



ARBITRATION AWARD

Panellist/s: Asha Sewpersad
Case No.: PSHS464-10/11
Date of Award: 7-Feb-2012

In the ARBITRATION between:

In the matter between:

BRETT PURDON ATT OBO NGCOBO C. AND 116 OTHERS

(Applicant)

and

DEPT OF HEALTH:KZN

(Respondent)

Union/Applicant's representative: BRETT PURDON ATTORNEYS

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1.Details of hearing and representation

[1.1] The arbitration was held at the King Edward Hospital, VIP Lounge, Doctors Quarters, Durban on 12 August 2012.

[1.2] The Applicant was represented by Adv D.S. Rorick, acting on the instructions of Brett Burdon Attorneys and the Respondent was represented by Ms N.A. Gumede a Labour Relations Practitioner from the Department of Health Kwazulu-Natal.

[1.3] The Applicant handed in a bundle of documents which was marked Exhibit "A" and the Respondent a bundle marked "B". The minutes of the Pre-Arb Conference was marked "C".

[1.4] The parties agreed that the status of all documents would be that they are what they purport to be.

2.Issues to be decided

[2.1] Whether the non-renewal of the fixed term contracts of the Applicants amounts to a dismissal and if so, the correct remedy to be implemented; and

[2.2] Whether the Applicants are entitled to the payment of birthday bonuses.

3.Common Cause

The following facts were common cause:

- That annexure "X" to the referral form are the Applicants in the matter;
- That C.Ngcobo can represent the Applicants;
- That the Applicant's were initially employed on fixed term contracts;
- That the fixed term contracts were generally renewed since 2003 depending on initial engagement;
- That the Applicants' contracts "terminated" on 31 July 2010;

- That a meeting occurred on 30 March 2010 between the Applicants and CEO Mrs Zondi at Inkosi Albert Luthuli Hospital;
- That at the aforesaid meeting the Applicants were advised that their contracts would be extended until further notice;
- That the Applicants' letters of appointments for 2010 were handed to them in June 2010; and
- That the Applicants never received birthday bonuses before 2007.

4. Background to the issue

[4.1] The Applicants were retired nurses 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.

[4.2] In June 2010 they received contracts for 2010 which they signed. In terms of the contract their contracts would terminate on 31 July 2010.

[4.3] It was the Applicant's case that the Respondent had created a legitimate expectation of the renewal of their contracts and that they were permanent employees and were therefore entitled to payments of their birthday bonuses from 2007 and sought re-instatement with backpay, alternatively compensation.

[4.4] It was the Respondent's case that the Applicants contracts terminated on 31 July 2010 in terms of their contracts of employment and that contracts signed prior to 2007 did not make provision for bonuses and that the Applicants always signed their contracts without that provision and hence they were not entitled to bonuses for the periods prior to 2007.

5. Survey of evidence and argument

5.1.Applicant's evidence

Christina Ngcobo testified as follows:-

5.1.1. She was 73 years old and a retired Chief Professional Nurse who was employed at the Inkosi Albert Luthuli Hospital since October 2003 in terms of a fixed term contract which was renewed annually since 2004 until it was terminated on 31 July 2010 .

5.1.2.. All full time employees with the Respondent had been receiving birthday bonuses since 2004 whilst she began received a birthday in 2007.

- 5.1.3. She believed that she was a permanent employee and expected to continue working until “one was unable to work”.
- 5.1.4. There was a total of 117 applicants who were all employed at Inkosi Albert Luthuli Hospital.
- 5.1.5. She had attended a meeting in 2004 which was chaired by a Mr Mhlongo who had told them that they could” work for so long as they were fit to work and their feet could carry them”.
- 5.1.6. The benefits that she had received, was 20 days leave and 12 days sick leave during the year.
- 5.1.7. Her net salary was R18 225-00 whilst the others were as set out in page 13 and 14 of the Applicant’s bundle.
- 5.1.8. Her contract for March was due to terminate on 31 March 2010 but on 30 March 2010, Mrs Zondi had called all contract workers to a meeting where she advised them that their contracts would not expire on 31 March 2010, but that it would be extended until further notice.
- 5.1.9. They all continued working until they were informed on 3 June 2010 that they had to sign forms which stated that their contracts would terminate on 31 July 2010 which they did sign although they wanted to query it.
- 5.1.10. She had never seen the appointment letter at page 15 of the Applicant’s bundle which was addressed to her and which stated that her contract was from 1 April 2010 until 31 July 2010.
- 5.1.11. The relief that they sought was reinstatement and payment of the birthday bonuses since 2003 alternatively compensation.
- 5.1.12. During cross examination she testified as follows:-
- *They were employed with the Respondent due to the shortage of nurses but nothing had been said about the availability of nurses and they thought that they would continue working as nurses.
 - *Presently there was still a shortage of nurses as nurses who were employed there had been complaining about the shortage.
 - *Prior to working at Inkosi Albert Luthuli Hospital she was employed at Stanger Hospital where she was in charge of the operating theatre before she had retired.
 - *There was a shortage of nurses after they had retired as nurses leaving for Overseas .
 - *their contracts were at all times read prior to being signed, however with regards to the last

contract they were given short notice and they were called individually and asked to sign without being given the opportunity to take them away to read.

*After they had signed the contract they all decide to meet and realised that there was a problem.

*They had expected to finish working at the end of March 2010.

*The contract was signed in June 2010 and their last working day was 31 July 2010 and they had received two (2) months notice.

*They had expected the contract to be renewed until they felt unfit to work.

*They did not have a problem with the Respondent securing full time nurses but they had wanted to continue working as there was a scarcity of skills.

*They were not contributing to a pension fund and only received a birthday bonus in 2007.

*She confirmed that by signing the acceptance clause dated 1 June 2010 on Page 16 of bundle B she was accepting everything which was contained in the letter.

*She confirmed that in terms of page 9 of bundle B which was the appointment letter for the period 1 April 2010 until 31 July 2010 she understood that the contract would start on 1 April

2010

and terminate on 31 July 2010 and as she had signed the contract it meant that she had acknowledged it.

*When it was put to her that there was no dismissal and no unfairness as her contract had come to an end as she had accepted and signed the document on page 16 of bundle B, she replied

that

her query was that the notice period was too short but that she had accepted it and had no problem that the contract had come to an end.

5.1.13. During re-examination she testified that she has seen the document at page 9 of bundle B for the first time and that her signature was not on the document and that she had signed the acceptance of the contract on page 16 of bundle B.

5.2. Respondent's evidence

The Respondent led the evidence of Gillian Lee Dix, the Assistant Human Resources Manager at Inkosi Albert Luthuli Hospital,

Dix testified as follows:-

5.2.1. Her duties included dealing with advertising, Recruitment and Service conditions and

terminations.

- 5.2.2. When the hospital was commissioned in June 2002, many departments from other hospitals were also commissioned on the understanding that they would come with their nursing staff ,however what actually transpired was that the nursing staff chose to remain in their hospitals.
- 5.2.3. There was a nationwide shortage of staff as most nursing staff were going Overseas.
- 5.2.4. It was then that the MEC for Health spoke to all retired nursing staff about the utilization of their services as there was a shortage of nursing staff.
- 5.2.5. It was then decided that retired nursing staff would be utilized until such time as the Department could appoint full time nursing staff.
- 5.2.6. Nursing staff were employed on a fixed term contract which was renewed annually.
- 5.2.7. On 1 July 2002 there was a nursing OSD (involved career pathing for nursing staff with an increase in salaries and recognition was afforded to specialty streams and salaries were adjusted) and thereafter there was an influx of enquiries from nursing staff from abroad and the private sector who wanted to return to the hospital.
- 5.2.8. In February 2010 an advertisement was put out and there was a large number of applicants. who responded to the advertisement and therefore a large number could be appointed to permanent posts.
- 5.2.9. On 1 April 2010 there was an objection received from NEHAWU and it was agreed that fixed term contracts should remain in force until such time as the dispute was resolved.
- 5.2.10. On 31 March 2010, Mrs Zondi, the CEO advised the fixed term employees about that and told them that they should continue working until further notice.
- 5.2.11. During May the dispute was resolved and fixed term, employees were given contracts from 1 April 2010 until 31 July 2010. This was agreed on 1 June 2010 and they were given letters which gave them two months notice.

- 5.2.12. During this time new appointees were issued with letters of appointment to commence employment on 1 August 2010. As they were not in a position to have initially appointed the appointees due to the dispute, and in order not to interrupt service delivery, they requested the fixed term employees to work until 31 July 2010.
- 5.2.13. The contract employees were no longer required as the posts were now filled by permanent staff.
- 5.2.14. The fixed term contracts initially did not provide for a service bonus, however in June 2007 contract nurses were given service bonuses and all fixed term contracts made provision for service bonuses with effect from 1 July 2007.
- 5.2.15. It was not unfair that the contracts were not renewed as these contract nurses were retired nurses and in terms of the Public Service Act employees resign at age 65.
- 5.2.16. Various meetings were held with the nursing staff in February 2009 and on 16 February 2010 advising that the contracts would terminate on 31 March 2010 and had it not been for objections received from the union, the permanent appointees would have commenced duty on 1 April 2010.
- 5.2.17. The hospital was unaware as to how long it would have taken to resolve the dispute therefore a meeting was held with contract nurses and Mrs Zondi on 31 March 2010 advising them of the position.
- 5.2.18. the letters of appointment provide for a months' notice , however the hospital gave the contract nurses two months notice which was much more than that required in terms of the letters of appointment.
- 5.2.19. Nursing posts were utilized and filled with suitable incumbents under the age of 65 and in terms of the recruitment policy preference must be given to people below the age of retirement ie. 65.
- 5.2.20. Under cross examination she testified as follows:-
- * What was discussed at the meeting at the Royal Hotel was against the recruitment policy because any person above the age of 65 would be employed in terms of a contract because the retirement age was 65.
 - * A temporary contract did not become permanent and it did not create an expectation of continued employment as it was a yearly contract with an end date.

* the terms of the letter of appointment differed in 2009 but it was not different because their employment was based on a need.

*A meeting was held in February 2009 and the HR Management, Nursing Management and contract nurses were all present at the meeting.

* she was surprised that the Applicant had not seen the letter of appointment on page 16 of Bundle B because she had signed the acceptance on 1 June 2010.

* Contract nurses were advised of the implementation of the OSD in 2009 although it had been implemented in 2007 and could not offer an explanation as to why they were not told about it in 2009.

* She did not believe that an expectation of continued employment was created because contract nurses were employed based on need and that the Public Service Act stipulated the retirement age.

* She did not believe that the renewal of their contracts made them permanent and that there was a dismissal as they were given two months notice.

*Prior to 2007 they were employed in terms of a contract by legal services which did not provide for a birthday bonus but since 2007 they were given birthday bonuses.

*she did not agree that the 2010 contract which was handed to the contract nurses was a means to swop the current pool of nurses for a fresh pool of nurses.

Analysis of evidence and argument

My analysis and findings below take into account all the evidence presented above and shall therefore not be repeated here. I shall focus mainly on those aspects which are relevant to my finding.

Grogan in Dismissal at page 39 states as follows:-

A fixed term contract of employment is a contract the duration of which is determined in advance by agreement between the parties. The period for which the contract will remain in force can be determined either by reference to a specific date or by the occurrence of a specific event, for example the completion of a project for which the employee's services were engaged. When the date arrives or the event occurs, the contract expires in accordance with the intention of the parties. This means the employee has not been dismissed."

Applying the above to the present case, the Applicants who were all retired nurses were employed in terms of fixed term contracts and were at all material times aware of the reason as to why their services were engaged and were fully aware that this situation would not have

continued indefinitely. The last contract that was entered into between the parties afforded the Applicants two months notice of the Respondent's intention to terminate the contract. There is no basis for the Applicant's contention that they were permanent employees as they had retired and were aware of the arrangements regarding their employment.

The Applicant in her testimony referred to various meetings with Management regarding the status of their contract and for the Applicants to now submit that they thought that they would continue working until they felt unfit to work is totally unacceptable.

Unless the Applicants could prove a reasonable expectation, the expiry of their fixed term contract will never constitute a dismissal. The Applicants in this case were brought in from their retirement as a result of the shortage of nurses at the hospital. They were well aware that full time nurses would be appointed at some point in the future. The Applicant in her testimony stated that she had no issue with the Respondent employing full time nurses, her only difficulty was that the notice period was too short but had accepted it and had no problem that the contract had come to an end.

The Respondent's witness gave her evidence in a clear and concise manner and explained the reason for the employment of the retired nurses as well as the delay in the appointment of the full time nurses. Her evidence on the whole in relation to the material aspects remained unchallenged.

Grogan in Dismissal at page 41 states:-

"The requirement that the termination of a fixed term contract will be regarded as a dismissal only when the employee reasonably expected it to be renewed enables a court or an arbitrator to examine the circumstances behind non-renewal to establish whether the termination was merely a disguised form of dismissal. Although the inquiry goes beyond the normal principles of contract law, it is consistent with the idea that unfair dismissal is based not merely on the termination of the contract between an employer and an employee, but also on the termination of the employment relationship. When a court finds that the termination of a fixed term contract constitutes a dismissal, it is in effect saying that the employment relationship would have endured had it not been for the employer's failure to renew the contract: the decision not to renew the contract was a pretext for terminating the employment relationship"

Turning to the present case the critical issue to determine is whether the employees' claim that they expected the contract to be renewed was reasonable i.e. whether the circumstances were such that any reasonable employee would in the circumstances have expected the contract to be renewed on the same or similar terms.

The Applicants were aware that the posts which they held in terms of the fixed term contracts were posts which were to be advertised for the appointment of permanent employees. The Applicants in this instance as they had already retired were not eligible for indefinite or permanent employment.

The last fixed term contract of employment was for a period of four months and it was common cause that there was a meeting held on 30 March 2010 between the Applicants and the CEO Mrs Zondi at Inkosi Albert Luthuli Hospital.. Further Dix testified that on 16 February 2011 the Applicants were made aware that their contracts would be terminating in March, but due to the dispute with NEHAWU regarding the filling of the posts, the posts could not be filled. This remained unchallenged by the Applicants.

Ngcobo testified during cross examination that the notice period was too short but that she had accepted it. In terms of Section 37(c) of the Basic Conditions of Employment Act 75 of 1997, a contract of employment terminable at the instance of a party to a contract may be terminated only on notice of not less than four weeks if the employee has been employed for one year or more. The Applicant did not provide any authority justifying her claim for a notice period in excess of two months. Therefore there is no basis upon which to find that the Applicant was entitled to a longer notice period.

I accordingly find that the Applicants' could not have had any legitimate expectation of having their fixed term contracts of employment renewed. It therefore follows that there was no dismissal.

7.Award

[7.1] This application is dismissed.

DONE AND SIGNED AT DURBAN ON THIS 07TH DAY OF FEBRUARY 2012.

Ashwini

ASHA SEWPERSAD