

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J2088/99

In the matter between:

HESTER JACOMINA DU TOIT

Applicant

and

BLOEMFONTEIN MUNICIPALITY

Respondent

JUDGMENT

JAMMY AJ

With effect from 13 March 1973 until 27 February 1996, the Applicant was in the permanent employ of the Respondent as a Clerk Grade 1 in the creditors department of the Respondent's treasury.

It is common cause that on the latter date, 27 February 1996 and together with numerous other employees of the Respondent, she resigned voluntarily. The common motivation in doing so was apparently related to the avoidance of tax on Provident Fund benefits. She received payment in lieu of leave and also other entitlements save for bonus.

Two days later, with effect from 1 March 1996, the Applicant was re-employed by the

Respondent in the same position and with the same functions, save that in this instance, her engagement was expressly stated, in a confirmatory document subsequently submitted to and signed by her, to be temporary, with effect from 1 March 1996 and subject to termination on twenty-four hours notice by either party. It was expressly recorded however that the date of termination of employment was to be understood to be subject to alteration in changed circumstances.

She continued to work on that basis, the Applicant testified, until at the end of June 1997, she was called in by Mr Jan de Klerk, the head of her department, who informed her that her post was to be formally advertised by the Respondent at the end of the following month, July, and that she could if she wished apply for that appointment on a permanent basis. The post however was not so advertised and she continued to work without any change in her employment environment until 16 September 1997.

On that date, she was handed a letter headed **“Termination of Employment”** and informing her that a permanent appointment had now been made in the temporary post which she then occupied and that in terms of her agreement with the Respondent, her services were consequently terminated, with her last working day to be 30 September 1997.

On 23 September 1997 she was handed a Certificate of Service, recording her employment as **“Clerk Grade 1 (Temporary)”** from 1 March 1996 to 30 September 1997 and reflecting the **“Reason for Termination of Service”** as being **“Completion of Duties”**.

When she enquired as to which duties she had completed, she was informed, she said, that in order to create an affirmative action position elsewhere within the Respondent’s organisation, a white male had been appointed to the position held by her by way of an internal transfer.

There had been no change, she said, in any aspect of her work or working conditions

during the nineteenth month period of her **“temporary”** employment, from those obtaining during the period of her permanent employment prior to her resignation in February 1996. She did not know, when it ultimately occurred, why her employment was terminated.

Questioned under cross-examination by Advocate D Grobler for the Respondent as to what she believed to be the import of her temporary employment in March 1996, she replied that she anticipated that it would be for a certain period of time, **“say a month or two until someone else was appointed”**. She perceived that her temporary employment would either terminate in those circumstances or be confirmed ultimately as permanent.

It was correct that neither she nor her employer had, with effect from the beginning of March 1996, made further contributions for her benefit to the Respondent’s provident fund and that thereafter the only deductions made from her salary related to her union subscriptions. She had not, before now, seen a letter from the City Treasurer to the Town Clerk dated 30 January 1996, recording her willingness to assist the Respondent on a temporary basis and endorsed with the Town Clerk’s confirmation of her appointment in that capacity. The **“certain period”** of time for which she considered that her temporary employment would enure, would be until she was informed by the personnel department that they had **“found a permanent employee to do my job”**. As far as she was concerned however this would be expected to occur within a **“reasonable period of time”**.

It was when, shortly before she had been in the temporary position for one year, she became aware of a council recommendation dealing with the **“Position of Temporary Employees”** that she concluded that her position was now permanent and no longer temporary. It is apposite in my view for the relevant portion of that recommendation, which was adopted by the executive committee of the council on 18 February 1997, to be here recorded. It read as follows -

“Temporary employee refers to an employee appointed for a specified term in either a temporary or permanent post. Temporary employees enter into a specific contract of service with Council. The main difference between a temporary and permanent service contract is the term of employment and benefits applicable to temporary employees. There is otherwise legally no real difference.

There should be a clear objective with the appointment of temporary employees. The objective used to be to obtain labour for a predetermined job, project or work which could be completed within a specified time. This objective is however not applied consistently and gives thus rise to many problems.

It should also be borne in mind that a temporary employee and temporary post are defined in Council’s Conditions of Service. The most important part of the definitions are that temporary employment will not exceed twelve months”.

- . She realised then, she answered under further questioning, that she could no longer be in a temporary position.
- . Following further cross-examination regarding her perception of her position, the Applicant ultimately acknowledged that the only basis upon which she considered her position to have become permanent was that she had held it for a period in excess of the twelve month limitation on temporary appointments decreed by the Council.
- . It was correct, she testified, that she was called in approximately June 1997 and advised that the post that she held was to be made permanent and that she could apply for that appointment. She informed her superior, Mr De Klerk, that she did not know if she would do so. She had been there for more than a year and was shocked at this development. It was not true that she had told Mr De Klerk that she would not apply.
- . Finally, she acknowledged, no promises or undertakings had been made to her of permanent employment at the time that she took up her temporary position or

thereafter. She had received no confirmatory letter to that effect and had made no further enquiry after she was informed in due course that the post was to be advertised. She had not at any stage entertained any expectation of permanent employment until she saw the recommendation of the executive committee.

Mr N B Jansen, the Respondent's first witness, was at the relevant time the head of employment recruitment, personnel and the labour relations in the municipality. There had been "**massive**" tax-related resignations from October 1995 through 1996 and the Respondent had lost more than four hundred employees. Some of these had filled key posts where continuation was essential and whilst, in due course, three hundred and seventy one permanent positions had been advertised, (eliciting nineteen thousand applications), the process of filling them took considerable time.

In order to bridge this hiatus period, heads of department received the Town Clerk's authority to appoint employees who had resigned temporarily to their old positions. One such appointment was that of the Applicant. In the meantime, "**horizontal**" transfers were being made to fill certain permanent positions, regard at all times being had to the Respondent's affirmative action policy.

Although the recommendation to and the ultimate resolution of the council was that temporary appointments should not exceed a period of twelve months, it was correct that the Applicant had filled the position held by her for some nineteen months. The recommendation however related to appointments to a temporary *position* and not to temporary appointments to a *permanent* position (the witness' emphasis).

When that recommendation was compiled, approximately fifty-nine of the initial sixty-five temporary appointees to permanent posts had been in those positions for periods exceeding twelve months. The posts were then advertised and the temporary incumbents were invited to apply. The posts filled by internal horizontal transfers were not advertised. Whilst he personally was not involved in the Applicant's appointment or the termination thereof, if she had enquired from the personnel department regarding

her position in relation to the twelve month limitation period, she would have been informed that this was an abnormal situation applicable to temporary appointments to permanent posts.

. Cross-examined by Mr S Snyman for the Applicant, as to why her particular permanent post had not been advertised following the advice to her in June 1997, Mr Jansen stated that this was because there had been a request for transfer to that position from an internal candidate. When she was given notice, the intention was in fact to advertise the position but this was superseded by the internal application and subsequent transfer.

. Mr Jan de Klerk, now on pension, testified that at the relevant time he was the head of the department in which the Applicant was employed. He had had no discussions with her after her temporary appointment on the 1st March 1996 and nor was he aware of the twelve month limitation which was placed on temporary appointments.

In June 1997 he had discussions with the Applicant and two other temporary appointees. He informed them of the executive direction that temporary employees were to be replaced with permanent appointees and that their employment was to be terminated in those circumstances. The Applicant was clearly unhappy at this information and he asked her if she was prepared to apply for a permanent position. Her answer was that she was absolutely not interested in doing so. She said nothing about the length of her service with the Respondent but when she learned of the internal horizontal transfer, she asked for the reasons for the termination of her employment, which he then gave her. There was no further discussion and she did not change her mind regarding an application for the permanent position.

. The gravamen of the Applicant's case is clearly sourced in the legitimacy or otherwise of what must clearly be interpreted as her perception of her entitlement, at the time of the eventual termination of her employment, to be deemed to be a permanent employee. If that perception was legitimate then, as is contended on her behalf, her dismissal would *prima facie* be open to challenge for want of substantive and/or procedural unfairness.

The Applicant could have had no uncertainty regarding, or misunderstanding of, the basis of her initial temporary employment. That status, and fact that it would continue **“until further notice”**, subject to twenty-four hours notice of termination, was unequivocally stated in the confirmation document signed by her on 19 March 1996. Her impression that her period of service would be for no more than **“a couple of months”** was no more than that, - a perception entirely without basis. No representations, undertakings or commitments to that effect had been made by the Respondent. The temporary nature of her employment was, or should have been, emphasised by the fact that save for her union subscription, no further deductions, whether in respect of provident fund, medical aid or otherwise, were made from her salary. She had in fact been paid out and had received her full entitlement from the provident fund at the time of her resignation at the end of February 1996.

The Applicant testified that shortly before the expiration of the first year of her temporary appointment, she became aware of the twelve month limitation recommendation in question. It is in my view significant that she did not seek at that time to obtain clarity regarding her own position but was content to continue to perform her functions without question or query. The limitation on temporary appointments of a twelve month period was not decreed for the benefit of the incumbent employees, but was a direction, to be complied with in the normal course, by the heads of the department's concerned. The fact that, for good reason - and the complexity of the transition and re-employment process seems to me to have been such - that period may have been in certain cases exceeded, could not, and did not in my view, create any vested right to permanence in temporary employees in the Respondent's service.

That service, as provided for in the confirmation document, could be terminated at any time by either party on twenty four hours notice. That decision, Mr Snyman argued, could not be taken arbitrarily. That does not seem to me to have been the case. The application by the eventual appointee for appointment to the permanent post in question and his transfer to that position in a situation where, having regard to the post that he himself was vacating, the Respondent's affirmative action policy would have relevance, seems to me to constitute good cause on any assessment.

. A critical factor in this overall assessment in my opinion is what I accept, on a balance of probabilities notwithstanding her contentions to the contrary, was the Applicant's emphatic statement to Mr De Klerk that if the position which she temporarily occupied was advertised, she would not under any circumstances apply for it. The Respondent's submission that that rejection left the way open either for an advertisement or the exercise of delegated authority to effect the horizontal transfer which then took place, is a valid one. No unfairness to the Applicant resulted and the prerogative to manage its affairs in that context on the most practicable basis possible, was patently that of the Respondent.

. In summary, and as submitted by the Respondent in argument, the Applicant is the unfortunate author of her own misfortune. The opportunities which were available to her after the first twelve months of her temporary employment and thereafter following her discussions with her superiors in June 1997, to clarify her position, were not taken by her. There can be no substance to her submission that she was not obliged to do so and that **"they should have come to me"**.

. In the prevailing circumstances and for the reasons which I have stated, I have determined that the Applicant was not dismissed. Her temporary employment terminated on the basis and in the circumstances defined at its commencement. There was no unfairness or illegality of the part of the Respondent in that process. The order that I accordingly make is the following -

The application is dismissed with costs.

B M JAMMY

Acting Judge of the Labour Court

9 July 2001

Representation:

ant: Mr Snyman – Snyman Van Der Heever Heyns Attorneys

t: Advocate D Grobler, instructed by Honey & Partners Inc