



ARBITRATION AWARD

Commissioner: **Jerome Mthembu**

Case no. **PSHS70-14/15**

Date of award: **4 September 2014**

In the matter between:

HOSPERSA obo M RANTSHO & 17 OTHERS

Applicant

and

DEPARTMENT OF HEALTH- FREE STATE

Respondent

DETAILS OF HEARING AND REPRESENTATION:

1. The hearing was held on **11 August 2014**. Mr **Ramokoatsi** an official of **HOSPERSA** represented the Applicants and Mr **Malakoane** the Respondent.
2. The parties agreed not to present *viva voce* evidence and to conduct the matter by means of written arguments.
3. The parties agreed to file their arguments as follows:

- 3.1 The Applicants on **15 August 2014**;
- 3.2 The Respondent on **22 August 2014**;
- 3.3 The Applicants replied on **29 August 2014**.

THE ISSUE TO BE DETERMINED:

4. Whether or not the Applicants were unfairly dismissed when the Respondent failed to renew their fixed term contracts as envisaged in terms of Section 186(1)(b) of the Labour Relations Act (“LRA”).

SURVEY OF THE ARGUMENT:

APPLICANTS' CASE

5. Initially the employer advertised hundred and sixty (160) contract vacancies in the Free State Department of Health Emergency Care Service. The Applicants were the successful candidates.
6. Eighty two (82) of the one hundred and sixty (160) were permanently appointed as from February 2012, sixty (60) employees were on fixed term contract which was continuously extended till December 2014.
7. The Applicants were on fixed term contracts of twelve (12) months from February 2012 till February 2013.
8. Their contracts were first extended for a six (6) month period from 1 March 2013 till end August 2013.
9. Their contracts were again extended from 31st August 2013 till 30th September 2013.
10. They were extended for a third time from September 2013 till March 2014 but at the end of March 2014 their contracts were terminated.
11. By virtue of extending their contracts on three occasions an expectation was created by the employer from the first extension until the last that they were needed to render a service within the Emergency Care Department.

12. Their service is still on-going and not finished which clearly indicates that the employer still needed them to continue rendering the service.
13. The Applicants are challenging the criteria used by the employer in appointing eighty two (82) fixed term contract employees on permanent basis, sixty (60) on fixed term contract which is extended until the end of 2014 and which criteria was used to unfairly dismiss the Applicants.
14. No consultation process took place.
15. What is startling is that the employer eventually replaced the eighteen (18) unfairly dismissed employees with the service of a private supplier to render the same service the eighteen (18) dismissed employees were rendering.
16. Due to this unfair dismissal by the employer these eighteen (18) employees suffered emotionally and were prejudiced severely financially due to loss of income.
17. These employees seek that the employer reinstate their fixed term contracts retrospectively from the date of the termination of service due to the fact that the service they were rendering is still on-going and not finished.

RESPONDENT'S CASE:

18. It is important to look into the non-renewal of the fixed term contract. Whether on proper contraction of the facts dismissal is in existence under the circumstances. In determining reasonable expectation under the circumstances it is important to also consider whether there is an existence of the expectation and the reasonableness of the expectation.
19. Firstly, the contracts were fixed term contracts with specified dates when they will end and it is common cause that the contracts were renewed only once after the initial contracts.
20. According to **Grogan: Workplace: Tenth edition, page 148 – 150**, he argues that “*Employees are deemed dismissed when they reasonably expected their employers to renew a fixed term contract of employment on same or similar terms.* At common law, a fixed-term contract expires

automatically on arrival of the date or occurrence of the event on which the parties agreed that the contract would terminate.

When establishing whether the non-renewal of a fixed term contract constitutes a dismissal, the terms of the contract remain relevant; the contract itself is an important indication that the parties in fact intended the contract and relationship to terminate on the date mentioned.

Employees on fixed term contract may claim to be dismissed, and challenge the fairness of the dismissals, only if they can prove that they had some reasonable ground for expecting renewal. The onus of proving a reasonable expectation rests on the employee. The most obvious basis for an expectation of renewal is some promise by the employer. Such a promise may be express or implied. If the employer promised that the contract would be renewed or extended, the employee may have a contractual claim for renewal, as well as a claim for dismissal under the LRA.

The notion of reasonable expectation suggests an objective test: the employee must prove the existence of facts which, in the ordinary course, would lead a reasonable person to anticipate renewal. Circumstances that might found a reasonable expectation of renewal will clearly differ from case to case, but most commonly take the form of some prior promise or past practice e.g. where the contract was habitually renewed. That a fixed term contract has been renewed a number of times is not, however, in itself indicative of the existence of a reasonable expectation of renewal; whether there was a reasonable expectation of renewal must be determined from the perspective of both the employer and the employee.

21. Where the employer has repeatedly renewed a fixed term contract, the weight to be attached to the practice probably increases in proportion to the number of successive contracts the parties have concluded.
22. It is therefore the argument of the Respondent that the Applicants were appointed initially for the period of twelve (12) months and the first and the only extension was from March 2013 to March 2014, the Commissioner's attention is invited on page 14 to 15 of the Respondent's bundle of documents. The arguments of the Applicants that there was a series or number of extensions is misplaced as the records show that the extension happened only once.

23. It is further the Respondent's argument that the fact that the extension ended in March 2014 the Applicants knew that same was going to come to an end in March 2014 as a result of effluxion of time, as such it is the Respondent's view that the fact that there was extension same cannot be argued or be assumed to imply that the expectation was created. The arguments of the Applicants that employer terminated their services and later outsourced the services is neither here nor there for it cannot be substantiated with any facts.
24. Paragraph 5.2 of page 5 "B" of the referral papers indicated that "**their contracts were renewed on several extension of their contracts**" and same amounts to misrepresentation of facts as same was extended only once.
25. Reading further on the same page of the referral papers it is their own admission that "**employer gave them notice to terminate their service**" *implying that they were aware of the fact that their contract was going to come to an end at some stage. The question then is how the expectation was created under the circumstances when in their own referral papers they were aware of this fact.*
26. As alluded the dispute that is before the Commissioner relates to Section 186(1)(b) and that a reasonable expectation was created. In the matter of **Department of Finance, Eastern Cape v De Milander & Others [2011] 9 BLLR 893 (LC)**, par. 35 – 36 the Court argued that *it disagrees with the appellant. The question whether the employer's failure to renew the fixed-term contract of employment constitutes a dismissal within the meaning of Section 186(1)(b) is a legal one. In other words the Commissioner hearing the matter is called upon to determine the conclusion of law.*

It is therefore incumbent upon an employee who brings an unfair dismissal dispute in terms of Section 186(1)(b) to set out the material facts upon which he relies for the conclusion of law he wishes the Commissioner to draw from those facts and it will not be sufficient, therefore to plead a conclusion of law without pleading the material facts giving rise to it. The mere ipse dixit of an employee, without further evidence, is not sufficient.

The setting of this standard will prevent the opening of the floodgates for large numbers of other cases involving claims based on Section 186(1)(b). it was not convinced "in the instant matter that the appellant has succeeded to set out the necessary facts, on which

her belief that her contract would be renewed, was based. It is clear from the totality of the objective facts that the appellant's employment was linked to the term of Office of the Premier and had to terminate at any stage when the Premier ceased to hold such office.

27. In light of the abovementioned, the contracts of the abovementioned officials expired they were not dismissed in terms of Section 186(1)(b) of the Labour Relations Act.
28. Out of the abovementioned, it is clear that there is no existing expectation and the reasonableness of the expectation is unfounded.
29. Initially when the Applicant wanted to argue that the dispute affected both officials who were appointed at Control and Operational, the Respondent indicated that the contracts of those who were appointed for Control was a process of being renewed until December 2014 and it was on those basis that part of the dispute was resolved. Therefore there is no dispute about Control officials based on the record that the Respondent has for those who were appointed at Control. Therefore the issue raised by the Applicant Union about Me Rantsho is neither here nor there.
30. For anyone to be appointed permanently in the Public Service there are processes that MUST unfold and further to that what the Applicant Union requires the Commissioner to do is to exceed his powers, and Respondent wishes to state that there are NO contracts at this point in time that were extended by the Respondent to officials who were appointed for Operational apart from those appointed for Control. Those appointed permanently were subjected to various assessments, driving theory on resuscitation and oral interviews, and those that were not appointed cannot be appointed permanently if they were not subjected to same. The Department is currently having financial challenges and appointing anyone permanently without following procedures will surely amount to irregular appointment.
31. Commissioner the service that the Applicants were rendering was for Operational and indeed the service must be rendered to the citizens but the impression should not be given that service cannot be rendered if they cannot be appointed.
32. It is the Respondent's argument that fixed term contracts have an end date and same will come to an end either by agreement of the Parties, effluxion of time or by death of a party to a contract and the Applicants were aware of the fact that same must also come to an end.

33. The Respondent sought the following relief:
- 33.1 That there was no dismissal.
- 33.2 That the alleged reasonable expectation was not created based on the aforementioned facts, as such the arguments are misplaced.
- 33.3 That the matter should be dismissed.

ANALYSIS OF THE ARGUMENTS:

34. It is apposite to seek guidance from case law on what are the relevant factors to be considered in establishing a reasonable expectation:
35. AJ Oosthuizen in **ANDREAS DIERKS v UNIVERSITY OF SOUTH AFRICA (1999) 20 ILJ 1227 (LC), at par. [133]**: *“A number of criteria has been identified as consideration which have 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 reemployment, 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.”*
36. The factors listed above are a pointed guide more emphatically on evaluating surrounding circumstances; contractual terms; practice or custom; reason for concluding a fixed term contract and the nature of the employer’s business.
37. The Labour Appeal Court per AJA Tlaletsi in **SOUTH AFRICAN RUGBY PLAYERS ASSOCIATION v SOUTH AFRICAN RUGBY (PTY) LTD [2008] 9 BLLR 845 (LAC)**, reasoned as follows in paragraph [43] and [44]: *“What Section 186(1)(b) provides for is that there would be a dismissal in circumstances where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer only offered to renew it on less favourable terms or did not renew it. The operative terms in Section 186(1)(b)*

are in my view, that the employee should have a reasonable expectation, and the employer fails to renew a fixed term contract or renew it on less favourable terms. The fixed term contract should also be capable of renewal.

Paragraph [44] The appellants carried the onus to establish that they had a 'reasonable expectation' that their contracts were to be renewed. They had to place facts which, objectively considered established a reasonable expectation. Because the test is objective, the enquiry is whether a reasonable employee in the circumstances prevailing at the time would have expected the employer to renew his or her fixed term contract on the same or similar terms. As soon as the other requirements of Section 186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent (SA Rugby) would have to establish that the dismissal was both procedurally and substantively fair."

38. The test to be applied is therefore whether a reasonable employee in the circumstances that prevailed at the time expected a renewal on same or similar terms. The test is an objective one. Therefore the facts relied upon by the Applicants, must be objectively considered.

THE ISSUE OF REPEATED RENEWALS:

39. This aspect must be assessed in line with other facts and not as a separate aspect of the case.
40. In **MALANDOH v SABC [1997] 5 BLLR 555 (LC)**, the Labour Court held, despite the fact that the fixed term contract had been renewed eight times, that the employee had no reasonable expectations for renewal for the following reasons: contract stated that the employee was temporary; contract was renewable at employer's sole discretion; there was a clear agreed procedure for recruitment and selection of permanent employees, which had not been followed and the person allegedly promising permanent employment had no such authority.
41. According to the above decision repeated renewals are not a reason to raise expectation of renewal if the contract of the Applicant stated that he was appointed temporarily: the contract of the Applicant was at the sole discretion of the Respondent.
42. I submit that the renewal of the Applicants' contracts over the last two (2) years is not a conclusive factor to raise an expectation for renewal of the fixed term contracts by the Applicants. This aspect

must be assessed in line with other facts as argued above and not as a separate aspect of the case.

43. In CHWEIZER v WACO DISTRIBUTORS (1998) 19 ILJ 1573 (LC), the Labour Court confirmed that a contract that comes to an end by the effluxion of time cannot be regarded as constituting a dismissal in terms of the Labour Relations Act, 66 of 1995, as amended.
44. The termination of the contract of the Applicants was by effluxion of time, the contracts having come to an end and the Applicants could not have had a reasonable expectation for renewal on same or similar terms. It is submitted on the authority of CHWEIZER v WACO DISTRIBUTORS above that the termination of the contract does not constitute dismissal as contemplated in section 186(1)(b) of the LRA.
45. The thrust of the Applicant argument is that their contracts were renewed on three occasions and this gave rise to an expectation that at the coming to an end thereof on **31 March 2014** they would once more be automatically renewed.
46. The Applicants have not presented other factors on which they relied for their expectation. It is only Rantsho who has provided evidence in the form of a letter confirming that her contract was extended from **31 March 2014** to **30 June 2014**.
47. No argument was submitted that all the other Applicants were in possession of similar letters and that the one of Rantsho was used as an example and the other letters were not submitted for the sake of not burdening the record. I cannot therefore read the said letter to be applicable to all the Applicants.
48. The Respondent has explained above how the contracts of the sixty (60) employees who are rendering service in the control room were extended until **December 2014** and there is no need for me to repeat it.
49. Since the renewal of the Applicants' fixed term contracts was at the sole discretion of the Respondent, it is therefore deemed it appropriate to outsource the service if indeed it did so and it was beneficial to its operations.

50. By the Applicants' own token the service has been outsourced, therefore the posts are no longer available and the contracts are incapable of being renewed.
51. Save for Rantsho the other Applicants carried the onus to establish that they had a reasonable expectation that their contracts were to be renewed. They had to place facts which objectively considered established a reasonable expectation, they did not do so.
52. Because the test is objective, the inquiry is whether a reasonable employee in the circumstances prevailing at the time would have expected the employer to renew his or her fixed term contract on the same or similar terms. I submit that save for Rantsho, the other Applicants have failed to do so and are therefore not entitled to any relief.
53. The posts are no longer available, I cannot direct that Rantsho's contract be renewed. It would accordingly be proper to award her compensation for the remainder of her contract from **1 April 2014 to 30 June 2014**. Rantsho earned a salary of **R3330.00** per month.

AWARD:

I make the following award:

54. Save for MM Rantsho, I find that the Respondent's failure to renew the fixed term contracts of the other Applicants does not constitute a dismissal within the meaning of section 186(1)(b) of the LRA and their application is accordingly dismissed.
55. In the case of MM Rantsho, she is awarded three (3) months compensation being the remainder of her contract from **1 April 2014 to 30 June 2014**.
56. MM Rantsho's compensation is calculated as follows:
- R3 330.00 x 3 = R9 990.00**
57. The sum of **R9 990.00** is payable to M M Rantsho by the Respondent on or before **15 October 2014 failing which interest will accrue at the legally prescribed rate**.

58. There is no order for costs.



JEROME MTHEMBU
PHSDSBC PANELIST