

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

LAC/REV/30/04

In the matter between:-

THABO MOTLAMELLE

APPLICANT

AND

NAPO RANTSANE

1ST RESPONDENT

LESOTHO REVENUE AUTHORITY

2ND RESPONDENT

JUDGMENT

CORAM: THE HON. MR JUSTICE S.N. PEETE

PANELISTS: 1. Mr. Kolobe
2. Mr. Twala

DATE: 29TH APRIL 2005

Headnote

**Labour Code Order 1992 – Termination of contract – Employee
under probation – Section 71 (2) of the Order – Right of such**

employee to bring a claim for unfair dismissal under section 66 (3) or 68 (c).

Though generally disentitled to claim for being unfairly dismissed, an employee on probation who has been dismissed has a right to bring a claim for an unfair dismissal if he can show that he has been dismissed for grounds listed under section 66 (3) of the Labour Code Order.

The arbitrator has to determine this entitlement after hearing evidence as to why the employee was dismissed; a summary approach to the inquiry is not equitable.

[1] This is an application for review of the arbitrator Napo Rantsane's decision to dismiss the applicant's referral of an unfair dismissal dispute upon the ground that when he was purportedly dismissed, the applicant was still under probation.

[2] **Facts common cause**

- On 1st August 2003 the applicant was engaged by the 2nd respondent as a Public Relations Manager. His job description is not outlined in his contract document.
- Probation period was four months ending on 30th November 2003.
- On 12th September 2003 – during the probation period – the Director of Human Resources Mr. M.N. Monyamane addressed a letter to applicant “terminating” the five year contract.

It reads:-

“12 September, 2003

*Mr. Thabo Motlamelle,
Public Relations Manager,
Lesotho Revenue Authority
Maseru*

Dear Mr. Motlamelle,

TERMINATION OF CONTRACT

Following the meeting we held with you regarding your incompatibility with the position you have been entrusted to (Public Relations Manager), the outcome was presented to the Lesotho Revenue Authority (LRA) Management. It is the decision of the Management that your incompatibility has gone beyond repair, and as a result, your employment contract is being terminated with effect from 12th September, 2003.

Cheques are enclosed for your statutory notice period and outstanding prorated monthly salary and leave.

Yours sincerely,

M.N. Monyamane
Director Human Resources

Encl.”

- Because of some acute misunderstanding between himself and a certain Mr. Kao, the applicant had written through e-mail to Mr. Nelson Monyamane on 9th September 2003 complaining about Mr.

Kao's attitude and competence/suitability for the job as Head of Executive Support.

- Further communications occurred between applicant and Mr. Monyamane which precipitated termination of contract for reasons of incompatibility. No evidence was led on this point.

[3] Under the Labour Code Order No.24 of 1992, Section 71 reads in full:

“71. Excluded categories

(1) Subject to subsection (2), the following categories of employees shall not have the right to bring a claim for unfair dismissal-

(a) employees who have been employed for a probationary period, as provided under section 75;

(b) employees over the normal age of retirement for the type of employment involved.

(2) An employee in a category covered by subsection (1) shall none the less be entitled to bring a claim for unfair dismissal alleging that the dismissal was for any of the reasons specified in subsection (3) of section 66 or section 68 (c) above.”

[4] For the general protection of employees (probationers included) is section 66 (3) (c). It reads-

“66. (3) the following shall not constitute valid reasons for termination of employment-

- (a) *trade union membership or participation in trade union activities outside working hours or, with the consent of the employer, within working hours;*
- (b) *seeking office as, or acting or having acted in the capacity of, a workers' representative;*
- (c) *the filing in good faith of a complaint or grievance, or the participation in a proceeding against an employer involving the alleged violation of the Code, other laws or regulations, or the terms of a collective agreement or award."*(my emphasis)

A fair interpretation of section 71 of the Code illustrates that an employee still on probation has a right to bring a claim for unfair dismissal if he can show that he has been dismissed for the reasons specified under section 66 (3) or 68 (e).

- [5] It stands to reason that the inquiry involves two stages (a) was the employee on probation? If the answer is yes, does he fall to benefit under section 66 (3) of the Code. The onus is on the probationer to establish entitlement.
- [6] It is quite clear that even though the applicant had been with the 2nd respondent's employ for a mere 43 days, relations had soured worsened after the e-mail correspondences written by the applicant on the 9th September 2003.

- [7] What sort of acrimonious communications took place over the three days day is not evident.
- [8] The basis for the arbitrator's decision revolved on the interpretation he gave to Section 66 (3), namely that the filling in good faith of a complaint or grievance must relate to the violation of the Code by the employer and not just any complaint or grievance.
- [9] It seems to this court that from reading the annexed record it is not clear whether before the arbitrator Applicant and **Ms Sephomolo** were giving evidence or making submissions.
- [10] This is a proper case where the applicant – being a probationer at the material time – should have been allowed to discharge the onus cast on him to show on a balance of probabilities that he had been dismissed unfairly for having filed a complaint, and not, incompatibility, as 2nd respondent alleges. All these are issues of fact upon which the arbitrator ought to have heard evidence.

In the book “*Employment and the Law*” **Landis and Grossett** have these to say on incompatibility:-

“Guiding principles

- *Behaviour which can be defined as incompatible is the failure or inability of the employee to maintain a standard of relationship with his/her superiors, peers and subordinates, suitable for maintaining productive working relationships and effectively performing the job function.*

- *The effect of incompatibility is poor work performance, e.g. the efficiency of the team and the employee's own efficiency is adversely affected.*

Recommended process

- *Advise the employee of the conduct causing the disharmony;*
- *Indicate what the consequences are and who is affected;*
- *Suggest the required remedial action;*
- *Give the employee a fair opportunity to consider the allegation and respond to it;*
- *Give the employee a fair opportunity to present his/her version;*
- *Provide a fair opportunity to the employee to remove the source of the disharmony, if the employee is found to have caused it;*
- *Should the disharmony persist due to the employee's actions, behavior, attitude (or similar), discipline should be implemented, culminating in a disciplinary enquiry;*
- *Liaise with Human Resources Department/accountable manager;*
- *Investigate the facts;*
- *Suspend the employee with pay, if necessary, pending the outcome of the Disciplinary Enquiry;*
- *Establish the appropriate charge;*
- *Undertake relevant internal administrative arrangements;*
- *Give notification of the Disciplinary Enquiry to the employee;*

- *Compile evidence (documentation, affidavits, statements, witnesses);*
- *Hold enquiry.”*

[11] It is important to realize that even though section 66 (3) (c) is drafted rather conjunctively there are, in our view, two distinct acts of “filing a complaint or grievance” one hand and on another of “participation in a proceeding against the employer involving the alleged violation of the Code”... We do not think that the filing in good faith of a complaint should necessarily involve allegation of violation of the Code by the employer; a complaint may be filed internally for any reason and the latter act involves participation in a proceeding and being victimised therefore. The subsection has been most inelegantly drafted and has led to this present misunderstanding.

This court therefore directs that another arbitrator go into the main factual issue whether applicant’s case falls to be treated under section 66 (3) (c) i.e. whether the reason for his dismissal was for having filed a complaint or for incompatibility.

S.N. PEETE

JUDGE OF LABOUR APPEAL COURT

PANELIST: _____

PANELIST: _____

For Applicant : **In person**

For Respondents : **Ms Sephomolo**