**IN THE LABOUR COURT OF LESOTHO**

**CASE NO LC 145/95**

**HELD AT MASERU**

**IN THE MATTER OF:**

**ANTHONY QHOJENG** **APPLICANT**

**AND**

**LESOTHO HIGHLANDS PROJECT CONTRACTORS RESPONDENT**

# *JUDGMENT*

**This case arises out of the dismissal of the applicant following a disciplinary enquiry which found him guilty of being part of the group of workers who physically assaulted and verbally abused one of the senior employees of the respondent. In the originating application the applicant has raised numerous allegations, but at the hearing hereof Mr Mosito stated that some of those allegations were part of the applicant's attempt to disclose all that happened. He submitted that the central issue revolves around whether applicant's dismissal complied with the provisions of the Collective Bargaining Agreement (the agreement) entered into between the respondent and the Construction and Allied Workers Union (CAWULE) the majority union to which the applicant belongs.**

**It was Mr Mosito's contention, which was not denied by Mr Van Tonder for the respondent, is that the applicant is entitled to enforce the agreement between CAWULE and the respondent. He submitted that it is applicant's case that his dismissal does not comply with clause 6.1 and 6.5.1 of the agreement. Mr Mosito contended that in terms of Clause 6.1 disciplinary action against an employee found guilty of misconduct has three stages. The first one being to seek to educate the offending employee, and where education is ineffective corrective action by way of a series of formal written warnings is embarked upon, and only in the event of these two measures failing may punitive action be resorted to, he argued. He submitted**

**further that applicant's termination failed to comply with the agreement because the first two stages of disciplinary action were bypassed by the respondent, which imposed a punitive action from the onset.**

**Mr Mosito contended further that in terms of Clause 6.5.1 discharge of an employee as a result of a misconduct is the last option available to the employer. He submitted that in terms of the note to Clause 6.5.1 all dismissals must be sanctioned by the Project Manager and that in the instant matter applicant's dismissal was not sanctioned by him.**

**Mr Van Tonder submitted in reaction that the provisions of Clause 6.1 are not mandatory as the word "may" is used. He stated further that both Clauses 6.2 and 6.5 of the agreement stipulate that action taken in respect of an act of misconduct will depend on the nature and seriousness of the offence. He then submitted that a verbal warning should not be given to an employee guilty of a serious misconduct of assaulting his employer. He argued that educational and corrective action may be invoked in cases of lesser offences, but the nature of applicant's misconduct warranted a punitive action in view of its seriousness. In reply, Mr Mosito pointed out that evidence on the record of the disciplinary hearing (Annexure "C" to the originating application) does not show that there was an assault on the manager as alleged. Instead there were complaints about insults, as such there was no reason why Clause 6.1 of the agreement regarding the three stages of disciplinary action was not invoked.**

**The Court is in full agreement that the use of the word "may" in Clause 6.1 is evidence of the fact that the order in which the three ways in which disciplinary action may be applied is not mandatory. Secondly, in paragraph A of Clause 6.1 under the heading "Educational Action", it is stated that;**

> ***"these are routine informal actions that a supervisor takes to:***
> ***A.1 Make sure that an individual is aware that his behaviour or performance is unacceptable and the consequence which will arise if he continues to behave or perform in his way. (sic).***
>
> ***A.2 Provide training or guidance if a subordinate is doing a wrong thing because he has not been taught or is unaware of the correct procedure, rules, methods etc".***

**The catch words are "routine" and "informal actions". Looking at the purpose that educational action is meant to achieve one sees that its key objective is to educate a person in order to forestall breach of discipline and procedures on his part. At this stage no complaint is envisaged to be laid. The supervisor within his own department is enjoined to seek to appraise his subordinates of the expected code of conduct and the rules before laying complaints of breach of the rules. It seems to the court that applicant's alleged misconduct cannot be classified under**

**this part, because it cannot by any stretch of imagination, be argued that applicant would need a supervisor's counselling and education before he could know that it is wrong to assault a manager or hurl verbal abuse at him.**

**Under corrective action it is provided that;**

> ***"where educational action is ineffective a series of formal written warnings is available to correct wrong doers".***

**Firstly it is clear that this type of action follows where the offence committed is of a class that could have first been addressed through educational action. As already held, the offence of assault is not of that type. Secondly, as Mr Van Tonder correctly submitted, these approaches to discipline are meant as a guide to address breaches of discipline of a minor nature, which assault is not.**

**It does seem inevitable that because of the nature of the offence with which applicant was charged, he had to face the highest form of disciplinary action as opposed to the lenient and moderate forms which are meant for moderate offences. Thus under the heading "Punitive Action" it is stated immediately below the note to it that;**

> ***Disciplinary procedures are initiated by line management when an employee's performance and/or behaviour are unacceptable".***

**Then the agreement provides detailed procedures that must be followed when the employee is faced with a serious charge of misconduct that may result in punitive action being taken against him. These procedures include right to a hearing, right to be represented by a representative of one's choice right to appeal to next line of management etc. The important thing is that these procedures are initiated by line management as opposed to the educational action which is a sole prerogative of a supervisor. Clearly the offence of assault with which the applicant was charged was not only of a type that could not first be addressed through education, but it was also above supervisory level as the misconduct occurred away from applicant's duty station where he is responsible to his supervisor. Secondly, it involved employees from various duty stations and no particular supervisor could take responsibility for it. It does seem to the Court therefore, that nothing untoward happened in the application of Clause 6.1 of the agreement. It has infact been complied with.**

**Clause 6.5.1 which Mr Mosito also contended was violated must be read together with Clause 6.5 which provides;**

> ***"6.5 <u>PROGRESSIVE DISCIPLINARY ACTIONS.</u>***

***Disciplinary action taken for an offence will depend upon the nature of the offence and should take account of any other offences, which may have occurred previously.....".***

***"6.5.1 For a first offence, action to be taken will be one of the following;***
**** A verbal warning.***
**** A first written warning given by the appropriate level of management.***
**** A severe written warning.***
**** A final written warning.***
**** Discharge (after the enquiry and appeal procedures have been carried out)."***

**Firstly, the clause has a very important rider that action taken will depend upon the nature of the offence. Secondly, the penalties listed under 6.5.1 are not in the order in which disciplinary action must be applied, Mr Mosito sought to convince the Court. They are on the contrary, a list of possible actions that may be taken against a first offender depending on the nature of his offence. That dismissal comes last in the list is neither here nor there because what determines what action to be taken is the nature of the office committed. In the circumstances we are of the view that no violation of Clause 6.5.1 has occurred as alleged.**

**With regard to Mr Mosito's contention that Clause 6.5.1 was violated in that applicant's dismissal was not sanctioned by the Project Manager as required by a note to Clause 6.5.1, we are of the view that the applicant had the duty to prove that this was so, but not an iota of evidence was adduced to prove this allegation. In the same way Mr Mosito's contention that the nature of the offence with which applicant was charged was not serious as only complaints of insults were made, is not sustainable because in terms of joint Annexures "A" to the answer which are statements by security guards Mathoethoe and Ntisane the applicant was positively identified as having participated in the assault on Mr Otto.**

**Under paragraph 6 (d) of his originating application, applicant had contended that, there is no where in the agreement where there is provision for suspension before disciplinary hearing is conducted. It is common cause between the parties that before the disciplinary enquiry was conducted applicant was suspended. In his submissions Mr Mosito did not address this point which might lead to the conclusion that he had abandoned it. But since it is contained in his originating application and he has not expressly indicated that he abandons it, we think it appropriate that we address it. In our view it suffices only to state that if the agreement does not provide for suspension before disciplinary hearing it also does not prevent it. That being the case it is within the employer's common law rights to take such a measure. We, therefore, find that there is no substance in this argument. In the circumstances the Court is of the view that this application should not succeed and it is accordingly dismissed.**

**THUS DONE AT MASERU THIS 23RD DAY OF DECEMBER, 1996.**

**L.A LETHOBANE**
**PRESIDENT**

**T. KEPA**
**MEMBER** **I AGREE**

**R. MOTSETA**
**MEMBER** **I AGREE**

**FOR APPLICANT:** **MR MOSITO**
**FOR RESPONDENT:** **MR VAN TONDER**