



ARBITRATION AWARD

Commissioner: **Charles Oakes**

Case No: **PSHS916/16/17**

Date of Award: **26 July 2017**

In the matter between:

Ciaran Amon Lalor

(Applicant)

and

Department of Health- Kwazulu Natal

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The hearing took place at the Pietermaritzburg, Natalia Building, on the 27 July 2017.
2. The Applicant was represented by Mr M.H. Bremner, an attorney from the law firm, Tatham Wilkes Incorporated. The respondent was represented by Mrs Bot, an Employee Relations Official of the Respondent. The date for the submission of the award was extended to the 28 July 2017.

ISSUES TO BE DECIDED

3. I have to decide whether the Applicant was dismissed in terms Section 186 (1) (b) (i) of the Labour Relations Act, No 66 of 1995.

BACKGROUND TO THE DISPUTE

4. The Respondent is a ministerial department of government and overseas, hospitals and clinics which offer free health care services to the public.
5. The Applicant was employed as Maxillo Facial Surgeon whose services were terminated on the 31 September 2017. He challenged the fairness of his dismissal.

SURVEY OF EVIDENCE

6. The first witness to testify was the Applicant, Ciaran Amon Lalor who testified under oath as follows:
7. He is a qualified Maxillo Facial Surgeon. He is one of two Maxillo Facial Surgeons in Pietermaritzburg.
8. He began his employment with the Respondent in December 1993. He was employed as a part time consultant working 12 sessions per week at Northdale hospital. From the middle of 1994 his sessions were increased to 26 sessions per week.
9. His contract was renewed annually and was done informally. When contracts were presented to him, this would be done after he had commenced and during the course of the contract.
10. His contract changed for the first time when his contract was reduced to three-month contract. His sessions were reduced from 26 sessions to 20 sessions. He went to Dr Singh to enquire about the change. Dr Singh informed him that the change was done the year before by Dr L. Naidoo. He stated that Dr Naidoo should have communicated this to me.
11. He wrote a letter to Dr Balenga, the Chief Executive Officer of Greys Hospital, requiring him to rectify the change as it was done without notifying him and was contrary to the arrangement he had with the Respondent. He further pointed out that this change had caused undue financial hardships for him as he was unable

to pay SARS as per his arrangement with SARS in this regard, that money for his session work would be used to pay SARS. (Annexure 'E').

12. Dr Balenge responded to his letter indicating that the number of sessions were reduced from 26 sessions to 20 sessions on instruction of Dr Singh, the head of department and was approved by the Senior Manager, Medical Services (Annexure 'F').
13. He was advised to lodge a grievance which he did (Annexure 'G'). Therein HE requested he be paid for the sessions which he was not paid from September 2014 when the change was implemented.
14. They responded to his grievance indicating that they would pay for the sessions provided he gave them proof of having worked the sessions in question.
15. He then sent them a letter through his attorneys demanding payment for the sessions he worked and was not paid (Annexure 'I', bundle 'A').
16. Dr Balenga responded to the letter (Annexure 'J') indicating that employees are not permitted to have a legal representation in terms of the grievance rules.
17. Following on this two weeks later he was offered a three-month fixed term contract.
18. He was then offered a further three-month contract (Annexure 'K') which was followed by six-month fixed term contract (Annexure 'L').
19. Annexure 'P' is a letter he wrote to Dr Naidoo, the medical manager, in response to a request by Dr Singh that he produce proof of sick leave records and records of patients he had seen over a certain period of time wherein he complained about the request and his treatment as a senior colleague. He also complained that he was given a letter with the request and the letter was then taken away from him after reading it. He complained that he was warned that he could be fired.
20. In response Dr Naidoo sent him an email indicating that he would investigate his complaint.

21. In the meantime, his dispute in respect of a unilateral change to terms and conditions of employment was scheduled for conciliation on the 30 September 2016, where he attended his case at the bargaining council. During this time his dispute relating to unpaid sessions was settled and he was paid for the unpaid sessions.
22. Following on this he was sent a letter on the 03 October 2016, to discuss his sessional post by Dr Govindasamy, the head of clinical department, which was scheduled for the 10 October 2017.
23. He met with Dr Govindasamy who informed him that it was general policy of the government to get rid of sessional doctors and that his sessions were being terminated.
24. It was never his intention to leave and had informed Dr Naidoo in a letter that he intended to work until he was 75 years old for the Respondent. There is currently another doctor doing session work.
25. He believes he was being dispensed with to make sure no one makes trouble in the department.
26. Under cross-examination he testified as follows:
27. He did not refer a dispute to the Public Service and Social Development Sectoral Bargaining Council regarding the reduction of his sessions because they told him they were reducing his sessions and he agreed thereto.
28. He confirms that the dispute about the session salary was settled.
29. His session contract was for 12 months until 2015, hereafter they changed to three monthly contracts.
30. He believes the change into a three-month contract was personal vindictiveness.
31. He agreed as informed that the reduced contract period was because of financial constraints.

32. He expected his contract in November 2016 to either be extended by six months or twelve months.
33. He agrees that his contract came to an end on the 31 September 2016.
34. It was put to him that he expected exco to make a decision to renew his contract, whilst he did not submit the documents requested.
35. When re-examined he testified that on the 10 October 2016, he was informed by Dr Govindasamy that his contract was not been renewed.
36. The next witness to testify was Avin Sunker Singh who testified under oath as follows:
37. He is employed as the head of the Maxillo Facial department since 2010. The Applicant is known to him. The Applicant was employed as a Sessional doctor.
38. The Applicant was not dismissed. Every year he sends a request for renewal of sessional doctor's contracts. He made a request for a renewal of the Applicant's sessional contract.
39. He sent an email on the 08 September 2016 in this regard. Anita responded telephonically and said that he should make the request formally.
40. Dr Naidoo then sent an email on the 15 September 2016 requesting that Dr Lalaor submit time sheets and a summary of patients seen. He then wrote to Dr Lalor in this regard. He then met with Dr Lalor and showed him the email.
41. He wrote an email (page 17, bundle 'B') to the Applicant informing him that his request for renewal has been submitted to Human Resources and that there are no guarantees that it would be renewed as there are budgetary constraints.
42. He would have not written for a motivation for the renewal of his contract if he did not want his contract to be renewed.

43. Dr Govindasamy contacted Dr Lalor thereafter and met with the Applicant. He does not know what was discussed at the meeting. The meeting took place on the 10 October 2016.

44. He waited for the Applicant to submit the relevant documentation but none was provided and the Applicant did not return to work thereafter. He would have submitted the documentation had he been contacted.

45. The Applicant received the email on page 17, bundle 'B'. He has previously communicated with the Applicant on the email address in question.

46. The letter on page 18 is a request that the Applicant's sessions be extended.

47. The Applicant was not dismissed. He was asked to submit documents.

48. When cross-examined he testified as follows:

49. He is not aware of the contract in Annexure 'A' as he did not issue the contract.

50. It was put to him that the Applicant was not needed to keep time sheets. He testified that doctors are required to keep time sheets.

51. He confirms that the Applicant's contracts were renewed three or four times. It is not required in the contract of employment for the Applicant to keep time sheets but he informed the Applicant to keep time sheets.

52. All doctors submit time sheets.

53. He did not give the Applicant the email requesting that the Applicant submit copies of signed time sheets and a summary of patients seen by the Applicant per week, because the email was sent to him (Singh).

54. He confirms that the Applicant is a specialist and that there is a need for him.

ANALYSIS OF EVIDENCE

55. For consideration before me is the question whether the applicant had an expectation that his contract of employment would be renewed at the end thereof.

56. Section 186 (b) (i) of the Labour Relations Act No:66 of 1995 is relevant here.

57. In Section 186 (b) (i) 'dismissal' means:

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

(i) to renew a fixed term contract of employment on same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it."

58. Whether an expectation exists in the present matter in terms of Section 186 (b) (i) of the Labour Relations Act No:66 of 1995 is dependent primarily on a number of items of evidence as they evolved in the arbitration.

59. These are:

- The number of times the contract of the Applicant was renewed.
- The role played by a referral of an unfair labour practice dispute for payment of session salary.
- The grievance lodged by the Applicant regarding the reduction of his sessions from 26 sessions to 20 sessions.
- The change of the Applicant's twelve-month contract to a three-month contract.
- The fact that this coincided with a letter from his attorney relating to unpaid sessional salary.
- The three-month contract which was offered to the Applicant two weeks after the letter was written to the Respondent.
- The alleged existence of work and together with this the specialized qualification of the Applicant.
- The need for his specialist skills and the fact that only two such specialist including the Applicant exist in Pietermaritzburg.
- The continued employment of another maxilla facial specialist as a sessional doctor.

60. Arising out of the above is the argument by the Applicant that these factors show that the Applicant's contract was not renewed for ulterior reasons and that factors show that it was not because his services were no longer needed.

61. More importantly arising out of this he, through his representative argued that he had an expectation of a renewal of his contract when it ended on the 31 September 2016.

62. Also for consideration is the following items of evidence presented by the Respondent through its witness and documentary evidence:

- The evidence that Dr Singh had requested an extension of the Applicant's contract showed that there was no intention on the part of the Respondent not to renew his contract for ulterior reasons.
- The failure of the Applicant to provide time sheets and a summary of patients seen for submission to the executive committee determining the extension of contracts.
- The existence of budgetary constraints

63. It is common cause that the Applicant worked on fixed term contracts from 1993 which were renewed every twelve months. It is also common cause that in July /August 2014, the Respondent reduced the number of sessions the Applicant worked from 26 sessions to 20 sessions. Unknowingly the Applicant continued working 26 sessions per month. When the Applicant found out he queried culminating in a grievance and the matter was eventually settled in 2016 and the Applicant was paid for the sessions he worked and were not paid for.

64. According to the Applicant the grievance in this regard resulted in the Respondent being aggrieved and this set-in motion a desire on the part of the Respondent to get rid of him.

65. As proof of this he testified that following on this he disputed the reduction in his sessions and instructed an attorney to represent him in this regard. His attorneys wrote a letter (Annexure 'I', bundle 'A') on the 14 July 2015 to the Respondent demanding that they reinstate the 26 sessions per week. On the 27 July 2015, the

Respondent responded to the letter indicating that employees are not permitted to have legal representation in departmental matters.

66. A few weeks later the Applicant alleges as a retort hereto, the Respondent offered him (Applicant) for the first time a three-month contract. He was according to him told that it was because of budgetary reasons which reasons he accepted.

67. At the end, thereof it was renewed where he was offered a six-month contract, which was to end on the 30 April 2016.

68. All this time his dispute regarding his outstanding salary for sessions worked was not paid and on the 18 April 2016, he sent a letter to the Respondent regarding the unpaid sessions and informed the Respondent that he had sought legal assistance in the matter, given their request that he submit proof in the form of time sheets and a summary of patients seen for the period which he was not paid.

69. On the 05 May 2016, his contract was renewed for a further twelve months.

70. In the meantime, he received a date for his unfair labour practice which dispute he referred to Council for the reduction in his sessions. This was scheduled for Conciliation on the 30 September 2016. On the 29 September 2016, the Respondent offered the Applicant as settlement payment for the unpaid sessions.

71. Following on this is what led to the present dispute. The Applicant was called to a meeting on the 19 September 2016, where he was shown an email from Dr Naidoo requesting that he produce all outstanding leave forms and details of patients he had seen. On the 23 September 2016, he wrote a letter to Dr Naidoo indicating that he has never before been requested to submit outstanding leave forms or keep a log book of patients he had seen.

72. On the 03 October 2016, he received written communication from Dr Govindasamy, requesting to meet with him on the 10 October 2016. At the meeting Govindasamy informed him that it was always the intention of the government to get rid of sessional doctors. Govindasamy then informed him that they were not going to renew his contract.

73. He believes that his contract was terminated because of his disputes with the Respondent regarding his session work. He believes that the Respondent would have not terminated his contract had he had no dispute with the Respondent. This aside he always believed that he was employed by the Respondent and had an expectation that he would work until retirement for the Respondent.
74. The Respondent argued that the Applicant was employed on a fixed term contract which came to an end on its expiry date. The Respondent further argued that the Applicant was not terminated because of a grievance and dispute the Applicant had with the Respondent.
75. It was argued that Dr Singh would have not sought an extension of his contract, had this been the case.
76. The Applicant, it was argued failed to provide documents which would have assisted the executive committee make decision on the extension of his contract.
77. The essential issue to be decided here is whether objectively, there is evidence which on a balance of probabilities shows that the Applicant had an expectation that his contract would be renewed on the same terms and conditions as existed prior to the termination.
78. The Applicant argued that the following factors must be considered when determining whether an expectation has been created of renewal as enunciated in the case of *Dierks v University of South Africa (1999) 20 ILJ 1227 (LC)*:
- the significance or otherwise of the contract stipulation;
 - The Agreements;
 - Undertakings by the employer;
 - Or practice or custom in regard to renewal of the employment;
 - The availability of work;
 - The purpose of or the reason for concluding the fixed term contract;
 - Inconsistent conduct;
 - Failure to give reasonable notice;
 - And the nature of the employer's business

79. I agree the above is pertinent and applicable to the present case.
80. Of significance in the present matter is the sheer number of renewals, about 23 times. It is difficult to conceive how any employer in these circumstances, could argue that the intention was never to renew beyond the fixed term of each contract. So frequent was the renewal that subjectively it is natural for an employee to believe after 23 renewals that the contracts would be renewed continuously. Objectively any reasonable person in the same position as the Applicant would expect after so many renewals that the contract would be renewed continuously.
81. In addition, the Applicant in written communications, which is not disputed indicated that he intended to work for the Respondent until retirement.
82. It is also highly improbable that the Applicant given his scarce skills would have been targeted for non-renewal of his contract especially in light of the Respondent's recognition of this by their conduct in continuously renewing the contract of the Applicant. That his skills were needed in Pietermaritzburg was emphasized by the existence of two qualified maxilla facial surgeons in the city, the Applicant being one of the two. There was also evidence from the Respondent's witnesses that the Applicant's skills were needed and there was certainly enough work to accommodate the Applicant.
83. All the contracts are standard contracts stipulating a fixed term without any mention that the contract would not be renewed or excluding the possibility of renewal.
84. The factors all favour the conclusion that the Applicant had a legitimate expectation that the contract would be renewed.
85. The Applicant has requested compensation as an outcome. The last contract of the Applicant was for a fixed term of six months.
86. It is for this reason that I believe that it would be just and equitable to award the Applicant six months compensation. The last contract stipulates the salary of the Applicant as R613 000-00 per annum and six months R306 800.
87. Hence, I find as follows:

AWARD

88. The dismissal of the Applicant, Ciaran Amon Lalor is found to be substantively unfair.

89. The Respondent, The Department of Health- KwaZulu Natal is ordered to pay the Applicant, Ciaran Amon Lalor R306 800-00.

90. The amount on paragraph 89 is to be paid to the Applicant on or before 31 August 2017.

C. Oakes

C.OAKES
COMMISSIONER