IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO :D492/06

DATE: 26 NOVEMBER 2008

Reportable

In the matter between:

TERENCE ALEC OWEN	First Applicant
JOHANNES ERENST OWEN	Second Applicant
JEAN PIERRE PELLISSIER	Third Respondent
and	
DEPARTMENT OF HEALTH, KZN	Respondent

JUDGMENT

A Van Niekerk AJ

This is my judgment in respect of the trial proceedings which concluded yesterday.

The respondent, to which I shall refer as the Department, employed the applicants, all of whom are medical practitioners, to perform what are known as “sessions” at the Greytown Hospital. On 29 December 2006 each of the applicants received a letter from Dr Molla, the hospital manager, giving them a month’s notice of the termination of their employment. In these proceedings the applicants dispute the fairness of that termination and claim compensation and severance pay.

The Court must decide two questions. The first is a jurisdictional question, ie whether the applicants were dismissed. If they were, the Court must then determine the substantive and procedural fairness of the dismissals.

I turn first to the jurisdictional question. Section 192 of the LRA requires an employee to establish the existence of a dismissal. To establish the existence of their dismissal the applicants rely on the Notice of Termination of Employment signed by Dr Molla on 29 December 2005. The letter, headed 'Termination of Contract', reads as follows:

> "1. The Sessional doctors are mostly required by this institution when there is a need due to the shortage of full time personnel.
> 2. This hospital will be securing the services of six full time doctors as of 03 January 2006 and it is regretful that your services/contract will be terminated on 31 January 2006.
> 3. The hospital management and staff would like to extend their sincere thanks to you for your dedication and commitment you have shown over the years."

The Department contends that the applicants were employed in terms of a fixed term contract and that that contract terminated by the effluxion of time on 31 January 2006. In the absence of any reasonable expectation of renewal of the contract, there was no dismissal.

The jurisdictional question arises in the following factual context. The

applicants were employed on 1 January 1989, 11 June 1986 and 1 September 1984 respectively. Collectively they provided over 65 years of service to the Greytown Hospital. There is no dispute that the relationship between them and the Department was an employment relationship. They can best be described as part-time employees required to work a specified number of hours per month for the Department. This they did on an uninterrupted basis for the whole period of their employment. The number of sessions worked over the years varied from approximately 15 to 20 per week, depending on the demand for their services. They were remunerated at the end of each month for the sessions worked. The number of sessions worked by the applicants, to some extent at least, was determined by the number of full-time doctors in the hospital's employ.

The first applicant, Dr Owen, whose evidence it was accepted would apply in respect of each of the other applicants, testified that during the course of his employment the number of sessions he was required to work was variously reduced and increased depending on the number of full-time doctors employed by the hospital at any given time and therefore on the demand for the applicants' services. Until 1999, the contractual arrangements between the applicants and the hospital were informal. The number of sessions to be worked was generally agreed at the beginning of each year; the applicants worked those sessions and they were paid for them. The applicants regarded the arrangement as a mutually beneficial one. They were able to apply their skills in a hospital environment and earn income beyond that provided by their private practices and the hospital and its patients benefited

from their expertise and experience.

In 1998 the Department appears to have adopted a policy, never specifically drawn to the applicants' attention, that sought to impose a greater degree of control over the employment of sessional doctors. One of the purposes of the policy was to promote the appointment full-time doctors. Dr Owen fairly conceded that the applicants' continued employment had always been vulnerable to developments of this sort. However, their experience was that shortages of full-time doctors were both inevitable and ongoing and that until 2004, at least the appointment of full-time doctors had no direct or significant impact on the terms of their appointment.

In these proceedings, the Department produced two offers of employment of a fixed term nature which it alleged that the applicants had signed. There is some disagreement about whether the applicants actually signed the offers or only certain annexures regulating the number of sessions they were required to work, but nothing significant turns on this. The first offer records a commencement date of 1 August 1999 and a termination date of 31 July 2000. The second offer, made almost five years later, records a commencement date of 1 February 2005 and a termination date of 31 July 2005. Less is known about the first contract and the circumstances in which it was concluded and I accept Dr Owen's evidence that this had no effect on the terms of the applicants' engagement. 31 July 2000 came and went and the applicants' employment continued unaffected, as it had done in the past.

A second offer of a fixed term contract is more relevant to these proceedings.

The agreement, the terms of which were acknowledged by Dr Owen, was concluded after a meeting held between Dr Molla and the hospital staff in December 2004. At that meeting Dr Molla announced that the hospital had advertised a number of full-time posts and that it intended to appoint more full-time doctors and that these appointments were imminent. In these circumstances the applicants were offered session work in the Outpatients Department only, they had been working in the wards, on the basis of a six month fixed term contract. All of the applicants accepted this arrangement, albeit reluctantly.

On 20 January 2005 Dr Molla wrote a letter formally offering the applicants employment for a fixed term from 1 February 2005 to 31 July 2005 on the basis that the applicants would work in the Outpatients Department for 15 sessions a week. The offer contemplated that this allocation, ie the allocation of the sessions, could be changed depending on circumstances. In that event one month's notice of the variation was to be given.

It is common cause that the applicants performed work in terms of the contract and that after the expiry of the contract on 31 July 2005 they continued to work on the same terms and conditions until their employment was terminated with effect from 31 January 2006. There is no written contract regulating the applicants' employment for the period 1 August 2005 to 31 January 2006. As I have already noted, the Department contends that with effect from 1 August 2005 there was an implied contract between the parties on the same conditions in terms of which the applicants would work

only for a further period of six months.

Mr *Pillay*, who appeared for the applicants, accepted that the applicants bore the *onus* of establishing the existence of a dismissal. He contended that after the expiry of the fixed term contract on 31 July 2005, and in the absence of any extension or renewal of that contract, or the conclusion of any new contract, the applicants' employment should be regarded as continuous subject to the contractual relationship being one of indefinite duration. In support of this submission Mr *Pillay* referred to Grogan's *Dismissal* at page 35 where, in the context of an employee who continues to work beyond the expiry of a fixed term contract, the author states the following:

> "If the employer permits the employee to continue working after the date on which the contract would otherwise have expired, the contract will be deemed to have been tacitly renewed on the same terms, except that the contractual relationship is now of indefinite duration. Once this happens, the only way in which the contract can be terminated is by ordinary dismissal, with or without notice, or by the employee's resignation."

Grogan quotes no authority for this proposition, but the principle has been applied in at least one CCMA award (see: *National Education Health & Allied Workers Union on behalf of TATI and SA Local Government Association* 2008 29 (ILJ) 1777 (CCMA)). Mr *Pillay* submitted further that this approach is consistent with the purpose underlying the Act and that if further fixed term contracts were to be implied in circumstances where an employee works

beyond the termination date fixed by a particular contract, unscrupulous employers might seek to avoid the protections established by the Act simply by relying on non-*extant* fixed term contracts to deny the existence of a dismissal.

Mr *Nankin*, who appeared for the Department, submitted that the factual circumstances surrounding the six month contract in force between February 2005 and July 2005 suggested that by their conduct, the parties had renewed the contract for a period only of a further six months and that the applicants were accordingly aware that their employment would terminate on 31 January 2006. Mr *Nankin* relied on *Yebe v University of KwaZulu-Natal (Durban)* 2007 28 (ILJ) 490 (CCMA) in support of the proposition that the conduct of the employer in particular was relevant to the expectation of any indefinite renewal of the contract. However, that case dealt with the application of section 186(1)(b) of the Act, and the extension of the definition of dismissal to a situation where the employee reasonably expected the employer to renew a fixed term contract on the same or similar terms but the employer offered to renew the contract on less favourable terms or did not renew it. As the Commissioner points out in the award, that section is intended to provide a remedy to an employee who has no remedy in contract when a contract expires by the effluxion of time, provided that the employee has a reasonable expectation of renewal of the contract.

The issue in the present instance is rather different. The issue is whether, after 1 August 2005, the applicants were party to an implied contract that

limited their continued employment to 31 January 2006 and whether it can be said in those circumstances, that they were dismissed for the purposes of the Act when that contract terminated by the effluxion of time on that date.

The approach suggested by Grogan, ie that a tacit renewal of the contract on the same terms but for an employment relationship of indefinite duration, is commendable at the level of principle, but each case is fact and context specific and the application of the principle must account for this. In this instance, the principle begs the question of the existence or otherwise of an implied contract to the effect that the applicants would work only for a further six months on the same terms. This is a factual inquiry to be determined on the evidence before the Court and it is in this context that the factual inquiry urged by Mr *Nankin* is relevant.

Dr Owen's testimony, as I have already noted, was that he attached no particular significance to the fixed term contract in force between February and July 2005 and that there had been no discussion between him and the hospital authorities that might suggest that with effect from 1 August 2005, his contract had been extended only for a further period of six months. This evidence was not challenged in any way or called into question during cross-examination. When Dr Molla gave evidence he suggested that the applicants' fixed term contracts had been renewed for a further six months on the basis of discussions that he says he had with the applicants on an individual basis in July 2005. In these discussions he says that he stated that the applicants' contracts could "carry on until December". This crucial

proposition was never put to Dr Owen in cross-examination, nor is it pleaded as part of the respondent's case. This is remarkable, if not astounding, since the respondent's entire case is based on the renewal, albeit tacitly, of the contract from 1 August 2005 to 31 January 2006. It was put to Dr Molla in cross-examination that he was lying about the nature and content of his discussions with the applicants in July 2005. His response was a less than animated defence of his evidence.

I have no hesitation in accepting Dr Owen's evidence that, while he was aware that the fixed term contract expired on 31 July 2005, the hospital simply continued to employ the applicants on the same terms and that there was no agreement, implied or otherwise, that they would work only for a further six months. Dr Owen's statement that "as far as we (the applicants) were concerned this was no different to the haphazard situation that prevailed before" neatly encapsulates the basis on which the hospital management dealt with the applicants.

The additional factual context that the Department sought to emphasise was the applicants' knowledge, for a long period, and at least from December 2004, that their continued security of employment was precarious on account of the prospect of the engagement of full-time doctors at the hospital.

Evidence of what transpired at the meeting held in December 2004 is to be gleaned from the evidence of Drs Owen and Molla and Mr Cochobos, the hospital's financial and systems manager, all of whom attended the meeting,

and a letter written a year later by Dr Molla to the Department's labour relations directorate concerning a dispute with Dr Ramdass. It is common cause that Dr Ramdass refused to sign the six month fixed term contract between February and July 2005 and that his employment was terminated as a consequence. At this meeting Dr Molla advised the session doctors, including the applicants, that their services were required only in the Outpatients Department and that they would no longer work in the wards. Mr Cochobos testified that the meeting "got a bit out of hand" and that it had to be closed. Mr Cochobos stated further that the applicants were advised that with more fully staffed full-time posts the Department would no longer require their services. This statement is not clearly borne out by the terms of the letter written by Dr Molla on 30 December 2005, where he refers only to a requirement that part-time doctors sign a new contract to work in the Outpatients Department.

Be that as it may, I accept, on the basis of the evidence of Dr Owen, that while there was "talk in the corridors" during the course of 2005 about sessions being taken away from part-time doctors, there were no official communications made to the applicants prior to the meeting held on 29 December 2005. I will return to what transpired at that meeting in the context of the fairness of the applicants' dismissal.

Finally in relation to the jurisdictional point, Dr Molla, after asserting that he was familiar with South African labour laws, stated that he had given the applicants a month's notice and that he was satisfied that the applicants'

part-time status somehow exempted the Department from complying with any retrenchment procedures. In fact, his evidence was that they were entitled only to 24 hours' notice of the termination of their contracts.

The giving of notice is ordinarily inconsistent with employment on a fixed term of contract, which, by definition, terminates without notice by the effluxion or the happening of a specified event. The fact that Dr Molla thought it necessary to give the applicants one month's notice of termination of their employment, which he did on 29 December 2005, is inconsistent with his version that in July 2005 the applicants' employment was the subject of an agreement that it would continue only for a further six months.

In my view, the factual circumstances on or about 31 July 2005 are not so unequivocal so as to indicate the establishment of any tacit contract, as the Department contends, between the parties to the effect that the applicants would be employed only for a further six months, ie that their employment would terminate by the effluxion of time on 31 January 2006. For these reasons, Dr Molla's letter dated 29 December 2005 constituted a notice of termination of the applicants' employment and a dismissal for the purposes of section 187(1)(a) of the Act.

I now turn to the substantive and procedural fairness of the applicants' dismissal. For obvious reasons the Department's reliance in these proceedings on its contention that the applicants had not been dismissed meant that its submissions on substantive and procedural fairness (where

the Department bears the *onus* of proof to satisfy both components of the equation) were proffered somewhat faintly. It was common cause that any dismissal of the applicants was effected for a reason related to the Department's operational requirements and that in that context the provisions of section 189 of the Act applied. The Department's witnesses could not deny that soon after the applicants' dismissal three posts were advertised for session doctors at the Greytown Hospital. There was no clear evidence produced by the Department as to whether all of the full-time doctors referred to in the meeting held on 29 December were ever employed or what impact that employment had or could be expected to have on the number of sessions worked by the applicants or on their continued employment. There was specifically no evidence to suggest why a reduction in the number of sessions, a provision contemplated by the contract relied on by the Department, could not have been invoked as a means to meet the Department's operational ends. In short, I am satisfied that the Department has failed to establish any cogent and substantively sufficient reason for the applicants' dismissal.

In relation to procedure Mr *Nankin* submitted that the meeting held in December 2004 constituted the commencement of a consultation process which culminated in the meeting held on 29 December 2005. There is no merit in this submission. The Department's attitude throughout was that it was not obliged to follow the procedures envisaged by section 189. The minutes of the meeting held on 29 December 2005 record a *fait accompli* presented by Dr Molla to the applicants and a clear inability on his part to

respond to the questions and concerns that were tabled. I have noted that Dr Molla expressed the view in his evidence that the applicants' part-time status denied them the protection of the Act and of section 189 in particular. There was no notice of invitation to consult as contemplated by section 189(3), there was no meaningful consultation on any of the matters contemplated by section 189 and there was no severance pay paid to the applicants.

These concerns were brought to the Department's attention as early as 8th of January 2006 when Dr Owen wrote to a Mr Shezi of the Human Resources Department and pointed out the defects in the procedure adopted by the Department. Mr Shezi's response was dismissive, and the applicants were obliged to pursue their rights.

The applicants' unchallenged evidence was that the loss of part-time sessions affected them both financially and professionally. In the absence of any evidence of substantive fairness, particularly in the form of any need to retrench, and given that the Department failed woefully in every respect to comply with the standards of procedural fairness prescribed by section 189 the applicants are entitled to compensation of 12 months' remuneration each and to the severance pay payable to them in terms of the Basic Conditions of Employment Act. These amounts have been quantified and agreed by the parties. Finally, there is no reason why the respondent should not pay the costs of these proceedings.

ORDER

I accordingly make the following order:

1. The applicants were dismissed by the respondent.
2. The applicants' dismissal was substantively and procedurally unfair.
3. The respondent is to pay each of the applicants compensation to the equivalent of 12 months' remuneration, an amount of R83 655,00 each.
4. The respondent is to pay the applicants severance pay in the following amounts: to the first applicant R27 369,80, to the second applicant R41 859,70 and to the third applicant R35 419,70.
5. The respondent is to pay the costs of these proceedings.

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A van Niekerk AJ

Date of Editing: 18 February 2009

Appearances:

For the Applicant: Adv I. Pillay instructed by R Scott (Austen Smith)

For the Respondent: Adv S. Nankin instructed by M Pillai (State Attorney)