



- (1) Reportable: Yes
(2) Of interest to other Judges: Yes
(3) Revised

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

CASE NO: JR 1766/24

In the matter between

FULUFHEDZANI FRIDAH DZGANA

Applicant

and

**EDUCATION LABOUR
RELATIONS COUNCIL (ELRC)**

First Respondent

VUSI MOYO N.O.

Second Respondent

TSHWANE NORTH TVET COLLEGE

Third Respondent

Heard: 26 March 2026

Delivered: 28 August 2026

Summary: The non-renewal of a fixed-term contract constitutes a dismissal within the meaning of s186(1)(b) of the LRA. The dismissal is unfair, at minimum procedurally. The commissioner committed a reviewable error of law by requiring the employee to discharge an evidentiary burden on the interpretation of the Circulars — a question of law, not of fact.

JUDGMENT

SWARTZ AJIntroduction

- [1] This is an unopposed review application brought in terms of section 145 of the Labour Relations Act 66 of 1995 (“the LRA”). The applicant seeks an order reviewing and setting aside the Education Labour Relations Council (“the ELRC”) ruling issued by the second respondent (“the commissioner”) on 21 August 2024, in which the commissioner found that the applicant had not been dismissed and, consequently, dismissed her unfair dismissal claim arising from the non-renewal of her fixed-term contract.

Factual background

- [2] The applicant was employed by the third respondent (“the College”), a state-owned college, from 15 August 2019 until 31 December 2023 under a series of fixed-term contracts, predominantly in the position of Financial Management Lecturer. This position fell under Ministerial Programmes.
- [3] The applicant’s fixed-term contracts spanned over the following period:
- 3.1 15 August 2019 to 31 December 2019;
 - 3.2 10 February 2020 to 31 December 2020;
 - 3.3 8 February 2021 to 30 April 2021;
 - 3.4 1 May 2021 to 31 December 2021;
 - 3.5 1 January 2022 to 31 December 2023; and
 - 3.6 1 October 2022 to 31 December 2023.
- [4] The applicant was employed and initially paid by the College. On 30 November 2023, the applicant was issued with a notice that her fixed-term contract would expire on 31 December 2023.
- [5] Aggrieved by the termination of her employment, which she regarded as a dismissal, the applicant referred an unfair dismissal dispute to the ELRC. The

College opposed the dispute, and the arbitration proceedings were conducted over five days. The College called three witnesses, while the applicant was the sole witness in support of her case.

- [6] The College has not opposed this review application.

The Applicant's Submissions

- [7] The applicant based her case principally on two Circulars issued by the Department of Higher Education and Training. The first, Circular 30, dated 9 October 2020, dealt with the implementation of the Post Provisioning Norms ("PPN") in Technical and Vocational Education and Training ("TVET") colleges. The College was one of the TVET colleges to which Circular 30 applied.

- [8] Circular 30 stipulated *inter alia* that:

"It is crucial that the practice related to the termination of contracts related to Ministerial Programmes and the advertising of new positions related to the PPN Model and college structure ceases with immediate effect until the approved implementation Plan and Policy Manual is signed off and published.

Colleges or to note that a recent submission related to the permanency of contract staff associated with the delivery of Ministerial Programmes has been approved by the Minister and is currently being implemented via the head office HRMA unit. The termination of existing contracts at this stage is likely to be counterproductive to this aim. The above should also apply to staff members appointed by College Councils currently associated with the Ministerial Programmes.

In view of the above the circular serves to place a Moratorium on the filling of any new vacant position(s) associated with approved PPN model and standardized structure in TVET colleges, as well as the discontinuation of termination of existing contracts of staff delivering on Ministerial Programmes until due process around permanency of contract employees in such programmes and the PPN in implementation is completed. Any existing recruitment drives are to be deferred until formal approval of the PPN Policy and Implementation Procedure Manual is published.

Failure to therefore adhere to the content of this Circular will be deemed a deviation to a clear Department directive."

- [9] The second, Circular 40, dated 8 December 2020, is headed "CLARIFICATION ON CIRCULAR 30 OF 2020 REGARDING MORATORIUM..." and stipulated *inter alia* that;

"All staff identified as offering Ministerial Programmes and therefore eligible for (blank) into posts in the standardized college structure are ring fenced, and remain in the sector until the completion of the PPN implementation process. This relates to staff employed on both the college and the Persal payrolls currently.

In view of the above, this circular serves to reinforce and clarify the existing moratorium on the filling of any new vacant post(s) associated with the approved PPN model and standardized structure in the TVET colleges, as well as the deferment of termination of existing contracts of staff delivering ministerial programmes, (employed both via the Persal or College payrolls), until due process around the PPN implementation is completed.

College management is also advised that no recommendations for appointment that are against the spirit and intent of Circular 30 of 2020 on the Moratorium will be considered. Failure to adhere to the content of both circulars will be deemed a deviation from the a Departmental directive which will be dealt with in terms of the Public Finance Management Act (PFMA), applicable Public Service Regulations and Labor Relations prescripts."

- [10] The applicant also referred to an Internal Memorandum dated 12 January 2024 that stated *inter alia* that "Ministerial approved Programmes will not be terminated be until the end of the cycle of the PPN process (31 March 2024) to ensure continuity and stability."

- [11] The applicant further contended that, having regard to the successive extensions of her fixed-term contracts, together with the other surrounding circumstances, she had acquired a reasonable expectation that the College would retain her in employment until at least 31 March 2024 and/or on an indefinite basis.

- [12] The applicant's case was that she had a reasonable expectation of being appointed on a permanent basis once the PPN was implemented. She contended that Circulars 30 and 40 applied directly to her because she had been employed on successive fixed-term contracts within the Ministerial Programmes and that, accordingly, her post fell within the category of posts contemplated by those circulars.
- [13] Accordingly, the applicant contended that the termination of her final fixed-term contract upon its expiry on 31 December 2023 constituted a dismissal as contemplated in the LRA.
- [14] The applicant's grounds of review are, in essence, that the commissioner committed a gross irregularity in the conduct of the proceedings and reached an unreasonable result. First, she contends that the commissioner misconstrued Circulars 30 and 40 and placed undue reliance on the so-called interpretation of those circulars. In particular, she challenges the adverse inference drawn from her failure to subpoena the authors of the Circulars to testify as to their meaning and application.
- [15] Secondly, the applicant contends that the commissioner failed properly to appreciate the circumstances which, on her version, created a reasonable expectation of permanent employment. She submits that, if the College no longer required her services because it could not afford to retain her, it was required to terminate her employment through a retrenchment process in terms of section 189 of the LRA rather than simply permitting her fixed-term contract to expire.
- [16] Thirdly, the applicant contends that the commissioner failed to properly consider and apply section 198B of the LRA. Her case is that, having been employed on successive fixed-term contracts for a period exceeding the statutory threshold contemplated in section 198B, her employment ought to have been regarded as being of indefinite duration, absent a justifiable reason for fixing the term of her employment.

The Third Respondent's (the College's) Submissions

- [17] Although the College did not oppose the review application, in order to determine the application fairly, it was nevertheless necessary to consider the College's case as it emerged from the arbitration transcript and the evidence placed before the commissioner. This was necessary to determine whether the commissioner's award was one that a reasonable decision-maker could reach.
- [18] The College's case was that the applicant had been employed on successive fixed-term contracts to address temporary lecturing needs arising from vacancies created when permanent lecturers were no longer employed by the College, as well as to accommodate periods of student over-enrolment.
- [19] Each of the applicant's fixed-term contracts expressly stated that "*It should be noted that the extension should not be construed to be a permanent appointment.*"
- [20] During 2023, the College did not reach its targeted student enrolment numbers and, consequently, no longer had an operational need for the applicant's services. The College's case was therefore that the applicant's final fixed-term contract simply expired on 31 December 2023 in accordance with its terms and was not renewed because the operational need for which she had been employed no longer existed.
- [21] The applicant was one of fourteen lecturers whose fixed-term contracts were not renewed. On 28 November 2023, Mr Thambe, the College's Assistant Director: Curriculum Implementation, and the College's second witness, addressed an internal memorandum to Ms Tsibogo of the Department of Higher Education and Training, which stated, inter alia, as follows: "*We, therefore, request the approval to terminate the services of 14 college paid lecturing staff due to insufficient workload for 2024.*"
- [22] The College's witnesses testified that Circulars 30 and 40 did not apply to the applicant because she had not been employed pursuant to the PPN. Rather, her fixed-term employment arose from the College's temporary operational

need to accommodate student over-enrolment. Her remuneration was funded by the College itself and not by the Department of Higher Education and Training. Accordingly, the applicant's post was not one of the posts ring-fenced for conversion to permanent employment under Circulars 30 and 40.

Analysis of the facts and reasoning

- [23] The test on review is trite. The question is whether the commissioner's ruling is one that a reasonable decision-maker could have reached on the material before him or her. This Court is not sitting as a court of appeal and is therefore not concerned with whether the commissioner was correct, but rather whether the outcome reached falls within the band of decisions to which a reasonable decision-maker could have come. Accordingly, the review test is fundamentally different from that applicable on appeal.
- [24] The commissioner found that the College had not created a reasonable expectation that the applicant would be employed on a permanent basis. In reaching that conclusion, the commissioner placed considerable reliance on his interpretation of Circulars 30 and 40. He rejected the applicant's interpretation of the circulars and, in particular, her contention that they had the effect of ring-fencing her post until March 2024. The commissioner further reasoned that, because the applicant had not called the authors of the Circulars to testify as to their meaning and application, she had failed to establish the interpretation upon which her case depended.
- [25] In this regard, the commissioner in his analysis of the evidence stated that¹:

"The Applicant attested that she derived an expectation of renewal from the two Circulars issued by DHET. However, in her evidence she failed to make concerted efforts to ensure that the responsible DHET official/s are subpoenaed to testify on the interpretation of their circulars.

I find that the Applicant party placed itself in an elevated and condescending tower in believing that it has the sole correct interpretation of the Circulars

¹ The arbitration award at paras 60 – 64.

above the HOD, AD of Curriculum Implementation and the Recruitment & Selection Officer without any input from the authors of the document...

Of the essence is the underlying reality that in the absence of an expectation being created specifically by the college (Being the Respondent in this matter), the Applicant party elected to rely on an external documents from the DHET and opened a superficial debate about the interpretation thereof. The casual fact is that this matter was not referred as an interpretation and application dispute but rather an unfair dismissal dispute emanating from the non-renewal of the fixed term contract in terms of section 186(1)(b) of the LRA...

The Applicant was unreasonably obstinate in this regard as the Circulars have to be equally read with the economic realities of the college. It was never disputed that the college had no funds, hence assistance had to be sought from the DHET until termination of the FTC. Any continuation from January - March 2024 would have been would have neither state funding nor revenue from student fees."

Interpretation of Circulars 30 and 40 of 2020

[26] Departmental circulars issued by the DHET are properly characterised as "administrative quasi-legislation."² As such, they serve as authoritative internal guides to the exercise of administrative discretion by subordinate officials and institutions within the Department's regulatory sphere. They are not enacted through the ordinary legislative process and lack the formal authority of statutes or regulations, but they carry significant administrative weight within the hierarchy they govern.

[27] In this Court's view, Circular 30 must be interpreted according to the ordinary and plain meaning of the language used, considered in its proper context and having regard to its purpose. Of particular relevance, Circular 30 provides, *inter alia*, that: "...the discontinuation of termination of existing contracts of staff delivering on Ministerial Programmes until due process around

² *Munyai and Another v Director General of Home Affairs and Another* 2024 (2) SA 635 (GP) at para 14.

permanency of contract employees in such programmes and the PPN in implementation is completed."

- [28] South African courts apply a unitary interpretive approach to all legal instruments whether statutory, contractual, or administrative. The foundational articulation of this approach in South African law is the Supreme Court of Appeal's judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,³ which has been consistently applied in labour law. Under this approach, consideration must be given simultaneously to the language used, the context in which the provision appears, and the purpose to which it is directed. Pure textual literalism, mechanically applying words divorced from their context and purpose, is rejected.⁴
- [29] The Labour Appeal Court applied this approach directly to a departmental circular in *HOSPERSA obo Naidoo and Others v MEC Department of Health KZN*.⁵ The Court held that the circular had to be read "in light of the resolution it implements, the [parent] statutory provisions on ministerial directives, and the need for consistency." An interpretation giving effect to the purpose of the circular was preferred over a strictly literal reading, and an arbitrator who "gave an interpretation that gave effect to the purpose of the resolutions and the circular" was affirmed as having acted correctly. The Court further confirmed that interpretation must be approached with regard to "the aim, purpose and all the terms" of the relevant instrument.
- [30] The Labour Appeal Court in *NUMSA v Motor Industry Staff Association*⁶ confirmed that interpretation must proceed with regard to the "objects and purpose" of the instrument and that a normative approach is required, rather than a mechanical literalism.
- [31] A purposive interpretation does not, however, displace the primacy of the language actually used. The *Endumeni* approach requires text, context and purpose to be considered together, rather than permitting purpose to override

³ [2012] ZASCA 13 (Wallis JA at para 18).

⁴ *HOSPERSA obo Naidoo and Others v MEC Department of Health KZN and Others* (2025) 46 ILJ 933 (LAC) at para 30.

⁵ (2025) 46 ILJ 933 (LAC).

⁶ (2025) 46 ILJ 109 (LAC).

clear wording. Where the language, properly considered in its context, admits of only one sensible meaning, effect must be given to that meaning.

- [32] That principle is directly applicable in the present matter. If Circulars 30 and 40, properly construed in their textual and contextual setting, unambiguously prohibited the termination of the contracts of employees falling within their scope during the relevant moratorium period, effect had to be given to that prohibition. The meaning of the circulars was an objective question of interpretation. It did not depend upon the subjective intentions or opinions of their authors. Accordingly, the applicant's failure to call or subpoena the authors of the circulars could not, without more, constitute a proper basis for rejecting the interpretation advanced by her.
- [33] The commissioner's approach, in requiring the applicant to prove her interpretation of the Circulars by calling their authors, reflects a misconception of the interpretative exercise. The meaning of a written instrument is not ordinarily a factual issue which a party is required to prove through the evidence of its author. While evidence concerning the context and purpose of an instrument may, where appropriate, assist in its interpretation, the interpretation of the instrument remains a matter for the decision-maker, having regard to its text, context and purpose.
- [34] This distinction is particularly important in the present matter. The applicant's case was that the relevant provisions of Circulars 30 and 40 were clear on their face and prohibited the termination of the contracts of employees falling within their scope during the stipulated period. If that construction is correct, the commissioner was required to determine the meaning and effect of those provisions by applying the established principles of interpretation. The applicant's failure to subpoena the authors of the Circulars could not, in itself, constitute a proper basis for rejecting her interpretation.
- [35] The commissioner's reasoning effectively converted a question of interpretation into an evidential burden resting upon the applicant. In doing so, he asked the wrong question. The enquiry was not whether the applicant had proved, through the authors of the Circulars, what they intended the Circulars

to mean, but what the Circulars objectively meant when their language was considered in its proper context and having regard to their purpose. To the extent that the commissioner rejected the applicant's case because she failed to call the authors to prove her interpretation, his approach was materially flawed.

[36] The commissioner's misdirection was not merely methodological. By treating the interpretation of the Circulars as a factual matter which the applicant was required to prove through the evidence of their authors, the commissioner committed a material error of law. In doing so, he misconceived the nature of the enquiry before him and materially affected the reasoning process that led to his ultimate conclusion. The ruling is therefore susceptible to review under section 145 of the LRA.

[37] The Labour Appeal Court in *NUMSA v Motor Industry Staff Association and Others*⁷ confirmed this principle, drawing expressly on *Herbert v Head of Education* (LAC)⁸:

*"Where an arbitrator commits a material error of law in the interpretation of [an instrument], the result is an award that is both incorrect and unreasonable, capable of review either on the basis of its incorrectness or for being unreasonable."*⁹

[38] The purposive approach requires Circulars 30 and 40 to be interpreted having regard to their language, context and evident purpose. The apparent purpose of the moratorium on the termination of the contracts of employees falling within the scope of the Circulars was to afford those employees protection against the termination or non-renewal of their contracts during the stipulated period.

[39] An interpretation which deprives that protection of practical effect cannot readily be reconciled with that purpose. If the Circulars contain clear prohibitory language, requiring the applicant to adduce additional evidence

⁷ (2025) 46 ILJ 109 (LAC) at para 26 -27

⁸ (2022) 43 ILJ 1618 (LAC)

⁹ At para 27

from their authors to “prove” what that language means not only misconceives the interpretative exercise but risks undermining the very protection the Circulars were intended to afford. The Circulars were required to be interpreted objectively, having regard to their text, context and purpose, and in a manner that gives practical effect to their evident object rather than renders their protection ineffective.

- [40] The Circulars, properly interpreted, clearly prohibited the termination of the contracts of employees falling within their scope during the relevant period, the commissioner was required to give effect to that prohibition. His refusal to do so on the basis that the applicant had failed to prove the meaning of the Circulars through the evidence of their authors constituted a material error of law. The commissioner thereby misconceived the nature of the interpretative enquiry and failed to apply the Circulars according to their objective meaning. To that extent, the ruling is susceptible to review under section 145 of the LRA on the standard applicable to a material error of law.
- [41] The question that then arises is whether the fact that the applicant's fixed-term contract expired before 31 March 2024, being the date by which the PPN was to be implemented, justified the termination of her employment on 31 December 2023. The answer to that question turns on whether, notwithstanding the stated expiry date of her contract, the applicant had acquired a reasonable expectation of continued employment as contemplated in section 186(1) of the LRA.

Reasonable expectation

- [42] The transcript of the evidence of the College's first witness, Ms Baloyi, the Head of Department, is not contained in the record. Her evidence is, however, summarised in some detail by the commissioner in paragraphs [8] to [26] of the award. Having regard to that summary, the fact that the review application is unopposed, and the prejudice that the applicant would suffer if the matter were removed from the roll solely because of the incomplete transcript, I consider that there is sufficient material before this Court to determine the

review. In these circumstances, it is in the interests of justice that the matter be determined on the record as it stands.

[43] Although paragraph 66 of the founding affidavit makes reference to section 198B of the LRA, there is nothing in the record establishing that the applicant earned below the applicable earnings threshold and was therefore entitled to rely on the protections afforded by that section. In the absence of such evidence, there is no factual basis upon which this Court can conclude that section 198B applied to the applicant or that her employment was deemed to be of indefinite duration by operation of that provision.

[44] Accordingly, the focus is on section 186(1)(b) of the LRA that defines "dismissal" to include scenarios arising at the end of a fixed-term contract. This section provides that a dismissal occurs where an employee employed on a fixed-term contract reasonably expected the employer:

- (i) to renew the fixed-term contract on the same or similar terms, but the employer offered to renew it on less favourable terms or did not renew it; or
- (ii) to retain the employee in employment on an indefinite basis, but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms or did not offer to retain the employee at all.

[45] The test requires both a genuine subjective belief by the employee that renewal (or indefinite retention) would occur, and an objective foundation for that belief, that is, whether a reasonable employee in those circumstances would have formed the same expectation. The onus lies on the employee.

[46] In *Member of the Executive Council for the Department of Finance Eastern Cape v De Milander & Others*¹⁰. That decision summarised the approach adopted:¹¹

¹⁰ (2011) 32 ILJ 2521 (LC) at para 32 – 34.

¹¹ Upheld on appeal in *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 ILJ 1427 (LAC)

"The onus to prove that the dismissal occurred in circumstances where the employee had a reasonable expectation that the fixed-term contract would be renewed at the end of its period rests with the employee. A dual enquiry is conducted in determining the existence of reasonable expectation. The first enquiry is subjective and entails enquiring into the subjective basis upon which the person who claims reasonable expectation relies in contending that his or her contract ought to have been renewed. The enquiry into reasonable expectation ends if the employee fails to show that he or she had the expectation that the period of the fixed-term contract would be extended. If the employee is successful in showing that he or she had a subjective expectation that the contract would be renewed then the second enquiry entails determining the existence of such an expectation on the basis of the objective facts that existed prior to the termination of the contract.

In SA Rugby the Labour Appeal Court per Tlaletsi JA summarizes the meaning of s 186(1)(b) of the LRA as follows at para 43:

'What s 186(1)(b) provides for is that there would be a dismissal in circumstances where an employee reasonably expected the employer to renew a fixed-term contract of employment on the same or similar terms but the employer only offered to renew it on less favourable terms or did not renew it. The operative terms in s 186(1)(b) are, in my view, that the employee should have a reasonable expectation, and the employer fails to renew a fixed-term contract or renews it on less favourable terms. The fixed-term contract should also be capable of renewal.'

Court then went further to summarize what needs to be done to satisfy the objective tests as follows at para 44:

'The appellants carried the onus to establish that they had a "reasonable expectation" that their contracts were to be renewed. They had to place facts which, objectively considered, established a reasonable expectation. Because the test is objective, the enquiry is whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew his or her fixed-term contract on the same or similar terms. As soon as the other requirements of s 186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent (SA

Rugby) would have to establish that the dismissal was both procedurally and substantively fair.’ ”

[47] In *Joseph v University of Limpopo and Others*¹² this Court pointed out that, in deciding whether or not an employee has established that he had a reasonable or legitimate expectation that the contract would be renewed, the Court will have regard *inter alia* to previous regular renewals of his contract of employment, terms of the contract and the nature of business, but it pointed out that the list was not exhaustive. This means that where there is evidence of regular renewal of the employee’s contract of employment in the past by the employer, the Court will most likely consider it as a strong indication that the parties intended to extend their employment contractual relationship.

[48] Although the applicant's fixed-term contracts expressly provided that any extension or renewal should not be construed as constituting permanent appointment, that provision is not, in itself, dispositive of the enquiry. The existence of a reasonable expectation must be determined objectively, having regard to the totality of the circumstances surrounding the employment relationship.

[49] Having considered the arbitration bundle together with the transcript of the proceedings, I am satisfied that the objective facts established that the applicant had acquired a reasonable expectation that her fixed-term employment would be renewed on an indefinite basis. That conclusion does not rest upon the applicant's subjective belief alone, but is supported by a number of objective factors, including the following:

49.1 Although the applicant was initially employed to assume the lecturing responsibilities of Mr Bruno, who had resigned in 2019, and thereafter those of Ms Mogale, who had passed away in 2021, her employment did not end once those immediate circumstances had passed. Instead, the College continued to renew her fixed-term employment. In total, the applicant's contract was renewed on six occasions, resulting in an uninterrupted employment relationship spanning more than four

¹² [2011] 12 BLLR 1166 (LAC)

years. The repeated renewal of her contract over such an extended period is a material objective factor in determining whether she had acquired a reasonable expectation of continued employment;

- 49.2 On 1 October 2022, the applicant was called to the College's Human Resources Department and requested to sign a new contract of employment. She was informed that she was being migrated to the Department of Higher Education and Training and that, as a consequence, her remuneration would no longer be funded by the College but by the Department;
- 49.3 At a later stage, although the precise date is unclear from the record, the applicant was again called to the Human Resources Department and requested to complete Government Employees Pension Fund (GEPF) nomination forms. When she enquired why she was required to complete those forms, the HR official made reference to her anticipated "absorption";
- 49.4 The applicant testified that, as a result of these representations and the surrounding circumstances, she understood that she was to be absorbed into a permanent position and would thereafter be employed by the College on an indefinite basis;
- 49.5 The applicant's evidence was that she had always understood that, as a fixed-term employee, she fell within the PPN program and that Circulars 30 and 40 applied directly to her and governed the continuation of her employment;
- 49.6 The College's contention that the applicant did not fall within the PPN program was, on her evidence, raised for the first time during the arbitration proceedings. She testified that this allegation was "*very new to me*". There is no indication that, during the course of her employment, the College had informed her that she fell outside the PPN programme or that Circulars 30 and 40 did not apply to her employment;

49.7 The applicant testified that, during a meeting, the Principal expressly assured her that, because she was lecturing in the Ministerial Programs, her contract would not be terminated; and

49.8 The applicant expressly stated in her evidence on several occasions that she was not expecting any notice of termination and that she would be employed on an indefinite basis.

[50] The decision of the Labour Appeal Court in *Ekurhuleni West College v Education Labour Relations Council and Others*¹³ is instructive, particularly because it concerned fixed-term employment in the education and lecturing context. In that matter, the employee had been employed as a lecturer under three consecutive three-month fixed-term contracts. The arbitrator found that the requirements of section 186(1)(b) of the LRA had been established and that the employee's non-renewal constituted a dismissal which was both substantively and procedurally unfair. The Labour Appeal Court declined to interfere with that conclusion, holding that the arbitrator's award fell within the bounds of reasonableness.

[51] The facts of the present matter provide an even more substantial objective foundation for the applicant's expectation of continued employment. Unlike the comparatively short succession of contracts in *Ekurhuleni West College*, the applicant's employment extended over more than four years, and her fixed-term contract was renewed on six occasions. Those repeated renewals must, moreover, be considered together with the representations made to her concerning her migration to the Department, the request that she complete GEPF nomination forms, the reference to her anticipated absorption, and the Principal's assurance that, because she lectured in the Ministerial Programs, her contract would not be terminated. Viewed cumulatively, these circumstances provide compelling objective support for the applicant's expectation that her employment would continue

[52] The evidence set out above constitutes material objective factors supporting the applicant's contention that she reasonably expected her employment to

¹³ (JA55/2016) [2017] ZALAC 75.

continue until at least 31 March 2024 and/or on an indefinite basis. The commissioner failed to properly consider these factors and instead focused predominantly, and incorrectly, on the interpretation of Circulars 30 and 40. In doing so, he failed to consider the totality of the evidence relevant to whether the applicant had established a reasonable expectation of continued employment and, as such, failed to apply his mind to whether there was a dismissal.

There was a dismissal

[53] For the reasons stated above, I find that the applicant was dismissed under section 186(1)(b) of the LRA.

[54] When questioned by the commissioner concerning the applicant's expectation of continued employment, the applicant testified that she expected her employment to continue at least until 31 March 2024, by which date the PPN process was expected to have been finalised. Thereafter, in her words, she would "*see what they will do*". Her evidence therefore established, at the very least, an expectation that her employment would continue beyond the expiry of her fixed-term contract on 31 December 2023 and until 31 March 2024.

[55] The significance of the applicant's reference to 31 March 2024 should not be overlooked. That date was not arbitrary. On the evidence before the Commissioner, the applicant could only reasonably have acquired knowledge of that specific date either from the meeting with the Principal, about which she testified, or from the internal memorandum issued by Ms Tsibogo dated 12 January 2024, the Principal. Paragraph 2 of that memorandum records:

"At one of the Post Provisioning Norms (PPN) College Implementation Committee (CIC) meeting, it was resolved that contracts of Lecturers offering the Ministerial approved Programmes will not be terminated until the end of the cycle of the PPN process (31st March 2024) to ensure continuity and stability."

[56] The contents of the memorandum therefore materially corroborate the applicant's evidence that she met with the Principal and was informed that,

because she lectured in the Ministerial-approved Programs, her contract would not be terminated before the completion of the PPN process on 31 March 2024. Importantly, the applicant's evidence as to her expectation of continued employment until that precise date was therefore not based merely on a subjective belief; it was objectively supported by the memorandum emanating from the College itself.

- [57] The contents of this memorandum also corroborate the plain meaning and evident purpose of Circulars 30 and 40, namely, to ensure the continuation of the employment of lecturers falling within their scope until the completion of the PPN process. This was material evidence which the commissioner failed to consider in determining both the proper interpretation of the Circulars and whether the applicant had acquired a reasonable expectation of continued employment.
- [58] In terms of section 188 of the LRA, once a dismissal has been established, the employer bears the onus of proving that the dismissal was effected for a fair reason and in accordance with a fair procedure.
- [59] All three witnesses called by the College testified that student enrolment had declined significantly and that, as a consequence, there was no longer sufficient work for the applicant. The applicant disputed this evidence, albeit only in general terms. However, because the commissioner found that no dismissal had occurred, the question whether the College had established a fair operational reason for terminating the applicant's employment was not fully ventilated or determined at the arbitration.
- [60] In those circumstances, the record before this Court is insufficient to determine whether the College had established a substantively fair reason for the applicant's dismissal based on its operational requirements. It would therefore be inappropriate for this Court, sitting as a review court, to determine that issue on an evidential record which was not fully developed before the commissioner.
- [61] However, if the true reason for the termination of the applicant's employment was the College's operational requirements, arising from declining student

enrolment and the consequent reduction in available work, the College was required to follow the consultation process prescribed by section 189 of the LRA. It is common cause that no such process was followed. Accordingly, even if a substantively fair operational reason for the dismissal ultimately existed, the dismissal could not have been procedurally fair in the absence of compliance with section 189.

- [62] During argument, the applicant's attorney, Mr Siebani, submitted that the applicant sought either reinstatement or compensation. Given that the College's operational requirements were not fully ventilated during the arbitration, and that more than two and a half years have elapsed since the applicant's dismissal, I am of the view that reinstatement would not be appropriate in the circumstances. The most appropriate relief is therefore an award of compensation.
- [63] Having regard to the internal memorandum dated 12 January 2024, Circulars 30 and 40, and the applicant's own evidence that she expected her employment to continue at least until 31 March 2024, I consider it just and equitable that the compensation awarded should take account of the remuneration she would have earned for the three-month period from 1 January to 31 March 2024.
- [64] In addition, the College followed no fair procedure whatsoever before terminating the applicant's employment. In particular, if the reason for the termination was operational requirements, no consultation process as contemplated in section 189 of the LRA was undertaken. I consider compensation equivalent to a further four months' remuneration to be just and equitable for the procedural unfairness of the dismissal.
- [65] Accordingly, the applicant is awarded total compensation equivalent to seven months' remuneration, calculated at the rate of remuneration applicable to her immediately before her dismissal.

Order

- [66] In the circumstances, the following order is made:

1. The review application is granted.
2. The arbitration award issued by the Education Labour Relations Council under case number ELRC812-23/24GP is reviewed and set aside.
3. The following award is substituted in its place:
 - 3.1 The applicant's dismissal was unfair.
 - 3.2 The third respondent is ordered to pay the applicant 7 months' salary.
4. There is no order as to costs.

S. Swartz

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Siebani from Sebani Attorneys

For the Respondent:

LABOUR COURT