



ARBITRATION AWARD

Commissioner: **Khehla Khanyile**

Case No: **PSHS32-20/21**

Date of award: **13 August 2020**

In the matter between:

NUPSAW obo SIBONGILE MBOKAZI

Applicant

and

DEPARTMENT OF HEALTH- KWAZULU NATAL

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was scheduled for 03 and 24 July 2020, at KwaMashu CHC in Durban. The applicant appeared in person and was represented by the Union Official, Mr. Mlondi Memela from NUPSAW. The respondent was represented by a Deputy Director Labour Relations, Mrs Ntokozo Gumede. The proceedings were digitally recorded and I also took down notes.

ISSUE TO BE DECIDED

2. I am required to decide whether the applicant had a reasonable expectation that her fixed term contract would be renewed on the same terms and if so, whether the dismissal was fair and if unfair, determine the appropriate relief.

BACKGROUND TO THE DISPUTE

3. The applicant, Ms. Sibongile Mbokazi was employed on the fixed term contract by the respondent as a care giver on 24 November 2011. She was earning R3500.00 monthly at the time of the alleged dismissal. The applicant was employed on the fixed term contract of employment and the respondent did not renew the contract. It is the applicant's contention that the respondent dismissed her for no plausible reason. It is the respondent's contention that the applicant's contract was not renewed because of the effluxion of time.

SURVEY OF EVIDENCE AND ARGUMENT

Applicant's case

4. Ms. Sibongile Agrineth Mbokazi stated that she was employed on the fixed term contract which was renewed every year from 24 November 2011 to 31 March 2020. She submitted that she got sick in October 2019 and Ms. Ndebele visited her at home. She further testified that Mrs Masango instructed her to attend a doctor at Poly clinic. She stated that she submitted the medical certificates to the respondent. She further stated that she had a good performance and the respondent had never subjected to a hearing for a poor work performance. She submitted that she was never informed that she was in breach of the agreement in terms of the fixed term agreement clause 4.2 which reads " The aggrieved party shall be obliged to first attempt to settle the matter by way of consultation with the defaulting party. If the consultation fails then the aggrieved party shall promptly give the defaulting party 14 (fourteen) days written notice to remedy the breach. She further submitted that she was not given 30 (thirty) days' termination notice as required by the agreement in clause 8.2. reads "This agreement may be terminated by either party who shall be required to submit written notice to the other party no less than 30 (thirty) days prior to the date of termination.
5. She submitted that other care givers' contracts were renewed except her. She further submitted that Ms. Ndebele informed her that the respondent would not renew her contract as she had been sick and failed to submit medical certificates.

6. Under cross examined it put was put to the applicant that the respondent relied on the Community Caregiver agreement clause 4.2 reads “ In the event the Department determines that the Community Caregiver’s performance is satisfactory and the Department wishes to extend or renew this agreement for an additional period after the expiry date, the Department shall give the Community Caregiver written notice of the proposed extension or renewal no less than 30 days prior to the expiry of this agreement. The applicant submitted that at all material times she provided a satisfactory performance until she fell sick.

Respondent’s case

Witness 1

7. Ms. Simangele Ndebele (Supervisor) stated that she joined Lindelani Clinic on 12 April 2019 and resumed duties on 15 May 2020. She submitted that the applicant was reporting to her. She further submitted that she noticed that the applicant was off sick but no sick notes submitted. She testified that Mr Khaya Mthembu, Nokulunga, Thandazile Mgwaba and herself visited the applicant at her home on 05 July 2019 and August 2019. Upon arrival, they discovered that the applicant was indeed sick and advised her to visit a doctor. She further testified that the applicant did not submit any medical certificates.
8. She stated that she reported the matter to an operation manager, Mrs Masango at Lindelani Clinic intervene to refer the applicant to occupational health doctor at Poly Clinic. She stated that the applicant reported for duty in September 2019 and she submitted to her a bad report. She further stated that if she were to rate the applicant would give her zero as she could not compile monthly reports, attend training and assessment. She conceded that the respondent did not subject the applicant to the hearing for poor work performance. She further stated that the applicant did not report for duty from October 2019 until December 2019. She submitted that the applicant worked few days in January 2020 and worked the whole month in February 2020. She conceded that the applicant was sick for a period from May 2019 to January 2020. She submitted that the applicant came to Lindelani Clinic and she informed her that she was still not feeling well.

9. Under cross examination it was put to her that the applicant would lead evidence that the applicant submitted sick notes to Ms. Ndebele and Ngubane and her reply" she submitted sick notes".

ANALYSIS OF EVIDENCE AND ARGUMENT

10. The applicant referred an unfair dismissal dispute to the Council. I am required to decide whether the applicant had a reasonable expectation that her contract would be renewed.

11. In terms of section 186(1)(b)(i) of the Labour Relations Act 66 of 1995 ("the LRA") dismissal means 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. In terms of section 192 the applicant bears the onus to prove of showing that she was dismissed.

12. It is common cause that the applicant was employed on the fixed term contract since 2011 to 31 March 2020. It further appeared as common cause that the applicant was off sick from May 2019 to January 2020. It further appeared as common cause that the respondent continued paying the salary of the applicant while she was off sick.

13. The applicant contended that she had a reasonable expectation that her contract would be renewed in that she had a good work performance standard until she fell sick. I reject the applicant's contention that the respondent created a reasonable expectation that her contract would be renewed.

14. In *University of Cape Town v Thomas auf der Heyde* [2001] 12 BLLR 1316 1316 (LAC) it was held that the test for reasonable expectation was twofold. It deals with firstly, whether the employee actually expected the contract to be renewed and secondly, the expectation was reasonable.

15. The applicant failed to pass the objective test in that a reasonable person in the similar situation of the applicant would not have had a reasonable expectation that his or her contract would be renewed. In this instance, the applicant was off

sick from May 2019 until January 2020, she could not prove how the respondent created a reasonable expectation that her contract would be renewed. She further led evidence that she would not be able to perform her duties, as she was still sick. In my view, it was going to be fruitless to renew her contract while she would be unable to work. The applicant also signed the contract which had a start date and an end date. I find that the applicant failed to establish a dismissal. Therefore, the Council lacks jurisdiction to hear the matter. Therefore, the application is hereby dismissed.

AWARD

16. Accordingly, I order as follows:

17. The applicant failed to establish a dismissal.

18. The Council lacks jurisdiction to hear the matter.

19. The application is hereby dismissed.

20. I make no order as to costs.



COMMISSIONER: KHEHLA KHANYILE