

IN THE LABOUR COURT OF ZIMBABWE

JUDGMENT NO LC/H/02/2014

**HARARE, 23 OCTOBER 2013 &
31 JANUARY 2014**

CASE NO LC/H/156/2013

In the matter between:-

WILBERFORCE CHIMUTIMBIRA

APPELLANT

Versus

ZIMBABWE REVENUE AUTHORITY

RESPONDENT

Before The Honourable D L Hove : Judge

For the Appellant : In Person

For the Respondent : K Renzva (Legal Officer)

HOVE J:

The appellant was employed by the respondent on a contract of employment without limit of time in May 2004. In March 2007 the respondent decided to place all its managerial employees on fixed term contracts. His position and responsibilities as Chief Internal Auditor did not change. The fixed term contract was to run for a period of three years.

The parties agreed in clause 3:1 as follows:-

"You will serve the authority for a period of three years commencing from the first day of April, 2007, and terminating on the 31st day of March, 2010. The contract maybe renewed at the discretion of the authority subject to your satisfactory performance."

In March 2010, the respondent gave the appellant notice of termination of the contract of employment and terminated the contract of employment.

The appellant was aggrieved and challenged the employer's decision. He was not successful and hence this appeal to this court.

The appellant has argued that the contract of employment ought to have been renewed because renewal was subject to satisfactory performance.

The court in the case of ***Chikonye & Anor v Peterhouse 1999 (2) ZLR 329 (S)*** held that even if performance was satisfactory, there is no obligation on the employer to offer a permanent post and it was not relevant to argue that the appellant's service was satisfactory.

The appellant further argues that, the authority had been directed by the Minister to extend expiring contracts. This directive applied to the appellant's expiring contract together with others of his colleagues. The authority took heed of the ministerial directive in relation to all other of the appellant's colleagues. He was the only one whose contract was not renewed. He argues that the ministerial directive was applied selectively as he was the only one whose contract was not renewed.

He further argued that the employer acted in breach of s 12 B (3)(b) of the Labour Act [*Cap 28:01*] ("the Act") which provides that:

"An employee is deemed to have been unfairly dismissed if, on termination of an employment contract of fixed duration, the employee:

- (i) Had a legitimate expectation of being re-engaged;
and
- (ii) Another person was engaged instead of the employee."

So the position in law is that where a fixed term contract expires the only circumstances that would oblige an employer to re-engage is where; the employee had a legitimate expectation to be re-engaged and another person was engaged instead of the employee.

The appellant must therefore show that the criteria set out in terms of s 12B (3)(b) has been satisfied.

The appellant argues that he had a legitimate expectation in that:

- (i) There was a ministerial directive that expiring contracts be renewed.
- (ii) Further he believed and showed that he had performed well.

He referred the court to the case of ***Administrator, Transval v Traub (1989) 10 ILJ 823 (A)*** wherein the court explained the doctrine of legitimate expectation as follows:

"The implication of the doctrine of legitimate expectation is that, if a decision maker, either through the application of a regular practice or through an express promise, leads those affected legitimately to expect that he or she will decide in a particular way then that expectation is protected and the decision maker cannot ignore it when making the decision."

It was further submitted that the legitimate expectation need not be shared by the employer. The employee must be able to demonstrate an objective basis for that expectation.

In *casu* the appellant argued that because he had performed well, then he legitimately held that expectation.

The case of **Chikonye** (*supra*) however, does not accept that good performance can be a good basis for holding a legitimate expectation where the contract of employment state that the contract "may" be renewed.

The case of **Administrator, Transvaal** (*supra*) also states that the employer ought to have itself, either through the application of a regular practice or through an express promise led to the expectation.

In *casu*, nothing is alleged to have been done or said by the authority to justify the holding of that expectation.

The case of **Dierks v University of South Africa**, relying on **Mediterranean Wollen Mills (Pty) Ltd v SA Clothing & Textile Workers Union** held that the wording of a contract is not sufficient to exclude a legitimate expectation but regard should be had not merely to the specific terms of the fixed term contract and the formal legal principles involved, but to the specific context of the particular refusal or failure to renew. All the surrounding circumstances and particularly, the conduct of the parties.

The circumstances of this case are such that there is nothing on the part of the employer's conduct that can be pointed out as having been the one to cause the appellant to have a legitimate expectation.

The persuasive case of **Cremerk Division of Triple P - Chemical Ventures (Pty) Ltd v SACWU (1994) 15 ILO 289 (LAC)** which held that the termination of a fixed term contract of employment is no different from a termination of a contract on other grounds, i.e., misconduct in capacity etc where it is

required that the termination must have been both procedurally and substantively fair/justified. Further, the court in that case also held that the employer does not have an unfettered discretion to renew or not renew whatever the reason might have been substantive and procedural fairness is always a requirement, even if you want to cancel a fixed term contract. There is always need that the administrative action be fair, reasonable and non-arbitrary.

The appellant argues that this approach has been accepted in our jurisdiction in the case of ***Minister of Information, Posts & Telecommunications v PTC Managerial Employees Workers Committee SC 24-99*** where the Supreme Court said that, legitimate expectations include expectations which go beyond enforceable rights provided that they have some reasonable and rational basis. The expectation in *casu*, being based on the ministerial directive deserves the protection of the court.

The PTC case (*supra*) does not tie the existence of a reasonable expectation to what the parties themselves did or gave the other party reason to believe but that there must be a reasonable and rational basis for it.

The cases of ***Metsoki v Chairman of the Public Service Commission & Anor 1989 (3) ZLR 147 (S)***; ***Health Professions Council v McGown 1994 (2) ZLR 329 (S)*** acknowledge the fact that a legitimate expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice.

The case of ***Makromed (Pvt) Limited t/a Catecho Enterprises v Medicines Control Authority of Zimbabwe HC-1247-2010*** the court accepted that a legitimate expectation may arise from an express promise given on behalf of a public authority.

The court in *Health Professions Council v McGown* (*supra*) has stated that the legitimate expectation doctrine as enunciated in *Traub*, extends the principle of natural justice.

The Minister issued a directive which gave rise to the legitimate expectation and that directive was expressly given on behalf of the authority and this should bind the authority as the applicant did hold a legitimate expectation based on that express directive issued on behalf of the public authority.

The several Supreme Court cases that state that a fixed contract expires by effluxion of time can thus be distinguished on the basis that the issuing of an expressly given directive by a Minister of Government on behalf of a public authority as was the case in *casu* gives rise to a legitimate expectation.

This however, is not the only requirement to be satisfied in terms of s 12 B of the Act. There is a second requirement that someone else was engaged instead of the employee.

The authority submitted that no one else was employed instead of the appellant.

The appellant has shown that when the authority decided not to renew his contract, they proceeded to advertise for the recruitment of a Chief Internal Auditor in the Sunday Mail of 21 March 2010 and on 31 March 2010, the day of the appellant's dismissal, another person was engaged in an acting capacity. The appellant also referred the court to the ZIMRA supplement of 1 April 2011 which shows that the authority did employ a Chief Internal Auditor in the appellant's place.

I am satisfied therefore that the requirement of s 12 B of the Act were in this case satisfied.

The appellant had a legitimate expectation arising from the ministerial directive which bound the authority as a public company and was issued expressly on behalf of the authority and secondly, the appellant has also managed to prove to the court that someone else was engaged in his place.

In the result, I make the following order:

1. The appeal is upheld with costs.
2. The respondent's decision to terminate and not renew the appellant's contract is set aside.
3. The appellant is to be re-instated into his position with no loss of salary or benefits.
4. Should re-instatement no longer be tenable, the appellant is to be paid damages in *lieu* of re-instatement.
5. In the event that the parties fail to agree on damages payable in terms of paragraph 4 above, either of the parties can refer the matter to the Labour Court for quantification.

L HOVE
JUDGE - LABOUR COURT