

IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA

COMP NO.391/2016

BETWEEN:

**HEATHER MAUREEN CAMPBELL
MUSARIRI**



COMPLAINANT

AND

ISCHOOL ZAMBIA LIMITED

RESPONDENT

Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 30th day of August, 2017

Appearances:

For the Complainant: Mr. D. M. Chakoleka and Ms. S.M. Sichalwe of Messrs. Mulenga Mundashi Kasonde Legal Practitioners

For the Respondent: No Appearance

JUDGMENT

Legislation referred to:

- 1. The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia**
- 2. The Employment Act as amended by Act No. 15 of 2015**

Cases referred to:

- 1. Diereks vs. University of South Africa, (1999) 20ILJ1227**
- 2. Choonge vs. ZESCO Recreation Club Itezhi Tezhi, SCJ Appeal No. 168/2013**
- 3. Chilanga Cement Plc vs. Kasote Singogo (2009) Z.R. 122**
- 4. Fidler vs. Sun Assurance Co. of Canada (2006) 25. C.R.3**

5. *Keays vs. Honda Canada Inc (2008) 2.5. C.R. 362*

Other references:

1. *Johanette Rheder, Fixed Term Contracts 'www.jrattorneys.com' accessed: 6/08/2017*
2. *Grogan, J. J, 2014 Workplace Law, Juta & Company Limited*

1.0 COMPLAINANT'S CASE

1.1 On 22nd August, 2016, the Complainant commenced legal action against the Respondent pursuant to **Section 85(4) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia.**

1.2 The grounds upon which the Complaint was made were that:

“(a) That by way of a written contract of employment, the Complainant was employed by the Respondent as Evaluation Specialist on 18th June, 2014 on a two years renewable contract;

(b) That on 17th June, 2016, the Complainant's contract of employment came to an end by effluxion of time but the Complainant continued working for the Respondent.

(c) That on 22nd day of June, 2016 the Respondent told the Complainant by way of a Skype call that her contract of employment would not be renewed since she was due to go on maternity leave for 90 days and that the Complainant should go back to the Respondent in January, 2017 after maternity leave was over to discuss the renewal of her contract.

- (d) *That the Complainant indicated to the Respondent during the same Skype call on 22nd June, 2016 that she was going to seek legal advice as to the position taken by the Respondent regarding her maternity issue.*
- (e) *That on 23rd June, 2016, the Respondent wrongfully, unfairly and unlawfully terminated the employment Contract of the Complainant herein without giving her notice as required under the contract of employment.*
- (f) *That the real reason why the Respondent terminated the Complainant's contract of employment was on account of the fact that the Complainant was pregnant and due to go for maternity leave and therefore, the Complainant was discriminated against."*

1.3 The Notice of Complaint was supported by an affidavit deposed to by the Complainant.

1.4 At trial, only the Complainant was present and she gave evidence on oath.

1.5 She relied on her affidavit in support and oral evidence.

1.6 She testified that she was employed by the Respondent on the 18th day of June, 2014 as an Evaluation Specialist on a two (2) year renewable contract.

1.7 It was her testimony that the Contract came to an end on 17th June, 2016. That prior to the Contract expiry, she was

engaged in telephonic and email communications with a Ms. Mary Morris who was the Program Director of the Respondent.

- 1.8 The said communications were in connection with her contract which was coming to an end that she would be taking maternity leave at the beginning of her new Contract.
- 1.9 The witness referred the Court to the emails of February 24th, 2016, which was written by Ms. Morris to herself and a Mr. Miyanda Mulambo, discussing the end of Contract and the pending Maternity Leave. **See exhibit "HMCM5"**.
- 1.10 The witness further referred to an email written by Ms. Morris, of May 26th, 2016 where she wrote:
- "Hi Miyanda and Heather, how are the things progressing with Heather's Contract renewal?"*
- 1.11 It was her testimony that she had believed that her Contract would be renewed as Maternity Leave was to happen only in August, 2016 after her 1st Contract had expired. She further testified that once her Contract had expired, she continued working at home and all company emails were being copied to her.
- 1.12 The witness testified that on 22nd June, 2016, she had a Skype call meeting with Ms. Morris and Miyanda. This call was to discuss the Complainant's contract renewal and that Ms. Morris told the Complainant during that call that the

Respondent would not be renewing her Employment Contract due to the long absence she was to have at the beginning of her new Contract due to the eminent Maternity Leave.

- 1.13 She further testified that Ms. Morris told her that discussions as regards the renewal of Contract would be held in January, 2012 when she would be ready following the birth of her daughter.
- 1.14 She testified that on 22nd June, 2016, the Respondent indeed wrote to her giving her the notification of non-renewal of Contract of Employment.
- 1.15 She told Court that she was shocked as she had always believed that her contract would be renewed. Her belief was based on the following conduct of the Respondent:
 - 1.15.1 The communication from Ms. Morris that discussed her Maternity Leave immediately after the 1st Contract was to end.
 - 1.15.2 The fact that the Respondent was in the process of renewing her work permit with the immigration. The Respondent in fact went further and prepared the payment and all documentation for her work permit renewal. She told Court that the payment was being prepared within the accounts department and that she knew about this because she was given a letter

that was sent to Barclays Bank advising the Bank to issue a Bank Certified Cheque for her work permit.

- 1.16 She testified that since her Contract of Employment was expiring at the same time as the work permit, she took keen interest in following up the issue with the Immigration, that is why she was given the letter that was sent to the Bank so that she could know how the process was going.
- 1.17 She testified that all the documentation and payment were ready and the only thing that was remaining to complete the work permit application was the copy of the renewed contract of payment.
- 1.18 She further testified that the letter of notification for non-renewal of Contract of 22nd June, 2018 (sic) gave the reason for non-renewal as due to the fact that her work permit would expire on 24th June, 2016. She claimed that this was not the real reason as the Respondent had already done all paper work for her work permit renewal and the Immigration department had not denied her a permit. She further claimed that the reason for non-renewal was because she was pregnant and the eminent maternity leave had unsettled the Respondent.
- 1.19 The witness told Court that she was on Medical Scheme under Metropolitan and it covered her Medical needs including her Ante and Post Natal costs. This was immediately cut upon the non-renewal of contract. As a consequence, she had to pay

these costs out of her own pocket which was not budgeted for as she had been assured that the Contract would be renewed. She told Court that she spent K18,000.00 as a cost for delivery at Fairview Hospital (see Complainant's supplementary Bundle of Documents).

- 1.20 It was her testimony that she was praying for payment of damages for unfair and unlawful termination of her employment contract.
- 1.21 She claimed for damages for severe mental distress as the non-renewal of her contract was done during her ninth month of her pregnancy. She testified that she could not fully express the stress she was put in as she had thought being pregnant and just about to give birth for the first time was to be her happiest time of her life but this was robbed away from her by the sudden actions of the Respondent.
- 1.22 She testified that she had a good working relationship with the Respondent and she believed she would work with the Respondent for a long time and this is why she was shocked by the way she was treated.
- 1.23 She lastly prayed for punitive damages so as to prevent the Respondent from having the behaviour it exhibited to her with future and current employees as its behaviour was morally, ethically and lawfully wrong.

2.0 **RESPONDENT'S CASE**

- 2.1 The Respondent did not attend trial but had filed an Answer to the Notice of Complaint.
- 2.2 In its Answer, the Respondent stated that the Contract of Service between the Complainant and itself allowed it to exercise the right to either renew the Contract of Service or not once the term had expired.
- 2.3 That on 22nd June, 2016, the Complainant was advised that her Contract would not be renewed and she was paid her dues including an ex-gratia payment of K36,000.00.
- 2.4 The Respondent stated that the Complainant was not entitled to the reliefs sought.
- 2.5 The Answer was supported by an affidavit deposed by Charlotte Scott the General Manager of the Respondent.
- 2.6 In her affidavit, Ms. Scott averred that there was no intimation on the part of the Respondent either expressly or implied that the Contract of Employment for the Complainant would be renewed as it was a condition in the Contract of Employment that each party reserved the right to either elect to renew the Contract upon afluxion of time or not.
- 2.7 That as result, the Respondent by the letter of 22nd June, 2016, had intimated to the Complainant that the Contract would not be renewed.

- 2.8 That the Complainant did not continue working after her contract had expired, as the contract expired on 17th June, 2016 which was a Friday and on 20th June, 2016, the Program Director had advised the Complainant to delegate all subsequent assignments and meetings to other employees in light of the expired Contract. (**Exhibit 'HMCM3' refers**).
- 2.9 That the Complainant never continued to work for the Respondent after expiry of her contract but that she was merely being copied in emails on account of the fact that she held an email account with the Respondent and was in no way a reflection of her continued period of service.
- 2.10 She further averred that the policy of the Respondent was that all employees of foreign nationality should have in possession all necessary documentation to live and work in Zambia as stipulated in the Contract of Employment with the Respondent.

3.0 **SUBMISSIONS BY THE COMPLAINANT**

- 3.1 I have perused the submissions filed on behalf of the Complainant. I have taken note of these submissions, I will not recite them here but will take them into consideration in my opinion.

4.0 **ISSUES FOR DETERMINATION**

- 4.1 (a) Whether or not there was a legitimate expectation of renewal of contract by the conduct of the Respondent;

- (b) Whether or not the Complainant is entitled to reliefs claimed as outlined in the Notice of Complaint.

5.0 **OPINION**

(A) The Law/General Principles on legitimate expectation

- 5.1 This case has brought to fore the concept of legitimate expectation in employment matters.
- 5.2 Before I resolve the issue, it is imperative to discuss the general principles that underpin the concept of legitimate expectation.
- 5.3 At common law a fixed term contract expires automatically on arrival of the date on which the parties agreed that it should.
- 5.4 This common law situation of a fixed term contract of employment expiry ***Ex Lege*** (automatically by law) at the end of the period has been changed substantially in our jurisdiction with the inception of Section 28C (2) of Act No. 15 of 2015, which provides:

“Where an employee who is engaged on a fixed term contract of service continues in employment with the same employer after expiration of the prescribed cumulative period, the Contract of Service shall be deemed to be a permanent contract.”

- 5.5 It follows that, it is now possible that the relationship between the employee and the employer be construed as aiming at a permanent duration despite an official description to the contrary in an employment agreement, when one continues to work after the expiry of the fixed agreed period.
- 5.6 An employee who continues to work and is dismissed after expiry of the fixed term contract now has a right to sue based on legitimate or reasonable expectation that the contract would be renewed.
- 5.7 The Jurisdictional fact that the employee has to prove is that there was reasonable expectation of the renewal of the fixed term contract created in the mind of the employee by the Employer.
- 5.8 Grogan in his book '*Workplace Law*'¹, summarizes the legal position as follows:

“The notion of reasonable expectation clearly suggests an objective test: the employee must prove the existence of facts that would lead a reasonable person to anticipate renewal. The facts that found a reasonable expectation will clearly differ from case to case but will mostly commonly take the form of some prior promise or past practice.The conduct of the employer in dealing with the relationship, what the employer said to the employee at the time of the Contract was concluded

¹ Grogan, J. 2014 Workplace Law. Juta and Company Ltd

thereafter, and the motive for terminating the relationship has been cited as factors to be considered.”

- 5.9 It follows that the expectation of a renewal of contract cannot be based on the subjective say-so or perception of the employee. It is the totality of the evidence together with surrounding circumstances that serve to indicate whether or not objectively existed a reasonable expectant on the part of the employee.²
- 5.10 In the South African case of ***Diereks vs. University of South Africa***³, the factors to take into account in assessing whether there was an expectation of the renewal of contract were enunciated as follows:

“A number of criteria has to be identified as consideration which have influenced the findings of the past judgments in the Industrial and Labour Appeals Courts. These include an approach involving the evaluation of all surrounding circumstances, the significance or otherwise of the contractual stipulations, agreements, undertakings by the employer, or practice or custom in regard to renewal or employment, the available of the past, the purpose or the reason for concluding the fixed term Contract, inconsistent conduct and failure to give reasonable notice.”

² Johanette Rheder, Fixed Term Contracts 'www.jrattorneys.com' accessed:6/08/2017

³ (1999) 20ILJ1227

5.11 **Conduct of the parties**

5.12 A dismissal, therefore, occurs on the expiring of a Fixed Term Contract only if the employee has acquired a reasonable expectation that it will be renewed based on the factors announced by the authorities I have referred to.

5.13 Turning to the facts of this case, the evidence of the Complainant which was not challenged or contradicted by the Respondent shows as follows:

- (a) On 18th June, 2014, the parties to this suit signed an employment Contract. The Contract was couched in the following words:

“You will be on a two year renewable contract effect 18th June, 2014.”

- (b) On 24th February, 2016 at 13:44 hours, the Respondents Program Director Ms. Mary Morris wrote an email to the Complainant. I will quote the relevant parts of that email to this case:

“I think we should let Dave Burrows know personally that you are pregnant and will be taking maternity leave. We should try to indicate time frames, say from July, 2016, and your maternity allowance as part of your employment contract. I suggest you and I have a quick call with him, not at progress meeting time, I would like to arrange a call

say early tomorrow morning? 7:30UK/9:30CAT. Shall we discuss by Skype later this afternoon?"

- (c) On the same day at 14:22 hours, Ms. Morris sent another email whose subject was "Employee Maternity Leave" to Miyanda Mulambo and the Complainant and wrote:

"Hi Miyanda and Heather, would you confirm the Maternity Leave in Heather's contract please?"

- (d) At 14:24 hours on the same day, Miyanda Mulambo responded to the email as follows:

"90 working days."

- (e) At 16:05 hours on the same day, the Complainant wrote:

"If I go on leave on August 1st, this means my maternity leave would end the first week of December. I plan on taking an additional month past that of leave to be with my family in California over Christmas and New Year."

- (f) On March 30th, 2016, at 10:59 hours, the Complainant wrote to Ms. Morris as follows:

"Hi Mary,

Just remembered something now that I will surely forget tomorrow, back in November I discussed, both with Ian and Justin, the possibility of moving my salary to Pound or

Dollar-based from Kwacha-based. One concern of mine is the devaluing Kwacha and many of my expenses (school, travel, etc) are in dollars and my kwacha salary has significantly lost its power (about 50%) since I started Ischool. Rumors have it that the Kwacha will become more unstable following the elections.

With a new Contract would you be able to explore this option with Justin.

*Thank you!
Heather”*

(g) On the same day at 22:10 hours, Mrs. Morris responded:

“Yes of course, lets chat tomorrow.”

(h) On 26th May, 2016, Ms. Morris wrote an email to Miyanda Mulambo the Complainant and states:

*“Hi Miyanda and Heather,
How are things progressing with Heather’s contract renewal?”*

(i) The Complainant testified that on 22nd June, 2016, she had a Skype meeting with Ms. Morris and Mr. Miyanda Mulambo (the General Manager of the Respondent) where Ms. Morris told the Complainant that her contract would be terminated as a result of the long absence she was to

have at the beginning of her new contract due to the maternity leave. She was told that the Contract talks would only be held in January, 2017 after her maternity leave.

- (j) Around 10th June, 2016, the Respondent had processed all documentation for the work permit for the Complainant and a Bank Certified Cheque was requested from the Respondent's Banker (Barclays Bank) to the Director General Immigration in the sum of K4,000.00 (**exhibit HMCM6 refers**).
- (k) On 22nd June, 2016, (date was erroneously put as "22nd June, 2018"), the Respondent wrote a letter to the Complainant informing her that her Contract of service had ended on 18th June, 2016 and the reason given for not renewing the Contract was that the Complainant's work permit would expire on 24th June, 2016.

5.14 From the evidence I have just discussed, and the wording in the Contract that, "*you will be on a two year renewable contract*" created a reasonable expectation of renewal of the Fixed-Term Contract in the mind of both parties.

5.15 Further, the email trail between the Complainant and the Program Director (Ms. Morris) all point to the fact that there existed facts that would lead a reasonable person to anticipate a renewal. The Complainant in this case acted like a

reasonable person and anticipated a renewal. How would one explain the issue of Maternity leave being discussed for the month of August, 2016 when the Contract would have expired on 18th June, 2016?

- 5.16 Further, after, the expiration of the Contract on 18th June, 2016, the Complainant continued to work until 22nd June, 2016 when the Contract was purportedly terminated.
- 5.17 In the case of **Choonge vs. ZESCO Recreation Club, Itezhi Tezhi**, the Supreme Court in referring to an employee on a Fixed-Term Contract who had continued to work after the expiring of the Contract had this to say:

“Since the Respondent allowed the Appellant to continue his duties for one month after the contract expired due to effluxion of time on 31st July, 2012, it can be implied and properly to that the Contract of Employment was extended for the same for the same period and on the same conditions as those contained in the expired fixed term Contract of Employment.”

- 5.18 The Respondent will therefore, be estopped from denying that the Complainant in this case had her contract renewed as she had continued to work even after the expiry of her Contract.

5.19 It was unchallenged evidence that the long absence from work due to the Complainant's pregnancy was the main reason for the non-renewal of her contract. This fact was confirmed by the WhatsApp message (**see exhibit "HMCM5"**) from Mr. Miyanda Mulambo, the General Manager of the Respondent when he wrote to the Complainant:

"She did not say she did not want you working in the long term. I think it's just how to work the long absence and the renewal."

5.20 It is clear then that the real reason for non-renewal was the pregnancy and the eminent maternity leave of the Complainant. It was submitted on behalf of the Complainant, correcting in my view that; it is illegal to dismiss or not to renew a contract on grounds of pregnancy. This is provided for under **Section 34 (4) of the Employment Act as amended by Act No. 15 of 2015.**

5.21 Based on the evidence that is before me, and taking into account all the circumstances of this case, I find that the conduct of the Respondent created a reasonable expectation that the Complainant's contract would be renewed.

5.22 A dismissal, therefore, occurred when the Respondent purportedly terminated the Complainant's Contract of Employment as she had acquired a reasonable expectation that it would be renewed.

- 5.23 It is my finding that reasonable expectation and renewal or re-employment in as far as it relates unfair labour practices is anchored under Sections 28 (c)(2) and 34(4) of Act No. 15 of 2015 which has been proved in this case.
- 5.24 The dismissal was therefore unfair.

B. Whether the Complainant is entitled to reliefs claimed

(i) Damages for unfair and unlawful termination

- 5.25 Since I have found that the dismissal was unfair as it contravened statutory provisions, Section 85 A of the Industrial and Labour Relations Act gives me discretion to grant such remedy that I consider just and equitable.
- 5.26 In the premises, I award the Complainant twelve (12) months' salary as damages for unfair dismissal.

(ii) Damages for mental distress

- 5.27 The Complainant has claimed damages for mental distress.
- 5.28 The Supreme Court in ***Chilanga Cement Plc vs. Kasote Singogo*** held that:

"We are of the view that such an award for torture or mental distress should be granted in exceptional cases, and certainly not in a case where more than the normal measure of Common law damages have been awarded."

- 5.29 I am guided by the Supreme Court holding but I will go further to explain that any improper conduct on the part of the employer in the cause of dismissal was to be compensated for by an enhanced notice period of payment.
- 5.30 In the Canadian case of ***Fidler vs. Sun Assurance Co. of Canada*** the Court held that: “*damages for mental distress could be awarded if such as may be arising naturally from such breach of contract itself, or such as may be reasonable be supported to have been in contemplation of both parties.*”
- 5.31 This therefore, brings in an issue that the object of the Contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties.
- 5.32 Following up on the case of Fidler (Supra), the Supreme Court of Canada in the case of ***Keays vs. Honda Canada Inc.*** went on further to discuss the issue of damages for mental distress in employment contracts and held that:

“Employment Contract is by its nature subject to cancellation on notice and thus at the time the Contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal

possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.”

- 5.33 The ratio from the cited cases is that the damages for mental distress granted beyond notice period must be shown to have been within the contemplation of the parties at the time of Contract and the psychological distress has arisen from the manner of termination.
- 5.34 The employee should therefore, prove that the manner of dismissal caused mental distress that was in the contemplation of the parties. Once that is proven, then as guided in the Singogo case, damages may be granted above the normal measure of damages.
- 5.35 In casu, the Contract of employment does not show that the parties contemplated a psychological distress resulting in a dismissal at the time of framing the employment contract. Indeed, the Complainant may have experienced normal distress and hurt feelings when the Contract was not renewed. These feelings are however, not compensable as a dismissal such as the one that affected her is a clear legal possibility. I am not therefore, persuaded to award damages for mental distress for the reasons I have given.

6.0 **CONCLUSION**

- 6.1 From the judgment I make the following order:

- (a) The claim for unfair dismissal succeeds and the Complainant is awarded 12 months' salary as compensatory damages;
- (b) The claim for mental distress fails and is dismissed.
- (c) The award in 6.1 (a) above will attract interest at short term Commercial Bank lending rates from 2nd August, 2016 until the date of Judgment, thereafter, at the lending rates as determined by the Bank of Zambia from time to time until full settlement.
- (d) Costs to the Complainant.

Delivered this day of 2017



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M. MUSALUKE
HIGH COURT JUDGE