

IN THE INDUSTRIAL COURT OF SWAZILAND**HELD AT MBABANE****CASE NO. 320/2005**

In the matter between:

NKOSENHLE BEN KUNENE**APPLICANT**

and

PUBLIC SERVICE PENSION FUND**RESPONDENT****CORAM:****S. NSIBANDE A. M.****ACTING JUDGE****NKAMBULE P.****MEMBER****THWALA****MEMBER****FOR APPLICANT FOR****MR. M. SIMELANE MR.****RESPONDENT****K. MOTSA****JUDGEMENT - 26th MARCH 2009**

1. The Applicant applied to the Industrial Court for determination of an unresolved dispute arising from the termination of his employment by the Respondent.
- 2 The Applicant reported his dismissal to the Conciliation Mediation and Arbitration Commission as a dispute because he considered it to be unfair and unlawful. The dispute could not be resolved, was certified unresolved and a certificate of unresolved dispute issued.

18. The Applicant states in his papers that from 15th July 1998 up to 1st October 2002, the Respondent employed him on various fixed term contracts. These various fixed-term contracts, he says, created a legitimate expectation that he would be employed on a permanent basis. He states that his last contract of service with the Respondent started on 15th July 2002 and was terminated on 1st October 2002. He was earning E-2-500.00 when this contract was terminated. He says it was unfair for Respondent to terminate this contract and therefore seeks payment of notice pay and compensation for unfair dismissal.
19. In his evidence before Court, the Applicant stated that he was first employed by the Respondent on 15th July 1998 until 30th October 1998. A letter of appointment was handed into Court as part of his evidence and specifically states that the Applicant is appointed as temporal data clerk from 15th July 1998 until 31st October 1998.
20. He was employed again from February 1999 until October 1999; again as a data clerk. He states that there was no letter of appointment given to him during this period but that in October 1999 he left the employ of the Respondent. He was again employed on a fixed term contract from 1st June 2000 until 30th September 2000, this time in the benefits department under the supervision of the Claims Manager.
21. The Applicant was next hired by the Respondent from 29th April 2002 until 5th July 2002. His final contract with the Respondent started on 15th July 2002 and ended on 1st October 2002. His letter of appointment dated 17th July 2002, states that he is being offered *"temporary appointment in the administration office. Your salary will be on a monthly basis of E 2500.00 per month starting 15th July 2002. Either party can give 1 day's notice to terminate this arrangement in writing."*
22. No letter of termination was filed, however it is common cause that the Applicant was terminated on 1st October 2002. It was after this termination that the Applicant took issue with his treatment by the Respondent, first with Respondent's Chief Executive Officer and later with the Conciliation, Mediation and Arbitration Commission. The nature of the Applicant's

complaint, which is set out in his papers before Court is that his various temporary appointments by the Respondent created a legitimate expectation that he would be employed on a permanent basis. His dismissal on 1st October 2002 was unfair because he had the legitimate expectation to be employed permanently.

23. In his evidence before the Court, the Applicant stated that his expectation of permanent employment was that:-

24. In 1999 a person with whom Applicant had worked during prior temporary engagements, was employed by the Respondent on a permanent basis. Again in between 2000 - 2001 two temporary employees were employed on a permanent basis by the Respondent; and

25. In December 2000, the Respondent's Human Resources Manager, Mr. W.M. Dlamini told him together with the other temporary employees that they would be hired on a permanent basis as soon as a Chief Executive Officer was employed by the Respondent.

9. The Respondent's case is that the Applicant was never at any stage employed on a permanent basis and was always employed on fixed term contracts. As a result thereof, the Applicant was not an employee to whom section 35 of the **Employment Act 1980** applied by virtue of the exclusion contained in section 35(1) (d) of the Act. Section 35(1) (d) reads: - *"This section shall not apply to - (d) an employee engaged for a fixed term and whose term of engagement has expired."*

10. The position of our law as articulated in **Swaziland Meat Industries vs Mduzuzi Nhlabatsi and Nine Others Industrial Court Appeal Case Ne 142/2005** is that: *"There is nothing in the Employment Act or in any other law which makes it illegal for a person to be employed on a temporary basis in order for a specific job to be undertaken. Such employment must however be for a specific period (my emphasis] otherwise, if not, upon expiry of the*

statutory permissible period in which any employee may be kept on probation, the employment becomes permanent and subject to protection by section 35 (2) of the Act.

- ,11. It is common, cause that the Applicant's final temporary employment period, although not fixed term, lasted for about two and a half months from 15th July to 1st October 2002. It appears from the evidence that the Applicant did not work, on the last temporary contract, for a period **exceeding** three (3) months without a break. The statutory permissible period in which an employee may be kept on probation did not expire; the employment did not become permanent. The Applicant has failed to prove that he was an employee entitled to protection under section 35 (2) of the **Employment Act**.

(See also Sarah Ndwandwe vs The Principal Secretary Ministry of Works and Construction and Others Industrial Court of Appeal Case N2 6/1997 and Nkosinathi Dlamini vs Tiger Security IC Case No.287/2002).

26. Mr. Simelane for the Applicant argued that the Applicant had a legitimate expectation to be employed permanently by the Respondent arising as aforementioned in paragraph 8 above.
27. Such an expectation would usually arise out of express promises made by the employer but may also be inferred from the fact that the contract had previously been extended as a matter of course.
28. The Respondent's response to these assertions is that the Applicant has not made out a case for the doctrine of legitimate expectation to be applied because:-
29. he had always been employed on fixed term temporary contracts; and
30. he had never been promised permanent employment either through his various letters of appointment or through any conduct of the Respondent.

31. The South African Labour Relations Act No 30 of 1994 provides that failure by an employer to renew a fixed term contract constitutes a dismissal if the employee reasonably expected renewal. We have no similar provision in our law.
32. **Mr. W.M. Dlamini** who gave evidence on behalf of the Respondent and who was the Respondent's Human Resources Manager in December 2000 denied ever making an undertaking to hire the temporary employees (including the Applicant) on a permanent basis. He stated that it would have been outside his authority to make such undertaking since he was not the temporary employees' supervisor. It was the supervisors, he said, who could **recommend** that temporary employees, under their supervision, be employed on a permanent basis.
33. We note that the Applicant's final letter of employment dated 17th July 2002 offers him an open ended temporary employment. The letter provides only that each party may terminate "*this arrangement*" on one day's notice.
34. In this case, the Applicant does not say he has been unfairly dismissed because his last contract was not renewed when he expected it to be renewed. He seems to be saying that because of the various contracts of temporary employment he had entered into with the Respondent over the years, he reasonably expected to be employed on a permanent basis.
35. It seems to us that there is no basis for the expectation. The employment of people on a temporary or permanent basis is a matter falling squarely within the discretion of the Respondent's management, taking into account among other factors, the Respondent's human resource needs. In the case of **Bernardin B. Bango vs The University of Swaziland IC Case N2 342/08** the Court stated that even a legitimate expectation to have a contract renewed does not give rise to any contractual entitlement. Also, as stated in **the Attorney General IC Case N° 398/06**, there is currently no legal precedent in our law to accord substantive rights on the basis of legitimate expectation. There can not be, in the Court's view, any reasonable expectation of permanent employment arising from unrenewed temporary contracts.

36. Even if such expectation could accord such substantive rights, on the facts of this matter, the Applicant could not reasonably have expected permanent employment. According to the Applicant himself, he accepted temporary employment in 2002 after allegedly having been promised permanent employment on the appointment of a chief executive officer, despite that a chief executive officer had been appointed. He did not protest at the temporary employment but complained only after his employment had been terminated. The alleged promise of permanent employment was, in the Court's view, not established.
21. In the result and for the foregoing reasons the application is dismissed. We make no order as to costs.

The members agree.



S. NSIBANDE

ACTING JUDGE OF THE INDUSTRIAL COURT