

IN THE LABOUR APPEAL COURT OF LESOTHO

Held at Maseru

In the matter between:-

**LESOTHO HIGHLANDS DEVELOPMENT
AUTHORITY (LHDA)**

APPELLANT

And

MAILE MAILE

RESPONDENT

CORAM : THE HON. MR ACTING JUSTICE K.E. MOSITO

ASSESSORS: MR. O.L.MATELA
MRS M. MOSEHLE

DATE: Heard on 30th October 2006
Delivered on 2nd November 2006

SUMMARY

Discrimination – Respondent Deputy Manager denied benefits accruing to managers – Contract and policies entitling him to such benefits – section 5 of the Labour Court meet permitting discrimination – Decision of the Labour Court confirmed.

JUDGMENT

1. In this matter, the Applicant instituted proceedings in the Labour Court for an order in the following terms:-

- (a) Declaring that the non-payment of certain benefits to him constituted an unfair Labour practice.
- (b) Payment of benefits to the tune of M434, 654.00.
- (c) Costs of suit.

2. The application was opposed by means of an Answer in terms of Rule 5 of the Labour Court Rules 1994.
3. The facts precipitating the institution of the proceedings in the Labour Court. They are that, the respondent herein was employed as a Deputy Manager – Mohale Field Operations Branch in the Appellant. Respondent claim has that he is being discriminated against by not being paid certain benefits which he says he is entitled and which he says other Deputy Managers like him were getting, the accordingly claimed from present Appellant payment of M434,654.00 (four hundred and thirty four thousand, six hundred and fifty four Maluti) broken down as follows:-

(a)	Company Car allowance	M150,129.00
(b)	Mileage fortransport	M143,000.00
(c)	Standing charge	
	For 395 days at	
	M355.00 per day	M140, 225.00
(d)	Cell phone charges	
	At M100 x 13 months	M1, 300.00

4. In his evidence, Respondent testified before the Labour Court that he discharged duties of Managers, and that his duties entail traveling on official duties, and he used his own car, the testifies that as a managerial cadre, he is entitled to choose between a company and a car allowance he testified that he was given neither and was also not reimbursed for use of his own vehicle. He testified further that, he was issued with a cellphone with the quote of M300.00 when other managers like him are given an allowance of M400.00. His efforts at regularising these anomalies were all in vain.

5. The Appellant's case was that, Respondent is not a manager, but a Deputy Manager. He was therefore not entitled to the benefits to which managers are contended Respondent further not entitled to the cellphone charges at the M400.00 quota because she belonged to a category that rendered him entitled a quota of M300.00.
6. The Labour Court found for the Respondent in respect of cellphone charges and car allowance in the sum of M1, 300.00 and M150, 129.00 respectively. The other claims were unsuccessful.
7. The present Appellant then appealed to this court on four grounds. The first ground was that the Labour Court erred in upholding respondent's case that he had been discriminated against and subjected to an unfair Labour practice when he was not paid as a manager, manager's company car allowance, managers cellphone quota and managers *per diem* like other Appellant's Managers contrary to both Respondent's contract of employment and Appellant's Remuneration strategy. Secondly, the Appellant complained in the alternative that the Labour Court erred in upholding Respondent's case that, as a Deputy Manager, he was entitled to benefits which did meet arise under Respondent's contract of employment and Appellant's Remuneration Strategy. The third complaint on appeal was that the Labour Court erred in finding that Respondent's company car allowance was not in-built in his salary under the Appellant's Remuneration Strategy and was not entitled to any not entitled to any additional car allowance in terms of his employment contract or Remuneration Strategy. The last complaint was that the Labour Court erred in reaching a decision that the Appellant discriminated against Respondent and thus practiced unfair Labour practice.
8. It is worth mentioning at this stage that, the first and last complaints on appeal before us are in essence the same. He was not turn to consider the above-mentioned grounds of appeal *seriatim*.
9. The first grounds raises two important legal concepts, namely discrimination and unfair Labour practice section 201-202 of **the Labour Code Order No.24 of 1992** provide for unfair Labour practices. The term "unfair Labour

practices” has not been defined in the Act. The code however proscribes certain conduct as amounting to unfair labour practices. The concept of unfair labour practice is neither a common law, nor an ILO jurisprudence concept. It is a statutory creature. The Labour Code Order No.24 of 1992 identifies a number of proscriptions as instances of unfair labour practices. These are: (a) discrimination against union members and officials, (b) interferences by employers in trade union affairs; (c) failure to give employees reasonable facilities for conferring with an employer; (d) interference by trade union official or other person, without consent of the employer to persuade or induce an employee to become a member or officer of a trade union (e) sexual harassment, as well as (f) interference by employers in trade union affairs. Section 198A of the Labour Code (Amendment) Act No.5 of 2000 introduces a further instance of unfair Labour practice in the nature of a breach of a duty to bargain in good faith. The Labour Code (Amendment) Act No.5 of 2006 introduces yet a further labour practice in the nature of discrimination against HIV/AIDS positive employees on the basis of their status. It follows therefore that in our law, unlike in case of the South Africa; the concept of unfair Labour practice covers a narrower spectrum of instances.

10. In the case of Lesotho therefore, a determination of the existence of an unfair labour practice has to be informed by whatever the conduct complained of as constituting an unfair Labour practice within the contest of the Labour Code (as amended) depends on whether the conduct complained of falls in any of the categories of unfair labour practice identified by the legislature.
11. The question to be answered at this stage is whether failure by Appellant to pay the respondent as a manager, or manager’s company car allowance, manager’s cell phone quota and manager’s per diem like other appellant’s manager’s contrary to both Respondent’s contract of employment and Appellant’s Remuneration Strategy constitutes an unfair labour practice as conceptualized and explained above. In our view, it is not an unfair labour practice to discriminate against employee in respect of remuneration if such discrimination is not connected with any of the instances outlined above. In

the present case the Labour Court did not hold that failure to pay such dues amounted to an unfair labour practice. The Appellant clearly misconstrued the judgment of the Labour Court on the aspect of unfair labour practice.

12. Another aspect raised by the first ground is that, the Labour Court erred in holding that there had been discrimination against the respondent in not being paid as other manager of the Appellant. Section 5 of **the Labour Code Order No.24 of 1992** provides as follows:

(1) The application by any person of any distinction, exclusion or preference made on the basis of race, colour, sex, marital status, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, is incompatible with the provisions of the Code.

(2) Sexual harassment, as defined in Section 200 of the Code, shall be prohibited.

(3) Men and women shall receive equal remuneration for work of equal value.

(4) Any distinction, exclusion or preference in respect of a particular job based on the narrowly defined inherent requirements thereof shall not be deemed an act of unlawful discrimination.

(5) For the purposes of this section, the terms "employment" and "occupation" include access to vocational and other occupationally related training, access to employment and to particular occupations, retention of employment and any terms or conditions of employment.

13. Ms Matshikiza for the Appellant contended that the Labour Court erred in holding that the Respondent was a Manager. She argued that while it may be corrected that Respondent was in the managerial cadre that does not make him a manager to be entitled to the contractual benefits of the LHDA's substantive managers. She contended that Respondent had a valid contract of employment to the position of Deputy Manager which contract is binding on the parties. She further contended that cadre is a group with different levels, which means that different employers would occupy the different levels. She consequently submitted that employers occupying such differing levels within a cadre cannot ipso facto be entitled to the same benefits and rights. In the circumstances, so that argument proceeded, Respondent cannot in law be entitled to the unable to refer us to such a definition. In our view, the terms

and conditions of service in individual employment relationships are derived from the statutes International Labour standards and the contracts of the employees, as well as common law.

14. The common law is the underlying body of rules developed and handed down over the ages by (mainly) judicial bodies. Lesotho inherited some of these rules through the operations of **the General Law Proclamation No.2B of 1884**, whereby it was provided that, the law to be administered in Basutoland, shall as nearly as the circumstances of the territory will permit, be the same as the law for the time being in force in the colony of the Cape of Good Hope. Thus, at Roman Dutch common law for example, the contract of employment is complete by the mere consent of the parties as soon as they have agreed upon the nature of the rights and benefits as substantive managers. For the above contentions, counsel for the Appellant relied on the judgment of the High Court of Lesotho in **Senior University Staff Union v National University of Lesotho CIV/APN/422/96** (unreported) for the proposition that, it is in the nature of Labour relations that differences in the terms and conditions of service among individual employees are bound to occur where they hold different contracts or where they do not perform identical or same type of work or even where they differ in terms of seniority, experience and qualifications. The learned counsel then submitted that the Respondent had his own contract, which was different from the LHDA's Managers' contracts.
15. As a starting point we observe the definition of the term "Manager" or Deputy Manager" is nowhere to be found in the policies or regulations of the Appellant. Both counsel were of the duties and the charges to be paid – no formalities on writing I required. (See *Scoble The Law of Master and Servants in South Africa, 1956 at p.3*), (see also **the Senior University Staff Union's case** at p.16). The Labour common law comprises decisions of the courts, ancient and venerable legal commentaries, industrial relations common law (i.e. the norms emerging from the collective bargaining processes, particularly as captured in collective agreements; other employment customs and practices; rulings of private arbitrators; foreign

labour courts see for example **Bleazard v Argus Printing & Publishing Co. (1983) 4 ILJ 60 (IC)**; International Labour Standards (see Thompson *“Borrowing and bending : the development of a South Africa Unfair Labour Practice jurisprudence”* (1993) 9 (3) **International Journal of comparative Labour Law and Industrial Relations**, 183). Codes of Good Practice also play a significant role as influencing the development of labour law. It is in our view, from all the foregoing sources that the terms and conditions of the employment relationship may be found.

16. What then is the source of the interpretation that, once employees fall within a particular cadre in an establishment, then all within the cadre, irrespective of their terms of contract, seniority, experience, qualifications etc must be treated alike? What is the source of this approach?
17. According to Mr. Ntlhoki for the respondent, since the term “manager” has been used in the designation of respondent as Deputy Manager, then the Court should hold that, since it is a rule of interpretation that the larger includes the smaller, a Deputy Manager should be included in the meaning of “manager” as used in. This technique of extensive interpretation involves the curial extrapolation of the provision of the instrument from one set of circumstances expressly convened to another cognate set of circumstances not expressly set out in the instrument in order to give expression to the ratio or purpose of the instrument. (See G.E. Devenish, **Interpretation of Statutes**, 1st ed, 1992 at pp.76-77). It is understood as extending to general cases the application of an enactment which literally was limited to a special case. (See p. St J. Langan Maxwell, *Interpretation of Statutes* (1969) at p.236.
18. In essence, Mr. Ntlhoki’s argument is that, since there is no express provision that a Deputy Manager is entitled to the same benefits as a manager, we should read this to mean that, a reference to a manager included a reference to a Deputy Manager. He further contends that the Deputy Manager is still in the same cadre as the Manager, and that therefore they should be interpreted as entitled to the same benefits. No authority was cited for this proposition.

19. In our view, this contention cannot stand. As was said by Ramodibedi J (as he then was, now JA) in the Senior University Staff Union case (supra) at p.16:

“I cannot imagine that it could have been the intention of the legislature [drafters of the LHDA’s policy instrument] to treat the man at the top of the academic staff ...equally with the man at the bottom of the cadre”.

In our view therefore, the terms and conditions of the respondent are to be found in his contract of employment.

20. What then are his terms on this issue? Paragraph 2.0 of the Applicant’s Remuneration Strategy which was handed in evidence, and marked exhibit “MM3” provides for car allowances. Of those eligible are “employees from Grade D4 to F to qualify for the car allowance”. It is common cause that Respondent was at Grade D4 and as Mr. Ntlhoki correctly submitted, he was entitled to car allowance. It is on this basis that we agree with the Labour Court that he is entitled to his claim for car allowance. We are therefore unable to agree with Appellant on this ground.
21. Appellant further contends that respondent ought not to have been entitled to the M1, 300.00 cell phone charges because he is not a manager. We have already found that we are unable to say a manager includes a Deputy Manager in this context.
22. However on the facts of the present case, it appears from the evidence of DW1, a witness called by the Appellant in the Labour Court that even he himself was earning the cell phone charges quota at the rate of M400.00 when he was at par position-wise with respondent.
23. In our view we find no justification why respondent had to be treated differently from his fellow colleagues with whom he was at par position-wise, doing the same kind of job. We find that Respondent was entitled to the cell phone charge quota of M400.00, as the Labour Court correctly found on the facts.]

24. Having found as we did above, we do not find it necessary to consider the submission that the Labour Court erred in finding that Respondent's company car allowance was not in-built in his salary under the Appellant's Remuneration Strategy and was not entitled to any not entitled to any additional car allowance in terms of his employment contract or Remuneration Strategy, as other deputy manager who was at par with respondent.
25. In the result the order that this court gives is that:
- (a) The appeal is dismissed with costs.
 - (b) The judgment of the Labour Court is confirmed with costs.

K.E. MOSITO

JUDGE OF THE LABOUR APPEAL COURT

For Appellant : Ms Matshikiza

For Respondent : Mr. M. Ntlhoki