IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA6/18

In the matter between:

DEPARTMENT OF AGRICULTURE, FORESTRY

AND FISHERIES **Appellant**

and

DENVOR CRAIG BARON **First Respondent**

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **Second Respondent**

HILARY MOFSOWITZ N.O. **Third Respondent**

Heard: **14 March 2019**

Delivered: **23 July 2019**

Summary: Review of arbitration award – fixed term contracts renewed successively-position advertised as three year contract with help of incumbent-incumbent dismissed before decision made on appointment-incumbent's evidence that he was promised position and had reasonable expectation to be appointed not disputed at arbitration-arbitrator's award that incumbent had such expectation and that his dismissal was substantively unfair confirmed-part of award only awarding compensation set aside and replaced with reinstatement order- On appeal decision of Labour Court confirmed and appeal dismissed.

Coram: Coppin JA, Murphy *et* Savage AJJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the whole judgment of the Labour Court (Moshoana J) in terms of which it reviewed and set aside part of an arbitration award of the third respondent ("the arbitrator"), acting under the auspices of the second respondent ("the Bargaining Council"). The Labour Court substituted that part of the award requiring the appellant ("the Department") to pay the first respondent ("Mr Baron") compensation in the amount of R 482, 451 – 00, with an order, *inter alia*, requiring the Department to reinstate Mr Baron "without loss of benefits". The Labour Court also refused to condone the Department's late filing of a cross-review, had dismissed the cross-review and had ordered the Department to pay the costs. Leave to appeal to this Court was granted on petition.

[2] The appeal essentially turns on the following: firstly, whether the Labour Court was correct in refusing to condone the late filing of the cross-review and in dismissing it; secondly, whether the Labour Court was correct in concluding that the arbitrator had reasonably found that Mr Baron's dismissal was both procedurally and substantively unfair and that it was a dismissal as contemplated in section 186(1)(b)(i) of the Labour Relations Act[1] ("the LRA"); and, thirdly, whether the Labour Court was correct in substituting the arbitrator's award of compensation with one of reinstatement.

Background

[3] The following background facts are common cause, or not really in issue. Mr Baron was appointed initially on 15 July 2013 in terms of a written contract for a fixed-term of 12 months, expiring on 14 July 2014, as a fishing rights coordinator/programme manager for the Department's Working for Fisheries

[1] Act 66 of 1995.

Programme. This fixed-term contract was renewed a number of times for varying periods of duration.

[4] In August 2014, upon expiry of a seemingly oral/tacit contact at the end of August 2014, Mr Baron was appointed in the same capacity, in writing, for a further period, i.e. from 1 September 2014 to 30 November 2014. In that period Mr Baron established the Working for Fisheries Programme Unit ("the Unit"). And before expiry of that contract, Mr Baron was appointed, in writing, for another three-month period, i.e. from 1 December 2014 to 28 February 2015.

[5] Within the period of duration of the last mentioned contract, the position occupied by Mr Baron, i.e., that of programme manager, was advertised with his knowledge. According to the advertisement, the position was for a three-year contract with an all-inclusive remuneration package of R819126 – 00 per year. Mr Baron had been made aware that this was a necessary step towards formalising the Unit. He applied for the position having been asked to do so by Ms Middleton and Mr Mannya, who at the time were, respectively, the Chief Director: Fisheries Operations Support and Deputy Director-General: Fisheries, in the Department. Other related positions in the Unit were also advertised, including that of Deputy Programme-Manager: Working for Fisheries Programme.

[6] According to Mr Baron's undisputed testimony at the arbitration, he had been assured by both Ms Middleton and Mr Mannya that he was the preferred candidate for the position of programme manager. With their encouragement he participated in formulating the requirements for the post. They were essentially tailored to suit the qualifications and experience of those already employed in the Unit, including himself.

[7] On 17 February 2015, Mr Baron was interviewed for the post of programme manager and on 19 and 20 March 2015 psychometric evaluations were conducted. On 17 April 2015, Mr Mannya requested Mr Baron to urgently clear a judgement from his credit record, which Mr Baron duly attended to and confirmation of such clearance was sent to Mr Mannya on 30 May 2015.

[8] Of significance was Mr Baron's interim employment status. The three-month period of his last fixed-term employment contract expired on 28 February 2015. According to Mr Baron's uncontested testimony at the arbitration, his employment in the Unit of the Department was orally or tacitly extended by Ms Middleton and Mr Mannya beyond that date until he was to be appointed in terms of the three-year contract that he had applied for.

[9] It is however common cause that on 24 July 2015, before finalisation of the three-year contract appointment, Ms Middleton delivered a letter to Mr Baron requesting him to vacate the department's offices on the close of that day. The letter was dated 24 July 2015 and signed by Ms Middleton. It is addressed to Mr Baron and refers to him as "Programme Manager: Working for Fisheries Programme". The letter states the following:

> 'Dear Mr Baron
>
> **Expiration of the contract period for your appointment as the Programme Manager: Working for Fisheries Programme**.
>
> As you are aware, your contract period as the Programme Manager: Working for Fisheries Programme expired on 28 February 2015. This was then extended via adding an additional deliverable to the Jaymat Business Plan to include the administrative support of the Working for Fisheries personnel, including yourself, based at the DAFF offices. This extension of the Jaymat brief was valid from 1 March 2015 to the end of June 2015. This extension has therefore expired and unfortunately the appointment process of the Programme Manager: Working for Fisheries Programme has not yet been concluded.
>
> Given that there is not a valid contract in place between yourself and the Working for Fisheries Programme, I must therefore request that you vacate the DAFF offices with effect from the close of day on Friday, 24 July 2015.
>
> Yours sincerely
> Sue Middleton
> Chief Director: Fisheries Operations Support
> Date: 24/7/2015'

[10] According to Mr Baron's uncontested evidence at the arbitration, Ms Middleton brought this letter to him at his office, and said to him that she did not know what was going on. Just before that Ms Middleton had a meeting with the Chief Director of Human Resources in the Department (Fisheries) and she had asked Mr Baron for a copy of his contract. When he later attended at her office she informed him that she had been instructed to terminate his services. She also showed him a submission made to the Director-General of the Department concerning his appointment for the three -year contract. In terms of the submission, his appointment had been approved by both Ms Middleton and Mr Mannya, and the third person who had been on the panel that interviewed him, namely a Mr Mtoba, Chief Director of Monitoring, Control and Surveillance, but the new Deputy Director-General, Ms Ndudane, had not recommended his appointment. It also appeared from the submission that Ms Ndudane had complained that he was illegally in the Department and had access to confidential documents; that there were no documents in existence relating to Mr Baron's performance; and that she also referred to an investigation report that suggested that Mr Baron was being investigated by the Hawks in respect of a project in the Northern Cape in 2009. According to Mr Baron's uncontested testimony, there was never such an investigation and that had been confirmed by Mr Mannya, who preceded Ms Ndudane as Deputy Director-General.

[11] According to Mr Baron's testimony, he complied with the request in the termination letter and left the Department's offices on the afternoon of 24 July 2015, after "handing over" to his assistant, in order to ensure continuity in the programme of the Unit. Noteworthy is also the fact that Mr Baron gave unchallenged evidence, that his assistant, who had been employed on temporary contracts similar to his, continued in his employment and was not asked to leave.

Referral of the dispute

[12] Following the termination of his employment with the Department on 24 July 2015, and on or about 24 August 2015, Mr Baron referred an unfair dismissal dispute to the Bargaining Council for conciliation. In his summary of the dispute on the referral forms, in addition to relating the history of his appointment with

the Department, he mentions that he had also been informed that the appointment process for the Programme Manager: Working for Fisheries Programme had not yet been concluded. In response to a question on the referral form as to what outcome he required, Mr Baron stated: “to be appointed as the Programme Manager: Working for Fisheries Programme/compensation”. He also indicated elsewhere in the form that he felt that his dismissal was substantially unfair because there were no genuine reasons for his dismissal.

[13] On 2 November 2015, a panellist of the Bargaining Council certified that the dispute that had been referred “concerning an alleged unfair labour practice”, remained unresolved. Following this certification, Mr Baron requested that the matter be referred to arbitration. In the referral form, Mr Baron described (in manuscript) the issue/s in dispute as follows: “Unfair Labour Practice. I (the party) was working at DAFF as a director on contract, which was renewed a few times. I applied for the same post for a longer term and was made to believe that I would be appointed if I removed a judgement from my name. I was not appointed after I complied”. Also of importance, Mr Baron proposes the following relief or outcome: “to be appointed in the position of director and to be compensated for the loss of earnings”.

[14] When the matter went to arbitration for the first time, Mr Baron alleged that he had referred both an unfair dismissal dispute and an unfair labour practice dispute to the bargaining council on 25 August 2015 by means of one referral form. The department’s representative objected to these disputes being arbitrated at the same time because the certificate of the outcome of the conciliation indicated that only an unfair labour practice dispute had been conciliated. Mr Baron’s representative, seemingly, argued that both disputes could be arbitrated at the same time because the certificate was not binding on anyone. The panellist seized with the matter at the time concluded (correctly in my view) that the dispute that Mr Baron had referred was an unfair dismissal dispute and not an unfair labour practice dispute, and that the certificate had erroneously referred to the latter as having been conciliated, whereas the former had been referred and had been conciliated. The panellist, accordingly, ruled that the Bargaining Council did not have jurisdiction to arbitrate the alleged

unfair labour practice dispute, as it had not been referred to conciliation, and that the unfair dismissal dispute was to be set down for arbitration. This binding ruling was not reviewed.

The Arbitration

[15] Following preliminary hearings before the arbitrator, the matter was finally scheduled for hearing on 5 September 2016. The issue to be decided was whether Mr Baron was dismissed; and if so, whether his dismissal was procedurally and substantively fair. The arbitrator took this to mean that she had to decide whether the Department had created a reasonable expectation that Mr Baron's fixed-term contract would be renewed for a further term of three years.

[16] At the arbitration, Mr Baron testified and called Mr Charles Titus, who took – over his position at the Unit in an acting capacity, but the Department called no witnesses. According to the arbitrator, the Department sought to advance its case through written submissions, being of the view that it was not necessary to lead oral evidence as the relevant common cause facts (according to the Department) did not support Mr Baron's case. The Department's case was that in July 2014, Mr Baron had become aware that his post would be advertised and that he would be required to participate in a competitive process; and he conceded that it was open to anyone to apply. The fact that he accepted and participated in the public appointment process dispelled any subjective or objective perception and he could, therefore, not have had a reasonable expectation of the renewal of his contract for three years. Had Mr Baron been successful in applying for the advertised position, a new contract for a three-year period would have been entered into; and, lastly, that Mr Baron's expectation of being appointed into the advertised post relates to the unfair labour practice dispute, which was not before the arbitrator.

[17] In her award the arbitrator reasons as follows:

‘14. The test to be applied in the current case is whether the officials in authority at the relevant time had created a reasonable expectation in the mind of the employee. This is an objective perception to the extent that any other person in the same position would have had the same expectation. No evidence was led to challenge the applicant’s evidence and consequently I have accepted it. The respondent’s case was mainly that the applicant could not have held a reasonable expectation of renewal of contract on account of him participating in a competitive recruitment process. The respondent argued that if it is the applicant’s contention that the outcome of the process was predetermined, then the entire process was a “shame”. The applicant placed the recruitment process and his participation in context. The advertisement was tailored to suit him; he was instrumental in drafting the advertisement; he was told prior to participating in the recruitment process that he would remain the programme manager for a period of three years; he was involved in strategic planning (with Middleton) for 2016 to 2017; it was imperative for the functions performed by the applicant and his team to continue in the formally established Unit. The applicant’s evidence that he was told to apply as “a means to an end” was not challenged by the respondent. After the interviews were conducted Mannya told the applicant to clear the judgement on his credit profile in order for his new contract to be finalized. Middleton revealed to the applicant that he was the preferred candidate. Middleton informed the applicant that she and the other interview panellists were unanimous about the applicant remaining the programme manager. The new deputy director-general Ndudane (who took over the position from Mannya) instructed Middleton to terminate applicant’s employment. It is safe to assume that the respondent did not find a candidate more suitable than the applicant as it was undisputed that Titus (the applicants subordinate) was appointed to act in the position of programme manager. Both the applicant and Titus testified that there was no difference between the position held by the applicant and the advertised position of programme manager other than its duration. This was not materially disputed.

15. Based on the evidence presented at arbitration, I find that the applicant’s expectation of renewal was reasonable in the circumstances. He has satisfied this test on an objective basis. The respondent’s submission is simply that I cannot come to this conclusion as it would mean that the applicant’s participation in the recruitment process would then have been a “shame”. I agree with the applicant that this “shame” was not one created by him. The

> "shame" was created by the respondent. The circumstances of the current case are similar to the circumstances of the case of *Mcinness versus Technikon Natal (2000) 21 ILJ 1138 (LC)*... The two officials held the necessary and requisite authority at the time regardless that the guarantees were not in writing. I have accepted the evidence of the applicant that it was the respondent's intention to retain him (and his team) in the division after its official establishment. It is reasonable to conclude that any other person in the same position would have had the same expectation. The fact that the respondent does not appear to have appointed anyone into the position seems to support the applicant's contention that it was not possible that any candidate could be more suitable than him. This contention is supported by the fact that the interview panellists unanimously recommended him as programme manager. At all material times it was agreed that the applicant and East team will continue to be employed by the Working for Fisheries Programme as it was imperative for the functions performed by these individuals to continue. I have concluded that the applicant held the same position as the one that he reasonably expected to be appointed into and that it would have amounted to a renewal of the same or similar contract of employment.'

[18] The arbitrator then went on to conclude that based on those findings, Mr Baron had discharged the *onus* of showing that he was dismissed as contemplated in terms of section 186(1)(b)(i) of the LRA, and that the Department, which adduced no evidence, had failed to show that Mr Baron's dismissal was substantively and procedurally fair.

[19] Notwithstanding those conclusions, the arbitrator found that it was impractical to reinstate Mr Baron for a further three years as he had sought because by then more than three years had passed since his dismissal. The arbitrator also found that since Mr Baron had placed no evidence before her regarding the practicality of reinstating him, an award of compensation was the most appropriate in the circumstances. She determined this compensation to be equivalent to the amount Mr Baron had earned over a period of six months (i.e. R 80408 – 50×6) giving a total of R 482 451 – 00. The arbitrator ordered the Department to pay Mr Baron this amount by no later than 30 November 2016.The award was handed down on 11 October 2016.

Proceedings in the Labour Court

[20] On 30 November 2016, Mr Baron brought an application in the Labour Court to review and set aside that part of the arbitrator's award ordering compensation instead of reinstatement, and sought to have it substituted with an order that he be reinstated retrospectively to the position he would have held under the three-year contract. In the application, he, *inter alia*, complains about the inadequacy of the compensation, contending, essentially, that compensation should have been the equivalent of what he would have earned over a three-year period and not merely for six months.

[21] The Department opposed the application for review by notice filed on 8 December 2016 and on 9 January 2017 also brought a counter-application to review the award, incorporating a condonation application since the counter-review was filed two weeks out of time. The Department sought to review and set aside the arbitrator's award and to have it substituted with an award dismissing Mr Baron's claims for reinstatement and compensation based on his alleged unfair dismissal. Mr Baron opposed the Department's Counter-review, including the condonation. The essence of the case made by the Department in the counter-application (also referred to as "the cross-review) was that the arbitrator had erred in finding that Mr Baron had established a reasonable and legitimate expectation that his fixed-term contract would be extended or renewed and also erred in treating the three-year position as a renewal and extension of Mr Baron's previous fixed-term contracts. In this regard, the Department submitted that there were differences - unlike with the previous renewals or extensions, the three-year post was advertised and was subject to a competitive application process in which Mr Baron willingly and voluntarily participated; that there were no guarantees that he would be appointed and that, in any event, the arbitrator had ignored specific provisions in the previous contracts applying to Mr Baron's appointment that clearly precluded him from having any reasonable expectation of their extension or renewal.

[22] It is common cause that on the same day the Department brought its cross-review, that is on 9 January 2017, it filed an answering affidavit to Mr Baron's review application. On 10 January, Mr Baron filed a notice indicating his

intention to oppose the Department's cross-review. On 27 January 2017, Mr Baron filed an affidavit supplementing his founding affidavit in the review application and on 21 February 2017 the Department, in response, filed a supplementary opposing affidavit in Mr Baron's review application. On 9 March, Mr Baron filed an answering affidavit to the Department's cross-review and in response the Department filed its replying affidavit in that application on 26 March 2017.

[23] The Labour Court dealt with the review before it considered the cross-review. In respect of the former, it concluded that the arbitrator had only erred in not ordering Mr Baron's reinstatement. According to the Labour Court, the arbitrator had failed to consider the provisions of the law, including section 193 (2) of the LRA and that her reasons for not granting reinstatement were "speculative" and were arrived at without any evidence. In respect of the cross-review, the Labour Court held that there was no point in granting condonation for the late filing of the cross-review, because the prospects of that application succeeding were weak as the Department had failed to lead evidence at the arbitration proceedings. According to the Labour Court, Mr Baron's evidence could in those circumstances not be rejected and on his evidence a reasonable expectation had been established. Accordingly, the review was to succeed and the cross-review was to fail. The Labour Court then went on to make an order setting aside the compensation order of the arbitrator and replacing it with an order that Mr Baron be reinstated to his position without a loss of benefits. In addition to refusing condonation and dismissing the cross-review, the Labour Court ordered the Department to pay the costs. The Department was granted leave to appeal the Labour Court's order after it petitioned the Judge President of this Court.

The Appeal

[24] The Department's counsel argued that the Labour Court had erred in refusing to condone the late filing of its cross-review and in that regard, in particular, argued that the Labour Court had failed to consider the prospects of success of that review which were dealt with in in the supporting affidavit to that application and despite having before it all the papers filed in the review and cross-review

applications. The Department made new submissions and persisted with the submissions made in the cross-review, which were, in brief, that Mr Baron could not have had a reasonable expectation that his fixed-term contract would be extended for three years, and that the arbitrator had erred in concluding accordingly. The detail of the Department's submissions is considered under the subsequent headings in this judgment.

Discussion

[25] I shall now consider the issue of condonation first and then deal with the other issues arising from this appeal.

[26] The Department chose not to file a separate substantive condonation application, but instead, dealt with the issue of condonation in the affidavit filed in support of the cross-review. In the final paragraphs of that document, the Department deals with the issue of condonation. It does not specifically aver that the cross-review had reasonable prospects of success, instead, the deponent to that affidavit, Mr Arthur Frans, states: "it is respectfully submitted that it is in the interest of justice to condone the late filing of the cross-review. The matter is of considerable importance to employment in the Public Service and will have a far reaching effect in the Public Service… Accordingly, I humbly pray that I can good grounds exist for the grant of condonation herein".

[27] In that affidavit, Mr Frans stated essentially: Firstly, that the arbitrator ignored stipulations in the advertisement for the post to the effect that the successful candidate would be appointed for a probationary period of 12 months and that the Department reserves the right to make appointments to the advertised post; Secondly, that the arbitrator had erred in not taking into account Ms Ndudane's authority concerning the appointment and in particular had failed to give consideration to the fact that if Mr Mannya left the position before finalisation of the appointment, the new DDG had a discretion concerning the appointment, and further that Ms Middleton did not have authority to make an appointment and was merely an interview panellist; Thirdly, that the arbitrator failed to find that the reasons provided by Ms Ndudane for not recommending Mr Baron's appointment were valid and justified; Fourthly, that the arbitrator had failed to

properly consider the previous fixed-term contracts entered into with Mr Baron and in particular the "no expectation" clauses therein; Fifthly, that the arbitrator had failed to have regard to the appointment letters relating to the said contracts which stipulated that the appointment was subject to statutory approvals and that no assurance of an extension/renewal can be given; and lastly, that the arbitrator failed to consider that Mr Baron's employment was not previously renewed in respect of an advertised post, and that by applying for an advertised post, Mr Baron had subjected himself to a competitive appointment process where no guarantees existed.

[28] In his answering affidavit to the cross-review, Mr Baron takes issue with all of Mr Frans' contrary contentions. He not only deals with the issue of the condonation and asks that it be refused, but also deals with the merits of the cross-review. Mr Baron mentions, *inter alia*, that the Department was attempting to present a new case in the cross-review, which was not presented before the arbitrator. He mentions, for example, that it was for the first time that the Department contended that Ms Ndudane had valid reasons for not recommending his appointment, and that it was also for the first time that the Department relied on actual recommendation. At the arbitration, the Department resisted Mr Baron's efforts to have the document disclosed, contending, *inter-alia*, that it was only relevant to the unfair labour practice dispute, and by abandoning questioning relating to the document. Mr Baron requested that all the new evidence be struck out.

[29] In addition, Mr Baron denied that the authority of Mr Mannya and that of Ms Middleton had been an issue at the arbitration, and averred that no evidence had been placed before the arbitrator contesting their authority. He also points out that, at the time the undertakings of his employment in the advertised position were made, Ms Ndudane was not DDG and that she only got appointed when the process relating to the advertised post was in its final stage. He also averred that the "no expectation" and related clauses in the previous contracts, now being relied upon by the Department, were never an issue before the arbitrator and that, in any event, their wording did not suffice to exclude the expectation of a renewal.

[30] In its replying affidavit in the cross-review, Mr Frans, on behalf of the Department concedes that the recommendation was not before the arbitrator, but, in essence, maintains that the recommendation was dealt with in the course of Mr Baron's evidence, both in chief and even when he was cross-examined and that the Department's reliance on the recommendation at this stage of the cross-review was therefore not prejudicial to Mr Baron. As far as the grounds of review were concerned, Mr Frans contended in reply that the grounds relied upon by the Department bear a direct relationship to the analysis of the evidence and argument by the arbitrator in the award, and accordingly, denied that the Department was attempting to adduce new evidence, or to introduce "a new cause of action".

[31] Mr Baron's review application essentially only dealt with the issues of compensation and reinstatement, and he contended therein, *inter alia*, that the arbitrator had erred in not reinstating him. Mr Frans, who also deposed to the Department's answering affidavit in that review application, denies that the arbitrator's analysis of the evidence and findings were factually correct, but avers that in the event of the court finding that the arbitrator's award was reasonable on the merits, the Department agreed with the arbitrator that reinstatement was inappropriate in the circumstances. He accepts that Mr Baron's contract of employment was terminated, but states that "the dismissal arose out of the non-renewal of his-fixed term contract" and further "[that] his dispute concerned his non – appointment by the Director-General". Mr Frans essentially further avers that Mr Baron was not appointed to the three-year contract position and would not have been so appointed contrary to the Director-General's and Deputy Director-General's decision not to appoint, and that he would not have commenced his employment under a renewed contract, since he was not appointed by those with authority to do so.

[32] That was essentially what was before the Labour Court. However, before us completely new points were argued on behalf of the Department, such as the following: that the reinstatement order had far-reaching implications "for the legality of the Department's employment and recruitment decisions". The essence of the submissions in that regard was that Mr Baron's employment on

the basis of "an alleged verbal promise from an official of the Department" was not lawful, because it was not in terms of the Public Service Act[2] and "did not enjoy the attribute of lawfulness". According to this argument, Mr Baron should not have been found to have had a reasonable expectation and to have been reinstated, because courts do not enforce unlawful employment contracts. In effect, it was argued that reliance on an oral agreement to be an employee in the Public Service would be contrary to the Public Service Act, and therefore, not reasonable or unlawful.

[33] Submissions were also made on behalf of the Department then went on to deal with, and elaborate on other points, which were either completely new, or related to the grounds relied upon by the Department in its cross-review, which had not been raised as issues in the arbitration. In addition to relying on "no variation" clauses and "sole memorial" clauses in the contract of 15 July 2013 and the contract of 1 December 2014, a submission was made that Mr Baron was "not dismissed", and in that regard facts were relied upon that was not evidence before the arbitrator. It was also submitted that the dispute was not about an unfair dismissal, something which was also not an issue at the arbitration; and further, that Mr Baron had not sought to review the decision not to accept the recommendation of the interview panel and that that decision stood until it was set aside, this despite the evidence at the arbitration that the appointment had not been finalised, and despite this not having been an issue before the arbitrator. There was also a submission that Mr Baron was not employed by the Department, despite this never having been an issue before the arbitrator, or in the Labour Court.

[34] In any event, these arguments made on behalf of the Department before us lack merit. We were not referred to any specific provision in the Public Service Act which outlawed temporary oral contracts, or even the oral extension of a written contract. I am not aware of such a provision. Section 8 of that Act seems to accept the reality of temporary contracts. The reference to section 197(2) of the Constitution[3] is also of no assistance to the Department in that regard,

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[2] Public Service Act,1994.
[3] The Constitution of the Republic of South Africa, 1996.

because it merely provides that the terms and conditions of employment in the Public Service must be regulated by national legislation. The Department not only did not invoke the "non-expectation" clauses and other "no variation" and "sole memorial" clauses, in Mr Baron's previous contracts, in the arbitration – but its reliance on those clauses is misplaced, because, despite those clauses, those contracts were indeed renewed or extended. The Department conceded expressly, including in the termination letter of 24 July 2015 that at the time Mr Baron was employed by the Department. Further, there is no proof that there was any provision similar to a "non-expectation" clause applicable at the time. In any event, such a clause does not necessarily exclude a reasonable expectation of renewed or extended employment.[4]

[35] As the record shows, at the arbitration, Mr Baron's testimony went uncontested. On his version, which the arbitrator reasonably accepted,[5] he established that he had a reasonable expectation of being retained in the position as Programme Manager even in terms of the three-year contract. The high-watermark of the questioning of Mr Baron by the Department's legal representative turned around whether Mr Baron could have had such a reasonable expectation because he applied for the position which had been advertised. It is clear from the questioning that Mr Baron's case at the arbitration was that, but for the fact that the new Deputy Director-General, Ms Ndudane, did not approve his appointment, he would have been appointed to the post. Furthermore, that he saw the new appointment merely as a continuation of the position that he had been occupying until he received the letter of 24 July 2015 from Ms Middleton terminating his employment. Mr Baron explained why that was the case. The only reason the post was advertised was to make it part of the "fixed establishment". He was not only involved in drafting the advertisement, and instrumental in determining what was required of the incumbent for the post, but also in securing additional funding for the Unit. He was the best candidate, and this was confirmed by the fact that the entire interviewing panel unanimously recommended his appointment. Even though

[4] See: *Mediterranean Woollen Mills (Pty) Ltd v South African Clothing and Textile Workers' Union* 1998 (2) SA 1099 (SCA).
[5] See: *inter alia*, *Bargaining Council for the Furniture Manufacturing Industry Kwa- v UKD Marketing and Others* [2013] 2 BLLR 119 (LAC) paras 15-17.

there was no written guarantee that he would be appointed, according to his uncontested evidence, it was "a given" that he would be appointed to the position advertised.

[36] Mr Baron was sceptical about the termination of his contract on 24 July 2015, because everyone else in the Unit that had been employed on a similar basis as him, including Mr Titus, remained employed in the Department. His fixed-term contracts had been extended several times, both orally and/or in writing. At the arbitration, Mr Baron explained as follows: "I believe my reasonable expectation was that the position that I had at the Department, the contracts I have had that [were] extended continuously for five periods would be in effect extended for another three years plus another year as approvals were given, so [as] to be [an] ongoing position from where I was sitting". He clarified what he meant by "approvals". He said: "You see the approvals for the establishment of this unit was also that you'd be appointed for three years and it would be renewed on an annual basis subject to the availability of funding. So it would be – there's an automatic renewal of 12 months on the condition that the funding has been approved for the post and that was my expectation, that I was being appointed for the additional three-year contract in terms of the approvals".

[37] At the arbitration, the Department's legal representative stated the following to Mr Baron: "I put it to you that you did not have any reasonable expectation for that contract which was advertised to be renewed because you participated in a public interviewing process". In response, Mr Baron related the assurances given to him by both Ms Middleton and Mr Mannya and what had occurred after he had been asked to clear his credit record and stated: "… Subsequent to that, in July I was still working at the Department and it was an ongoing process. So based on that I had the reasonable expectation that I am going to be issued with a three-year contract and it's just a matter of time for this to happen and as I under oath indicated what I saw in the submission – unfortunately the submission is not here – but what I saw in the submission, it stipulated that the entire selection panel recommended me to be appointed as – in other words, those individuals who said Denver, sort out this judgement of yours and we will

appoint you. They did that. So my expectation was to be given and issued a three-year contract and it was just a matter of time."

[38] In response to a proposition put to him during questioning by the legal representative of the Department, that the arbitrator did not have jurisdiction to deal with a "non–appointment dispute", Mr Baron answered: "… I believe that you are incorrect . . .I was summarily dismissed by the Department based on the submission and comments made by the DDG that was then basically given – as in . . . go and dismiss Mr Baron. So I was dismissed. I believe I was working at the Department, I was coming in there every day, working, doing my work and on the 24 July I was dismissed from my position at the Department and the position that I had at the Department was Programme Manager for the Working for Fisheries Programme. So I was dismissed and I was expecting to be issued with a contract for a three-year period in the position that I was holding and clearly from my evidence that I've given Ms Middleton was also shocked that she had now been instructed to dismiss me on the 24 July". Mr Baron also referred to the termination letter to corroborate his evidence that he was still employed in the Department at the time the letter was given to him.

[39] Thus as far as Mr Baron was concerned, even though he had to apply for the advertised position, his appointment to that position was a foregone conclusion and for him, it was just as if his contract was to be extended for another three or more years. That he had a reasonable expectation in that regard was not countered with evidence from the Department. In those circumstances, it was reasonable for the arbitrator to accept Mr Baron's version-which was not demonstrated to be improbable or far-fetched – and to have made the findings that she made regarding that expectation.[6] The fact that he applied for the position that was advertised does not matter.[7]

[40] What the Department purported to do in its cross-review in the Labour Court was to put up a case that it did not put up before the arbitrator. In effect, it was trying to appeal the arbitrator's findings, which was impermissible. The

[6] See previous footnote.
[7] Compare: *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC); *Ekhuruleni West College v Education Labour Relations Council and Others* (JA55/2016) [2017] ZALAC 75 (30 November 2017) (LAC).

Department does not at all refer to prospects of success in its request for condonation. In addition, the Department's reasons for the delay in filing the cross-review are vague. According to the Department, the cross- review was filed late because the Department had "received conflicting legal opinions", "had to obtain further instructions" and because "senior counsel had requested a transcription of the record." But these are not fully explained in order to enable the court to appreciate with a reasonable degree of certainty how exactly the delay came about, and to determine whether it was reasonable in the circumstances. The entire condonation aspect is dealt with in four paragraphs in the cross -review.

[41] It is trite that in condonation applications, good or sufficient cause must be shown by the party seeking condonation for a delay.[8] This not only involves giving a full explanation for the delay, but also showing that it has reasonable prospects of success. Generally, a slight delay and good explanation for the delay could compensate for weak prospects of success, and good prospects could make up for a long delay.[9] It was for the appellant to show that it had good prospects of succeeding with its cross- review, that, despite the fact that it had adduced no evidence to counter Mr Barron's evidence at the arbitration, and that there was a reasonable prospect that the Labour Court would find that the arbitrator's findings and conclusions, in those circumstances, were not reasonable. In that regard, the Department failed. The Labour Court correctly refused to condone the late cross-review, otherwise, by dismissing it.

[42] Similarly, the Labour Court's conclusions regarding the review brought by the respondent cannot be faulted. The provisions of section 193 of the LRA are clear and its meaning has been clarified in decisions, *inter alia*, of this Court[10] and the Constitutional Court.[11] Mr Baron had no *onus* to show that it was not reasonably practicable for him to be reinstated. Having found that Mr Baron had been dismissed as is contemplated in section 186(1)(b) of the LRA – in accordance with section 193 – the arbitrator had to require Mr Baron's

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[8] See: *inter alia*, *Melane v SANTAM Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532 C-F.
[9] See previous footnotes.
[10] See, *inter alia*, *Kroukam v SA Airlink (Pty) Ltd* [2005] 12 BLLR 1172 (LAC).
[11] See, *inter alia*, *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] 12 BLLR 1129 (CC).

reinstatement.[12] Mr Baron wanted to be reinstated to the position he held at the time of the dismissal letter, which was to be extended for three years. There was nothing to show that the circumstances surrounding the dismissal are such that the continued employment relationship would be intolerable. There was further nothing to show that it was not reasonably practicable for the Department to reinstate Mr Baron as he had sought, and Mr Barron's dismissal was reasonably found to be both, substantively and procedurally unfair.

[43] In the circumstances, the appeal stands to be dismissed. There is no reason in law and fairness why the costs should not follow the result.

[44] Accordingly, the following is ordered: The appeal is dismissed with costs.

P Coppin

Judge of the Labour Appeal Court

Savage and Murphy AJJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT: T Masuku SC

[12] *Maepe v Commission for Conciliation, Mediation and Arbitration and Another* (2008) 29 ILJ 2189 (LAC) para 13.

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