



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Panellist: Ncumisa Bantwini
Case No.: PSHS642-13/14
Date of Award: 09 September 2014

In the ARBITRATION between:

Thabo Mthunzi Sibeko

(Union / Applicant)

And

Department of Health: Eastern Cape

(Respondent)

Union/Applicant's representative: Advocate Mxolisi Nduzulwana
Union/Applicant's address: P.O. Box 6001
King Williamstown
5600
Telephone: 08282 36974
Telefax: (043) 642 1583

Respondent's representative: Mr Michael Begraims
Respondent's address: Private Bag X0038
Bhisho
Telephone: (040) 608 11 11/082 736 7026
Telefax: (040) 608 1112

Details of hearing and representation:

1. This arbitration was scheduled for 09 December 2013, 27 March 2014, 28 March 2014 and 18 to 20 August 2014. It was heard in the respondent's offices in East London. It came before the PHSDSBC in terms of Section 191 (5) (a) read with section 186 (1) (b) of the Labour Relations Act no.66 of 1995 (the LRA). The respondent, the Department of Health, was initially represented by Mr Luyanda Mtukushe who was later substituted by Mr Michael Begraims from Begraims Attorneys. Advocate Mxolisi Nduzulwana, instructed by Masoka- Mankayi Attorneys represented the applicant, Doctor Thabo Mthunzi Sibeko who was also in attendance. Parties agreed to submit written closing arguments on 22 August 2014. The last set of arguments from the applicant was received on 27 August 2014 after a request of extension was made.

Issues to be decided:

2. I have to decide as to whether the applicant's termination of contract was procedural and substantively fair or not.

Background to the dispute:

3. The applicant was appointed on a 3 year contract on 15 March 2010. The contract was terminated on 02 October 2013. The applicant was allowed to work past 15 March 2013 by consent. It is the contention of the applicant that the respondent ought to have extended the contract by 3 years instead of 6 months.
4. The applicant challenged the termination contract by referring the dispute to the PHSDSBC. When the dispute could not be resolved at conciliation level, the applicant filed a request for arbitration.

Survey of evidence and argument:

The respondent's case

5. In terms of section 192(2) of the LRA the onus is on the respondent to prove the fairness of the dismissal of the applicant.
6. According to Mr. Mtukushe's opening statement the applicant's dismissal was procedurally and substantively fair.

7. **Mr. Luyanda Mtukushe**, the respondent's first witness, testified as follows:
8. The dismissal of the applicant was both procedural and substantively fair. The applicant was appointed on a 3 year contract. The contract signed by the applicant does not have a clause which indicates that the contract is renewable.
9. Mr. Mtukushe made reference to the terms of termination of the contract and stated that they are clear and unambiguous. Contracts are there in law to be enforced, to provide certainty and predictability. The applicant is educated and was not represented when he signed the contract. The respondent has a sole right to renew or not to renew the contract. It is not true that the applicant received the termination letter while he was at work as it was signed for by his PA on 19 June 2013. The applicant was given 3 months before the end of the contract; he received the termination letter on 19 June 2013.
10. The letter that was written to the Superintendent General by the applicant, Mr. Goduka and Doctor Beja is an indication of the fact that the termination of the contract was not sudden and unexpected. The letter appears from 22 to 23 of bundle B and reads as follows;
11. "In conclusion, therefore and given the background and circumstances as alluded to above, it would seem fair that in the spirit of the original intention of the extension memo that the appointments of the incumbents in the affected post be regulated and that they be appointed on a permanent basis"
12. The applicant was well aware that the position he was occupying was highly questionable and the termination was not sudden and unexpected. The moves within the department were to ensure that the structure is in line with the National Department of Health. The memo that appears on page 14 to 18 of bundle A seeks a mandate from the MEC to extend the contracts by 6 months and it was approved. The SMS contracts were then extended by 6 months and the last date was 30 September 2013. The applicant's post was never advertised because it does not exist and there were no intentions of making the position permanent.
13. The respondent never created a reasonable expectation that the applicant's contract would be renewed. The 3 years contract was extended by 6 months before it expired.
14. Under cross-examination, Mr. Mtukushe testified as follows;

15. He works for the respondent as a Senior Manager: Legal Services since 01 October 2010. He is aware that a referral form is not a pleading. The applicant was aware that the contract was not going to be extended beyond 6 months based on the approval of the MEC to extend the SMS contracts by 6 months. The letter that was written by Ms. K. Campbell was also read and the witness stated that she (Ms. Campbell) and Mr. Qwase will be called to testify on the letter and other documents.
16. The applicant's contract was extended by 3 months not 6 months based on the letter dated 11 June 2013 by Ms. Campbell. The new organogram has not been approved by the MEC (Page 11). The organogram that is in use is the one that was approved in 2007 (page 100). The witness disputed being evasive in answering most questions but emphasized that the respondent will call about 3 witnesses to testify as most of the issues were decided before he joined the Department.
17. The second witness **Ms. Nomsa Vena** testified as follows;
18. She works for the respondent since 2003 and is occupying a position of a Director Human Resources: Planning and Organizational Development. She is aware of the applicant's contracts and it was 3 years plus 6 months extension. She had certain discussions with the applicant on the planning of the unit as she was reporting to him (the applicant).
19. There were meetings and presentations on a weekly basis regarding the restructuring of the organogram around 2010/2011 financial year. The presentations were done with the applicant on whether to dissolve or keep his position or not. The Executive Management Team made a recommendation to Executive EXCO in 2012/2013 for the second option (a new organogram) to be used. The applicant was aware and was a member of the EXCO. He was aware about the proposal to the DPSA. When Dr. Mbengashe joined the department, there were deliberations about the 2 options. No expectations could have been created as the position does not exist to date.
20. Under cross-examination, Mrs. Vena testified as follows;
21. The old organogram that is in use (page 10) was approved by the then MEC Mrs. Jajula. The restructuring was for the whole department. The new organogram was drawn up in 2013 and it is awaiting validation by the Office of the Premier (OTP) and DPSA. The structure cannot be implemented if it is not validated. The applicant's directorate had about 20 to 30 employees with 3 chief directors. If the new structure is approved while the applicant was still in the employ of the respondent, the affected employees would be moved to other components using a migration policy. The applicant was reporting to the Superintendent General.

22. When it was put to the witness that the applicant will testify that there has been no approval of the new structure until 30 September 2013, the witness's response was that the new structure was signed by the MEC on 27 November 2013 although it has not been validated by DPSA. The process of restructuring and realignment is not over yet. The respondent is currently using the old structure that was approved in 2007 to date.
23. Although the witness stated that she is not dealing with contracts, she testified that it is her opinion that the applicant should have been given a notice before his 3 year contract ended. The witness could not dispute that other SMS members' contracts were not terminated. Reference was made to Ms. Dina Morapedi, Andiswa Mayekiso, Nomvula Khwatsha, Nomfusi Jara, Thilosi Govender, and Nomvula Kwadjo. Other SMS members who are still working for the respondent although their contracts expired are; Messrs.' Nokhwe, Macingwane, Qangule Jacobs, Botha and Seame. The witness stated that she was not even aware that the officials were appointed on contractual basis.
24. The third witness, **Ms. Karen Campbell** testified as follows;
25. She works for the respondent as DDG Human Resources since 10 December 2012. Before her appointment, the applicant was performing the duties she is currently doing. The applicant was employed on a 3 year contract and was extended by 6 months. The 3 year contract expired in around March/April 2012 and she did not explain anything to him but he showed him that it has been extended by 6 months.
26. She never knew about the expectation. There were ongoing discussions on EMT on restructuring of the organogram and the 2 options. Option 2 would mean that the DDG Clinical position would not exist. The SMS contracts were extended further by 6 months. There were fluctuations with regards to the expiry dates as some contracts were 3 years and 5 years. The human resources section on the previous years was not managed properly, Dr. Beja got appointed to a permanent position of a General Manager: Quality Assurance which he applied for.
27. With regards to the list that appears on page 13 of bundle A, Hala was incorrectly appointed for 5 years. The list was known to the EMT and it was part of the memo. None of the SMS members responded to the letter she wrote on 16 June 2013 (page 16 Bundle A).
28. Both options were presented to EMT and she was part of the meetings. It became obvious that all officials were proposing option2. The applicant was aware that his positions would be dissolved. The applicant applied for other positions before the end of the 6 months extension.

29. Under cross-examination the witness testified as follows;

30. Mr. Ntete was erroneously appointed on contract while his position was permanent. Reference was made to memos from page 51 to 53 for ratification of the position. Qangule and Morapedi were erroneously loaded by Human Resources as contractual while their positions were permanent. The applicant's position as reflected in the organogram is permanent (page 10 Bundle A). The Superintendent General, Doctor Pillay can answer as to why was the position advertised as contractual. When it was put to her that the applicant will testify that there was no economic justification for him to have been appointed on fixed term contract, the witness's response was that there was a trend to employ SMS members on contract instead of permanent.

31. The witness could not comment as to whether the applicant's position was for a specific project or not as she was not working for the respondent at the time of the applicant's appointment. The witness could not comment when it was put to her that the applicant's position was not for a temporary funding or specific grant and is permanent on the approved organogram. (See p13 and 18 BA).

32. The OTP Circular on page 12 of Bundle B indicates that all SMS members were appointed on contractual basis without singling out anyone. All managers are currently on 6 months contracts and their positions will be advertised in April 2014 (Page12 Bundle B). P10 to 12 was read and the witness agreed with the contents of the letter. The letter was shown to the applicant.

33. It was put to the witness that the applicant should have been advised and in the absence of a written correspondence, a new contract should have been drawn up. The applicant's representative made reference to (page16 Bundle A as well as page 97-98 of bundle B and stated that the applicant will testify that he sought a meeting with Mr. Qwase for the contract to be extended for a further 3 years. The applicant's representative further stated the fact that the letter was not responded to by the respondent, by conduct it means the applicant can continue working. The witness testified that she cannot answer for the HOD. Advocate Nduzulwana further put to the witness that the contract does not say it is not renewable. The witness's response was that she did not write the contract. Reference to clause 2.4 of the contract reads;

" The employer reserves the right not to renew this contract upon expiry of the tenure"

34. The standard procedure is to draw the reports 4 months before the expiry of the contract. The applicant was supposed to have been advised that his contract will not be renewed in November 2012. The conduct of the respondent in 2012 was that employees were not advised about the expiry of their contracts.

35. The applicant's representative stated that he will argue that the respondent should have terminated the contract on 15 March 2013 or on 01 April 2013 but by conduct the applicant was allowed to work. The letter dated 16 June 2013 appearing on page 16 of bundle A advised the applicant about the expiry of the contract but it was written late and she had explained about the renewal of the contract by 6 months instead of 3 years.
36. The witness testified further that Morapedi is still working for the respondent since 01 February 2008. No extension letter was issued to him. She was not working for the respondent at the time and she does not know why. All SMS members were given 6 months extension of their contracts. Doctor Beja and Mayekiso got permanent appointment during the 6 months period. Mayekiso was working on expired contract since 01 February 2010. The applicant was the head of Human Resources and Ms. Tantsi was supposed to have checked the contracts. Kwatsha p66. Jara, Govender and Kwadjo are (p72) are still working for the respondent and will be given 6 months notices. Jacobs 's contract expired on 31 December 2012. Qangule, Govender and Morapedi stayed beyond 6 months and they were incorrectly loaded on PERSAL as permanent.
37. Hala was never given 6 months' notice while Kwadjo and Jacobs were given notice of extension in 2013. Despite the fact that the respondent wanted all contract employees to leave after 6 months, some employees did not leave and are still working to date (Page 45 par 1).
38. The applicant's position in terms of the approved organogram is permanent. The advert that appears on page 95 is in terms of the approved structure (page 10.). The closing date for the advertisement was 13 December 2013. Hala's 5 year contract ended on 01 February 2013. The contract was extended until June 2014. The contracts were dealt with in batches due to the fact that files got lost. His post is being advertised together with other SMS members positions.
39. The applicants' representative put to the witness that the applicant will testify that some SMS member's contracts expired long before he was terminated but were allowed to work to date. This started in 2010 and the respondent was aware. The witness conceded to the applicant's version, stating that the respondent did not manage contracts correctly. Nandi Sishuba was managing the contracts as she (the witness) was not working for the respondent at the time. Jara's status has been rectified as permanent instead of 5 year contract.

40. Under re-examination, the witness stated that there were debates about the applicant's position, he was part of the meetings and he was given another 6 months contract.
41. In closing, Mr. Begraims argued as follows;
42. It is clear from the above mentioned evidence that for an applicant to have an expectation of a renewal of a contract he needs to specifically outline which contract he (the applicant) believes should have been renewed. Throughout the arbitration it was argued by the respondent that the applicant was not entirely sure as to which contract the applicant was talking about. The applicant under cross examination conceded that his expectation whilst in the employ of the respondent was for a permanent contract and not for a renewal. Furthermore the applicant, when pressed, said that he was at the arbitration for a renewal of the three year contract and not the six month contract which was given after his termination of the three year contract. The following points should be noted:
44. The Applicant was given initially a three year contract with the Respondents. At the termination of this three year contract the applicant was given a letter confirming that he will receive a six month contract by the respondent.
45. The applicant, during the course of this six month contract received a letter to say that the six month contract was coming to an end.
46. Throughout the process of the employment contracts (x2) the applicant did not challenge the fact that the contract was renewed and nor did he challenge the fact that he had an expectation of a renewal. The only time the applicant said that he thought he had an expectation was when he argued that he should be given a permanent position as opposed to a short term contract.
47. Furthermore if the applicant argues that the contract was not renewed but merely continued, then if the applicant is correct he has lodged the wrong claim with the PHSDSBC.
48. The applicant's argument although it is incorrect and wrong, militates against a renewal of a contract that had already expired six months previously.
49. The applicant is stating under cross-examination that his six month contract was not a contract and that he was merely working at the department on some other basis. It is not clear on what basis the applicant he is alleging that he is working.

50. The evidence of the respondent's witness Ms Nomsa Vena who is the Director Organisational Development Regional Planning is appropriate. Ms Vena testified that the applicant was given a three year contract and was fully aware of the end date. Ms Vena testified that during the course of the applicant's three year contract (his first contract) the Applicant became aware of the debates about the organogram and the possibility of his position being disestablished. The applicant was fully aware that he was given a six months contract after the termination of the three year contract.
51. The Applicant became aware of the reason for the need of the six month contract when he was part of the organogram debates and was certainly part of the discussions with the Respondents third witness, Ms Campbell.
52. The restructuring of the organogram started in 2010 according to Ms Vena. Furthermore Ms. Vena said *"so Dr. supported us and we were required to have short meetings where we would update him on what we were doing so that he could be ready for a report to the EMT which is the Executive Management Team."* Over and above this Ms. Vena stated that the applicant was in these discussions right from the commencement of his employment.
53. Ms. Vena said *"Yes, during the realignment of the organogram we had to discuss several posts. In fact we were discussing the whole structure and his own post was involved in that."* (Ms. Vena was referring to his own post as the applicant's own post).
54. Over and above this, Ms. Vena stated that the Department did the structure with two options i.e. keeping the status quo and the second option would be if the post was not there. This was referring to Dr. Sibeko's post (the applicant).
55. Ms. Vena stated that the applicant was presented with two options and he made a comment that he did not want to be subjective and talk about his own post. At this point which was in the beginning of 2012 Ms. Vena stated that the applicant was fully aware that his post would possibly be disestablished and he could not have at that point had an expectation in his mind. Throughout the year of 2012 the applicant was fully aware that one of the options was to dissolve his post. Ms. Vena said he was aware according to the options and there was a possibility that his post would be dissolved.

56. The applicant was a member of the Executive Management Team and it was this team that received all the minutes of the meetings discussing the organogram. Ms. Vena stated that the recommendation of the Executive Management Team was the option referring to the dissolution of the applicant's post. Ms. Vena stated that the applicant was presented with this option and told about the recommendation.
57. Ms. Vena said that they were having continuous consultations throughout Dr. Sibeko's involvement with the Department and throughout his employment period. Ms. Vena said that the applicant could not have had an expectation of a further three year contract because of all the discussions and because it came clear that some of the people were given six months and others were given twelve months.
58. It was the evidence of both Ms. Vena and Ms. Campbell that in fact the DDG post held by the applicant does not exist and has never been filled.
59. Ms. Campbell testified that she had written a letter advising the applicant that he was given a six month contract which letter was never responded to. Ms. Campbell accepted that this letter was not challenged in any way and nor was Ms. Campbell challenged in cross-examination.
60. Ms. Campbell testified at length as to the other individuals who had been given different posts and filled different functions. Not one of the other individuals was given another three year contract. Some of the individuals were given permanent contracts and others entered the employ of the Respondent under different contracts altogether.
61. The Applicant testified stating that he knew that there were two options but because the organogram had not been finalised he had an expectation of a renewal of a contract. This is incorrect as the applicant was fully aware that the option of dissolving his post was the preferred option and he was part of those discussions and took interest in the minutes of those discussions.
62. The Applicant testified that the DDG (Karen Campbell) did not have the right to extend the contract or to give him another contract. When challenged on this he said that he was not sure what contract he was working under after the termination of the three year contract. It is submitted that the applicant

could not have formed an expectation of a renewal of any contract when he was not sure what contract he was labouring under.

63. The Applicant could not explain why he did not challenge Ms. Campbell when he received the letter giving him a six month contract and he could not explain why she (Ms. Campbell) was not cross examined on this point either.
64. The applicant stated that Karen Campbell did not have the power to make the decisions to appoint him but he could not explain why he was still working there when he knew that his three year contract had been terminated.
65. The applicant was indeed on a six month contract as per the letter given to him. The applicant was not aware when the actual unfair dismissal took place. It was put to the applicant that if he wished to challenge the termination of the three year contract this should have been done at the time and not for him to wait after the termination of the six month contract. The applicant could not give a proper answer to this question. It would only be possibly appropriate to challenge the termination of the six month contract and at that point he would have to prove that he had an expectation of a further six month contract. This is not the applicant's claim and hence the arbitrator is not competent to rule on this.
66. The applicant could not explain why he did not appeal the decision taken by the MEC and it is the respondent's contention that his refusal to appeal showed an acceptance within the Department. The Applicant testified that he wrote a letter together with other colleagues asking for permanency.
67. The applicant testified that the respondent was "cherry picking" those that they wanted to dismiss as some of his colleagues received six months contracts and became permanent. It is submitted that this does not help the respondent in his claim for an expectation of a renewal of a three year contract as this was not even testified to by the applicant.
68. When it was put to the applicant why he did not challenge the document that was hand written by Campbell with the extension times for further contracts he merely stated that she was not competent to extend. This is wreck less on his part and he should have challenged it if he thought that he had an expectation of a three year contract as opposed to a six month contract.

69. The applicant has not discharged his onus to show that he was entitled to a three year extension of a contract. The applicant should pay the respondents wasted costs.

The applicant's case

70. According to Advocate Nduzulwana's opening statement, no procedures were complied with before the applicant's contract was terminated. The applicant was employed on a position that was permanent in the organogram. He was not employed on a temporal project. The 3 year contract scheme was to evade the provisions of the LRA. The respondent's actions were arbitrary. There was inconsistency in dealing with senior managers as some were extended by 3 years while the applicant was extended by 6 months.
71. The applicant seeks retrospective resuscitation of the 3 year contract with effect from 15 March 2013 as a remedy.
72. The applicant, **Doctor Thabo Mthunzi Sibeko** testified as follows;
73. He was employed on a 3 year contract by the respondent with effect from 15 March 2010. The respondent was in a big crisis at the time and he was requested to do some work in Port Elizabeth before he signed the contract. The contract was signed on 30 March 2010.
74. He was employed as a Deputy Director General: Corporate Strategy and Organizational Performance to drive strategic planning of the department. He was in charge of the quality of health care services and to put the systems in place. The organogram which was approved in 2007 appears on page 10 of bundle A and was in use at the time of termination of his contract.
75. The review of organogram takes a very long time; the National Department of Health, MEC, DPSA and the Premier are involved. Both options (option 1 and 2 reflected on page 10 to 11 of bundle A) were still on the table when he left. The recruitment was to be done based on the approved structure.
76. The letter that is dated 19 June from Ms. Campbell was written more than 2 months after his contract had expired. Ms. Campbell had no authority to write the letter as she is holding equivalent positions.

The HOD had delegated authority from the MEC to terminate his contract. Subsequent to this letter he received a letter dated 01 October 2013 from the HOD terminating his contract (page 27 of bundle A). There were other expired contracts but the employees were still working. The following employees were cited.

77. Botha was given 3 years, Morapedi was given 3 years extension , Qangule was given 3 years and is still working for the respondent to date, Mayekiso was given 3 years extension and she is still working for the respondent, Beja is still working for the respondent, Govender, Kwadjo, Jara, Ntete were changed to being permanent, Gamaleri was given 3 years but his contract was terminated around October 2013. Hala and Jacobs are still working for the respondent to date although according to the list he was to be given 6 months. The respondent is aware and some of the employees are still working for the department . He sought a meeting with Doctor Mbengashe, the HOD in the letter dated 03 October 2013 (page 28 of bundle A). The meeting did not materialize although the HOD promised to make time in the email dated 03 October 2013 until he referred the dispute to the PHSDSBC.
78. He did not appeal to the MEC because Dr. Mbengashe told him that the termination of his contract was MEC's decision, not his wish. He (the applicant) expected that his contract would be renewed or allowed to work post his contract just like other officials/employees.
79. His termination letter was not written by the MEC. If his contract was not terminated, the renewal would terminate in 2016. The letter that appears from page 23 to 26 of bundle A was written by himself (applicant), Doctor Beja and Mr. Mgoduka to the Superintendent General. Their complaint was that the respondent was cherry-picking employees to be terminated as others were given 3 years extension instead of 6 months. They were also indicating that their positions are permanent not contract. The respondent did not respond to this letter.
80. He was never given an addendum of an extension except for the letter. He was allowed to work beyond 15 March 2013. Reference was made to all the contracts which were not terminated despite the memo by Provincial Treasury which was approved by the MEC (page 10 bundle A) which states that all 12 officials must be extended by 6 months. This was unfair selective treatment. It was only himself and Goduka who were terminated on 30 September 2013; the 10 officials remained in the service. The advertisement for Deputy Director General; Clinical Management Services belongs to the approved structure. The closing date was 13 December 2013.

81. Under cross-examination, the applicant testified as follows;
82. He did not get a 6 months contract. After the end of the 3 year contract, he was given a letter. The positions still exist in the approved organogram.
83. The applicant did not dispute that he applied for other positions after the expiry of the 3 years contract but did not accede to the fact that his position was redundant as it was put to him by the respondent's representative. The options were initially 3 and he was fully aware that his position will exist. The management ended up putting 2 options on the table and chances were 50/50 for any option to be accepted.
84. He realized when he received a letter from Doctor Mbengashe that his contract will be terminated as Ms. Campbell did not have an authority to terminate his contract as they were on the same level.
85. His contract was unfairly terminated by the respondent and he expected that the 3 year contract would be renewed. The group letter was based on the fact that the positions were permanent and they sought the positions to be regularized. He did not appeal to the MEC because Dr. Mbengashe had consistently told him (the applicant) that it was the MEC's decision to terminate the contract. He sought a meeting with Dr Mbengashe after receiving a notice of termination of the contract but it did not materialize. There were other SMS contractual members whose contracts were not terminated.
86. After March 2013, he was allowed to work and no one told him to stop until he received a letter from Dr. Mbengashe stating that his contract will be terminated on 30 September 2013.
87. When the respondent's representative put to the applicant that he was aware based on the evidence of Misses. Vena and Campbell that his position was questionable or will be resolved, the applicant's response was that there were initially 3 options but 2 options were tabled by EXCO to DPSA and Premier who preferred option 1.
88. The issue of the structure was a continuous consultation but nothing was finalized. The new structure was never validated and the approved structure that appears on page 10 (option 1) is still in use. He never signed a 6 months contract but was given memos.

89. Under re-examination, the applicant stated the following;
90. His position is in the current organogram and there is no approved new structure before this arbitration. He expected that his position will still exist even if option 2 has been approved. He was given a 3 year contract because management anticipated that option 1 would be approved. The decision to terminate his contract was from the MEC hence he did not see the need to appeal. MS Campbell testified that he (the applicant) was supposed to have been given a notice of termination of his contract in November 2012 for termination in March 2013. He was never consulted
91. The discussions about the organogram were not about his position. The new structure has not been approved to date. The position that has been advertised is in terms of the approved structure that appears on page 10 and it was filled.
92. In closing, Advocate Nduzulwana argued as follows;
93. It is common cause that the applicant commenced working for the employer on 15 March 2010 although he signed a contract on 30 March 2010, that means for all intents and purposes his appointment date is 15 March 2010 and his evidence in this respect was not put in dispute by any witness of the employer, save Mrs Campbell who only speculated that because the contract of employment was signed on 30 March 2010 that must have been the date of appointment. It is respectfully submitted that Mrs Campbell's evidence in this respect should be rejected as she was not in the employ of the employer at that time.

Paragraph 2.3 of the contract of employment provides:

"2.3 This appointment is for the period of three (3) years subject to the following terms:

2.3.1 Signing of a performance contract;

2.3.2 one year probation; and

2.3.3 Security clearance on a top secret vetting level

2.4 The employer reserves the right not to renew this contract upon expiry of the tenure."

CONCEPT OF REASONABLE EXPECTATION

94. In *South African Clothing and Textile Workers Union & J Heynes v Cadema Industries (Pty) Ltd*¹ it was held:

“the common law principle that a fixed term contract expires automatically on the arrival of the date on which the parties agreed that it should, has been altered by the provisions of section 186(b) of the LRA. The section reads as follows:

“Dismissal” means that -

- (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 favorable terms, or did not renew it.”*

95. Section 186(b) has its origins in the equity jurisprudence that emerged during the era of the 1956 Labour Relations Act. The jurisprudence was based on the concept of legitimate expectation, recognized as such in the case of *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A). The case *MAWU & another v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (LC), was the first case during that period to raise the concept of reasonable expectation.”
96. It has not been disputed that on 20 February 2013, the employee met the then acting superintendent general Mr Qwase and gave him a letter requesting the executing authority to extend his contract for another term”. It has not been disputed that Mr Qwase promised to forward the letter to the executing authority.
97. According to Ms Campbell the practice of the respondent is to give employees, whose fixed term contracts are to expire where the employer is not intending to renew or extend such contracts, 3 months’ notice that reminds them that their contracts will be expiring on a particular date and the employer will not be extending such contracts. Mrs Campbell testified that a fixed term contract expires automatically on the arrival of the date on which the parties agreed that it should. In line with the decision of *South African Clothing and Textile Workers Union & J Haynes v Cadema Industries (Pty) Ltd* that provided that the common law principle that a fixed term contract expires automatically on the arrival of the date on which the parties agreed that it should, has been altered by the provisions of section 186(b) of the LRA, it is respectfully submitted that this contention ought to be rejected. The respondent ought to have given the applicant the 3 months’ notice of its intention to terminate the fixed term contract on 15 March 2013 and that the employer’s failure constituted a

reasonable expectation for renewal of the contract for another 3 year term and proves that the termination of the employee's contract on 30 September 2013 amounted to a dismissal.

98. Ms Campbell testified further that the employee should have been given such notice in November 2012 wherein the employer will remind him that his contract of employment will be expiring on 15 March 2013 and that the employer is not intending to extend it. Mrs Campbell conceded that the employer failed to give the employee such notice and she blamed such failure to poor management of all fixed term contracts on human resources management directorate.

99. Mrs Campbell conceded that there is a wide practice of appointing employees who occupied permanent positions, like in the case of the employee, on fixed term contracts and that all those fixed term contracts were renewed without any discussion as to why they renewed and why the practice of renewal for the various contracts and periods. In the employer's memorandum it is stated:

"From about 2006-2008, the Department appointed its senior managers (levels 13 and above) on contract either on a fixed term / renewable basis. Initially, this practice was aimed at those SMS members appointed for a fixed period linked to specific projects and their timeframes and / or those positions not on the post structure / establishment e.g. conditional grant managers. Unfortunately, the practice became the norm and was inadvertently extended to every other SMS appointment being made.

With a view to curbing this practice in the Eastern Cape Province, the Office of the Premier (OTP) made a submission to EXCO wherein they sought approval to change this practice i.e. from contract (probably meaning 'fixed term') appointment of DDG's (sic) to having them employed permanently".

100. In part, the focus on DDG's (sic) was because in general, the practice applied to both them and HoDs. The underpinning principle endorsed by EXCO is that all future appointments of SMS members from DDG and below should be on a permanent basis. Furthermore, it was decided that current incumbents still employed on contract basis be allowed to stay-on until their contracts have expired.

101. Ms. Campbell conceded that since 2008 no fixed term contract of employment that had expired had actually been terminated. All the employees whose fixed term contracts had been allowed to continue working past the date on which their contracts expired and by way of an example, the following cases were cited and confirmed by Mrs Campbell as set-out below:

102. Mrs Mabeen Dinah Morapedi was appointed on a 5 year contract starting on 1 February 2008 and ending on 31 January 2012. The employer allowed her to continue working after her contract expired without extending it or giving any reasons and she is still working for the employer to date;
103. Ms Andiswa Mayekiso was appointed on a 3 year contract starting on 1 December 2007 and ending on 31 January 2010. The employer allowed her to continue working after her contract expired without extending it or giving any reasons and she is still working for the employer to date;
104. Ms Nomvula Kwatsha was appointed on a 5 year contract starting on 1 January 2007 and ending on 31 December 2011. The employer allowed her to continue working after her contract expired without extending it or giving any reasons and she is still working for the employer to date;
105. Ms Nomfusi Jara was appointed on a 5 year contract starting on 1 November 2007 and ending on 30 October 2012. The employer allowed her to continue working after her contract expired without extending it or giving any reasons and she is still working for the employer to date;
106. Mrs Thiloshni Govender was appointed on a 5 year contract starting on 1 April 2008 and ending on 31 March 2013. The employer allowed her to continue working after her contract expired without extending it or giving any reasons and she is still working for the employer to date;
107. Mrs Campbell confirmed that the lists of employees whose fixed term contracts has expired contains many more names than those referred to above and those contained in the attachment to the employer's memorandum.
108. The undisputed evidence, relating to the regular and continuous renewal over an extended period (from 2006 to date) created a reasonable expectation that the employee's contract would or has been renewed. This is supported by the fact that the employee continued to work for over 3 months after the date of the expiry of his contract (from 16 March to 18 June 2013) before he was given a notice that his contract will be terminated on 30 September 2013. In the circumstances the notice given on 19 June 2013 was for a dismissal.
109. On 13 March 2013, Mrs Campbell, in her memorandum sought approval to extend the contracts of employees whose names appear on page 13 totalling to 12 employees, by three years, renewable annually subject to availability of funds and proven satisfactory to good performance. Mrs M Mbina-

Mthembu – HoD of provincial treasury & planning recommended a six months extension ending on 30 September 2013 for all 12 affected employees and the MEC supported her recommendation. It is not reflected as to when the MEC approved the memorandum but it is certainly after 13 March 2013. Of significance is the fact that the decision to extend the expired fixed term contract of the employee was only communicated to him on 19 June 2013 – some 3 months after his contract had expired and the employer renewed by conduct by allowing the employee to continue working past the 15 March 2013 and of the 12 employees whose fixed term contracts were supposed to be terminated on 30 September 2013, only Mr. Gamaleri and the employees' contracts were terminated on 30 September 2013 leaving 10 employees still working for the employer to date.

110. Rycroft seating as an assessor in the Labour Appeal Court in the case of *SA Clothing and Textile Workers Union v Mediterranean Woolen Mill 1998 (2) SA 1099 (SCA)* in dealing with the purpose of a fixed-term contract, said:

"It is apposite to consider the reasons why parties enter into a fenced-term contract. Usually a fixed -term contract is entered into because the task to be performed is a limited or specific one, or the employer can offer the job for a limited or specified period only."

111. In addition to showing the subjective anticipation for the renewal of the contract the employee has to adduce evidence that point to the objective creation of such anticipation. In other words reasonable expectation cannot be established by a simple statement of perception or bald averment. The test entails an objective enquiry of determining whether a reasonable employee in the circumstance prevailing at the time would have expected the contract to be renewed on the same or similar terms. See in this regard ***Dierks v University of South Africa*** at 1246 and *SA Rugby (Pty) Ltd v CCMA & Others [2006] 1BLLR 27*".

112. The respondent's failure to give the applicant the 3 months' notice in November 2012 reminding him that his contract of employment will expire on 15 March 2013 and the employer is not intending to renew it beyond that date created a reasonable expectation of renewal and the termination of his contract of employment on 30 September 2013 constituted a dismissal by the employer.

113. The undisputed evidence is that the applicant was appointed in a fixed term contract as an error , as it is not in dispute that the applicant's position is permanent in terms of the approved structure. The respondent, instead of correcting the error as it has done in the case of Mr P. Ntete whereby his erroneous appointment in a fixed term contract was corrected and his contract was converted to

permanent appointment. In the case of other employees the respondent is prepared to correct an erroneous appointment of fixed term to permanent but not for the applicant. The respondent is guilty of an unfair selective action and that the applicant's contract ought to have been corrected to permanent.

114. In **South African Clothing and Textile Workers Union & J Heynes v Cadema Industries (Pty) Ltd** the court held:

“Thus, in circumstances where the contract is not renewed because of operational requirements and the employee has a reasonable expectation that, that contract would be renewed, the employer is obliged to comply with the operational requirements procedures for the dismissal to be procedurally fair. And for the dismissal to be substantively fair, in these circumstances, the employer has to prove that the dismissal was for a valid and legitimate reason.”

115. Both Mesdames Vena and Campbell stated that in the draft organisational establishment: 2013 in one of the two options the position of the applicant has been done away. That means the dismissal of the employee on 30 September 2013 was in anticipation of the approval of option 2 of the organogram. Mrs Vena stated that the discussion to restructure the organogram started before the employee was appointed and continued during his tenure.
116. The applicant did not dispute that there were on-going restructuring discussions and that he participated in such discussions as member of senior management but that at no stage was he ever informed that the respondent intended not to renew his fixed term contract due to the restructuring that will do away with his position. The applicant stated that there were two options and that in the other option his position had been retained. At the time of his dismissal the restructured organogram remained a draft that is, it had not been approved and no approved organogram was placed as documentary evidence before the arbitrator.
117. If the respondent's case is that the applicant's contract was terminated on 30 September 2013 because it was anticipated that his position would be rendered redundant after the restructured organogram had been approved then the employer was obliged to have complied with section 189(1) of the LRA. There was not a scrap of evidence at the arbitration that the employer had complied with section 189(1) of the LRA. Section 189(1) prescribes that where an employer contemplates dismissing one or more employees for reasons based on the employer's operational requirements, the employer must consult any person whom it is required to consult in terms of the relevant

prescripts in their hierarchy or the affected person and section 189(2) sets out the agenda of that consultation meeting and section 189(3) provides for written notice inviting the affected persons to consult.

118. Advocate Nduzulwana argued further that it is not only opportunistic and disingenuous of the respondent to attempt to portray the restructuring discussions held by senior management of the employer as “consultation” but that it is dishonesty on their part as restructuring discussions amongst senior managers of the employer cannot be elevated to consultation meetings. There were no written invitation extended to the recognised unions in terms of the collective agreement and there were no consultation or consensus seeking meetings held with either the employee or the recognised unions.
119. Having established that the respondent’s conduct created a reasonable expectation that the applicant’s contract would be renewed or alternative had been renewed, the onus to prove the fairness of the dismissal rests on the respondent. There was not a scrap of evidence before the arbitrator proving that the dismissal of the applicant on 30 September 2013 was procedurally and substantively fair. In the circumstances the dismissal of the employee ought to be declared unfair.
120. During cross examination it was suggested to the applicant that the fixed term contract that is ought to be renewed is a six months contract for the period 16 March to 30 September 2014. 121. This is an opportunistic argument as there was no 6 months fixed term contract that was concluded between the respondent and the applicant. The only legal and valid contract that was concluded between the respondent and the applicant is the 3 year contract that commenced on 15 March 2010 and there is no other contract. Ms Campbell’s letter dated 19 June 2013 can never be an extension of the 3 year fixed term contract in that it is trite that a contract can only be extended during its life time and not after it has expired and Ms Campbell is at the same rank as the employee and cannot appoint or extend the applicant’s contract. In essence Mrs Campbell’s letter is a notice advising the employee that he is being given notice of dismissal.
121. In the circumstances, the totality of undisputed evidence, particularly relating the respondent’s failure to give the applicant the 3 months’ notice of termination of his contract of employment in November 2012; the MEC’s silence to the employee’s proposal to extend his contract by another term; the regular and continuous renewal of fixed term contracts of all other employees on fixed term contracts that have expired as explained above; the respondent’s failure to terminate the applicant’s contract of employment on 15 March 2013 coupled with the conduct of allowing the employee to

continue working for up to 3 months without having communicated anything to him; that there is no rational reasons for appointing the applicant on fixed term contract as his post was for a permanent position; and the selective dismissal of the employee out of 12 employees whose contracts were supposed to have been terminated, created a reasonable expectation that the applicant's contract would be renewed or alternatively had been renewed. In the circumstances the applicant's contention that what happened on 30 September 2013 was in essence dismissal ought to be accepted, as the preferred reason of expiry of his contract was not the true reason for the termination of his contract of employment.

122. The applicant seeks retrospective re-instatement on the same or similar terms and conditions of employment no less favourable than those that governed his employment prior his dismissal on 30 September 2013 and payment of his lost remuneration calculated at R1136 910,00 annual salary divided by 12 months amounting to R94742,50 per month x 11 months (for period 1 October 2013 to 30 September 2014) totalling to R1042167,50 plus 15.5% annual interest (R161535,96) calculated at the legal rate amounting to a sum of R1203703,40.

ANALYSIS OF EVIDENCE AND ARGUMENTS

123. It is common cause that the applicant was appointed on a three year fixed term contract on 15 March 2010 as a Deputy Director General Corporate Strategy and Organisational Performance.
124. That the post of Deputy Director General Corporate Strategy and Organisational Performance is on the permanent establishment and that it is a permanent position in terms of the approved organogram of the respondent that is being used to date.
125. It is also common cause that the applicant wrote a letter to the MEC requesting him to extend the 3 year contract for another term. The applicant handed the letter to the then HOD, Mr Qwase who promised to forward the letter to the MEC.
126. It is the applicant's undisputed evidence that the respondent did not object to the request to extend his contract for another term. Mr Qwase in particular was not called by the respondent to dispute the applicant's contention in this respect.
127. Advocate Ndzulwana made reference of the case of **Tshishonga vs Ministry of Justice & Constitutional Development & Another (2007) 28 ILJ 195 (LC)**, paragraph 112, the Court held:

“But an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case.”

128. In the **Foschini Group vs. Maida Mabel & 4 others, Eric Louw & CCMA Case no JA12/08, paragraph (55)**, the court decided that an adverse inference must be drawn where a party fails to call a material witness who would help the decision-maker to ascertain the material facts of the dispute. It is more probable than not that the sentiments expressed in the **Tshishonga vs. Ministry of Justice & Constitutional Development & Another** and **Foschini Group vs. Maida Mabel & 4 others, Eric Louw & CCMA** are applicable to the present dispute.
129. The applicant’s representative in his closing arguments stated that an adverse inference ought to be drawn from the respondent’s failure to call Mr Qwase to either confirm or dispute the applicant’s evidence that he took delivery of the letter requesting extension of the fixed term contract from the MEC and agreed to forward the letter referred to above to the executing authority and that the applicant’s version ought to be accepted.
130. It is the respondent’s argument that the failure of the applicant to appeal to the MEC means that he accepted that his termination was fair and there is no way that he had a reasonable expectation of renewal his contract beyond 30 September 2013.
131. It is the applicant’s evidence that upon receipt of a notice of termination of his services on 01 October 2013, he wrote a letter to the HOD, Dr. Mbengashe on 02 October 2013, seeking a meeting and the withdrawal of the termination letter. The HOD in the email dated 03 October promised to make time but the meeting did not materialised. It is also the applicant’s evidence that a decision to terminate his services was from the MEC.
132. It is furthermore common cause that the respondent did not write a notice to the effect that the 3 year contract will come to an end on 15 March 2013 and there were no intentions of extending it. Ms Campbell conceded to this and blamed it to the poor management of all contracts. Ms Vena also testified that although she does not deal with contracts, the respondent ought to have reminded the applicant about the termination of his contract on 15 March 2013.

133. It is the applicant's case that a reasonable expectation was created that his (the applicant) contract would be renewed when the respondent allowed the applicant to work without a notice of termination of the contract in November 2012. The termination of the contract on 30 September 2013 constitutes a dismissal as per the contention of the applicant.

134. Clause 2.3 of the applicant's contract provides;

"This appointment is for the period of three (3) years subject to the following terms:

2.3.1 signing of a performance contract;

2.3.2 one year probation; and

2.3.3 security clearance on a top secret vetting level

2.4 The employer reserves the right not to renew this contract upon expiry of the tenure." It is the applicant's argument that the contract does not say it is non-renewable.

135. Section 186 (b) of the LRA reads;

"Dismissal" means that -

(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."

136. It is the respondent's evidence through Ms. Campbell that some of the SMS members were appointed on contractual basis although their positions were permanent in terms of the structure. She made reference of Messrs' Ntete, Qangule and Morapedi whose statuses were converted to permanent.

137. It is the applicant's contention that the respondent is guilty of an unfair selective action and that the applicant's contract ought to have been corrected to permanent.

138. It is undisputed evidence that although the applicant's position is permanent in terms of the approved structure, the applicant was not converted to a permanent position. Under cross-examination, Ms Campbell stated that Doctor Pillay can answer as to why the applicant was appointed on contractual basis.

139. I must be noted that the respondent did not call Doctor Pillay to testify. It was also the evidence of Ms Campbell that the applicant's position was not for a special grant or project in terms of the structure.
140. It is the respondent's evidence through Mesdames Vena and Campbell's evidence that the issue of restructuring wherein 2 options of organograms were tabled to (EMT) Executive Management Team. Option 1, the current structure/approved structure and option 2 the new structure wherein the applicant's position is dissolved. The second option (the new structure) has not been approved by the Premier/MEC and has not been validated by the DPSA. This evidence was not disputed by the applicant as he was a member of executive management. This means that the structure that was approved in 2007 is still in use to date. The restructuring according to both the applicant and the respondent's witnesses was for the whole department.
141. It is the respondent's case that the applicant was aware that his position would be disestablished if the new structure is approved.
142. It is undisputed evidence that the approved structure is still in use to date. This means that the applicant's contract was terminated in anticipation of the new structure being approved.
143. It is also undisputed that although the MEC approved a memo for all 12 SMS member's contracts to be extended by 6 months and be terminated on 30 September 2013, (memo on page 14 to 18 of bundle A) only 2 officials were terminated ie, the applicant and Gamaleri. Ms Vena testified that she was not even aware that the 10 SMS members who are still in the respondent's employ were appointed on contractual basis.
144. Ms. Campbell testified that since 2008, no expired fixed term contract had been terminated; meaning employees had been allowed to continue working past the dates on which their contracts expired.
145. Reference was made to Nomfusi Jara, Dinah Morapedi, Andiswa Mayekiso, Nomvula Kwatsha, and Thiloshni Govender. Contracts in respect of the above cited officials are contained from page 54 to page 90 of bundle A. Mrs Campbell testified that there are more names other than those referred to above. Beja and Mayekiso got permanent employment during the 6 months period. All other SMS members were converted to permanent in terms of the approved structure.

146. It is also undisputed evidence that the respondent advertised a position of Deputy Director General: Clinical Services in December 2013 and this position is in terms of the approved structure.
147. It is the applicant's case that the non-termination of other SMS members' contracts as well as the fact that the applicant was allowed to work past 15 March 2013 until 18 June 2013 when he was advised that his contract will be terminated on 30 September 2013 also created a reasonable expectation that his contract would be renewed or has been renewed.
148. It is the respondent's case that the applicant is not certain as to which contract is contesting as he was given a further 6 months contract after a 3 year contract expired on 15 March 2013. Mr Begraims further argued that the applicant could not have formed an expectation for the renewal of any contract.
149. Only one contract was signed between the parties, (3 year contract). The applicant further testified that he was never given a 6 months contract to sign by the respondent except for memos which were talking to 6 months.
150. This means the contract that is being contested by the applicant is the 3 year contract appearing from page 1 to 9 of bundle A.
151. In *Diereks v University of South Africa* (1999) 20 ILJ 1227 (LC) (at page 1245 paragraph [130]) by the court held that:

"A number of criteria have been identified as consideration which has influenced the findings of the past judgments of the Industrial and the Labour Appeal Courts. This includes an approach involving the evaluation of all the surrounding circumstances, the significance, or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed-term contract, inconsistent conduct, failure to give reasonable notice, and (sic) nature of employer's business"

It is the applicant's argument that the respondent it would be opportunistic for the respondent to claim that the applicant was consulted in terms of section 189 of the LRA before his services were terminated on 30 September 2013.

152. The Labour Court, in **NUMSA & Others v Delta Motor Corporation (2002) 9 BLLR 817 (LAC)**, held that where the employer deviates from the standard practice or sanction, that the employer must show that there was a valid reason for differentiating between the employees
153. It is my view that where there is a perception of bias, employees will inevitably and justifiably consider themselves to be aggrieved.
154. I am satisfied, based on the above evidence and arguments that the applicant has discharged the onus in proving a reasonable expectation created that his 3 year contract would be renewed or had been renewed.

AWARD

155. I therefore make the following award:

156. The termination of contract of the applicant, **Doctor Thabo Mthunzi Sibeko** by the respondent, **the Department of Health-Eastern Cape** constituted dismissal within the meaning of section 186(1)(b) of the LRA and that dismissal was both procedurally and substantively unfair.

157. The respondent, the **Department of Health-EC** is ordered to reinstate the applicant **Doctor Thabo Mthunzi Sibeko** on the same terms and conditions of employment as existed prior to the date of dismissal (30 September 2013).

158. The respondent, the **Department of Health-EC** is further ordered to pay the Applicant **Doctor Thabo Mthunzi Sibeko** a back pay of eleven (11) months salary being the sum of R1042167,50 calculated as R94 742,50 monthly salary X 11 months= R1042167,50 as back pay on 30 September 2014 less any statutory deductions.

159. The applicant **Doctor Thabo Mthunzi Sibeko** is ordered to report for duties at the respondent's workplace on 20 September 2014.

160. There is no order as to costs



Signature

Ncumisa Bantwini

PHSDSBC Panelist