THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

MBEYA DISTRICT REGISTRY

AT MBEYA

LABOUR REVISION NO. 19 OF 2021

(Originating from Labour Disputed No. CMA/MBY/129/2019)

Between

HJF MEDICAL RESEARCH INTERNATIONAL INC. .....APPLICANT

VERSUS

EMMA BASIMAKI & 32 OTHERS .....RESPONDENTS

JUDGMENT

Date of last order: 16th August, 2022

Date of judgment: 13th September, 2022

NGUNYALE J.

The applicant above named filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration henceforth "CMA" delivered on 30/04/2021 by Hon. Ndonde, Arbitrator. What is discerned from the record is that the applicant was the employer of the respondents on fixed term contracts of one year from September, 22nd and 23rd, 2018 to September, 21st and 22nd 2019. Prior to this last contract

there had been previous renewal. In 2nd August, 2019 the applicant issued notices of non-renewal of the respondents' contract.

At the end of their contract, the respondents at different time lodged a complaint with the CMA alleging unfair termination grounded on reasonable expectation of renewal of their contracts. Their complaints were consolidated as CMA/MMBY/128/2019/AR.70.

In the CMA the respondents' claim was unfair termination grounded on reasonable expectation of renewal of contract vis previous renewal and employer's undertakings. The CMA upon hearing the parties found the respondents were unfairly terminated and awarded compensation of twenty-four months. Aggrieved by the CMA's award the applicant has filed the present application predicated mainly on two issues namely;

i. *Whether there was reasonable expectation of the renewal of Respondents' employment contract.*
ii. *What are the reliefs are parties entitles to?*

When the application was called on for hearing, the applicant was represented by Jonathan Lulinga whereas the respondents had the service of Isaya Mwanri, both learned advocates. By consensus disposal of the application was by way of written submission, dutifully they both complied with the Court order.

Submitting on whether there was reasonable expectation of renewal of the contract Mr. Lulinga submitted that the fixed term contract expires on the date mentioned in the contract and in this case the applicant undertook to notify the respondents of her intention not to renew the contract through exhibit P2 collectively. He referred to Rule 4(2) of the employment and labour relations (code of good practice) rules, G. N. 42 of 2007 and cited the case of **National Oil (T) Limited v Jaffery Dotto Msensemi & 3 Others**, Revision No. 558 of 2016 in which it was held that where the contract is of a fixed term, it terminates automatically when the agreed period expires.

On reasonable expectation of renewal of the contract, it was submitted that the expectation must be legitimate. Amplifying he submitted that in contracts, exhibit P1 and D1 collectively there was neither terms on renewal of the contract nor any agreement which varied the terms of the contract. He added that previous renewal is not an absolute factor to be considered. On this the case of **Rosamistika Siwema (Administrator of the Estate of Joseph Mandago v Add International Tanzania,** Revision No. 498 of 2019 to support the argument.

It was further submitted that even if such expectation existed, it was extinguished upon being served with notice of none-renewal of the

contract to the respondents. He cited the case of **Board of Trustees of the Medical Store Department v Robert Njau,** Revision No. 621 of 2019 and **HJF Medical Research International Inc. v Daudi Vicent & 2 Others,** Revision Application No. 05 of 2021, in which it was held that any expectation created by previous renewal or employer's undertakings were rebutted by the notice of non-renewal.

On existence of bank loan of the respondents where the applicant guaranteed them to be their employees, Mr. Lulinga submitted that the applicant is not privy to that agreement. He added that even if that was a point it applied only to four respondents who had a loan with NBC Bank.

Regarding e-mail of Dr. Chintowa which informed the respondents that they had secured the project with Home Affair America and assured them further five years employment, Mr. Lulinga submitted that it did not amend terms of contract. The case of **HJF Medical Research International Inc.** (supra) and **Paul James Lutome & 3 others v Bollore Transport and logistics Tanzania Ltd,** Revision No. 347 of 2019 were cited. He added that such expectation was rebutted by being served with notice of non-renewal.

On letter of offer issued to employees on their first appointment, it was submitted that in such offer it is provided that the renewal shall be in writings which was not the case in the matter at hand.

Regarding compensation ordered to be paid, Mr. Lulinga submitted that if indeed there was any such reasonable expectation the compensation was supposed to be for twelve months and not twenty-four as the arbitrator did.

In rebuttal, Mr. Mwanri submitted that where the employer fails to renew the contract of the employee who had reasonable expectation of renewal under section 36(a) of the Employment and Labour Relation Act read together with rule 3(1)(c) and 4(4)(5) of the Employment and Labour Relations (Code of Good Practice) Rule, G.N. 42 of 2007 it amounts to unfair termination.

Replying on expectation the respondents had, Mr. Mwanri submitted that the previous renewal and employer undertakings must be considered. He cited the case of **National Oil (T) Limited(supra), Revin Raphael Gigambo v Dangote Industries Ltd & Another**, Application for Labour Revision No. 14 of 2019 and **Ariel Glaser Pediatric Aids Healthcare Initiative (Agpahi) v Amos Hakin Sheha**, Revision No. 245 of 2020, in which it was held that undertaking made by the applicant,

established that, despite the fact that the applicant had sued an email to all respondents intimating its intent of not renewing their employment agreements the respondents had already formed reasonable expectation of renewal of their employment agreements.

Amplifying on undertaking made by the applicant Mr. Mwanri referred to **one;** offer of employment exhibit P1 which provided that renewal or extension of the contract will be made in writings and agreed by authorised representative of HJFMRI.

Two, securing the extension of the project which its reference is made in the respondents' contract. **Three**, use of curriculum vitae of PW3 exhibit P8 to secure the extension of the project. He cited the case of **Ariel Glaser Pediatric aids Healthcare Initiative (AGPAHI) (supra).**

Four, email from Dr. Chintowa exhibit P4 which assuring the respondents employment for next five years. **Five,** use of financial year of 2020 in the notification, it was submitted that the letter of non-renewal of the contract referred to the financial year of 2020 and not 2019 in which the respondents were terminated.

Six, enunciation of the retrenchment process that the applicant initiated the retrenchment process but suddenly changed and served the

respondent with letter of non-renewal of the contracts which meant he waived her right of non-renewal.

Seven, advertisement of the same posts held by the respondents it was submitted that in the notification letter the reason was cessation of the posts in the institution but after the end of the respondents' contract the same position was advertised referring to exhibit P9.

Eight, existence of loan to the bank. That the respondents had loan with NBC which was guaranteed by the applicant beyond respondents' contract. He added that so long as the loan had to be paid through salary of the respondents, there was reasonable expectation that their contract could be renewed. Here the case of **Ariel Glaser Pediatricaids Healthcare Initiative (AGPAHI)** (supra) was cited in support of the argument.

Nine, ongoing renewal process. It was submitted on 11/6/2019 the respondent received email from Eric notifying them renewal of their contracts. Mr. Mwanri added that all these were undertakings created by the applicant which made the respondent to have reasonable expectation of renewal of their contracts.

Mr. Mwanri distinguished all authorities referred by the applicant's counsel to the effect that notice of non-renewal did not water down reasonable

expectation which had already been formed by the respondents as it was not stipulated in their contract. As for the case of **HJF Medical Research International Inc. v Daudi Vicent & 2 Others** it was submitted that facts are deferent and in the case at hand there were multiple strong reasons which created expectation of renewal.

On whether the arbitrator was justified to award 24 months compensation Mr. Mwanri submitted that unfair termination was established hence the arbitrator could go beyond the period of the contract.

In rejoinder, Mr. Lulinga Made similar argument in most of aspects. Regarding offer letter providing room for renewal, it was submitted that it was not so expressly and it was conditional upon being agreement between the parties.

On issue of CV being used to secure the project, it was argued that it was not an issue in the CMA and there was no concreate evidence to establish the same. He added that there was no cross revision if the respondents were not satisfied with the finding of the arbitrator. Haltering retrenchment process it was submitted that the same cannot be used as a basis of creating reasonable expectation. Regarding reason for non-renewal as discerned in notification letter it was argued that the same was not in dispute in the CMA and no findings was made.

On email of Eric Black on renewal exercise it was submitted that there was no evidence that the respondents held the position in HR and Administration department for which their contract were to be renewed.

I have considered the submission for and against this application. The determination of this application will be restricted to only two issues illustrated at the beginning of this judgment.

In this application there is undisputed fact that the disputants had fixed term contract on one year to end in September, 2019. Again, it is undisputed fact that the respondents were notified on non-renewal of their contract. The only dispute is on whether the respondents had reasonable expectation of renewal of their contracts. From the above it is pertinent to have glance on some of the principles. The first is that principles of unfair termination do not apply to fixed term contracts, unless it is established that the employee had reasonably expected a renewal of the contract. See the case of **Asanterabi Mkonyi v Tanesco,** Civil Appeal No. 53 of 2019 (unreported).

The second principle is that the contract the parties sign has to be respected in its letters and sprits, the terms of the contract are relevant in the determination of whether non-renewal of a fixed-term contract constitutes a dismissal. That is so because the contract itself indicates the

intention of the parties. In the case of a fixed term contract, the intention of the parties is that the contract and employment relationship terminate on the date mentioned therein.

The third principle is that where an employee challenges the fairness of termination on the grounds of reasonable expectation of renewal of a fixed term contract, in terms of rule 4(5) of the Rules, it is the employee who assumes the duty to prove the basis of his expectation and this cannot be said to be a shift of the burden of proof as it is an elementary principle that he who alleges is the one responsible to prove his allegations. The employee has to show that despite the contract of employment having been one for a fixed term, the employer had acted in a manner upon which the employee could have formed a legitimate expectation to be re-engaged. See the case of **Ibrahim Mgunda & 3 Others v African Muslim Agency**, Civil Appeal No. 476 of 2020, CAT at Kigoma (Unreported).

This court will be guided by the above principles in resolving the burning issue in this application. In terms of section 36(a)(ii) of the Employment and Labour Relation Act read together with rule 3(1)(c) and 4(4)(5) of the Employment and Labour Relations (Code of Good Practice) Rule, G.N. 42 of 2007 failure to renew contract if there was reasonable expectation of

renewal it amounts to unfair termination. There is the issue that notification letter of non-renewal extinguished the expectation of renewal. In reply it was submitted issuance of notice does not automatically extinguish reasonable expectation.

I have considered the arguments and read the cases cited. Issuing notice for non-renewal of contract was not among the terms of the contract. The question as to why did the applicant served the respondents with such notice leaves raises a lot of questions than answers. So long as there was no such requirement the issue whether it extinguished expectation of renewal or otherwise has to be looked at the whole circumstances of the case.

Starting with the issue of previous renewal, with respect to the respondents' counsel it is the settled law that previous renewal is not the absolute factor in determining legitimate expectation of renewal. There are other factors which must be considered and it depends with circumstance of each case. See the case of **Ibrahim Mgunda & 3 Others v African Muslim Agency**, Civil Appeal No. 476 of 2020, CAT at Kigoma (Unreported).

In her award the arbitrator was clear that the contracts had no clause for renewal of the contract but offer letter had. Having considered the offer

letter the arbitrator found that contracts are those which were to be agreed in writings and not expectations.

The above reasoning of the arbitrator was supported by the respondents' counsel. This court has found it necessary to look on the term offer letter and contract. The term offer letter is defined as a document given to the employee by the employer at the time when they get selected for the job. It is an offer for employment which in essence can be accepted or rejected.

Whereas the term contract is defined in terms of agreement section 10 of the Law of Contract Act [Cap 345 R: E 2019] define the term agreement, it provides that

> *'All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.'*

From the above it is clear that offer letter is not a binding document, so long as parties in this matter signed a contract which is binding on both parties, no reference can be made to offer letter unless the contract expressly provided so. I have gone through exhibit P1 contract of employment and found nothing making reference to offer letter, therefore the renewal of the contracts has to be interpreted in the context of the contract and surrounding circumstances of the case.

Having studied the circumstance of this case previous renewal cannot be the sole ground for the respondents to has legitimate expectation of renewal of their contract. Reading exhibit P1 collectively the court have found nothing suggesting the mode under which their contract could be renewed or otherwise. In addition, even requirement of notices for non-renewal is not among the requirement in the contract. On that basis it is hard for the court to hold with certainty that respondents had reasonable expectation of renewal of their contract based on previous renewal. This is for obvious reason that even the modality of previous renewal was not forthcoming in evidence. What the court gathered is that the respondents on previous renewal continued to work after end of their contract and signed contracts later which is not the case here.

This brings the court to employers' undertakings which has been submitted to create reasonable expectation on party of the respondents;

On extension of the project, I have gone through exhibit D1 and P1 they all make reference to Walter Read Southern Highlands HIV Program in Mbeya of which there is no forthcoming evidence that it was extended. Evidence in record make reference to Cooperative Agreement between HJF Home Office America and HJF MRI Tanzania. In the contract exhibit P1 collectively clause 1.2 expressly provides that the contract could

automatically terminate upon termination of the Walter Reed Southern Highlands HIV Program in Mbeya Tanzania. In the premises the contract of the respondents did not whole depend on any project carried out by the applicant. Even the CA being referred was not tendered into evidence.

Cessation of post in the organisation, going through evidence it is not clear on post held be each respondent. The respondent relied on exhibit P9 in which post of associate director, community service was advertised of which were not told was held by who. There is lack of evidence that the posts they held was advertised and granted to another person. More importantly all application were to be submitted before/on 20th may, 2020, long after the respondents' contract had ended. Advertising a post cannot be said to have created expectation of renewal because it was done while respondents had no contract of employment with the applicant.

Regarding the email of Dr. Chintowa, it was submitted by the applicant's counsel that it did not amend terms of the contract. In reply it was argued that the respondents were assured of employment for five years.

The court has perused exhibit P4 email dated May, 2018. Upon thoroughly scrutinising the email the court has discovered that it was communicated before entering the contracts under discussion with the respondents. That is the Cooperative Agreement was secured by the applicant in May, 2018

while the respondent signed contracts in September, 2018 to end in September, 2019. Making reference to it is like resurrecting graves. The respondents cannot be heard to complain that they had expectation of renewal based on the email notification beyond the date of their contracts.

Use of respondents' Curriculum Vitae to secure the Cooperative Agreement, the project under discussion was secured by the applicant in 2018 long before even the respondents' last contract had been signed. Despite the knowledge that their CV had been used to secure the five-year project, the respondents agreed to sign the one-year fixed contract. The respondents are bound by terms of the contract they freely signed which is clear that their employment could exist for one-year regardless availability of the project.

Presence of bank loan which was to end in 2020. It was the applicant's contention that the type of loan was non-guarantor hence it could not be treated to create reasonable expectation. In reply it was argued the loan was to be paid through respondents' salary although the contract was to end in 2019, they expected the same to extend to 2020 presumably at the end of their loan contract with the bank.

Having considered the argument, it is the established practice that once the employee takes a loan to be secured and paid through salary the

employer has to guarantee that the employee will continue to work until the whole loan is repaid. In this matter it is undeniable fact that the applicant guaranteed the loan of the respondents to be paid through salary and signed the contract on part to be signed by the employer. Going through exhibit P6 it is clear that they were signed in June, 2018 way back before the last contract had been signed. Without hesitation the applicant read the contents of the loan agreements and committed herself that the payment could be made through deduction from the salary until its completion. Indeed, any reasonable man place at the position of the respondents would have expectation of working until the loan is full repaid.

The applicant argued that only four respondents had bank loan agreement, and therefore if I understood her are those who could only have created reasonable expectation. Indeed, the argument looks attractive but it lacks basis because there were no criteria which was used in confirming loan to the respondents. On this the expectation was genuine.

Coming to renewal approval, reference is made to Eric Black emails. The applicant's argument was that there was no agreement to renew the contract and notice extinguished the expectation if they had any.

In reply it was argued that Eric Black was a senior operation director and approval of budget holder operation and used signed some of the respondent's contract on behalf of the applicant.

From the argument the applicant has not disputed that there was continuous exercise of renewing respondents' contract being chaired by Eric Black. Emails dated 4th, 5th and 11th June, 2019 were received without objection from the applicant and also during cross examination the witness was not cross examined on this aspect. It is trite law that failure to cross-examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence. See **National Microfinance Bank Ltd (NMB) vs Neema Akeyo**, Civil Appeal No. 511 of 2020, CAT at Arusha (Unreported) where the court stated;

> *'Besides, as the appellant did not cross-examine the respondent on the question of being discriminated by the employer, that means the appellant admitted what was asserted by the respondent in the evidence which is settled law in our jurisdiction.'*

During rejoinder Mr. Lulinga tried to submit that there was no evidence that the HR and Administration officer for which there was renewal process was held by the respondents. This court has found that raising the argument at this stage is just like a kick of a dying horse. Accordingly,

the argument is rejected, I take as accepted truth that there was ongoing approval of the respondents' contracts.

Regarding the second issue of compensation of twenty-four months, it was submitted by the applicant that they ought to have been given twelve months while in reply Mr. Mwanri submitted that so long as unfair termination was proved the arbitrator has power to award compensation above the tenure of the contracts.

Remedies for the unfair termination from employment are regulated by section 40 (1) of the ELRA and the Mediation and Arbitration Rules. While section 40 (1) of the ELRA vest upon the CMA and the Labour Court with discretion to make award of compensation which is not less than twelve months' remuneration. The arbitrator or the Labour Court has discretion to decide on the appropriate award compensation which could be over and above the prescribed minimum. However, the discretion must be exercised judiciously taking into account all the factors and circumstances in arriving at a justified decision. Where discretion is not judiciously exercised, certainly, it will be interfered with by the higher courts. The circumstances upon which an appellate court can interfere with the exercise of discretion of an inferior court or tribunal are **one,** if the inferior Court misdirected itself; or **two,** it has acted on matters it should not have

acted; or **three,** it has failed to take into consideration matters which it should have taken into consideration and **four,** in so doing, arrived at wrong conclusion. See **Pangea Minerals Limited vs Gwandu Majali** Civil Appeal No. 504 of 2020, CAT at Shinyanga (Unreported).

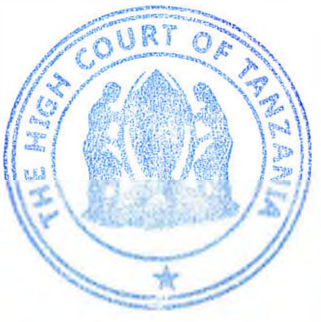
In the award the arbitrator awarded twenty-four months compensation on the reason of unfairness in the respondents' termination was great and that their remuneration was derived from their last contract. I have considered the reason advance by the arbitrator and found that the term unfairness was not elaborated in which context it was being referred. Although, the arbitrator was aware that the last contract was for one year but awarded twenty-four months compensation which I find it was not judiciously.

In the CMA there was no evidence that the contract could have been renewed beyond one year for a reason that even the respondents did not adduce evidence for how long they expected their contract to continue being renewed. The issue whether the termination was substantively or procedurally fair did not arise for purpose of calculating severance of compensation to be paid. It is on record that the bank loan the respondents had was to end in June, 2020. Also, evidence on ongoing renewal did not come clearly out for how long the same were to be

renewed. The circumstance of this case warrants the court to interfere with the discretion on award of compensation awarded by the arbitrator. Consequently, the award of twenty-four months compensation is set aside, twelve months compensation will meet the end of justice.

In the upshot the application is dismissed save for the award of compensation to the respondents as discussed above. This being labour matter each party to bear own costs.

DATED at MBEYA this 13th September, 2022



D.P. Ngunyale
Judge.