

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 114/96

HELD AT MASERU

IN THE MATTER OF:

LESOTHO CLOTHING & ALLIED WORKERS
UNION

APPLICANT

AND

SUNTEXTILE (PTY) LTD

RESPONDENT

JUDGMENT

The applicant union is suing the respondent company on behalf of its member Ms Matheko Mokholo. The complainant was dismissed by the respondent for allegedly contravening the company rule which provides that;

“an employee who remains absent for 3 consecutive days without even verbally informing the Personnel Department shall be taken to have resigned and deserted and the position will be filled. The employee in question will be paid off when and if she returns.”

The facts which are largely common cause are briefly that, on the 2nd August 1996, the complainant had approached her supervisor Mr. Reddy requesting days off to enable her to go and bury her grandmother. According to the applicant Mr. Reddy released her, but required that she should bring proof of the alleged death when she came back. She then proceeded to her home which is at Matsieng. She found that the Chief was not present as such she could not get the written proof required by Management. However, on the 8th August she was able to bring the letter and after delivering it she went back home. Her grandmother was buried on the 10th August and on the 12th August she reported back to work. She was not allowed to resume

duties and was kept in the office until in the afternoon when she was told to go back home because Management treated her as a deserter.

Mr. Reddy confirmed the complainant's evidence regarding the request put to him by the complainant. He, however, denied that he said the complainant should bring the proof when she came back. He said it was on Friday when the complainant made the request and he expected her to bring the proof the following Monday. On the contrary the complainant only came back with the proof about six days later.

The union's contention is that it is the term of their member's contract of employment that if she is absent for a valid reason, she should bring proof of such reason and the Management would take it into account. Mr. Billy contended that not only did the complainant bring the letter from the Chief proving the death, she also wore a black cloth and her head was shaven as a sign of mourning according to custom. He contended further that the management was unsympathetic and acted harshly against the complainant.

Mr. Van Tonder for the respondent relied on the evidence of Mr. Nkoko, the Personnel Manager, who said that proof of death is required before one can be granted days off. He testified that whilst a person whose home is far may be allowed to bring the proof when she comes back, in the case of the applicant who is coming from Matsieng which is relatively near, she would be expected to provide proof of the death before she could be released. The difficulty with Mr. Nkoko's evidence is that, he was not there when the cause of action in this matter arose. In his own testimony in cross-examination he said he only joined the respondent on the 6th January 1997. Since the cause of action herein arose in August 1996, this Court has no knowledge if what he is attesting to was already the procedure at that time. Mr. Reddy on the other hand only spoke of what his expectation was, not what the procedure was.

It is common cause that the validity of the reason advanced by the complainant is not being questioned. The problem is that she was absent for three consecutive days without proof of reason for absence. The rule being relied upon says the employee will be treated as having deserted if she *"...remains absent for 3 consecutive days without even verbally informing the Personnel Department...."* We have emphasized the words *"even verbally"* because they are a clear indication that the bottom line is that the Management must be informed of the absence and for purposes of the rule a verbal information will suffice. Written reasons of the absence may be desired in particular circumstances but that is not the rule.

Management has admitted in evidence that the complainant informed Mr. Reddy that her grandmother had passed away. Management cannot then say simply because the letter of proof of death was not delivered as it expected, it was not informed of the reason for the complainant's absence and as such was entitled to invoke the 3 day desertion rule. In the view of this Court the 3 day rule was

improperly invoked and as Mr. Billy argued the Management is guilty of breach of its own rules.

Assuming that this Court is wrong in the view it has held, Mr. Billy's further argument was that the complainant was not given a hearing before dismissal. In paragraph D(ii) of its Answer the respondent admits that "*...there was no hearing because she (the complainant) had disappeared.*" In argument Mr. Van Tonder submitted that when the complainant came to deliver the letter of proof on the 8th August, the three day rule had already taken effect.

In our view breach of the employer's rules by an employee is a misconduct. Section 66(4) of the Labour Code Order 1992 (the Code) provides as follows:

"where an employee is dismissed under sub-section (1)(a) or (b) of this section, he or she shall be entitled to have an opportunity at the time of dismissal to defend himself or herself against the allegations made, unless, in light of the circumstances and reason for dismissal, the employer cannot reasonably be expected to provide this opportunity."

In our understanding, the respondent was under a duty to afford the complainant a hearing before dismissing her unless it could not in the circumstances of this case be reasonably expected to give her a hearing. The issue is whether this is a suitable case to be treated as an exception to the rule that employees dismissed for misconduct ought to be afforded a hearing.

It appears that a person who absconds from work never again to return, or even if he returns, he surfaces after such a long time that the employer would not reasonably be expected to have continued to operate with a vacancy, has denied himself the right to be heard. But a person who informs the Management of his intended absence but only fails to comply with certain procedural requirements, and who after the period he requested returns to work, cannot be treated in the same way as the former. The circumstances of the two cases are clearly different. The view that we hold is that there was nothing that prevented the respondent from complying with the requirements of Section 66(4) of the Code either on the 8th when the complainant had brought the letter or on the 12th when she reported for work.

Her uncontroverted evidence is that on the 12th August when she returned to work she was kept in the office for nearly the whole day. In the afternoon she was told to go home because Management regarded her as having deserted. Why could she not be confronted with the allegations during that time that she was being held in the office? The conclusion to which we arrive is that the dismissal of the complainant was both substantively and procedurally unfair.

The Court was not addressed on the applicant union's prayers. We are as such reluctant to award them without hearing arguments and perhaps evidence on the

practicalities of the granting of the prayers. Neither was there any arguments on the complainant's steps to mitigate her loss. We therefore, direct the parties herein to meet and try to reach agreement on a mutually acceptable settlement within a period of 30 days from the date of delivery of this judgment. If no agreement is reached the parties shall set this matter down for arguments on the relief to be granted to the complainant.

THUS DONE AT MASERU THIS 6TH DAY OF
JULY, 1998.

L.A LETHOBANE
PRESIDENT

P.K. LEROTHOLI
MEMBER

AGREE

T. KEPHA
MEMBER

AGREE

FOR APPLICANT :
FOR RESPONDENT:

MR BILLY
MR VAN TONDER