IN THE LABOUR COURT

LC/33/95

HELD AT MASERU

IN THE MATTER OF:

NATIONAL UNION OF PRINTING, PUBLISHING AND ALLIED WORKERS **APPLICANT**

AND

LESOTHO EVANGELICAL CHURCH **1ST RESPONDENT**

MORIJA SESUTO BOOK DEPOT **2ND RESPONDENT**

JUDGMENT

The applicant union has brought this application on behalf of four of its members who were employed by the 2nd respondent at Morija. Three of the four employees were employed as Sales Clerks. Each one of them was in charge of a given set of books. The fourth employee was the supervisor of the other three who was responsible for all incoming and outgoing stock as well as to ensure that the daily stock of the three clerks correlates with what has been issued out to them and what they have sold or officially been empowered to disburse.

Sometime in January 1995, the Manager of the second respondent delivered books to depots in Peka and Leribe. When he arrived at the Leribe depot he found that there were some dictionary books which had been loaded into the delivery vehicle which were not included in the delivery note. He immediately returned to Morija to investigate.

Upon arrival he asked the sales clerk responsible for dictionary books and the supervisor how the dictionaries had been loaded for delivery when they were not

included in the delivery note. Upon checking the balance of the dictionaries' stock it was found that there was a shortage. The manager then decided to check everybody's stock and he found that all the employees had shortages.

On the 3rd February 1995, the manager suspended the complainants together with two others for three days *"pending office investigation regarding your stock shortages in your section."* The investigation established that the three complainants, who were sales clerks had between them a shortage of M58, 969-25. According to the evidence of the manager Mr. Ramasike they were called before a disciplinary committee composed of himself and one Mr. Mosehle who was the employees' representative on the 8th February 1995. Mr. Ramasike testified further that none of the three complainants could explain his or her shortage to the satisfaction of the committee. They were thus dismissed. The fourth complainant who was the supervisor also allegedly failed to explain, not only the stock shortage of the other three complainants, but also why the stock loaded for delivery in Leribe did not conform with the delivery note. He was therefore, also dismissed.

Applicants challenge the dismissal of their members on the ground that they were not given a hearing prior to dismissal in terms of the Labour Code and Article 7.4 of the Recognition Agreement, entered into between them and the 2nd respondent. They contend further that their members were never given notice of any charge against them. Mr. Maieane submitted that the onus is on the respondents to prove that they gave complainants a hearing. He submitted further that the fact that the respondents do not have either the minutes or, record of proceedings, or a copy of charge sheet, is proof that the respondents have failed to show on the balance of probabilities that a hearing was held as they alleged.

Mr. Maieane does not dispute that the complainants were called upon to explain their shortages. He, however, contends that, this did not amount to a charge or a hearing. Mr. Van Tonder submitted on the other hand that Mr. Maieane is confusing the investigation stage and the actual hearing. He pointed out that the initial questioning of the complainants which led to the letter of suspension of 3rd February 1995, was part of the investigations, but the actual hearing was held on the 8th February. He pointed out further that the manager's letter of dismissal to the complainants does show that

complainants were asked questions about the shortages which they failed to answer.

This court has repeatedly held that a disciplinary enquiry is not a court of law or a criminal court where a charge sheet would have to comply with certain technical requirements, failing which the charge is dismissed. In the case of a disciplinary enquiry, it is sufficient that the employee comes into the enquiry knowing what conduct is complained of. As Cameroon puts it in his article, The Right To A Hearing Before Dismissal; Part 1 (1986) 7 ILJ 183 at page 201:

> ***"it would be grossly unfair to summon an employee to a fairly timed enquiry but leave him or her ignorant of what conduct is complained of until the hearing commences. This would render futile the employee's attempt to prepare for the hearing. So the employee should be told what conduct will be put in issue at the disciplinary enquiry.....***
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> ***The requirement is not technical. If it is obvious what is in issue, the employer is not obliged solemnly to inform the employee of what he or she already knows."***

According to Mr. Ramasike's evidence, after the discovery of the stock shortages, the complainants were given a full day to go and investigate if they had not misplaced the books. At the end of the day they were called to explain if they had recovered them. When they could not produce the books, they were suspended for three days and when they came back on the 8th February, they appeared before a disciplinary enquiry. It is clear that the complainants were well aware of the conduct complained of well before the day of the hearing. There was therefore no need for the employer to have given them a formal advance warning of the charge.

They knew why they were suspended and when they appeared before the enquiry to answer a charge arising out of their suspension they were not taken by surprise as they knew what conduct on their part the respondents were complaining of, and that was unexplained stock shortage.

Mr. Maieane contended that the respondents have failed to prove on the balance of probabilities that an enquiry was held prior to the dismissal of the complainants. He pointed to the absence of the record of proceedings or minutes as proof that no enquiry

was held. When he was asked by Mr. Maieane under cross examination to prove that he held the enquiry, Mr. Ramasike referred to the letters that he wrote to the complainants. In his evidence in chief Mr. Ramasike had explained that he chaired the disciplinary enquiry into the complainants' misconduct and that he was with Mr. Mosehle, who had been appointed by the complainants in terms of the Recognition Agreement, to be their representative. Under cross examination, Mr. Ramasike alleged that he took minutes of the proceedings but that he did not bring those minutes to court.

It seems to the court that the balance of probabilities favour Mr. Ramasike's version that a hearing was held, following the investigation which was conducted during the three days when the complainants had been *"temporarily laid off."* The letter of dismissal to which Mr. Ramasike pointed as proof that an enquiry was held supports his oral evidence that he conducted an enquiry into the complainants' misconduct. If the complainants had not been afforded the chance to be heard as they allege, why would they allow Mr. Ramasike's letters of dismissal to give a wrong picture that they were each afforded a chance to account for his or her shortage? In our view they did not challenge this averment because they had infact been given a hearing.

Mr. Maieane's further contention is that since the respondents cannot produce either the minutes or the record of proceedings of the enquiry, it should be found that they never held any hearing before dismissing the complainants. There is no obligation on an employer conducting a disciplinary hearing to keep the record of the proceedings. Neither the rules of the respondents nor the Recognition Agreement between the applicant and the second respondent require that such a record be kept. There is no dispute, however, that where the record of proceedings has been kept or minutes have been taken, the work of the court becomes much more simplified and it becomes easy to prove that a hearing was infact held. The minutes or the record of proceedings, is but one of several ways of proving that a hearing was held, but not the only way. The absence of such minutes or record of proceedings does not therefore mean that a hearing was not held.

The respondents contended in their answer that the complainants did not exhaust the local remedies in that they brought their complaint to court without first appealing as it

is provided under Article 7.5 of the Recognition Agreement. The applicant's response was that firstly, there is no obligation to appeal and secondly, there were too many irregularities which warranted the immediate intervention of the court. It is true that Article 7.5 of the Recognition Agreement is couched in peremptory terms as the word *"may"* is used. One would expect however, that as a party to the Agreement the applicant union would show its commitment to the Agreement by seeking to follow its terms at all times. The wording of Article 7.5 gave the applicant choice whether to appeal or not to appeal. As a signatory to the Agreement it should have followed the procedure it has laid for itself by appealing. The applicant's choice not to appeal, shows either that it is not committed to the Agreement, or that it had no grounds on which to appeal.

The second contention that there were too many irregularities was based on the allegation that, since there was no hearing there was nothing to appeal against. We have already held that there was a hearing.

Mr. Maieane also contended that Mr. Ramasike was judge and prosecutor at the sametime. If this was the case, then there was a ground for appeal which would have made it even more appropriate that an appeal should have been lodged. Be that as it may, there is nothing wrong with the chairman of the enquiry leading the enquiry with questions to establish the facts. That is precisely his job as the chairman. What he should desist from, is to have an interest in the matter under investigation. It was never alleged that Mr. Ramasike had an interest and therefore, ought not to have been chairman. The applicant's attempt to explain their failure to exhaust the domestic

remedies is not satisfactory. It can only be assumed against them that they failed to exhaust the internal procedures because they were running away from something and that was the substantive fairness of their termination.

A rather disturbing feature of this proceedings however, seems to be that Mr. Ramasike was investigator, complainant and chairman of the enquiry all at the sametime. He was asked by Mr. Maieane under cross-examination as to who should have been the

complainant in this case. His answer was that it ought to have been Mr. Matiea, the supervisor, however, he could not fulfil this role because he was also implicated. The result was that Mr. Ramasike conducted the investigations which gave rise to the charges against the applicants. At the end of the investigations he charged them whilst at the sametime chairing the proceedings. It seems to the court that this was not proper. It vitiated against the elementary procedural requirements of fairness.

It may well be that if the respondents had followed the right procedure, the conviction of the applicants was inevitable. Furthermore it is clear from the facts of this case that applicants were guilty of a serious breach of discipline involving large sums of money. However, their conviction cannot be upheld in the face of the unfair hearing that they were given. It is not enough that a person should be given a hearing, but it must also be conducted in a fair manner. As an investigator, Mr. Ramasike had established even before the hearing that applicants were guilty of a misconduct. As complainant, he was interested in securing conviction of the applicants. These interests cannot be reconciled with the neutral position that the chairman is expected to hold. Applicants' dismissal was therefore procedurally unfair.

AWARD

The court takes note of the serious breach of discipline with which the applicants were charged. They betrayed the trust bestowed on them and if the "no difference principle" was acceptable, this would be a suitable case for saying notwithstanding the procedural irregularity, the applicants are guilty of the misconduct with which they are charged and they would still have been dismissed if the right procedure had been followed. But so fundamental and sacred is the requirement to act fairly that failure to do so would render an otherwise right decision a non-decision.

Applicants were employed in positions of trust where they were responsible for large stocks of books of the respondent. They flouted this trust. It is inconceivable that the respondent can still trust them for this job. Furthermore, for reasons that are not convincing, the applicants failed to exhaust the local remedies which they have by agreement with respondent laid for themselves as avenues for settlement of disputes

between them. For these reasons the court shall not order reinstatement of the applicants. Respondent shall compensate applicants as follows:

(a) Payment of one month's salary in lieu of notice.

(b) Payment of such other terminal benefits which are due but not paid.

(c) Payment of one month's salary in place of reinstatement.

There is no order as to costs.

THUS DONE AT MASERU THIS 12TH DAY OF DECEMBER 1995

L. A. LETHOBANE

PRESIDENT

M. KANE I CONCUR

MEMBER

A. T. KOLOBE I CONCUR

MEMBER

FOR APPLICANTS : MR. MAIEANE

FOR RESPONDENTS : MR.VAN TONDER