

DISTRIBUTABLE (4)

KENYA AIRWAYS LIMITED
v
(1) EPHRAIM MUSARURWA (2) LETICIA MWANAKAOMA

SUPREME COURT OF ZIMBABWE
GWAUNZA JA, GOWORA JA & PATEL JA
HARARE, 17 OCTOBER 2014

I. Chagonda, for the appellant
T. Marume and J. Mafongoya, for the respondents

[Original judgment delivered *ex tempore* on 17 October 2014]

PATEL JA: This is an appeal against a judgment of the Labour Court, handed down on 28 June 2013, which upheld an award made by the arbitrator, reinstating the first respondent to his former position as Station Manager and ordering that the second respondent be paid 3 months' salary in lieu of notice.

The respondents were employed on 5 year fixed term contracts of employment as Station Manager and Sales/Marketing Agent respectively. Their contracts were due to expire on 30 September 2011. On 28 September 2011, both respondents received letters to the effect that their contracts were expiring and would not be renewed. On 1 October 2011, another employee of the appellant, one Itayi Chinyerere-Mafuva was

appointed as Acting Station Manger to take over the first respondent's duties. The second respondent had found alternative employment.

The matter went for conciliation and eventually to arbitration on the ground that the respondents had been unfairly dismissed. The arbitrator found in favour of the respondents and made an award in the terms indicated above. Aggrieved by the award, the appellant noted an appeal to the Labour Court, which appeal was dismissed.

The grounds of appeal herein are essentially twofold. As regards the first respondent, the appellant argues that he was not unfairly dismissed because the appellant did not engage an outsider to take up his position. As regards the second respondent, the appellant contends that she was not entitled to 3 months' notice because her fixed term contract had expired by effluxion of time.

As regards the first respondent, s 12B(3) of the Labour Act [*Chapter 28:01*] requires two elements to be satisfied by an employee alleging unfair dismissal: firstly, that he had a legitimate expectation to be reengaged upon the expiry of his fixed term contract and, secondly, that another person was engaged in his stead. The question of legitimate expectation did not form part of the grounds of appeal and therefore does not constitute an issue before us.

As for the second requirement, it is abundantly clear on the facts before us that another person was engaged to take over the first respondent's functions as Station

Manager. The appellant does not dispute that the post was still functional and there is nothing in the papers to indicate that the post was ever abolished. The objective behind s 12B(3) is to ensure that an employee is not discharged and replaced by another simply because his fixed term contract has expired. The provision does not require that the person engaged be someone who is engaged from outside the employer's establishment. We therefore find that the court *a quo* correctly upheld the arbitrator's award in this regard.

Turning to the second respondent, Mr. *Marume* has conceded, quite properly in our view, that s 12B(4) of the Labour Act does not apply to a fixed term contract of employment that comes to an end by the effluxion of time. The three months' notice requirement stipulated by the provision would only apply to any termination of employment that occurs during the subsistence of a contract of indefinite duration or a fixed term contract of 2 years or more. Consequently, we find that the arbitrator erred on this count and that the court *a quo* misdirected itself in upholding the arbitrator's award in that respect.

In the result, the appeal partially succeeds. It is accordingly ordered as follows:

1. The order of the Labour Court is upheld in respect of the first respondent and set aside in respect of the second respondent.
2. The order of the Labour Court is substituted with the following:
 - “(i) The appeal is partially allowed with no order as to costs.

(ii) The appellant is ordered to reinstate the first respondent on the same terms and conditions that applied before his contract of employment was terminated.

(iii) If reinstatement is no longer feasible, the appellant shall pay the first respondent damages in lieu of reinstatement in such amount as may be agreed by the parties, failing which either party may apply to the arbitrator for quantification of damages.

(iv) The appellant is ordered to pay the second respondent cash in lieu of the leave days that accrued to her.”

3. Each party shall bear its own costs in respect of this appeal.

GWAUNZA JA: I agree.

GOWORA JA: I agree.

Atherstone & Cook, appellant’s legal practitioners
Matsikidze & Mucheche, respondents’ legal practitioners