IN THE LABOUR COURT OF LESOTHO

CASE NO LC 20/98

HELD AT MASERU

IN THE MATTER OF:

'MALIMAKATSO RANTEKOA APPLICANT

AND

LEE RIDER (PTY) LTD RESPONDENT

JUDGMENT

1. This is a case in which the applicant is asking the court to find that her dismissal was unfair. However, because of ill-health the applicant no longer seeks reinstatement. She instead asks for an order for payment of her terminal benefits as follows:

> **(a) payment by respondent of applicant's severance pay from 1983 October to 1997 October.**
> **(b) Payment of salary in lieu of one month's notice.**
> **(c) The balance of leave money still owing to applicant.**

2. These claims follow the dismissal of the applicant by the respondent in October 1997 without benefits for allegedly refusing to obey instructions.

3. Applicant's case is to be found in her Originating Application and was later substantiated by her oral testimony. Applicant says she first knew the respondent in October 1983. Then the respondent was called Gallant Clothing Manufacturers (Pty) Ltd (Gallant Clothing) and it was based at Maputsoe. The company later expanded and opened another factory at Ha Maqele where the applicant moved. The applicant however, does not seem to know how the respondent came to be called LEE RIDER (Pty) Ltd.

4. It is apposite at this stage to refer to the evidence of DW2 Lisebo Mafaleng whose evidence as one of the managers of the respondent was quite helpful in this regard. She said she started to work for the respondent then called Gallant Clothing in 1978. In 1989 Gallant Clothing was sold and another company called Galberk was formed. In 1990 it changed from Galberk to H.D. Lee the present respondents. It was never suggested that during the aforesaid changes the workforce was affected in any material way. We are prepared to assume therefore, that the respective successors inherited all rights and liabilities of their respective predecessors and consequently there were no breaks in the continuity of service of the employees. Mafaleng and the applicant would seem to represent vivid example of employees who have been inherited by all the successors with their service continuous.

5. Applicant says when she started to work for Gallant Clothing she was a Cover Sim stitch checker. She was later transferred to buttonhole machine, a job she did until around June / July 1997, when she was instructed to operate a button machine as well, over and above the buttonhole machine. This entailed operating two machines at a standing position when previously she worked with one machine sitting down. At the beginning of August, applicant says she began to feel strain and developed chest and back pains. She allegedly informed her line manageress, who testified as DW1. The latter promised to convey her health condition to the manger who also testified as DW2. The line manageress did take her to the manager, whom they could not see because she said she had visitors. A week passed without her health complaint being addressed. She then requested for permission to go and consult a doctor, which was granted. She was booked off sick for two weeks and was to report back to work on the 10th October 1997.

6. The respondent's version is a complete denial that the applicant ever approached any one in management to inform her of her illness. DW1 Mamoloi Mokete denied that the applicant once came to her to complain that she was not feeling well. She also denied that she passed applicant's case to DW2 Lisebo Mafaleng to make a final decision. Similarly DW2, Lisebo denied being aware of applicant's health condition at anytime before she was presented with her sick leave certificate. However, she confirmed that applicant did come to her to ask for permission to go and see a doctor, which she granted.

7. It was applicant's testimony that she was a healthy person until she started to operate the two machines. The machines ruined her health, as she had to collect material in person from four machines to do her two-part operation. When she came back from leave, she found that the two machines which she had to operate alone in a standing position, were being operated by two persons sitting down. In her originating application, applicant says she also was permitted to operate one machine sitting down for some time after her return from sick leave. After a while the line manageress 'Mamoloi Mokete instructed her to go back to the task of operating two machines in a standing position. She informed her that she could not operate two machines because of ill health. At that point the manager told applicant

that ".... since she was saying she could not operate two machines then there was no work for her, and dismissed applicant on the spot and gave her passout."

8. However, applicant's oral testimony regarding the events following her return from leave is materially different in major respect. Her evidence is that upon her return she found Manapo Mots'eare and Sam operating the two machines sitting down. Having reported herself to management she proceeded with her work in the same way as she had done before going on leave. She averred further that because of her health which had still not returned to normal her production went down. She stated further that because of her declining production she was told by the supervisor and the line manager that Lisebo the Manager wanted to see her. She went to the manager's office where she found a member of the worker's committee, the line manager and the supervisor. They confronted her about her declining productivity. Later Lisebo was called and on arrival she said it appears applicant did not like to work. She then instructed Mamoloi to make applicant a passout to enable her to go home as there was no work for her.

9. The respondents in their response also have contradictory versions between what is stated in their answer and their oral account of the events. In their answer the respondents aver that buttonhole and button sewing is one operation. They averred further that the jobs were separate in the past when old machines were in use. The new machines which they said were introduced in 1994, necessitated that button hole and button sewing be done as one job by one person in a standing position. They denied that upon applicant's return from leave the buttonhole and button sewing were being done by two persons sitting down. They averred that if ever such a thing happened it was during breakdowns when new machines were not in use and the old ones were being used.

10. However, in oral testimony DW1 'Mamoloi Mokete agreed that the applicant did the button hole and button sewing alone in a standing position. She had been instructed to tell her that she had to do the job standing. When she was asked how many people do the job at present she said it is done by two people. When asked why applicant had to do the job alone, the witness kept on saying the job was so little it had to be done by one person. However, eventually she came out and said the machines which were to be introduced to make those two operations one operation never arrived hence the return to the old system.

11. DW2 Lisebo Mafaleng also testified that she gave an instruction that applicant should do her work in a standing position. She said this was because buttonhole and button fit were small jobs as such it was decided they be the first ones to be merged and done in a standing position. Both 'Mamoloi and Lisebo stated that before her sick leave the applicant was carrying out the job as instructed but on her return from leave she refused to work standing.

12. They testified further that the applicant was called before a committee made up of two shop stewards, applicant's supervisor and 'Mamoloi. Before this committee the applicant persisted that she would not work standing. Lisebo was called and the applicant repeated in front of her that she would not afford to work as instructed. It was at that juncture that the applicant was made a passout so that she could go home. In her evidence Lisebo said the applicant is now dismissed because she refused to obey instructions.

13. In his submissions Mr. Masiphole for the applicant sought to convince the Court that the applicant's dismissal was irregular because she was not given a hearing before dismissal. He relied on several authorities in support of the proposition that an employee must be given a hearing before adverse action is taken against him. Indeed the statement appearing in paragraph 5.10 of originating application which says, upon being told by the applicant that applicant could not operate two machines because she was sick, the manager "..... dismissed applicant on the spot and gave her a passout," does convey the notion that applicant was not heard.

14. Applicant's testimony however, tells a different story. She informed the Court that she was called to appear before a committee made up of the line manager, 'Mamoloi the supervisor Ts'eli Lebese and the shopsteward 'Malebone. She testified further that this committee questioned her about the unsatisfactory state of her work. This much is confirmed by the respondent's witnesses 'Mamoloi and Lisebo. In their version however, they said the shop stewards were two and not one. Furthermore they said the applicant was charged with refusal to obey instructions not for declining production.

15. Nothing much turns on the number of shop stewards who participated in the enquiry. The point is that whether one or two they participated. It is significant to resolve the difference of the charge the applicant was charged with. In paragraph 5.8 and 5.9 of the originating application it is averred respectively that "*after several days applicant was ordered by the lines manager to go back to the double task of cutting a hole and sewing a button ...*" In paragraph 5.9 it stated "*applicant very respectfully explained to the manager that she was ill and that she could not operate two machines.*" According to paragraph 5.10 the manager then dismissed applicant on the spot.

16. We have extracted the contents of these paragraphs because they are consistent with what respondent's witnesses say that applicant refused to obey instructions. What she said in her evidence was clearly a fabrication that was intended to paint a picture of a person who was trying hard to do her work but was failed by her ill health. For these reasons we are prepared to accept applicant's testimony as confirmed by respondent's witnesses that she was given a hearing. Furthermore we accept as true respondents evidence that applicant was charged with refusal to obey instructions.

17. Throughout his testimony the applicant depicted herself as a person who was all along healthy until when she was made to operate two machines in a standing position. She maintained this is what caused her illness and the subsequent permanent condition of ill-health. This may well be so, but no evidence was adduced before us to prove this allegation. When the applicant was asked who said her illness was caused by her work she said nobody said so but she felt it was so. This Court requires medical proof before it can reach a conclusion that a person's health condition has been caused by this or that factor. Furthermore, we are inclined to believe as more probable the respondent's witnesses version that the applicant never formally informed them of her ill-health apart from merely approaching them for permission to consult a doctor. The sick leave certificate which she submitted is silent as to her illness or the cause thereof. The respondent's officers could not therefore conclude that her illness was in any related to her work.

18. We come now to the most pertinent issue in this case. It does seem that, the applicant had been given a clear instruction to work standing. In the process she was operating two machines. It is worth noting that according to 'Mamoloi's evidence, these were not the new machines which the respondent's answer suggested they were introduced in 1994. Infact according to respondent's witnesses testimony it is false to say that new machines were introduced. They never were even though they were intended to. We have already made a finding that the applicant was charged with refusal to obey instructions namely to operate the two machines in a standing position. The issue to decide is whether this was a sufficiently serious infraction to warrant summary dismissal.

19. In National Trading Co. .v. Hiazo (1994) 15 ILJ 1304 the Labour Appeal Court per Myburg J, relying on the appellate Division decision in Smit .V. Workmen's Compensation Commissioner 1979 (1) SA 51(A) at 61E-F held at p. 1307D-E that "*in terms of the contract of service the employee is subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer.... refusal or failure to obey an employer's order may justify summary dismissal if the order was lawful and reasonable and the refusal or failure to obey is serious enough to warrant dismissal.*"

20. At p. 1308B-C the learned judge quotes from the decision in Moonian .v. Balmoral Hotel 1925 NPD 215 at 219 where Wilson J.P as he then was stated;

> ***"It is not every act of insubordination or disobedience ..... which will justify the summary dismissal of a servant. Where the ground relied upon is refusal to obey an order it must be a serious and deliberate refusal."***

21. In hoc casu it was conceded by management's witnesses that whilst applicant was instructed to operate the two machines standing, during her absence the same machines were operated by two persons sitting down. The witnesses also testified

that the applicant had done the job according to instruction before going on sick leave. She protested after her return when she found that her replacements were not subjected to the same treatment as she had been. On the face of it this would appear to be discriminatory treatment unless full disclosure is made why there is such a difference in treatment.

22. In her evidence in chief 'Mamoloi admitted that previously the applicant used to operate one machine sitting down. She was asked what necessitated the change and she said that was the instruction from top management that the two operations be done by one person standing. When she was asked why the applicant was required to do the job alone when it was done by two people when she was on sickleave and it continues to be done by two people even now she said, if the machines that were intended to be introduced did arrive the job would be so little that it would not require two people. Lisebo Mafaleng said applicant was required to do the job alone standing because management was doing improvements and that the button hole and button fit were regarded little hence the instruction that they be the first to be merged and be done by one person standing.

23. In our view all these reasons are understandable. It was however, incumbent upon management to explain to the workforce particularly the applicant who was the first to be affected by the changes why there were changes. Not an iota of evidence was adduced to show that management discharged this obligation. The only time when the respondent came close to saying that applicant was informed of the reason for the change was when Ms Sephomolo asked DW2 Lisebo in re-examination if she ever explained to applicant why she was required to work standing and she said yes. Now this is not acceptable, because this was a completely new evidence which was being adduced for the first time in re-examination. Nothing had arisen in cross-examination which necessitated this question. It cannot therefore be admitted as evidence as the applicant never had chance to rebut it.

24. Furthermore, the applicant has not adduced evidence to show that they explained to applicant why there was this apparent unequal treatment between her and the persons who replaced her during her absence. In our view she was entitled to protest that glaring discriminatory treatment. In Laws .v. London Chronicle (Indicator Newspapers) Ltd (1959) 2 All ER 285, the plaintiff who had been engaged by the defendant as an advertisement representative some three weeks previously, followed the Advertisement Manager of the defendant, her immediate superior out of the room after an embarrassing interview between the Advertisement Manager and the Managing Director despite the Director having said to her : "stay where you are." She left the room out of loyalty to her immediate superior who had asked her to follow her because the situation was embarrassing and unpleasant. She was dismissed summarily for the misconduct. The trial court had found that what the plaintiff did "was not sufficiently grave to justify dismissal." On appeal Lord Evershed MR in overturning the decision stated:

> ***"I think it is not right to say that one act of disobedience, to justify dismissal, must be of grave and serious character. I do however think that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show that the servant is repudiating a contract, or one of its essential conditions....."***

25. In our view the principle in this case does not detract from the principle which we earlier on quoted namely that for disobedience to justify dismissal it must be sufficiently serious. In our view this principle is being strengthened by Lord Evershed by saying that the disobedience must be so serious as to amount at common law to repudiation of the contract or one of its essential conditions. We do not see applicant's behaviour in the circumstances of this case as fitting these fundamental requirements given that the respondent itself had caused the situation to be what it was between it and the applicant by not discharging its obligation to explain the change and/or the glaring discriminatory treatment between applicant and the other employers. In the circumstances we are not persuaded that the applicant's dismissal in the circumstances was fair. It was infact glaringly unfair.

26. It is common cause that the applicant has said she does not require reinstatement. In her Originating Application the applicant has not asked for compensation. But section 73(2) of the Code provides that;

> ***"if the employee does not wish reinstatement, the court shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement."***

27. It is therefore the duty of the court to fix the compensation where the employee says she does not wish to be reinstated in circumstances in which she would be reinstated. In fixing compensation the court is enjoined to consider whether the employee has taken any steps to mitigate her loss. It is common cause that applicant has repeatedly stated before the court that her health is failing her and she is infact not seeking reinstatement because of that ill-health. The evidence of her ill-health was never contradicted. Accordingly therefore it would be absurd to expect her to mitigate her loss in such circumstances.

28. This court takes into account applicant's uncontroverted evidence that she started to work for respondent, then called Gallant Clothing in October 1983. Save to deny that she was machinist for twelve years, the aspect of her evidence concerning when she started to work for respondent was not contradicted. She testified that she was a loyal employee who was even awarded a certificate of ten years of loyal service with the company. A copy of this certificate dated 16 December 1993 was handed in by applicant as part of her evidence and marked "MR2". In October 1997 when she was dismissed she had completed fourteen years of service with the respondent. It is common cause that applicant abandoned her prayer for payment of outstanding leave because she did not know if she was owed

any leave. Against the above background this court considers it fair and equitable in the circumstances to make the following award:

29. Respondent shall pay the applicant:

(a) Compensation in the form of twelve months salary at the rate of applicant's remuneration in October 1997.

(b) One month's salary in lieu of notice

(c) Fourteen years severance pay

(d) All payments to be calculated at the rate of applicant's earnings in October 1997.

The above payments to be made within thirty days of the delivery of this judgment.

THUS DONE AT MASERU THIS 13TH DAY OF OCTOBER, 2000.

L.A LETHOBANE
PRESIDENT

C.T. POOPA
MEMBER **I AGREE**

M. MAKHETHA
MEMBER **I AGREE**

FOR APPLICANT : MR MASIPHOLE
FOR RESPONDENT: MS SEPHOMOLO