



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case No.: JR 2835/2012

In the matter between:

UNIVERSITY OF SOUTH AFRICA

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION ("CCMA")

First Respondent

WERNER KRUGER N.O.

Second Respondent

DIRK JACOBUS VAN DER MERWE

Third Respondent

AMES WILLIAM DE JAGER

Fourth Respondent

Heard: 7 January 2014

Delivered: 10 November 2015

JUDGMENT

PILLAY AJ

- [1] This is an application to set aside an arbitration award dated 7 October 2012 issued by the Second Respondent. The Second Respondent found, on a balance of probabilities, that the Third and Fourth Respondents had a reasonable expectation that their contracts would have been renewed. He found that the failure to renew the contracts constituted a dismissal in terms of the Labour Relations Act 65 of 1995, as amended ("LRA"). The Applicant was ordered to compensate the Third and Fourth Respondents three months' salary.

Background facts

- [2] The Third and Fourth Respondents were employed on two month contracts from 1 January 2008 to 28 February 2008. The contract was renewed for a further five months from 1 March 2010 to 31 July 2010. There was a further fixed term contract for a period of seven months and twelve months. The final contract expired on 29 February 2012. The contracts were not renewed.
- [3] The evidence was that the Third and Fourth Respondents went to their supervisor, Pieter Stander ("Standar"), on a weekly basis during their last four months of their contract period. Standar did not have authority to enter into a contract or extend the contracts of employment.
- [4] Standar told the Third and Fourth Respondents that their contracts were approved (although Standar did not give direct evidence to this effect), that everything was in place and that the employees did not have to worry.
- [5] Their contracts were not available on 29 February 2012. They alleged that Standar informed them that they should take leave from 1 March 2012 until 17 March 2012. They further allege that they went on leave.
- [6] They were informed on 14 March 2012 that their contracts were, in essence, not renewed.

[7] Stander did not have authority to extend the Third and Fourth Respondents' contracts. He could only make recommendations on whether the contracts should be extended. It was MANCOM that was responsible to decide whether the contracts should be renewed or not. The arbitrator found that:

7.1 Nothing prevented Stander from informing the Third and Fourth Respondents timeously that their contracts were not going to be renewed. Had he done so, there would have been no misunderstanding as to whether the contracts would be renewed.

7.2 Stander did not have the authority to renew the contracts;

[8] The Applicant seeks to review and set aside the finding of the Second Respondent on the following grounds:

8.1 the Second Respondent committed a gross irregularity in failing to seek clarity as to what the duration of the extended contracts would be. In doing so, he could not properly exercise his discretion on what the appropriate compensation would be;

8.2 the Second Respondent failed to assess the Third and Fourth Respondents' evidence that they were promised contracts and authorised to take leave from 1 March 2012 to 17 March 2012. In doing so, he failed to assess the probabilities of the Third and Fourth Respondents' version;

8.3 the Second Respondent failed to consider the terms of the fixed term contracts which did not create any rule that the Applicant had to give notice that it would not renew the fixed term contracts. He also failed to consider that the contracts would automatically expire on 29 February 2012, and that there would be no expectation of renewal that was created;

8.4 the Second Respondent failed to take into consideration the common cause evidence that Stander was not authorised to extend the contracts;

8.5 the Second Respondent made reference to "*surrounding circumstances*". There was no detail on these surrounding circumstances;

8.6 the Second Respondent made reference to rules of the University, without giving any indication of what these rules were and where he got them from;

8.7 the Second Respondent failed to seek clarity on who/what entity had previously authorised the extension of contracts. This then prevented him from determining whether the Third and Fourth Respondents' expectations were reasonable;

8.8 the Second Respondent made reference to a channel of authority. This, however, did not go to whether the expectation was reasonable or not;

8.9 there was no factual finding as to what created the alleged reasonable expectation.

[9] The Applicant, in essence, alleges that, in light of the conspectus of evidence, the Second Respondent reached a decision that no reasonable decision-maker could reach.

Analysis

[10] The Second Respondent was required to determine whether the Third and Fourth Respondents had a reasonable expectation of re-employment on the same or similar terms. The Second Respondent correctly captured the evidence that Stander did not have any authority to extend the contracts of the Third and Fourth Respondents. He, however, did not consider the evidence that the Third and Fourth Respondents gave to the effect that they were in discussions with Stander simply for the purpose of following the right channels.

[11] The Second Respondent did not consider that the continued visits by the Third and Fourth Respondents to Stander demonstrated that they themselves did not have clarity. If they had clarity and certainty, there would have been no reason for them to visit Stander at all.

- [12] The Second Respondent failed to consider the terms of the fixed-term contracts of employment, which stipulated that there would be no reasonable expectation of its renewal. He also failed to consider whether there was any rule in place that required/obliged the Applicant to follow the correct channels. He does not deal with source of the alleged rule and what the correct channels were. He appears to conclude, at paragraph 15 of his award that the rule extends to some expectation that Stander ought to have informed the Third and Fourth Respondents timeously that their contracts were not going to be renewed.
- [13] There was no positive duty on the Applicant to inform the Third and Fourth Respondents timeously or otherwise that there would be no renewal of their contracts. Furthermore, given the common cause evidence that Stander did not have the authority to extend the contracts, the Third and Fourth Respondents could not have had any expectation, in the absence of a decision by MANCOM, that their contracts of employment would be renewed. It was their own evidence that they communicated with Stander simply to follow protocol. There is no evidence that this following of protocol gives rise to any expectation, reasonable or otherwise.
- [14] The Second Respondent relied on “rules”. There was no evidence of any such rules. He ignored the terms of the contract of employment.
- [15] The Second Respondent has relied on irrelevant evidence, and appears to have even created his own evidence, particularly in relation to the existence of a rule that the Applicant had to approach the Third and Fourth Respondents and inform them that their contracts of employment would not be renewed.
- [16] The Second Respondent ignored the relevant evidence that Stander did not have authority to extend the Third and Fourth Respondents’ contracts of employment. He took the evidence by the Third and Fourth Respondents, that they were simply following protocol, to mean that the discussions with Stander gave rise to some reasonable expectation. However, he did not even clarify or

examine what this protocol was, and whether it would, in fact, have given rise to any reasonable expectation.

[17] The Supreme Court of Appeal has endorsed the test for review as follows:

'Where a commissioner fails to have regard to material facts, that will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined'.

[18] The following position was also endorsed:

'If a commissioner fails to take material evidence into account, has regard to evidence that is irrelevant, or the commissioner commits some other conduct or irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether the basis of the record of proceedings, that result is nonetheless capable of justification'.

[19] It is clear that the Second Respondent has failed to take material evidence into account, and had regard to evidence that is irrelevant. He has committed a gross irregularity during the proceedings. The Applicant has been prejudiced as a consequence. The Second Respondent's decision must be set aside.

[20] There is sufficient evidence before me to make a determination on whether there was a reasonable expectation of renewal of the contracts of employment. The relevant facts are *inter alia*:

20.1 the Third and Fourth Respondents were communicating with Stander because it was protocol. There is no evidence that this protocol gave rise to any reasonable expectation of renewal of the contract of employment;

20.2 Stander did not have authority to renew the contracts;

20.3 there was no rule that the employees had to be notified in advance that their contracts would not be renewed.

[21] In essence, the only evidence from the Third and Fourth Respondents which could support their claim of a reasonable expectation of renewal of their contracts, were discussions with Stander where he indicated that the contracts were not signed. Their continuous visits to Stander increase the probabilities that they were aware that there was no renewal. If there had been any reasonable expectation and/or renewal, there would have been no reason for them to constantly visit Stander in their last month of employment.

[22] In my view, the Third and Fourth Respondents did not have any reasonable expectation of the renewal of their contracts. The Third and Fourth Respondents have not discharged the onus on them.

Order

[23] In the circumstances, I make the following order:

- (a) The arbitration award handed down by the Second Respondent on 7 October, under case number CATW5864-12 is reviewed and set aside;
- (b) The arbitration award is substituted with a finding that the Third and Fourth Respondents were not dismissed;
- (c) There is no order as to costs.

L Pillay AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: _____ instructed by Koikanyang Inc. Attorneys

For the Respondents: _____ instructed by Geyser Attorneys