



ARBITRATION AWARD

Arbitrator: Mr. Anand Dorasamy
Case No.: PSHS 355-10/11
Date of Award: 13:06:2012

In the ARBITRATION between:

MACGREGOR ATT OBO KHUMALO N
(Union / Applicant)
and

DEPARTMENT OF HEALTH: KZN
(Respondent)

Union/Applicant's representative : MR B MACGREGOR (ATTORNEY)
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Respondent's representative : Ms N A GUMEDE
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INTERPRETER : MR M R M NJOKO

1, Details of hearing and representation:

The arbitration proceedings commenced at 10H00 on the 10 May 2012 at the King Edward Hospital, VIP Lounge, Doctor's Quarter's Durban. Mr B MacGregor an attorney represented the applicant and Ms N A Gumede represented the respondent.

2. After discussing the matter the parties agreed as follows:

- i. There would be no oral evidence tendered and the matter would be finalised on their written submissions as follows:
- ii. The applicant/employee will submit its Heads of Arguments on or before the 17 May 2012;
- iii. The respondent/employer would answer on or before the 24 May 2012 and
- iv. The applicant will reply by the 31 May 2012. The award will be rendered on the written submissions.

SPECIAL NOTE

The respondent filed its Heads of Arguments on the 7 June 2012. The applicant indicated on the 11 June 2012 that it would not be making further submission.

3. ISSUE TO BE DECIDED

Is whether the Applicant's expectation that her fixed term contract would be renewed is reasonable. Should I find in her favour then I need to determine the appropriate remedy.

The party's submissions are recorded below:

4. APPLICANT'S (EMPLOYEE) SUBMISSION

INTRODUCTION

1.

This is a dispute whereby the Applicant had a reasonable expectation that her fixed term contract would be renewed.

2.

The common cause facts are as follows:

Common cause

1. That Bundle A, pages 22 – 30 is the referral forms of the Applicant in the matter;
2. That Mr B Macgregor will represent the Applicant;
3. That the Applicant was initially employed on six fixed term contracts for the period 2003/2004; 2004/2205; 2005/2006, 2007/2008, 2008/2009 and the final contract ending on the 31st July 2010;

4. A meeting occurred on the 30th March 2010 between a number of retired nurses and the CEO, Mrs Zondi at Inkosi Albert Luthuli Hospital although the Applicant did not attend as she was ill;
5. At the aforesaid meeting the nurses were advised that their contracts would be extended until further notice;
6. That the nurses' letters of appointment for 2010 were handed to them in June 2010;
7. That the Applicant's contract was brought to an end on the 31st July 2010.

3.

It is the Applicant's contention that she had an expectation of the contract being renewed. These were as follows:

3.1 Previous contract

- 3.1.1 For six successive years the Applicant was afforded six one year fixed term contracts.

Example contract, Bundle B

- 3.1.2 The Applicant felt due to the frequency of these (six of them), including the fact that the contracts were to proceed as per the 30th March 2010 meeting and in June 2010 were given their contracts, the Applicant formed the expectation that her contract would be renewed for at least one year. If not for a number of years by virtue of the repeated renewals as indicated above.

3.2 Memo, page 1, Bundle A

- 3.2.1 Near the beginning of these contracts the Department issued a memo in which it dealt with the employment of retired nurses in which it is evident that there is no cut-off age. The Applicant accordingly formed the view that she would continue to render her services indefinitely in light of the fact that the mandatory retirement age was no longer applicable as the Department had specifically retired nurses and secondly that there was no cut-off age for nurses to continue to be employed. Once again this gave rise to an expectation, which on these facts it is submitted in a reasonable and legitimate expectation.
- 3.2.2 Furthermore arising out of this memo is the fact that the memo appears to indicate that contracts would be routinely returned.

3.3 Previous litigation

- 3.3.1 The Applicant finally had a concern that possibly the reason why her contract was not returned was the fact that she had previously litigated against the Department in 2006 – 2008 and furthermore in 2010 had instructed her lawyers to address correspondence regarding a bonus to be paid to her.

3.3.2 It is submitted however that a number of other applicants had not litigated against the Department and their employment was also brought to an end and accordingly this concern must remain at a level of being of a concern only.

3.3.3 In terms of Section 186(1)(b) of the Labour Relations Act, the termination may constitute a dismissal if the employer failed to renew the contract on the same or similar terms.

See: ***University of Pretoria v CCMA (2012) 33 ILJ 183 (LAC)***

SARS v CCMA (2009) 30 ILJ 2961 (LC)

Alvillar v NUM (1999) 20 ILJ 419 (CCMA)

4.

The Applicant clearly had a legitimate expectation.

5.

The Applicant seeks a finding that:

5.1 the Respondent failed to renew the contract on the same or similar terms;

5.2 the Applicant had a reasonable expectation of renewal;

5.3 the Applicant was dismissed;

5.4 granting the Applicant permanent employment alternatively, a further contract for a period of 12 months, alternatively compensation equivalent to 12 months pay;

5.5 costs.

5. RESPONDENT'S (EMPLOYER) SUBMISSION

1.

The applicants declared a dispute alleging unfair dismissal. There was no dismissal but the fixed term contract came to an end.

2.

It is my submission that the applicant was a retired nurse. The country as a whole experienced challenge in employing nurses because the nurses moved abroad for green pastures or secured employment with private hospitals.

3.

The MEC for Health of that time made efforts for patient care not to be comprised because of shortage of nurses. The retired nurses were brought on board because of their experience to come back on public service

on contract basis until the department was able to attract nurses for full time employment. The reason for engaging the services of the applicant was the shortage of the nurses in the country. This was the specific reason the Department engaged their services and they were aware of it.

4.

It is my submission that the applicants were addressed by the CEO of the hospital, in March 2010 of the hospital, where she was consulting with them that their contracts were to be extended until further notice because of the dispute that was raised by NEHAWU regarding the filling of advertised posts. It was the same posts that they were occupying.

5.

The posts were advertised on 22 February 2010 and the closing date was 01 March 2012(Bundle B page 9 to 13) NEHAWU then called for an urgent suspension of employment on advertised posts on 12 March 2010. The respondent had the responsibility to investigate the allegations raised by NEHAWU. The investigation process was finalized in May 2010 and the findings revealed that the allegations were unfounded.

6.

The respondent made the applicants to sign their last contracts on 01 June 2011 which was starting from 01 April 2011 to 31 July 2011. This was after the respondent had attended to the dispute raised by NEHAWU. The applicant served two full months notice, which is much reasonable and fair.

7.

It is my submission that the applicant always knew that the respondent had a problem of recruiting full time nurses and that logic dictates that once qualified staff were employed their services would not be required.

8.

The applicant did not refuse to sign the contract which was ending on 31 July 2010; she accepted the conditions as stated in the contract.

It is my argument that the notice period is generally one month for either party to terminate a contract.

9.

It is therefore my argument that it was not possible for the respondent to proceed with filling of these posts in April as it was planned. The dispute was cleared in May 2010 hence the applicants were made to sign their contracts on 01 June 2010.

10.

It is my submission that it would not have been possible for the permanent incoming nurses to assume employment whilst the applicant was still in service because she was carried against the very same permanent posts.

11.

The reasonable expectation that the applicants had is not justifiable because in the last contract that she signed, the Department extended its appreciation by including "Hospital Management would like to thank you for the services you have rendered at IALCH".

12.

This clearly indicated that there was no way the contract would be renewed and this clause was never included in previous contracts.

13.

It is my argument that the several renewals are not the only determining factor but other factors must be considered. The applicant was on fixed term contract for a reason that she knew at all material times, the shortage of nurses not only for IALCH but the whole country.

14.

The several renewals did not entitle the applicant to perpetual renewals. The last contract was ending at the end of March 2010 but due to the dispute lodged by NEHAWU another contract was entered into which ended 31 July 2010. There is nothing that justify why a contract should have been extended for a year. The contracts were repeated for a reason.

15.

The applicant could not work indefinite because the reason they were recalled by the Department on fixed term contract was the shortage of nurses. The Occupational Salary Dispensation (OSD) for the nurses was introduced in 2007 and implemented in 2009 addressed the issue of shortage of the nurses in the whole country.

16.

The circular on Bundle A page 1 states that retired nurses must be employed on fixed term contract and contracts be renewed on condition that younger candidates are not attracted to fill the post. The respondent had attracted a very high number hence the posts were filled (Bundle B page 14).

17.

It is correct that there is no cut off age for the nurses to continue working but the circular clearly indicate that the contracts would only be renewed if there are no younger candidates available to fill the posts.

18.

There is no legitimate expectation created by the respondent, the respondent was always clear and open about the applicant employment.

19.

The cases quoted by the applicant are not relevant, in *University of Pretoria v Commission for Conciliation, Mediation & Arbitration & Others* the respondent after series of fixed term contract the employee demanded for a permanent employment. This could not have been the case with the applicant because she was a retired nurse there was no way she could be permanent.

20.

See *Motsukunyane M /Sedibeng District Municipality*
(2011) 20 SALGBC 6.9.3

21.

It is my submission that the applicant cannot be an exception from *Ngcobo & 116 others*. The Commissioner ruled in their matter that there was no unfair dismissal, the facts are the same.

22.

The respondent, prays that there was no unfair dismissal and dismiss the matter.

SURVEY OF EVIDENCE AND ARGUMENT

6. The applicant's employment was terminated and the matter was set down for arbitration.
7. The parties must be complimented for their comprehensive submission. It is recorded that their submissions have been carefully considered before a determination was made.
8. The applicant was a retired nurse amongst other nurses who also challenged their non-renewal of their fixed term contracts were employed, as nurses at the Inkosi Albert Luthuli hospital as nurses in terms of fixed term contracts in 2003 and which contracts were renewed annually.
9. In June 2010 they received contracts for 2010 which they signed. In terms of the contract their contracts would terminate on 31 July 2010.
10. It was the applicant's case that the respondent had created a legitimate expectation of the renewal of her contract and the respondent failed to renew the contract on the same or similar terms and seeks an order granting the Applicant permanent employment alternatively, a further contract for a period of 12 months, alternatively compensation equivalent to 12 months pay and costs.
11. The respondent submitted that the applicant cannot be an exception from *Ngcobo & 116 others* where the Commissioner ruled in their matter that there was no unfair dismissal and the facts are the same. The respondent, prays that there was no unfair dismissal and dismiss the matter.

ANALYSIS OF EVIDENCE AND ARGUMENT

12. The applicant was amongst other applicants who lodged a dispute about the respondent's non-renewal of their fixed term contracts.
13. All employees in this category attended a meeting where the respondent's position in respect of their employment was discussed. The applicant did not attend this meeting. Subsequent to that meeting all the affected employees excluding the applicant had lodged a dispute about the non-renewal of their fixed term contracts.
14. The initial arbitration hearing was adjourned to enquire whether the applicant could be joined in the proceedings of Ngcobo & 116 others. She was not joined because that proceeding had already commenced.
15. The commissioner Ms Asha Sewpersad had dismissed the application.
16. The question arises is what would have been the applicant's fate had she be joined in the Ngcobo & 116 others proceedings. Her dispute ought also have been dismissed.
17. I intend to deal with her dispute for completeness as follows:
The applicant's appointment letter dated the 31 May 2010 stipulates the following:
..... The period of your contract will be from 1 April 2010 to 31 July 2010. On this date this contract will be automatically terminated. (my emphasis)
18. It is clear from the wording of the contract that there was a start and end period.
19. The applicant had retired but because of a need she was employed in various fixed term contracts. Where there is an agreed retirement age employment terminates due to effluxion of time in terms of the agreement and there is no dismissal (see Southern Cross case 2475F)
20. The applicant and the other employees were aware that their fixed term contracts resulted from a shortage of nurses at IALC. It is reasonable to infer that once the shortage was met the applicants amongst them the applicant who had retired could not reasonable expect to force the issue and assume that she had a legitimate expectation that her contract would be renewed once the suspended conditions of the needs were addressed.
21. The applicant was aware that she was filling in for nurses who were not available or in short supply and her contention entitling her to perpetual renewals or permanence is unconvincing. She was told in her contract and at a meeting where she was absent that her contract would terminate on the 31 July 2010 and the respondent then terminated it on that day.
22. I have noted that the applicant was a retired nurse and was aware or reasonably ought to have been aware that her contract would end on the 31 July 2010 failed to prove or cannot contend that the respondent created a legitimate expectation of continued employment.
23. As a consequence of the above the application is dismissed.

24. I have considered the question of costs and do not believe that either party was frivolous or vexatious in this matter and in terms of law and fairness I do not believe that either party should be saddled with a cost order against it.

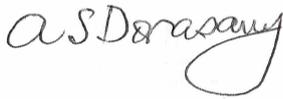
AWARD:

25. The applicant's application is dismissed.

26. No order for costs is made.

27. This file should be closed.

DONE AND SIGNED IN DURBAN ON THIS 13 DAY OF JUNE 2012.

A handwritten signature in cursive script, appearing to read 'a S Dorasamy', written in black ink.

Arbitrator: Anand Dorasamy