

Majambe / University of South Africa

(2023) 32 CCMA 7.1.4

Reported in (Butterworths) Case No.	[2023] 7 BALR 770 (CCMA)
Award Date	GATW 15479-22
Jurisdiction	01/05/2023
Commissioner	Commission for Conciliation, Mediation and Arbitration Adv GS Jansen van Vuuren, Senior Commissioner
Subject	Procedural fairness in dismissal Dismissal – Proof of Fixed-term contracts – Non-renewal of Practice and procedure Jurisdiction

Keywords

Procedural fairness in dismissal - Dismissal – Proof of – Employee claiming that she was dismissed when her fixed-term contract was not renewed without proving reasonable subjective or objective expectation of renewal – Dismissal not proved.

Fixed-term contracts – Non-renewal of – Employee claiming that she was dismissed when her fixed-term contract was not renewed without proving reasonable subjective or objective expectation of renewal – Dismissal not proved.

Mini Summary:

The applicant, a consultant in the respondent's student administration department, was employed on two consecutive fixed-term contracts, the last of which was not renewed. Although her contract expressly stated that she had no expectation of renewal and she had provided no motivation for a renewal, she claimed that this constituted an unfair dismissal as the university had a "culture" of renewing fixed-term contracts. The university closed its case without leading evidence.

The Commissioner noted that the purpose of section 186(1)(b) of the LRA is to avoid exploitation of employees on fixed-term contracts but that the onus of proving a reasonable expectation rests on the employee. To do so, the applicant had to prove that she subjectively expected renewal and that the expectation was reasonable. A hope that her contract would be renewed did not prove a subjective expectation of renewal. The applicant's contracts explicitly stated that she could have no such expectation and, despite a previous renewal, she must have realised that there was a real risk that her contract would not be renewed again. Contractual provisions cannot be ignored. While previous renewals were relevant, they did not necessarily imply that the university had waived its right to rely on the non-renewal provision. The applicant had relied on an alleged assurance given by managers, who she had not called to testify, and who had allegedly said that she would be called "as and when" a new contract was ready. This did not amount to an assurance that she would be offered another contract. The applicant's claim that several of her colleagues had had their contracts renewed was backed by no details of the circumstances in which that had occurred. The applicant had, accordingly, failed to show that her alleged expectation of renewal was reasonable. That the applicant had been given no prior warning that the contract would not be renewed was irrelevant. Since the applicant had failed to prove that she was dismissed, the Commission lacked jurisdiction to arbitrate the dispute.

The application was dismissed for want of jurisdiction.

Award

Details of hearing and representation

- [1] The applicant in this matter is Zona Tembakazi Majambe and the respondent is the University of South Africa ("UNISA"). The dispute was set down for arbitration at CCMA Towers in Pretoria on 17 April 2023.
- [2] The applicant was represented by Ms J Naidoo (an attorney) and the respondent was represented by Mr M Ramotlou (legal adviser).
- [3] The proceedings were recorded digitally.
- [4] The parties submitted written heads of argument.

Background

- [5] This dispute was referred to the Commission on 25 October 2022. The applicant (in LRA Form 7.11) claimed that she had been unfairly dismissed on 30 September 2022 and the matter was set down for con-arb on 14 November 2022.
- [6] The respondent objected to the con-arb procedure, but attended the proceedings. The dispute could not be resolved and a certificate of non-resolution was issued. The matter was eventually set down for arbitration before me.

- [7] This is an arbitration award with brief reasons as contemplated in section 138(7)(a) of the Labour Relations Act, 1995 (hereinafter referred to as "the Act").

Issues to be decided

- [8] The applicant had been employed on a fixed-term contract. She claimed that the respondent had created an expectation to the effect that the said contract would be renewed.
- [9] The issues to be decided consequently stem from:
- (a) the question whether or not there had been an unfair dismissal as contemplated in section 186(1)(b)(i) of the Act; and
 - (b) the question of the appropriate remedy – ie in the event of the applicant's alleged dismissal being found to have been unfair.
- [10] The applicant sought renewal of her fixed-term contract of employment for a period of one year commencing on 1 October 2022.

Summary of evidence

The applicant's case

The evidence of Zona Tembakazi Majambe (applicant)

- [11] The applicant had been employed as a SCSC consultant (in Student Administration and Support Services) on a fixed-term contract of employment from 7 October 2020 until 31 March 2021. She was responsible for taking inbound and outbound calls as well as email correspondence. She eventually also dealt with social media and trained staff to use the Moodle application.
- [12] The applicant's initial fixed-term contract of employment was renewed from 10 April 2021 until 30 September 2021 and again from 1 October 2021 until 30 September 2022, but it was not renewed again after that.
- [13] Each fixed-term contract was subject to specific terms and conditions of employment set out in the respondent's "CONDITIONS OF SERVICE: FIXED-TERM CONTRACT APPOINTMENT" – hereinafter referred to as the "CONDITIONS".

(The applicant, in cross-examination, confirmed that she held an honours degree and that she was busy studying for her Master's degree. She conceded that the said CONDITIONS had applied to all her fixed-term contracts of employment and that she had understood the relevant provisions, including the fact that each contract had a limited duration.

The applicant more specifically confirmed that she had agreed to (and signed) the following declarations captured in paragraph 15 of the CONDITIONS:

"I have read, fully understand and accept the terms and conditions of the contract of temporary employment;

I expressly declare that I shall have no claim against UNISA for indefinite employment, deemed or actual;

I expressly declare that I harbour no expectation of an extension/renewal of the period of this agreement, or permanent employment;"

The applicant also understood that she could not claim to have any expectation of renewal, but intimated that she had nevertheless expected a renewal at the end of September 2022 because her fixed-term contracts had been renewed in the past – ie despite the aforesaid declarations.

- [14] The applicant, during her evidence-in-chief, also furnished the following reasons for expecting a further renewal after 30 September 2022:
- (a) It had become the culture or norm to renew fixed-term contracts. The Manager used to motivate such renewals and the Deputy Director approved that.
 - (b) The number of fixed-term staff had increased on each occasion when the applicant's contract was renewed.
 - (c) Paragraph 9 of the respondent's CONDITIONS provided for a written notice to be given prior to the expiry of a contract of service, but the applicant did not receive any such notice. The Deputy Director (two weeks prior to the expiration of her contract) merely advised the applicant that there were issues with her contract at HR. The applicant made enquiries at HR, only to be told that they had not received any motivation for the renewal of her contract. (The applicant's attention was, during cross-examination, drawn to the fact that paragraph 9 applied to the termination of fixed-term contracts prior to expiry and that it was not applicable to her. She agreed that her fixed-term contract had not been terminated prematurely, but nevertheless persisted with her contention that she should have been given notice.)
 - (d) The applicant had not made herself guilty of any misconduct and she was not accused of incapacity.
- [16] A shop steward made enquiries on behalf of the applicant on 30 September 2022, but received no reply. The applicant and a colleague were, however, summoned to the offices of Messrs Kaka (Manager Operations) and Sefolo (Deputy Director) on 30 September 2022 and told not to return to the office the next day – they would

be called as and when their contracts were ready. The applicant and her colleague were also told to leave their laptops and headsets in the office.

(It was, during cross-examination, put to the applicant that she could not have expected a renewal for the very reason that there had been no motivation for such a renewal. She disagreed and contended that her expectation of renewal had arisen when she and her colleague were told that they would be called “as and when” their contracts were ready. She could not remember who had said that, but understood those words to mean that she was going to get a new contract. The applicant agreed that an expectation could only have been created by a person with authority. It was put to her that neither Mr Kaka nor Mr Sefolo had authority to approve the renewal of fixed-term contracts and that only the Deputy Registrar could do that, but she merely indicated that she did not get any correspondence from the latter.

[Numbering as per Award – Ed.]

- [17] The applicant addressed an email to the Executive Director (HR) on 5 October 2022, stating that she was awaiting contract renewal and seeking clarity.
- [18] The applicant (based on past practice) expected to have her contract renewed by no later than 7 October 2022 and consequently also addressed an email to Mr Kaka (Manager Operations) on 10 October 2022, requesting an update. He responded by indicating that there were still pending contracts. The applicant asked for time frames, but received no reply. (The applicant conceded that the word “pending” did not indicate that contracts had been approved.)
- [19] The applicant’s colleagues had their fixed-term contracts renewed, but she heard nothing from the respondent and on 4 January 2023 addressed a letter to the Vice Chancellor, Prof. Lenka Bula, complaining about the fact that her fixed-term contract of employment had not been renewed and claiming that she had been unfairly dismissed.
- [20] The applicant received no reply from the Vice Chancellor. The applicant claimed that the fixed-term contracts of her twelve colleagues had been renewed and submitted that she had been prejudiced economically. She believed that the respondent needed more consultants to serve the student population and that there was enough work for her as well. (The applicant’s attention was, during cross-examination, drawn to the fact that the respondent’s Management Committee had on 21 February 2023 taken a decision to place a moratorium on the appointment of fixed-term employees.)

The respondent’s case

- [21] The respondent closed its case without calling any witness.

Analysis of evidence and argument

Introduction

- [22] A fixed-term contract of employment normally expires (terminates) by operation of law at the end of its term. An employer is not required to give notice of such termination and it does not constitute “dismissal” – *cf Sindane v Prestige Cleaning Services* (2010) 31 ILJ 733 (LC) at 739 (paragraph 16) [also reported at [2009] 12 BLLR 1249 (LC) – Ed], *Mahlamu v CCMA and others* (2011) 32 ILJ 1122 (LC) at 1131 (paragraph 23) [also reported at [2011] 4 BLLR 381 (LC) – Ed], *Pecton Outsourcing Solutions CC v Pillemer NO and others* (2016) 37 ILJ 693 (LC) at 699 (paragraph 19) [also reported at [2016] 2 BLLR 186 (LC) – Ed] and *Ukweza Holdings (Pty) Ltd v Nyondo NO and others* (2020) 41 ILJ 1354 (LAC) at 1359 (paragraph 15) [also reported at [2020] 6 BLLR 544 (LAC) – Ed].
- [23] The Legislature attempted to curb possible exploitation and abuse by enacting section 186(1)(b) of the Labour Relations Act 66 of 1995 which defines “dismissal” as follows:
- “Dismissal means that 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
 - (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 employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;”
- [24] The onus to prove such a reasonable expectation rests on the employee who has to show that he/she actually or subjectively expected an employer to renew his/her fixed-term contract or to retain him/her in employment on an indefinite basis. The Labour Appeal Court in *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and others* (2013) 34 ILJ 1427 (LAC) at 1437 (paragraph 29) [also reported at [2014] JOL 31613 (LAC) – Ed] held that it was first necessary to determine whether the employee in fact expected her contract to be renewed – that was the subjective element. Secondly (if the employee did have such an expectation) whether, taking into account all the facts, that expectation was reasonable – that was the objective element. Whether or not the employee’s expectation was reasonable would depend on whether it was actually and genuinely entertained. The Court cited with approval the Labour Appeal Court’s judgment in *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC); [2001] 12 BLLR 1316 (LAC).

The question whether the applicant had indeed expected renewal of her fixed-term contract

- [25] I am prepared to accept that the applicant might have wished or hoped that her fixed-term contract would be renewed, but the question is whether she had actually and genuinely (subjectively) expected the respondent to renew her fixed-term contract of employment which had expired on 30 September 2022.
- [26] The applicant conceded that she had been aware of (and understood) the CONDITIONS which applied to all her fixed-term contracts, including the explicit declarations contained in paragraph 15. She nevertheless claimed that she had expected a renewal at the end of September 2022 because her previous contracts had been renewed – ie despite the provisions in question. The applicant’s initial fixed-term contract of employment had indeed been renewed on two occasions, but renewal had never been a *fait accompli*. The applicant must have appreciated the fact that there had always been a real risk of non-renewal.
- [27] The CONDITIONS contained contractual provisions which cannot simply be ignored. The mere fact that the applicant’s fixed-term contract of employment had been renewed on two previous occasions did not necessarily imply that the respondent had abandoned the provisions in question and that a precedent had been created, entitling the applicant to capitalise on it.
- [28] The fact that the applicant’s fixed-term contract of employment had been renewed on two occasions, may be relevant considerations, but more is needed. The applicant on each occasion accepted the conditions applicable to her fixed-term contracts of employment and explicitly declared that she held no expectation of renewal. Why should she not be held to that? The rugby players in *SA Rugby Players Association and others v SA Rugby (Pty) Ltd and others* (2008) 29 ILJ 2218 (LAC) [reported as *SA Rugby Players’ Association (SARPA) and others v SA Rugby (Pty) Ltd and others; SA Rugby Pty Ltd v SARPU and another* [\[2008\] 9 BLLR 845 \(LAC\)](#) – Ed] also tried to dodge similar conditions in their fixed-term contracts of employment. The Labour Appeal Court at 2231 (paragraph 46) held as follows:
- “**Clause 3.2** stating that the contracts automatically terminated on the dates set out and that the players acknowledged that they had no expectation that their contracts would be renewed on the terms contained therein or any other terms **is to me of critical importance**. This clause and other exclusionary clauses referred to above were deliberately included in the contracts in order for them to be part of the contracts and to mean what they were intended for. It would, therefore, be expected of the appellants to place more credible facts to make their expectation reasonable in the face of clause 3.2. **The mere ipse dixit that there is an expectation, based on flimsy grounds, would not suffice.**”
- [29] The applicant (who carried the onus to prove that she had indeed harboured an expectation of renewal) referred to a meeting with Messrs Kaka and Sefolo on 30 September 2022 and vaguely contended that one of them (she could not remember who) had said that she and her colleague would be called “*as and when*” their contracts were ready. The applicant claimed that this was the very reason why she had expected a renewal of her contract, but she did not call her colleague (or anybody else) to corroborate this allegation. The words “*as and when*” would, in any event, not have implied that the applicant and her colleague would indeed have been given new contracts. The applicant (who holds an honours degree) should have appreciated the fact that the phrase or idiom “*as and when*” referred to an uncertain future event and that it simply meant “*if and when*”. The context in which these words had allegedly been used, in any event, leaves no room for the applicant’s contention that this was the reason why she had expected her contract to be renewed. The applicant herself testified that the said words had been used in a situation where she and her colleague had been told not to return to work and to leave their laptops and headsets in the office.
- [30] It follows that the applicant could not have expected the respondent to renew her fixed-term contract of employment. The question whether the applicant’s alleged expectation had been reasonable does not even arise, but I am prepared to consider the applicant’s evidence to cater for the (unlikely) possibility that I may be wrong in holding that the applicant had not genuinely harboured such an expectation.

The question whether the alleged expectation had been reasonable

- [31] The first reason why the applicant cannot be heard to say that she had a reasonable expectation of renewal is the fact that her appointment had been subject to the respondent’s “CONDITIONS OF SERVICE: FIXED-TERM CONTRACT APPOINTMENT”. She expressly declared that she harboured no expectation of an extension/renewal and was well aware of the risk of non-renewal. She accepted that risk.
- [32] The mere fact that the applicant’s fixed-term contract had been renewed on two previous occasions could not *per se* have resulted in a reasonable expectation of yet another renewal. The Labour Appeal Court in *Mofokeng and others v Rotek & Roshcon SOC Ltd* (2021) 42 ILJ 1902 (LAC) at 1909 (paragraph 35) held as follows:
- “The fact that the appellants’ (respective) fixed-term contracts may have been renewed by the respondent each time since about 2007, could not on its own have given rise to a reasonable expectation that they would be renewed or extended yet again”.
- [33] The respondent’s “CONDITIONS OF SERVICE: FIXED-TERM CONTRACT APPOINTMENT” also applied to other employees and it is highly unlikely that there would have been a “culture or norm” to renew fixed-term contracts. The applicant, in any event, furnished no concrete evidence to substantiate or corroborate her averment in this regard.
- [34] There is also no evidence to the effect that anybody (with or without authority to renew fixed-term contracts) had verbally or in writing communicated anything whatsoever to the applicant that could have resulted in a reasonable expectation that her fixed-term contract of employment would be renewed. The Deputy Director two weeks prior to the expiration of the applicant’s contract, on the contrary, advised her of the fact that

there were “issues” with her contract and HR informed her that they had not received any motivation for the renewal of her contract.

- [35] The fact that the applicant had not been notified of the fact that her contract would expire is irrelevant – see the authorities cited in paragraph 22 (*supra*). Her reliance on paragraph 9 of the CONDITIONS is also misplaced because it applies to the termination of fixed-term contracts of employment prior to their expiry.
- [36] The applicant also alleged that the respondent had continuously increased the number of consultants and that there was a growing demand for their services, but that could not have led to a reasonable expectation that her particular contract would be renewed in the factual context of this case.
- [37] The applicant furthermore alleged that the fixed-term contracts of twelve of her colleagues had been renewed, but she furnished no proof of that and nothing is known about their particular circumstances. The alleged renewal of those contracts might have been relevant if it had come to the applicant’s attention prior to the expiration of her own fixed-term contract of employment, but she did not say at what stage she had first become aware of that. It is consequently impossible to determine whether (and to what extent) the alleged renewal of the said fixed-term contracts of employment might have caused any (reasonable) expectation in the applicant’s mind.
- [38] The applicant has consequently failed to show that her (alleged) expectation of renewal had been reasonable.
- [39] It also follows that the applicant has failed to prove that she had been dismissed. Her fixed-term contract of employment expired on 30 September 2022 and the Commission lacks jurisdiction to arbitrate in this dispute – *cf SA Rugby Players Association and others v SA Rugby (Pty) Ltd and others (supra)* at 2230 (paragraph 31) and *Ukweza Holdings (Pty) Ltd v Nyondo NO and others (supra)* at 1359 (paragraph 16).

Award

- (a) The applicant, Zona Tembakazi Majambe, failed to prove that she had been dismissed.
- (b) The Commission lacks jurisdiction to arbitrate in this dispute.