



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS215-16/17

Commissioner: Martin Le Roux Koorts

Date of Award: 20 April 2017

In the matter between:

JELENA SIMPRAGA

(Applicant)

and

DEPARTMENT OF HEALTH- EASTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was heard on 29 & 30 March 2017 at the boardroom of Bax Kaplan Russel Inc. in East London.
2. The Applicant was represented by Mrs B. Beetge Magnus an attorney. The Respondent was represented by Adv. S. Nzuzo.

ISSUE TO BE DECIDED

3. If the Employers failure to renew the Applicant's fixed term contract of employment on the same or similar terms, alternatively to retain the Applicant in employment on an indefinite basis on the same or similar

terms as the Fixed Term Contract, constitute a dismissal as per Section 186(1)(b) of the Labour Relations Act no 66 of 1995 (“the LRA”).

BACKGROUND TO THE MATTER

4. The Applicant was initially employed via an Employment Agency in her position during the period of 2004. She was thereafter employed by the Department of Health (“DOH”) in the same position on a one year fixed term contract from 1 August 2005 until 31 July 2006. Her employment continued albeit via Kelly Agencies during the interview process for the position.
5. She was thereafter, with unbroken service appointed on a further fixed term contract from 1 February 2007 to 31 January 2008. She was thereafter appointed on a further five year Fixed Term Contract (with unbroken service) from 1 February 2008 until 31 January 2013 in the same position she had held before. During this period, she further undertook an acting position of Deputy Director for a period of twelve months. She was subsequently employed on a further two month Fixed Term Contract for the period of 1 February 2013 to 31 March 2013, being the final official Contract she was given by the Department. She continued to work after the expiry of the last two month Contract.
6. It was agreed that closing arguments will be submitted by latest 10 April 2017. I have received arguments from the Applicant party on 10 April 2017. The Respondent party submitted arguments on 12 April 2017

SURVEY OF EVIDENCE AND ARGUMENT

7. I have considered all the evidence and argument, but because the Labour Relations Act 66 of 1995 (LRA) requires brief reasons (section 138(7), I have only referred to the evidence and argument necessary to substantiate my findings and my award
8. The parties tabled a bundle of documents as part of the evidence to consider.
9. Both parties made opening statements at the onset of the hearing.

10. The Applicant testified at this hearing. It was in essence her evidence that she was employed in the realm of telemedicine which is critical and cost saving and part of a National Strategic Plan. She gave evidence with regard to the new systems that were introduced which led to all the information on patients inclusive of x-rays being digitised on a server which enabled specialists to retrieve the information and images which resulted in huge costs savings and the saving of lives due to early diagnoses. She then gave evidence with regard to her employment tenure with the DOH and the various contracts that she was employed on.
- 11 She testified that she was not given a further Fixed Term Contract for this period but was aware of a memorandum which was given to her sometime in 2013, such Contract which was signed by all the necessary principals including the then Superintendent General Doctor SM Pillay which recommended that her Contract again be extended for a period of three years with effect from the 1 February 2013 to 31 January 2016 as reflected on page 26 to 28 in the Bundle.
12. It was her evidence that of importance at page 27 is the commitment to incorporating the telemedicine operational support unit into the Department Organogram (which implies permanency in the near future), the importance of scarce skills and retention. The instruction was accordingly to absorb her Department into the Eastern Cape Departmental Organogram:
- “Extending the Contracts for a period of three years will ensure that the Department is able to retain the telemedicine institutional knowledge, ensure that the Department continues to provide support to rural communities and health privations through telemedicine, and allow the OSU to be fully incorporated into the Departmental Organogram. Of the nine Provinces in the Country, the Eastern Cape and Kwa Zulu Natal are the only Provinces with a dedicated telemedicine unit. To ensure a sustainable telemedicine program in the Department, it is imperative that the scarce skills and knowledge acquired by the said Employee is retained”.*
13. She received instructions during the month of April 2016 as set out in the evidence from many of her superiors as reflected on pages 4 to 9 in the Bundle. Significantly Karen Campbell, the DDG on 10 April 2016 in relation to a submission by Mrs Varra for her to be absorbed into the Cecilia Makiwane Hospital establishment on a post of outreach Co-Ordinate (which is separate to her post she had held throughout the period), was fully aware that she continued to work during February, March and April of 2016, and requested her file to be sent to her office. Furthermore, she enquired under which Directorate Tele Health fell.

14. It was her evidence that Respondent invested thousands on training her over the years on what was a permanent project.
15. It was also her evidence that on 26 April 2016 she received a letter which had been e-mailed the day before enclosing her termination letter as per page 1 in the Bundle. She then discovered as set out on the thumbnail which she acquired during a mini Forensic Investigation (page 3 in the Bundle), that this letter was dated the 31 March 2016, refers to her employment being terminated on 31 March 2016, but was only created on Monday the 25 April 2016 at 11:20 and thereafter e-mailed some 19 minutes later to one Nomonde Malala.
16. The Applicant inter alia testified under cross-examination that she thought she was employed permanently and was shocked when her services were terminated. She was referred to page 1D in the Bundle whereby a summary of her dispute on her referral form states that it is "a failure to renew her fixed term contract after numerous renewals and unbroken service since 2005". The Applicant responded that she was not a lawyer and she did not receive a contract for the last 3 years. She was referred to page 27 of the Bundle, third paragraph from the top of the page as well as page 28. She confirmed that it is recorded here that it is recommended that her contract must be extended / renewed for a period of 3 years from 1 February 2013 to 31 January 2016. She though never received the contract but she did receive a copy of this document at a later stage. She agreed that it is recorded on page 28A by the CFO that the position must be advertised. She confirmed that it is recorded that her position must be advertised and the recruitment process is to be followed. She confirmed that a certain process is followed when a contract is extended and it is authorised by the Superintendent General. She conceded that there were no submissions made to extend her contract beyond March 2016.
17. She confirmed that her memorandum appears on pages 13 & 14 of the Bundle and she never received a response. She confirmed that it is stated that her position must be advertised but she expected it to be advertised as a completely new program for outreach. It was put to the Applicant that it was clear that the post will have to be advertised after 2016 and as such there can be no expectation. The Applicant responded by testifying that as to why will the DOH invest in her if she was to be temporally employed. She asked about the advertising and was told that there were no funds.

18. She confirmed that her fixed term contract of 5 years from 2008 up to 2013 specifies a specific termination date and is for a limited period. She confirmed that Mr Marthinussen was also employed on a fixed term contract and his services were also terminated on 31 March 2016.
19. She testified that she does not dispute that as per page 24 of the Bundle that even when a post is approved for extension it should be advertised.
20. She confirmed that he commenced employment in 2005 and her contract was extended on 4 or 5 instances.
21. It was her evidence under re-examination that after her contract expired on 31 January 2013 she did not receive any further fixed term contracts besides for the two (2) month contract for February & March 2013. She did not see any memorandum signed by the SG which provides her with a contract from 1 March 2016 onwards. Her last day of employment was 30 March 2016 and as such she worked for a period of 3 years and 3 months without a contract. She was never interviewed before each extension of her contract.
22. The next witness to testify was Mr Edward Batty who gave extensive evidence with regard to the importance of telemedicine and the need for the continuation thereof. It was also his evidence that the DOH often hired Employees without advertising. He also testified that at a meeting with himself and the Superintendent General in March of 2017, where the retention of the Applicant was discussed, the Superintendent General charged the then CEO Mr Simon Kay to retain her, emphasized that the Department could not afford to lose her and instructed Mr Kay to do what was necessary to retain her.
23. One witness, Mr Makhitshi was called on behalf of the employer. He inter alia testified that he is a Senior Manager Human Resources and as such he is an officer in charge of a unit that is responsible for recruitment of officials of the Department and termination of their services.
24. He testified that he disputed the employee's contention that there was no signed employment contract between the parties in respect of the last extension ending in March 2016. He further testified that the employee's contract of employment was for a fixed term period ending in March 2016 and that there was no indication in the memorandum in respect of the last extension that it would be for an indefinite period

25. He testified further that the Superintendent General issued a circular informing all officials that employment contracts will come to an end on 31 March 2016 and that there will be no further renewals. He further confirmed that an official by the name of Mr L Marthinussen who was also on a fixed term contract and in the same department with the employee was discharged from service on grounds of coming to an end of his employment contract. He indicated that the commissioner in that case was convinced that the employee was on a fixed term contract and he failed to give sufficient evidence supporting his claim for legitimate expectation of extension of his employment contract.
26. When cross-examined Mr Makhitshi inter alia conceded that he had no personal knowledge of the Applicant, had not seen her personal file and had not seen any of her Contracts of employment.
27. He testified that although it was normal to advertise, the Superintendent General can appoint persons without advertising for critical and scarce skills positions. He could not dispute that no advertisements had taken place in relation to the numerous renewals of the Applicants Fixed Term Contract. He confirmed that it was practice that Fixed Term Contracts were “renewable”.
28. He referred to a memorandum that specified that no contracts could be extended but was unable to produce such a memorandum when required by the Applicant’s representative. He also testified as to the existence of a fixed term contract of the Applicant for the period February 2013 to the end of January 2016 that was not produced at this arbitration hearing.

ANALYSIS OF EVIDENCE AND ARGUMENT

29. I at first need to attend to the Respondent’s submission in his written arguments that the matter should be dismissed as the Council have no jurisdiction to entertain this dispute. This challenge was essentially based in that as there was no fixed term contract in existence and the existence a fixed term contract is a pre-requisite in a dismissal contemplated under section 186(1)((b). I have to state that this was never raised as a *point in limine* at the onset of the hearing or raised during the hearing by the Respondent. As such I view this as opportunistic and inappropriate as the Applicant party was never made aware of this and as such never had an opportunity to address a jurisdictional challenge. It was always the Respondent’s case that there was no conduct and no intent on the part of the Respondent to extent the fixed term contract as per the Respondent opening statement.

30. This jurisdictional challenge raised by the Respondent is also nullified by the Respondent's own witness who testified that there was in fact a fixed term contract concluded between the parties for the period February 2013 to the end of January 2016.
31. It was in any event always in the first instance the challenge of the Applicant that the Respondent's failure to renew the Applicant's fixed term contract of employment on the same or similar terms, alternatively to retain the Applicant in employment on an indefinite basis on the same or similar terms as the Fixed Term Contract, clearly constitute a dismissal falling squarely within the ambit of Section 186(1)(b) of the Labour Relations Act no 66 of 1995 ("the LRA") and as such the Council has the required jurisdiction to consider this dispute.
32. I at first attend to the Applicant's contention that she "thought" that she was employed permanently and as such was shocked when her services were terminated. The Applicant's expectation for indefinite employment was in essence based on the failure of her employer providing her with a fixed term contract for the period 1 February 2013 to 31 January 2016. I am not persuaded that the facts before me could give rise for the Applicant to objectively believe that her employment had become of a permanent nature. It is clear from the facts before me as well as the extensive documentary evidence that the intent of the Respondent was at all times to only bind themselves for the periods stipulated in the contracts and the documentation submitted. The Applicant also inter alia conceded under cross-examination that she was aware of a memorandum which was given to her sometime in 2013, such memorandum which was signed by all the necessary principals including the then Superintendent General Doctor SM Pillay which recommended that her Contract again be extended for a period of three years with effect from the 1 February 2013 to 31 January 2016 as reflected on page 26 to 28 in the Bundle.
33. I will now attend to the Applicant's challenge in that the Respondent's failure to renew the Applicant's fixed term contract of employment on the same or similar terms, constitute a dismissal as per Section 186(1)(b) of the Labour Relations Act no 66 of 1995 ("the LRA").
34. According to **Grogan, "Workplace Law", 6 ed, at page 106:**

"The notion of a reasonable expectation clearly suggests an objective test: the employee must prove the existence of facts which would lead a reasonable person to anticipate renewal. The facts that will find a reasonable expectation differ from case to case, but will most commonly take the form of some prior promise or past practice – eg. Where the employer has habitually renewed the contract."

35. Some of the considerations for assessing whether a reasonable expectation of renewal exists are summarized as follows: Regard should be had, not merely to the specific terms of the fixed-term contract and the former legal principles involved, but to the specific context of the particular refusal or failure to renew – all the surrounding circumstances and, particularly, the conduct of the parties; A reasonable expectation can be present or created despite a contractual stipulation to the contrary; Where the employer agreed to renew the fixed-term contract, or gave an undertaking, even a tacit one to do so, it will be held bound to the agreement or undertaking; A practice or custom or re-employment or continued employment; See: **Thiso & Others V King Sabata Dalindyebo Municipality [2003] 12 BALR 1439 (CCMA); King Sabata Dalindyebo Municipality V CCMA & Others [2005] 7 BLLR 696 (LC); Aphane V Leeuw [2005] 7 BALR 734 (CCMA)**
36. A lengthy period of service, even on a fixed-term basis; The continued availability of the particular job or position; The purpose or reason for entering into a fixed-term form of employment; The reason for terminating the contract; Inconsistent conduct on the part of the employer; The failure to give notice that the fixed-term contract is not to be renewed; The nature of the employer's business. See: **Legal Constraints on the termination of Fixed Term Contracts of Employment: An enquiry into recent developments; Marius Olivier; (1996) 17 ILJ 1001.**
37. In **Dierks V University of South Africa 2 (1999) 20 ILJ 1227 (LC), Oosthuizen AJ stated at 1246 D-H:** *"In my view, it can be deduced from the foregoing and the use of the word 'reasonable' that the application as employee must prove that he had an expectation of renewal and that the expectation was reasonable in that apart from subjective say so or perception, there is an objective basis for the creation of his expectation. A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Court Appeal Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreement, 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 contracts, inconsistent conduct, failure to give reasonable notice, and the nature of the employer's business. These factors are not numerous clauses. Indeed, in my view, the identified approach of an evaluation of all the surrounding circumstances entailed an analysis of the facts in any given situation for the purpose of establishing whether a reasonable expectation has come into existence on an objective basis."*

38. The following additional considerations emerge from Labour Court and CCMA decisions since the enactment of Section 186(b) of the Act: The reasonable expectation must be created by a person with the necessary authority to bind the employer; A reasonable expectation will be created if an employee is permitted, by default, to continue in employment after the fixed term has expired; If an employer can prove that operational requirements have necessitated continuous renewal of fixed term contracts, and the employees are aware of this, a reasonable expectation will not have been created; A reasonable expectation of continued employment may still be present even if certain conditions of employment in the contract are to be reviewed after a certain period; if the employer states that further renewals are subject to good behaviour and proper work performance, the failure to inform an employee of poor work performance prior to the expiry of the fixed terms may lead to a reasonable expectation of renewal; Where contracts are renewable on the happening of a certain event, employees have a reasonable expectation of renewal on the happening of that event. See: **Fixed Term Contracts: When is an employee entitled to have a “reasonable expectation” of renewal?; Ingrid De Villiers; Contemporary Labour Law Vol. 10 No. 4 November 2000.**
39. It is trite law, as concluded by **John Grogan dismissal and discrimination unfair labour practices, 2nd edition, page 191**: If the Employer permits the Employee to continue working after the date on which the Contract would ordinarily have expired, the Contract will be deemed to have been tacitly received on the same terms, except the contractual relationship is now of indefinite duration. Once this happens, the only way in which the Contract can be terminated is by an ordinary dismissal, with or without notice, or by the Employees resignation.
40. I have carefully considered the evidence and argument before me and it is my view that if the evidence of the Applicant is objectively assessed it proves that any reasonable employee in her position would in the circumstances have expected that her fixed term contract will be renewed on the same or similar terms if the following is inter alia considered:
- It was conceded by the Respondent that the project to which the Applicant was employed was, of a permanent nature. It was undisputed that the Applicant was employed in the realm of telemedicine which is critical and cost saving and part of a National Strategic Plan.
 - The undisputed evidence of the Applicant was that she was initially employed via an Employment Agency in her position during the period of 2004. She was thereafter employed by the DOH in the

same position on a one year fixed term contract from the 1 August 2005 until 31 July 2006. Her employment continued albeit via Kelly Agencies during the interview process for the position. This was the only interview process undertaken by the DOH. She was thereafter, with unbroken service appointed on a further fixed term contract from the 1 February 2007 to 31 January 2008. At no stage in either of these Contracts or any of these further contracts was it ever stated there was no expectation of a renewal of the Fixed Term Contract. She was thereafter appointed on a further five year fixed term contract (with unbroken service) from 1 February 2008 until 31 January 2013 in the same position she had held before. During this period, she further undertook an acting position of Deputy Director for a period of twelve months. She was subsequently employed on a further two month fixed term contract for the period of 2 February 2013 to 31 March 2013, being the final official Contract she was given by the DOH. She continued to work at the expiry of the two month Contract from the 1 March 2013 up to April 2016.

- The Applicant was not given a further fixed term contract for this period (1 March 2013 to April 2016) but was aware of a memorandum which was given to her sometime in 2013, such memorandum which was signed by all the necessary principals including the then Superintendent General Doctor SM Pillay which recommended that her contract again be extended for a period of three years with effect from the 1 February 2013 to 31 January 2016. I concur with the Applicant representative that of importance at page 27 is the commitment to incorporating the telemedicine operational support unit into the Department Organogram (which implies permanency in the near future), the importance of scarce skills and retention. The instruction was accordingly to absorb her Department into the Eastern Cape Departmental Organogram:
- *“Extending the Contracts for a period of three years will ensure that the Department is able to retain the telemedicine institutional knowledge, ensure that the Department continues to provide support to rural communities and health privations through telemedicine, and allow the OSU to be fully incorporated into the Departmental Organogram. Of the nine Provinces in the Country, the Eastern Cape and Kwa Zulu Natal are the only Provinces with a dedicated telemedicine unit. To ensure a sustainable telemedicine program in the Department, it is imperative that the scarce skills and knowledge acquired by the said Employee is retained”.*
- Much reliance was placed by the Respondent at page 28 that the CFO said these posts should be advertised. I concur with the Applicant party that this can only be on the assumption that these become permanent posts within the organogram.

- It is common cause that at the time of the Applicant's dismissal, the post had not been incorporated. The evidence also established that, not one of the other extensions were premised by an advertisement process, and in the absence of the post being placed on the organogram, the history of numerous past renewals on lengthy contracts. Considering the aforementioned I concur with the Applicant party that the Applicant was entitled to assume at the very least that she would be placed on a further fixed term contract of a similar nature until such time as the post had been made permanent, in which case advertisements would have been issued out by the DOH and she would have applied and in all probability been the most successful candidate for a permanent post as she was the only person left with the required skills.
- Of further significance is the fact that the Applicant continued to work beyond the period stipulated in the memorandum. More particularly, she performed duties and received remuneration in February 2016, March 2016 and most of April 2016. She was dismissed in April 2016, in circumstances where she continued to work beyond what was contained in the memorandum signed by the Superintendent General to which she was not a party.
- She furthermore received instructions during the month of April 2016 as set out in the evidence from many of her superiors. Significantly Karen Campbell, the DDG on 10 April 2016 in relation to a submission by Mrs Varra for her to be absorbed into the Cecilia Makiwane Hospital establishment on a post of outreach Co-Ordinate (which is separate to her post she had held throughout the period), was fully aware that she continued to work during February, March and April of 2016, and requested her file to be sent to her office. Furthermore, she enquired under which Directorate Tele Health fell.
- It was also the undisputed evidence of the Applicant that the Respondent invested thousands on training her over the years on what was a permanent project.
- I concur with the Applicant party that of significantly is the undisputed evidence of the Applicant that on the 26 April 2016 she received a letter which had been e-mailed the day before enclosing her termination letter. This is the undisputed evidence of the Applicant as set out on the thumbnail which she acquired during a mini Forensic Investigation, that this letter was dated the 31 March

2016, refers to her employment being terminated on the 31 March 2016, but was only created on Monday the 25 April 2016 at 11:20 and thereafter e-mailed some 19 minutes later to one Nomonde Malala. Clearly the Respondent attempted to back date a letter to avoid the ramifications of letting the Applicant work during the month of April 2016. Of significance is the Applicant's annotation on the letter stating that it was received under duress, that she had continued working beyond the end of March 2016, and that she fully expected the contract to be renewed as it had over the past 11 years.

- The evidence of Mr Batty which was not contested was the importance of telemedicine and the need for the continuation thereof. He furthermore testified that the Department often hired Employees within advertising.
- I concur with the Applicant party that the evidence on behalf of the Respondent in the form of Mr Makitshi did not take the case of the Respondent any further. He had no personal knowledge of the Applicant, had not seen her personal file, had not seen any of her contracts as such his evidence was hearsay. He confirmed that although it was normal to advertise, the Superintendent General can appoint an extra advertisement for critical and scarce skills. He could not dispute that no advertisements had taken place in relation to the numerous renewals of the Applicant's fixed term contract. He furthermore confirmed that it was practice that fixed term Contracts were "renewable". He referred to a so called memorandum that no Contracts could be extended but failed to produce such a memorandum and as such an adverse inference must be drawn and his evidence disregarded. He furthermore testified as to the existence of a so called fixed term contract for the period February 2013 to the end of January 2016, such document which furthermore was not produced.

41. It is thus my finding that the evidence before me, objectively assessed shows at the very least the Applicant had an expectation of renewal of her contract for a further three years.

42. The Applicant seeks an order for reinstatement into her position on same or similar terms as she was previously employed as well as payment for services rendered during the month of April 2016. I see no reason as to why I should not award the Applicant the relief sought.

AWARD

43. The Respondent must renew the Applicant's fixed term contract of employment on the same or similar terms that prevailed at the time of her dismissal, the renewal of her contract must be for a further three (3) years effective from 1 May 2016 up to 30 April 2019.
44. The Applicant must report for duty on 1 May 2017 at the normal starting time.
45. The Respondent must pay the amount of R467598.72 to the Applicant on or before 31 May 2017 which is outstanding payment due to her as result of the renewal of her fixed term contract for the period of 1 May 2016 up to 30 April 2017 (12 months remuneration) calculated as follows:
R38966.56 per month x 12 months = R467598.72)
46. The Respondent must in addition pay the Applicant for services rendered for 18 days during the month of April 2016 which was not paid to the Applicant at the time of her dismissal, comprising:
 $R38966.56 / 30 \times 18 \text{ days} = R23396.73$
47. The Respondent, Department of Health-Eastern Cape must pay the total amount of R490995.45 to the Applicant, Mrs J. Simpraga on or before 31 May 2017.



M. LE R. KOORTS
PHSDSBC ARBITRATOR