



# ARBITRATION AWARD

Case No: **PSHS816-19/20**

Commissioner: **Mr. Anand Dorasamy**

Date of award: **7 September 2020**

In the matter between:

**ASHINA BHIMMA & 6 OTHERS**

(Union/Applicant)

and

**DEPARTMENT OF HEALTH- KWAZULU NATAL**

(Respondent)

---

## DETAILS OF HEARING AND REPRESENTATION

1. The arbitration proceedings were set down for the 30 and 31 July 2020 commencing at 09H00 at the R K Khan Hospital boardroom in Chatsworth. After the evidence was completed the parties were to submit written Heads of Arguments (Closing) arguments on the 14 August 2020. Respondent submitted closing arguments on the 24 August 2020. The applicants lodged a dispute in terms of section 186(1) (b) of the Labour Relations Act (LRA) challenging the non- renewal of their fixed term contracts.
2. The applicants are Ms. Ashina Bhimma, Ms. Shamlatha Ramsunder, Ms. Munadia Fareed-Kajee, Ms. Judisha Imrithlall Naicker, Ms. Sagrie Moodley, Ms. Sumayya Manack and Ms. Karen Pillay (who did not attend the proceedings because she was in Johannesburg and had work commitments at the hospital where is working).

### **ISSUE TO BE DECIDED**

3. I am required to determine whether the applicants were dismissed and, if so, whether the dismissal was procedurally and substantively fair. Should I find in favour of the applicants, I am to determine what relief should be granted to them. I must also determine Whether either of the parties should pay the costs of the arbitration, or whether there should there be any cost aware for the non-compliance with the rules of Council or non-compliance with any Ruling of Council.

### **BACKGROUND TO THE DISPUTE**

4. The applicants were employed on fixed term contracts by the Department of Health KwaZulu-Natal and stationed at R K Khan's hospital in Chatsworth. Their contracts were terminated on the 30 September 2019.
5. They seek to be re-instated to their positions as indefinite employees because of the respondent's conduct and seek a cost order against the respondent on the High Court scale.
6. The respondent contends that the termination should be seen as a lapse of employment life in terms of the contract.

### **SUMMARY OF EVIDENCE**

#### **APPLICANTS' CASE**

##### **ASHINA BHIMMA**

7. The salient aspects of her testimony are recorded below.
8. She is a pharmacist employed at the hospital since 1 June 2009 as a locum pharmacist. The initial three contracts were of three-month duration. Thereafter the contracts were increased to six months. These contracts were renewed over Twenty-Two (22) times over 10 years and 4 months. It created a right of expectation of permanent employment by signing the contracts which became a mere formality.
9. There were many occasions where the contracts were signed a month later. At no time over the years was she given any indication that the contracts would not be renewed.

10. Mr. Brian Pillay (hereinafter referred to as Mr. Pillay) the pharmacy manager assured her on several occasions over the years that he post would not be affected since it was created specially to accommodate a locum pharmacist as the permanent post were frozen at the time of her starting at the hospital.
11. In 2013 four locum pharmacists were made permanent and she thought that the same would happen to her. It created an expectation of permanent employment. Their workload at the hospital was steadily increasing and the locums were retained even though permanent staff were being employed.
12. R K Khan Hospital received an international award for a project which reduced the need for large patient at the hospital. The patients were redistributed to various sites such as community centres, churches etc. This department dealt with the chronic scripts which was the largest in pharmacy.
13. The locums were involved in implementation and maintenance of this chronic medication distribution programme. There were more than 50 000 scripts per month and the next hospital dealt with approximately 4 000 scripts. Due to the workload the staff both the permanent and locums were requested to work overtime. There was a need for pharmacy staff.
14. On the 6 September 2019 she was given a notice that the contract would end at the end of September 2019 and would not be renewed. The pharmacy manager, HR manager and CEO were approached to find a resolution. The CEO agreed to escalate the matter to Head Office. A week later she was informed that the hospital would not be able to accommodate them because the pharmacy had adequate coverage.
15. Initially they were given a choice of the hours of work and her hours was part of the day. Three posts were advertised at the beginning of October but they were told that pharmacy had adequate coverage. She applied but was not successful. She was called for an interview with external candidates and of the four who applied two were called for the interview.

16. Her period of employment was 10 years and 4 months. No discussion took place prior to the termination.
17. She believes that she was unfairly dismissed and seeks re-instatement as a permanent pharmacist in the hospital or other hospital back-dated to the date of termination. There was no discussion on UIF.
18. Under cross examination she stated as follows:
19. The previous pharmacists were absorbed into the Department and Mr. Pillay assured her that her post would not be affected.
20. As a locum they worked six and a half hours while the permanent worked eight hours. She did not work the same hours as the other applicants. Mr. Pillay decided on the hours of work.

**SAGRIE MOODLEY**

21. The salient aspects of her testimony are recorded below.
22. She is a pharmacist and in 2011 she was working in private and telephoned Mr. Pillay who got approval for a locum in 1 February 2011 and in March 2011 her post was converted to a permanent post. She did not go for an interview but signed a full-time permanent post.
23. In January 2015 she returned from maternity leave and asked Mr. Pillay to find a locum post again as she be more flexible and worked fewer hours. He agreed and she resigned in January 2015 and became a locum in February 2015 to September 2019. She did not apply for the 2019 posts. Mr. Pillay could not offer her anything because he said that his hands were tied.
24. If she knew that the locum post was uncertain she would not have resigned. All the contracts were the same. She worked five hours by choice. If they required extra staff, she worked extra hours.

25. There were no discussions before her termination. Brian informed them about the posts to be advertised in the middle of September and they made representations to retain their services but were told that they could not be accommodated because the pharmacy department had adequate pharmacists.
26. At a meeting with the CEO who mentioned three posts and that equity targets would be used in the posts. She felt she would not get the post if she applied.
27. The locum position never ended and it was not uncertain and she believed that she had a job as long as she wanted it. She was comfortable and did not think she would lose her job. If she was offered one of the three positions, she would have accepted it. She was paid by the Department but there was no UIF.
28. She is seeking permanent employment in a hospital in Durban.
29. Under cross examination she stated as follows:
30. She signed documents with HR but does not recall filing a Z 83 form.

**JUDISHA IMRITHLALL NAICKER**

31. The salient aspects of her testimony are recorded below.
32. She qualified as a pharmacist in 2001 and held several positions in private practice. In 2011 she contacted Mr. Pillay for employment at the hospital. He offered her a locum position and served her notice and Mr. Pillay contacted her in respect of a permanent position and asked her if she was interested. She accepted and was called for an interview with the panel being Mr. Pillay HR and pharmacy staff. At this interview she was offered a permanent position and accepted it.
33. She started her on 1 April 2011 as a permanent pharmacist. On the 1 February 2014 she spoke to Mr. Pillay about a locum post as it was a secure position and the hours were less than the permanent position. At the time given her family circumstances and she was pregnant with her third child and her husband travelled three to four days per

week and being a permanent pharmacist, she was to be on call. On one occasion she was called out at one in the morning to had to arrange for someone to look after her children to go to the hospital to issue medication required.

34. When she spoke to Mr. Pillay and it was agreed that she could resign her permanent position and work as a locum pharmacist from 08H to 13H00. The term locum pharmacist commonly used to pharmacists not permanently employed and did not do the full day's work.

35. The reason for the change was the locum pharmacists were converted to permanent and it was done internally without the posts being advertised and she spoke to Mr. Pillay that should the position arise she would be offered a permanent position again. At no time as a locum pharmacist was there any concern that the job was not secured. She believed that her contract would continue in the future.

36. On the 6 September 2019 the locum pharmacists were called to Mr. Pillay's office and with Mr. Roger Munsami present they were told that their contracts would terminate as of the 30 September 2019. No notice period was given. They asked the CEO to secure other positions in the Durban area. She said that she would escalate the matter to Head Office and got back to them to say she got no help from Head Office.

37. She wants to be re-instated as a pharmacist.

38. She did not apply for the three positions because it required a full day pharmacist and if the posts were offered to her, she would have accepted the full day position. Her contract was renewed twelve times and worked for five and half years.

39. Under cross examination she stated as follows:

40. In 2011 she was offered a permanent position and there was no application. She handed in a CV and cannot remember handing in a Z83. She was party to the group that made representation to the CEO to be placed in a position.

### **MUNADIA FAREED- KAJEE**

41. The salient aspects of her testimony are recorded below.
42. She qualified in 2005 and worked at R K Khan Hospital as an intern and in 2008-2012 she worked for an NGO and enjoyed the benefits as a permanent employee.
43. She was often in contact with Mr. Pillay and in 2012 he contacted her and she came to the hospital on 1 October 2012 working five hours without benefits.
44. She did not think that her position would come to an end. Her contract was rolled over for fourteen times.
45. She seeks a 6-8 position and was aware of the three posts and was not short listed because a document was missing. Mr. Pillay assured them that they would have their contracts renewed. She was aware of locum pharmacists who were converted to permanent.
46. Under cross examination she stated as follows:
47. Her contract ended abruptly and she had bills to pay. There were seven of them to contest three posts.

### **SUMAYYA MANACK**

48. The salient aspects of her testimony are recorded below.
49. She qualified in 2012 and Mr. Pillay offered her locum pharmacist position and commenced in 8 June 2015. During her four years she applied for a permanent position three times but was unsuccessful and was on contract.
50. On several occasions she informed Mr. Pillay that locum positions were being absorbed into permanent positions. On the 6 September 2019 she was told that her contract would end on 30 September 2019 and would not be renewed. The letter said

they did not need locums but on the very same day posts were advertised after being told that the hospital had adequate coverage. She applied but was not successful.

51. Her fixed term contract rolled over for nine times in four years and not once was she told it was the last contract but it was renewed for six months. Some contracts were signed a month later. One of her contracts does not have a start and end date. She thought it was a permanent contract.

52. She believes that she should be re-instated because she had a reasonable expectation to be absorbed as others in the past. She wanted a full day post.

53. She seeks a permanent employment from the date of termination. She was interviewed but not appointed. It was her fourth interview.

54. Under cross examination she stated as follows:

55. She wanted a permanent position. There were no benefits. If the contract ended, she continued working and signed it later, it was on going.

### **SHAMLATHA RAMSUNDER**

56. The salient aspects of her testimony are recorded below.

57. She qualified in 1986. She started in the hospital in February 2011 and worked for eight and half hours and later for four hours. She was told at the same time as the others and with the others made representation for a resolution.

58. She did not expect her position would be ended. She went on doing the work and winning awards with the pharmacists.

59. Under cross examination she stated as follows:

60. In 2011 she did not want to be a permanent position because of her son and business. It was an unfair way of doing the termination.

### **CLOSING ARGUMENTS**

61. The parties agreed to submit written closing arguments on or before the 14 August 2020. The parties submitted comprehensive arguments were considered when I made my determination. The applicants' replying Heads of Arguments dated 31 August 2020 was also considered in arriving at my decision.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

62. This matter was cited as a dispute in terms of Section 186 (1) (b) of the LRA relating to the non-renewal of fixed term contract. The applicants (7) were employed by the respondent as locum pharmacists hereinafter referred to as locums for various years and were given a number of fixed term contracts that were renewed except the last contract that ended on the 30 September 2019 and all of the services were terminated.

63. I have taken cognizance of the decision in Sweeney/ Transcash [2000] 6 BALR 712 (CCMA) where the commissioner held that arbitration hearings constitutes a rehearing de novo on the merits. The award must accordingly be based on evidence led at the arbitration.

64. The issues in dispute in this matter are fairly straightforward.

65. The applicants were employed as locum pharmacists. A locum pharmacist is a pharmacist is employed on a contractual basis rather than having a permanent salaries position. The locum choses his/her hours of work and pay.

66. In order to prove that a dismissal in relation to the termination of a fixed-term contract occurred, the employee had to establish that:

- (1) s/he had an expectation that the employer would renew the fixed-terms contract in question on the same or similar terms;
- (2) the expectation by the employee had been reasonable;

(3) the employer did not renew the contract, or offered to renew if on less favourable terms.

67. In considering the first two requirements the question to ask would be firstly whether the employee subjectively expected the contract to be renewed (the subjective element) and secondly whether that expectation was reasonable given the facts of the matter (the objective element). It must be determined whether a reasonable employee in the same circumstances as the employee would have expected the contract to be renewed on the same or similar terms.

68. In *SA Rugby (Pty) Ltd v Commission for Conciliation Mediation and Arbitration* 2006 27 ILJ 1041 (LC) the LC held that the pre-amended section 186(1)(b) clearly stated that dismissal could be argued only where the employee reasonably expected the existing fixed-term contract to be renewed on the same or similar terms and not that a new contract would be concluded for a different period or purpose. While not overtly stated as such by the court, from the aforesaid it can be deduced that an employee could not rely on section 186 (1) (b) for protection where a reasonable expectation of a permanent appointment, that is a different period, was argued.

69. Further I noted in *SARPA and others v SA Rugby (Pty) Ltd v SARPU and others and another* (2008) 29 ILJ 2218 (LAC) the court found that “the Employees could not rely on a statement by a coach that the players would have a further contract when he was shortly thereafter removed and replaced by a different coach. It held that any expectation created should have been diminished when Streuli’s contract was terminated.”

70. In the present case the powers of Mr. Pillay were removed and his previous actions could not have led to the belief that it created any expectation because he at the most only made recommendations to the appointed functionary. These powers were withdrawn when the contracts were terminated.

71. To be successful with a claim of reasonable expectation of permanency the employee would have to show that:

- (a) the employer is in a position to provide indefinite employment;
- (b) the employer is responsible for creating an expectation that indefinite employment would be offered; and
- (c) such expectation held by the employee is reasonable.

72. In this matter certain applicants were offered permanent position accepted it and then applied and changed it to a locum position. Further some of the applicants elected to accept the fixed term locum position because it offered them a choice of hours worked and salary.

73. The respondent challenged the locus standi of Mr. Pillay the pharmacy manager to negotiate and offer the applicants positions and to have their positions changed. When the contracts were terminated he indicated to them that his “hands” were tied.

74. The respondent submitted that the fixed terms contracts were created because of a need and because the pharmacy was adequately covered the need for fixed term locums had come to an end and positions permanent positions were advertised. Some applied for the vacancy whilst other did not apply.

75. The needs of the respondent had changed and there was no longer a need for fixed terms locums. Some of the applicants did not favour permanent employment because they preferred the locum option.

76. The fact that the respondent did not need locums, the lack of authority of Mr. Pillay to negotiate offer the applicants permanent, changed to locum and locum positions and the election of the applicants’ choice of hours worked leads on to conclude that the applicants’ expectation was not reasonable.

77. As a consequence of the above I do not believe that the applicants are convincing in their arguments of having a reasonable expectation of their contracts being renewed.

78. The rule by default matters before the High Court is that the losing party is ordered to pay the successful party’s costs but this is not the case in labour disputes. Section 162

of the LRA states that an order as to costs must be based on law and fairness. It does not follow the result thus even where an employer is successful in defending a case, such employer could still be required to pay his/her own costs.

79. As a consequence of therefore I do not believe that any party acted frivolously or vexatiously and the law and fairness require that each party pays its own costs.

**AWARD**

80. The application is dismissed.

81. Each party shall pay its own costs.

A handwritten signature in black ink, appearing to read 'a S Dorasamy'. The signature is written in a cursive style with a large loop at the end of the last name.

Anand Dorasamy