



ARBITRATION AWARD

Case No: **PSHS1261-19/20**

Commissioner: **Dumisani Sonamzi**

Date of award: **9 September 2020**

In the matter between:

Matamba Joe Kayeya

Employee

and

Department of Health- Eastern Cape

Employer

Details of hearing and representation

1. This is the arbitration award in the matter between Mr. Joe Matamba Kayeya, hereinafter referred to as (“the employee”) and Department of Health-Eastern Cape, hereinafter referred to as (“the employer”).
2. The arbitration hearing was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council (“PHSDSBC”) in terms of the Dispute Resolution Rules of the PHSDSBC and the award is issued in terms of section 138 (7) of the Labour Relations Act (“the LRA”).

3. The employee referred an unfair dismissal dispute in terms of section 186 (1) (b) of the LRA.
4. The arbitration hearing took place on 31 August 2020 at Aliwal Hospital, Aliwal North.
5. The employee was present and was represented by Mr P. Grobler, an attorney from Greyvenstein & Spence Attorneys.
6. The employer was represented by Mr SLQ Busakwe, Labour Relations Officer-Joe Gqabi District.
7. The parties submitted bundles of documents which were admitted as employee bundle “A” and employer bundle “B” respectively. The parties also filed written heads of argument.
8. The proceedings were conducted in English and were mechanically recorded.

Issue/s to be decided

9. I am required to determine whether or not the employee was dismissed on the ground that he had a reasonable expectation that his fixed term contract of employment would be renewed or extended (“contract”). Secondly, if the employee succeeds in proving that he was dismissed, I am required to determine whether his dismissal by the employer was substantively fair.

Background to the issue and common cause facts

10. On 1 June 2019 the employee and the employer concluded a contract of employment in the capacity of a Pharmacist, Grade 1 based at Cloete Joubert Hospital, Barkly East. The termination date of the contract was 7 December 2019.
11. On 26 November 2019, the CEO of Cloete Joubert hospital penned a memo to the Superintendent General, Eastern Cape Department of Health, Bhisho wherein she

requested the renewal of the employee's contract of employment after its termination date of 7 December 2019.

12. The recommendation was endorsed by various officials of the hospital and officials of Joe Gqabi District. It was, thus recommended by Ms N. Yekani-Mati-CEO of Cloete Joubert Hospital, L. Solomane-Assistant Director: HRA, Joe Gqabi, Z.P. Tyalana-Deputy Director HRM, B. Mdashe-Senior Manager IHRM, M. Matandela-Acting District Manager, DDG-Clinical and finally by the Superintendent General Dr D. Mbangashe on 7 January 2020.
13. Despite this process and approval of the recommendation for the extension of the employee's contract, the employer did not renew his contract of employment beyond 7 December 2019. He alleged that he had a reasonable expectation that the employer would renew his fixed term contract of employment on the same or similar terms but the employer did not renew it.
14. It was the employer's case on the other hand that the reason/s his contract was not renewed was because the employee did not have a work permit to facilitate the renewal of his contract since he was not a South African national but a Congolese from the Democratic Republic of Congo. The second reason was because the employer wanted to employ a permanent South African in that position.
15. On 6 March 2020, he referred an unfair dismissal dispute to the Bargaining Council for conciliation. A period of 30 days expired and on that basis the Council issued a certificate of non-resolution. The matter was postponed for various reasons until it finally took place on 31 August 2020.

Survey of evidence and argument

Employee's case

16. Mr. Matanda Joe Kayeya testified in person under oath as follows:
17. He stated that he was a Congolese from Democratic Republic of Congo. The employer advertised a post for a Pharmacist. On 26 April 2019 he was given a permanent

contract of employment as a Pharmacist, Grade 1. He stated that because he was a foreign national, it transpired that he could not be employed in the Republic of South Africa on a permanent basis in terms of section 10 of the Public Service Act, his permanent contract of employment did not materialise.

18. Instead, on 1 June 2019 he was offered a one year fixed term contract of employment which came to an end on 7 December 2019. Before this contract came to an end, he went to apply and obtained or renewed his work permit which was valid with effect from 18 November 2019 until 18 November 2020 and other relevant endorsement documents.
19. On the basis of that renewed work permit, the CEO of Cloete Joubert Hospital wrote a memo on 26 November 2019 to the Superintendent General, Eastern Cape Department of Health, Bhisho. This memo was contained in both bundles of the parties. He referred to the background of this memo which stated:

Background

“The above mentioned officer [the employee] is currently employed at Cloete Joubert Hospital on contract basis ending on December 7, 2019. It was approved subject to renewal of his permit which expires on 7 December 2019. The officer mentioned above has now managed to get his work permit renewed with effect from 18 November 2019 till 18 November 2020, hence Cloete Joubert Hospital is humbly requesting for the extension of his contract for a further 12 months period starting from 07, 2019 [sic], till November 18, 2019.”

20. The fixed term contract of employment came to an end on 7 December 2019 but he had always held a reasonable expectation that it was going to be renewed. His expectation was revived by the fact that he was called by Dr Moshani during December and informed him that there was a crisis in Cloete Joubert Hospital due to no Pharmacist available. He responded to the call and went to Cloete Joubert hospital to render services as a Pharmacist as per the request by Dr Moshani. He continues to render these services the whole of December 2019 until early January 2020.

21. On 25 January 2020 the CEO of Cloete Joubert Hospital called and informed him that his contract was approved for another year. It is worth mentioning that the contract was read in part and stated his remuneration package as R 693 372.00 per annum.
22. On 27 January 2020 he attended at Cloete Joubert Hospital to sign the contract but he established that its last page was missing and could therefore not sign it. He informed Dr Moshani about the developments but on 6 February 2020 Dr Moshani informed him that he and the CEO of Cloete Joubert Hospital were instructed to write a report on why they have disclosed that his contract was renewed or was going to be renewed.
23. On the following day, 7 February 2020, Dr Moshani called and informed him that he should not continue with his services at the hospital. At all material times, he had a reasonable expectation that the employer would renew his contract until 18 November 2020. The employer however did not renew his contract.
24. Under cross examination, it was put to him that the document he presented for the renewal of his fixed term contract was not a work permit. To this he stated that he was appointed on the strength of the same or similar document for the fixed term contract ending 7 December 2019. The document he managed to renew was in fact a work permit. The document was read into record. The employee read the document into the record. It stated that:

FORMAL RECOGNITION OF REFUGEE STATUS IN THE RSA PARTICULARS OF
RECOGNISED REFUGEE IN THE RSA

"It is hereby certified that the person whose particulars appear above has, in terms of section 24(3)(a) of the Refugees Act 1998 (Act 130 of 1998) been recognised as a refugee in the Republic of South Africa (RSA) from 18/11/2019 to 18/11/2020 on condition that this formal recognition shall become null if he/she departs permanently from the Republic. The Refugee shall within 14 days of receipt hereof apply for a Refugee Identity Document in the RSA. The holder of this certificate is entitled to

Socio-economic rights as provided for in Chapter 2 of the Constitution including work and study in RSA.”

25. He was in possession of the document as well as identity document when his first one-year fixed term contract was concluded and had the same or similar documents expiring on 18 November 2020 for the processing of the renewal of his second fixed term contract. The employee closed his case.

Employer's case

26. Mr. Lunga Solomane was the only witness for the employer. He testified under oath as follows:

27. He was the Assistant Director in Human Resource Management, Joe Gqabi. He was familiar with the processes of employment or non-renewal of the employee's contract.

28. The employee was appointed as a Pharmacist on a one-year fixed term contract which ended on 7 December 2019. His fixed term contract of employment was aligned to his work permit.

29. The employer still wanted his services after the expiring of the fixed term contract on 7 December 2020 hence the CEO of Cloete Joubert Hospital wrote the memo on 26 November 2019 seeking approval for the renewal of his fixed term contract. He confirmed that he was one of the signatories who recommended the renewal of the one-year fixed term contract of employment.

30. On why the employee's fixed term contract was not renewed, he stated that he did not submit a work permit. Secondly, the employer filled the position by appointing a permanent South African resident since the employee was not a South African national.

31. Under cross examination, he conceded that he was not aware of any other outstanding documents other than those that were submitted by the employee when his first one-

year contract was approved. He also acknowledged that the employee submitted similar updated documents for the processing of the renewal of a contract which would have ended on 18 November 2020. The employer closed its case.

Analysis of evidence and argument

32. In evaluating the evidence and argument by the parties, the first issue I have to consider is whether there exists a dismissal upon which the jurisdiction of the Bargaining Council to entertain the dispute is founded. The second issue is to consider, if I find that the employee was indeed dismissed, whether such a dismissal was fair.

33. The central issue is that the employee alleged that a fixed term contract was terminated or not renewed despite reasonable expectation of its extension. The termination of a contract of employment in fixed term contract and the fairness thereof are integrally linked by the concept of reasonable expectation for the renewal of the contract. The determination of the existence of a dismissal in a dispute concerning the non-renewal of a fixed term contract remains critical in that it is a jurisdictional fact upon which the Council can entertain the dispute

34. In terms of section 192 of the LRA read with section 186(1)(b), the employee bears the onus of showing that he was dismissed because the employer failed to renew his fixed term contract. The employee discharges the onus by showing that he had reasonable expectation that despite the contract having come to an end by effluxion of time, he had reasonable expectation that the contract would be renewed and the employer failed to do so. Once the employee has discharged the onus of showing that the employer has failed to renew a fixed term contract despite the existence of reasonable expectation, the onus rests on the employer to prove that the termination of the contract was for a fair reason.

35. In my view, that the employee managed to discharge the onus to prove, on a balance of probabilities, that he was dismissed. The employee proved that the employer failed to renew his fixed term contract which ended on 7 December 2019 despite the existed

of a reasonable expectation for the renewal of a fixed term contract. In other words, the facts as presented by the employee objectively establish that a dismissal had occurred when the employer did not extend his employment contract after it expired on 7 December 2019.

36. Secondly, the employer focused on the fact that the provision of the contract of employment provided for termination of the contract at the end of the period set out therein being 7 December 2019. I therefore make a formal finding that the evidence of the employee is sufficient to discharge the onus of showing the existence of a dismissal by the employer as envisaged in terms of section 186(1)(b) of the LRA.

37. In light of the above finding, I now proceed to determine whether the decision of the employer not to renew his fixed term contract was fair or not. It is trite that the common law principle that a fixed term contract of employment expires automatically on the expiry date on which the parties agree that it should, has been altered by the provisions of section 186(1) (b) of the LRA. The LRA does not provide for a definition of the concept “reasonable expectation.” The concept has however been defined by case law to include:

- a) equity and fairness,
- b) existence of substantial expectation that the fixed term contract would be renewed,
- c) the employee, subjectively expecting the contract to be renewed or extended, and
- d) objective factors that supports the expectation. See in this regard *Dierks v University of South Africa*¹ where the court held that the following factors are important in the assessment of whether there existed an expectation that the fixed term contract would be renewed.

“A number of criteria have been identified as considerations which have influenced the finding of the past judgments of the Industrial and the Labour

¹ *Dierks v University of South Africa* ¹(1999) 20 ILJ 1227 (LC) at 1245 paragraph 39

*Appeal Courts. These include 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, in consistent conduct, failure to give reasonable notice, and [sic] nature of employer's business."*²

38. The enquiry to be conducted in determining whether an employee had a reasonable expectation that the fixed term contract would be renewed consists of both the subjective and objective factors. The employee has to adduce evidence showing that he had subjectively anticipated that the contract would be renewed. The employee has to also adduce evidence that point to the objective creation of such anticipation.

39. It is well established that the written provisions of the fixed term contract also play an important role in the evaluation of existence of the expectation but is not decisive. The key in the assessment of the objective existence of the reasonable expectation is the totality of the evidence together with the surrounding circumstances of a given case. See in this regard, the decision of the Supreme Court of Appeal in *Mediterranean Woollen Mills (Pty) v SA Clothing and Textile Workers Union*, ZASCA 11, 1998 (2) SA 1099 SCA, *Drerks v University of South Africa supra*, and *Zank v Natal Fire Protection Association*³.

40. Turning to the facts of this case and to which the employee testified:

- a) On 1 June 2019 the employee and the employer concluded a written contract of employment ending on 7 December 2019.
- b) His contract was approved upon submission of a Refugee Identity Document in the RSA, and Formal Recognition of Refugee status in the RSA document contained on page 29 and 38 of the Employee's bundle.

² *Ibid* 1 1246 para 136

³ *Mediterranean Woollen Mills (Pty) v SA Clothing and Textile Workers Union*, [1998] ZASCA 11, 1998 (2) SA 1099 SCA, *Drerks v University of South Africa supra*, and *Zank v Natal Fire Protection Association* (1995) 16 ILJ 708 IC

- c) Before the expiry of his contract of employment on 7 December 2019 the employer's CEO Mr Yekani-Mati wrote a memo to the Superintendent General of the Department of Health, Bhisho requesting renewal of the contract for the employee, dated 26 November 2019. It is worth mentioning that the CEO acknowledged that the employee was indeed in possession of a valid work permit expiring on 18 November 2020.
- d) It was the employer's case that the employee did not have a work permit. It is clear from the reading of the above paragraph that the employee had managed to obtain the work permit and the employer was aware of this fact. In other words, the employee had managed to get a new refugee identity document in the RSA as well as formal recognition of refugee status in the RSA both expiring on 18 November 2020. I must mention that it was not disputed that he was physically present when the Superintendent General signed and approved the request for renewal on 7 January 2020.
- e) It was not disputed that the employee rendered services for the employer beyond 7 December 2019 until early in January 2020. In this regard, the employer simply submitted that it was a private arrangement between Dr Moshani and the employee. This might well be the case but the issue is whether he rendered services or not. In my view, the employee rendered services as requested by Dr Moshani. The employer could not dispute that assertion by the employee. The second one-year employment contract would have commenced on 8 December 2019 to 18 November 2020.

41. In my view, the totality of the evidence and the circumstances of this case support a view that objectively speaking, the employee had a reasonable expectation for the renewal of the one-year fixed term contract. The above enumerated facts clearly support a view that he had a reasonable expectation for the renewal of his contract.

42. I reject the employer's assertion that the employee did not have a work permit. The employee submitted the same or similar documents that were considered when his

first one-year contract was concluded. In this regard, he reasonable expected that his contract would be renewed on the basis of the same documents or similar documents.

43. It is on the basis of the above that I find that the dismissal of the employee was substantively unfair.

Remedy

44. I have considered the fact that the employee was contracted by the employer for a period of 12 months. I have also considered the fact that the employee was not in a position to be appointed on a full-time basis owing to the fact that he was a foreign national. This however does not mean that he did not enjoy the rights in terms of the Laws of the Republic of South Africa.

45. To this end, it is my considered view that compensation equivalent to 6 (six) months remuneration which is equivalent to fifty percent of the amount he would have earned had his contract been renewed namely, R655 980.00 divide by 2 =R327 990.00.

46. I therefore make the following award:

Award

47. The dismissal of the employee, Mr Matamba Joe Kayeya was substantively unfair.
48. The employer, Department of Health-Eastern Cape, is ordered to pay the employee an amount of R 327 990.00 being compensation equivalent to (six) 6 months remuneration.
49. The employer is entitled to deduct any monies that it is entitled to deduct in terms of the law.
50. The employer must pay the said sum of money on or before 31 October 2020.



Dumisani Sonamzi