



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA55/2016

In the matter between:

EKURHULENI WEST COLLEGE

Appellant

and

EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

R DE WET N.O.

Second Respondent

SHIKWAMBANA, JERRITAH TINYIKO

Third Respondent

Heard: 28 November 2017

Delivered: 30 November 2017

Summary: The third respondent employee was employed on three consecutive three-month fixed-term contracts. The post in which she was employed was advertised but she was not appointed into the position. Shortly after she was asked to complete an application for maternity leave, the employee was notified that her third fixed-term contract would not be renewed. She referred an unfair dismissal dispute to the Education Labour Relations Council (ELRC) on the basis that she had been dismissed for reason of her pregnancy and, further, that she had a reasonable expectation that her contract would be renewed. The arbitrator found that although she was not dismissed for reason of her pregnancy, the employee held a reasonable expectation that her contract would be renewed and she was awarded three months' compensation

for unfair dismissal. The Labour Court dismissed the employer's review application finding that the decision of the arbitrator fell within the ambit of reasonableness required. On appeal: judgment of the Labour Court upheld. Appeal dismissed with costs.

Coram: Musi and Coppin JJA and Savage AJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This appeal, with the leave of the Labour Court (Gush J), is against the judgment of that Court in terms of which the appellant's review application was dismissed.
- [2] The third respondent, Ms Tinyiko Jerritah Shikwambana (the employee), applied for a renewable temporary fixed term contract post as lecturer advertised by the appellant, the Ekurhuleni West College. She was employed on a first three-month fixed term contract, which commenced on 18 July 2012 and terminated on 30 September 2012, earning R14 416.67 per month. During July 2012, the appellant advertised the position on a permanent basis, with the closing date for applications being 3 August 2012. The employee was not appointed into the position. On 27 September 2012, the parties entered into a second fixed term contract, which commenced on 1 October 2012 and terminated on 31 December 2012. Thereafter, on 4 December 2012, a third fixed term contract was entered into between the parties, which commenced on 1 January 2013 and terminated on 31 March 2013.
- [3] In February 2013, Ms Evelyn Mgwexe, the appellant's human resources manager, and the employee's head of department, Mr Bernard Nkalanga, advised the employee, who was pregnant, to apply for maternity leave. When she approached Ms Mgwexe during March 2013 with the required medical certificate, the employee was told to return at another time since the application was not urgent. In mid-March 2013, Mr Nkalanga asked the employee why he had not received her maternity leave forms as he needed to

find a replacement for her during the period of her maternity leave. The employee returned to Ms Mgwexe and was told that while she should still sign the maternity leave application form, *“there’s a catch...(t)he post you are now occupying has been occupied by somebody else but we’ll move you to college counsel post”*, which would not affect her maternity benefits.

- [4] On 20 March 2013, which was the employee’s last working day before the end of the first term, the appellant gave her notice that her third fixed term contract would expire on 31 March 2013.

Arbitration award

- [5] Aggrieved with the appellant’s failure to renew her fixed term contract, the employee referred an unfair dismissal dispute to the first respondent, the Education Labour Relations Council (ELRC). In her dispute referral form, the employee alleged both that her pregnancy was the reason for the appellant’s failure to renew her fixed term contract and that the termination of her contract constituted a dismissal in terms of s186(1) of the Labour Relations Act 66 of 1995 (the LRA) in that she held a reasonable expectation that her fixed-term contract would be renewed.
- [6] The employee testified at the arbitration hearing and, on subpoena, called Ms Mgwexe and Mr Nkalanga to testify in support of her case. The appellant adduced no oral evidence at arbitration. The employee’s testimony was that Ms Mgwexe told her that the appellant could not renew her fixed term contract *“because you are pregnant and during maternity leave the students will suffer because they won’t have a lecturer”*.
- [7] Ms Mgwexe testified that she was informed by the campus manager that the contracts of all temporary employees would not be renewed after March 2013 and that the employees affected had been informed of this in a public meeting. Ms Mgwexe was not aware that the employee had applied for a permanent post and denied offering to submit the employee’s application for her in Germiston. She stated further that she did not receive an application for maternity leave from the employee.

- [8] Mr Nkalanga testified that, although he requested the employee to apply for maternity leave, it came as no surprise to him that her contract was not renewed given that the names of the persons appointed permanently with effect from 8 April 2013 to the posts advertised had been circulated in late February or early March 2013.
- [9] The arbitrator found both Ms Mgwexe and Mr Nkalanga to be unreliable witnesses whose evidence contradicted each other in several respects. While the arbitrator found that the employee had not been dismissed for reason of her pregnancy, he found that the employee had shown that she had held a reasonable expectation that her contract would be renewed. This was so in that the appellant had engaged her on maternity leave arrangements which would have commenced after the expiry of her third contract; and the appellant had a practice of providing in excess of a month's notice to employees of the expiry of a fixed term contract. For these reasons, it was found that the employee had been dismissed without a valid reason and without compliance with a fair process. Yet, given that the employee was employed on a three-month contract and her post had since been filled, compensation equivalent to three months, being R43 250,01, being the period of a further contract "*as per the reasonable expectation*" was found to be just and equitable.

Judgment of the Labour Court

- [10] Dissatisfied with the arbitration award, the appellant sought the review of the arbitration award by the Labour Court. The appellant contended on review that the arbitrator had committed a gross irregularity in the conduct of proceedings and that the outcome reached was not one that could reasonably be reached on the evidence.

- [11] The Labour Court in its judgment found that it was –

'completely inconceivable that the [employee] would not have had a reasonable expectation that her contract would be renewed in light of her evidence, corroborated by the evidence of her two witnesses that she was

requested to obtain a doctor's certificate regarding her pregnancy and was to complete the maternity leave forms.'

[12] The Court found the answers to both review grounds to be clear:

'Not only did the second respondent deal with the matter appropriately and afford the parties a full opportunity to have their say, the second respondent identified and understood the dispute he was required to arbitrate and dealt with the substantial merits of the dispute. It is also abundantly clear from the award that the second respondent's decision was eminently a decision that another decision-maker could reasonably have arrived at'.

[13] The review application was accordingly dismissed, with no order as to costs, given the absence of the third respondent's attorney at the hearing of the matter.

Grounds of appeal

[14] On appeal, the appellant contended that the arbitrator had committed a gross irregularity in the conduct of the arbitration proceedings in the manner in which he had exercised his power and that the arbitration award was unreasonable. Since the contract had expired through the effluxion of time, the employee could not have held a reasonable expectation under s186(1)(b) of the Labour Relations Act 66 of 1995 (the LRA) that her contract would be renewed. The employee was aware that the post had been advertised and that it was thereafter filled by a suitable candidate. Given that Mr Nkalanga was not involved with appointments and was only involved with ensuring the necessary paperwork was completed for maternity leave should the fixed term contract be renewed, his conduct could not have created a reasonable expectation that renewal would occur. The employee was aware that the position was to be filled on a permanent basis from 1 April 2013 and she was not appointed into the position, despite apparently applying for the post. Consequently, the appellant sought that the appeal be upheld.

[15] It was contended for the employee that a reasonable expectation that her fixed-term contract would be renewed was created by Ms Mgwexwe and Mr Nkalanga when they invited her in January 2013 and February 2013 to apply

for maternity leave. Furthermore, since the practice was to give one month's notice of expiry of a fixed term contract, the short notice given to the employee was unreasonable and unfair. The arbitration award was reasonable in the circumstances and the Labour Court correctly refused to set aside the award on review. For these reasons, the employee sought that the appeal be dismissed with costs.

Evaluation

[16] Section 186(1)(b) provides that:

'(1) 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.'

[17] The employee bore the *onus* to establish that she held a reasonable expectation that her fixed-term contract would be renewed. The facts which she placed before the arbitrator to support her contention that a reasonable expectation existed were that, while she was aware that a permanent appointment into the post may be imminent, she was asked, by both Ms Mgwexe and Mr Nkalanga, to apply for maternity leave; that she understood from their conduct that she was to be granted such leave; and that she was only given notice on the last day of term that her contract was to expire at the end of the month.

[18] The arbitrator was required to determine whether on the facts before him, objectively considered, it had been established that the employee held a reasonable expectation that her contract would be renewed. The arbitrator found on the evidence before him that the requirements of s186(1)(b) had been satisfied and that the employee had been dismissed. It was then for the

appellant to establish that the dismissal was both procedurally and substantively fair.¹

- [19] The appellant elected to lead no evidence at the arbitration hearing. The result was that the arbitrator had before him the testimonies of three witnesses, all of whom confirmed that a representation had been made to the employee that she should apply for maternity leave when they were aware that the employee was employed on a temporary fixed-term contract which was to expire shortly. Given this representation, the finding that the employee had discharged the *onus* to prove that she held a reasonable expectation that her fixed term contract would be renewed, was a decision which a reasonable commissioner on the material before him could have reached. It is reasonable to conclude that the employee, who had been told to apply for four months' maternity leave, held a reasonable expectation that her contract would, as a result, be renewed and that when she received notice of the expiry of her contract on her last day of work before the end of the first term, this would have come as a surprise to her.
- [20] The Labour Court correctly determined that the arbitrator had committed no irregularity in the conduct of the arbitration proceedings and that the arbitration award fell within the ambit of reasonableness required. There is consequently no reason for this Court to interfere with the order of the Court *a quo* and the appeal in the circumstances falls to be dismissed.
- [21] Having regard to the issue of costs, it is entirely unclear why the appellant elected to pursue an appeal in this matter when it had adopted a hands-off approach in calling no witnesses to testify at the arbitration proceedings, and when it was not in dispute that two of its senior employees had advised the employee that she was entitled to apply for maternity leave in spite of the fact that the expiry of her fixed term contract was imminent. These facts clearly supported a finding that the appellant had created a reasonable expectation

¹ *SA Rugby Players' Association and Others v SA Rugby (Pty) Ltd and Others* [2008] 9 BLLR 845 (LAC); (2008) 29 ILJ 2218 (LAC) at para 44.

that the employee's fixed-term contract would be renewed. It follows that there is no reason in law or fairness why costs should not follow the result.

Order

[22] In the result, the following order is made:

1. The appeal is dismissed with costs.

SAVAGE AJA

Musi JA and Coppin JA agree.

APPEARANCES:

FOR THE APPELLANT:

Ms K A Wilson

Instructed by Motalane Kgariya Inc.

FOR THE RESPONDENTS:

Mr Goldberg of Goldberg Attorneys