

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

CASE NO: J 1031/08

In the matter between:

UNIVERSITY OF PRETORIA

APPLICANT

AND

COMMISSION FOR CONCILIATION

MEDIATION & ARBITRATION

1ST RESPONDENT

COMMISSIONER JANSEN VAN VUUREN N.O

2ND RESPONDENT

JUDITH GILDENHUYS

3RD RESPONDENT

JUDGMENT

NYATHELA AJ

Introduction

[1] This is an application in terms of which applicant seeks the following declaratory orders:

1.1 An order declaring that the third respondent was not dismissed by the applicant.

1.2 In the alternative to 1.1 above, that the jurisdictional ruling handed by second respondent under case number GAPT 1385-08 dated 07 May 2008 issued under the auspices of the first respondent be reviewed and set aside.

1.3 An order declaring that the first respondent has no jurisdiction to entertain the dispute referred to it by the third respondent pertaining to her alleged unfair dismissal.

1.4 In the alternative to 1.3 above, the matter be remitted to the first respondent to adjudicate the dispute *de novo* before a commissioner other than the second respondent.

1.5 Costs only in the event of opposition.

The parties

- [2] The applicant is the University of Pretoria, a tertiary institution established in terms of Higher Education Act 101 of 1997 and a juristic person as contemplated in section 20(4) thereof having its principal place of business at Lynnwood Road, Hillcrest, Pretoria.
- [3] The first respondent is the Commission for Conciliation Mediation and Arbitration, a juristic person established in terms of section 112 of the LRA.
- [4] The second respondent commissioner Jansen Van Vuuren, a commissioner of the first respondent. The second respondent is cited herein in his capacity as the commissioner who made the jurisdictional ruling under case number GAPT 1385-08.
- [5] The third respondent is Judith Geldenhuys, a former employee of the applicant.

The facts

- [6] Third respondent was employed by applicant in terms of a series of fixed-term contracts as a part-time lecturer in the Department of Mercantile Law which were renewed each time they expired. The employment commenced on 01 February 2004 and the last contract expired on the 30th November 2007.
- [7] Third respondent applied for appointment on a permanent basis. She was interviewed on 30 November 2007 but was not successful.
- [8] On or about 07 January 2008, third respondent was offered a further fixed term contract on better terms which would cover the first six months in 2008.
- [9] Third respondent declined the offer stating that she expected to be appointed on a permanent basis.
- [10] On 28 January 2008, third respondent was presented with written reasons for the decision not to appoint her on a permanent basis.

- [11] On 31 January 2008, third respondent referred an alleged unfair dismissal dispute to the first respondent. The dispute was conciliated on 27 February 2008, it remained unresolved. The dispute was scheduled for arbitration and the arbitration hearing took place on 05 May 2008. During the arbitration hearing, applicant raised a point in limine that first respondent has no jurisdiction to handle the dispute since in its view third respondent was not dismissed. According to applicant, third respondent cannot rely on a dismissal in terms of section 186(1)(b) of the LRA since she had been offered another fixed term contract on even better terms.
- [12] The point in limine was rejected by the second respondent.
- [13] Applicant was then served with a notice of set down of the arbitration hearing to be held on 15 May 2008. The arbitration hearing has been postponed *sine die* pending the outcome of this application.

Applicant's Submissions

- [14] Third respondent's case pertains to her alleged dismissal as contemplated in section 186(1)(b) of the LRA.
- [15] According to third respondent, she reasonably expected the applicant to appoint her on a permanent basis. Applicant does not ask this court to reject third respondent's assertion of such expectation.
- [16] A reasonable expectation on the part of an employee employed in terms of a fixed term contract that, after expiry of the fixed term contract, that employee will be employed in terms of a permanent contract of employment is, in law, not an expectation which can found a claim in terms of section 186(1)(b) of the LRA.
- [17] Third respondent has admitted that she was offered a renewal of her fixed term contract on terms not less favourable than that of her previous contracts. The reason why she is currently not an employee of the applicant is her

unwillingness to accept an offer to renew the contract on the same or similar terms as before, and not because of the applicant's failure to make such offer.

Third Respondent's Submissions

- [18] Third respondent disputed applicant's allegation that she presented lectures in the place of permanent lecturers who were absent as a result of their sabbatical or maternity leave and stated that she did the same work as permanently appointed employees.
- [19] Third respondent's case revolves around two issues, namely that the terms offered were on less favourable terms and that section 186(1)(b) of the LRA if properly interpreted includes a legitimate expectation to indefinite employment on similar terms.
- [20] Third respondent declined the offer of another fixed term contract on the basis that she had a reasonable expectation of permanent appointment.

Legal position

- [21] Section 186(1)(b) of the LRA provides the following: "*Dismissal means that –*
(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;".
- [22] In **Dirks v University of South Africa (1999) 20 ILJ 1227 (LC)** – the court held that employees cannot claim to have been dismissed within the meaning of section 186(1)(b) of the LRA if they expected that they would be permanently appointed.
- [23] In **McInnes v Technicon Natal (2000) 21 ILJ 1138 (LC)** – the court held at para 20 and 21 as follows: "*What section 186(1)(b) clearly seeks to address is the situation where an employer fails to renew fixed- term employment where there is reasonable expectation that it would be renewed. It is the employer who*

creates this expectation and it is then this expectation, created by the employer, which now gives the employee the protection afforded by this section. If the expectation which the employer created is that the renewal is to be indefinite, then the section must be held to also cover that situation”.

- [24] In **University of Cape Town v Auf der Heyde (2001) 22 ILJ 2647 (LAC)** – the court stated at para 20 as follows: “...For the respondent, Mr Janisch submitted that the respondent reasonably expected the appellant to renew his fixed- term contract either by extending it to five years or by appointing him permanently. In *Dierks v University of South Africa (1999) 20 ILJ 1227 (LC)* it was held that an expectation of renewal in terms of section 186(b) does not include an expectation to be appointed permanently. In *McInnes v Technicon Natal (2000) 21 ILJ 1138 (LC)* it was held that section 186(b) covers a reasonable expectation of a permanent appointment (at 1143B-F). It is not for present for present purposes necessary to resolve this difference of opinion. I shall assume, without finding, that the reasonable expectation of a permanent appointment falls within the ambit of section 186(b) ”.
- [25] In **SA Rugby (Pty) Ltd v CCMA & Others (2006) 1 BLLR 27 (LC)** – the court held that “what section 186(1)(b) requires in expressed terms is a reasonable expectation on the part of the employee that there would be a renewal of the fixed contract in question, i.e the said 3 month contract on the same or similar terms, not an expectation of another contract for a period of 1 year and for a different purpose”.
- [26] In **Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood (2008) 11 BLLR 1111 (LC)** – the court held at para 20 as follows: “The question that arises is whether or not the Applicant had a legitimate expectation that the contract will be renewed and that she would be appointed on a permanent basis. I am of the view that the evidence supports this conclusion and that the Applicant did in fact have a legitimate expectation that the contract would be renewed and be made permanent. As a result I am of the view that that Applicant was dismissed as contemplated by section 186(1)(b) of the LRA...”.

Analysis

- [27] It clear from the case law referred to above that there are two schools of thought regarding the question whether the concept of reasonable expectation as contained in section 186(1)(b) of the LRA includes an expectation for permanent appointment or not.
- [28] In my view, the LRA is a piece of social legislation which should be interpreted in a liberal manner so as to ensure the attainment of fairness at the workplace.
- [29] I am further of the view that the purpose of section 186(1)(b) of the LRA was to curb the anomaly that employers would deprive employees of job security and other benefits which are enjoyed by permanent employees by simply employing employees on a fixed term contracts and renewing the said contracts each time such contracts expired.
- [30] In view of the purpose of section 186(1)(b) it could not have been the intention of the legislature to limit the concept of reasonable expectation to the renewal of the contract and thereby exclude an expectation of permanent employment where the evidence shows that the employee indeed had a reasonable expectation of permanent employment.
- [31] I therefore agree with the decision in **Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood** referred to above that concept of reasonable expectation as contained in section 186(1)(b) includes an expectation for permanent appointment. In his award second respondent has dealt with the divergence of opinion on this aspect and also substantiated his preference for the view that section 186(1)(b) should include an expectation for permanent appointment. In the circumstances the application for declaratory orders as contained in prayer 1 and 3 of the Notice of Motion cannot be granted.
- [32] Applicant has in the alternative submitted that second respondent's ruling should be reviewed and set aside based on various grounds which will be dealt with

below. However, the crux of applicant's review application is that second respondent's interpretation of the law is incorrect since the concept of reasonable expectation should not include an expectation by part time employees to be employed on a permanent basis. The further central issue in the review application is that second respondent made a conclusion that applicant's failure to give effect to the expectation of permanent employment "*constituted an unfair dismissal as contemplated in section 186(1)(b) of the Act*" is inexplicable and irreconcilable with the provisions of the Act.

[33] I shall deal with the grounds for review in the context of each one of the above issues.

Do the provisions of section 186(1)(b) of the LRA exclude an expectation of permanent appointment by part-time employees

[34] Section 213 of the LRA which defines the term employee does not contain any distinction between permanent and part time employees. The only persons excluded from the definition of employee are independent contractors. Furthermore, part time employees do not fall within the category of persons excluded from the application of the LRA in terms of section 2 of the LRA. I therefore find that the provisions of the LRA in general apply to part time employees as well.

[35] However, applicant's review is based on the view that section 186(1)(b) of the LRA does not apply to an expectation of permanent employment by part time employees and thus should be confined to an expectation by permanent employees on a fixed term contract.

[36] I must point out that the wording of section 186(1)(b) of the LRA does not contain any exclusion which applicant is reading into the section. The entire section does not distinguish between part time and permanent employees nor does it contain any exclusion of any category of employees. In my view, the cardinal issue is that any employee who is employed on a fixed term contract

and has a reasonable expectation of the renewal of the contract or appointment on a permanent basis can rely on section 186(1)(b) of the LRA.

[37] The above conclusion reaffirms the liberal interpretation which should be adopted in interpreting the provisions of social legislation like the LRA as referred to in paragraph 23 above.

[38] In view of the above conclusion, I am of the view that the ruling by second respondent which in effect implies that section 186(1)(b) also applies to an expectation of permanent appointment by part time employees on fixed term contract is not unreasonable, irrational, contrary to case law, evidence of the commission of a latent gross irregularity and neither shows that he failed to apply his mind to the facts.

Did third respondent make a ruling that applicant's failure to give effect to the expectation of permanent employment "constituted an unfair dismissal as contemplated in section 186(1)(b) of the Act".

[39] I have perused third respondent's ruling and found that third respondent never made a ruling that applicant's failure to give effect to the expectation of permanent employment "constituted an unfair dismissal as contemplated in section 186(1)(b) of the Act". On paragraph 20 of the ruling, third respondent stated the following: *"The fact that the respondent in casu (applicant on review) has offered a new fixed term contract to the applicant (on better terms) does not necessary imply that there was no dismissal as contemplated in section 186(1)(b) of the Act"*. This is the only view expressed by third respondent in the entire ruling which is closest to the finding he is alleged to have made. It is clear from the above extract that third respondent only made a finding that there was a dismissal but such finding had nothing to do with the fairness of such dismissal. In the portion entitled "Ruling" third respondent ruled that first respondent has jurisdiction on the dispute and that the matter should be set down for arbitration. This conclusion militates against any statement that third respondent pronounced on the fairness of the dismissal since there would have been no purpose to set

the matter down for arbitration if there was already a finding that applicant committed an unfair dismissal. I therefore conclude that third respondent never made the finding as alleged by applicant and thus the grounds for review based on this fact cannot stand.

Did third respondent fail to properly apply his mind to the significance of the fact that the applicant offered a renewal of the fixed term contract on the same (or better) terms

[40] On page 4 of the ruling, second respondent stated the following: *“The applicant pointed out, however that it was not her case that the respondent had created an expectation to the effect that her fixed term contract would be renewed or that the respondent had failed to renew such a contract. She, on the contrary, contended that the respondent had created an expectation that she would be permanently be employed and it was the respondent’s failure to give effect to that expectation which constituted an unfair dismissal as contemplated in section 186(1)(b) of the Act”*. Second respondent proceeded to state that: *“The point is well taken. The fact that the applicant (applicant on review) had been offered a further fixed term contract is indeed irrelevant in this circumstances”*.

[41] It is clear from the above extracts from the ruling that the fact that applicant had offered third respondent a further fixed term contract was not the issue before third respondent. The issue was the failure by applicant to meet third respondent’s expectation of permanent employment. It would have served no purpose for second respondent to have considered the fact that applicant had offered a renewal of the contract even on better terms since that issue was not the cause of the dispute before him.

[42] I therefore find that second respondent’s failure to deal with the applicant’s offer of further fixed term contract of employment does not prove that he failed to apply his mind to the issues properly before him. This ground of review fails.

[43] In the premise, I make the following order:

Order

43.1 The application for a declaratory order is dismissed.

43.2 The review application is hereby dismissed

43.3 The jurisdictional ruling made by second respondent under case number GAPPT 1385-08 dated 07 May 2008 stands

43.4 Applicant is ordered to pay costs.

Nyathela AJ

Date of Hearing : 18 June 2009

Date of Judgment: 15 January 2009

Appearances

For the Applicant: Adv Redding SC

Instructed by: Anton Bakker Attorneys

For the Respondent: H. Cheadle