



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case No: C 890/2013

In the matter between:

CAPE PENINSULA UNIVERSITY OF TECHNOLOGY

(CPUT)

Applicant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

S H CHRISTIE

Second Respondent

H DEEDAT

Third Respondent

Heard: 2 September 2014

Delivered: 18 February 2015

Summary: The CCMA lacks jurisdiction to arbitrate a dispute arising from a dismissal in terms of section 186(1)(b) of the LRA if the applicant fails to establish that he/she had reasonable expectation that his/her fixed term contract would be renewed on the same or terms. Expectation of a renewal of the fixed term contract on its own is insufficient to prove dismissal.

JUDGMENT

LALLIE, J

Introduction

- [1] This is an application to review and set aside an arbitration award of the second respondent ('the commissioner') including the verification award, in which she found the applicant's non-renewal of the third respondent's fixed term contract to constitute a dismissal within the meaning of section 186 (i)(b) of the Labour Relations Act 66 of 1995 ('the LRA'). She further found the dismissal substantively and procedurally unfair and ordered the applicant to pay her compensation. It is opposed by the third respondent.

Factual background

- [2] On 1 July 2010, the third respondent was employed by the applicant as a project co-ordinator in its Centre for Water and Sanitation Research (the Centre) on a fixed term contract which was renewable subject to the continuation of contract WP 10327 and a satisfactory performance review. During the subsistence of the contract, her duties were not limited to working in the WP10327 contract but she was assigned to perform other functions including sourcing other contracts for the Centre. However, on 24 May 2013, Professor Lagardien (Lagardien) addressed a letter to the applicant reminding her that her appointment was specific to contract WP 10327 which terminated on 30 June 2013. He further advised her that her contract which was linked to contract WP10329 would not be renewed. Aggrieved by the decision not to renew her contract, the third respondent referred a dispute to the first respondent ('the CCMA') on the basis that the non-renewal of her fixed term contract constituted an unfair dismissal as envisaged in section 186 (1)(b) of the Labour Relations Act 66 of 1995 ('the LRA'). The dispute was arbitrated by the commissioner who found in the third respondent's favour and ordered the applicant to pay her compensation equivalent to remuneration that she would have earned over a period of six months. As the commissioner had

miscalculated the amount of compensation due to the third respondent, she issued a verification award in which she corrected her error. It is the arbitration and the verification awards that the applicant seeks this Court to review and set aside.

The award

- [3] The commissioner pointed out that the onus to show a reasonable expectation of the renewal of the fixed term contract was on the third respondent. She noted that the applicant's argument was based on two grounds, namely, the terms of the third respondent's contract of employment and that the work that she did outside contract WP 10327 was ancillary and could, therefore, not amount to stand alone continuing work. The commissioner took into account the centre's practice that as one project came on line staff members needed to be on the lookout for further contacts for funding for the continuation of their work.
- [4] All the centre's researchers are dependent on securing funding for the continuation of the centre and their viability as its employees. The centre had a practice of accommodating its employees on fixed term contracts when they were between projects. The applicant denied that the third respondent was between projects when her contract expired and submitted that the need to accommodate her, therefore, did not arise. The commissioner made a finding that the facts did not support the applicant's version because the third respondent was involved in the Nuffic Gender Equity Project and the WRC Project.
- [5] The commissioner accepted the third respondent's version that she had a role in the centre outside the WP10327 contract and beyond its expiry, funding permitting. Her finding is based on the applicant's reaction to the third respondent's grievance against Lagardien. The grievance meeting was held on 29 April 2013. Its outcome was a recommendation that a facilitated workshop be held with a view to improve staff relations and improve efficiencies. No mention was made of the expiry of the third respondent's contract. The commissioner expressed the view that the applicant would have

advised the third respondent to get through the next few weeks as she would be leaving at the end of June had the real reason for the non-renewal of her contract been the one proffered by the applicant. No mention was made that the third respondent would not participate in the prospective project proposal that Mr Muanda wrote weeks before the third respondent received the letter advising her of the expiry of her contract. There were meetings which were attended by the third respondent on behalf of the centre which Lagardien did not attend, which proved that she had a role outside project WP 10327 and beyond its expiry. The commissioner made a finding that the Nuffic proposal which the third respondent sought to rely on did not support her case.

She also found that the third respondent was at least a co-author of the WRC proposal and at that time, in February 2013, reasonably concluded that she was an integral part of the project proposal which would have participate in its fulfilment, had it been awarded to the centre.

- [6] The commissioner expressed the view that evidence suggested that the third respondent's contract of employment did not end on its own terms. It was terminated by Lagardien as an act of retaliation. The commissioner's decision that the applicant had been dismissed was informed, to a great extent, by her finding that there was both funding and work to be done in contract WP10329. She found that the applicant was entitled to be protected by section 186(1)(b) of the LRA whose purpose is to guard against an employer artificially relying on the expiry of a fixed term contract with an employee to terminate the employment relationship when there is no legitimate business reason for doing so. She found that the applicant had been dismissed in terms of section 186(1)(b) of the LRA. She ordered the applicant to pay the third respondent compensation in the amount of R 172, 117.50 for dismissing the third respondent in a manner that was both substantively and procedurally unfair.
- [7] The applicant submitted that the commissioner's decision that its conduct of not renewing the third respondent's fixed term contract of employment constituted a dismissal within the meaning of section 186(1)(b) of the LRA was unreasonable given the evidence tendered at the arbitration. As the third respondent's fixed term contract was linked to the duration of contract WP

10327, when the contract was terminated on 30 June 2013, the applicant correctly declined to renew the third respondent's fixed term contract. As the applicant's evidence of the date of the termination of project WP 10327 was not disputed, the commissioner ought to have found that the third respondent had failed to establish the existence of dismissal and dismissed her claim. The commissioner committed a reviewable irregularity by granting an award in favour of the third respondent when the third respondent had failed to prove that she had a reasonable expectation that her contract would be renewed on the same or similar terms. A further attack on the award is based on the commissioner's finding, which is not supported by evidence that the non-renewal of the third respondent's contract was due to her poor relationship with Lagardien. The conclusion is based on the incorrect commissioner's view that the applicant would have resolved the grievance that the third respondent had filed against Lagardien by telling her to get through the next few weeks because her contract would end at the end of June 2013 instead of holding a workshop to improve both staff relations and efficiencies.

- [8] In its supplementary affidavit the applicant denied having created any expectation of the renewal of the applicant's fixed term contract beyond contract WP10327. It submitted that the commissioner's conclusion that the expectation was based on past practice was not supported by evidence. So was the conclusion of the expectation to renew the third respondent's contract based on the WRC 2013 project as its duration and terms and conditions were not disclosed.

Test for review

- [9] The thrust of the applicant's case is that the commissioner erred in not dismissing the third respondent's case for lack of jurisdiction in that she failed to prove her dismissal as envisaged in section 186(1)(b) of the LRA. When an applicant has failed to prove a dismissal in terms of section 186(1)(b) of the LRA, the CCMA will lack jurisdiction to arbitrate a dismissal dispute arising from an employer's failure to renew a fixed term contract. A decision whether the CCMA has or lacks jurisdiction to arbitrate a dispute needs to be correct. If it is incorrect, it is susceptible to review. The test whether the CCMA has the

necessary jurisdiction to arbitrate a dispute is expressed thus in *SA Rugby Players Association (SA RPA) and Others v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU and Another*¹

‘The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.’

The Court explained the operative terms of section 186 (i) (b) of the LRA to be that the employee should have reasonable expectation, and the employer must have failed to renew a fixed term contract or renewed it on less favourable terms.

[10] In *University of Pretoria v Commission for Conciliation Mediation and Arbitration and Others*,² the Court expressed the view that section 186 envisages that two requirements must be met in order for any employer’s action to constitute dismissal. Firstly, reasonable expectation, on the part of the employee, that a fixed term contract will be renewed on the same or similar terms. Secondly, there must be a failure by the employer to renew the contract on the same terms or failure to renew it at all.

[11] Both parties sought to rely on the following *dictum* of the *University of Cape Town v Auf der Heyde*.³

‘In order to determine whether the respondent had a reasonable expectation, it is first necessary to determine whether he in fact expected his contract to be renewed or converted into a permanent appointment. If he did have such an expectation, the expectation was reasonable.’

[12] The essence of the third respondent’s opposition is that she had an expectation that her contract would be renewed. She sought to rely on Lagardien’s failure to tell her that her contract would not be renewed. This argument overlooks the undisputed terms of the third respondent’s contract of employment which provide that the contract was of limited duration and linked

¹ [2008] 9 BLLR 845 (LAC) at para 41.

² (2012) 33 ILJ 183 (LAC) at para 18.

³ (2001) 22 ILJ 2647 (LAC) at 21.

to contract WP10327. When the third respondent assumed her duties, she was aware of the duration of her contract and the evidence that contract WP10327 expired on 30 June 2013 was not challenged. The argument that Mr Moandla was not aware that the third respondent's contract would be terminated and Lagardien's report, that the third respondent would focus on the river health project whose training had not been done, did not assist the third respondent. Similarly, her arguments that renewable fixed term contracts were based on funding that was raised and the participation in the work of other projects only confirm the correctness of the commissioner's finding that the third respondent's contract would be renewed. They exclude essential parts of the test for dismissal. They do not address the issue whether the expectation was for a renewal of the third respondent's fixed term contract on the same or similar terms.

- [13] A correct reading of the award reveals that the third respondent failed to establish that she had an expectation that her fixed term contract would be renewed on the same or similar terms. The commissioner based her finding on the availability of work and funds in project WP 10327. The availability of funds and work in the project on its own is insufficient to base a decision of a renewal on the same or similar terms in the absence of evidence to the effect that such work and funds were sufficient to have the third respondent's contract renewed on the same or similar terms.
- [14] The commissioner's finding that the third respondent had established her dismissal based on the centre's practice that if staff members, all employed on fixed term contracts, were 'between projects', efforts would be made to accommodate them. No evidence was led that at the time of the expiry of her fixed term contract, the third respondent was between projects. Even the commissioner did not disclose the projects which the third respondent was between when her contract expired. Even when the applicant's practice is considered, it discloses no basis for the conclusion that the third respondent was dismissed. The fact that the third respondent was finalising a proposal on 25 February 2013 did not place her between projects in the absence of evidence that the contract which was the subject of the proposal got awarded to the applicant.

- [15] The commissioner's finding that the third respondent had a reasonable expectation that with the appropriate changes, she would have been appointed to perform project management work in fulfilment of secured project, funding available at the centre and if there was a delay between project proposal and securing funding; the centre should have consulted with her about the possible shortfall in funding is based on conjecture. Further, in *SA Rugby (supra)*,⁴ it was held that anticipation of negotiation of a new contract without the certainty that its terms would be the same or similar is not protected by section 186(1) (b) of the LRA. The commissioner's decision that the third respondent proved dismissal is incorrect. The evidence before the commissioner reflects that the third respondent failed to prove her dismissal as envisaged in section 186(1) (b) of the LRA. In the absence of dismissal, the CCMA lacked jurisdiction to arbitrate the dispute before the commissioner.
- [16] The third respondent opposed this application armed with an award in her favour in an attempt to assert her right not to be unfairly dismissed. Granting a costs order against her will not be appropriate.
- [17] In the premises, the following order is made:
- 17.1 The arbitration award dated 7 October 2013 and the variation award dated 17 October 2013 are reviewed and set aside and substituted with the following:
- 17.2.1 The first respondent lacked jurisdiction to arbitrate the dispute under case number WECT 10383-13.

Lallie J

Judge of the Labour Court of South Africa

⁴ *SA Rugby (supra)* at paras 48-53.

Appearances

For the Applicant: Advocate De Koch

Instructed by Carelse Khan Attorneys

For the third respondent: Advocate Banderker

Instructed by Halday Attorneys

LABOUR COURT