

IN THE HIGH COURT OF LESOTHO

In the matter between:-

MATSIE CHOBOKOANE

Applicant

and

ATTORNEY GENERAL

1st Respondent

MINISTRY RESPONSIBLE FOR THE PUBLIC SERVICE

2nd Respondent

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 23rd day of November, 1990

This is an application for an order in the following
terms:-

- "(a) Declaring Applicant's dismissal from
the public service null and void;
- (b) Directing Respondents to pay Applicant's
salary with effect from the date of the
purported dismissal;
- (c) Directing Respondents to pay the costs
hereof;

The facts of this case are common cause and may be summarized as follows:

At all material times the applicant was employed as an assistant engineer on permanent terms with the Ministry of Works.

On the 5th November, 1987 he was transferred from the Training Section, Maseru to the Central Region, Maseru where he was to serve under a junior officer. He raised an objection with the Principal Secretary as well as with his immediate superior but nothing came out of it.

On the 24th December, 1987 the applicant was once more transferred from the Central Region, Maseru to the Southern Region, Mhale's Hoek. He alleges that he did not take up the transfer because he had to see the Principal Secretary. On the 18th January, 1988 the Engineer (Executive) wrote a letter to the applicant warning him he must report for duty at the office of Engineer (South) as soon as possible in order to avoid unnecessary disciplinary action that might be taken against him.

On the 28th January, 1988 the applicant received a letter from the Senior Roads Engineer informing him, inter alia, that he shall be considered to be on unpaid leave as from the 29th January, 1988 if he did not take up the transfer. On the 18th February, 1988 after meeting the Principal Secretary who had requested the applicant to put his complaint in writing and who had promised to

solve the impasse quickly, the applicant complied and reduced his complaints in writing and requested that his transfer be suspended pending the determination of his appeal. He received no reply.

On the 10th November, 1988 the applicant wrote a letter in which he requested a transfer to Maseru Town Council, Ministry of Interior. Finally on the 15th February, 1988 the applicant received a letter to the effect that he had been removed from office on the ground that he absented himself from duty without leave. The letter reads as follows:-

"Dear Mr. Chobokoane,

I regret to inform you that you have been removed from office by way of dismissal without disciplinary proceedings under section 6 (3) of the Public Service Order 1970, in consequence of your absence from duty without leave in contravention of section 10 (1) (i) of that order.

Effective date is 1st February, 1988.

Yours sincerely,

M. MOHALENYANE (MRS).
FOR PRINCIPAL SECRETARY
MINISTRY OF THE PUBLIC SERVICE."

Mr. Putsoane, counsel for the respondents conceded that the dismissal was unlawful on the ground that it purported to make dismissal retrospective. He, however, submitted that the applicant

was not entitled to any salary because at the relevant period i.e. from the 29th January, 1988 to the time of his unlawful dismissal the applicant was on unpaid leave. The unlawful dismissal merely restores the status quo, which is that the applicant was on unpaid leave. In paragraph 13 of his founding affidavit the applicant also considered himself to be on unpaid leave with effect from the 29th January, 1988.

Mr. Putsoane further submitted that it is trite law that one can only be paid for services rendered unless his failure to render services was caused not by him but by his employer. He referred to Roger W. Rideout! Principles of Labour Law, 2nd edition, pp. 78-81. He submitted that from the 28th January, 1988 to the 15th February, 1989 the applicant did not render any services as he was on unpaid leave, and as such he was not entitled to any payment for the said period. His failure to render services came as a result of applicant's failure to obey orders to go to Mohale's Hoek. Applicant cannot be allowed to benefit out of his own unlawful acts.

Mr. Malebanye, counsel for the applicant submitted that there is no proof that the applicant was on unpaid leave because there is no casualty return to that effect. In the letter of dismissal it is stated that applicant was dismissed for being absent from work without leave yet in paragraph 10 of the opposing affidavit deponent says that applicant was on unpaid leave. He submitted further that even if from the 29th February, 1988 to the 15th February, 1989 the applicant was on unpaid leave, that between the 15th February, 1989 to the date of judgment he is entitled to payment of his salary.

Regulation No.571 of the Public Service Regulations

1969 provides that -

"A head of department may, in exceptional circumstances, and then only if it is consistent with the public interest, grant unpaid personal leave to a public officer who in the opinion of the head of department has proved that it is necessary for him to absent himself from duty for reasons of urgent private affairs, and who has insufficient annual holiday to cover the period of absence required. Leave granted under these circumstances does not count as a break in service, but does not count as service for the computation of pension, nor does the period earn annual holiday."

The applicant was granted unpaid leave under this Regulation. Mr. Malebanye submitted that there is no casualty return to show that unpaid leave was granted. I have no idea what a casualty return is but I find that the letter of the head of the department is sufficient authority. That letter (Annexure "MC4") was copied to the Principal Secretary, Works. If some junior officers failed to make a casualty return that does not mean that the applicant was not on unpaid leave. He was on unpaid leave and he accepted that state of affairs.

My main concern about Annexure "MC4" was that the Senior Roads Engineer (M & A) is ~~not~~ head of the Department of Roads. That letter ought to have been written by the Chief Roads Engineer who is the head of that department. My initial reaction was that the officer who wrote that letter had no authority to do so. However, looking at section 45 of the Interpretation Act No.19 of 1977 it seems to me that the Senior Roads Engineer (M & A) may be covered by this section. It reads as follows:-

"In any Act, instrument, warrant or process of any kind, a reference to a public officer, or to a person holding a public office by a term designating his office, shall include a reference to any person for the time being lawfully discharging the functions of that office or any part of such functions, and any person appointed to act in or perform the duties of such office, or any part of such duties, for the time being."
(My underlining)

I shall assume for the purposes of this judgment that the Senior Roads Engineer (M & A) was acting lawfully.

The applicant was on unpaid leave when he was unlawfully dismissed. The question is whether he is entitled to any salary for that period when he was on unpaid leave. If the applicant had returned to work after the unpaid leave he would not be entitled to any salary covering the period when he was on unpaid leave and I see no sound reason why when he is dismissed whether lawfully or unlawfully he should be entitled to a salary for that period. I agree with Mr. Putsoane that the fact that the dismissal has been found to be unlawful restores the status quo, which is that the applicant was on unpaid leave. Another effect of the unlawful dismissal of the applicant is that if he were to return to work now he would be reinstated without any hesitation and he would start earning a salary from the day he resumed his duties at Mohale's Hoek.

I am of the opinion that the applicant cannot get benefits to which he was not entitled before he was unlawfully dismissed. It is true that damages are the normal and natural consequences of unlawful dismissal where the dismissed worker was working or

rendering service and also earning a salary. Regulation 571 (supra) is very clear about the effects of unpaid leave - it does not count as a break in service, but does not count as service for the computation of service, nor does the period earn annual holiday.

The submission that the applicant can only be paid for services rendered is unacceptable because the applicant was granted unpaid leave. He was not expected to render any services while he was on leave. He had not been recalled to resume his duties but the employer was entitled to expel him while he was still on unpaid leave if he had not made the dismissal retrospective. That renders the dismissal unlawful.

I was referred to a number of decided cases dealing with unlawful dismissal but all of them are not of any assistance to me because they do not deal with an employee who has been unlawfully dismissed while he was on unpaid leave. The applicant in the instant case does not challenge the lawfulness of the unpaid leave granted to him under the circumstances described above. The applicant was a disgruntled man who felt that his constant transfers, lack of promotion and being forced to work under the supervision of officers junior to him, were deliberate actions on the part of his senior officers to make him unhappy. Be that as it may he was on unpaid leave when he was dismissed and it seems to me that even now he is still on unpaid leave and cannot claim any salary for the period when he is on unpaid leave.

In the result the application is dismissed with costs.

J.L. KEHOLA
JUDGE

23rd November, 1990.