REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 494/2016

In the matter between:

CITY OF CAPE TOWN	Applicant
and	
SALGBC	First respondent
Retief OLIVIER N.O.	Second respondent
IMATU obo Lucille SEARLE	Third respondent

Heard: 31 May 2017

Delivered: 2 August 2017

SUMMARY: Review – fixed term contract of employment -- arbitrator found that employee had a reasonable expectation of permanent employment. Award reviewed and set aside. LRA ss 145, 186(1)(b).

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application for review following an unusual set of circumstances resulting from two separate arbitration awards. It concerns the question whether an employee had the expectation of the permanent renewal of her fixed term contract of employment after the employer had twice refused to renew it.

Background facts

[2] Ms Lucille Searle[1] was employed by the City of Cape Town on a fixed term contract for three years from 1 April 2012. It was extended twice. The second extension expired on 30 September 2015 and the City did not renew it. In contrast, the City extended the contracts of her similarly situated colleagues until 31 January 2016.

[3] The employee referred a dispute to the South African Local Government Bargaining Council[2] in terms of s 186(1)(b) of the Labour Relations Act.[3] That subsection used to read as follows:

> " 'Dismissal' means that –
>
> …
>
> (b) an employee reasonably expected the employer 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…"

[4] Following some uncertainty as to its interpretation[4], the subsection was amended in 2015. The legislature added the following subsection as s 186(2)(b)(ii):

> "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

[1] The third respondent, represented by the Independent Municipal and Allied Trade Union (IMATU).

[2] The first respondent.

[3] Act 66 of 1995 (the LRA).

[4] Discussed later in the judgment.

> employer offered to retain the employee on less favourable terms, or did not offer to retain the employee."

[5] The dispute came before Commissioner Anne Erwin. She found that the employee did reasonably expect the City to renew her contract on the same or similar terms. She ordered the City to reinstate the employee retrospectively for the same period as her similarly situated colleagues, i.e. from 1 October 2015 to 31 January 2016.

[6] The City accepted the Erwin award and did not take it on review. But it asked the employee not to physically return to work. Instead, it paid her out the balance of her contract until 31 January 2016. According to the City, her functions and duties as an administrative officer had been absorbed into other functions.

[7] Come 31 January 2016, the City permanently appointed other employees whose contracts had expired from 1 February 2016, arguing that they are specialists in their field.

[8] Ms Searle referred a fresh dispute to the Bargaining Council in terms of s 186(1)(b) of the LRA on 10 March 2016. She now claimed that she expected to be permanently appointed, together with her colleagues, from 1 February 2016.

[9] The new dispute came before Commissioner Retief Olivier[5]. He found that the employee was dismissed – and that the dismissal was unfair – because she reasonably expected to be employed on an indefinite (permanent) basis. It is that award that the City seeks to have reviewed and set aside.

Arbitration award

[10] The Commissioner found that the employee had "more than a reasonable expectation" that her fixed term contract (pursuant to the Erwin award) would be converted to a permanent contract of employment. He ordered the City to:

[5] The second respondent.

10.1 employ Ms Searle on an indefinite contract from 4 July 2016;

10.2 pay her retrospectively to 1 February 2016; and

10.3 pay the wasted costs for a postponement on 5 May 2016.

Grounds of review

[11] The City has applied to have the Olivier award reviewed and set aside in terms of s 145 of the LRA. It argues that the arbitrator:

11.1 committed misconduct in relation to his duties to an arbitrator;

11.2 committed errors of law; and/or

11.3 committed gross irregularities in the conduct of the arbitration proceedings.

Misconduct and gross irregularities?

[12] The City's argument is that the Commissioner committed misconduct in relation to his duties as an arbitrator by failing to apply his mind to the evidence before him and, as a result, coming to a conclusion that no reasonable arbitrator could have arrived at.[6] Mr *Conradie* argued that, quite simply, there was no evidence before Commissioner Olivier to support the conclusion that the employee had a reasonable expectation of further or permanent employment.

[13] In order to decide whether a reasonable expectation of employment existed, an arbitrator must take into account all the surrounding circumstances. For example, in *Dierks v University of South Africa*[7] the Court listed the following factors, pointing out that it is not a closed list:

> "These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or

[6] Thus rendering the award reviewable in light of the test in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

[7] [1999] 4 BLLR 304 (LC) par 133.

> reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business.
>
> These factors are not a *numerus clausus*."

[14] In this case, the surrounding circumstances could not have created a reasonable expectation of permanent employment. The arbitrator appears not to have taken the following circumstances into account:

14.1 In terms of the Erwin award, there was no obligation on the City to take the employee into account for permanent employment. Her temporary contract was only extended to the end of January 2016.

14.2 The City never offered the employee a permanent position or made any promises in this regard. On the contrary, it made it clear to her that she would not be expected to return to work and that it would pay out the balance of her contract until the end of January 2016.

[15] The facts of this matter are diametrically opposite to those, for example, in the recent case of *Nowalaza and Others v Office of the Chief Justice*[8] where the factual position was this:

> "The applicants expressed their expectation. They expressed their understanding that the new contracts constituted a holding position for the OCJ. They at all times wished to pursue their rights to employment. They harboured such an expectation."

[16] In this case, the employee did not return to work after the Erwin award. She accepted the payment of the balance of her contract in terms of that award. The City made it abundantly clear that she should not expect any permanent employment – in fact, she should not even return to work for the balance of her contract.

[17] Commissioner Erwin recorded in her award that "[i]t had been explained to the employees that job descriptions were being developed and there were no guarantees that non-permanent staff would be placed on the new structure". She found that Ms Searle's contract had to be extended to 31 January 2016, thus "giving her an opportunity to be considered for the

[8] [2017] ZALCJHB 234 (15 June 2017) par 91.

permanent post"; there was no indication that the City was under any obligation to appoint her permanently or that she had an expectation of permanent employment.

[18] There is also no indication that Commissioner Olivier took into account the City's evidence at arbitration that the other employees' circumstances were different to those of Ms Searle. Her line manager, Mr Alistair Graham, testified that she was a generalist fulfilling administrative functions, whereas those employees who were appointed permanently fulfilled specialist functions:

> "The specialist staff were made permanent.
>
> I think it is important to note with respect to these specialised posts that they're unique posts primarily within the organisation and they were functions which even the planning department couldn't give coverage over. There was no coverage within the planning department for [these] functions. They were specialist functions which were developed through the development of violence prevention through urban upgrading methodology. So they were unique … posts with unique job descriptions."

[19] The other obvious difference was that Ms Searle never returned to work, whereas those employees who were offered permanent employment continued with their (specialised) work throughout, as the City's representative (Ms du Preez) pointed out to her in cross-examination:

> "You see the comparison[9] that you're drawing is that your circumstances are exactly the same to other permanent employees. We're saying no, that's not the case. They were continuously working, whereas you were at home."
>
> …
>
> "Apart from one email there's nothing to indicate that you seriously want to return to work."
>
> …

[9] Transcribed as "comparative".

> "…I haven't heard any evidence presented stating that the City created an expectation that you would become permanent. In fact the City told you we don't want you back."

[20] Graham also confirmed that Ms Searle could be differentiated form the other employees as they were at work uninterrupted. She could not have had a reasonable expectation of permanency as the City simply did not want her to return to work for the balance of her contract period, let alone permanently. And Leonie Kroese had already informed her in August 2015 that a contract would not be renewed and that her functions would be done from the director's office. Graham testified that, if the post doesn't exist anymore, it would be difficult to have an expectation to fill it because it doesn't exist anymore. The arbitrator does not appear to have taken this testimony into account.

[21] When the employee referred her first unfair labour practice dispute, she did not claim that she had a reasonable expectation of permanency. In her answering affidavit in these proceedings, she says as much: "When I referred my first dispute to the [Bargaining Council], my expectation was only to receive a four-month contract as all other fixed term employees that worked with me did." Any claim of an expectation of permanent employment could only have arisen after the Erwin award had been issued on 15 December 2015. And following on that award, the City made it clear that she did not have any expectation of further employment after the expiry of her contract: it paid out until 31 January 2016, asked to stay at home, and she did so.

[22] The further evidence before Commissioner Olivier was that the City was still in the process of finalising its new organisational structure at the time. The changes to the structure were continuously communicated to staff and the two administrative officer posts were no longer on the new structure. Ms Searle could not have had an expectation to fill a position which did not exist any longer. This evidence, too, was not taken into account by Commissioner Olivier.

[23] To make it abundantly clear that she should not have any expectation of permanent employment, the City's head of dispute resolution

management, Mr Riedewaan Momberg, wrote to her trade union, IMATU[10], on 27 January 2016 and stated:

> "With regards to your request that the employer should consider offering Ms Searle permanent status. The applicable arbitration award does not address that area and more Importantly permanent employment within the City are govern by well-established policies, procedures and procedures, as you are familiar with. Until such time it has been followed and/or adhered to we cannot entertain any proposal for permanency."

[24] Commissioner Olivier also failed to consider the evidence before him that the employee had applied for four alternative positions in the City and a number of positions at the University of Cape Town since February 2016. Contrary to an expectation for permanent employment in her previous position at the City, that created the impression that she did not have an expectation to be permanently employed.

[25] By failing to evaluate significant common cause facts and by disregarding the evidence set out above, the Commissioner committed a number of irregularities. But for these irregularities, he would have arrived at a different conclusion. Having regard to the two-stage enquiry set out in *Gold Fields*[11], that renders the award reviewable. As the Labour Appeal Court recently pointed out in *SAB v Hansen:*[12]

> "In short, this requires the Labour Court to consider two issues: The first is whether the applicant has established an irregularity. This irregularity could be a material error of fact or law, the failure to apply one's mind to relevant evidence, or misconceiving of the enquiry or assessing factual disputes in an arbitrary fashion. The second is whether the applicant has established that the irregularity is material to the outcome by demonstrating that the outcome would have been different having regard to the evidence before the arbitrator. An arbitration award will, therefore, be considered to be reasonable when there is a material connection between the evidence and the result."

[10] The third respondent. (Momberg's grammar as in original).

[11] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC).

[12] *South African Breweries (Pty) Ltd v Hansen* [2017] ZALAC 33 (25 May 2017) par 11.

[26] In this case, there was no material connection between the evidence and the result. And, as discussed below, he further committed an error of law that was material to the outcome.

Error of law

[27] Despite the amendment of s 186(1)(b) by the addition of subsection (ii), the employee could not have had a reasonable expectation of renewal of the fixed term contract as well as a reasonable expectation of permanency. The two are mutually exclusive. Yet the arbitrator refers to her alleged reasonable expectation of renewal on the same terms and conditions as before (i.e. a fixed term contract) to include a reasonable expectation of permanency. He says that the employee was "reinstated to the same terms and conditions that she employed before her dismissal, which was also the same terms and conditions that apply to the other non-permanent employees". He says that there is no reason for him to disagree with the findings of Commissioner Erwin. Yet he then jumps to a conclusion that the employee would be made permanent, contrary to the Erwin award. In so doing, he ignored the disjunctive "or" in subsections (i) and (ii) in the amended s 186(1)(b), thus committing an error of law. And in turn, this led to an unreasonable result.

Conclusion

[28] The award must be reviewed and set aside. This Court is in a position to substitute it, having all the evidence before it. It need not be remitted.

[29] With regard to costs, I take into account that there is an ongoing relationship between the City and IMATU; and that the employee had an arbitration award in her favour. Taking into account the requirements of the law as well as fairness, I do not consider a costs award to be appropriate.

Order

[30] I therefore make the following order:

30.1 The arbitration award of Commissioner Retief Olivier under case number WCM 021612 dated 20 June 2016 is reviewed and set aside.

30.2 It is replaced with an award that the employee, Ms Lucille Searle, was not dismissed.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT:	Bradley Conradie of BCHC attorneys.
THIRD RESPONDENT:	Elco Geldenhuys of MacGregor Erasmus.