IN THE LABOUR COURT OF LESOTHO

CASE NO LC /144/95

HELD AT MASERU

IN THE MATTER OF:

LABOUR COMMISSIONER **APPLICANT**

AND

HIGHLANDS WATER VENTURE **RESPONDENT**

JUDGMENT

In this application the Labour Commissioner is suing the respondent company on behalf of its former employee (the complainant) in terms of Section 16(b) of the Labour Code Order 1992, (the Code) which provides that;

> ***"For the purpose of enforcing or administering the provisions of the Code a Labour Officer may:-***
>
> ***"(b) institute and carry on civil proceedings on behalf of any employee, or the employee's family or representative, against any employer in respect of any matter or thing or cause of action arising in connection with the employment of such employee or the termination of such employment."***

The facts hereof are common cause. The complainant was employed by the respondent as an electrician. Whilst at home on a weekend, the complainant fell off a horse and fractured one of his legs. He was taken to hospital where he was put on P.O.P. and a sick leave certificate was issued by the Doctor which advised that he would be indisposed for the period 24/02/95 to 14/04/95. The P.O.P. was not removed until 25/04/95. The Doctor did not, however, cause the sick leave to be

extended accordingly. Complainant's medical record book, however, confirmed that the P.O.P. was only removed on the 25/04/95.

Complainant returned to work on the 26/04/95. Upon arrival he was informed by his supervisor to attend a disciplinary hearing in connection with his two months absence, on the 4th May 1995. The finding of the enquiry was that due to extended absence the applicant was replaced and as such his services were terminated on account of incapacity to perform. The complainant noted an appeal. The chairman of the appeal hearing confirmed the decision of the initial inquiry but made it clear that applicant's case is not one of misconduct, but that the nature of his job is such that his position cannot be kept open for two months.

Mrs. Matsoso for the applicant conceded that respondent's operations are such that it could not do without an electrician during the period of applicant's incapacitation. She, however, contended that what she is against is that applicant should have been dismissed for the mere reason that he was absent due to ill health. She contended that the unfairness of complainant's dismissal is aggravated by the fact he had been issued with a valid sick leave certificate by the Medical Doctor. It was her submission that complainant's incapacity was of a temporary nature and as such the respondent should have obtained a temporary replacement whilst he was on sick leave.

Mr. Malebanye contended that the complainant had been properly dismissed after being afforded a hearing, due to incapacity to perform. He submitted further that applicant's period of absence extended beyond the date stipulated in the sick leave certificate. It seems to the Court that nothing turns on this argument, because it is clear from the record of the disciplinary hearing that even though no extention of sick leave was given, the enquiry was presented with the complainant's medical record book which confirmed that he had not overstayed his sick leave without justifiable cause. Secondly the charge that the complainant faced did not relate just to the period extending beyond the official sick leave granted by the Medical Doctor. It related to the entire period of his absence.

The Court has difficulty with Mrs. Matsoso's contention that since complainant's incapacity was of a temporary nature the respondent should have obtained a temporary employee to replace him. It is not for this Court to make decisions that ought to be made by employers, for that would amount to running the undertaking concerned. It is not the function of this Court to do that. Employers must make their management decisions and this Court will only be concerned with whether such decisions are fair in the circumstances of the case.

We are struck by the chairman of the appeal hearing's concession in response to a question from the complainant's representative, that complainant's case in not one of misconduct, but that his situation had been dictated by the nature of his job which could not be kept open for two months. This statement in our view is in

direct contrast to Mr. Malebanye's contention that the complainant was dismissed persuant to Section 66(1)(a). The chairman of the appeal hearing must have been aware that Section 66(1)(a) is premised on a dismissal on account of the fault of the employee and he could see no fault on the part of the complainant as he had justifiable reasons for his absence. Still at the appeal hearing, the complainant and his representative insisted that if his case was not one of misconduct it was retrenchment for operational reasons. The respondent did not unequivocally accept this was the case. They, however, raised a problem of overstaffing and that they were reorganising. In the opinion of the Court the dismissal of the complainant should be classified under Section 66(2) of the Code, since it is not for any of the reasons stipulated under Section 66(1)(a), (b) and (c). The burden is therefore, on the respondent to proof that it acted reasonably in treating the reason for dismissal of the complainant as sufficient ground for terminating his employment.

As we have already observed the respondent's contention is that the nature of complainant's job was such that it could not be kept open for two months. The issue of an employee who is incapacitated by ill-health, not lack of skill, from performing his obligations under the contract was considered in Davies .v. Clean Deale Garden Services (1992) 13 ILJ 1230. In that case it was held that;

> ***"There is greater duty to accommodate the employee where the disablement is caused by a work-related injury or illness. The employer must in the first place ascertain whether he is or is not capable of performing the work he previously performed and for which he was employed and if not the extent to which he will be unable to perform his former duties."***

The present case is, however, distinguishable from the above case in that the complainant's illness was not work-related. Furthermore, the complainant in the present case is not physically incapacitated from doing his job as an electrician. His was a short term incapacitation during his absence on account of illness.

A similar case to the present one where an employee's illness was of a non-work related nature is that of NUM & Another .v. Rustenburg Base Metal Refiners (Pty) Ltd (1993) 14 ILJ 1094. The decision of the Court in this case was in many respects classical and due to its importance it is our respectful view that it must be quoted in extenso from pages 1098 to 1100 of the judgment. The member of the Court Mr. Van Zyl, said in response to respondent's contention that the second appellant had been dismissed due to excessive absenteeism due to illness:

> ***"The question which arises is whether it is fair to expect an employer to keep an employee on indefinitely, despite the fact that the employee is unable to fulfil his contractual obligations due to excessive sick leave.***
>
> ***Under the common law an employee may be summarily dismissed on account of unreasonable absence due to illness (see Gibson South African Mercantile***

***and Company Law** (5ed) at 229). Whether such a dismissal would constitute an unfair Labour practice is another question. Some writers are of the opinion that in principle it is required that a dismissal on account of incapacity/incompetence should not only be lawful, but also fair. An investigation into an employee's alleged incapacity is required (see Brassey et al **The New Labour Law** at 445). It further seems that a process of consultation is required (see Cameron et al **The new Labour Relations Act** at 154).*

In English law there appears to be two ways of dealing with this issue, namely frustration of the employment contract and the reasonableness of the employer.

The common law principle of frustration applies to contracts of employment and is based upon the proposition that a contract of service is a contract of personal service. Consequently it can only be performed by the contracting parties, and it will be discharged where either party is incapable of performing his contract due to circumstances beyond his control i.e. the agreement as envisaged between the parties has become impossible and is frustrated (see Mead **Unfair dismissal Handbook** (3ed.) at 156).

Where the contract of employment is frustrated, it is terminated by operation of law and there is no dismissal under the statute. Consequently, the employee is unable to make a claim for unfair dismissal. It follows that in unfair dismissal cases it benefits the employer to assert that the contract has been frustrated, and for the employee to allege that it has not. (See Harvey on Industrial Relations and Employment Law Vol. 111, 127).

Incapacity due to sickness may be a frustrating event. In deciding whether the employee's incapacity renders future performance impossible or radically different from that which the parties envisaged when entering the contract the National Relations Court held in Marshall .v. Harland & Wolff Ltd (1972) 7 ITR 150, that the industrial tribunal should take the following factors into account:

(a) the terms of the contract, including the provisions as to sickness pay;

(b) how long the employment was likely to last in the absence of sickness;

(c) the nature of the employment;

(d) the nature of illness or injury and how long it has already continued and the prospects of recovery;

(e) the period of past employment.

The Employment Appeal Tribunal held in Spencer .v. Paragon Wallpapers Ltd (1977) ICR 301 that the questions whether the contract has been frustrated and

whether dismissal for sickness is reasonable in the circumstances are distinct. There may be an overlap between the criteria to be applied in answering these questions but the criteria are not identical. The criteria to be applied in deciding the question whether the dismissal for sickness was reasonable are inter alia the following:

(a) the nature of the illness;

(b) the likely length of the continuing absence;

(c) the need of the employer to have the work done which the employee was engaged to do.

What seems to be clear from the cases dealing with such a dismissal is that there should be consultation before dismissal. The need for consultation was described as 'well established' and as 'a elementary requirement of fairness' by the Employment Appeal Tribunal in Williamson .v. Alcan (UK) Ltd (1978) ICR 104.

In English law the test of reasonableness is found in Section 57(3) of the Employment Protection (Consolidation) Act of 1978 which reads inter alia as follows:

'The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case.'"

The learned member went on to suggest that in the South African situation, he would not advocate a reasonable employer test as applied in English law, but that the circumstances of each case must be considered in determining the fairness or otherwise of a dismissal. He went on to say at p.1100 of the judgment:

"It further seems more appropriate to deal with these cases on the basis of reasonableness and not on the basis of the frustration of the contract.

I am of the opinion that there should be discussion and consultation before dismissal for sickness. In the Spencer case the Employment Tribunal, when considering the need for warnings in dismissals for sickness commented as follows:

'Obviously the case of misconduct and the case of ill-health raise different considerations, but we are clearly of the view that an employee ought not to be

> ***dismissed on the grounds of absence due to ill-health without some communication being established between the employer and the employee before he is dismissed.***
>
> ***The word "warning" perhaps is not appropriate, but by its association with cases of misconduct it carries with it [the] suggestion that the employee is being required to change or improve his conduct. That is not the case where the absence is due to ill-health, and it is possible to imagine cases of ill-health where some damage could be done by a written warning unaccompanied by a more personal touch.'***
>
> ***I am in full agreement with those comments."***

This Court is equally in full agreement not only with the comments in Spencer's case above, but also with the learned member's suggestion that cases like the one before Court should be treated on the basis of reasonableness and not on the basis of the frustration of contract. Indeed this is precisely the test that Section 66(2) of the Code prescribes when it says that a dismissal that does not fall under Section 66(1) paragraphs (a), (b) and (c)

> ***"will be unfair unless having regard to the circumstances, the employer can sustain the burden of proof to show that he acted reasonably in treating the reason for dismissal as sufficient grounds for terminating employment."***

Although not worded in identical terms, this provision is the same as that of Section 57(3) of English Employment Protection (Consolidation) Act of 1978, which was referred to in the judgment of Van Zyl in the NUM case. Even though Section 66(2) does not specify as the English Statute does, that the reasonableness or otherwise of the employer in regarding the reason as sufficient to terminate the contract shall be determined in accordance with equity, it is trite law that in determining the fairness or otherwise of dismissals this Court is guided by the requirements of fairness and equity. In the circumstances, it seems to the Court that it is apposite to follow the guidelines suggested by the Employment Appeal Tribunal in the Spencer case in determining the reasonableness or otherwise of the respondent in treating the complainant's ill-health as sufficient ground to terminate his contract.

<u>THE NATURE OF THE ILLNESS</u>

As we stated earlier complainant sustained a fractured leg as a result of a fall from a horseback. This is the type of illness which as Mrs. Matsoso stated only disabled him from performing his work temporarily. After he recovered it would not in our view have had any impact on his performance of his duties as an electrician. There is no indication from the Doctor who treated him that his future performance would in any way be affected by the injury.

THE LIKELY LENGTH OF ABSENCE

From the very beginning the Medical Doctor who issued a sick leave certificate had shown that applicant would be unfit to do his duties from 24/02/95 to 14/04/95, roughly one month and three weeks. The respondent had these definite days of complainant's absence. However he did not report to work on the 15/04/95. He instead returned to work on the 25/04/95, exactly two months since his incapacitation.

From the papers before Court, there is no indication that the respondent was disturbed by applicant's extended absence. Even though in his ruling the chairman of the original enquiry refers to the extended absence, this statement is not supported by the charge which applicant faced, which related to his entire period of absence. Secondly it is in contradiction with respondent's other submission that the complainant was the only electrician in his department therefore they had to obtain a replacement. If this was so, we agree with Mrs. Matsoso's submission that a replacement for the complainant must have been needed and obtained almost immediately after the complainant's disappearance due to the disability he had.

In the view of the Court, in the light of the nature of the complainant's injury, it must have been obvious that his likely period of absence was not going to be long. Infact the Medical Doctor had already given an indication of the period of absence, which was extended by another one week to make it full two months. This is the period around which the respondent should have budgeted for the complainant's likely length of absence.

THE NEED OF THE EMPLOYER TO HAVE THE WORK DONE

This is the basis upon which the respondent alleges to have terminated the complainant. It is said that he was the only electrician in the department in which he was employed. The respondent therefore had to secure a replacement to have the job done. The Court has no doubt as to the employer's need to have the job done.

DISCUSSION AND CONSULTATION

There is no evidence before the court that the respondent discussed and consulted with the complainant before terminating him. What the respondent allege they did was to give applicant a hearing. In the view of the Court, even though this so-called hearing was not challenged by Counsel for the applicant, it was a sham hearing, because, the complainant had to answer a case about which a decision had already been taken. This is clear from the statement of the complainant's supervisor, Mosoch at the top of page two of the record of the proceedings of the 4th February 1995, where after the complainant's reason for the two months absence had been given; he answers,

"I have now replaced Shao and no longer need his services."

That the complainant had provided satisfactory reasons for his absence, thereby calling for his acquittal was no longer considered. The Chairman became preoccupied with the fact that Shao was already replaced meaning terminated. We are of the view that this was a misdirection on the part of the chairman.

However, in the light of our finding that the respondent needed to have a job done, it may appear reasonable that in some circumstances a replacement has to be sought as the vacancy cannot be kept indefinitely. The English cases to which we referred said in such a case it is an elementary requirement of fairness that an employee be consulted. In response to a question why the respondents did not give the complainant a hearing before they replaced him permanently, which we are of the view might have substituted the required consultation, Mr. Malebanye said the only possible time to give him a hearing was when he returned to work. No direct evidence was tendered on this as to why it would not be possible for the respondent to consult and discuss with the complainant about his future employment before his return to work. The onus was certainly on the respondent. In the case of NUM & Another .v. Libanon GM Co. Ltd. (1994) 15 ILJ 585, the Labour Appeal Court, while endorsing the principles enunciated by Van Zyl in the NUM case supra, went further to say;

> ***"while an employer may not be obliged to retain an employee who is not productive, in my view fairness requires that a proper assessment be made of whether that situation has been reached before the employer resorts to dismissal. A fair employer will ensure that the employee concerned, assisted if needs be by his trade union, will be kept informed, and will be properly consulted, in the course of making the assessment." (at p.589).***

The Court is not satisfied that in hoc casu consultation with the complainant took place as required prior to his replacement. The respondent has not discharged the onus why it was not possible for it to hold such consultation prior to complainant's return to work. Neither have they said why consultations could not be held with the union if it was impossible to reach the complainant.

The respondent raised another argument that it was in any event already faced with reorganisation. Precisely the same argument was presented by the respondent in the NUM .v. Libanon GM Co. Ltd case. Nugent J held that this was in effect the notion of "no difference" principle which has been emphatically rejected by the courts. He went on to hold at p.590 that;

> ***"The 'no difference' principle serves only to undermine the value of fair process and render it illusory.***
>
> ***In any event, I do not agree that the respondent has shown in the present case that consultation would not have affected the outcome..... Whether the same***

> ***conclusions would have been reached after proper consultation is in my view no more than speculation. The fact that the respondent was overmanned does not mean that it was the appellant who was superfluous."***

This Court is in respectful agreement with the learned judge's views. That the complainant and/or his union ought to have been consulted prior to taking of the adverse decision against the complainant cannot be substituted by the alleged impending inevitable scaling down of the workforce.

Whilst we agree that since complainant's injury was not work related and as such imposed a lesser duty on the respondent to accommodate the complainant's disability, (see NUM .v. Rustenburg Base Metals Refiners (Pty) Ltd supra), we are of the view that the respondent has not acted reasonably in the circumstances of this case to have terminated the complainant for the following reasons:

(a) complainant's nature of the illness was not so as to affect his performance of his work in future;

(b) the period of absence was relatively short to have necessitated such a drastic step of terminating his employment;

(c) the fact that a person who replaced the complainant had been internally transferred from the workshop shows that the real reason for termination of the complainant was the so-called reorganisation.

This having not been properly done as nothing was tendered in evidence to show that complainant was one who was superfluous coupled with non-consultation which was essential renders the termination void.

(d) The respondent had a duty to act fairly by consulting with the complainant before giving his job to another person, which it has not discharged. In the circumstances we find that, the termination of the complainant's contract due to his disability while nursing a fracture was unfair and the respondent acted unreasonably in terminating him as it did.

AWARD

It is common cause that the respondent contended that the nature of its job was such that it could not do without an electrician. This Court has no knowledge as to how that problem would have been addressed had the respondent carried out the necessary consultations. In NUM .v. Libanon GM Co. Ltd supra, Nugent J said the best relief in the circumstances of a case like the present, was to reinstate the appellant *".....so as to afford him the opportunity of consultation which he was denied."* Further down the judgment he said;

> ***"it would be for the respondent in consultation with the appellant and if necessary his union, to reach a fair and proper decision as to what should happen to him. It may well be that appellant's present condition no longer precludes him from performing underground duties. In my view this Court ought not to attempt to make the respondent's decision on its behalf. The respondent is entitled to make its own decisions in this regard, and this Court should require only that its decision is a fair one." (at p. 591).***

There is no reason why this court should not follow this ratio. If the consultation had been carried out it may well have been found that since the complainant's disability was going to be of a relatively short duration the electrician who was transferred from the workshop could have only been put in complainant's position temporarily as Mrs. Matsoso suggested, or some alternative arrangement short of termination could have been made. But it is not for us to make respondent's decisions on its behalf. What is clear is that the respondent's cause of action against the complainant was dictated by Mosoch who insisted, despite clear reasons for applicant's absence, that he had replaced him. Mosoch could well have had an evil intention of getting rid of the complainant at the slightest opportunity and this the respondent should have considered when presented with an emphatic refusal by Mosoch to accommodate the complainant. Such traps are not uncommon between a supervisor and his subordinates.

In the premises the Court comes to the decision that, the respondent is ordered to:

> **(a) reinstate the applicant with effect from the day he instituted the present proceedings namely 26/10/95, because there is no explanation even by way of annexed correspondence, why this matter was not lodged earlier than October 1995. It is after that reinstatement that the respondent can make proper consultation with the complainant assisted by the union if he so wishes. It may well be that new positions have surfaced or if he has become redundant then proper procedures for laying off redundant labour will be initiated;**
>
> **(b) pay complainant his salary from the 26th October 1995 to the date of judgment less amounts received by him by way of severance pay, notice pay, and ex gratia.**
>
> **(c) complainant is an electrician. He has given no evidence regarding efforts he took to mitigate his loss either by way of seeking an alternative job or self-employment. The amount due under paragraph (b) above shall be reduced by three months salary as mitigation of loss.**

There is no order as to costs.

THUS DONE AT MASERU THIS 16TH DAY OF OCTOBER 1996.

L. A. LETHOBANE
PRESIDENT

A. T. KOLOBE **I AGREE**
MEMBER

P. K. LEROTHOLI **I AGREE**
MEMBER

FOR APPLICANT : MRS. MATSOSO
FOR RESPONDENT : MR. MALEBANYE