

IN THE LABOUR COURT OF LESOTHO

LC 29/13

HELD AT MASERU

In the matter between:

TUMELO MONYANE

APPLICANT

and

NATIONAL UNIVERSITY OF LESOTHO

RESPONDENT

JUDGMENT

DATE: 12/09/13

Contract of employment - Fixed term contract - Expectation of a renewal - Whether such expectation reasonable - Question dependent on whether Section 68 (b) of the Labour Code Order, 1992 applied to the applicant or not - Court rules that the applicant's contract automatically terminated upon its expiration.

1. This matter revolves on a purported breach of contract. It is a matter that otherwise falls under the jurisdiction of the Directorate of Dispute Prevention and Resolution (DDPR) but was brought before this Court by way of an application for an interdict. The matter was heard on 29th July, 2013, and all things being equal, a determination ought to have been made earlier if it were not for the serious manpower constraints facing this Court. There were other matters that were just as pressing.

2. Be that as it may, the facts of this case are fairly straightforward and common cause. The applicant was engaged by the National University of Lesotho as a lecturer in the Department of Historical Studies on 22nd September,

2006 for a fixed term contract of two years. The contract was renewed for a further one year upon its expiry on 28th August, 2008. In a memorandum dated 25th May, 2008, from the office of the Vice Chancellor, the respondent stated that the extension of the applicant's contract was made against the University's Strategic Planning Vote pending the possibility of an established position within the contract period and within the University budget. According to the respondents the Strategic Planning vote related to funds from the Kellogg Foundation.

3. By a letter dated 4th June, 2009, the said contract was once again renewed for two years. Apparently there was an administrative hiccup leading to the applicant being off duty for some time. The respondent only wrote on 21st January, 2013 to clarify applicant's position. It informed her that her contract of employment shall commence on 12th September, 2011 (when she resumed duty) and ended on 11th September, 2013. This is the contract that forms the subject of the present dispute.

4. It is applicant's case that the non renewal of her contract constituted a dismissal in terms of ***Section 68(b) of the Labour Code Order, 1992*** (hereinafter referred to as the Code) and in the circumstances the respondent ought to have subjected her to a disciplinary hearing to render her termination lawful. She is seeking relief in the following terms:-

- (i) That the respondent be interdicted from breaching the contract of employment between itself and the applicant;
- (ii) That the respondent be ordered to pay costs of this application; and
lastly
- (iii) Any further and/or alternative relief.

In reaction, respondent's Counsel contended that ***Section 68 (b) of the Code*** was not relevant to applicant's case and that her contract had automatically terminated upon the expiration of her contract.

THE COURT'S EVALUATION

5. The bedrock of applicant's case is the Vice Chancellor's memorandum of the 25th May, 2008 which stated that the extension of the applicant's contract of employment was made ***"against the strategic planning vote pending the possibility of an established post within the contract period and within the University budget"***. It is her case that being engaged on a fixed term contract and it providing for the possibility of a renewal, the termination of her contract on 11th September, 2013 constituted a dismissal in terms of ***Section 68(b) of the Code***. The Section provides that:-

For purposes of Section 66 "dismissal" shall include -

The ending of any contract for a period of fixed duration or the performance of a specific task or journey without such contract being renewed , but only in cases where the contract provided for the possibility of renewal.

She contended that she was supposed to have been subjected to a disciplinary hearing before such a dismissal could take effect.

6. Back to basics on employment protection law: to protect employees against unjustified or unfair dismissals, the law not only requires that dismissals be based on valid reasons, but further provides that procedures adopted prior to and at the time dismissals be fair. Also to be fair are procedures regulating appeals against such dismissals. For instance, an employee has a right to defend himself or herself before termination of employment. A sanction as serious as a dismissal may not only jeopardise an employee's career but sometimes his or her future.

7. Courts are empowered to examine the reasons given for the termination and the circumstances relating to the case and to render a decision whether the termination was justified. To this end, ***Section 66 of the Code*** provides that a dismissal shall be for a valid reason which reason must relate to the employee's performance; conduct or operational requirements of the undertaking. It provides further that any other form of dismissal shall be deemed unfair unless

the employer was to sustain the burden of proof that he or she acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment.

8. On procedural fairness, it provides that where an employee is dismissed for unsatisfactory performance or misconduct he or she shall be entitled to an opportunity to defend himself or herself against any allegations that may be levelled against him or her. **Section 68 (b) of the Code** has thereby brought employees on fixed term contracts within the protection of **Section 66 of the Code**. It should be noted that it is only to the extent that their contracts provided for the possibility of a renewal. Hence, the ending of a contract of a fixed duration which provides for the possibility of a renewal amounts to the dismissal of a concerned employee.

9. This Section endorses the common law principle of legitimate expectation. In **Koatsa Koatsa v National University of Lesotho 1991-1992 LLRLB 163 at 169** the Court pointed out that once an expectation has been created an employee could not be terminated without first being given an opportunity to be heard. In terms of **Section 68(b) of the Code** a contract of a fixed duration which provides for the possibility of a renewal would require that all requirements relating to dismissal particularly the *audi alteram partem* rule be complied with for its termination to be lawful – See the judgment of this Court in **Mulenga v Lesotho Pharmaceutical Corporation LC126/95 at p. 11 (lesotholii.org/ls)**. However, for an expectation to be legitimate, there must exist grounds which render it objectively justiciable. The claimant must have an objectively deserving status and not merely substantial hope - **See Administrator of Transvaal & Others v Traub (1989) 10 ILJ 829 at p. 835D**.

10. It is common cause that applicant's contract of employment was on fixed terms. We have also established that the applicant was offered the possibility of the renewal of her contract which commenced by the Vice Chancellor's memo of 25th May, 2008). Thus bringing her contract within the purview of **Section 66 of the Code**. The question of a disciplinary hearing cannot arise where there is no allegation of misconduct or unsatisfactory performance. The termination of her contract at this stage would constitute a dismissal in terms of **Section 66 of the Code** as envisaged by **Section 68 (b) of the Code**.

11. As it turned out, respondent's Director of Human Resources wrote to the applicant in a letter dated 21st January, 2013 that ***"it has not been possible to create a permanent and pensionable position for you due to currently prevailing financial crisis at the University"***. This was contained in a letter extending the applicant's contract from 12th September, 2011 to 11th September, 2013. If we may recall the extension of applicant's contract of employment was made subject to ***"the possibility of an established post and the University budget"***. It was further explicitly mentioned in the memorandum that applicant's contract was made against the Strategic Planning Vote. Clearly her contract of employment was conditional upon the establishment of a permanent position; the University budget and Kellogg Foundation funds.

12. It should also be noted that respondent's averment that the Strategic Planning Vote referred to Kellogg Foundation funds and that they were withdrawn was not disputed. The applicant acknowledged in her originating application (paragraph 9 thereof) that she was informed by a letter dated 15th February, 2011 that the University faced constraints in establishing a permanent position for her. In their answer the respondent pointed out that this letter was a follow-up from a meeting where the applicant was told that Kellogg Foundation withdrew its funds and also that the University was in dire straits financially. The respondent through the Human Resources' Director's letter thwarted the possibility of a renewal. The applicant can therefore in the circumstances not talk of a possibility of a renewal as contemplated by ***Section 68 (b) of the Code***.

13. With the question of a possibility of a renewal having fallen off, what is applicant's position? A letter dated 21st January, 2013 and addressed to the applicant clearly stipulated that her contract would be extended from 12th September, 2011 to 11th September, 2013, and with the falling off of a possibility of a renewal her contract became subject to the principles regulating ordinary fixed term contracts as enunciated in ***Section 62(3) of the Code***. The Section reads:-

A contract for one period of fixed duration shall set forth its date of termination. Such a contract shall, subject to the provisions of Section 66 concerning dismissal, automatically terminate on that

date and no notice of termination shall be required of either party.

Applicant's assertion that this letter constituted a dismissal in terms of ***Section 68 (b) of the Code*** does not hold water. Her contract of employment automatically terminated upon expiry.

DETERMINATION

The application is therefore dismissed. There is no order as to costs as the Court does not consider the application to have been frivolous.

THUS DONE AND DATED AT MASERU THIS 12TH DAY OF SEPTEMBER, 2013.

F. M. KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

M. THAKALEKOALA
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR THE APPLICANT: ADV., M. E. TEELE (KC)

FOR THE RESPONDENT: ADV., L. MOLATI