IN THE EDUCATION LABOUR RELATIONS COUNCIL

HELD AT CAPE TOWN

Case No PSES 280-05/06WC

In the matter between

J D PRINSLOO Applicant

And

DEPARTMENT OF EDUCATION WESTERN CAPE Respondent

ARBITRATOR: Adv D P Van Tonder

HEARD: 19 AUGUST 2005

DELIVERED: 29 AUGUST 2005

SUMMARY: ***Labour Relations Act 66 of 1996 – Unfair dismissal dispute - Fixed term contract - Dismissal of applicant in dispute – Onus on applicant to prove dismissal***

ARBITRATION AWARD

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

[1] This is a dispute concerning an alleged unfair dismissal referred to the ELRC in terms of section 191 of the Labour Relations Act No 66 of 1995("LRA") read together with the Constitution of the ELRC.

[2] This matter was set down for a Conciliation and Arbitration hearing on 19 August 2005 at the offices of the Western Cape Department of Education in Cape Town. After an unsuccessful conciliation, the conciliation certificate was issued and the matter proceeded to arbitration. The applicant was present and represented by Mr. P Scott, a practising attorney from Cape Town. Respondent was represented by Mr. K Petersen from the Western Cape Provincial Department of Education.

[3] During the arbitration hearing, the applicant gave evidence and respondent called two witnesses. The evidence was mechanically recorded on three cassette tapes and the proceedings were conducted in English.

THE ISSUE IN DISPUTE

[4] I have to decide whether there was a dismissal 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

[5] Applicant who was an educator (or teacher) employed by respondent between 1985 and 1998, took a voluntary severance package(hereinafter referred to as “VSP”) during 1998 and accordingly left the Department of Education in that year. One of the conditions upon which the VSP was granted to educators, was that such educators who took the VSP could not be employed by the department as an educator again, except under exceptional circumstances. However, since 2002 applicant was employed in various positions on various fixed term contracts as an educator by respondent at various schools in the Western Cape.

[6] *Inter alia*, applicant was employed as an educator at Lantana Primary school in Mitchell’s Plain for the second, third and fourth school quarters of 2004 and again for the first and second school quarters of 2005.

[7] It is common cause that applicant did not return to Lantana Primary School after the end of the second school quarter of 2005, which was the end of June and is no longer employed by respondent. There is a dispute of fact as to whether applicant had a fixed term contract with respondent for the whole duration of 2005 from January until December(which is applicant's version) or whether applicant's fixed term contract terminated at the end of June 2005(which is respondent's version).

[8] Applicant's version is that respondent breached this alleged fixed term contract which was due to end at the end of December 2005, by terminating his services and dismissing him for no valid reason at the end of June 2005. Respondent's version is that since applicant's fixed term contract was only until the end of June 2005, no dismissal or breach of contract took place.

[9] Applicant's further and alternative argument is that even if his fixed term contract was only until the end of June 2005 (which he denies), he had a reasonable expectation that his contract would be renewed after June 2005 until the end of December 2005 and that by not renewing it again for the period between June 2005 and December 2005, there was a dismissal as contemplated in section 186(1)(b) of the LRA. This is also in dispute since respondent's version is that applicant could not have had a reasonable expectation that the contract would have been renewed.

[10] It is common cause that at the time when applicant left respondent's employment at the end of June 2005, his monthly salary was R8842,75 (before deductions) and that he had a clean disciplinary record. Applicant is not asking for reinstatement but asked to be compensated. It was also common cause that in respect of all the relevant positions in which applicant was appointed during 2004 and 2005, his employer was the respondent and not the Governing Bodies of the respective schools.

SUMMARY OF EVIDENCE AND ARGUMENT

Evidence on behalf of applicant

[11] Applicant testified that during 2002 he was employed on a temporary basis at the Eastville Primary School in Mitchell's for 9 months from February until the end of September. He testified that the procedure for his appointment was that he had to complete an application form for each and every quarter and that the principal then completed the other necessary documents.

[12] During the last quarter of 2002 he was employed at Lantana Primary School as an educator on a fixed term contract. He applied for the position, the principal recommended the appointment and he was then appointed by the respondent. Regarding his appointment, respondent never communicated with him directly or explained any procedures pertaining to his appointment.

[13] During the first quarter of 2004 applicant phoned the principal of Lantana and asked him if he knows of any temporary positions. At that stage there happened to be a vacancy for a substitute educator at Lantana and applicant was accordingly appointed from February to March 2004. There was no communication between him and respondent directly with regard to his appointment. All the communication was done through the deputy principal, Mrs. Baker. At the end of March 2004 an educator resigned at Lantana and although the post was advertised the school could not find a suitable candidate. Mrs. Baker, the deputy principal of Lantana then asked applicant if he was interested in the post. Applicant was interested and once again started teaching at Lantana from the beginning of the second quarter of 2004. He remained in the position at Lantana until the end of 2004. Once again there was no communication between applicant and respondent directly regarding his employment and he never received a written employment contract. He also did not need to complete any forms between April and December 2004 regarding his employment.

[14] Close to the end of the 2004 school year, the school principal of Lantana, Mr. Gasant, said to applicant that he would like applicant to come back to Lantana as an educator for 2005 from January until December. There was however no discussions between applicant and Gasant regarding the terms of his employment contract. No mention was made of any consent or approval which respondent had to give for applicant's appointment. Once again applicant did not complete any forms with regard to the temporary position and there was no communication between him and respondent.

[15] After applicant went back as an educator to Lantana in January 2005 he became worried towards the end of January whether he will get paid and approached Mrs. Baker with regard to this concern, who assured him that he will get paid and that everything was arranged. When he asked Baker if he must complete any forms, she said that all the necessary forms had been completed and sent away. Applicant was indeed paid but received no correspondence from respondent regarding his employment. He continued to be employed at Lantana until the end of June 2005.

[16] On 15 June 2005, Gasant called applicant in and said that he was very sorry because he(Gasant) had made a mistake. He mentioned to applicant that when he advertised the two vacant posts at Lantana (one of which was the position in which applicant was appointed on a temporary basis at the time) he(Gasant) did not realise that the new applicants had to start on 1 July 2005. Accordingly he said, since a suitable candidate was indeed appointed on a permanent basis in that position as from 1 July 2005, there will be no post for applicant any longer as from 1 July 2005. Applicant mentioned that he was not happy because he had been appointed for the whole year upon which Gasant said to him "was it not for 6 months?" Applicant replied that it was for the full duration of 2005 and mentioned that it was his intention to take legal advice regarding the matter. Gasant then replied that applicant does have his rights and that the he will stand behind applicant.

[17] Applicant testified that on the basis of the discussion which he had with Gasant during December 2004 to the effect that he would be at Lantana for the whole of 2005, he committed himself financially by sending his daughter to college and writing out 8 postdated cheques. The respondent never communicated with him saying that he will be appointed on fixed term contracts for three month at a time. Before the principal spoke to him on 15 June 2005, he was aware that applicants had come in for interviews for his position. Colleagues has also told him that his contract will come to an end at the end of June 2005. Prior to the principal calling him in on 15 June everyone except him appeared to know that he would not be at Lantana anymore after the end of June 2005. When he heard these rumours he did not go and speak to the principal because he was too upset.

[18] During cross-examination applicant conceded that when he took the VSP during 1998, he knew that in terms of paragraph 8 of the annexure which forms part of Resolution 3 of 1996, which resolution was handed in as document F4-F4 of exhibit “C”, he was not allowed to be re-appointed as an educator again unless there were exceptional circumstances. He testified that he was aware that once an educator has taken VSP, the principal of the school must motivate why there are exceptional circumstances why the VSP educator may be allowed to be re-appointed again.

[19] Applicant at all relevant times knew that there is a difference between a governing body appointment and a departmental appointment of an educator. In the case of an educator appointed by the governing body, the governing body decides to appoint the educator and pays his salary. Where the department appoints an educator, the department pays his salary.

[20] He testified that at the moment the governing body and principal of a school merely nominate the educator for appointment (where it is not a governing body position), whereas prior to 1998 before applicant resigned it was the principal of the school who appointed the educator. Applicant conceded that he is aware that the governing body does not appoint an educator (who is not appointed on a governing body contract) and only makes a nomination. When being asked to look at exhibit “A”, applicant conceded that this document is not an appointment but only a nomination for appointment signed by the governing body. He however stated that in his mind exhibit “A” is a contract.

[21] During cross-examination applicant was confronted with the version of the deputy principal of Lantana, Mrs. Baker, who says that after the nomination for the whole year of 2005 contained in exhibit "A" was sent to the respondent, the school received from respondent a letter contained in document C1 in exhibit “C”, a copy of which was handed by Baker to applicant during the beginning of February 2005. According to this letter the respondent acknowledged receipt of the recommendation to appoint applicant from 1 January to 31 December 2005 but declined to make the appointment because applicant has accepted a VSP. Respondent also mentioned in the letter that applicant is accordingly only appointed from 1 January until 31 March 2005 and that extensions of this contract will only be considered if paragraph 6 of circular 52 of 1997 has been complied with. That would mean that the principal must show exceptional circumstances and show that despite serious efforts a suitable candidate other than an educator who has taken VSP could not be found. Applicant denied that Baker ever handed him this letter or told him about its contents. According to him he has never seen this letter before and has neither been made aware of its contents.

[22] Mr. Petersen asked Applicant to look at document D1 in exhibit “C”, which is a nomination made by the Governing Body of Lantana, recommending to respondent to appoint applicant from 1 April 2005 until 30 June 2005. Applicant indicated that he had never seen this document before and had not been aware of its existence. Asked if he knew that his post was already advertised in March 2005, he said that he heard about it but was not interested because he could not apply. It may be during April 2005 that he heard that the post was advertised.

[23] Applicant admitted that he went to speak to Baker during the first quarter of 2005 and said to her that he will probably not come back to Lantana in the second quarter because he was going into a business venture. The venture however fell through and he therefore returned to Lantana in the second quarter of 2005. He was not made aware of any of the provisions of any of the Education Acts or his conditions of employment when he re-entered the education profession on a temporary basis after 1998. He testified that he was still unemployed at the time of the hearing. He knows that his employer is the respondent but in his mind the principal was the representative of the department. That concluded the evidence of applicant and Mr. Scott called no further witnesses and closed his case.

Evidence on behalf of respondent

[24] Cheryl Baker testified that she has been the Deputy Principal at Lantana primary school for the past 11 years. She has known applicant since 2004 when he was first employed at the school as an educator on a fixed term contract. She is aware that applicant took the VSP. When an educator takes the VSP he cannot be appointed as an educator again unless there are exceptional circumstances. The school must motivate why it wants to appoint the educator who has taken VSP and must prove that the post was advertised but that a suitable person who did not take VSP was not found and that the VSP educator is therefore the most suitable candidate at that moment. That will constitute exceptional circumstances.

[25] The motivation to prove these exceptional circumstances is signed by the principal of the school, the Governing Body and the circuit manager. That motivation is then send together with the Governing Body recommendation/nomination as well as an application form for appointment signed by the applicant/educator to respondent for consideration. The nomination is just a suggestion. The respondent is the one who makes the appointment.

[26] The witness testified that she is the one who communicated on behalf of the Governing Body and management of the school with the respondent regarding applicant's appointments at Lantana. Referring to Exhibit "A" the witness testified that at the start of 2005 the school decided to nominate applicant for the whole year. The reason for the nomination of one year was that there is such a lot of forms to complete to get an educator who has taken VSP appointed that they decided to just take a chance and nominate applicant for the whole year.

[27] She completed Exhibit “A”. The school hoped that applicant would be appointed for the whole year but they knew that they were pushing their luck because he had previously taken VSP. Exhibit “A” is only a nomination and not a contract. This document does not mean that respondent will automatically confirm the nomination. There is no guarantee that the nomination will be confirmed by respondent.

[28] In the week of 14 February 2005 the school received the letter contained in document C1 in exhibit “C” from respondent advising that applicant was only appointed for the first quarter and not for the whole year. She still has the original of this document in her office. Upon receipt she immediately made a copy of this letter and handed a copy to applicant, because it affects him. After handing the letter to applicant, applicant never spoke to her about the contents of the letter,

[29] During the first quarter of 2005 applicant mentioned to her that he will not be coming back to Lantana in the second quarter because he is going to start some business venture. Then at the end of the first quarter applicant approached her again and said that if the post is still available for the second quarter he will stay at Lantana because the business venture had fallen through. The witness then told applicant that the school would nominate him again for the second quarter until the end of June 2005. On that basis applicant was then nominated again by the Governing Body for the second quarter from 1 April until 30 June 2005, as per document d1 in exhibit “C”.

[30] Applicant only completed one application form for appointment as an educator in March 2004, handed in as exhibit "F". The witness testified that she is allowed to make copies of this form every quarter when the school sends in a recommendation for applicant’s appointment, because the details on the form did not change. Applicant was however always appointed for a closed period of one school quarter (3 months) at a time on a fixed term contract. During 2004 he was nominated and appointed three times for three quarters and in 2005 he was nominated and appointed twice for the first and the second quarter.

[31] Applicant’s position was advertised during March 2005. The staff was informed by the principal that there are advertisements for the two vacant posts and both the witness and applicant was present when it was announced on more than one occasion that the vacancy lists are available at the school.

[32] The vacancy list reached the school during April. The vacancy list also states when the position becomes available - in this case it was 1 July 2005. Applicant would have known that his post is one of the posts being advertised because the school only had the two vacancies and applicant was temporarily appointed in the one position.

[33] When it was put to the witness during cross-examination that applicant had taught at Lantana during 2002, the witness denied this and said that he first taught there in 2004. The respondent never sent any correspondence similar to document c1 in exhibit "C" to the school relating to applicant's appointments during 2004 because before 2005, applicant was always nominated for one quarter at a time. For the period of April to June 2005 a similar letter was also not received from respondent because the school only nominated applicant for that one quarter and not for the whole year as they tried to do in the beginning of 2005. During 2005 the school did not recommend applicant for any period beyond June 2005 because in March 2005 the school already knew that applicant's position was advertised for 1 July 2005. The recommendation for the second quarter was approved by respondent and this was communicated to the witness by respondent upon enquiry during April 2005. She then verbally advised applicant that his appointment had been approved for the second quarter until the end of June 2005. The witness was adamant that it was unreasonable for applicant to have expected that his contract would be renewed after June 2005 because he was fully aware that his post was being advertised for 1 July 2005. Applicant's contract in respect of the second quarter which he was supposed to sign only arrived at the school in August 2005, when applicant had already left.

[34] Nicholas John Bailey testified that he is the supervisor at the appointments division for College and Schools based educators at the Western Cape Provincial Department of Education (Respondent). He ensures that appointment of educators falls within the statutory provisions. He is responsible for the actual appointment of educators and personally dealt with applicant's appointments. He appointed applicant on a fixed term contract for the second quarter of 2005 until the end of June 2005. With reference to the various circulars and resolutions which formed part of exhibit C, he explained that educators such as applicant who took the VSP are not supposed to be employed in schools by respondent at all. Only in exceptional circumstances where no other suitable candidates are available, may someone such as applicant be considered for appointment and then only for appointment on a fixed term contract of one quarter at a time.

[35] Even if a Governing Body nominates a VSP educator for a period of 12 months, respondent will limit his fixed term contract to one quarter at a time. Exhibit "A" is only a nomination by the Governing Body and not a contract. Document C1 in exhibit "C" is the standard type of letter respondent will send to a school who has nominated a VSP educator for or a whole year. The purpose of the letter is to warn the school that they are going beyond its powers because a VSP educator may not be appointed for more than one quarter at a time. Exhibit "D" which suggests that applicant was appointed by respondent for a 6 month period, is not a document produced by respondent and is probably just a pro forma document which the school used to nominate applicant and to show applicant what his contract of employment might possibly look like should respondent decide to appoint him. After the witness was excused respondent closed its case.

Closing arguments

[36] On behalf of applicant, Mr. Scott submitted that the evidence shows that applicant was appointed for a fixed term until the end of December 2005. He further argued that even if there was not actually a contract until the end of December 2005, then applicant would in any event have had a reasonable expectation to be employed until end of December 2005. Accordingly he submitted, a dismissal which was unfair did indeed take place. On behalf of respondent, Mr. Petersen argued that there was no contract beyond June 2005 and that there was also no reasonable expectation of a renewal. Therefore he argued no dismissal took place.

ANALYSIS OF THE EVIDENCE AND ARGUMENT

[37] The main issue in dispute is whether applicant was dismissed by respondent. In terms of section 192 of the LRA the *onus* is on applicant to prove on balance of probabilities that there was indeed a dismissal. In order to decide whether there was a dismissal, I must firstly determine whether applicant was employed by respondent on a fixed term contract which was due to end at the end of December 2005 as opposed to the end of June 2005. If the contract was due to end at the end of December 2005, there would indeed have been a dismissal at the end of June 2005 in terms of section 186(1)(a) of the LRA. If I find that applicant was employed on a fixed term contract that was due to end at the end of June 2005, I must determine whether there was not perhaps a dismissal in terms of section 186(1)(b) of the LRA in that applicant reasonably expected respondent to renew his contract until the end of December 2005.

Was there a contract which was due to end at the end of December 2005?

[38] 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 page 24 and the authorities referred to by the learned author in footnote 5*). 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] On perusal of sections 16 and 20 of the South African Schools Act No 84 of 1996(hereinafter referred to as "SASA"), sections 3 and 6 of the Employment of Educators Act 76 of 1998(hereinafter referred to as "EEA") and clause 3 of the Personnel Administrative Measures (PAM), the process of appointment of educators who are appointed in public schools in positions which are not created by the Governing Body of the school, is very clear and can be summarised as follows:

39.1 Appointments can only be made by the Head of the Provincial Department of Education(see section 6 of EEA);

39.2 An appointment may however not be made without the recommendation of the governing body of the particular school(see section 6(3)(a) of EEA);

39.3 The governing body of the particular school only has powers to recommend such an appointment and has no powers to make an appointment(see section 20(1)(i) of SASA and 16(1) of SASA), since only the employer department makes the decision to appoint (see clause 3.4 of Chapter B of PAM);

39.4 The Head of the Provincial Department of Education shall be the employer of all educators so appointed for all purposes of employment(see section 3(1) of EEA), provided that the Minister is the employer for salary purposes(see section 3(2) of EEA);

[40] The Western Cape Provincial Department of Education, like any corporation or juristic person can only act through human agency. The particular individual who is entrusted in terms of EEA and SASA with the authority of appointing and employing educators in public schools, is the Head of the Provincial Department of Education. It is therefore only him, or his duly authorised agent, who may contractually bind the respondent with regard to employment contracts concluded between an educator and the provincial department of education. A principal of a public school is merely entrusted with the management of that school(see section 16(2) of SASA) and the governing body is merely entrusted with the governance of the school(see section 16(1) of SASA). In terms of SASA and EEA neither the governing body nor the principal of a school is authorised to appoint educators (except in the case of governing body posts which is not relevant for purposes of this case). Neither is the governing body or the principal an agent for the provincial department of education in terms of EEA and SASA for the purposes of appointing and employing educators.

[41] The undisputed evidence of Nicholas John Bailey is that he is responsible for the appointment of educators in the Western Cape. From his evidence it is clear that he is not the Head of the Western Cape Provincial Department of Education, but it must be logically inferred from his evidence that the Head of Education has delegated powers to appoint educators to Bailey because he is indeed responsible for such appointments. There is no evidence before me that any other person(including Gasant) had been duly and legally mandated to make such appointments and on the available evidence I must therefore find that Bailey is the only person who is legally capable of appointing educators such as applicant. According to his evidence applicant was never appointed by respondent on a fixed term contract until the end of December 2005. According to the witness the applicant's last fixed term contract with respondent was approved and concluded for the second quarter of 2005 up to the end of June 2005. This evidence is corroborated by Baker.

[42] Applicant's main arguments as to why he says that he was appointed on a fixed term contract due to end at the end of December 2005, is firstly the undertaking which the principal allegedly gave him during 2004 and secondly the fact that exhibit "A" mentions that applicant is to be appointed from January until December 2005.

[43] Even if the principal did make the alleged statement during December 2005, that still does not mean that a contract was concluded between applicant and respondent for a the full duration of 2005. Despite what applicant may or may not have thought regarding the principal's roll in his appointment, the reality is that in terms of the EEA and SASA, the principal of a school does not have any powers to enter into an employment contract on behalf of respondent with applicant or any other person.

[44] Furthermore no evidence was placed before me to enable me to find that the school principal was actually duly mandated by the Head of the Western Cape Provincial Department of Education to enter into contracts on his behalf. The onus in this regard once again was on the applicant and since no such evidence was led, I must find that the principal had no actual authority to bind respondent in any manner regarding any contract between applicant and respondent.

[45] Regarding exhibit "A", it is clear that this document is merely a nomination for an appointment by the governing body of the school. The document clearly states in capital letters that it is a nomination. How applicant could have ever thought that this document constituted a contract between him and respondent, is beyond my understanding. What applicant might or might not have thought does in any event not distract from the fact that in terms of the EEA and SASA the Governing Body has no power to appoint educators and may only make a recommendation which may be accepted or rejected by respondent. The document can therefore not be regarded as a contract, despite what applicant may think in this regard.

[46] Objectively it is therefore clear to me that respondent never actually agreed to appointing the respondent on a fixed term contract until 31 December 2005. That being the case there was no *consensus* which is the basis for any contract, that applicant's appointment will be until 31 December 2005. From a contractual point of view, exhibit "A" together with the principal's motivation and the copy of applicant's application could at the most have constituted an offer which could either be accepted or rejected by respondent. Only if this offer was accepted by the department would a contract for a fixed period of 12 months have come into operation.

[47] Both Baker and Bailey testified that respondent did not accept the nomination contained in exhibit “A” and that it instead only appointed applicant for a fixed term period of 1 January 2005 until 31 March 2005 as will more fully appear from document C1 contained in exhibit “C”. This document clearly shows that the offer which was made to the respondent in exhibit “A” was rejected by respondent in the sense that it did not appoint applicant until 31 December 2005. Instead respondent indicated that it would appoint applicant only until 31 March 2005. This in effect constituted a counter offer, which could either be accepted or rejected by applicant. Baker testified that she handed this document to applicant personally. Applicant denies that he ever received this document.

[48] As to whether Baker actually handed the document to applicant or not I am faced with two mutually destructive versions, both of which cannot be the truth. Either applicant or Baker must lie regarding this aspect. Where there are opposing versions in a civil case, the version which is more probable must be accepted. However there are no probabilities which could assist me in deciding who is lying and who is telling the truth on this point. I cannot really see what Baker could possibly gain from telling lies regarding this, but that in itself is certainly not enough to make a finding as to who is lying and who is telling the truth. At the most I can say that the probabilities are evenly balanced regarding this aspect and does not assist me in finding the truth on this point. Where there are two mutually destructive versions, as we have in this case, and where the probabilities are evenly balanced, a court or tribunal may only find for the party upon whom the onus rests, if it is satisfied on a balance of probabilities that the story of the party upon whom the onus rests is true and the other is false(See *National Employers Mutual General Insurance Association v Gany 1931 AD 187 at 189*).

[49] There is no basis for me to reject the evidence of Baker. She was a good and satisfactory witness and gave her evidence in a clear and satisfactory manner. There was no motive on her part to fabricate evidence. Having said this, and since the onus is on applicant, I must find that applicant has failed to prove that his version and not that of Baker must be accepted. I accordingly accept that Baker did in fact hand to applicant a copy of document C1 in exhibit “C” during the week of 14 February 2005. By not responding to this letter and continuing to remain in the employment of the respondent, applicant accepted the offer of employment for the first quarter of 2005 as contained in this document and a valid and binding contract for the period of 1 January 2005 until 31 March 2005 was concluded.

[50] With regard to the second quarter of 2005, the evidence of Baker and Bailey is that a recommendation was indeed made by the governing body and the school to appoint applicant for the second quarter until 30 June 2005 and that this recommendation was in fact accepted by respondent who appointed applicant until 30 June 2005. Baker testifies that prior to the recommendation being send to respondent she advised applicant that he would be nominated for the second quarter of 2005. After she made enquiries early during the second quarter of 2005 she once again advised applicant that respondent had appointed him for the second quarter.

[51] Once again and for the same reasons as mentioned in paragraphs 48 and 49, I find that Baker's version must be accepted on this point. The onus is on applicant and since there are no probabilities which indicate that his version on this point is more probable than Baker's version together with the fact that there is no reason for me to find that Baker is lying and applicant is telling the truth on this point, applicant has once again failed to prove that I must accept his version and not that of Baker on this point(See *National Employers Mutual General Insurance Association v Gany supra)*.

[52] In the circumstances I must conclude that there was no actual meeting of the minds between the parties to the effect that applicant would be employed until 31 December 2005 and that objectively speaking respondent in respect of the 2005 academic year only agreed to appointing applicant for the first quarter of 2005 and thereafter again for the second quarter of 2005 until 30 June 2005.

Was a contract from January to December 2005 created by estoppel?

[53] Although the evidence objectively shows that there was not ever any actual agreement between the applicant and respondent to the effect that he will be appointed until the end of December 2005 as opposed to the end of June 2005, that is not the end of the enquiry yet. If a person represents either to specific persons or to persons generally that another person is his special or general agent or permits such person to do so or to act as such, he is not permitted to allege that the apparent authority never existed to the prejudice of any third party who has reasonably and in good faith acted upon it(see *Monzali v Smith 1929 AD 382 at 385*). This is referred to as agency by estoppel. The question which therefore needs to be answered is whether respondent can be held liable on account of the conversation which Mr Gasant, the principal had with applicant during December 2004.

[54] For a contract to have been created between applicant and respondent through estoppel on account of the statement of Gasant, at least the following requirements need to me met:

54.1 The words uttered by Gasant must be shown to be a clear offer of employment from January until December 2005;

54.2 Applicant must have believed that Gasant is the agent for respondent in employing and appointing educators;

54.3 Respondent (not Gasant) must through words or conduct have represented that Gasant has authority to bind respondent in the employment and appointment of educators;

54.4 Applicant must reasonably have relied on such misrepresentation made by respondent;

54.5 Applicant must have acted to his prejudice on the faith of such misrepresentation

(see *Monzali v Smith supra; Connock's (SA) Motor Co Ltd v Sentraal Westelike Ko-operatiewe Maatskappy Bpk 1964 (2) SA 47 (T) at 39-53; Strachan v Blackbeard & Son 1910 AD 282; Weedon v Bawa 1959 (4) SA 735 (D); Saambou –Nasionale Bouverening v Friedman 1979 (3) SA 978 (A); Van der Merwe et al Contract General Principles page 29*).

[55] I have listened to the tapes again and according to applicant's evidence Gasant said to him during December 2004 that he would like applicant to come back to Lantana for the next year from January till December. Nothing more was said. The question then is whether Gasant contractually bound respondent until December 2005 through these word by estoppel.

[56] In the first place there is no evidence on record that respondent ever made any representation by words or conduct to applicant or anyone else that Gasant has authority to bind respondent in the employment and appointment of educators. This is an essential requirement of estoppel.

[57] More importantly before a party may succeed on estoppel, it must be shown that he was reasonable in his reliance on whatever representation the other party have made. Even if respondent did make any type of representation through words or conduct that Gasant is its agent for purposes of concluding employment contracts, applicant's belief that Gasant was respondent's agent for such purposes cannot be said to have been reasonable. Reasonableness in this contexts is not reasonableness viewed in isolation but the reasonableness of a man placed in applicant's position(see *Monzali v Smith supra at 386*). The question is whether the reasonable educator in applicant's position would have thought that Gasant has authority to conclude employment contracts on behalf of respondent.

[58] In terms of our law a person who engages in a specific area of commerce, trade, occupation or profession, is expected to acquaint himself with all the relevant legal principles and statutory provisions which are applicable in that particular area(*see Reynolds v Kinsey 1959 (4) SA [FC] 50 at 65F; S v De Blom 1977 3 SA 513 (A); S v Waglines 1986 (4) SA 1135 (N); S v Longdistance 1990 2 SA 277 N at 283F-I*). To this extent the maxim *ignorantia iuris non excusat* (ignorance of the law is no excuse) still applies. A person who fails to acquaint himself in this manner acts negligently. He is also unreasonable if he wants to rely on his ignorance to justify an expectation which was allegedly created (see also *Craig Administrative Law (5th ed) page 651*).

[59] That applicant made no attempts to acquaint himself with the relevant statutory provisions applicable to educators, is clear. He admits that he has almost no knowledge of EEA or SASA. What is even more shocking is the fact that he says that although he has heard of PAM and the Code of Profession Ethics for Educators he is not familiar with the contents of these documents and has never read it. The Code of Profession Ethics for educators is a very important document. In fact this code itself imposes a duty on every educator to familiarise himself with the provisions of the code. This I would think is a very basic document which each and every educator should be familiar with. The fact that applicant, after having been teaching again for almost two years, is not even aware of the contents of this document which only consists of two pages, is a clear indication to me that applicant showed no interest in making any attempts to acquaint himself with the relevant legislation and regulations applicable to his profession. This is not how the reasonable educator would conduct himself.

[60] The reasonable educator who has been out of the profession since 1998, would when he re-enters the profession several years later, ensure that he is aware of all developments. The reasonable educator will have a thorough knowledge of the basic principles of EEA and SASA. Accordingly the reasonable educator will know that respondent is his employer, he will know that respondent makes appointments and he will know what powers and authority the principal of a school and the Governing Body have. The reasonable educator who is appointed on a fixed term contract will never think that when a school principal says to him that he wants him back at the school for the entire period of the next year, the school principal has any authority to bind respondent. The reasonable educator would know that such words uttered by a principal is only a wish, which the principal is expressing and that although the school principal and the Governing Body may recommend such an appointment, the final decision is with respondent. The reasonable educator will know that neither a school principal nor a governing body has any powers to appoint educators but only have recommendation powers. He will know all of these things because he would in fact have acquainted himself with EEA and SASA.

[61] Viewed from this perspective, applicant could not reasonably have thought that Gasant has any authority to make any binding offers of employment on behalf of respondent. It is possible that applicant may have thought that Gasant has those powers, but it was certainly not reasonable to think so. Had applicant not been so careless and negligent in not acquainting himself with the relevant statutory provisions, he would have known that Gasant has no powers to enter into any employment contracts on behalf of respondent. Accordingly applicant only has himself to blame that he apparently committed himself financially on the basis of what Gasant had told him. In the circumstances I am satisfied that applicant cannot rely on estoppel because the requirements for a successful application of estoppel have not been met. Hence I find that no fixed term contract was ever concluded between applicant and respondent beyond 30 June 2005. Accordingly applicant did not succeed in proving that there was a dismissal in terms of section 186(1)(a) of the LRA.

Did applicant have a reasonable expectation that his contract will be renewed?

[62] A dismissal can also take place where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms where the employer failed to renew the fixed term contract(see section 186(1)(b) of the LRA). The onus of proving a reasonable expectation rests on the employee(see *Ferrant v Key Delta (1993) 14 ILJ 464 IC*).

[63] I respectfully agree with Grogan where the learned author remarks as follows:

> The notion of reasonable expectation suggests an objective test. The employee must prove the existence of facts that, in the ordinary course, would lead a reasonable person to anticipate renewal(see *Grogan Workplace Law page 110-111*).

[64] There are numerous criteria which could be considered in order to establish whether such a reasonable expectation existed. These include, but are not limited to: promises made by the employer, prior practice where the employer has habitually renewed the contract, overt conduct by the employer, custom and practice in the sector, the nature of the employer's business, continued availability of the post after non-renewal, the purpose and reason for the fixed term contract, failure to give notice of non-renewal, arranging the employee's work schedule for future, the reasons why the contract is not renewed(see *Grogan supra; Dierks v University of SA [1999] BLLR 304 (LC); Du Toit et al Labour Law through the Cases LRA8-4 and further; Du Toit et al Labour Relations Law page 368-369*)

[65] That a fixed term contract had been renewed a number of times is not in itself indicative of the existence of a reasonable expectation of renewal(See *Grogan supra page 111*). Although applicant's fixed term contract had been renewed several times, this must be seen against the background of him having taken the VSP. The applicable resolutions which governs the VSP and of which applicant was aware, make it clear that once an educator has taken a VSP, he is actually not supposed to be employed in the public schools at all unless there are exceptional circumstances. Where a VSP educator is appointed again on a fixed term contract, it should in my view be clear to him that he is back in the public education system on a very temporary basis only until such time as a suitable candidate can be permanently appointed in his place. Under these circumstances I have serious doubts whether an educator who has taken the VSP, can ever, if he succeeds in being appointed on a fixed term contract by respondent, have a reasonable expectation of renewal of the contract, even if his fixed term contract had been renewed on several occasions in the past. The discussion which Gasant had with applicant towards the end of December 2004 could in my mind also not have created such a reasonable expectation of renewal. As I have already indicated earlier, Gasant had no authority to offer applicant an appointment for the full duration of 2005.

[66] In *Malandoh v SABC [1997] 5 BLLR 555 (LC)* one of the factors which the Labour Court took into account in finding that the employee could not have a reasonable expectation of renewal was the fact that the persons who promised the employee a permanent position, had no authority to do so. As I have explained before, a reasonable educator in applicant's position would in any event have been aware of the relevant provisions of EEA and SASA and would have known that Gasant had no authority to make promises on behalf of respondent. Applicant cannot blame respondent for his negligence in not acquainting himself with the provisions of EEA and SASA and only has himself to blame if he seriously thought that Gasant could make any binding promises to him on behalf of respondent.

[67] Whether applicant ever really thought that Gasant had such powers, is in any event doubtful:

67.1 Applicant testified at one stage that he viewed the remarks of Gasant in December 2004 as a "gentleman's agreement". Why did he mention that it was a gentleman's agreement and not an agreement?

67.2 Furthermore upon a question from myself as to whether applicant thought that Gasant was the representative of respondent, applicant said that everybody thinks that the principal is "not their employer but that he is liaising between the staff and the department". There is certainly a huge difference between liaising between parties and acting as an agent. In the first scenario the person merely acts as a conduit between parties whereas in the second scenario the person acts on behalf of one of the parties. Applicant is not an ignorant person. He is a qualified educator and would surely know the difference.

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67.3 At some stage during his evidence applicant also said that although the principal of a school was the one who made appointments before applicant resigned in 1998, things have changed.

[68] Irrespective of whether applicant actually thought that Gasant had the authority to conclude contracts on behalf of respondent, I am satisfied that the remarks allegedly made by Gasant during December 2004 could not have created a reasonable expectation of employment for the full duration of 2005.

[69] Any reasonable educator would have known that Gasant's remarks could be no more than the expression of a wish, that the principal of a school only has powers to recommend the appointment of an educator and that it was for respondent to decide whether applicant will be appointed and for what period.

[70] The contents of exhibit "A" is neither here nor there. Apart from the fact that it clearly states that it is only a nomination, the reasonable educator should know that it is only a recommendation by the governing body, because the reasonable educator would be aware of the provisions of EEA and SASA. Accordingly exhibit "A" could not have created any reasonable expectation that applicant would necessarily be appointed for the period suggested by the governing body in the nomination.

[71] I have already found that I accept the evidence of Baker that a copy of document c1 of Exhibit "C" was handed to applicant during the week of 14 February 2005. After receiving this document it should have been very clear to applicant that he was appointed only for the first quarter of 2005 and that the principal's assurances during December 2004 could not be relied on. Yet he made no enquiries. In fact he made arrangements to enter into a business venture during the second quarter of 2005 and not to return to Lantana after the end of the first quarter.

[72] I have also found that I accept the evidence of Baker that applicant was told by her towards the end of the first quarter of 2005 that she would apply for an extension of his contract for the second quarter of 2005, that applicant's appointment had been confirmed by respondent for the second quarter and that she then advised applicant that his contract was approved until the end of June 2005. In the circumstances there could not have been any doubt in applicant's mind that his contract was only extended until the end of June 2005.

[73] Applicant would have been aware that because he took the VSP, his contract could only be extended if no other suitable candidates were available because a VSP educator like himself is only appointed in exceptional circumstances. It is not as if applicant was appointed in a position which required an exceptionally out of the ordinary high degree of skill, training and education such as a brain surgeon where very few suitably qualified people are available for the position.

[74] It must therefore have been clear to applicant that a suitably qualified candidate for his position could be appointed at any moment and that it would be unrealistic to expect that he would remain in the position for more than a year an a half without a suitably qualified person being found to fill the position during this period.

[75] Applicant's own evidence was that he did hear rumours that his post was being advertised and that this might have been during April 2005. He also testified that he also saw that candidates for the vacant posts were being interviewed either during April or May 2005. Under these circumstances much cannot be made of the fact that respondent did not give applicant notice of non-renewal. Judging from the evidence of Baker which I accept, applicant should have known that his contract would probably not be renewed again. His post was being advertised. He saw that candidates were being interviewed for the position. He must have realised that a suitably qualified candidate would more probably than not be appointed in his place. Whether applicant was actually aware of his post being advertised for 1 July 2005 or not is however not really that relevant. In my view applicant should continuously have been aware that he is actually not supposed to be employed as an educator in a public school because he took the VSP and that he is just at Lantana until a suitable candidate could be found for the position he was occupying on a temporary basis. The reality is that that could unexpectedly happen at any moment

[76] On a *conspectus* of all the evidence, it is my view that applicant has failed to prove on a balance of probabilities that there was any objective basis for him to have had any reasonable expectation that his fixed term contract with respondent would be renewed beyond June 2005. Accordingly I find that no dismissal took place in terms of section 186(1)(b) of the LRA.

COSTS

[77] With regard to costs Mr. Petersen argued that applicant was vexatious in pursuing his claim and requested that applicant should be ordered to pay respondent's costs as well as the arbitration costs. Although the general principle in the civil courts is that costs follow the result, meaning that the successful party is entitled to a costs order in his favour, this is not a rigid rule. Costs is a matter of discretion which should be approached in a fair manner.

[78] This tribunal, like the CCMA exclusively deals with social legislation. I am of the view that parties should not be discouraged from enforcing or defending their rights under social legislation by the possibility of facing cost orders should they loose. This tribunal is intended to be a quick, efficient and inexpensive forum where parties, no matter how bad their financial position may be, should feel comfortable to pursue cases without the fear of being financially crippled by cost orders.

[78] The following quotation from *Skhosana and others v Roos* 2000 (4) SA 561 (LCC) page 574 para 30, although handed down by the Land Claims Court in the context of the Extension of Security of Tenure Act 62 of 1997, seems equally applicable when dealing with matters referred to the CCMA and this tribunal in terms of the Labour Relations Act:

> "In considering what costs order will be appropriate in this matter, it must be borne in mind that the applicants have attempted to enforce rights under social legislation. In such cases this Court has in the past usually not made any costs order...This is because parties must not be discouraged from enforcing or defending their rights under such legislation for fear of running the risk of having to pay the costs of their adversaries."

[79] There may be cases where cost orders are indeed appropriate taking into account the general principles applicable to costs orders, but I think that to transplant the rule which is applicable in the civil courts being that costs follow the suit, as a general rule into proceedings before the CCMA and this tribunal, is somewhat unrealistic and would undermine the purpose of this tribunal when dealing with the Labour Relations Act, namely accessible social justice to each and every person irrespective of his or her financial position. The approach that costs do not automatically follow the result in employment law unless there are special or exceptional circumstances such as mala fides, unreasonableness and frivolousness has also been endorsed by the Supreme Court of Appeal(see *Chevron Engineering (Pty) Ltd v Nkambule 2004 (3) SA 495 at 512 para 42*).

[80] I am of the view that the applicant was not *mala fide*, unreasonable, vexatious or frivolous in pursuing this matter and that he acted *bona fide* in doing so, honestly albeit mistakenly, believing that he had good prospects of success.

[81] In the circumstances it would not be just and equitable to make a costs order and I therefore decline to make such order.

AWARD

I accordingly make the following order:

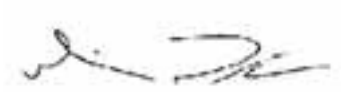
1. In terms of applicant's fixed term contract with respondent, his employment with respondent was due to end and did end on 30 June 2005.

2. Applicant had no reasonable expectation that his fixed term contract with respondent would be renewed after 30 June 2005.

3. Applicant was not dismissed by respondent in terms of section 186 of the LRA.

4. Applicant is not entitled to any relief in terms of the LRA.

5. No order as to costs is made.



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Adv D P Van Tonder BA LLB LLM

Arbitrator/Panelist: ELRC

Appearances:

For the applicant:	Mr. P Scott (practising attorney)
For the respondent:	Mr. K Petersen (employee of respondent)