

EMPLOYMENT

Previous renewal does not automatically constitute an expectation of re-renewal

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Issue

Whether the non-renewal of an employee's fixed term contract ("**FTC**") constituted an unfair dismissal as contemplated in section 186(1)(b)(i) of the Labour Relations Act 66 of 1995 ("**LRA**").

Facts

The above issue was considered by the Commission for Conciliation Mediation and Arbitration ("**CCMA**") in the case of *Majambe // University of South Africa (2023) 32 CCMA*. The facts of the matter are briefly as follows.

The Applicant, Ms Majambe ("**Majambe**"), was employed by the respondent, the University of South Africa ("**UNISA**"), as a consultant on a FTC from 7 October 2020 to 31 March 2021. Her FTC was renewed on two occasions. The first renewal period was from 10 April 2021 until 30 September 2021, and the second renewal period was from 1 October 2021 until 30 September 2022. Majambe's FTC was, however, not renewed after 30 September 2022. She claimed that UNISA had created an expectation that her FTC would be renewed and that, by failing to renew the agreement, she has been unfairly dismissed.

Majambe referred a dispute to the CCMA alleging that she had been unfairly dismissed on 30 September 2022 (on the basis of the non-renewal). The matter could not be resolved during conciliation, and it proceeded to arbitration.

In determining whether Majambe was dismissed, the CCMA referred to UNISA's Conditions of Service ("**Conditions**"), as referred to in the FTC. In particular, reference was made to paragraph 15 of the Conditions which provided as follows –

"I have read, fully understand and accept the terms and conditions of the contract of temporary employment;

I expressly declare that I shall have no claim against UNISA for indefinite employment, deemed or actual;

I expressly declare that I harbour no expectation of an extension/renewal of the period of this agreement, or permanent employment"
(emphasis added).

Despite these Conditions, Majambe argued, during her examination in chief, that she expected a renewal after 30 September 2022 on the basis that, "(a) it had become the culture or norm to renew fixed term contracts. The Manager used to motivate such renewals and the Deputy Director approved that. (b) the number of fixed term staff had increased on each occasion when [Majambe's] contract was renewed. (c) paragraph 9 of the Conditions provided for a written notice to be given prior to the expiry of a contract, but [Majambe] did not receive any such notice... (d) [Majambe] had not made herself guilty of any misconduct and she was not accused of incapacity".

A further email was addressed to UNISA, by a shop steward acting on Majambe's behalf, in relation to the renewal on 30 September 2022, but no reply was received. On the same day the email was addressed to UNISA, Majambe and her colleague were informed "*not to return to*

the office the next day and that they would be called as and when their contracts were ready" (emphasis added). Majambe was of the view that the above reference to 'as and when' also constituted an expectation of renewal.

Majambe addressed a further email on 5 October 2023, to the Executive Director indicating that "*she was awaiting contract renewal and seeking clarity*". After receiving no response, she addressed another email to the Manager Operations ("**MO**") on 10 October 2022 after having expected her FTC to be renewed by 7 October 2023 (based on past practice). The MO responded by stating that "*there were still pending contracts*".

She also contented that her colleagues had their FTCs renewed while her FTC was not renewed and claimed that same prejudiced her economically.

CCMA's Findings

In determining whether Majambe was indeed dismissed, the arbitrator referred to section 186(1)(b) of the LRA which defines dismissal in relation to FTCs. The section provides that –

"Dismissal means that an employee employed in terms of a fixed term contract of employment

reasonably expected the employer –

(i) 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; 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." (emphasis added)

The CCMA stated further that such a contract would terminate by operation of law and be seen as the termination of an employment contract by the effluxion of time rather than a dismissal.

The test to prove a reasonable expectation

The CCMA reiterated that an employee bears the onus to prove that the expectation was reasonable (emphasis added) and that the employee actually or subjectively expected the FTC to be renewed or to be retained on an indefinite basis.

The arbitrator referred to relevant case authority which expounded on the test. First, one should determine whether the employee expected her contract to be renewed. This is the subjective element. Secondly, if an employee had such an expectation and after taking all the factors into account, one should determine whether that expectation was reasonable. This latter consideration is the objective element.

Subjective element – Whether Majambe had indeed expected renewal of her FTC

In determining whether Majambe subjectively expected her FTC to be renewed after 30 September 2022, the Arbitrator stated that Majambe admitted that she was aware and understood the conditions of her FTC (specifically paragraph 15 above) but still expected a renewal based on past practices. The Arbitrator however stated importantly that "renewal had never been a fait accompli" (emphasis added) and no precedent has been created by the employer based on the two previous renewals.

The conditions contained in the FTC are of importance and cannot be ignored. They were accepted by Majambe when she concluded her FTCs which clearly provided that she held no expectation of renewal.

In relation to Majambe's contention that the statement that they (i.e., her and her colleague) would be informed "*as and when their contracts were ready*", the Arbitrator found that Majambe should have understood that such statement referred to "*an uncertain future event*" and the context would not have implied that the FTC would have been renewed.

The Arbitrator, therefore, held that Majambe could not have expected UNISA to renew her FTC. Majambe did not, therefore, meet the subjective element. The Arbitrator held that based on the latter, the question on the reasonableness of the expectation did not arise. Despite this, the arbitrator also considered this element, should it be found that he was wrong on the first element.

Objective element – Whether the alleged expectation had been reasonable

In analysing whether the alleged expectation was reasonable, the Arbitrator reiterated that this could not be the case based on the fact that the Conditions in the FTC expressly stated that “*she harboured no expectations of an extension or renewal and was well aware of the risk of non-renewal*”, which conditions she accepted. Moreover, the Arbitrator reiterated that the previous renewals could not have resulted in a reasonable expectation of a guarantee of another renewal.

In relation to Majambe’s claim that she should have been given notice prior to the expiry of the FTC, the Arbitrator held that the claim is unfounded on the basis that such a contract terminates “*by operation of law at the end of its term*”. No notice was, therefore, required.

Majambe also failed to furnish any proof that the FTCs of her twelve colleagues were renewed despite relying on the latter as a ground to prove a reasonable expectation.

The Arbitrator held further that Majambe produced no evidence to prove that anybody (with or without authority to renew FTCs) communicated either verbally or in writing to her in a manner that could have resulted in a reasonable expectation of renewal. In addition, the allegation that UNISA increased the number of consultants due to the increase in demand for service did not lead to a reasonable expectation of renewal in her case.

The Arbitrator held that in light of the factors above, Majambe failed to show that her (alleged) expectation of renewal had been reasonable. Majambe, therefore, failed to prove that she had been dismissed and the CCMA, therefore, lacked jurisdiction to arbitrate the dispute.

Importance of the case

The above case illustrates the importance of mitigating against any suggestion that an employee has an expectation of a renewal of a contract. While the words of the contract are important it is also important to ensure there are no additional factors present giving rise to such an expectation (i.e., a promise of renewal, for instance).



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