



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: Joseph Mphaphuli

Case No: PSHS918-16/17

Date of award: 12 June 2019

In the matter between:

HOSPERSA obo Leonie Lollitta Bezuidt

(Union/ Applicant)

and

Department of Health – Northern Cape

(Respondent)

1. DETAILS OF HEARING AND REPRESENTATION

1.1 The hearing was conducted at Kimberly Hospital. The hearing was conducted in terms of Section 191 of the Labour Relations Act 66/1995 on 09 November 2018, 19 and 20 March 2019 and 13 and 14 May 2019

1.2 Mrs. I Dithebe – Thole, Acting Deputy Director, Labour Relations, appeared for the Respondent. The Applicant was represented by Miss Taylor, Attorney. The proceedings were digitally recorded.

2. ISSUE IN DISPUTE

2.1 I had to determine whether there was a dismissal or not, if so, whether the dismissal was fair or not and the appropriate remedy, if any.

3. BACKGROUND TO THE DISPUTE

3.1 The Applicant commenced employment on 01 November 2012. The Applicant served in the capacity of Director Labour Relations and was remunerated at R 864 177.00 per annum.

3.2 The Applicant's services were terminated on 31 August 2015. Termination of employment was for a reason related to an expired fixed term contract.

3.3 The Applicant filed for reinstatement with arrear salary from the date of termination of employment.

4. COMMON CAUSE ISSUES

4.1 It was common cause that the Applicant served under multiple fixed term employment contracts. These read:

4.1.1 01 November 2012 to 30 April 2013 as Deputy Director Legal Services.

4.1.2 01 May 2013 to 31 October 2013 in similar capacity

4.1.3 01 October 2013 to 30 September 2013 in the capacity of Director Labour Relations

4.1.4 01 October 2014 to 31 March 2015 Director Labour Relations.

4.1.5 01 April 2015 to 31 May 2015 – Director Labour Relations

4.1.6 01 June 2015 to 31 August 2015 – Director Labour Relations

5. SURVEY OF EVIDENCE

5.1 APPLICANT'S CASE

5.1.1 The Applicant testified. The Applicant was currently employed in the position of Deputy Director, Medical Legal, effective 01 December 2017 at R 697 011.00 per annum.

5.1.2 Her application was for reinstatement to the position of Director Labour Relations, a position she held for thirty-two months dating from 01 October 2013 to 31 August 2015.

- 5.1.3 She previously worked in the office of the Public Protector when approached by the Departmental Health for the position.
- 5.1.4 Her first contract was for the period 01 November 2012 to 30 April 2013, followed by another for the period 01 May 2013 to 31 October 2013.
- 5.1.5 The third contract was for the period 01 October 2013 to 30 October 2014
- 5.1.6 The head of department had expressively indicated to her that she would eventually be appointed on a permanent basis.
- 5.1.7 She served in permanent capacity in her previous position.
- 5.1.8 The third contract expired but the Applicant continued to serve in the same capacity and similar terms and conditions of employment for the period 01 November 2014 to 01 March 2015.
- 5.1.9 To confirm her belief that she would be employed permanently at the time of the inception of the employment relationship in 2012, the Respondent recorded that there was an intention to employ her permanently in an application for her motor vehicle, as part of her remuneration package.
- 5.1.10 It was in the ordinary course of events that fixed term contracts were not signed at inception and at times only signed by the Respondent or signed *post facto*, or even on the eve of the expiry date.
- 5.1.11 The responsible head of department assured her throughout her term of employment that she would be permanently absorbed in time.
- 5.1.12 She took maternity leave from 11 August 2015 to 11 December 2015. She received no payment during maternity leave.
- 5.1.13 She received the news that her fixed term employment contract was not going to be renewed on 29 October 2015. She received the news telephonically from the

head of department, Mrs. Matlaupane. The instruction came from the responsible MEC according to the HOD.

5.1.14 This came as a big shock and surprise because the same MEC had assured her of permanent employment.

5.1.15 She received her last salary on 31 August 2015. She received no written communication to confirm her dismissal.

5.1.16 She received a call from the Respondent for an interview for her absorption in another position on 31 August 2015. The interview did not however materialise. .

5.1.17 Other directors who were employed on contract in circumstances similar to hers were eventually absorbed permanently.

5.1.18 The HOD letter served on her dated 20 March 2016 gave her further belief that she would be taken back into employment all be it on a fixed term contract.

5.1.19 The new HOD assumed office in or about November 2017 after which she was required to make representations for employment.

5.1.20 She had conversation with the new HOD and the conversation culminated in the Applicant being appointed.

5.1.21 The new HOD was Mrs Jonkers who undertook to put the Applicant back to her previous position. This did not, however, materialize.

5.1.22 The appointment was on condition that she withdraw her dismissal dispute with the Respondent. She accordingly accepted the offer subject to the stated condition.

5.1.23 The Council was informed of the withdrawal on or before February 2018. The Applicant reinstated the dispute on or about August 2018 with a condonation application. The council re-enrolled the matter and scheduled the matter for arbitration on 09 November 2018.

- 5.1.24 The position she previously occupied remains existent and unoccupied.
- 5.1.25 Mr. Steven Jonkers, HOD testified in the Applicant's case. He had been in the position for a year and a half. He was conversant with the Respondent's recruitment procedures and standards.
- 5.1.26 He spearheaded the Applicant's appointment in the current position. The appointment followed a submission to the MEC for the appointment. The executive authority, i.e. MEC approved as a result of which the Applicant was appointment.
- 5.1.27 Post advertisement was not an absolute condition for appointments.
- 5.1.28 Generally, an appointment made without the MEC approval of submissions in respect of the said appointment will be null and void.
- 5.1.29 It was, however, possible for the MEC to approve submissions made after an appointment, depending on circumstances.
- 5.1.30 Mr. Gavin Wayne Olivier, HOSPERSA official gave evidence. He served as a deputy manager at the Pretoria office. He has been in the service of the union since the year 2000.
- 5.1.31 The Applicant was a member of the union and was previously employed in the Labour Relations Department.
- 5.1.32 The matter was initially referred as an automatically unfair dismissal dispute which referral was later withdrawn. The withdrawal was influenced by the Respondent's undertaking to settle the dispute.
- 5.1.33 The settlement did not, however, materialize. As a consequence, the matter was re-enrolled to continue in process.

- 5.1.34 It was his knowledge that other employees employed in circumstances similar to those of the Applicant had their contracts renewed.
- 5.1.35 He believed that the position that the Applicant occupied existed and the appointment was authorised by the then H.O.D, Mrs Matlaopane.
- 5.1.36 A legitimate expectation was created when the Applicant submitted her maternity leave. It was at this stage that the HOD assured the Applicant that she would be well come back after maternity leave.
- 5.1.37 He was also mindful of the fact that the Public Service Act provides for absorption in a post.
- 5.1.38 Other factors pointing to legitimate expectation for continued employment were the bank letter, HOD's correspondence, HOD utterance when the Applicant presented her maternity leave application and finally the fact that the Applicant was invited to an interview for permanent appointment in the position of Director Labour Relations.
- 5.1.39 The interview was cancelled on the spot and without explanation.
- 5.1.40 As far as his experience went, Applicants for employment were outsiders and the fact that internal procedures pertaining to recruitment were not observed could not be held against them and to their detriment.
- 5.1.41 Mrs Gugulethu Matlaupane, former HOD Depart of Health from 2012 to June 2016 gave testimony. She head-hunted the Applicant for the position of Deputy Director.
- 5.1.42 The intention was to convert the Applicant's employment from contract to permanent employee. She would not have taken the Applicant from her previous employment if not for purposes of making the Applicant a permanent employee.
- 5.1.43 The objective was to employ the Applicant on a permanent basis from November 2013. This did not happen because of a delay in the recruitment process.

- 5.1.44 It was not unusual for parties to sign employment contract *post facto*. She recommended appointments under all the contracts which were eventually approved by the executive authority.
- 5.1.45 She was of the view that the Applicant's status conversation from fixed term contract to permanent employment could only happen if the Applicant satisfied all the requirements for permanent employment, including a successful appointment interview.
- 5.1.46 She signed the Applicant's maternity leave application making it possible for the Applicant to proceed on maternity leave.
- 5.1.47 She expected the Applicant to return from maternity leave to continue serving the Respondent as the Applicant was an asset to the Respondent for her exceptional skills.
- 5.1.48 She recalled that the Applicant was invited to an interview for permanent employment. The Applicant was interviewed but was not successful. She was part of the interviewing panel.
- 5.1.49 The director labour relations position was created and remained in existence at the time when the Applicant went on maternity leave and continued to exist on the Applicant's return from maternity leave.
- 5.1.50 To the best of her knowledge the reason why the Applicant's contract was terminated was suspected nepotism. Some people felt that she was too close to the Applicant.
- 5.1.51 She could not recall that the contracts of Mantantana and Mrs Coleman were ever renewed.
- 5.1.52 She believed that she created a legitimate expectation, a reasonable one at that, that the Applicant would be employed permanently subject to the Applicant competing for the position at the interview stage and receiving MEC approval.

5.1.53 The Applicant has requested her to issue her with a letter confirming that the Applicant's permanent employment was receiving attention. The Applicant intended to use the letter for purposes of staving off the attachment of her goods by the Sheriff of the Court.

5.2 RESPONDENT'S CASE

5.2.1 Mrs Sharon Plaatjie, Private Secretary to the MEC, finance testified. The Applicant was already in service when she commenced duties with the Respondent, in August 2014, that is, in the Health Department.

5.2.2 Irregular appointments of staff were a burning issue at the time. The Applicant's appointment was one such case which the MEC had to attend to urgently.

5.2.3 Even the Chief Director Corporate Services raised the issue with the MEC soon after the MEC's appointment.

5.2.4 The MEC approached the H.R Department with an instruction to look at all contract appointments.

5.2.5 It was her experience that the Executive Authority that is, the MEC alone had the authority to appoint.

5.2.6 The MEC was in the process of instituting charges for irregular appointments against Mrs Gugulethu at the time when he left the Department.

5.2.7 To the best of her knowledge Mr. Mantantana and Coleman's contracts were not renewed, they were placed in different capacities after their contracts expired.

5.2.8 In her experience head hunting can only arise when the normal recruitment process had failed to find a candidate with skills, experience or training to match the post. This was not the case at the time when the Applicant was appointed.

- 5.2.9 There was no doubt in her mind that there was an oversupply of legal professionals in the province.
- 5.2.10 Mrs Funeka Pearl Ntsiko, Director H.R testified. She has been in human resource management for seven years. She has also had exposure to labour relations.
- 5.2.11 She was familiar with the circumstances pertaining to the Applicant's appointment. The post in which the Applicant was appointed was created in 2013 and with effect from 01 October 2013.
- 5.2.12 The post creation and the offer to employ happened on the same day which process amount to an irregularity. Also, irregular was the fact that the position was only evaluated two years after the appointment.
- 5.2.13 The post filled by the Applicant was not even on the organogram of the Respondent's departmental set up.
- 5.2.14 The requirement for senior management appointment is, among others, middle manager plus five years experience. The Applicant fell short of the said requirements.
- 5.2.15 Head hunting applied in cases of a critical skills which is not easily and freely available but head hunted candidates are also subject to the normal recruitment procedure i.e. presentation of CVs, short listing and interviews.
- 5.2.16 Irregular appointments were in the normal course of events reversible and it was her experience that this did not happen in the Applicant's case.
- 5.2.17 To the best of her knowledge the power to appoint rest with the MEC save in circumstances where this authority has been delegated.
- 5.2.18 She had no knowledge that there was delegated authority to appoint in the instant case, not even to the HOD.

6. ANALYSIS OF EVIDENCE AND ARGUMENT

- 6.1 The issue forming the subject of the enquiry and failing for determination was whether there was a dismissal or not, if so, whether the Applicant had legitimate expectation for continued employment.
- 6.2 Dismissal is at issue where an employer takes direct positive steps to terminate the services of an employee as in the case of dismissal for misconduct, dismissal for a reason related to incapacity or a reason related to an employer's operational requirements.
- 6.3 Dismissal is also at issue where an employer in a direct fashion terminate the services of an employee for a reason not recognised by law or in circumstances where an employer terminates the services of an employee indirectly by causing an employee's exit due to intolerable unfair conduct.
- 6.4 The distinction herein above highlighted refers to actual dismissal and implied or constructive dismissal where an employer's conduct is calculated at forcing an employee out of employment.
- 6.5 Where an employee resigns, retires, enters into an agreement for mutual separation, abandons his position or has reached the end of line where a fixed term employment contract is at issue, termination of employment will not translate into a dismissal.
- 6.6 There may however, be a case for dismissal where an employee argues that a fixed term contract, though expired, the employee had legitimate expectation for continued employment or for a permanent appointment.
- 6.7 As opposed to the case where the existence of a dismissal is not in dispute, implying that the non-referring party, invariably the employer has a duty to prove that the dismissal was fair, legitimate expectation must be proved by the party that referred the dispute.
- 6.8 The standard of proof is on a balance of probabilities as it is the case where the existence of a dismissal is not in dispute.

- 6.9 Proof is a subject of evidence. To achieve this the Applicant called three witnesses to give substance to her case.
- 6.10 The essence of the Applicant's testimony was that she left permanent employment to take up a position with the Respondent, the responsible head of department gave her assurance that she was destined for a permanent position. The responsible MEC gave her a similar assurance and correspondence emanating from the Respondent confirmed the intention to appoint her on a permanent basis.
- 6.11 Finally, the fact that colleagues employed in circumstances similar to hers were converted to permanent employees fuelled her expectation for continued or permanent employment.
- 6.12 The testimony of the affected HOD and that of Mr. Jonkers did not at all further the Applicant's case.
- 6.13 According to Mr. Jonkers, the authority to appoint rested with the responsible MEC. The authority may, however be delegated. Mr Jonker had no knowledge that the authority was delegate to the affected head of department.
- 6.14 The accountable Head of Department Mrs Matlaupane poured cold water on the Applicant's claim for a legitimate expectation for continued employment.
- 6.15 The most Mrs Matlaupane could say that favoured the Applicant's case was that she head-hunted the Applicant with the intention to appoint her permanently.
- 6.16 Further in her testimony Mrs Matlaupane testified that the Applicant was fully aware that her permanent employment was subject to the Applicant successfully competing for a permanent appointment. The Applicant competed for an appointment but failed.
- 6.17 It was also Mrs Matlaupane's testimony that the authority to appoint did not vest in her and that power vested in the MEC save in circumstances where the authority was delegated.
- 6.18 There was no delegation of authority in the instance case.

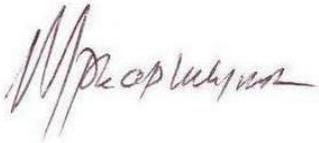
- 6.19 Mrs Matlaupane's testimony dealt the Applicant's case a fatal blow when she contradicted the Applicant's testimony that other colleagues in similar circumstances were issued permanent employment contracts.
- 6.20 The Applicant's reliance on a letter issued by an unauthorised member of the Respondent's administrative staff who acted outside of authority to undertake that a permanent appointment was in the offing was not a material fact on which to build a case for legitimate expectation for continued or permanent employment.
- 6.21 The MEC, also referred to by the Applicant as a source for her expectation for continued or permanent employment did not confirm the Applicant's version in the form of evidence.
- 6.22 The only major positive evidence in the Applicant's case was the multiple renewals of the fixed term employment contracts.
- 6.23 A multiplicity of contracts may only serve as a rallying point for the existence of a legitimate expectation but is by no means conclusive for the formation of a legitimate expectation.
- 6.24 Other factors to be taken into account are the existence of the position, whether the position has been subsequently occupied, whether the position forms part of the Respondent's structure, the contesting employee has the necessary competency and whether an authorised person in the establishment has created a legitimate expectation, all of which were not in the equation in the current dispute.
- 6.25 As testified by the Respondent's witness the position giving rise to the dispute ceased to exist.
- 6.26 Whereas the Applicant bore the onus to prove that there was a dismissal, and whereas the Applicant failed to discharge this onus, I therefore come to the conclusion that the application for an unfair dismissal was bound to fail.

6.27 Termination of employment was as a result of the expired fixed term employment contract.

7. AWARD

7.1 There was no dismissal, alternatively the Applicant failed to prove its existence.

7.2 I dismiss the application for the alleged unfair dismissal.



Joseph Mphaphuli

Signed

PHSDSBC Panelist

12 June 2019