



ARBITRATION AWARD

Panellist/s: Paul Kirstein
Case No.: PSHS503-10/11
Date of Award: 3-May-2011

In the ARBITRATION between:

**IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL
BARGAINING COUNCIL (HELD AT CAPE TOWN)**

CASE NO: PSHS503-10/11

In the matter between

DKJ ABRAHAMS

Applicant

and

Respondent

**DEPARTMENT OF SOCIAL DEVELOPMENT:
WESTERN CAPE PROVINCIAL GOVERNMENT**

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

1.

The matter was set down for arbitration on 15 April 2011 at the Regional Office of the respondent in Cape Town. The applicant was represented by attorney WD Field. The respondent was represented by Adv. CS Kahanovitz SC. The applicant submitted a bundle of documents marked bundle "A". The respondent submitted a bundle of documents marked bundle "B". The arbitration was mechanically recorded. The parties submitted written heads of argument.

ISSUE IN DISPUTE

2.

The applicant contends that his dismissal on 13 September 2010 was substantively and procedurally unfair. In paragraph 5.2 of the applicant's referral document of the dispute to the PHSDSBC the applicant *inter alia* stated the following:

"5.2 No valid reason for my dismissal existed; and

5.3 No valid reason for the non-renewal of my contract of employment on the same terms and conditions exists."

The applicant seeks compensation.

SUMMARY OF EVIDENCE

3.

The applicant referred to his background and employment career:

- 3.1 In 1998 the applicant was appointed as Media Liaison Officer: Minister P Meyer in the Ministry of Transport and later also Sport and Creation: Western Cape;
- 3.2 In 2002 the applicant was appointed as Media Liaison Officer: Minister P Meyer in the Ministry of Health: Western Cape;
- 3.3 In 2009 the applicant was appointed as Media Liaison Officer: Minister IH Meyer in the Ministry of Social Development: Western Cape.

The applicant referred to the contract of employment entered into between himself and the Western Cape Provincial Government: Department of Social Development. The applicant referred to various clauses in the contract of employment and to his job description. The applicant's gross salary at the date of termination of his services was R438 283.95 per annum. On 13 September 2010, P de Lille was sworn in as Minister of the Department of Social Development: Western Cape. Dr IH Meyer was transferred to the Department of Sport and Recreation. On 13 September 2010 the applicant

received a letter of termination of service. The applicant received a temporary contract appointment on 13 September 2010 for the period 13 September 2010 up to and including 12 October 2010. The applicant did not sign the new contract of employment. The applicant indicated that there was no discussion with him regarding the termination of his contract or the extension thereof prior to 13 September 2010. The applicant indicated that he had an expectation to be transferred with Minister IH Meyer to the Department of Sport and Recreation because in the past he was transferred and that he had a good relationship with Minister IH Meyer. The applicant indicated that he expected that his contract would have run for a five year term until the next election. Three years and nine months remained of his employment contract. The new Minister P de Lille needed a Media Liaison Officer. The applicant received remuneration until 12 October 2010. The applicant seeks compensation.

4.

TM Southgate, a Service Manager: HR Management with twenty-four years of experience in the Public Service testified on behalf of the respondent. Southgate referred to Chapter 8 of the Handbook for Members of the Executive. Ministers are allowed to appoint private staff which includes a Media Liaison Officer. The private staff of a Minister is appointed without the normal recruiting process. The duration of the contract is linked to the period which the Minister serves in the department. Southgate indicated that it is a conventional practice that the private staff do not

automatically follow the Minister to a new department. The Minister can appoint new personnel. The incoming Minister is entitled to appoint personnel in terms of chapter 8 of the Handbook for Members of the Executive. Southgate referred to the role playing allowance paid to private office staff members. Southgate confirmed that apart from the applicant and another private staff member, Minister IH Meyer took the rest of his private office staff. Southgate is not aware of the reason why the applicant was not appointed by IH Meyer in the new portfolio.

ANALYSIS

5.

It is common cause that the applicant entered into a contract of employment with the Western Cape Provincial Government: Department of Social Development to conduct duties as a Media Liaison Officer. Clause 5 of the contract of employment *inter alia* reads as follows:

"5.1 Irrespective of the date or dates of signing of this agreement by the parties, it is agreed and recorded that the agreement shall be deemed to be of force and effect from 11 May 2009 and shall automatically lapse on the date that the Member of the Executive Committee relinquishes the portfolio or otherwise vacates his/her office.

5.2 The employee hereby expressly acknowledges and accepts that the agreement will terminate automatically upon expiry of the agreed period."

It is common cause that the applicant was appointed by Minister I Meyer as Media Liaison Officer in the Department of Social Development. On 13 September 2010 P de Lille was appointed as the MEC for the Department of Social Development: Western Cape. On 13 September 2010 Minister I Meyer was appointed as the MEC for the Department of Sport and Recreation. It is therefore the respondent's contention that the MEC relinquishes his portfolio and/or vacated his office at the Department of Social Development: Western Cape and therefore the applicant's services were automatically terminated on the occurrence of such an event. The respondent, *inter alia*, relies on the entitlement of an MEC to appoint private office staff that includes a Media Liaison Officer. Clause 1.1 of the mentioned Handbook reads as follows:

"1.1 Executing Authorities may utilise the above-mentioned guideline for the Private Offices of Members provided that staff be appointed either:

1.1.1 on a contract linked to the political term of office of the Executing Authority or Deputy Minister concerned, as well as the contracts envisaged in section 12A (3)(a) of the Public Service Act and conditions laid down by the Cabinet;
or

1.1.2 as full-time public servants, provided that they utilise the job evaluation system and ensure that there are sufficient

funds available on the approved budget of the relevant Department for the creation of post(s)."

The applicant was appointed on a contract as referred to in clause 1.1.1 of the Handbook. Clause 1.1.1 specifically refers to the political term of the MEC. A political term as was placed on record at the arbitration is a period of five years. Clause 5.1 of the contract of employment does not state that the duration of the contract of employment of the applicant is linked to the political term and/or specifically Minister I Meyer. There is therefore a contradiction between clause 5.1 of the contract of employment and clause 1.1.1 of the Handbook for Members of the Executive. It is common cause that I Meyer either relinquished the portfolio as MEC of the Department of Social Development: Western Cape and/or vacated his office. It is further common cause that I Meyer's political term as stated in clause 1.1.1 will only expire in April 2014. Having considered the argument of the parties representatives together with the case law referred to in the heads of argument it is determined that the contract of employment and the duration thereof did not exist independently of the term of office of I Meyer. The employer in the contract of employment is specifically cited as Western Provincial Government, Department of Social Development. It is therefore determined that the contract of employment indeed terminated on 13 September 2010 when I Meyer vacated his office as MEC of the Department of Social Development: Western Cape. A similar decision was made in the case of **POTGIETER V GEORGE MUNICIPALITY** [2011] 32 ILJ 104 (WCC) where

the Court found that the contract linked the employee's fixed contract to the term of office of the Executive Mayor and determined the date of commencement of the employee's employment as well as the date of termination of the employment. In the mentioned case the employee's claim was founded on allegations of repudiation of the contract of employment and not an unfair dismissal in terms of the Labour Relations Act, 66 of 1995 ("LRA"). The applicant's representative raised the point in argument that the contract of employment of the applicant is unconstitutional and referred to case law supporting his argument. As counter argument the respondent's representative relied on the case of **SINDANE V PRESTIGE CLEANING SERVICES** [2010] 31 ILJ 733 (LC). I agree with the argument of the respondent's representative that the **SINDANE** decision is decisive on the specific point. The contract of employment of the applicant is further based on statutory authority which has not been declared unconstitutional.

6.

The respondent was entitled to terminate the contract of employment on 13 September 2010 on the basis that Minister I Meyer vacated his office as MEC of the Department of Social Development: Western Cape. The applicant's case is not only based on the termination of his contract of employment but also on Section 186(1)(b) of the LRA. Section 186(1)(b) of the LRA recognises that an employer's failure to renew a fixed term employment contract may constitute a form of dismissal and thereby offers an employee some measure of protection against

potential abuse. Section 186(1)(b) of the LRA provides that it would constitute a dismissal if the 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 the contract on less favourable terms or did not renew the contract at all. It is clear from arbitration awards and case law relating to Section 186(1)(b) of the LRA that a number of factors are taken into account to determine whether a reasonable expectation existed. The enquiry is not just whether the employee had an expectation but also entails a detailed analysis of the reasonableness of the expectation. It is expected of an employee that is relying on Section 186(1)(b) of the LRA to prove that there was some conduct, statement, incident or event that gave rise to the expectation. The applicant's expectation is based on the following:

- the applicant had been the Media Liaison Officer for MEC Piet Meyer, Dr I Meyer's father during the period 1998 to 2003. During this period MEC Piet Meyer had been the MEC for Transport and Public Works and Recreation and Health. The applicant followed MEC Piet Meyer from ministry to ministry during this period. Despite the wording of the contract the applicant expected the same to happen in relation to Dr I Meyer who was transferred from Social Development to Sport and Recreation;

- the uncontested evidence of the applicant is that he was appointed by Minister I Meyer and that Meyer advised him that the contract would be for the political term of the Provincial Government, namely until the next Provincial election on or about the end of April 2014. This version is confirmed to an extent in clause 1.1 of the Handbook referred to above which clearly states that a contract is linked to the political term of office of the Executive Authority;
- during cross-examination of the applicant an attempt was made to convince the applicant that the respondent had a performance issue with the applicant. The respondent did not present any evidence regarding the performance issue. It is therefore accepted that the performance issue is not a basis upon which the applicant could have expected that his contract would be terminated. The only evidence presented by the applicant regarding a reason for the termination of his employment contract was that Minister I Meyer was under pressure. The nature of such pressure was not made known to the applicant. There is no underlying basis the applicant knew of upon which the contract of employment of employment of the applicant could have been terminated. The applicant was a family friend of the Meyers and there was no reason for the applicant to believe that the relationship has changed;

- The employer cited in the contract of employment is the Western Cape Provincial Government, Department of Social Development. The argument of the applicant's representative in paragraph 42 of the heads of argument is accepted where the following is stated:

"The individual departments within the Provincial Government are not employers in their own right. Reference to the Constitution, the Republic of South Africa is constituted by nine provincial governments. The fact that the provincial government may politically decide to have any one or more departments and how it names and styles those departments and what extent of issues those department deal with, is a political decision taken by the Provincial Government. The Constitution envisages this flexibility, permitting a Province to have between 5 and 10 MEC's performing functions assigned by the Premier (Section 132(1) and (2))."

- It is common cause that the Department of Social Development as well as the Department of Sport and Recreation both required the services of a Media Liaison Officer. But for the applicant and another employee all the personal staff of Minister I Meyer were taken over to the Department of Sport and Recreation.

In evaluating the reasonableness of an employee's expectation the Labour Court in the case of **DIERKS V UNIVERSITY OF SOUTH AFRICA** [1999] 20 ILJ 1227 (LC) formulated four points or criteria and stated the following:

"Reasonable expectation' as expressed in s 186(b) is not defined by the Act but its meaning includes the following considerations:

- (i) 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.*
- (ii) The Act clearly envisages the existence of a substantive expectation, in the sense that the expectation must relate to the renewal of the fixed-term contract.*
- (iii) '[The] expectation is essentially of a subjective nature, vesting in the person of the employee. It is not required that the expectation has to be shared by the employer.'*
- (iv) 'Counsel for the respondent argued that the courts had to apply an objective test as to whether the applicant's employment had indeed become permanent and whether he could hold the alleged reasonable expectation of continued employment.'"*

It means that the applicant has to prove that he had an expectation of renewal and that this expectation is based on an objective basis for the creation of an expectation. Having considered the abovementioned facts and the guidance of arbitration awards and case law it is determined that the applicant has shown that

the expectation that he had of a renewal was indeed reasonable. The termination of the applicant's contract on 13 September 2010 therefore constitutes a dismissal in terms of Section 186(1) of the LRA.

8.

At the arbitration the applicant indicated that he seeks compensation for the unfair dismissal. In the applicant's heads of argument it has been argued that the maximum compensation in terms of the LRA should be awarded. Reference was made to the remaining period of the political term. It has been determined that the parties are bound by the agreement and that the respondent was contractually entitled to terminate the contract of employment. Compensation awarded in terms of the LRA is regarded as a *solatium* for the unfairness of the dismissal and does not necessarily relate to the loss incurred by an employee. The manner in which the applicant was informed of the termination of his contract is unacceptable. It would have been expected of the respondent to at least have a cordial discussion with the applicant regarding the reason why his contract of employment was terminated. There is no fair substantive basis upon which the respondent could not have renewed the contract of the applicant for the remaining period of the political term. The applicant's remuneration indicates a gross monthly salary of R37 955.50. Having considered the abovementioned and the average compensation awarded by arbitrators in similar cases it is determined that a

compensation amount equal to six month's remuneration would be just and equitable. The applicant was paid until 13 October 2010.

9.

Both parties were represented by legal representatives. There is no reason why a cost order should not follow the award.

AWARD

10.

1. The dismissal of the applicant on 13 September 2010 constitutes a dismissal in terms of Section 186(1)(b) of the LRA. The dismissal was unfair.
2. The respondent must pay to the applicant an amount of R222 773.00 (i.e. six months x gross monthly salary of R37 955.50) less statutory deductions.
3. The respondent must pay the applicant's costs in terms of the PHSDSBC Rules.

SIGNED AT PRETORIA ON THIS THE 4TH DAY OF MAY 2011



PH KIRSTEIN

ARBITRATOR