LAC/CIV/05/2008
LC/REV/122/2007

IN THE LABOUR APPEAL COURT OF LESOTHO

HELD AT MASERU

In the between:

LEROTHOLI POLYTECHINC APPELLANT

AND

BLANDINAH LISENE RESPONDENT

CORAM: HONOURABLE MR JUSTICE K.E. MOSITO (AJ)

ASSESSORS: MRS M. THAKALEKOALA

MRS M .MOSEHLE

Heard on: 13 and 17 January 2009

Delivered on: 20 January 2009

SUMMARY

Appeal from decision of Labour Court - Labour Court's jurisdiction – it being argued that the review was an appeal disguised as a review
Disciplinary proceedings - Right to legal representation – Lerotholi Poytechnic's statute 18(5) conferring representation of staff member facing disciplinary charges upon a representative of her/his choice - Purpose of the Statute to confine conduct of internal disciplinary proceedings to 'within family' - Unlikely that intention of statute is to sacrifice fairness, where circumstances calling for 'outside' legal representation to achieve procedural fairness, in favour of keeping things 'within family' - Disciplinary Committee retaining residual discretion to allow 'outside' legal representation - Such representation not available as of right - Factors to be

taken into account including nature of charge, degree of factual or legal complexity, potential consequences of adverse finding, availability of qualified legal representatives among the staff and student body, and any other factor relevant to fairness or otherwise of confining staff member to representation expressly provided for in statute - In casu, chairperson not submitting the request to Disciplinary Committee regarding itself as bound by law – Chairperson refusing to entertain staff's request for outside legal representation - Proceedings before Disciplinary Committee and its findings set aside.
Did the Staff Disciplinary Committee read a significantly different charge to Respondent? – Answer in negative –Splitting of charges - Progressive disciplining of an employee -Granting of orders not sought by parties - Reinstatement correctly granted - Judgment of Labour Court confirmed - Respondent substantially succeeding on appeal - Appellant to pay costs of appeal.

JUDGEMENT

MOSITO A J:

INTRODUCTION

1. This is an appeal from the judgment of the Labour Court handed down by the President of that court Mr. L.A Lethobane on the 1st day of September 2008. The Labour Court was sitting as a court of review over an award of the Directorate of Dispute Prevention and Resolution (DDPR).

FACTUAL BACKGROUND

2. As a background to these proceedings, it is worth mentioning that the Respondent (Mrs. Blandinah Lisene) was at all times relevant to the present proceeding an employee of the Appellant (Lerotholi Polytechnic) as a lecturer. She was employed by the Appellant in June 1979. She was summarily dismissed from Appellant's employ on 12

March 2007(after 28 years of service). The facts leading to her dismissal are that, after the students of the Appellant had sat for final examinations for the year ending May 2006, Respondent gave examination papers for a course designated ' Elements of Costing' taken by first year students to her niece who was a third year student at the National University of Lesotho for marking. This was done without the knowledge and authorisation of the Appellant.

3. The Respondent was consequently charged with: (a) Absence from duty without authorisation; (b) neglect of duty and dishonesty in that she delegated her responsibility to mark final year examination scripts for first year students undertaking Business Management to her niece without Lerotholi Polytechnic's (LP) knowledge and authorisation. (c) Disorderly conduct in that a 3rd year Bachelor of Commerce student is by no way a qualified person to mark the scripts mentioned above and has no contractual relationship with LP.

4. A disciplinary enquiry was subsequently held on 15 February 2007 at 6:00 pm. At the hearing, the Respondent arrived in the company of a legal representative from Ntlhoki and Company and the lawyer requested to be given an opportunity to speak. The lawyer informed the Disciplinary Committee that he would be representing the Respondent at the hearing. The chairperson of the Disciplinary Committee, (who happened to be the national Labour Commissioner of Lesotho) explained that a legal representative would not be allowed to represent the Respondent as the disciplinary hearing in a much as the disciplinary hearing was purely an internal matter and no outsiders were allowed. She therefore excused the lawyer from the hearing.

5. Thereafter, the Responded was asked whether she had received a letter inviting her for the hearing. She did acknowledge receipt of the letter. Thereafter, introductions were made and the Respondent explained that the statutes of Appellant allowed her to bring a representative of her choice, and that she was not prepared to handle the case herself as her representative had been told to leave the hearing. She said she would not be able to proceed with the hearing in her representative's absence. The reason for this, she said, was that it was her legal representative who had prepared to conduct the hearing on her behalf. The chairperson informed her that although the law allowed her to bring a representative of her choice, the law meant somebody who is not an outsider. The chairperson went on to point out "that labour law has pronounced itself that a representative in a disciplinary hearing should not be an outsider or a lawyer." The Respondent insisted on her right to legal representation and reiterated that she was not prepared to answer anything in the absence of he legal representative. She was then asked to leave the room so that the committee could decide on the next cause of action.

6. After sometime, she was called back into the room and the committee agreed that she be given another chance to prepare herself because she had said she did not prepare herself as she had relied on her lawyer. She however insisted that she wanted her legal representative to represent her as Statute 18 (5) expressly stated that she is allowed to represent by a representative of her choice. The chairperson informed her that Statute was restricted to staff members of Appellant, and that the hearing would proceed with or without her participation. She

asked that she be excused from attending as she would not answer anything in the absence of her representative. She was told that it was up to her to decide and she left. The committee then proceeded without her participation and two witnesses (Dr 'Mamokheseng Mpooa and Mrs Sizakele Kimane) were called for the Appellant. As a result the committee recommended that the Respondent be dismissed for gross misconduct. She was accordingly dismissed.

PROCEENDINGS AT THE DDPR

7. Thereafter, the Respondent referred the matter to the DDPR where the parties were represented by their present legal practitioners. The Respondent testified and informed the DDPR what transpired before the disciplinary committee as outlined above. She further informed the DDPR that the misconduct with which she was charged, of allowing a student to mark other students was not a new thing. It had been practised at the Appellant Polytechnic for more than 28 years ago. She said that not only her but also other lecturers as well had been undertaking this practice from as far back as during her student's days. Nobody ever told her that this practice was unacceptable or that it was in breach of a disciplinary rule of the Appellant.

8. At the DDPR, the Respondent challenged her dismissal on the following six grounds: (i) she said that the Disciplinary Committee failed the test of neutrality because it was the one that formulated the charges. (ii) She also complained that it was illegal for the Labour Commissioner who was chairing the Disciplinary Committee to have chaired the disciplinary hearing. (iii) She further complained that the

charges were unfairly split. (iv) She pointed out further that there was malice in the way her case was handled in that no investigation was made prior to her being charged contrary to Statute 18 (2) of the Statutes of Lerotholi Polytechnic. (v) Her further complained was that, there was no clear rule that she breached which warranted disciplinary action. (vi) She lastly complained that, she was unfairly denied legal representation contrary to Statute 18 (5).

9. The Appellant for its part, testified that it was not aware that this practice of allowing students to mark others had been going on as alleged by the Respondent. It agreed with the Respondent that there was no written disciplinary rule on the subject, but that the conduct itself was unacceptable and Respondent ought to have known that it was not acceptable. The DDPR's arbitrator in her lengthy award, concluded that:

> "[H]aving heard the evidence of the parties; an award is made in the following terms:
> (a) The Respondent is ordered to pay to the applicant an amount of M7, 607.92 as compensation for the procedural fairness of the dismissal.
> (b) The Respondent is further ordered to pay the above-stated amount at the offices of the DDPR in Maseru within thirty (3) days of the receipt of this award."

PROCEEDINGS IN THE LABOUR COURT

10 Dissatisfied with the award of the DDPR, Respondent then approached the Labour Court on 22 October 2007 for an order in the following terms:

(a) Reviewing, correcting and setting aside the award of the 2nd Respondent[DDPR] under referral number A0264/07

(b) Directing the 2nd Respondent [DDPR] to dispatch to this Honourable Court [the Labour Court] within 14 days of service hereof, the record of proceedings in A0264/07

(c) Granting the applicant such further and / or alternative relief as the Honourable Court may deem fit.

10. Before the Labour Court, the grounds on which Respondent had challenged the fairness of her dismissal before the DDPR as mentioned in paragraph 8 above became the grounds on which she sought to have the award of the DDPR reviewed by the Labour Court.

11. In the Labour Court the Respondent argued that the arbitrator failed to take into account that the recommendation that she be dismissed for gross misconduct was based on the consideration that the Respondent had been found guilty of not only dishonesty and neglect of duty as well as disorderly behaviour, but also a material breach of contract. The Labour Court upheld this argument. Another contention was that there was no disciplinary rule known to this Respondent, upon which the Respondent ought to have been found guilty that, prohibited the act of allowing other students to mark others, an infraction with which she was charged. The Labour Court also upheld this contention. She further complained that, while the learned arbitrator found that the Respondent was unfairly denied legal representation contrary to Statute 18 (5) which entitled her to such a right, the arbitrator

compensated the Respondent by awarding her only one month's salary as compensation. The Labour Court upheld this contention as well. The Labour Court went on to substitute the remedy of compensation and ordered reinstatement in its place as a suitable remedy in terms of section 73(1) of the Lobour Code Order 1992.

PROCEEDINGS BEFORE THE LABOUR APPEAL COURT

12. Dissatisfied with the decision of the Labour Court, the Appellant Polytechnic appealed to this Court on a total of twelve grounds of appeal. We now turn to consider these grounds below

Jurisdiction of the Labour Court

13. The first, second and eleventh grounds of appeal can conveniently be addressed together. They deal with the jurisdiction of the Labour Court in this case. It is common cause that the Labour Court has jurisdiction to review awards of the DDPR. It is also common cause that it does not have appellate jurisdiction over such awards. However, the aforementioned grounds may be crystallised into this that, the Labour Court had no jurisdiction to interfere with the arbitral award of the DDPR in this case in as much as the application was an appeal disguised as a review. The distinction between an appeal and a review has long been settled by our Courts. (See ***Teaching Service Commission and Others v The Learned Judge of the Labour Appeal Court and Other C of A (CIV) No. 21 of 2007;*** See also ***JD Trading (Pty) Ltd t/a Supreme Furnishers v M. Monoko (cited in his***

capacity as Commissioner for the Directorate of Dispute Prevention and Resolution) and 2 Others LAC/REV/39/04, at para.13. Accordingly, our law is to the effect that the valid distinction between an appeal and review remains intact. One of the tests for purposes of review proceedings is that, objectively speaking, there must be a rational connection between the outcome or the decision and the facts on which such decision is based. This approach is sometimes referred to as rationality review. ***Derby-lewis and Another v Chairman, Amnesty Committee of the truth and Reconciliation Commission, and Others 2001 (3) SA 1033 (C) p1065***. Under common law the courts are entitled to interfere only where there was gross unreasonableness to the extent that one of the established grounds of review could be inferred from such unreasonableness.

14. n the present case, the applicant's 'grounds of review' were set out in paras 6.1 – 6.11 of the founding affidavit filed in support of her review application to the Labour Court. We will not examine all the grounds therein contained as in our view; a consideration of at least one of them will suffice for our present purposes. In para 6.1, the Respondent had complained that "[t]he arbitrator disregarded my evidence that I was one of the students who was extensively engaged in marking others during my school days till I became a lecturer and that at no stage during my employment for 28 years with Respondent was I ever told that the practice was prohibited, which was not challenged." In para 4.1 of her opposing affidavit, 'Mamochele Phenduka does not address the above direct averment by Respondent at all. A reading of the Record of proceedings in the DDPR also reveals that the Respondent was not cross-examined on this aspect of

her evidence. This means that it remained unchallenged. The arbitrator did not address this piece of evidence. The importance of this piece of evidence in labour law was whether there was a disciplinary rule prohibiting this conduct. As the learned President of the Labour Court aptly put it, "what is important for the purpose of the review is not the conclusion reached. What is significant is whether the conclusions are justified." The effect of the arbitrator ignoring this piece of evidence was to bring her award within the ambit of a review procedure. The Labour Court was therefore entitled to assume review jurisdiction in this case.

Did the Staff Disciplinary Committee read a significantly different charge to Respondent?

15. A third complaint by the Appellant was that the Labour Court erred in finding that Respondent was read a significantly different charge from the one contained in the notification of hearing. The record of proceedings shows that it did not. In the first place, Respondent did not participate in the disciplinary proceedings and no charges were read to her. In the second place, nothing in the record supports the view that this was ever done. In all fairness to Mr. Ntaote for Respondent, he did not seek to argue this point before us. We agree with Mr. Letsika that the Labour Court erred in holding that Respondent was read a significantly different charge from the one contained in the notification of hearing.

Splitting of charges

16. The fourth ground was that, the Labour Court erred and/or misdirected itself in holding that there was a splitting of charges, which splitting was prejudicial to the Respondent. Although this ground was raised in the grounds of appeal, and a statement made in the Appellant's heads of argument, it was not addressed before us. We could not therefore get the essence of this complaint. Whatever its out come, it will be clear from our decision on the aspect of legal representation that this ground on its own, cannot tilt the scales in this case.

Graduated disciplinary measures

17. The fifth and sixth grounds related to what may be called the need for graduated disciplinary measure in the disciplining of an employee. The Appellant complained that the Labour Court erred in holding that Respondent should have been afforded an opportunity to correct her misconduct before disciplinary action could be taken against her, and that she ought to have been given a warning first. Section 240 of the ***Labour Code Order No. 24 of 1992*** as amended by the ***Labour Code (Amendment) Act No. 3 of 2000*** empowers the Minister to make codes of good practice. A code of good practice is what is called 'soft law'. This means that the provisions of the code do not impose any obligation on any person. They constitute policy or best practice – in other words what is expected of a person. The code of a fair procedure describes the kind of practices that are expected of an employer before dismissing an employee. It gives content to the meaning of a 'fair procedure'. An employer may depart from the

provisions of the code but if it does so it will have to justify why it did so.

18. Code of Practice No. 9 of the **Labour Code (Codes of Good Practice) (Government Notice No. 4 of 2003) Notice 2003** provides that:

> "(4) Discipline should be corrective. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employee behaviour through a system of graduated disciplinary measure such as counseling and warnings.
>
> (5) Formal procedures do not have to be evoked every time a rule is broken or a standard is not met. Informal advice and correction is the best and most effective way for an employer to deal with minor infractions of work rules and discipline. Repeated misconduct will justify warnings, which may themselves be graded according to the degree of severity. More serious infringements or repeated misconduct may call for a final warning, or other action short of dismissal. Dismissal should be reserved for cases of serious misconduct or repeated offences".

Code No. 10(2) of the Codes of Good Practice provides that, although it is generally not appropriate to dismiss an employee for a first offence, dismissal may be justified if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. In the present case there is no indication that a valid, reasonable, clear and an

unambiguous rule or standard against lecturers' allowing final examinations to be marked by students did exist at the Lerotholi Polytechnic. There is nothing to indicate, *a fortiori* that dismissal may be justified in such an instance, let alone that this conduct had been regarded as grave. We therefore agree with the Labour Court that there was every reason to hold that management ought to have taken corrective graduated disciplinary measures such as warnings, moreso where it appears that this practice was prevalent in the Polytechnic.

Legal representation

19. The seventh ground relates to legal representation before the Staff Disciplinary Committee of the Appellant. As indicated above, when the issue of Respondent's legal representation arose, the chairperson of the Disciplinary Committee took the view that Statute 18 (5) of the Appellant allowed no legal representation in internal disciplinary matters by an outsider. She went as far as to say that "labour law has pronounced itself that a representative in a disciplinary hearing should not be an outsider or a lawyer." Aside from the fact that it is not clear which "labour law" reference was being made to in the aforegoing statement, it suffices to say that this statement is with greatest respect to the learned Labour Commissioner not only too broadly-stated, but is also incorrect as will appear herein below. Nevertheless, the Labour Court differed from that view and held that Statute 18 (5) of the Appellant allowed the Respondent the right to legal representation by an outsider. The Appellant complains that, the Labour Court erred in

holding that Statute 18 (5) of the Appellant allows legal representation internal disciplinary matters. Statute 18 (5) reads as follows:

> "5. The Staff Disciplinary Committee shall provide an opportunity to the staff member for hearing. The staff members shall be free to appear in person and/or through a representative of his choice. The staff members shall have aright to cross-examine witnesses and examine the documents being used against him per his defence. (Emphasis is added)

20. As a starting point, it is correct that entitlement as of right to legal representation in arenas other than courts of law has long been a bone of contention and in some instances, courts have even gone to the extent of denying such an absolute right. (See **Dabner v South African Railways and Harbours 1920 AD 583 at 598**). However, as Marais JA put it in **Hamata and Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee, and Others 2002 (5) SA 449 (SCA)** at para 11:

> "It is equally true that with the passage of the years there has been growing acceptance of the view that there will be cases in which legal representation may be essential to a procedurally fair administrative proceeding. In saying this, I use the words 'administrative proceeding' in the most general sense, ie to include, inter alia, quasi-judicial proceedings."

21. In any event, if the learned Labour Commissioner was right in thinking that "labour law has pronounced itself that a representative in a disciplinary hearing should not be an outsider or a lawyer" and, because the employment of Respondent entails a contractual submission to the statutes of the Appellant, questions could arise as to

the validity of such an absolute prohibition or the enforceability of any waiver inherent in the contract of employment of even the right to have the Disciplinary Committee exercise a discretion in that regard. Of course if she was wrong in so thinking, those questions would not arise.

22. In the **Hamata**'s case *(supra)*, the Court was called upon to consider a Peninsula Technikon's statute that provided that, '[t]he student may conduct his/her own defence or may be assisted by any student or a member of staff of the Technikon. Such representative shall voluntarily accept the task of representing the student. If the student is not present, the committee may nonetheless hear the case, make a finding and impose punishment.' As the court correctly pointed out at paragraph 7 in that case, there are only three conceivable objects which the statute such as Statute 18(5) may have been intended to achieve, namely:

> (a) to prohibit, absolutely, any form of representation other than that for which provision is made in the rule; or
> (b) to grant, tacitly, an absolute right to be represented by a lawyer of one's choice and to extend expressly the right to representation to encompass representation even by a non-lawyer, provided only that such non-lawyer is a student or a member of the staff…; or
> (c) to grant an absolute right to representation by a…member of staff of [Lerotholi Polytechnic] irrespective of whether such person is a lawyer; to deny an absolute right to representation by a lawyer of one's choice if the latter is neither a student at, nor a member of the staff…; but to allow the IDC, in the exercise of its discretion, to permit representation by such a lawyer.

23. As to which of these three objects the rule should be held to have achieved entails an interpretive exercise which is governed by long-established principles of interpretation. Indeed as the Court correctly pointed out in ***Hamata's*** case *(supra)*, one should bear in mind that there may be administrative organs of such a nature that the issues which come before them are always so mundane and the consequences of their decisions for particular individuals are always so insignificant that a domestic rule prohibiting legal representation would be required to be 'read down' (if its language so permits) to allow for the exercising of a discretion in that regard. On the other hand, there may be administrative organs which are faced with issues, and whose decisions may entail consequences, which range from the relatively trivial to the most grave. Any rule purporting to compel such an organ to refuse legal representation no matter what the circumstances might be, and even if they are such that a refusal might very well impair the fairness of the administrative proceeding, cannot pass muster in law.

24. Inasmuch as a member of the Lerotholi Polytechnic's community may be asked to represent a person arraigned before the Staff Disciplinary Committee may be a qualified lawyer, it is not possible to conclude that Statute 18(5) of the Appellant was intended to prohibit altogether representation by lawyers in disciplinary enquiries. However, once one concludes that the purpose of the representation statute is to exclude representation as of right by 'outsiders', whether or not they be lawyers, can one say that the Staff Disciplinary Committee also has no discretion to allow representation by a lawyer who is neither a

student nor a member of the staff of Lerotholi Polytechnic? Mr Letsika contended that this question should be answered in the affirmative, while Mr. Ntaote contended that it should be answered in the negative.

25. The question therefore, is whether there is sufficient indication in the statutes that any residual discretion on the part of the Staff Disciplinary Committee was intended to be excluded. (See ***Libala v Jones No and The State 1988 (1) SA 600 (C) at 604A - Dladla and Others v Administrator, Natal, and Others 1995 (3) SA 769 (N) at 775J - 776B and 776J*).** The answer, in our view, is that there is not. The fact that a member of staff's entitlement to representation has not been qualified is in itself a sufficiently strong indication of an intention not to exclude a residual discretion to allow representation of a different kind in appropriate circumstances. That does not mean, of course, that permission to be represented by a lawyer who is neither a student nor a member of the staff of the Lerotholi Polytechnic is to be had simply for the asking. It will be for the Staff Disciplinary Committee to consider any such request in the light of the circumstances which prevail in the particular case. As Chaskalson CJ once put it in ***Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) 2001 (3) SA 1151 (CC)*** at ***1184E,*** ultimately, procedural fairness depends in each case upon the balancing of various relevant factors, including the nature of the decision, the "rights" affected by it, the circumstances in which it is made, and the consequences resulting from it. In doing so, the Lerotholi Polytechnic's legitimate interest in keeping disciplinary proceeding 'within the family' is of course also to

be given due weight, but it cannot be allowed to transcend all else no matter how weighty the factors in favour of allowing of 'outside' legal representation may be.

26. There is yet another disturbing aspect to this case. It appears that it was the chairperson herself that considered that the Staff Disciplinary Committee was bound by the relevant statute to refuse to even entertain a request to be permitted to be represented by an outside lawyer. This is patently clear both from the transcript of the proceedings before it and the affidavits filed in the review proceedings. There is no indication that the Staff Disciplinary Committee itself as a body, ever considered the request to permit legal representation. There is no indication in the report of proceedings that the Staff Disciplinary Committee itself ever considered the request to legal representation. The chairperson ought to have put the matter to the committee for the exercise of its discretion as such power reposes in the committee at common law and not the chairperson. Mr Letsika argued that this was a deficiency in the taking of the minutes. There was however no factual basis for this submission.

27. The learned counsel Mr. Letsika argued in the alternative that, in the event that this Court should find on proper construction that this statute allows legal representation, it should hold that the Respondent has not established that he suffered any prejudice. For this contention, he sought reliance on ***Rajah & Rajah (PTY) LTD and Others v Ventersdorp Municipality and Others 1961 (4) SA 402 (A)*** where it was held that, the Court will not interfere on review with the decision of a quasi-judicial tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice. This

principle is undoubtedly correct in law. (See also ***Jockey Club of South Africa and Others v Feldman, 1942 AD 340 at p. 359***; ***Larson and Others v Northern Zululand Rural Licensing Board, 1943 NPD 40***). In the case ***Rajah & Rajah (PTY) LTD and Others*** *(supra),* Holmes, J.A. pointed out that, it seemed clear that the Council had suffered no prejudice. The question is therefore whether we are satisfied that in the present case, the complaining party has suffered no prejudice. In our view, she did suffer prejudice. As Marais JA put it at para 2 in ***Hamata's*** case :

> *A fortiori* is that the case where, as happened here, the first Appellant did not acquiesce in the ruling and participate in the proceedings. Instead, he withdrew from them. The consequence was that the witnesses who then testified against him were not cross-examined, and the first appellant neither gave evidence himself, nor called witnesses, nor addressed any submissions on the merits to the IDC.

28. This is in our view, the prejudice that Respondent suffered *in casu*. It is obvious from the foregoing reasons that the Respondent was wrongly denied the right to legal representation when Statute 18(5) permitted her such a right within the aforementioned legal principles. The Respondent was entitled to have her request to have legal representation considered by the Committee. This denial of the right to legal representation has so pervasive and fatal an effect upon all phases of the disciplinary proceedings that took place that the Labour Court was obliged to set them and the decisions reached in them aside. The labour Court was clearly correct in this approach. It follows that the proceedings of the Staff Disciplinary Committee and all subsequent proceedings before the Council in this case must be set

aside. It follows, too, that the findings of those bodies and the expulsion of the Respondent from the Lerotholi Polytechnic must also be set aside. As Marais JA put it in ***Hamata's*** case

> If the refusal of the internal disciplinary committee (the 'IDC') to allow, or even to consider allowing, the first appellant to be represented by a lawyer who was neither a student at Pentech nor a member of its staff stemmed from an erroneous belief that it was prohibited by the representation rule from allowing such representation, and if the first appellant was entitled to have his request considered on its merits and, conceivably, granted, it would follow inexorably that the ensuing enquiry would be vitiated at its inception and that all subsequent phases of the disciplinary proceedings would suffer the same fate.

29. In our view, the DDPR and the Labour Court were correct in holding as they did that Respondent was entitled to legal representation to which she was improperly denied. The effect of this is to nullify the entire disciplinary process and decisions consequent thereon.

Substantive fairness

30. The eighth and ninth grounds challenge the correctness of the Labour Court's decision that the Disciplinary Committee's decision to dismiss the Appellant was illegal and substantively unfair. The charges that were preferred against Respondent were preferred in terms of Statute 18(3) of the Lerotholi Polytechnic statute 1997. The said Statute reads as follows:

> without prejudice to the scope and generality of pare 1 of this Statute, disciplinary cases in particular may be brought against Staff members for unauthorized absence from duty, theft of Polytechnic property, dishonest or disorderly conduct, drunkenness while on duty, neglect of duty or disobedience to Polytechnic regulations generally.

31. It is clear that this statute is couched in such general terms that, it fails to give even a clue as to whether marking of examinations by a student is a dismissable offence. Code 9 of the Codes of Good Practice provides for disciplinary rules. It provides as follows:

> "(1) All employers should adopt disciplinary rules that establish the standard of conduct required of their employees.
>
> (2) The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business.
>
> (3) In general, a larger business will require a more formal approach to discipline. An employer's rules must create certainty and consistency in the application of discipline. This requires that the standards of conduct are clear and made available to the employees in a manner that it easily understood. Some rules or standards may be so well established and known that it is not necessary to communicate them."

31. Code 10 (1) provides that any person who is determining whether a dismissal for misconduct is unfair should consider

> "(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) if a rule or standard was contravened, whether or not -

(i) the rule is a valid or reasonable rule or standard;

(ii) the rule s clear and unambiguous;

(iii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iv) the rule or standard has been consistently applied by the employer; and

(v) dismissal is an appropriate sanction for the contravention of the rule or standard".

32. The evidence before both the DDPR and the Labour Court revealed that there was no written rule of conduct or standard regulating the conduct of employees relating to the subject of marking of students' examinations, whether by members of staff, other students, including students from outside the Polytechnic. The Respondent testified that she was one of the students who were used to mark other students during her student's days. This was not disputed. She also testified that for the last twenty eight (28) years that she spent as a lecturer at the Appellant, she continued with the practice. She said that other lecturers were also doing the same. It is obvious that this practice continued unchecked for over a period of thirty years including the period when Respondent was a student. In the circumstances there would be no basis for holding that the Respondent contravened an existing valid, reasonable, clear and an unambiguous rule of conduct. There would be no basis even for holding that Respondent was aware or could reasonably be expected to have been aware of the rule or standard. There was no evidence that the rule or standard had been

consistently proscribed by the Polytechnic. In our view there was no basis upon which the Labour Court could have held that the dismissal was substantively fair. We are therefore not prepared to find fault with the Labour Court's decision that the dismissal was substantively unfair. This ground cannot therefore succeed.

33. Before leaving this subject, we wish to register our concern that a practice of this nature did prevail for so long at the Polytechnic without the management having allegedly not been aware of it. This practice is unwholesome and it is sure to compromise the quality assurance that a tertiary institution such as the Appellant would ordinarily be expected to observe. It needs no expertise to realise that the non-eradication of this practice and those akin to it is likely to prejudice this nation in as much as the products of the Lerotholi Polytechnic would at the end of the day be released upon the unsuspecting public to the prejudice of members of the public. It is time that this unruly horse should be harnessed. We say no more on this subject.

Reinstatement

34. The tenth ground was that, the Labour Court erred in ordering re-instatement without having heard further evidence and argument relating to whether or not it would be impracticable in the circumstances of this matter to order reinstatement. In motivating this point, Mr Letsika for Appellant argued that generally speaking, reinstatement is a discretionary remedy much as it is tantamount to specific performance. He argued that *in casu*, when the Court *a quo*

decided to order reinstatement, it failed to make a further enquiry, namely, whether it would be practicable to make this kind of order. As a result, he argued that he is constrained to make submissions on facts not pleaded or tendered in evidence on the basis of which he submitted, there is a high possibility that Respondent's position found a replacement. In the premises, he submitted that it was unwise for the Labour Court to order reinstatement without probing into the issue of its practicability or otherwise. Section 73 of the **Labour Code order 1992** provides that:

> (1) If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.
> (2) If the Court decides that it is impracticable in light of the circumstances for the employer to reinstate the employee in employment, or if the employee does not wish reinstatement, the Court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement. The amount of compensation awarded by the Labour Court shall be such amount as the court considers just and equitable in all circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps as may be reasonable to mitigate his or her losses.

35. The above argument by Mr Letsika therefore necessitates the interpretation of section 73 of the Labour Code Order 1992. Ordinarily, the primary rule in interpreting legislation is to determine the meaning of the words used in the relevant statute according to their natural, ordinary or primary meaning and also in the light of their context, including the subject matter of the statute and its apparent scope and purpose. (***Republican Press (Pty) Ltd v CEPPWAWU and others* 2008 (1) SA 404 (SCA), para 19**; **See also *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* [1950] 4 All SA 414 (A) at 421**). The provisions of section 73 of the Labour Code must be purposively construed to give effect to the rights protected thereby. It is clear that the section prefers reinstatement as a primary remedy. In the words of Nkabinde J sitting in the Constitutional Court of South Africa in ***Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others [2008] ZACC 16*** at para 36:

> The ordinary meaning of the word "reinstate" is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. Reinstatement is the primary statutory remedy in unfair dismissal disputes. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal.

36. Thus, the power to grant a remedy in section 73 of the Labour Code 1992 is by its nature discretionary and the discretion must be exercised judicially by a court or arbitrator that enjoys that unfettered discretion. It must be stressed, that the focus of the appeal before us is on the decision of the Labour Court to review the award and on the "discretionary remedy". The Labour Appeal Court is required to determine whether the decision of the Labour Court in reviewing the award and ordering reinstatement was correct.

37. We are of the view, in keeping with what Zondo P said in **Kroukam v SA Airlink (Pty) Limited [2005] ZALAC 5** at para 113 that, in reviewing the awards of the DDPR the Labour Court must, generally speaking, make such decisions as it thinks the DDPR should have made on the evidence before it at the time that it made its decision. Generally speaking, it cannot make an order that the DDPR could not have made at that time but which, maybe, it can make now. We do not rule out the possibility that there may be exceptions to this general rule. However, we do not have to decide that because there are definitely no circumstances in this case which would justify a departure from that general rule. Thus, one of such decisions would be to award reinstatement upon review of the awards of the DDPR.

38. Mr Letsika argued that, regard being had to the time period between reinstatement and the award of the DDPR, it was inappropriate for the Labour Court to have ordered reinstatement as it was possible that the Respondent's position might have found a replacement. We are unable to agree with this submission. As a general rule, the question whether reinstatement is the appropriate relief must be determined as at the time when the matter came before the DDPR or trial Court. The

denial of reinstatement by the DDPR or trial Court should not be allowed to prejudice an employee. Indeed, it would be unfair to a litigant to fail to provide the employee with the full relief that the trial court or tribunal should have given where the trial court or tribunal has wrongly refused such relief.(See ***Hoffmann v South African Airways 2001 (1) SA 1 (CC)***). Goldstone JA in ***Performing Arts Council of the Transvaal v Paper, Printing, Wood and Allied Workers Union and Others 1994 (2) SA 204 (A) at 219H – I***, once expressed the principle as follows:

> Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate.

Granting of orders not asked fore by parties

39. The last ground of appeal was that the Labour Court erred in granting the relief for reinstatement in as much as neither of the parties had asked for it. In principle Courts have, on more than once deprecated the practice of relying on issues which are not raised or pleaded by the parties to litigation.(See for example ***Frasers (Lesotho) Ltd vs Hata-Butle (Pty) Ltd 1995 – 1999 LAC 698; Sekhonyana and Another vs Standard Bank of Lesotho Ltd 2000-2004 LAC 197; Theko and Others v Morojele and Others 2000-2004 LAC 302; Attorney-General and Others v Tekateka and Others 2000 – 2004 LAC 367 at***

***373; Mota v Motokoa 2000 – 2004 LAC 418 at 424. National Olympic Committee and Others vs Morolong 2000 - 2004 LAC 449*).**

40. In this regard, even before we consider the basis upon which the Appellant opposes the Respondent's reinstatement, it may be helpful to mention that there is a distinction between the common law and the labour law approaches to reinstatement. The confusion and lack of certainty reigning when applying the common law approaches to reinstatement and or compensation is crystally clear from such decisions of the Court of Appeal as ***Khotle v Attorney General LAC (1990-1994) 502; Koatsa v National University of Lesotho LAC (1985-89) 335; Lesotho Telecommunication Corporation v Rasekila LAC (1990-94) 261;Lesotho Bank v Moloi LAC (1995-1999) 275.*** All these judgments reflect a disturbing lack of consistency of the common law's approach to reinstatement and compensation in lieu thereof. However, section 73(1) and (2) of the Labour Code has brought about a change and a resolution in this area of the law. In the words of Froneman AJA at para 12 in ***Fedlife Assurance LTD v Wolfaardt 2002 (1) SA 49 (SCA)***:

> Generally speaking …, employees have gained much that they did not previously have. Their primary remedy now is reinstatement, which must be ordered unless specified conditions exist…. It is in this context, so Mr Gauntlett submitted that the statutory remedies…, must be viewed.

41. We need to reiterate that in our labour law (as it appears from section 73 of the Labour Code as quoted above), reinstatement is the preferred remedy where there has been an unfair dismissal. In terms of section

73 of the ***Labour Code Order*** (read with the terms of the ***Labour Code (Amendment) Act 2000***), the Directorate of Dispute Prevention and Resolution [DDPR], the Labour Court, and, therefore, this Court as well, sitting in judgment of the Labour Court in an appeal from that Court, must require the employer to reinstate the employee unless in light of the circumstances, it is impracticable for the employer to do so, in which case, compensation should be ordered. Reinstatement is the legislatively preferred remedy so as to restore the employee to the employment relationship. It is upon the employer to produce evidence that reinstatement would be impracticable. There was no such evidence in this case.

COSTS

41 The general rule as to costs is that costs follow the event. The issue whether or not to grant costs is one within the discretion of the court. In the present case, we have considered in particular, the unacceptable way in which the disciplinary committee denied Respondent legal representation. We have also considered the unacceptable in which the Polytechnic treated its long serving employee by dismissing her not withstanding that the unsalutory practice for which she was dismissed was prevalent in the Polytechnic and that, notwithstanding this situation, the Polytechnic insisted in its appeal to date. We have also considered the fact that the Respondent has substantially succeeded in this appeal. Against this background we have decided that the judgment of the Labour Court should be confirmed. The Appellant is to pay costs of this appeal.

42. This is a unanimous decision of this court.

K.E. MOSITO AJ.

Judge of the Labour Appeal Court

For Appellant: Mr. Q. Letsika, Attorney

For Respondent: Advocate N.T. Ntaote