IN THE LABOUR COURT OF LESOTHO

CASE NO.LC/1/95

HELD AT MASERU

IN THE MATTER OF:

LESOTHO AMALGAMATED CLOTHING
& TEXTILE WORKERS UNION **APPLICANT**

AND

POLTEX GARMENT (PTY) LTD **RESPONDENT**

JUDGMENT

The Lesotho Amalgamated Textile Workers' Union (LACTWU) instituted these proceedings on behalf of its member Mrs. Mamotsamai Motete who was employed by the respondent company as a machinist. She was dismissed from her job on the 15th September, 1994, following a misunderstanding between her and her supervisor. The events that led to the dismissal of applicant's member are not in dispute.

On the 15th September, 1994, at around 09h15 the complainant was instructed by her supervisor, Mrs. Macario to go and relief in Section C, because she did not have any work to do in her section at the time. Apparently, the complainant did not understand the instruction since the supervisor giving it was an expatriate. A Mosotho supervisor Mrs. Khobotlo, was sent to go and relate the instruction in clear Sesotho language. The complainant refused to comply. Mrs. Khobotlo immediately took the complainant to the office of the Personnel Manager where she laid a charge against her.

The Personnel Manager sought an explanation from the

complainant why she was refusing to follow the instruction of her supervisor. Her reply was that she had a painful finger, therefore she could not do the work that is done in section c. The management concedes that the complainant sustained an injury on one of her fingers while at work. As a result of that injury there were types of duties which were no longer allocated to the complainant because, her injured finger would be hurt, thereby causing her pain. The Personnel Manager, however, made her aware that, it is advisable that she goes to Section C as instructed because she did not know at the time what work she was going to be allocated when she got there. The complainant still refused. The complainant was warned that her refusal to obey the instruction constituted a breach of company rules, but she did not change her mind. Management then decided to dismiss the complainant. The applicant is challenging the dismissal of the complainant on the grounds that:

(a) the complainant has not been dismissed by the Board of Directors,

(b) the complainant was not given a proper hearing and,

(c) reasons given for dismissal of complainant contradict those that she was given at the time of dismissal.

With regard to the first contention, Mr. Lebone for the applicants relied on the well known case of Seeisa Nqojane .v. NUL Case of Appeal (CIV) No.27/87. It is common cause that Mr. Lebone merely made this contention without submitting any evidence showing that the employees of the respondent can only be dismissed by the Board of Directors. It is trite law that he who alleges, must proof. In the case of Seeisa Nqojane, there was evidence before the court that the decision to dismiss the appellant resided in the Council. In the case of Ts'eliso Shao .v. Lesotho Haps Case No. LC/17/94 (unreported)

this court held at page 5 that powers of legal persona like the respondent reside in the Board of Directors. They are, however, exercised by Managing Directors on behalf of the board, because the latter only meet occasionally, and even when they do meet, they do not meet at short notice. In the case of LACTWU .v. Crayon Garments Case No. LC/15/95 (unreported) this court held at page 6 of the judgment that nothing turns on who signed a letter of dismissal, what is important is who made the decision to dismiss. It is significant that in the instant matter, the officer who conducted the enquiry was the Personnel Manager. In the answer to the originating application and in submissions before court, the Personnel Manager, who also represented respondent in these proceedings does not say she dismissed the applicant. She instead says that when applicant continued to refuse to obey the instructions, "the Management did not have any choice than to release her." In our view the management is the totality of those senior employees at managerial level normally headed by a General Manager or Managing Director. In the letter of reasons for dismissal dated 10th October, 1994, it is stated in part that, "due to reasons that we cannot overcome, we find that we have to dismiss you..." (emphasis added). This construction confirms our understanding that applicant's dismissal seems to have been a collective decision of the management which is a collective of the managerial staff headed by the Managing Director. We therefore hold that there is no irregularity with regard to the decision to dismiss applicant's member.

With regard to the second contention, Mr. Lebone submitted that the hearing was improper because the complainant was not given chance to prepare her defence. It is common cause that in casu the respondent has no disciplinary procedure. That the applicant was brought before the Personnel Manager to

answer why she was refusing to obey instructions, could have been a result of established practice or just out of instinct. The fact however, is that a hearing was given. As to what form a hearing should take in order for it to be proper and fair will depend on the circumstances of each case, taking into account the prejudice or potential prejudice that will or may be suffered by the accused person, if a particular procedure is, or is not followed in holding the enquiry. In his Article the Right to a Hearing Before Dismissal - Part 1 (1986) 7 ILJ 183 at page 185 Edwin Cameron submits that:

> **"The right to a hearing is not an inflexible package. Once it is held to be applicable, the employer will not be burdened with a cohesive bundle of duties all of which he must observe, and disregard of any of which will vitiate his decision to dismiss. It has been stressed that "the rules relating to the holding of disciplinary enquiries cannot and should not be applied mechanically to every situation." In one of the most influential and far-going decisions in this area the suggestion was even made that, at its minimum, the right to a hearing may involve no more than a series of questions and answers, provided that what ever procedure is adopted is "essentially fair and equitable." The "whole field of proper labour relations" is characterised by an inherent flexibility, and natural justice should not be led into "the trap of strict legalism."**

At pages 185 - 186 (bottom of page 185 to top of page 186) of the same Article Cameron goes on to say:

> **"Just as the principles of natural justice..... are flexible and have no precisely fixed content, so too the exact requirements of the right to a hearing before dismissal must depend on various considerations. These**

> may include the size of the undertaking where the employment occurs .... and the existence or otherwise of established procedures, whether these have been determined unilaterally by the employer, or have been agreed with a representative trade union."

As alluded to above, in the instant matter there is neither an agreed code between the employer and the applicant's union nor a unilaterally imposed code that governs the conduct of disciplinary hearings. It is therefore the merits of this case that will determine whether the procedure followed in conducting the enquiry was in any way unfair to the complainant. The issue of giving an employee prior notice of a hearing is not an inflexible requirement that applies to all cases. It will be governed by whether;

(a) there is a collective agreement or an employer's unilaterally imposed code providing that such notice be given, or
(b) the nature of circumstances of the case require that such prior notice be given.

Mr. Lebone has neither argued that there is an agreement providing for such advance notice, or that the circumstances of the case required that such a prior notice be given. Neither has he shown in what manner has the complainant been prejudiced in her defence by the failure to give her an advance notice of the hearing. In our view there has been substantial compliance with the requirements of the principles of natural justice that a person be given a hearing before any adverse decision is taken against him or her. The complainant has not suffered any prejudice as a result of the procedure that was adopted by the respondent in giving her a hearing.

Lastly Mr. Lebone contended that the reason given by the

respondent in their letter of 10th October, 1994 as reasons for the dismissal of the complainant be rejected, because they contradict those that were given to the complainant on the date of dismissal. The reasons allegedly given to the complainant on the date of dismissal are found in an unsigned form which is annexed to the applicant's originating application. In the first place this document can be rejected on the basis that it is not authentic as it is not signed. But that aside, in our view nothing turns on this argument, because the reasons given by the two annexures are not contradictory as alleged. In the form annexed to applicant's originating application the reason for dismissal is given as "refused to do the work that was given to her." Annexure "A" to respondent's answer is more elaborate. If we just pick on the reasons as they are put in the letter, in the first paragraph, the reason is put as "..... you do not cooperate with your supervisors ....." In the second paragraph the following reason is given, "you have refused to work and follow instructions from your supervisors and moreover you have been argumentative you have always been argumentative when you are given instructions." The main reason for the dismissal of the applicant is that she has refused to work and to follow instructions of her supervisors. These reasons are supported by the facts of this case. There is no contradiction between the two annexures, it is just that one is brief and the other is elaborate, and has some secondary consideration that the complainant is argumentative, which may have tilted the balance more heavily against the complainant. As to the primary reason it is the same.

Ms. Mojakisane for the respondent made it clear that the complainant was informed that there was no substance in her refusing to go to Section C, because she did not know at the time what duties she was going to be assigned there, but she

still refused. She submitted further that the complainant's problem was well known by all the supervisors and nobody would assign her a duty that would entail the use of the injured finger in a manner that it would hurt. In our view the complainant's conduct constituted plain disregard of managerial instructions.

From the record of employment of the complainant, which was handed by Ms. Mojakisane in court, the complainant was clearly a very difficult employee. Her employment record is very bad. In 1994 alone she had five written warnings. The incident which led to her dismissal was the sixth. In February 1994 she was given a final warning for refusing to obey the instructions of the manager. Still in February she was warned once more for going to the toilet without the card. In June she was warned for deliberately working slowly. In September she warned for insulting her supervisor. On the 6th September she was warned and suspended for four days for refusing to take instructions of her supervisor and being quarellsome. She returned from suspension on the 9th September. On the 15th of the same month she repeated the same misconduct of refusing to obey her supervisor's instructions. She continued to refuse to abide by the instruction even after she was given a second chance by the Personnel Manager before whom she had been charged by her supervisor.

Mr. Lebone argued that the supervisor who could have charged the applicant was Mrs Macario and not the one who had been called in as an interpreter. This is splitting hairs. The supervisor was not only translating she was also giving instructions as she is empowered to do so by her seniority above the complainant. If anything, the complainant became insubordinate to both of the supervisors, which is infact an aggravating factor.

The behaviour of the complainant is clearly incompatible with that of a person still interested to be party to an employment relationship. It clearly breaks the relationship beyond redemption. We have quoted many of those instances of misconduct, even those that are not relevant to the misconduct that led to her dismissal, simply to show what type of an employee she was at the work place. However, of particular significance is that in 1994 alone the insubordination that led to her dismissal was the third such incident. The last one, which had led to her suspension was less than two weeks old. She was only about five days from suspension. The continued refusal of the applicant to obey the instruction that was given to her on the 15th September was an unequivocal breach of her contract which the respondent was entitled to accept. She had been given several chances to reform, but she seemed to be getting worse. In the premises we have no alternative but to confirm the dismissal of the complainant.

The application is therefore dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 7TH DAY OF AUGUST, 1995

L. A. LETHOBANE

PRESIDENT

M. KANE **I CONCUR**

MEMBER

K. MOJAJE **I CONCUR**

MEMBER