Not Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C709/2018

In the matter between:

L K JONES	**Applicant**
and	
THE COMMISSION FOR MEDIATION, CONCILIATION & ARBITRATION	**First Respondent**
COMMISSIONER ALLIE RYKLIEF (*N.O.*)	**Second Respondent**
PARLIAMENT OF THE RSA	**Third Respondent**

Date of Set Down: 4 June 2020

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 26 January 2021

Summary: (Review – Unfair dismissal – Failure to renew a fixed term contract – objective test to determine if dismissal took place in terms of s 186(1)(b)(i) of the LRA – No closed list of factors –a reasonable expectation of a prospect of permanent employment is not a factor that can be considered under s 186(1)(b)(i) - Failure of employer to take disciplinary action or remedial steps to improve performance does not detract from the natural inference to be drawn from an unsatisfactory performance history in so far as it has a bearing on the prospects of renewal of a contract – policy behind s 186(1)(b)(i))

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application by Ms L K Jones ('Jones') to review and set aside an arbitration award handed down by the second respondent ('the arbitrator') in which he found that she had failed to discharge the onus of proving that a reasonable expectation had been created by the employer ('Parliament') that her five year fixed term contract, would be renewed when it expired on 31 December 2017 and accordingly failed to prove she had been dismissed under section 186 of the Labour Relations Act, 66 of 1995 ('the LRA').[1]

[2] The parties filed comprehensive heads of argument and agreed that the matter could be decided on the papers without an oral hearing of the application, owing to the exigencies of the Covid-19 pandemic.

[1] Section 186(1)(b)(i) states:

> '186 Meaning of dismissal and unfair labour practice
> (1) 'Dismissal' means that-
> *(a)* an employer has terminated employment with or without notice;
> (Para. *(a)* substituted by s. 30 *(a)* of Act 6 of 2014 (wef 1 January 2015).)
> *(b)* an *employee* employed in terms of a fixed-term contract of employment reasonably expected the employer-
> (i) 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; or …'

The award

[3] I do not intend to summarise the award, nor to relate in any detail the evidence before the arbitrator except where necessary for the purposes of the judgment. The thrust of the arbitrator's reasoning is set out below.

[4] The arbitrator reviewed some of the jurisprudence on the test for determining whether a reasonable expectation of renewal of a fixed term contract has been established by an employee. Amongst other decisions he noted the decision in *Member of the Executive Council for the Department of Finance Eastern Cape v De Milander & Others* (2011) 32 *ILJ* 2521 (LC).[2] That decision summarised the approach adopted:

> "[32] The onus to prove that the dismissal occurred in circumstances where the employee had a reasonable expectation that the fixed-term contract would be renewed at the end of its period rests with the employee. A dual enquiry is conducted in determining the existence of reasonable expectation. The first enquiry is subjective and entails enquiring into the subjective basis upon which the person who claims reasonable expectation relies in contending that his or her contract ought to have been renewed. The enquiry into reasonable expectation ends if the employee fails to show that he or she had the expectation that the period of the fixed-term contract would be extended. If the employee is successful in showing that he or she had a subjective expectation that the contract would be renewed then the second enquiry entails determining the existence of such an expectation on the basis of the objective facts that existed prior to the termination of the contract.
>
> [33] In SA Rugby the Labour Appeal Court per Tlaletsi JA summarizes the meaning of s 186(1)(b) of the LRA as follows at para 43:
>
> > 'What s 186(1)(b) provides for is that there would be a dismissal in circumstances where an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer only offered to renew it on less favourable terms or did not renew it. The operative terms in s 186(1)(b) are, in my view, that H the employee should have a reasonable expectation, and the employer fails to renew a fixed-term contract or renews it on less favourable terms. The fixed-term contract should also be capable of renewal.'
>
> [34] Court then went further to summarize what needs to be done to satisfy the objective tests as follows at para 44:
>
> > 'The appellants carried the onus to establish that they had a "reasonable expectation" that their contracts were to be renewed. They had to place facts which, objectively considered, established a reasonable expectation. Because the test is objective, the enquiry is whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew

[2] Upheld on appeal in *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 *ILJ* 1427 (LAC)

> his or her fixed-term contract on the same or similar terms. As soon as the other requirements of s 186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent (SA Rugby) would have to establish that the dismissal was both procedurally and substantively fair.' "[3]

[5] The arbitrator inferred that if an employee held such an expectation of renewal, they would be 'surprised or startled' to learn that their fixed term contract was not being renewed. In the case of Jones, her fixed term contract stated both that the contract would automatically terminate on 31 December 2017 and that she had no claim for continued employment. Clause 1 of the fixed term contract reads:

> 'The term of this Contract is from 1 January 2 31 December 2017.
>
> This contract will automatically terminate 31 December 2017 where after it is agreed that you will have no claim against the Secretary for continued employment.'

[6] Towards the end of September, and before contract expired, Jones attempted to meet with the Divisional Manager to discuss her contract. Her evidence was that he had told her it would be discussed with her line manager and HR executive, despite her belief it should be discussed with him. She had also testified that a meeting had been requested by the executive manager but never took place. She then was given a letter on 6 October 2017 by her line manager, Mr M Wolela, The letter, dated 5 October 2017, was issued by the human resources executive, L H Makele, and stated:

> 'Dear Ms. Jones
>
> RE: NOTICE OF EXPIRY OF EMPLOYMENT CONTRACT
>
> We refer to clause 1 of the fixed term contract of employment between you and the Secretary to Parliament and confirm that this contract will automatically terminate on the 31 December 2017.
>
> Accordingly, the Human Resources Division will contact you to facilitate the termination arrangements.
>
> Management would like to thank you for your contribution Parliament and would like to take this opportunity to wish you everything of the best in your future endeavours.
>
> Please do not hesitate to contact me should there be any further assistance queries in this regard.
>
> …'

[3] At 2531-2

[7] The arbitrator noted that Jones was shocked at receiving the letter and that the contract would not be renewed despite the absence of any discussions with her beforehand. He recorded that she felt that it was like a dismissal and was so upset when she received the letter that she had to go home. Her reaction to being told that she was on a fixed term contract and 'that was the end of the matter', was that she had said that she expected it to be renewed and that at least there would be a discussion about it. Even though shortly after receiving the letter she had sent an email which might have been interpreted to mean that she was not disputing the situation, the arbitrator accepted that she had demonstrated that she held a subjective expectation that her contract would be renewed.

[8] He then considered the objective grounds, which Jones had advanced for claiming that her belief her employment would continue after the expiry of the fixed term contract was reasonable. The first was that there were indications that Parliament was moving away from a policy of employing staff members on fixed term contracts occupying permanent positions. The arbitrator rejected her statement describing it as based on "corridor talk" and the fact that some other colleagues whose fixed term contracts were expiring had been extended. Somewhat confusingly, the arbitrator felt that these factors themselves were not subjective ones she could rely on.

[9] The second reason she had advanced was that presiding officers of Parliament had expressed dissatisfaction with the short-term contract policies and this had been communicated to staff by the Acting Secretary who is also the CEO of Parliament. The arbitrator reasoned that merely because there might have been such dissatisfaction did not displace the fact that Parliament had policies in place and only policies which existed could be relied upon as a basis for an expectation. It could not be reasonable to develop an expectation based on policies which had not yet been adopted.

[10] The third basis raised by the applicant was that, except for "certain individuals who had 'issues' " with Parliament, it was her perception that her peers were all re-employed on the expiry of their fixed term contracts. From the evidence of the employer, it was apparent that at least three other fixed

term contract employees did not have the contracts renewed and unsuccessfully challenged this in the CCMA. Further, there was evidence that the employer had 'issues' about a variety of issues relating to Jones' own work performance. The arbitrator reasoned that if Jones accepted that other persons who had not had their contracts renewed because of 'issues' with the respondent, then her situation was on a par with theirs and, for similar reasons, she could not have expected that her contract would be renewed under the circumstances.

[11] The fourth ground which the arbitrator identified as why Jones believe that she would be employed beyond 31 December 2017 was that Parliament's draft Human Resources Policy Document, which was circulated to all staff, indicated that it intended doing away with the practice of employing staff on fixed term contracts. He accepted that the draft had been in discussion since 2012 and at best it might have been expected that sometime in the future such a policy would be adopted, until such time as unreasonable to rely on a draft document.

Grounds of review

[12] The review application does not take issue with the correctness of the arbitrator's approach based on the jurisprudence mentioned. The founding affidavit, setting out the grounds of review, lists the oft-repeated general litany of alleged irregularities or errors committed by the arbitrator, but lacked any factual specificity pertaining to the case itself, before dealing with the substantive basis of Jones' complaint. Jones principally takes issue with the arbitrator's analysis, which is summarised above.

[13] She claims that the arbitrator wrongly concluded that the termination of her fixed term contract did not constitute a dismissal because -

13.1 He failed to consider the following her evidence that the fact that she had endeavoured to arrange a meeting with her divisional manager to discuss her "contract renewal" and that such a meeting was planned but did not take place. Although she does not say what error the Commissioner committed in this regard, I assume she implies that he

failed to attach enough weight to that evidence. The respondent affirms the correctness of the arbitrator's analysis in this respect.

13.2 He did not consider her evidence that the acting Secretary had indicated the previous year in a number of meetings that the she had told staff that when fixed term contracts of staff were expiring divisional managers should deal with people on time so that they could 'plan their lives for renewal or anything else'. The respondent does not dispute this evidence was un-contradicted but maintains that the arbitrator did address it and disputes that any reviewable issue arises from this.

13.3 Jones also reiterates her evidence relating to the draft human resources policy which was circulated towards the end of September 2017 which she took to as an affirmation that Parliament was intending to do away with fixed term contracts and this would result in her being permanently employed, particularly as the position she occupied was a permanent post on the fixed establishment. The respondent does not dispute the draft policy and concedes that the arbitrator found that she believed in her mind that her fixed term contract would be renewed, but notes that this is not the same as a belief that her employment relationship would continue as a permanent one. The respondent also does not dispute evidence that the post occupied by Jones still existed and was a critical one.

13.4 The arbitrator failed to consider that, even though the respondent's witness had said that the policy would only be effective once it had been signed by the relevant presiding officers, he did acknowledge that expectations might have been created by it.

[14] Jones further argues that the employer had to establish that the dismissal was fair and it was clear from the evidence that no procedures were followed prior to the decision not to "extend her employment relationship". The employer rightly points out that the fairness of a dismissal did not arise for consideration because the arbitrator found that Jones had not been dismissed.

[15] The LAC has made it clear that the test for reviewing a jurisdictional issue, as in this case where the first issue is whether a dismissal has taken place,

is an objective test and reasonableness is not the standard of review. The labour court cited this authority in *Pikitup Johannesburg (SOC) Ltd v Muguto and others* (2019) 10 BLLR 1146 (LC):

> '[22) Any further doubts about the applicable test was laid to rest *in Jonsson Uniform Solutions (Pty) Ltd v Brown and others*[4], where the Labour Appeal Court held as follows:
>
> > "The generally accepted view is that we have a bifurcated review standard viz reasonableness and correctness. The test for the reasonableness of a decision was stated in *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* as follows: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'
> >
> > In assessing whether the CCMA or the Bargaining Council had jurisdiction to adjudicate a dispute, the correctness test should be applied. The court of review will analyse the objective facts to determine whether the CCMA or Bargaining Council had the necessary jurisdiction to entertain the dispute. See *SARPA v SA Rugby (Pty) Ltd and others; SA Rugby (Pty) Ltd v SARPU*.
> >
> > The issues in dispute will determine whether the one or the other of the review tests is harnessed in order to resolve the dispute. In matters where the factual finding of an arbitrator is challenged on review, the reasonable decision-maker standard should be applied. Where the legal or jurisdictional findings of the arbitrator are challenged the correctness standard should be applied. There will, however, be situations where the legal issues are inextricably linked to the facts so that the reasonable decision-maker standard could be applied.
> >
> > It is therefore important to determine whether the dispute, between the parties, is a jurisdictional one or not. The dispute to be resolved determines the test to be applied. In this matter, the dispute between the parties was whether there was in fact a dismissal. If there was no dismissal the Bargaining Council would not have jurisdiction. If there was a dismissal the Bargaining Council would have jurisdiction. The existence or otherwise of a dismissal is therefore a jurisdictional issue. The correctness standard and not the reasonableness standard should therefore be applied. The court a quo, as both parties agreed, applied the wrong standard." (Citations omitted.)'[5]

[16] Accordingly, the question before the court is simply whether the arbitrator was correct in determining that Jones had been dismissed when her contract was not renewed. In this regard, it is important to note that a dismissal in terms of section 186(1)(b)(i) of the LRA is confined to determining whether there was a reasonable expectation that a fixed term contract should be renewed and does not include an expectation about permanent employment on the expiry of a fixed term contract.

[17] Consequently, any contention by Jones that the arbitrator should have determined that she had a reasonable expectation of permanent employment on the expiry of her contract and, because this did not

[4] (2014) JOL 32513 ((2014) ZALCJHB 32) (LAC)

[5] At 1152-3

transpire, he ought to have decided that she was dismissed, would require him to make a decision outside the ambit of section 186 (1)(b)(i). Accordingly, he had no jurisdiction to entertain the prospect of permanent employment as a factor determining whether Jones had been dismissed or not. It also follows that any evidence she led in order to establish that she had an expectation of permanent employment, would not assist her in establishing the fact of her dismissal in terms of that section. Only evidence relevant to establishing the existence of a reasonable belief in the expectation of a renewal of her fixed term contract on the same or similar terms could be considered by the arbitrator.

[18] This is an important factor in deciding if Jones had established that she had been dismissed in terms of the section. It is significant that a major part of her evidence in support of objective grounds for her having a reasonable expectation of extended employment, related to an expectation that a new policy would be introduced in terms of which the post she occupied would only be filled in future by permanent appointees and she expected that she would be the first of these. Likewise, her evidence of what the acting Secretary had said in meetings and of the draft policy was offered as evidence that she had an expectation her appointment would be permanent. So too was her evidence that some persons were permanently appointed. For the reason mentioned, none of this could assist her in establishing the fact of her dismissal under section 186(1)(b)(i) even if it was true.

[19] The remaining evidence she advanced, and the employer's responses thereto were the following:

19.1 The acting Secretary had spoken for senior managers telling them that they had to deal with people timeously about their contracts leave things to the last minute so they could "plan their lives for renewal you know or anything else". However, as the respondent argues, this is not an indication of a probability of renewal but merely an exhortation to managers not to leave matters to the last minute, and is open ended on the issue of renewal itself.

19.2 Jones had sought to discuss her contract with her divisional head, which had been agreed to in principle, but never took place. The fact

remains that, as noted by the arbitrator, a meeting was scheduled to discuss with her the reasons for the nonrenewal of her contract but she did not attend the meeting of her own volition. Nonetheless, it is is perfectly understandable that Jones thought it would be pointless attending the meeting as she had already been presented with the letter making it clear her contract would not be renewed. Even if the offer to meet with Jones to discuss her contract, could not have meaningfully dealt with anything other than the explanation why it was not renewed, it does not follow that an expectation of a meeting about her contract necessarily implied that she could expect it to be renewed, so nothing turns on this issue.

19.3 Insofar as the employer had produced evidence that her work attendance and performance was below par, Jones argued that she had never been reprimanded or put on terms to improve her performance. Evidence given was that the reason for not renewing her contract was her poor work performance. Jones claimed that this all should have been raised with her at the time. The employer claimed it would have done so if she had attended the meeting convened after she was told it would not be renewed. The evidence did show that Jones had failed to complete her annual performance management assessment twice in her five years of employment and her performance had declined 33%. Her attendance during 2016 was poor and when the issue of her performance was raised with her under cross-examination she was combative and would not be drawn into a discussion about her performance. She did concede that even though she was unhappy with her performance assessment she did not appeal the results. Similarly, Jones also could not dispute that in 2017, for one reason or another she had not been at work for altogether nine weeks, though she claimed there was a justification for all the absences. There was also evidence put to her under cross-examination suggesting her relationship with her line manager was poor and that she had even recorded in writing that she did not trust him. Jones' response was to minimize the significance of them not

getting on with each other and to emphasize the fact that they both did their own work.

19.4 Jones did acknowledge that a number of other persons who did not have their contracts renewed had 'issues'. Far from supporting an expectation of renewal, the evidence tends to show that a contract would not be renewed where the employment relationship had been problematic and Jones' performance history placed her in that category. It is difficult to understand why an employee would just assume that renewal would be automatic irrespective of how they conducted themselves during the previous fixed term contract. It stands to reason that if a fixed term contract employee receives glowing performance reviews, that might give rise to an expectation the employer might want to retain them. Conversely, it also follows that mediocre performance assessments and poor work attendance are more likely to have a negative impact on realistic prospects of renewal. The mere fact the employer does not take remedial steps during the course of the fixed term contract, does not detract from the reasonable inference that such performance would militate against the prospect of renewal. During the course of Jones' cross-examination the 2006 interim policy guidelines for the appointment of managers and designated professionals was raised with her. She seemed to be unaware of that policy. It is notable that the guidelines emphasized that appointments to such positions should be made on the basis of five-year performance contracts.

19.5 The post of media liaison manager, which she occupied was on the permanent establishment of Parliament. During the course of cross-examination, it was not canvassed with her that the guidelines for the appointment of managers and various professionals after 2006 was that their appointments should be on the basis of fixed term performance contracts. It was not the employer's case that the functions she fulfilled were temporary in nature, nor did it dispute that the position was part of the fixed establishment of parliamentary staff. Nonetheless, there was no evidence to support a conclusion that all

posts on the fixed establishment of Parliament of necessity entailed permanent appointments to those posts.

[20] Apart from the facts considered above, this is not a case where there had been a history of prior renewals of Jones' fixed term appointment. The provisions of clause 1 of her contract were clearly intended to discourage her from believing that, in the normal course of events, the contract would be renewed. Where the terms of the contract are so emphatic in discouraging an employee to hope for a renewal, the employee must adduce cogent evidence to show that, notwithstanding such bleak terminology, the expectation of a renewal when the contract ended was both subjectively held and objectively justifiable. In this regard, the absence of prior renewals is not insignificant. In *Biggs v Rand Water* (2003) 24 *ILJ* 1957 (LC), the court noted the purpose of including s 186(b) in the LRA:

> ' Section 186*(b)* was included in the LRA to prevent the unfair practice of keeping an employee in a position on a temporary basis without employment security until it suits the employer to dismiss such an employee without the unpleasant obligations imposed on employers by the LRA in respect of permanent employees.'

It is important not to lose site of the primary wrong the section was intended to address, which was mainly suffered by vulnerable low paid employees engaged on contracts between a couple of weeks and a year that were rolled over regularly. It is doubtful the legislature had in mind persons appointed on lengthy fixed term contracts. Nevertheless, if objective factors do exist to support a subjective belief that a renewal of a contract is likely, then even a person employed on such a long term fixed contract can establish that the non-renewal of the contract amounts to a dismissal. However, the longer the contract and the existence of wording in the contract which discourages the formation of such an expectation, will naturally mean that other objective factors will have to be compelling to support a conclusion that an expectation of renewal is reasonable in such a case.

[21] In *Joseph v University of Limpopo & others* (2011) 32 *ILJ* 2085 (LAC) the LAC stated:

> '[35) The onus is on an employee to prove the existence of a reasonable or legitimate expectation. He or she does so by placing evidence before an arbitrator that there are circumstances which justify such an expectation. Such circumstances could be, for instance, the previous regular renewals of his or her contract of employment, provisions of the contract, the nature of the business, and so forth. The aforesaid is not a closed list. It all depends on the given circumstances and is a question of fact.'[6]

[22] In this instance the contentions advanced by Jones do not establish, on a balance of probabilities, that her expectation of a renewal of her contract, was a reasonable one, assuming in her favour that the arbitrator was correct in finding that subjectively she had such an expectation. Consequently, on the evidence before the arbitrator, Jones failed to discharge the onus of proving she was dismissed within the meaning of s 186(1)(b) of the LRA.

Costs

[23] I accept that Jones' believed that the way she was advised that her contract would not be renewed without a prior discussion on its renewal, might have caused her to believe that there was something untoward about its non-renewal and that might have fuelled a belief, albeit a misguided one, that her employment ought to have been prolonged. Consequently, this is not a case where law and fairness warrant an adverse cost order against her in my view.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

[6] At 2093

Representatives -

For the Applicant:	L N Van Zyl
For the Third Respondent:	R Nyman instructed by the State Attorney (Cape Town)