

HELD AT MASERU

In the matter between:

KENEUOE RAJAKE

APPLICANT

and

NATIONAL UNIVERSITY OF LESOTHO

RESPONDENT

JUDGMENT

DATE: 20/02/14

Unfair dismissal claim - Non - renewal of a fixed term contract - Applicant alleging that she was forced to exhaust her leave days and only to be informed upon her return there from that her contract of employment was not going to be renewed - She contended that this constituted a dismissal because she had a reasonable expectation that it would be renewed - The Court finds her expectation to have been reasonable regard being had to respondent's previous conduct and therefore rules that in the circumstances she had been dismissed in the context of the concept of legitimate expectation.

FACTUAL BACKGROUND

1. The applicant was employed by the respondent as a Binding Assistant in its Printing Unit through a series of fixed term contracts running initially on a three month's contract commencing on 4th July, 2007 ending on 3rd October, 2007; then from 4th October, 2007 to 3rd October, 2008; again from 4th October, 2008 to 3rd October, 2009; and for a six months' duration from 4th October, 2009 to 3rd April, 2010; and lastly for a further six months from 4th April, 2010 to 5th October, 2010. The current dispute arises from the non-renewal of this latter contract.

2. It is common cause that around September, 2010, prior to the termination of her contract, the applicant was instructed by Mr Ntlama, the acting Superintendent, to proceed on leave. Her version of the rationale behind the leave differs with that of Mr Ntlama. According to her, the latter instructed her to exhaust her outstanding leave days because the University was experiencing

financial problems and would not be able to pay her accrued leave. Mr Ntlama's version, on the other hand, was that he had instructed the applicant to proceed on a terminal leave and informed her that this was because her contract would not be renewed due to the financial constraints the University was confronted with.

3. The applicant alleged that her leave was ending on the 4th October, 2010, a day prior to the expiration of her fixed-term contract. She averred that when she reported for duty on 5th October, 2010 Mr Ntlama pointed out to her that he was surprised to see her back at work because her contract had expired, and on that account he was not expecting her back. She told her to contact Mr Mokoma in the Appointment's Office. The applicant claims that she was taken aback because she had not been told that her contract would not be renewed. She indicated that she immediately went to the Appointments Office where she met Mr Tautona and related to him what she had just been told by her supervisor. She averred that Mr Tautona indicated that there was a mistake and undertook to attend to the problem, and give her feedback, but she never heard from him.

4. It is applicant's case that by purporting to have terminated her contract, the respondent's conduct constituted a dismissal in that her contract was terminated in circumstances in which she had a reasonable expectation that it would be renewed given the fact that her contract had previously been renewed four times and she also based herself on the employer's previous conduct of previously allowed her to continue to work beyond the expiry of her contract and then subsequently issuing her a renewal.

5. The reason given for the termination of her contract was that the respondent was in dire straits financially because the Government of Lesotho had reduced the subvention fund to the University. The applicant challenged both the substantive and procedural fairness of her dismissal. On substantive fairness, she contended that it was not true that the respondent was in a financial crisis at the time it purported to dismiss her, hence her dismissal was not based on operational requirements as the respondent claimed. On procedural fairness, she claimed that the respondent had failed to inform her prior to the expiration of her contract of its intention to terminate her contract.

6. She therefore prayed for the following reliefs:-

- (i) That her dismissal be declared both substantively and procedurally unfair;

- (ii) That she be reinstated to her former position with effect from 6th October, 2010; or alternatively that she be awarded compensation equivalent to five (5) years' salary plus interest at the rate of 18.5%;
- (iii) That the respondent pay costs of suit; and lastly for
- (iv) Further and/or alternative relief.

RESPONDENT'S DEFENCE

7. Respondent's Counsel argued that applicant's contract was not terminated but had run its course and further that the applicant had been warned that her contract would not be renewed. The respondent contended that when she proceeded on leave she was told that it was a terminal leave, thus she cannot claim to have been dismissed. Counsel submitted that the expectation of continuity was unreasonable given the nature of applicant's contract and respondent's financial circumstances at the material time. Mr Ntlama in his evidence pointed out that the nature of applicant's work in the Printing Unit necessitated retention of staff on short-term contracts because it fluctuated as there was meaningful work only around examination time. Counsel contended that the applicant along with her fellow colleagues in the Printing Unit were consulted through a series of meetings and informed that those on temporary contracts would not have their contracts renewed upon their expiration.

8. Advocate Molati, for the respondent, submitted that the onus rested with the applicant to prove that the respondent ought to have renewed her contract. As far as he was concerned, the respondent had established that it had no option but to terminate applicant's contract of employment. He placed a heavy reliance on the decision of *Dierk v University of South Africa (1999) 20 ILJ, 1227 (LC)* which is also reported in *4 BLLR 304 (LC)* for this submission. The Court made it clear at *p. 1246 D-H* that in order for an employee to show that he or she had a reasonable expectation that his or her fixed-term contract would be renewed he or she must convince the Court that there was an objective basis for the creation of the reasonable expectation.

9. Besides papers filed of record, respondent's defence was relayed through the evidence of Mr Ntlama, the Assistant Printing & Stationery Superintendent,

who was the head of Printing Unit, Mr Molefi Majalle, an Executive officer in the Unit and Mr John Sekoere, respondent's Deputy Bursar.

MR NTLAMA'S EVIDENCE

Mr Ntlama testified that the staff of the University was consulted in two categories; academic and non-academic and the applicant fell into the latter category. He averred that the consultations took place as early as July, 2010 (around 16th) when he summoned his staff to alert it that because of the University's precarious position, temporary contracts would not be renewed. He indicated that various options were explored during these consultations. One of the options was not to fill any vacant positions, including the position of Superintendent and that he urged staff to operate strictly within the budget framework.

10. He further testified that the meeting of July, 2010 was followed up by two meetings in August, 2010. He pointed out that after the August meetings all departmental heads were directed to tell staff engaged on temporary terms to take terminal leaves as their contracts were to end, and he held a staff meeting of the Printing Unit to inform them accordingly. He pointed out that the applicant had attended the meeting. He said he recalled summoning 'Maitumeleng Nkopi and the applicant to his office to tell them to exhaust their leave.

11. He averred that one of August, 2010 meetings was convened by the Bursar and in attendance were himself, the applicant, Majalle, 'Masechaba, and 'Maitumeleng. It was his testimony that they were informed that their contracts would not be renewed and alerted that 'Matanki Mafereka's and Palesa Mathunya's contracts had already not been renewed because of lack of funds. Mr Ntlama acceded under cross examination that the applicant was not informed in writing that her contract would not be renewed, and that there were no minutes of these meetings. He pointed out that these notwithstanding, he had informed her verbally.

12. In his testimony, Mr Ntlama further related the procedure followed in the recommendation for contract renewal of a non-academic staff member. He indicated that an employee would know prior to the expiration of his or her contract if it had been renewed or not, and acceded that sometimes a formal

communication would come subsequently. He pointed out that in requesting an approval for the extension of an employee's contract he would approach the Registrar for approval thereof and he or she would in turn remit the request to the Vice Chancellor to seek an executive approval from the Non - Academic Staff Appointment Committee (NASAC).

13. He was adamant that there was no way an employee could resume his or her duty without approval, and that they would let employees continue upon an assurance of an approval granted before the expiration of the employment contract, if a formal renewal had not been received. Mr Ntlama argued that it was not true that the applicant would always be allowed to continue working after the expiry of her contract and insisted that she would only do so upon an undertaking from the Registrar that her contract would be renewed.

14. On finances, Mr Ntlama pointed out that the applicant and other staff members in the Unit including himself knew that they were paid against vacant positions of the Printing Supervisor and that of the Executive Accountant and had no funds allocated to their positions.

THE COURT'S ANALYSIS

In ascertaining whether or not the applicant had been dismissed our starting point is should be to establish the nature of her employment contract. This is triggered by the fact that the respondent kept on emphasising that applicant's contract was a temporary contract. An employee may either be engaged under an open - ended or fixed term contract. Open - ended contracts of employment continue until such time as the employer or employee ends it or the employee reaches retirement age.

15. Fixed-term contracts cover employees whose contracts end on a specified date, or when an employee has completed a specific task or a specific event has occurred. ***Section 62 (1) of the Labour Code Order, 1992*** confirms this common law position by stating that ***“[a] contract of employment may take the form of a contract without reference to limit of time, a contract for one period of fixed duration or a contract to perform some specific work or to undertake a specified journey.”*** Open-ended contracts are normally referred to as indefinite or permanent contracts and are clearly distinct from fixed-term or contracts with a time-limit.

16. Sometimes the term “*temporary contract*” and “*fixed term contract*” are used interchangeably. Both are limited, but of essence is that the latter has a time-frame attached to it. It has emerged that the applicant had been engaged on a series of contracts with a specified time-frame. What is clear is that the contract of employment between the applicant and the respondent was for a limited fixed duration. We may therefore safely refer to it as a fixed term contract.

17. It is trite that a fixed-term contract comes to an end upon its expiration. Fixed term contracts therefore end by the effluxion of time. *Section 62 (3) of the Labour Code, Order, 1992* provides that:-

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.

18. The position however changes where the contract provided for the possibility of a renewal or where the circumstances are such that they created a legitimate expectation of a renewal of the contract of employment on the part of the employee. The applicant contended that because of previous renewals of her employment contract, she had a reasonable expectation it would be renewed when it expired on 5th October, 2010. The basis of her expectation was that her contract of employment had previously been renewed four times, and in some occasions the employer had let her remain in employment beyond the expiration of her contract and a formal renewal would later follow. She maintained that in the circumstances, respondent’s failure to renew her contract of employment constituted a dismissal.

19. In terms of *Section 68 (b) of the Labour Code Order, 1992* a dismissal includes -

the ending of any contract for a period of fixed duration or for 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 a renewal...

The applicant has rightfully not based her claim for dismissal within the ambit of this Section but upon the common law concept of legitimate expectation and *Section 7 (12) and Subsection (13) of the Labour Code (Codes of Good Practice) Notice, 2003*. The latter being soft law, it will be sufficient to concentrate on the law itself.

20. In assessing the reasonableness of applicant's contention that respondent's failure to renew her contract of employment constituted a dismissal, it is first necessary to determine whether she genuinely or honestly expected her contract to be renewed. Secondly, if she did have such an expectation, whether taking into account all the facts, the expectation was reasonable. These issues impinge on evidence. As aptly captured in the case of *University of Cape Town v Auf Der Heyde [2001] 12 BLLR 1316 (LAC)* whether or not her expectation was reasonable will depend on whether it was actually or genuinely entertained.

21. In *SA Rugby Players' Association (SARPA) and Others v SA Rugby (Pty) Ltd and Others [2008] 9 BLLR 845 (LAC)* the Court held that the onus is on an employee to establish the existence of a reasonable or legitimate expectation. The test whether or not an employee has discharged such an onus is objective, namely, whether a reasonable employee would in the circumstances prevailing at the time, have expected the employer to renew his or her fixed-term contract.

22. In *Joseph v University of Limpopo and Others [2001] 12 BLLR 1166 (LAC)* the Court pointed out that, in deciding whether or not an employee has established that he or she had a reasonable or legitimate expectation that the contract would be renewed, it will have regard, *inter alia*, to previous regular renewals of his or her contract of employment, terms of the contract and the nature of the business, and pointed out that the list was not exhaustive. This means that where there is evidence of regular renewals of the employee's contract of employment in the past, the Court will most likely consider it a strong indication that the parties intended to extend their employment contractual relationship.

23. Once an unfair dismissal is alleged, such a case will be evaluated on the basis of both substantive and procedural fairness. It is a cardinal labour law principle that a dismissal must not only be for a fair or valid reason but it must also be executed in a procedurally fair manner. On substantive fairness, applicant's Counsel argued that it was not true that the University was facing a financial crisis citing, among others, the fact that salaries were increased by 10% in the financial 2010/2011. He also contended that the subvention fund was not the only source of the University revenue. He mentioned, among others, student's fees. The acting Bursar, however, satisfactorily thwarted these arguments by relating how the cut in the Government's subvention affected the different areas of the University operations.

24. He pointed out that the staff of the University was made aware of this situation through various meetings and memoranda. He, among others, tendered as an exhibit a memo emanating from the office of the Bursar addressed to all Deans and Directors dated 30th July, 2010 titled “*developments with regard to the University’s financial situations (sic).*” His evidence gave the Court a clear picture of respondent’s financial woes at the point in time. We therefore find the respondent to have substantively proved the validity of applicant’s dismissal.

25. On the procedural aspect of applicant’s termination of employment, the applicant alleged that she never received any notification of the non-renewal of her contract whilst Mr Ntlama alleged that consultations were undertaken. He averred in his testimony that the consultations were carried out through meetings much as he acceded during cross examination that there were no minutes produced on these meetings. The applicant claimed to have not attended any one of these meetings. She claimed that she underwent an operation at some stage so it was likely that some of the meetings occurred in her absence. This evidence was not controverted. She indicated further that she just heard people talking generally about the looming financial crisis.

26. Procedural fairness is a critical requirement in dismissals because it underpins one of the fundamental rules of natural justice, the *audi alteram partem rule* which requires that a person be afforded a hearing prior to the taking of any decision that may adversely affect him or her. The classic formulation of this maxim was stated in the much celebrated case on legitimate expectation, namely, *Administrator of the Transvaal & Others v Traub & Others (1989) 10 ILJ 823*. The Court stated that:-

When a statute empowers a public official or body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter has a right to be heard before the decision is taken...

There is no doubt that the respondent has a managerial prerogative to dismiss any employee over operational exigencies that face it at the material time, but such should be exercised fairly. As the Court observed, the doctrine of legitimate expectation is one aspect of the ‘*duty to act fairly*’ - (*Traub supra at p. 834 A*).

27. Analysing the case before us, there appears to have been no evidence to corroborate the meetings alluded to by Mr Ntlama, besides minutes of the meetings; the respondent could have adduced further evidence, for instance, in

the form of evidence of other employees who had attended. He had for example given names of fellow colleagues from his Unit who had attended the acting Bursar's meeting in August. In the absence of any evidence to the contrary, the Court will be left with no option but to conclude that the respondent failed to rebut applicant's case that she did not know that her contract would not be renewed. This leads this Court to a further conclusion that the absence of a notification of non-renewal in the circumstances where the applicant has had her contract previously renewed four times evoked a legitimate expectation that her contract would be renewed like the previous ones. The more frequently the employer renews a fixed-term contract, the more it is likely that an employee will acquire such an expectation.

28. There was a duty on the part of the respondent to have personally informed the applicant that she would be personally affected by the financial difficulties. The respondent failed to tender proof of this. It was only Mr Ntlama's *viva voce* evidence. This evidence needed to be corroborated in light of the fact that the applicant refuted it. It was only fair and equitable that the respondent informed the applicant in advance that her contract would not be renewed due to the budgetary constraints confronting the University. The Court finds the expectation to have been reasonable. The Court held in *Koatsa Koatsa v National University of Lesotho 1991-1992 LLRLB 163 at 169* and also in *Attorney General and Others v M.S Makesi and 85 Others 1999-2000 LLRLB 306* that where circumstances create an expectation for the renewal of an employment contract it cannot be terminated without first giving the affected employee a fair opportunity to be heard.

29. The respondent has failed the applicant by failing to prove that they had informed the applicant of the non-renewal of her contract. She had prayed for reinstatement as a primary relief. However, the Court having found the dismissal to have been for a valid reason cannot order reinstatement.

Accordingly, the Court makes the following order:-

- (i) Applicant's dismissal is declared procedurally unfair;
- (ii) The Court awards compensation for the said unfair dismissal in the amount equivalent to six (6) months' salary plus interest at the rate of 18.5 % payable within thirty (30) days of the receipt of the judgment;

- (iii) The applicant has, among others, prayed for costs. The Court, however, does not feel compelled to award costs against the respondent. It is trite that costs in the Labour Court are awarded against a party which the Court finds to have acted in a wholly unreasonable manner.¹ There is therefore no order as to costs.

THUS DONE AND DATED AT MASERU THIS 20TH DAY OF FEBRUARY, 2014.

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

L. MOFELEHETSI
ASSESSOR

I CONCUR

D. TWALA
ASSESSOR

I CONCUR

FOR THE APPLICANT: ADV., R. SHALE

**FOR THE RESPONDENT: INITIALLY ADV., P.M. KOTO AND LATER by
ADV., L. MOLATI**

(We were informed that Adv., Koto had left the University employment)

¹ Section 74 (2) of the Labour Code Order, 1992