IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

LABOUR REVISION NO. 71 OF 2022

(C/f Labour Dispute No. CMA/ARS/40/22/14/22)

FRANSALIAN HEKIMA SECONDARY SCHOOL _____ APPLICANT

AND

PERUTH WILLIAM KAHABI _____ RESPONDENT

JUDGMENT

19/07/2022 & 22/09/2023

BADE, J.

The Applicants have filed four grounds of Revisions having been aggrieved by the decision resulting from Labour Dispute No. CMA/ARS/40/22/14/22 before the Arbitrator, Hon Mwebuga.

Through the affidavit sworn and filed by one Sijo John, who proclaims himself a school director, enumerated five grounds of grievance in his afiidavit, forming the basis for his application calling this court to revise and set aside Hon Mwebuga's award for being irrational and improper, to wit:

i) The Hon Commission erred in law and fact by ordering the Applicant to pay compensation for breaching of contract to the respondent (sic) without take note(sic) that the respondent have stated in clearance certificate that they don't owe anything with regards to my job from the school administration.

ii) That the arbitrator was (sic) erred in law and in fact as it had ruled that the applicant was not give reason (sic) of ending of contract.

iii) That the arbitrator was (sic) erred in law and in fact as it had ruled that by the applicant to write mere name of the respondent (sic) in Academic Roaster for the year 2022 shall be a reason (sic) for extension of employment contract while the applicant issued a notice and letter of non renewable (sic) of the employment contract before 2 month period (sic) of ending of the contract (sic)

iv) The Hon Commission erred in law and fact for failure to properly evaluate the evidence on record.

When the Application was called for hearing, both parties were represented, with the Applicant enjoying the services of senior counsel

Lengai Loitha and the Respondent represented by Advocate Kenneth Ochina.

Arguing ground one, the Counsel for the Applicant contends that the CMA ordered compensation for breaching the contract, while there was no breach but rather the contract lapsed, and parties including the Respondent were satisfied at the said effluxion.

He submits that at the hearing, DW1 tendered 3 exhibits which are Clearance Certificate issued to the applicant, Annual Leave Form and a letter written by the Respondent dated 3/12/2021 acknowledging that the procedure was according to the law. These documents all implied that the procedures were followed and that he had no further claim from the Applicant. So it is his argument the Respondent is bound by her own statements and having the matter filed at the CMA is an afterthought.

He made reference to the case of **Pendo Yona Majigile vs John Chimile Lubambe,** Land Appeal No 27 of 2020, where the Court emphasized that parties are bound by their pleadings.

He argues that he finds no basis for the CMA to order compensation while the termination was not a breach of contract but rather a lapse of contract by effluxion of time. He urges that this case is fictitious and without any basis and made reference to the case of **South Nyanza**

Conference Kanisa la Wadvenstist Wasabato vs Samson Kimume, Labour Revision No 42 of 2020, holding that a fictitious case attracts costs.

Arguing the second Ground of Revision, where the complaint is that the Applicant did not give a reason for ending the contract. He reckoned that the applicant had issued notice and the letter in which it was contained was clear that the contract is ending on the effluxion of time and that the same will end on 27 October 2021 giving two months' notice until the end of the contract. The respondent was well aware that the contract was ending, and she should have anticipated such an ending. He made a plea that the Applicant understands the law of the land to require that on a fixed period contract, the employer is not to follow the normal applying procedures of termination, making reference to the case of **International School of Tanganyika vs Stephen Mnubi and Ano**r, Labour Revision No 913 of 2019.

In further argument, he backed up his stance by referring to the holding by Kamuzora, J. in **Fransalian Hekima vs Faraja Rubangula,** Revision No 61 of 2020 explaining that circumstances are quite different if the contract is terminated before the contract period on a non-renewable contract. Since there was no proof of any reasonable

expectation of renewal, the applicant had no other reason to notify that they will not be renewing the contract with them.

The counsel insists that there being no expectation of renewal is pertinent since it is stated that if a contract is a fixed period contract, there is no need to issue the notice as the contract is explicit on the ending clause. Despite this being the prevailing condition, the applicant still issued notice to the Respondent quite contrary to the arbitrator's finding and award at the CMA. He thus urges that this ground be found with merit.

On the third ground of the Revision Application that the writing of the name of the Respondent on the Academic Roster be made the reason for the renewal of the employment contract, it is his view that the timetable is much like a diary which is a functional tool directing on how the respondent will perform its various duties. This does not give any expectation of further renewal since they had already issued notice. The contract was supposed to end on 31st December 2021. The roaster was issued covering all the way to the end of 2022.

He contends that the roaster was tendered by the respondent and despite their refusal for its admission in evidence, the said document had formed part of the record of the CMA. The counsel insists that the

said roaster did not give any expectation of renewal of the employment contract since notice was already issued to the Respondent, was paid all her dues, and did not put in any work on the basis of the said roaster as presented or at all.

Regarding the fourth ground that there was failure by the CMA to evaluate the evidence on record, the evidence confirms that the Respondent had admitted all the while that she had been cleared of her dues by the Applicant, in which case, the trial tribunal should have made a finding that the application before the CMA had no basis, as there was no contravention of any of the procedures.

On a separate note, I was minded to find out if this court is also invited to re evaluate evidence as adduced at the trial tribunal and so I the counsel on whether re-evaluation of evidence is amongst the grounds that are entertained by the law on Employment and Labour Relations Act when preferring a Revision of the CMA award. The counsel explained that since taking of evidence at the CMA was based on the law of evidence, the tribunal should have been guided to see that the evidence adduced was on preponderance on the side of the Applicant, and should not have found for the Respondent.

The respondent was also prompted to address the Court on the said item and responded that the applicant has not shown which evidence has not been evaluated. He insisted that the CMA evaluated all the evidence, and this court could too, and rightly found for the Respondent.

In responding to the Applicants, the counsel for the respondent proposed to address the 3 points of contention generally and together.

So arguing grounds 1, 2, and 3, he reckons that the issues that the CMA addressed itself on consideration of the dispute were two; that is one whether there was a breach of contract, and two, reliefs that parties are entitled to if there was found to be breach of contract. The applicant claimed that the respondent acknowledged, and accepted the termination, as a result of which she was paid her dues. He points on the 3rd page of the CMA award, the Arbitrator directed himself and made a finding on whether an employee could be terminated on a clause of a fixed term contract without following any procedure.

While the Applicant provided the respondent with notice of the ending of the contract, they went ahead and issued a roaster that included the respondent. The counsel for the respondent explained further that the respondent had previously worked for 3 years on an employment contract of the same nature, which is a one-year contract renewable,

being given notices and being made to work after the notices, which brought out a reasonable expectation of renewal of the contract.

Counsel for the Respondent referred the court to the case of **Dennis Kalau Said Mgombe vs Flamingo Cafeteria,** Labor Revision No 210 of 2010 [Labour Court Digest 2010 -2021] – where the court said

> " ..... by giving notice the parties had reasonable expectation of renewal. It was for the employer to terminate by giving reasons because a reasonable expectation had been formed.

The roaster had added more subjects to be covered by the respondent for the coming academic year compared to the previous one, which bring about the expectation of renewal. He thus urged that the CMA award was right and should be maintained by the Court.

He further explained through the principle as guided by the Court of Appeal in S**t Joseph Kolping Sec School vs Alvera Kashushura,** Civil Appeal No 377 of 2021, that Notice is not the reason for termination, but rather a mode. Unless the termination is based on disciplinary grounds, it is expected of the employer to give reason (s) why they are terminating the contract, not a mere notice.

In his view, the respondent in the instant case had the expectation of renewal, as she worked under the same circumstances previously, but this time choosing not to renew the said contract, without the applicant assigning any reasons for the non-renewal, and having given out the academic roaster for the year 2022. So they cannot fault the arbitrator for awarding the respondent TZS 7,440,000.

He urged the Court to confirm the award by the CMA and dismiss the Revision Application for lack of merit.

Rejoining, the Applicant's counsel reckoned that the **St Joseph Sec School's case** as well as the **Dennis Kalua's case** both supported the applicant's case as the Court in those circumstances, had a premature end of the contract. He discerns that in the instant case, the contract came to an end and thus was not prematurely ended, the applicant had not only given notice but also assigned the reason for non-renewal, which is the end of the contract.

Rejoining on the issue of the respondent having an expectation of renewal, the counsel for the applicant was of the view that since the Applicant had paid all her dues to the respondent, she should not have had any further expectation of renewal as this was not the norm in the

previous years when the contract had elapsed, insisting that her dues were not paid then.

So he maintains that it is the applicant's position that there is no breach of contract as the law was followed. He relies in emphasis on the **St Joseph Kolping Case**, where on p14 the court elaborate on the position that "…. A pre-mature fixed term contract cannot be terminated without assigning a reason". Distinguishing the circumstances of the instant case, where the contract in this case had actually come to an end, concluding that the issue of assigning a reason for ending a pre-mature contract like in the above case does not arise.

He reiterated his prayer that the Revision Application be found with merit and be allowed.

After hearing the submissions by both parties, it became apposite to determine the issue before me, which is whether the termination by the employer, of the fixed-term contract of employment was fairly based on reasonable expectation test.

A fixed-term contract in an employment relationship is expected to terminate when the time expires. However, there could be circumstances that may necessitate renewal of the fixed term contract which can be

provided under the contract of employment or actions of the employer as evolved even after effluxion of the contract by necessary implication.

In this instance, a fixed-term contract raised a presumption of legitimate expectation of renewal of the contract in subsequent year after the expiry of the term. This presumption is rebuttable on the instance of the employer and the test is an objective one on the employee. In my view, as gathered from the authorities and the pertaining position of the law, the conditions are 1) there has to be a fixed term contract between parties which has expired 2) the same contract had been renewed severally by the employer likely on the same terms and conditions, 3) existence of presumed affirmative actions towards expectation of further renewal of the said contract. See **Viettel Tanzania Ltd vs Esther Ndudumizi**, Labour Revision No. 9 of 2019, **Paul James Lutome and 3 others vs Bollore Transport and Logistics Tanzania Ltd** (Labour Revision No. 347 of 2019) [2021] TZHCLD 3 (TANZLII), **Dennis Kalau Said Mgombe vs Flamingo Cafeteria** (supra) to name but a few.

Expounding further, there must be evidence adduced by the employee which proves the basis of the said expectation to be seen as legitimate. It is understood that in law, the existence of fixed-term contract of employment alone does not create a legitimate expectation of renewal.

Further, once a fixed-term contract comes to an end, the employer has no obligation to justify the termination of the contract, as the contract terminates automatically by effluxion of time. This is so unless the employer had made some representation or promise that the employment contract would be renewed to be relied upon by the employee as a reasonable legitimate expectation of renewal.

So then from it, the question becomes whether a reasonable employee under the circumstances prevailing in her employment would have expected the employer to renew her fixed-term contract.

The employee here was retained on a fixed-term contract. In my view, the test above can be applied to actions that happened between the giving of notice after the effluxion of the time and payment of dues. The counsel for the Applicant insists that the difference between this time and the other times that the contract ended and then renewed was the payment of the dues. During the other times that the contract came to an end and was renewed, there was no payment to the employee of their dues.

The Respondent's counsel on the other hand is arguing that the actions of the employer created a legitimate expectation of renewal in the sense that there was issuance of a yearly roster that assigns duties to the

teachers. The roaster in question, Exh P3, had the respondent's name on the timetable with classes to teach for the next academic year 2022.

Several facts are uncontested by the applicants, including the fact that the respondent was employed by the applicant on a one-year fixed-term contract, she was issued with notice of non-renewal as well as paid her dues that had accrued upon the said non-renewal of her contract. Also in evidence at the Commission for Mediation and Arbitration, there was Exh P3 – an academic roaster that had the respondent's name in it. As a matter of fact, page 2 and 3 of the typed proceedings records the testimony of the respondent/complainant then thus:

"..... S: kwa nini unasema mkataba ulivunjwa

J: kwa kuwa nilikuwa nimeshapangiwa vipindi na nilikuwa nimeshapewa masomo ya kufundisha mwaka unaofuata wa 2022

S: Una uthibitisho

J: Ndio, Exh P3

S: Class Journal ziko wapi

J: Ni mali ya mwajiri hivyo anayo

S: Mwaka 2022 ulifundisha

J: Ndiyo"

Upon being cross-examined, the complainant then further explained:

"S: Katika mkataba kuna sehemu inasema ukiona upo kwenye ratiba basi mkataba umehuishwa

J: Hakuna ila ni utamaduni wa ofisi hiyo

S: Ulikuwa na mkataba wa muda gani

J: Mwaka mmoja na unaisha baada ya mwaka

S: Kama usipotaka kuendelea unafanyaje

J: Unaijulisha Ofisi kwa maandishi"

In this regard, I think it can be discerned from the testimony of PW1, and the same was not successfully controverted, that the legitimate expectation was formed based on previous conduct of the employer where the employee was accustomed for things to happen in a certain way, particularly compounded by the issuing of an academic roaster with the respondent's name in it.

From the record of the testimony, it is thus necessary to be grounded on the provision of the law where section 36(a)(iii) of the Employment and Labour Relations Act 2004 as revised, defines termination of employment to include a failure to renew a fixed-term contract on the same or similar terms if there was a reasonable expectation of renewal.

Also pertinent, is finding if the employee satisfied her duty to adduce evidence showing that she indeed had a reasonable expectation of renewal of her fixed-term employment contracts. In my view, the employee has satisfied this duty as put forth by law under Rule 4(5) of Employment and Labour Relations (Code of Good Practice) G. N. No 42/2007 that:

> *"where a fixed term contract is not renewed and the employee claims a reasonable expectation of renewal, the employee shall demonstrate that there is an objective basis for expectation such as previous renewals, employer's undertaking to renew"*

In **Asanterabi Mkonyi vs Tanesco,** Civil Appeal No. 53 of 2019 (unreported), while defining the phrase "reasonable expectation of renewal" the Court of Appeal sought inspiration from the South African case of **Dierks vs University of South Africa** (1999) 20ILT 1227 in which, though not specifically defining the phrase, the court had set the criteria for determining whether a reasonable expectation of renewal had come into existence pursuant to section 186(b) of the Labour Relations Act 66 of 1995, (with our apex Court approving the holding) that:

"A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeals Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice and nature of the employer's business."

In the instant case, the employee had continued to serve the employer after the issuance of the roaster, and I find that fact to be determinant of the legitimate expectation of renewal in the following aspects; **one**, it was in the employer's custom to renew the contracts upon its effluxion despite the notice informing that the contract has come to an end these being one-year contracts, **two**, the employee would proceed to offer her services and the contract will follow as it is renewed and signed for another similar term, a fact that has happened for all the past three years period comprised in one year fixed term contract each, **three**, the roaster came out signifying the practice that normally ensues, which had

the respondent's name assigning the same kind of work that she would usually perform for the employer, in similarity to the previous years, **and lastly**, the respondent indeed offered her services in line with the new roaster for the new academic year 2022. In addition, the other persons who were in a similar position with the complainant/respondent were continuing with their work on similar practices.

In **Ibrahim S/O Mgunga And 3 Others vs African Muslim Agency,** Civil Appeal No. 476 Of 2020, the Court of Appeal guided further the test in ascertaining legitimate expectations of renewal through best practices from neighboring jurisdictions, insisting on the objectiveness of the test. In the case of **Medecins Sans Frontiers (MSF) Belgium vs Vengai Nhopi and Eleven Others**, Civil Appeal No. SC 278/16, in which the issue was whether an employer's invitation to his former employee for an interview for the same post that the employee held during the subsistence of the fixed contract was a conduct that the employee could act on to form a legitimate expectation of re-employment by the employer. The court held that the onus of proving reasonable expectation rests on the employee, emphasizing that, the employee has to show that despite the contract of employment being 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. Instructively, the court fortified its position, approvingly quoting the observations made by Prof. Lovemore Madhuku, a Zimbambwe-an Politician and Professor of Law at the University of Zimbambwe in his book, Labour Law in Zimbabwe, Weaver Press, 2015 at page 101 where he states:

> *"The test for legitimate expectation is objective: would a reasonable person expect re-engagement? This requires an assessment of all the circumstances of the case. To be legitimate, the expectation must arise from impressions created by the employer."*

I am convinced through the evidence as demonstrated above and fortified with the foregoing authorities that the respondent was objective on the expectation that her fixed-term contract was going to be renewed, and had managed to adduce evidence to show the basis why such expectation was legitimate.

I must also comment before I pen off, on the contention by the Applicant, particularly forming the 2nd ground of revision that since the respondent signed a document purporting to show that the Applicant does not owe the respondent anything and has received all her dues,

then it should have been construed to mean that the claim to CMA that she had a legitimate expectation of renewal is an afterthought. I think this thinking is misconceived because the payment of her dues does not make right a wrong that arise out of the breach of contract founded on the claim on legitimate expectation of renewal of her fixed term contract. As a matter of fact, the arbitrator understood and took into consideration that the respondent was paid her other dues that would accrue on the lapse of the said contract and that is why he did not order payment of such dues. Only the compensation for the unfair termination.

I think the arbitrator cannot be faulted in his finding that the employee was terminated without a fair reason and ordered 12 months' compensation in favor of the employee. The said award from the Commission is upheld. The Labour Revision is dismissed for lack of merit.

This being a labour matter each party shall bear their own costs.

It is so ordered.

A. Z. BADE
JUDGE
22/09/2023

Judgment delivered in the presence of Applicant/their representatives, and the Respondent/Representative this **22nd** day of **September 2023** in chambers. Right of Appeal is also explained.

A. Z. BADE
JUDGE
22/09/2023