

HELD AT MASERU

In the matter between:

LESOTHO HIGHLANDS DEVELOPMENT
AUTHORITY

APPLICANT

and

MOEKO MALATA
DIRECTORATE OF DISPUTES PREVENTION
AND RESOLUTION

1st RESPONDENT
2nd RESPONDENT

JUDGMENT

Fixed - term contracts - Non - renewal of a fixed term contract - in circumstances where shortly before the expiration of the fixed-term contract the employer offered a renewal at less favourable terms - The employee failing to accept the offer within the stipulated period and the employer in turn rejecting the late acceptance of offer - Employee contending this constituted a dismissal and the employer holding onto the timing of the original contract which it contended had automatically ended by effluxion of time - Enquiry whether the Arbitrator misdirected himself by concluding that there had been an unfair dismissal - Court finds that by offering a renewal, albeit, at less beneficial terms the employer raised the employee's expectations of a renewal and felt that if the employer had just stopped at not renewing the fixed - term contract without offering any terms, there would have been no dismissal in terms of Section 68 (b) of the Labour Code Order, 1992.

1. The 1st respondent was engaged by the applicant as a Shift Mechanical Technician based at Muela on a five year fixed - term contract commencing 1st January, 2006 and ending 31st December, 2010. This dispute arose out of the non - renewal of this contract. What transpired is that shortly before the expiration of this contract, the applicant presented the 1st respondent with an offer of a new fixed - term contract on less favourable terms through a letter dated 14th December, 2010 and signed by its acting Chief Executive Officer (CEO). The new contract offered a two year contract as opposed to the initial five - year contract; an incentive allowance of One Thousand Maloti (M1 000.00) instead of a deprivation allowance of One Thousand and Eight Hundred

Maloti (M1 800.00) and lastly an obligation to pay rent when accommodation had hitherto been free.

2. The 1st respondent was given forty- eight (48) hours within which to consider the new terms. This was followed - up by a meeting with `Muela management on 20th December, 2010 wherein the terms of the new offer were reiterated and it was pointed out to him that the decision was taken on account of his underperformance and poor discipline. Upon failure to respond, he was given a further forty - eight hours to consider the new offer and told that if he did not indicate acceptance by 22nd December, 2010 the offer would be considered rejected.

3. Immediately after this meeting, the 1st respondent wrote a letter to applicant's CEO seeking an extension of the deadline and querying the issue of poor performance and ill-discipline, and further seeking clarity on the shift roster. He received no response to this letter. It emerged before the Directorate of Disputes Prevention and Resolution (DDPR) that the applicant was informed that the deadline for signing of the new contracts had been extended to 23rd December, 2010 for all the employees who had been affected by new terms. The other employees had also raised concerns over the new offers and in reaction; applicant's CEO paid a visit to 'Muela on 21st December, 2010 to address these concerns, a meeting the 1st respondent unfortunately failed to attend.

4. The deadline of 23rd December, 2010 lapsed without the 1st respondent signing the new contract and only got to sign on 31st December, 2010. He submitted his acceptance to Mr Molapo, the Acting Manager at the 'Muela Operations Branch and he refused to accept it. This notwithstanding, the 1st respondent reported for duty on 1st January, 2011 up to the 3rd thereof, but each time he was denied access by security personnel. He subsequently wrote a letter on 4th January, 2011 explaining that he had failed to accept the offer within the stipulated time because he had not received a response to his concerns, but indicated that, this notwithstanding, he has decided to accept the offer. The applicant replied on 12th January, 2011 pointing out that at this point in time, employment relations between him and the Lesotho Highlands Development Authority had terminated on 31st December, 2010 upon the expiry of the fixed - term contract.

5. Dissatisfied with the employer's reaction, the 1st respondent referred a dispute to the Directorate of Disputes Prevention and Resolution (DDPR) in **B023/11** in

which he claimed to have been unfairly dismissed. The claim was granted in his favour, and the learned Arbitrator ordered reinstatement on the same terms and conditions as in the previous fixed - term contract. The basis of his determination was that the 1st respondent had a legitimate expectation that his contract would be renewed and as such was entitled to a hearing prior to the termination of his contract. The applicant has approached this Court to have this award reviewed and set aside.

APPLICANT'S CASE

6. The gist of applicant's case is basically that the 1st respondent was not dismissed but his contract had ended by effluxion of time when he did not accept its offer within the stipulated time - frame. The applicant contended that since 1st respondent's employment contract did not provide for the possibility of a renewal as envisaged by **Section 68 (b) of the Labour Code Order, 1992** there was no dismissal. The Section provides that:-

For purposes of Section 66 'dismissal' shall include -

a) ...

b) *The ending of any contract for a period of fixed duration or 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 (underlining added for emphasis) ...*

In essence, failure to renew a fixed - term contract will constitute a dismissal only where the contract provided for the possibility of a renewal. In the absence of such a clause, the ending of a fixed - term contract would not be a dismissal in terms of this Section.

7. Put crisply, applicant's case is that when the 1st respondent refused to accept the new offer, the original contract remained and expired by effluxion of time on 31st December, 2010. It was its case that since the fixed - term contract made no reference to the possibility of a renewal; the 1st respondent could not have had an expectation for the renewal of his contract in terms of the law. Applicant's Counsel therefore submitted on behalf of the applicant that the learned Arbitrator ought to have determined this matter in terms of the above Section read together with **Section 62 (3) the Labour Code Order, 1992** instead of invoking principles of legitimate expectation. The latter Section 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.

8. Applicant's Counsel argued that in terms of the aforementioned Sections, upon the expiration of a fixed - term contract the employer/employee relationship automatically ends and the question of dismissal does not arise. He augmented his argument by the case of ***Nomaza Nkopane and Others v Independent Electoral Commission***.¹ He submitted that the learned Arbitrator misdirected himself in the application of the law and fact in holding that the 1st respondent had been unfairly dismissed in circumstances where he was engaged on a fixed - term contract with no provision for a possibility of a renewal. According to him, it was therefore erroneous for the learned Arbitrator to have concluded that the 1st respondent had a legitimate expectation that his contract would be renewed and that he had a right to be heard prior to the termination of his contract. There being no termination, he argued, the right to a hearing did not arise. Applicant's Counsel further argued that because the 1st respondent had failed to accept the offer within the prescribed time, it lapsed.

1st RESPONDENT'S CASE

9. The 1st respondent argued that by virtue of being offered an extension he expected it to be on the same terms as the former one, and not on less favourable terms. He further argued that because it was prejudicial to him, he ought to have been consulted. He therefore contended that such failure to consult him constituted a dismissal.

CREATING AN EXPECTATION

OVERVIEW

10. Applicant's Counsel argued that the learned Arbitrator's reliance on the doctrine of legitimate expectation to award the 1st respondent a whole new five year contract was misdirected and had no legal basis. He further argued that the doctrine does not give rise to any cause of action in Lesotho because in terms of ***Section 68 (b) of the Labour Code Order, 1992*** and expectation only arises where a contract of employment provided for the possibility of a renewal. He contended further that the doctrine of legitimate expectation applies only in

¹ (2007) 28 ILJ 670 (LC) particularly para 42, 77 and 80

administrative law “**to functionaries carrying out a statutory duty**” as opposed to general employer/employee relationships.

11. A brief overview on the doctrine of legitimate expectation: it has its inception in English Law, but with time became part of Roman Dutch law. As it is, the doctrine creates an entitlement to a hearing before a functionary exercising a statutory power makes a decision adverse to that person. Simply put, the doctrine implies that a decision prejudicial to a person’s interests cannot be taken before he or she is granted a fair hearing. It expresses principles of natural justice and is an integral part of the **audi alteram partem** rule which states 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.²

It basically entrenches the duty to act fairly in decision - making.

12. The doctrine has been a subject of a host of writings and decisions. Writing on the doctrine, Gideon Pimstone³ pointed out that:-

The fundamental tenet of natural justice is the requirement that administrative power must be exercised fairly. This incorporates the principle of the desirability of listening to the other side or audi alteram partem.

Traditionally, at common law a person was only entitled to a hearing when a functionary made an adverse decision that affected that person in his or her freedom, property or existing rights. This position has changed over time and has extended in scope to cases of legitimate expectation. The House of Lords stated in **Ridge v Baldwin and Others**⁴ that:-

An administrative body may in a proper case be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or, I would add, some legitimate expectation (emphasis added) of which it would not be fair to deprive him without hearing what he has to say.

13. This case was cited with approval in **Schmidt and Another v Secretary of State for Home Affairs**⁵ per Lord Denning when he indicated that:-

² Administrator of the Transvaal and Others v Traub and Others (1989) 10 ILJ, 823

³ “Measuring Up to Expectations: Legitimate Expectation, Natural Justice and Fairness in South African Law” Witwatersrand University Student’s Law Journal Vol 2

⁴ [1963] 2 ALL ER 66

⁵ [1969] 2 CH 149 at 170

an administrative body may be bound to afford a person affected by its decision a hearing if he has some right or interest or some legitimate expectation (emphasis added) of which it would not be fair to deprive him without hearing what he has to say.

Thus, legitimate expectations include expectations that go beyond enforceable legal rights provided they have some reasonable basis - *Traub*⁶ above.

14. In cases of legitimate expectation the enquiry is two-pronged, firstly whether the employee can be said to have expected a renewal, and secondly, whether such expectation was reasonable. The reasonableness of an expectation depends on the circumstances of each case and it must be based on objectively justiciable grounds. It is the relevant facts that make the expectation a reasonable one.⁷ It must have a basis in fact. Hence, it cannot be established by a simple statement of perception or bald averment. The test entails an objective enquiry of determining whether a reasonable employee in the circumstances prevailing at the time, would have expected the contract to be renewed on the same or similar terms - *South African Clothing and Textile Workers' Union and Another v Cadema Industries (Pty) Ltd.*⁸

WHETHER 1st RESPONDENT HAD A LEGITIMATE EXPECTATION

15. Turning to the facts of this case, the question then arises whether the learned Arbitrator erred in concluding that the 1st respondent had been unfairly dismissed as he had a legitimate expectation that his contract would be renewed on the same terms as the original contract. It is indeed the legal position in terms of **Section 68 (b) of the Labour Code Order, 1992** that the non - renewal of a fixed - term contract constitutes a dismissal only in cases where it provided for the possibility of a renewal. In the absence of a renewal clause the employment relationship automatically ends upon the expiration of the contract period.

16. As far as applicant's Counsel was concerned, the 1st respondent had no cause of action against the applicant as an expectation for renewal would only arise within the purview of **Section 68** above. Applicant's Counsel submitted that the learned Arbitrator erroneously relied on the South African law in making his decision as it renders it a dismissal if an employer fails to renew a contract or offers less favourable terms in circumstances where an employee expected a renewal.

⁶ Supra at p. 835 (see Note 2)

⁷ Nkopane (supra)

⁸ [1998] (2) SA 1099 (SCA).

17. According to applicant' Counsel, 1st respondent's position is covered by **Section 186 of the Labour Relations Act, 1995** in terms of which dismissal is said to include situations where:-

- a) ...
- 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...*

We agree with applicant's Counsel that we do not have a similar provision.

18. Applicant's Counsel contended that the concept of legitimate expectation does not bring into existence an employer/employee relationship. As far as we are concerned, the offer of a contract on less favourable terms cannot be divorced from the main fixed-term contract. The classic formulation of the **audi** principle refers to decisions prejudicially affecting an individual in his or her liberty, property or existing rights. In the present case none of these issues arose. The 1st respondent was neither affected in his liberty, property nor existing rights. However, the decision undoubtedly prejudicially affected the 1st respondent. It was stated in **Traub**⁹ that in the absence of a clear provision in the statute, fairness demanded that an individual be entitled to be heard before he or she was made to suffer such an adverse decision. As Professor Riggs put it:¹⁰

The doctrine of legitimate expectation is construed broadly to protect both substantive and procedural expectations.

Thus the person concerned may have a legitimate expectation that the decision will be favourable, or at least that before an adverse decision is taken he or she will be given a hearing.

19. This is a case where the employer instead of letting the contract expire by effluxion of time, offered another contract **albeit** on less favourable terms. Instead of allowing the fixed - term contract run its course the employer offered to extend it. This vitiated the provisions of **Section 68 (b) of the Labour Code Order, 1992** and it therefore became irrelevant in 1st respondent's circumstances. The Section would only come into play if the contract had not been renewed altogether, and the 1st respondent claimed that he had a legitimate expectation that the contract would be renewed.

⁹ P. 832 para I-J

¹⁰ (1988) American Journal of Comparative Law

20. As soon as an offer of a renewal was made, it raised his expectations for a renewal on the same terms, hence the common law concept of legitimate expectation concept kicked in. Why on less favourable terms, the employer would have to justify. The applicant ought to have responded to 1st respondent's letter in which he challenged its offer and explained its position. Otherwise, the employer would have to afford him a hearing as the offer of less favourable terms was prejudicial/adverse to him. To make matters worse, the 1st respondent even wrote on 20th December, 2010 to challenge the offer of less favourable terms, a letter the applicants never responded to.

21. Applicant's Counsel further argued that the doctrine of legitimate expectation and by implication the *audi alteram partem* only applies to functionaries carrying out a statutory or administrative duty and does not apply to 1st respondent's case. What this implies is that only people exercising a statutory or administrative function need to follow principles of natural justice. Courts have used the classification of acts or decisions into judicial or quasi-judicial on the one hand and purely administrative on the other in order to determine whether the actor or decision-maker was obliged, when exercising his or her powers, to observe the rules of natural justice, and more particularly the *audi* principle.

22. This approach is very restrictive and poses the danger of excluding a lot of decisions from observance of rules of natural justice. Court held in *Traub*¹¹ that this classification would only be appropriate in the traditional approach where the enquiry into whether a decision adversely affected an individual or not would be limited to matters affecting judicial, quasi-judicial or purely administrative decisions. According to Professor M Wiechers¹²

this classification and its application of administrative law to questions such as the justiciability of acts or decisions on the ground of a failure to observe the dictates of natural justice appear to have been derived from English law. English law itself has now...discarded it. It was pointed out¹³ that:-

the classification adds nothing to the process of reasoning: the court could just as well eliminate this step and proceed straight to the question as to whether the decision does prejudicially affect the individual concerned.

¹¹ Supra at p.842

¹² Administratiefreg, 2nd ed., at 141

¹³ Traub at p. 842 para F- G

23. As reflected above, traditionally the enquiry was limited to the prejudicial effect upon the individual's liberty, property and existing rights under modern circumstances it is only proper to include a person's legitimate expectations.¹⁴ Thus, the modern test is to include even administrative decisions taken at a micro level which would naturally include decisions taken by employers. The test is to ascertain whether a decision adversely affected an individual. Applicant's Counsel's argument in this regard therefore falls off.

POOR PERFORMANCE / ILL DISCIPLINE

24. The employer's reasoning for offering the 1st respondent a contract on less beneficial terms was his poor performance and ill - discipline. Clearly, the applicant's reason for not extending 1st respondent's contract on similar terms was dictated by his alleged misconduct. He was basically being punished by being offered lesser terms. He had, however, queried these allegations and indicated that the allegations levelled against him were unfair and damaging his name. He wrote in his letter dated 20th December, 2010 that:-

During the consultation meeting, it was indicated to me that I have underperformed, poor discipline, time and attendance, I would like clarification and authentication of these charges which I believe are not true and yet damaging to my name and character.

In the same meeting, there was another false accusation of having a bad influence towards students and attitude concern, for that reason beyond my understanding, it was not noted.

The applicant had an opportunity to substantiate his allegations by responding to this letter.

25. The mere fact of offering another contract to the 1st respondent meant that the applicant still needed his services. It however boggles one's mind why the applicant would want to retain someone who was ill-disciplined, performed poorly and allegedly influenced staff negatively even if it were for a shorter period. The applicant ought to have exercised its powers to take disciplinary measures against the 1st respondent, and not punish him for something he was never given an opportunity to make representations on. We consider this unfair on the part of the 1st respondent. Fairness is at the heart of labour law. It was stated in *South African Chemical Workers' Union and Others v Afrox Ltd*¹⁵ that **"fairness has become the hallmark, or essence, of labour law and**

¹⁴Supra para G

¹⁵ (1999) 20 ILJ 1718 (LAC) at para 22

practice, not only a moral adjunct thereto.” The 1st respondent specifically pointed out that he did not sign the new offer timeously because he was still waiting for the applicant to reconsider his case. Fairness dictated that he be responded to.

26. In *Lesotho Revenue Authority v M`amonyane Bohloko*¹⁶ the Labour Appeal Court held that poor performance had been a factor in the determination of whether or not it was reasonable for her to have expected a renewal of her contract, and that the learned Arbitrator ought to have taken it into consideration. The Court cautioned against employers sitting back and not disciplining employees, only to come back and punish them by not renewing their contracts.

27. There was therefore a duty to observe the rules of natural justice by affording the 1st respondent an opportunity to make his representations against the adverse allegations of underperformance and ill - discipline. In all fairness to the 1st respondent, the applicant ought to have reacted to this letter as it raised issues prejudicial to him. Lord Roskill stated in the case of *Council of Civil Service Union s and Others v Minister of the Civil Service*¹⁷ that the doctrine of legitimate expectation:-

...may now be said to be firmly entrenched in this branch of the law. As the cases may show the principle is closely connected with a right to be heard. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations...

28. The offer created an expectation and once that expectation had been created the employee could no longer be terminated without first being given a fair opportunity to be heard - *Koatsa Koatsa v National University of Lesotho*.¹⁸ The applicant ought to have treated 1st respondent’s case separately and reacted to the queries raised in his letter dated 20th December, 2010 instead of insisting that all employees who had been affected by new offers were given a deadline of 23rd December, 2010.

OFFER AND ACCEPTANCE

29. On the issue of offer and acceptance, it is common cause that the 1st respondent only accepted the new offer after the time prescribed by the applicant. He, however, had raised a query on issues raised in the letter

¹⁶ LAC/CIV/A/01/2014

¹⁷ [1984] 3 ALL ER 935 at 954

¹⁸ 1991 - 1992 LLR LB 163 at p. 169

communicating the offer through his letter dated 20th December, 2010 and was still awaiting a response. This question of failure to respond to this letter kept cropping up in the record.¹⁹ It was only reasonable and fair for the applicant to have attended to these queries. It could give any response it deemed appropriate in the circumstances but not be silent.

REVIEW

30. The Labour Appeal Court reiterated the legal principles applicable to reviews in *Thabo Mohlobo and Others v Lesotho Highlands Development Authority*.²⁰ It stated that:-

In arriving at her decision the arbitrator had to act bona fide, not be prompted by any ulterior motive and properly apply her mind to the matter. Included under the rubric of failure to apply the mind to the matter is capriciousness, a failure to appreciate the nature and limits of the discretion to be exercised, a failure by the person concerned to direct his thoughts to the relevant data or relevant principles, reliance on irrelevant considerations, an arbitrary approach and an application of wrong principles (emphasis added).

In our view, the learned arbitrator applied the right legal principles as related to the facts of this case. We feel that he exercised his discretion properly and therefore find no reason to disturb his finding.

RELIEF

31. Applicant's Counsel further challenged the relief of reinstatement awarded to the 1st respondent. The Court having considered the issue feels that due to the time lapse between 1st respondent's leaving applicant's employ on 30th December, 2010 and determination of his case, reinstatement might prove problematic. We find compensation a more realistic and fair option. The Court therefore orders the remittal of the matter to the DDPR for arguments on reasonable compensation due to the 1st respondent in the circumstances of this case.

DETERMINATION

- a) The review application is dismissed;
- b) Parties are ordered to approach the DDPR for arguments and determination of appropriate compensation; and

¹⁹ Pp 43 and 44 of the record of proceedings

²⁰ LAC/CIV/A/05/2010

c) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 08th DAY OF OCTOBER, 2015.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

M.THAKALEKOALA
ASSESSOR

I CONCUR

NB - Mr Ts'eua, one of assessors assigned to this case, unfortunately passed on before this matter could come to finality, hence, there is only one assessor.

FOR THE APPLICANT : MR H. WOKER - WEBBER NEWDIGATE
FOR THE 1st RESPONDENT : ADV., S. RATAU - TEELE CHAMBERS

ANNOTATIONS

CITED CASES

Nomaza Nkopane and Others v Independent Electoral Commission.2007 28 ILJ 670 (LC)
Administrator of the Transvaal and Others v Traub and Others (1989) 10 ILJ, 823
Ridge v Baldwin and Others [1963] 2 ALL ER 66
Schmidt and Another v Secretary of State for Home Affairs [1969] 2 CH 149 at 170
South African Clothing and Textile Workers' Union and Another v Cadema Industries (Pty) Ltd. [1998] (2) SA 1099 (SCA).
South African Chemical Workers' Union v Afrox Ltd
Lesotho Revenue Authority v `Mamonyane Bohloko LAC/CIV/A/01/2014
Council of Civil Service Unions and Others v Minister of the Civil Service [1984] 3 ALL ER 935 at 954
Koatsa Koatsa v National University of Lesotho 1991 - 1992 LLR LB 163 at p. 169
Thabo Mohlobo and Others v Lesotho Highlands Development Authority
LAC/CIV/A/05/2010

STATUTES

Section 186 of the Labour Relations Act, 1995
Section 68 (b) of the Labour Code Order, 1992
Section 62 (3) the Labour Code Order, 1992

BOOKS/ARTICLES

Gideon Pimstone “Measuring Up to Expectations: Legitimate Expectation, Natural Justice and Fairness in South African Law” Witwatersrand University Student’s Law Journal Vol. 2.