreme Court of Appeal in *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA) para 19 have been met. In the circumstances applicant has succeeded in proving that he was indeed dismissed in terms of section 186(1)(b) of the LRA.

THE FAIRNESS OF THE DISMISSAL

[46] Once a court or tribunal has found that there was a dismissal in terms of section 186(1)(b) of the LRA, it must determine whether such dismissal was substantively and procedurally fair(see *Solidarity obo McCabe v SA Institute for Medical Research* [2003] 9 BLLR 927 (LC) 930). In other words, dismissal in terms of section 186(1)(b) is not inherently or automatically unfair; a court or tribunal will also consider the circumstances with a view to establishing whether the employer's conduct was justified. The onus to prove that the dismissal was fair, is on the employer.

[47] I have already found that applicant did indeed abuse alcohol. Based on the evidence I am also satisfied that applicant's contract would indeed have been renewed beyond 30 June 2004, had it not been for the alcohol related incidents. Exhibit "C40", being the minutes of the school governing body's meeting of 28 June 2004, in fact makes it very clear that the School Governing Body decided not to renew applicant's contract as a result of his alcohol abuse. Galant also testified that the manner in which all the schools including Vondeling dealt with applicant's alcohol problem, was simply not to renew his fixed term contracts.

[48] The mere fact that an employee abuses alcohol, is however not necessarily sufficient reason to dismiss him. Alcohol abuse can indeed, if it impacts on an employee's work, warrant the dismissal of an employee. However, when dealing with alcohol related incidents in the workplace, it is important to determine whether it should be treated as misconduct or as incapacity. Casual drinking would normally constitute misconduct, whereas dependency would be indicative of incapacity which is really beyond the employee's control. The approach which an employer should follow, depends on whether

the employee is guilty of misconduct (i.e. casual drinking) or suffers from incapacity (i.e. dependency). In the case of misconduct, disciplinary action would be appropriate, whereas in the case of dependency, it would not be. The Code of Good Practice on Dismissal endorses the view that disciplinary action is not always an appropriate way to deal with alcohol abuse. In item 10 of the Code, which the deals with dismissal on the ground of incapacity, the code suggests that in the case of certain kinds of incapacity for example alcoholism, counseling and rehabilitation may be appropriate steps for the employer to consider. Item 3(9) of Schedule 1 to the Employment of Educators Act No 76 of 1998 also advocates counseling and rehabilitation of educators who are addicted to alcohol. Grogan in fact remarks as follows:

> "There is merit in treating individual case of alcohol abuse with sympathy. When an employee is found to be under the influence of alcohol, a separate inquiry may be held by appropriately qualified personnel to establish whether the employee is addicted to alcohol. If this is found to be the case, the employee should be offered assistance, which need not be provided at the employer's expense"(see *Grogan* Dismissal, Discrimination and Unfair Labour Practices (2005) Juta 251).

[49] No steps were taken to establish whether applicant's alcohol abuse was due to dependency or whether it was due to casual drinking. In addition, there was no proper investigation regarding incidents of alcohol abuse at Vondeling. Under these circumstances, where it was not even certain whether applicant's situation should be treated as misconduct or incapacity and where the exact circumstances surrounding the alcohol related incidents were not known, dismissal was simply irrational and unfair. In addition applicant's dismissal was also procedurally unfair because no procedures were followed prior to applicant's dismissal; not the procedures prescribed for incapacity dismissals and not the procedures prescribed for misconduct dismissals.

[50] Furthermore our courts have always held that where the employment relationship between an employer and an employee who is employed in terms of a fixed term contract, is not really severed because the fixed-term contract had expired, but for other reasons (i.e. alleged misconduct or poor work performance) which normally would require warnings and a disciplinary hearing before the relationship could fairly be brought to an end, it is not fair for the employer to cause the employment relationship to end for one set of reasons (i.e. alleged misconduct or poor work performance) while claiming that the reason why

the employment relationship has ended, was as a result of the fact that the fixed term contract had expired (see *Cremark a Division of Triple P-Chemical Ventures (Pty) Ltd* (1994) 15 ILJ 289 (LAC) 293D; *SACTWU v Mediterranean Woollen Mills (Pty) Ltd [*1995] 3 BLLR 24 (LAC) 35). Employers are therefore not allowed to use the expiration of temporary contracts as a device to terminate the employment relationship whereas the true reason for the employee not being re-employed, is something else(see *Mediterranean Woollen Mills (Pty) Ltd v SACTWU* [1998] 6 BLLR 549 (SCA) 552). This is exactly what the school governing body did in this case with regard to applicant's contract.

[51] I must immediately add that an employee cannot base a reasonable expectation of renewal simply on the fact that he was actually dismissed due to alleged misconduct or incapacity, whilst the employer falsely pretends that the reason for the termination of the employment relationship, is because of the expiry of the fixed term contract. To allow this, would mean that employees could intentionally make themselves guilty of misconduct or poor work performance simply so that they could remain in employment after the expiry of the fixed term contract until the prescribed procedures have been followed and exhausted by the employer.

[52] However, where independent from this factor, the facts clearly show as it did in this case, that but for the misconduct or incapacity, the employer would have continued to employ the employee beyond the expiration of the fixed term contract, and where a reasonable expectation of renewal was created by the employer, employers are not allowed to evade the provision of the LRA, by refusing to renew the fixed term contract, whereas actually, the non-renewal of the contract has very little to do with the expiration of the contract itself, but everything to do with misconduct or incapacity. In such cases the employer will be compelled to follow the prescribed procedures, failing which its conduct will be unfair.

RELIEF

[53] Applicant does not want to be reinstated, but asked for compensation. In terms of section 193 of the LRA. I am not allowed to order reinstatement if the employee does not wish to be reinstated. I am however entitled to award compensation if I find that a dismissal was unfair, as I have already done in this case.

[54] In terms of section 194 of the LRA I am entitled to award compensation which is just and equitable, but may not order compensation which is more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. This off course, is a discretion which must be exercised judicially (see *Fouldien v House Trucks (Pty) Ltd* (2002) 23 ILJ 2259 (LC) 2265 para 16). At the time of dismissal, applicant earned R6800,00 per month. I will therefore base my calculations on this amount.

[55] In *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC) at 981C–G, the previous Labour Appeal Court made the following remarks about compensation for unfair dismissals:

> "In my view the correct approach to be adopted is that to be found in English law, namely that the basic principle must be that an unfairly dismissed employee is to be compensated for the financial loss caused by the decision to dismiss him. I venture to suggest the following guidelines when determining the amount of compensation to be awarded:
>
> (a) there must be evidence before the Court of actual financial loss suffered by the person claiming compensation;
> (b) there must be proof that the loss was caused by the unfair labour practice;
> (c) the loss must be foreseeable, ie not too remote or speculative;
> (d) the award must endeavour to place the applicant in monetary terms in the position which he would have been had the unfair labour practice not been committed;
> (e) in making the award the Court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;
> (f) there is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment;
> (g) any benefit which the applicant receives eg by way of a severance package must be taken into account."

[56] Whereas most of the remarks made in *Ferodo* certainly still remain valid when deciding on compensation in terms of section 194 of the present LRA, under the new amended section 194 of the LRA, there is no further justification for limiting compensation to patrimonial loss only, as was done in *Ferodo*(see *Du Toit et al* Labour Relations Law:A Comprehensive Guide (2003) at 453; also see *Tamara Cohen* Exercising a Judicial

Discretion - Awarding Compensation for Unfair Dismissals (2003) 24 ILJ 737 -752 at 737). Patrimonial loss is no longer the core of the enquiry, although it is still very relevant(see *Alpha Plant & Services (Pty) Ltd v Simmonds & others* [2001] 3 BLLR 261 (LAC) at 292). Compensation is also a *solatium* in the sense that it is a payment for the anxiety and hurt suffered by the employee(see *FAWU & others v SA Breweries Ltd* [2004] 11 BLLR 1093 LC; *Mischke* in Employment Law Vol 15 No 3 at page 30).

[57] In quantifying the amount of compensation which should be awarded, I have taken into account the following factors:

57.1 Applicant had been employed at Vondeling for only six months. Twelve months compensation is in fact the maximum compensation which this tribunal can award and is reserved for the most serious cases involving employees who had been employed for lengthy periods of time and/or where the unfair conduct of the employer was particularly gross and reprehensible. To award six months compensation (which is half of what this tribunal may award) to an employee who has only been employed for six months, therefore seems excessive, especially given applicant's misconduct which led to the dismissal;

57.2 Applicant's reasonable expectation in terms of section 186(1)(b) was limited to renewal of his contract for a further period of 3 months. This does however not mean that he may for this reason alone not be awarded compensation in excess of 3 months' remuneration. It is however a factor, albeit not the most important factor, to take into account;

57.3 Applicant was under a legal obligation to mitigate his damages by seeking alternative employment immediately when he became aware of the dismissal;

57.4 Applicant did indeed succeed in obtaining alternative employment for the fourth school quarter of 2004, albeit at a lesser salary;

57.5 The fact that applicant could not obtain employment as an educator in a departmental position, but had to opt for a poorly paid governing body position at a much lower salary, is really only due to applicant's own fault, caused by his pattern of alcohol abuse, which has caused many principals in circuit 1 not to want applicant at their schools;

57.6 The purpose of compensation is not to punish an employer. The purpose is also not to award as much as possible compensation, simply because the employer can afford to pay it;

57.7 Although the dismissal was unfair, applicant did not approach this tribunal with clean hands in that his persistent alcohol abuse and refusal to admit his problem and seek help, was the direct cause of his dismissal. Nobody could seriously have expected that the learners must be continued to be exposed to his alcohol abuse;

57.8 The most important mistake which the school governing body made, was not to give applicant reasonable notice that his contract would not be renewed beyond June 2004; Had they given him such notice, he would not have had any reasonable expectation of renewal and no dismissal would have taken place, merely on the basis of the refusal to renew the contract;

57.9 On the other hand, dismissal is always a traumatic experience for an employee and his family and the trauma and hurt which is occasioned with any dismissal cannot be ignored;

57.10 Applicant could not succeed in finding alternative employment for the third quarter of 2004 and was indeed unemployed during that period, due to the school governing body's late notification of non-renewal;

[58] Having regard to these factors, I am satisfied that compensation equivalent to three (3) months' salary, is just and equitable. The amount which respondent will accordingly be ordered to pay to applicant as compensation will be R20 400,00 which I have calculated by multiplying the monthly earnings of R6800,00 by three months. It should however be

borne in mind that in terms of Interpretation Note 26, issued by SARS on 30 March 2004, this amount of compensation is subject to income tax.

AWARD

In the premises I make the following order:

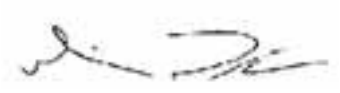
1. Applicant's expectation of the renewal of his 3 month fixed term contract which ended on 30 June 2006 was reasonable;

2. Respondent's refusal to renew applicant's aforesaid fixed term contract constituted a dismissal of applicant as envisaged in section 186(1)(b) of the Act and such dismissal was substantively and procedurally unfair;

3. The respondent must pay to applicant compensation in the amount of R20 400,00 (less deductions for income tax if applicable) on or before 31 August 2006.

4. Interest on the aforementioned amount of R20 400,00 (less income tax) will accrue at the rate of 15,5% per annum as from 31 August 2006 until date of payment.

5. No order as to costs is made



adv D P Van Tonder BA LLB LLM

Arbitrator/Panelist: ELRC