



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: **PSHS800-18/19**

Commissioner: **David J. Pietersen**

Date of award: **15 April 2019**

The matter between:

NEHAWU obo ZODWA MANQELE

APPLICANT

and

DEPARTMENT OF HEALTH- NORTHERN CAPE

RESPONDENT

DETAILS AND REPRESENTATION

1. The dispute between NEHAWU obo Mrs Zodwa Manqele, the applicant versus the Department of Health- Northern Cape, the respondent was referred to arbitration in terms of section 186(1)(b) of the Labour Relations Act 66 of 1995 as amended (the LRA) under the auspices of the Public Health and Social Development Sectoral Bargaining Council (the Council).
2. The arbitration hearing took place on 18 March 2019 at the respondent's Robert Mangaliso Sobukwe Hospital in Kimberley. The applicant was present and represented by Mr. Ricardo Cronje from the trade union NEHAWU. The respondent was represented by Mr. Richard Khoali, its Labour Relations Officer.

ISSUE TO BE DECIDED

3. I am required to determine whether the applicant was dismissed when her fixed-term contract was prematurely terminated and if so, if the dismissal was unfair.

BACKGROUND

4. It is common cause that the applicant was employed on a fixed-term contract which commenced in August 2012. The applicant was apparently placed to act in a Deputy Director position in the office of the Head of Department (HoD) in Kimberley. She was then after a certain period placed in an Assistant Director's position at the respondent's Asset Management Section.
5. The applicant's latest salary as an Assistant Director amounted to R38 193.00. The dispute follows a situation where the applicant's fixed-term contract was terminated on 15 August 2018, and not in March 2020 as expected by the applicant.
6. The applicant lodged a dispute with the Council on 15 November 2018. Conciliation took place on 07 December 2018, but the dispute remained unresolved and a certificate of non-resolution of the dispute was issued. The applicant applied for arbitration on 10 January 2019 and the arbitration hearing took place on 18 March 2019.
7. It is common cause that the fixed-term contract of the applicant rolled-over at least six times and that she continued to perform duties for the respondent after 15 August 2018. The applicant requested to be reinstated retrospectively with compensation as a form of relief.

SURVEY OF EVIDENCE AND ARGUMENT

8. This section constitutes a brief summary of the relevant evidence and arguments put forward by the parties. It is not intended to be exhaustive, but I have taken all the submissions into consideration in arriving at my conclusions. Due to the fact

that the respondent disputed the allegation that the applicant was dismissed, I allowed the applicant to start first in order to establish the existence of a dismissal in accordance with section 192(1) of the Act.

The Applicant's case

9. Mrs Zodwa Manqele, the applicant, was sworn in and she testified as the only witness in her case. She started by giving a brief background of her employment history at the respondent by stating that she started off as a deputy director in the office of the HoD in August 2012 and thereafter as an assistant director until August 2018. She stated that she commenced duties as an assistant director on 01 September 2015.
10. The applicant testified that she was informed both verbally and in writing every time her contract was renewed. With reference to her bundle of evidence, the applicant showed that her last contract was for the period 01 April 2018 until 30 June 2018 with the understanding that it would be renewed. She stated that she signed the contract on 26 April 2018.
11. The applicant referred to her last contract and stated that it was supposed to be for eight months as indicated in its first paragraph despite the duration indicated in it which shows three months. She showed that the contract was extended for a further month and a half.
12. The applicant stated that she went to the finance office of the respondent to enquire on why she did not get a salary increment. She testified that it was upon her return from home that she was informed to stay at home. The applicant testified that the extension letter (01 July-15 August 2018) was given to her in September 2018 whilst she was at home.
13. The applicant produced her attendance registers which shows that she worked until 21 August 2018 and also pointed out discrepancies in the communication letters where for example the submission allowing her to work until 30 June 2018

was only signed on 23 August 2018 and given to her whilst she was at home. The applicant stated that she received her outstanding salary on 15 August 2018 and was told to remain working pending the approval of her submission.

14. The applicant testified that the respondent never had a problem with the quality of her work. She stated that she was the only one doing the job and continued working until 21 August 2018. The applicant handed in an organogram of the respondent and pointed out that her post is on the organogram under Asset Management.
15. The applicant stated that her supervisor told her to sit at home and that he (the supervisor) had to submit a motivation on the impact her non-functioning had on the section. The applicant stated that the termination was unfair as she was only told upon her return from leave that she must go back home. She submitted that she has responsibilities and dependents to take care of.
16. In closing arguments, the applicant's representative submitted that a reasonable expectation was created that the applicant's contract would be renewed until 31 March 2020 and that the applicant was procedurally and substantively unfair. He submitted that the applicant's immediate supervisor created the expectation in that he promised the applicant that her contract would be renewed which never happened. The applicant's representative submitted that the renewal was promised to the applicant and that no reasons were given on why her contract was not renewed.

The Respondent's case

17. Mr. H Chipungu, the applicant's immediate supervisor (Deputy Director: Asset Management), was sworn in and he testified as the only witness in the respondent's case. He stated that he started in the unit in 2016 and found the applicant there. The witness stated that the applicant was in charge of the unit and on a fixed-term contract.

18. The witness stated that the applicant's fixed-term contract was renewed three times under his management. He explained how the processes of renewals work and stated that he only wanted to put the applicant at ease but that the authority to renew lies with the Member of the Executive Council (MEC). The witness stated that he initiated the renewals of the contracts and explained why the approval thereof was always delayed.
19. The witness testified that the organisational structures of the respondent was not yet concluded which is the reason why he undertook to have the contract of the applicant extended. He stated that the applicant worked between 30 June 2018 and 21 August 2018 based on his instructions. The witness stated that he remembers the discussion he had with the applicant on 21 August 2018 which was to explain the decision of the MEC and not to create an expectation.
20. The witness explained that the MEC was crossed with him renewing the contract without permission and that nothing came out of it. He testified that the current Assistant Director post in his unit is occupied by a certain Mr Kwena. The witness stated that he had no authority to extend contracts and has also not created legitimate expectations.
21. In cross-examination, the witness stated that the applicant's contract was extended three times in his time. He referred to the organogram and stated that the Assistant Director post appearing under Asset Management is the one occupied by Mr. Kwena and that there is no additional post for an Assistant Director. He stated that the applicant's Assistant Director post was not vacant and funded and that he is in a process to have another Assistant Director post on the establishment.
22. The witness testified that the applicant moved with the contract post from the HoD's office to his section and that it still remained a contract post. He stated that the eight months written in words on the renewals are errors and that the context of the last renewal is three months. The witness admitted that he did inform the applicant that her contract would be extended until 30 March 2019.

23. The witness conceded that the contracts were signed after the commencement dates and that his understanding of the words “*until the finalisation*” means that no further contracts would be renewed. The witness stated that it is not possible that the Director: HR would disapprove the March 2019 submission. He stated that he is not sure whether the applicant was remunerated for the period 15 August 2018 until 21 August 2018.
24. In re-examination, the applicant exceeded his powers to extend the contract and that he never discussed any letters which came from the HoD with the applicant. He stated that the applicant was not supposed to work beyond 30 June 2018. He stated that his contract did not create a legitimate expectation.
25. In closing arguments, the respondent’s representative submitted that the applicant’s immediate supervisor had no authority to commit the respondent and that the expectations created were not legitimate. He stated that the applicant conceded that she had signed the contract, which contained a specific provision that there could be no expectation of renewal and she would be notified that her contract would come to an end. The Applicant had accordingly failed to prove that she was dismissed.
26. The representative submitted that the only valid contract that the applicant accepted and signed with the respondent came to an ended-on 30 June 2018, which the applicant was aware of the end date. He stated that she then continued to work up until 21 August 2018 under unlawful instruction of her immediate supervisor. In terms of Public Service Act, the authority to appoint any person in the department lies with the MEC (Executive Authority), and there is no evidence on record that the MEC has delegated to managers or senior managers any power to appoint, Mr. Chipungu exceeded his powers. He submitted that there was no dismissal because the MEC never instructed the Applicant to perform duties.

ANALYSIS OF EVIDENCE AND ARGUMENT

27. It is common cause that the applicant's fixed-term contract was renewed six times of which the last one was done by the supervisor of the applicant. It is this last renewal where the arguments arose on the legitimacy thereof. Based on the admission of the supervisor Mr. Chipungu, I am persuaded that he committed an act of which he had no authority and that the last renewal was not legitimate.

28. As regards the previous five renewals of the applicant's fixed-term contract, I shall determine whether an expectation in fact existed. In so doing, I shall have consideration to the provisions of the law. Section 186(1)(b) of the Act provides the following:

186 **Meaning of dismissal...**

(1) **'Dismissal'** means that-

...

(b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer-

(i) 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 it; or

(ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;

...

29. Evidence was led that Mr. Chipungu was the person who initiated the last three renewals. This he did through making submissions to the MEC and in the 4th and 5th instances the submissions were approved. In addition to this, Mr. Chipungu also used to tell the applicant that such submissions were made and that her contract

would be renewed, which happened except for the last submission which the approval thereof was blatantly refused.

30. In addition to the evidence led in paragraph 29 above. Submissions were also made that the applicant would work and that her renewals were signed post the commencement of working in the new terms. It is my view that the manner in which the 4th and 5th renewals were done including the promises made to her by Mr Chipungu clearly gave the applicant a valid reason to believe that a following submission would be approved.

Was this expectation reasonable?

31. The fact that the contract was renewed six times and the fact that Mr Chipungu indicated that a submission will be made in order to make the post vacant and funded is a clear indication that the nature of the work is of a permanent type. I find it rather odd that the applicant was doing the work for six years just to be told that she must stay at home.

32. The Labour Court made it clear in *SACTWU & Another v Cadema Industries (Pty) Ltd* [2008] 8 BLLR 790 (LC) that *an employee's expectation becomes more reasonable every time the contract is renewed*. It is my considered objective view that the amounts of times the contract was renewed as well as the manner in which it was done clearly shows that the applicant's expectation was reasonable indeed. This is the case whether the last renewal was legitimate or not. The supervisor also became used to the idea that the applicant's contract is constantly being renewed which explains why he took the last initiative upon himself to renew it.

33. On a balance of probabilities, I am satisfied that the applicant has made out a case in accordance with section 186(1)(b) of the Act that the expectation which she harboured since August 2012 was reasonable indeed. It is my finding that the termination of the fixed-term contract on 21 August 2018 with the reason provided in it amounts to a dismissal.

34. With no evidence before me that the reason of the dismissal was fair, as well as the lack of evidence that a fair procedure was followed in this regard, I also find the dismissal to have been procedurally and substantively unfair.

RELIEF

35. The applicant submitted that she would like to be reinstated retrospectively based on the fact that she is the breadwinner in her household and is currently without employment. I have no evidence before me to disprove this claim.

36. Section 193 of the Act provides the following:

193 Remedies for unfair dismissal and unfair labour practice

(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-

- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;*
- (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or*
- (c) order the employer to pay compensation to the employee.*

37. The retrospective relief sought by the applicant clearly seems to be within the confines of the Act. However, the fact that she also wants to be compensated separately from the retrospective reinstatement seems unreasonable in that only one of the three options provided by the law may be awarded.

38. I shall as a result order that the applicant be reinstated with retrospective effect from 15 August 2018. The backpay of the applicant shall therefore be the applicant's monthly salary of R38 193.00 x 8 months = R305 544.00 minus all lawful deductions which the respondent is entitled to make in terms of the law.

39. In the premise, I make the following award:

AWARD

40. The applicant, Ms. Zodwa Manqele, was dismissed by the respondent, Department of Health- Northern Cape.
41. The dismissal in paragraph 40 was procedurally and substantively unfair.
42. The respondent is ordered to reinstate the applicant with retrospective effect from **15 August 2018**.
43. The respondent is also ordered to pay the applicant backpay in the amount of **R305 544.00** minus all deductions which it is entitled to make in terms of the law.
44. The amount in paragraph 43 above must be made by no later than **15 May 2019**.
45. The applicant is ordered to report for duty on or before **24 April 2019**.



David Pietersen