



**IN THE CONCILIATION, MEDIATION & ARBITRATION COMMISSION
(CMAC)**

HELD AT MANZINI

SWMZ 006/12

In the matter between:-

ALPHEOUS M. GUMBI

APPLICANT

And

S & B RESTAURANT (PTY) LTD

RESPONDENT

CORAM:

Arbitrator	:	Mthunzi Shabangu
For Applicant	:	In person
For Respondent	:	Mrs. Sibongile Fortunate Fyfe
Nature of Dispute	:	Unfair dismissal
Dates of Hearing	:	12 th April, 2012; 11 th May, 2012.

ARBITRATION AWARD

DETAILS OF THE PARTIES AND REPRESENTATION

1. Applicant is **Alpheous M. Gumbi**, an adult male Swazi who represented himself during the course of these arbitration proceedings, his right to legal representation having been explained to him by the Commission.
2. The Respondent is **S & B Restaurant (Pty) Ltd**, a corporate entity that trades under the hotel and catering industry, situate at Matsapha, Swaziland. Mrs. Fortunate Fyfe – Respondent’s Managing Director, represented the Respondent during these proceedings, the right to legal representation having been duly explained to her by the Commission.
3. The arbitration hearing was held at the CMAC offices – Manzini on the 12th April and 11th May, 2012 respectively, excluding the pre-arbitration conference which was held on the 5th April, 2012 at the same venue.

ISSUE TO BE DECIDED

4. The issue for determination is whether or not the non-renewal of the Applicant’s fixed term contract of employment constitutes an unfair dismissal of the Applicant from the Respondent’s employ.

BACKGROUND TO THE ISSUE

5. The parties (Applicant and Respondent) entered into an employment contract on the 16th December, 2007 wherein the Applicant was engaged as a Barman/Waiter. No written particulars of employment were prepared and signed for by the parties as at that time, not even the statutory employment Form (“Second Schedule”) obligated by **Section 22** of the **Employment Act No. 5 of 1980 (as amended)**.

6. In 2009 the parties converted their rather permanent/indefinite employment into a fixed term contract of twelve months at a time. The fixed term contract was in writing and duly signed for by both parties, the Respondent's Managing Director signing on behalf of the Respondent.
7. The fixed term contract signed in 2009 was renewed twice, being in 2010 and 2011 respectively. A copy of the last contract as admitted by both parties was signed on the 1st January, 2011 and due to expire on the 31st December, 2011.
8. It is of significance to note that the Applicant did not challenge the conversion of his permanent employment status in 2009 when it was introduced for the first time by the employer.
9. On the 15th October, 2011 the respondent served Applicant with a letter notifying him that his contract of employment will not be renewed for the year 2012 and further provided reasons for the non-renewal.
10. It is this non-renewal of the contract, that Applicant views as a dismissal, hence the subsequent referral of a dispute to this Commission, claiming:

10.1	Maximum compensation for unfair dismissal	= E18, 000.00
10.2	Public holidays (12 days)	= E1, 161.12
10.3	Additional notice pay	= E580.36
10.4	Leave balance (17 days)	= E822.46
10.5	Uniform deductions	= E744.25
10.6	Overtime pay	= E6, 572.88

Total

= E27, 881.07

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11. On failure of conciliation to resolve the dispute, the parties mutually referred the matter to arbitration in terms of **Section 85(2) of the Industrial Relations Act, 2000 (as amended)** for which I was appointed to be the Arbitrator.

SUMMARY OF THE EVIDENCE

THE APPLICANT'S VERSION:

12. During the pre-arbitration conference the minute of which was incorporated into the record of these proceedings, it was agreed that the Applicant bears the onus of proving that he was an employee to whom the provisions of **Section 35** of the **Employment Act** applied as at the time his contract was not renewed by the Respondent. That is in terms of **Section 42 (1)** of the **Employment Act**. It was in an endeavor to discharge this onus that the Applicant tendered the evidence as herein summarized.
13. The Applicant confirmed that his permanent employment was converted in February, 2009 into being a fixed term contract to run for a period of twelve months. He further confirmed that this fixed term contract, which he did not challenge, was renewed twice, being in January, 2010 and January, 2011 respectively, the last of which was due to expire on 31st December, 2011.
14. On the 15th October 2011, being some two and a half months before the expiry of the parties last fixed term contract, Applicant was served with a letter notifying him that his contract will not be renewed for the year 2012. The main reason for the non-renewal as contained in that letter was that the Company's sales had decreased by more than 50% since March of that

year – 2011 and, by consequence, the Company had to downsize on its staff to cope in the shrinking economy.

15. Before this letter and sometime during August 2011, the Managing Director had had a one-on-one discussion with the Applicant, whom he had invited into her office, about the dwindling economic challenges faced by the Company posed by the diminishing sales and the resultant need to retrench therefore. In this meeting, Applicant was told to look for possible alternatives to a retrenchment, although he denies that the Managing Director made it clear that he is one of the affected employees in the then impending redundancies. When served with the letter of the 15th October, 2011 Applicant had not returned to the Managing Director with his considered suggestions to avoid a retrenchment. He argued that no time frame had been fixed for his return to the Managing Director and that the latter had also not re-invited him to further the August discussions.

16. The Applicant argued that notwithstanding the obviously sufficient notice of non-renewal of his fixed term contract, the non-renewal amounts to an unfair dismissal, more because of the following reasons:

16.1 He argued that he was the longest serving employee for the Respondent and that all other Waiters came after him and were taught by him how liquor is served in the bar.

16.2 He also argued that he was the highest in sales than all the other Waiters. He was the first one to get commission for the highest sales when commissions were introduced as an incentive by the Respondent and was the last to get it when they were later stopped around 2010.

16.3 He had a clean disciplinary record with no previous infractions and warnings. This was only in reference to the duration of the last fixed

term contract for the year 2011 and not necessarily for the entire history of Applicant's service in the Respondent's employ.

16.4 The fixed term contract he signed for did not have a clause that talks of the criteria for its renewal or non-renewal. Since it had been renewed more than once (for two times to be precise) Applicant says he was of the view that it would also be renewed for the year 2012.

17. Besides the claim of compensation for unfair dismissal and additional notice pay, Applicant also testified about how he worked for overtime and on public holidays but was not remunerated there for in terms of the law, as well as some outstanding annual leave balance and uniforms deductions.

OVERTIME

18. In respect of the overtime claim Applicant says during day shifts, which would run for two weeks in a month, he knocked-in at 0630 hours and knocked-off at 17 30 hours for five days in a week, thus accumulating two (2) hours overtime per day. These totals up to twenty (20) hours overtime per fortnight.

19. During night shifts, which would also run for two weeks in a month, Applicant knocked-in at 0800 hours till 2000 hours for four (4) days per week, being from Mondays to Thursdays, thus accumulating some three (3) hours overtime per day. During Fridays and Saturdays, the night shift would start at 0800 hours till 2300 hours, thus giving rise to some six (6) hours overtime per day. The night shift overtime totals up to 48 hours per fortnight.

20. A combination of the overtime hours for both day and night shifts totals up to 68 hours in a month. Applicant claimed payment for these hours at time and a half using his hourly rate for an eighteen months period counting

backward from the expiry date of his last fixed term contract to come up with the figure indicated hereinabove, being the sum of **E6, 572.88**.

PUBLIC HOLIDAYS

21. In respect of public holidays, Applicant says he was made to report for duty on all public holidays and yet the employer did not double up the pay for such days but only paid on ordinary scale much against the law, i.e. **Regulation 16 of the Regulation of wages (Hotel, Accommodation, Catering and Fast Foods Industry) Orders, 2008 and 2011 respectively**.
22. To come up with the twelve (12) days claimed, Applicant took eight (8) days and four (4) days of recognized public holidays within the eighteen (18) months range from the date of termination of his last fixed term contract and claimed the remaining half thereof since the other half was duly paid for by Respondent. This arithmetic justified his claim for **E1, 161.12**.

LEAVE CLAIM

23. In proving his leave claim, Applicant testified that his annual holiday leave was not upgraded in line with his years of service as per **Regulation 8 (1) (a) and (b)** of the **Regulation of Wages Order** for the industry. This regulation provides that after two years and three years of continuous service, an employee should be entitled to twenty one (21) and twenty three (23) working days annual leave respectively, with full pay.
24. Contrary to this Regulation, Applicant says he was getting fourteen (14) annual leave days, thus leaving him with a balance of ten (10) days in 2011 and seven (7) days in 2010, hence the seventeen (17) days leave balance claim in the sum of **E822, 46**.

UNIFORM DEDUCTION

25. The uniform deduction claim is borne by the fact that Applicant said when the Respondent introduced the idea of uniforms to the staff members, they were made to pay for it from their salary, much against **Regulation 20 (1)** of the **Regulation of Wages Order**. Reference was made to the pay slips (envelopes) annexed on the Report of Dispute in proof of the monthly deductions for uniform which totaled up to **E744.25**.
26. Applicant, however, confirmed in evidence that he did not leave the uniform with the employer when exiting at the end of December, 2011 and yet the Wages Order say it remains the property of the employer.

THE RESPONDENT'S VERSION;

27. Mrs. Sbongile Ntombi Dlamini (RW 1) testifying as a lone witness and at the instance of the Respondent stated that she has been under the Respondent's employ as an Accountant since 2008. Her duties include preparing financial records, payment of salaries, making invoices and all accountants' functions, as well as responsible for the staff welfare.
28. RW 1 confirmed that when employing staff the Respondent uses fixed term contracts, usually of twelve months periods, which are in writing and signed for by both the employee and the employer.
29. This witness testified that inasmuch as the company uses the **Regulation of Wages Orders for the Hotel and Catering Industry** and the **Employment Act** as a compass it does not fully comply with all the conditions of service as provided for in these laws when it comes to the issues of overtime, public holidays and annual leave. Overtime and public

holidays are not paid for and yet annual leave is not granted in full, all because the basic wage for its employees is generally above that stipulated in the **Regulation of Wages Order**. She said the employees ought to know of this fact as it is provided for in their fixed term contracts.

30. Mrs. Dlamini recalled a discussion in one of the religious morning assembly wherein the Managing Director recommended to the staff the issue of staff uniforms over and above the regular or normal protective clothing. RW 1 differentiated between protective clothing for this industry and uniform. In this industry, she said the following clothing items constitute protective clothing for Waiters: aprons, hats and gloves. The uniform constituted of a jersey and shirts and had the company logo. The employees personally paid for the uniform and yet for the protective clothing, that was provided at the employer's cost.
31. It was RW 1's further evidence that towards the end of the year 2010 up to 2011 the company incurred some financial challenges as caused by a drastic decline in sales. The situation was so severe that the company's monthly income could not match its monthly expenditure which included, *inter alia*, a monthly premium for a bond in the sum of E67, 479.49 plus monthly wage bill ranging between E70, 000.00 to E75, 000.00.
32. But for the economic meltdown faced by the Company, the Managing Director- Mrs. Fyfe has not been drawing a salary.
33. This issue was discussed in one of the morning assembly prayer meetings during the year 2011, wherein the Managing Director explained this to the members of staff and further stating that the situation is threatening some retrenchments. Pursuant to this discouraging piece of information, some employees intensified their efforts to secure employment elsewhere and voluntarily resigned from the Respondent's employ. Even under cross-

examination, Mrs. Dlamini maintained that though the business generally has a high staff turn-over, but the numbers increased after the Managing Director's word to the employees.

34. Further under cross-examination, Applicant sought to vitiate the allegation of economic downturn by suggesting that the Company had sponsored certain huge functions, being the Smart Partnership Dialogue held at Mavuso Trade Centre in 2011 and Philani Maswati Patrons' get together held at Maguga Lodge in January 2012. RW1, confirming the Respondent's participation in both these events, stated that the Company's sponsorship in the Smart Partnership Dialogue was only to the extent of the provision of labour and the catering facilities. Otherwise the food parcels or stock was provided by the Government, the host of the function.
35. About the Maguga function, Mrs. Dlamini stated that the Company only availed itself to cater for that event on credit but was paid in full for its catering in due course.
36. When applicant suggested that the Company has re-employed other Waiters after him, RW1 stated that the only people who were employed after applicant were Cleaners and not Waiters. It's just that staff at S & B is rotated so that all may fit even in the other operations' departments.

ANALYSIS OF THE EVIDENCE

37. The basis of applicant's claim of compensation for unfair dismissal is the non-renewal of his fixed term contract for the year 2012 which renewal, if done, would have been for the third time since the parties' first fixed term contract was signed in 2009 and renewed in 2010 and 2011 respectively. He is alleging that the non-renewal of his contract for the year 2012 amounts to

an unfair dismissal. He says he reasonably expected that his contract would be renewed despite receipt of written notice on the 15th October, 2011 to the effect that his contract would not be renewed on the expiry date, being 31st December 2011.

38. It is common cause that as at the date of termination of Applicant's services the parties' employment relationship was governed by the fixed term contract duly signed for by both parties on the 1st January 2011. Clause 3.1 thereof clearly provides that the contract shall subsist for a period of twelve months or until such time it is terminated at the instance of either party in terms of clause 10 thereof.
39. Clause 10 provides that the contract may be prematurely terminated at the employee's instance by voluntarily resigning from the Respondent's employ and giving the latter notice in terms of clause 6 of the contract. Alternatively the pre-mature termination may be at the instance of the employer as caused by the employee's material breach of the contract either in terms of statutory law or at common law.
40. The notice clause, i.e. clause 6, provides that during the first three(3) months, either party may terminate the employment for whatever reason without giving notice to the other party. After three (3) months of service, termination shall be on fourteen (14) days notice from either party.
41. The selected paraphrased clauses of the parties' contract are those I consider germane for purposes of this analysis and Award.
42. It is also common cause that the parties' employment contract was not prematurely terminated but rather expired due to effluxion of time on the agreed termination date, being 31st December, 2011.

43. It is further common cause that about two and half months in lieu of the termination date, being on 15th October 2011, a written notice of non-renewal, with reasons there for, was furnished to Applicant by the Respondent. I hasten to remark that this notice period of termination is far more than the fourteen (14) day notice period stated in clause 6 of the contract.
44. The letter of non-renewal of the contract came after a consultative discussion which was held by the applicant and the Respondent's Managing Director (Mrs. Fyfe) during August 2011, wherein the reason for the non-renewal as contained in the aforesaid letter, was the only subject of discussion. That such a meeting was held is also common cause from the evidence.
45. The Commission is not being asked to review and set aside the introduction of the fixed term employment contract by the Respondent in 2009. The applicant conceded that he never challenged the conversion of his employment status from indefinite to fixed term contracts. Instead this change was smoothly accepted and confirmed by the mutual contract signing and subsequent renewals in 2010 and 2011 respectively.
46. In any event, even if the Applicant was challenging the legality of the conversion of his indefinite employment into fixed term contracts, that would be met with the challenge of time bar as envisaged by **Section 76(2)** of the **Industrial Relations Act, 2000(as amended)** which provides that: ***"a dispute may not be reported to the Commission if more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose"***.
47. In the circumstances, the only question that begs an answer is whether or not the non-renewal of the Applicant's contract for the year 2012 amounts

to an act of unfair dismissal. Supported by the probabilities arising from the totality of the evidence before the Commission, I would hasten not to answer this question in the affirmative.

48. Inasmuch as the parties' fixed term contract did not have a renewal clause, but in the Commission's view, the conversion of the employment contract in 2009 could not have been purely for cosmetic purposes. The only logical reason for the introduction of fixed term contracts was to avail to the parties the alternatives inherent or expressed in such contracts of either renewing or not renewing the contract at the expiry of the agreed period. The Commission fails to find any other reason for the conversion except for this one. Now, the consequence of a permanent (or indefinite) employee signing a fixed term contract is to render his employment temporary. The Applicant is bound by the terms of the fixed contract which he signed.

See: Derek Charles Macmillan & Another vs. Usuthu Pulp Company t/a Sappi Usuthu, Case no. 187/2006 (IC), paragraph 55 at page 19 of the judgment by the former Judge President, PR Dunseith.

49. The Respondent, exercising its right of either renewing or not renewing the contract, elected not to renew for the year 2012. And needless to say, it did not just exercise that right, but went further to give Applicant sufficient notice with reasons for the election not to renew. The reasons had been communicated to the staff in the religious morning assembly as per the evidence of RW 1, and further discussed privately between the Managing Director and the Applicant in a confirmed private meeting held in August, 2011 specifically initiated for that purpose by the Respondent's Managing Director.
50. The Commission is further failing to come up with any basis for the Applicant's alleged reasonable expectation of renewal of his contract come

December 31, 2011 in the face of a two and a half months' **written** notice of non-renewal. The alleged expectation, even if for arguments' sake could be said was there, it was rather unreasonable and baseless. No evidence is tendered by the Applicant that in-between the 15th October and the 31st December, 2011 the parties met and discussed the notice of non-renewal to an extent that the Respondent undertook to either retract its non-renewal letter or rather promised to renew the contract notwithstanding the notice of non-renewal. In **Nhlanhla Hlatshwayo vs. Swaziland Government & Another, Case No. 398/2006 (IC)** Judge President P.R Dunseith, as he then was, clarified the law as follows regarding the principle of legitimate expectation:

"To be "legitimate" an expectation must have some reasonable basis. It must be more than a mere hope or ambition. In the present case, there is no evidence that any promises or assurances were made to the Applicant to justify a belief that he would be promoted. He was all along aware that his position was temporary and that he was acting pending a substantive appointment. When he became aware that the post of Registrar was being advertised, the Applicant's reaction was to state that "I expect to leave with all my rights to whatever new position I may be transferred." He did not express any claim or expectation to be promoted to the substantive position." (Paragraph 47 at page 16 thereof)

51. In this case, in the absence of anything, promise or assurance from the Respondent post the letter of the 15th October 2011, there is absolutely nothing which could have given rise to the Applicant's alleged expectation.
52. In the Commission's further view, the fact that the contract was renewed twice does not in itself establish sufficient reason to expect further automatic renewals. The words of his Lordship the then Judge President of

the Industrial Court in the case of **Bernardin B. Bango vs. The University of Swaziland Case No. 342/2008 (IC)** are apposite here where he stated the position of our law as follows:

”It has been held in South Africa that the failure by an employer to renew a fixed term contract may constitute an unfair labour practice if the employee concerned is able to establish that he or she had a reasonable expectation that the contract would be renewed and that the employer lacked good cause for non-renewal of the contract.

Such an expectation usually arises from 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.

The SA Labour Relations Act 66 of 1995 expressly 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 statutory law. On the contrary, Section 35 (1) (d) of the Employment Act, 1980 appears to preclude reliance on a legitimate expectation of renewal of a fixed term contract, by providing that an employee engaged for a fixed term which has expired does not enjoy protection against the unfair termination of his or her services. (Paragraphs 17-19 at page 6 thereof) Emphasis added.

See also: Nkosenhle Ben Kunene vs. Public Service Pension Fund, Case No. 320/2005 (IC) (paragraph 14 page 5 thereof)

53. In paragraph 19 of the **Nkosenhle Ben Kunene’s** judgment (supra) the learned Judge of the Industrial Court went on to state the law as follows:

“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 Bango vs. The University of Swaziland, (IC) case no.342/2008 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 Nhlanhla Hlatshwayo vs. Swaziland Government and the Attorney General (IC) case no. 398/2006, there is currently no legal precedent in our law to accord substantive right to an employee on the basis of legitimate expectation. There cannot be in the Court’s view, any reasonable expectation of permanent employment arising from un-renewed temporary contracts.”

54. The recently concluded marathon case of **Doctor Lukhele vs. Swaziland Water and Agricultural Development Enterprise (Pty) Ltd, Case No. 47/2011 (Supreme Court)** provides a sterling conclusion for this analysis. Whilst dealing with the whole subject of a fixed term contract and the alleged tacit renewal thereof, the Supreme Court eventually landed on an interpretation of the provision in the Employment Act which excludes a certain category of employees from complaining of an unfair dismissal. Amongst these are employees engaged on fixed term contracts and whose term of engagements has expired by effluxion of time. This is in reference to **Section 35(1) (d) of the Employment Act No. 5 of 1980.**
55. The Supreme Court in a unanimous judgment delivered by Justice of Appeal S.A. Moore, with him Justices of Appeal A.M. Ebrahim and DR. S. Twum, interpreted the provisions of **Section 35 of the Employment Act** as follows:

“Conflicting submissions have been advanced by counsels for the parties concerning the meaning and effect of Section 35 (1) of the Act. Section 35 falls within PART V – TERMINATION OF CONTRACTS OF EMPLOYMENT. It comes under the heading: Employees Services Not To Be Unlawfully Terminated. Section 35 (1) lists four categories of employees to whom the “section shall not apply”. It begins in terse but imperative terms: “This section shall not apply to”. There can be no equivocation, unclarity, or uncertainty about the plain and obvious meaning of six simple ordinary and unambiguous English words. The patent import of subsection (1) of Section 35 of the Employment Act is that sub-section 35 (1) (d) shall not apply to: “an employee engaged for a fixed term and whose term of engagement has expired.” Paragraph 19 of the judgment (Emphasis added).

56. In this case, the Applicant has failed to discharge the onus resting upon him in terms of **Section 42 (1)** of the **Employment Act**, that of proving that he was an employee to whom the provisions of **Section 35** of the **Employment Act** applied as at the date of termination of his services. In the result and for the foregoing reasons, the Applicant’s claim of compensation for unfair dismissal and additional notice pay should fail.
57. Not much opposition was tendered by the Respondent as with regards to the other claims of the Applicant. RW 1 testified that it is normal at the Respondent’s business that employees are required to work for overtime and without honoring public holidays and annual leave days and yet they are not remunerated in terms of the law for that. In closing her arguments, Mrs. Fyfe, boldly stated that *“the Respondent is praying for judgment in its favour but if there are other issues where her Company did not pay the correct amounts, she would be willing to settle those but not for the claim of unfair dismissal”*.

58. In the absence of any cross-examination of the Applicant's evidence as with regards to the claims of overtime, public holidays and leave balance, taken together with RW 1's unequivocal admission and Mrs. Fyfe's offer for these claims, same should be accordingly granted without much ado. In this regard reference is made to **Section 27** of the **Employment Act** which provides that:

“No contract of employment shall provide for any employee any less favourable conditions than is required by any law. Any condition in a contract of employment which does not conform with this Act or any other law shall be null and void and the contract shall be interpreted as if for that condition there were substituted the appropriate condition required by law.”

59. The claim for uniform deductions is refused. Evidence was tendered that uniform as is necessary for a Waiter in this industry, being apron, hat and gloves, was freely provided by the Respondent. These items, in terms of **Regulation 20** of the **Wages Regulation Order for the Hotel and Catering Industry**, remain the property of the employer. The other uniform as recommended by the Company to its staff, being a jersey and shirt, these are not for protective clothing per se but are only for purposes of enhancing an organization's corporate image. They are usually paid for by the employees as such clothing items do not remain the property of the employer but rather of the individual employees. The Applicant conceded in evidence that even his uniform is still in his possession as he did not return it to the employer when exiting the company.

ORDER

60. The Applicant's claims of compensation for unfair dismissal, additional notice pay and uniform deductions are hereby dismissed.

61. The claims for overtime, public holidays and leave balance are hereby granted as follows:

61.1	Overtime pay	=	E6, 572.88
61.2	Public holidays	=	E1, 161.12
61.3	Leave balance	=	E 822.46
			<u>E8, 556.46</u>
			=====

62. The Respondent is ordered to effect payment of the total sum of **E8, 556.46** at CMAC – Manzini on or before the last day of July, 2012.

DATED AT MANZINI THIS DAY OF JUNE, 2012.

MTHUNZI SHABANGU
ARBITRATOR - CMAC