

IN THE LABOUR COURT OF LESOTHO

CASE NO LC 2/97

HELD AT MASERU

IN THE MATTER OF:

LEAH MOOKHO MOSAASE

APPLICANT

AND

LESOTHO PLANNED PARENTHOOD ASSOCIATION
RESPONDENT

JUDGMENT

The applicant is the former Executive Director of the respondent. She was terminated on the 17th December 1996 because the respondent's National Executive committee had "...resolved to upgrade its operations to enhance its efficiency and image, and to boost its staff morale which is currently very low. To achieve the foregoing (the respondent) requires a person who holds a senior/higher degree/qualifications such as MBA or MA in a relevant field, plus the necessary ten (10) years experience in Personnel and Resources Management with a bias towards family planning, (see Annexure "A" to the Originating Application).

On the 3rd January 1997, the applicant launched the present proceedings contending that her dismissal was malicious, unjust, unfair, and unlawful for the following reasons:

- (a) The dismissal was summary dismissal giving her no notice to look for alternative employment.
- (i) Having been dismissed for no fault of hers, the applicant should have been treated humanely to allow her to ease herself out of the employment as opposed to a summary dismissal.
- (j) The dismissal shows mala fide because as at the time of the filing of the Originating Application no person with the required qualifications

had been identified or if identified was not ready to take over from applicant.

- (k) The reason given for applicant's dismissal was not true at all.
- (l) Applicant was not consulted.
- (m) Respondent did not allow applicant to make representations.
- (n) The termination was contrary to Sections 4.10, 4.11 and 4.12 of the Personnel Management Policy.
- (o) Applicant was not given pension money as she was on Permanent and Pensionable terms.
- (p) If performance was the basis for termination applicant was not given chance to defend herself.

On the 15th October 1997, the applicant lodged an application in terms of rule 6 of the rules of this Court in which she sought an amendment of her Originating Application. The amendment was moved and granted unopposed on the 23rd April 1998. The effect of the amendment was to add to further grounds for relief as follows:

- (i) Respondent did not meet constitutionally to decide on applicant's dismissal.
- (ii) The alleged restructuring was not necessary in that it is not the qualifications that perform the work, it is the person.

The amendment further deleted paragraph 9(b) of the Originating Application which prayed for payment of compensation in the amount equal to one year's salary, and substituted it with a prayer that the Court directs that the applicant be retired as if she has attained the age of sixty(60) and that she be paid for the remaining ten years of service.

On the 13th October 1998 counsels for both parties held a pre-trial conference the minutes of which were filed on the 30th October 1998. According to the minutes, the parties agreed that the applicant drops grounds (a) – (d) and (h) – (i) above. The minutes stipulated further that the applicant will continue to pursue grounds (e) – (g) and (i) – (ii) above. Thus applicant's grounds for relief were cut down to only five (5).

The respondent is a family planning association. It is a non-profit making organization which subsists on donations and membership subscriptions. It is an affiliate of the International Planned Parenthood Federation, which has a Regional Director based in Nairobi, Kenya. The respondent is responsible to this Nairobi office. Sometime in February 1996 two office bearers of the National Executive Committee (NEC) of the respondent, namely; the President and Treasurer wrote an urgent letter to the Regional director in Nairobi requesting for Management and Performance Audit/Overall programme evaluation of the respondent Association.

According to the letter the office bearers' initiative was triggered by what they termed "... a series of excruciatingly unnerving events regarding overall management programme and administration of the FPA i.e. Lesotho Planned Parenthood Association." They stated that respondent was constantly encountering problems prominent among which were in so far as they are relevant to the case before us in summary are the following:

- (i) Weakness in management to ensure timeous submission of requisite documents e.g. Work Programme and budget, three year Plan, Annual Report and half year report.
- (ii) Discord at top management resulting in divisions at lower working levels.
- (iii) Uncontrollable and fraudulent use of both funds and assets of the Association.
- (i) Collapse in the association's collaboration with other organizations.

In his response the Regional Director observed that it would not be possible to undertake a full Overall Programme Evaluation and Management Audit. Due to the seriousness of the issue however, preliminary investigation of the issues raised in the letter would be undertaken. Significantly the Regional Director noted with satisfaction that the NEC had recently discussed the issue and that "... the Executive Director is aware of the situation and the decisions of NEC." In order to ensure transparency the Regional director copied his response to the Executive Director and attached a copy of the two office bearers' letter for her to note its contents.

On the 18-27 July 1996, a Dr. Mphangile, a Programme Coordinator responsible for Lesotho undertook a mission to Lesotho with the following as its objectives;

- (i) to undertake a fact-finding mission on the existence, nature, magnitude and potential effects of the association's management problems;
- (ii) to get consensus on steps to be taken to solve the problems to be identified.

This mission was a follow-up to the request of the President and Treasurer of the respondent. According to his report, which was acknowledged by both parties, Dr. Mphangile interviewed 32 people of whom 11 were volunteers, 17 staff and 4 from collaborating agencies. The report goes further to state that;

"All staff and volunteers and one collaborating agency (Ministry of Health) agreed that the President and Treasurer were right in saying that there were management problems in LPPA".

The report identified three key issues which constituted problems. These were issues relating to the Association's top management, volunteer issues and those the reporting officer considered serious allegations that needed further in depth study.

For the purposes of this judgment, we will dwell only on the first issue namely, issues relating to the Association's top management. The report said the three Directors who constitute the Association's top management were divisive and never worked as a team. "Of the three Directors, by far the accusations were on the Executive Director followed by the Finance and Administration Director and very little directly on the programmes Director" the report stated.

The draft report was presented to the NEC. According to applicant's evidence, she called the NEC meeting that discussed the report, and when the report was tabled she was asked to leave. This version is vehemently denied by the respondent's only witness Mr. Kefumane Taka, the President who says the applicant was never asked to leave. After the consideration of the report, the NEC resolved to ask the Executive Director to voluntarily resign. According to Mr. Taka's evidence which was not controverted, the Executive Director refused and the NEC decided to terminate her employment in terms of her contract of employment.

We come now to the issues which must be decided in order to determine the fairness or otherwise of applicant's dismissal.

Consultation

Mr. Rakuoane for the applicant referred us to a number of authorities in support of the proposition that an employer ought to consult employees that are ear-marked to be terminated on grounds of operational requirements. Following a number of decisions by this Court on this point, there can no longer be any argument about the need for consultation prior to retrenchment. This is now a fairly well anchored principle in our law.

However, there is no hard and fast rule regarding the form which the process of consultation must take. In his evidence under cross-examination, Mr. Taka was asked whether it was correct that before the NEC dismissed the applicant it did not give him a hearing. His response was; "that is correct. We simply consulted with her." This in our view corroborated what Mr. Taka said in chief about first asking the applicant to resign before dismissing her. Clearly this was a process of consultation whereby alternatives to outright dismissal were considered. It was for the applicant to have made her proposals at that stage. But as we now know, she simply refused without proposing alternatives. In our view the respondent discharged its obligation of consulting and it was entitled to take a final decision if the applicant did not accede to its request while at the sametime not proposing any alternatives.

REPRESENTATION

Section 66(4) of the Labour Code entitles an employee who is to be dismissed for misconduct or for incapacity to be afforded the opportunity to defend himself or herself before she/he is dismissed. Quite clearly the findings of Dr. Mphangile's fact-finding mission on the management problems of the LPPA and the fact that the applicant's performance was the key causal factor was the main reason for applicant's dismissal. Whether in order to effect the desired change in the structure of management, the NEC called it re-organisation, that did not and still does not change the fact that the change was necessitated by the desire to bring about effective, efficient, coherent and revitalised management.

According to the applicant's own testimony, she had occasion to meet face to face with Dr. Mphangile where she was confronted with the allegations levelled against her. She goes further to state that she did seize that opportunity to clear her name save that she says this was a very ordinary meeting. Nothing turns on this concern. A forum to defend oneself against allegations made ought not be in the form of an extra-ordinary meeting.

According to applicant's evidence in chief, she expected to be given a further opportunity to make representations by the NEC. She testified that at no stage did the NEC ever call her to discuss the report. On the contrary Mr. Taka testified on behalf of the respondent that Dr. Mphangile presented the report to the NEC in the presence of the applicant. He averred further that the applicant was afforded the opportunity to respond to the report and that she (applicant) agreed with the report's observations and findings.

We note that, we are here faced with the word of the applicant against that of Mr. Taka. We observe however that, during cross-examination, Mr. Makeka made it very clear to Mrs. Mosaase, that her evidence that she was asked to recuse herself at the time of the presentation of the report was going to be contradicted. She was therefore given ample opportunity to corroborate her version but she decided not to do so. This Court is therefore inclined to accept Mr. Taka's version as the true version. Even if we may be mistaken in our assessment of the evidence our position would still not change because, the applicant had the opportunity to make representations before Dr. Mphangile. It was therefore, not necessary that she be afforded yet another chance by the NEC which was meeting to consider the report and recommendations of its own fact finding mission.

Compliance with Paragraphs 4.10, 4.11 and 4.12 of The Personnel Management Policy

Paragraph 4.10.1 of the respondent's Personnel Management Policy provides:

“All appointments on terms of service may be terminated by either party on giving not less than one calendar month notice or cash payment in lieu of notice to the Executive Director and to the NEC.”

It is common cause between the parties that upon her termination the applicant was paid three months salary in lieu of notice. Quite clearly this was in full compliance with paragraph 4.10 of the Personnel Management Policy.

Paragraph 4.11 deals with retirement, and it provides as follows:

“The normal retirement age for LPPA employees shall be 65 years of age. The retirement date shall be the first day of the month following the month in which an employee attains the age of 65.”

In her Originating Application and in her evidence in chief the applicant has stated that she was dismissed. This much has been confirmed by the respondents. Accordingly her reliance on this paragraph is inappropriate as hers was a case of dismissal not retirement.

Paragraph 4.12 deals with redundancy. In her evidence the applicant averred that the Personnel Management Policy requires that employees who are to be retrenched be prepared mentally, psychologically and financially. Not only did the applicant fail to refer to a specific paragraph or sub-paragraph which provides as she testified. We also on our perusal of the extract of the policy annexed to the Originating application did not find anything along the lines suggested by applicant in her evidence. Mr. Rakuoane asked Mr. Taka under cross-examination if the NEC followed the procedure laid down for dealing with redundancies. His response was that it was followed. This evidence was never challenged. Accordingly we find that applicant’s contention that paragraph 4.12 of the Personnel Management Policy was not complied with lacks evidential basis.

Did The Respondent Meet to Decide on Applicant’s Dismissal?

Applicant contends that the respondent did not meet constitutionally to decide on her dismissal. In support of this contention, she relied on Clause 12.3 of the respondent Association’s Constitution which provides that:

“12.3 A written notice for the meeting of the NEC shall be given at least seven days before the meeting. The notice shall be given by the Executive Director on instruction of the President...”

Applicant contended that she never called a meeting which led to her dismissal. In her evidence in chief however, the applicant was asked if she convened the meeting of 26th November 1996, which is the meeting which resolved to dismiss her. Her response was that she did not remember. Mr. Makeka again asked her the same

question under cross-examination and she reiterated that she did not remember if she is the one who issued notices for that meeting.

She was further asked under cross-examination who between her and the President calls meetings she answered that it is the President. She was again asked if in her view meetings convened through notices not issued by her were unconstitutional. She said that was not her view as in her absence another person could issue such notices. The last question on this point was whether she would deny that the person who calls meetings is the President who in turn instructs her to issue notices, she would not deny. From the review of the evidence of the applicant it is clear that she could well have issued the notice for the meeting of the 26/11/96, but she does not recall. Furthermore even if she may not have issued the notice, that would not render the meeting of the 26/11/96 unconstitutional. In any event she did not challenge that an NEC meeting did take place on the said date. In the premises we find that this is yet another allegation which has no basis.

Was the restructuring necessary?

This is one of the two issues which were raised by the amendment to the Originating Application. The applicant contended that “the alleged restructuring was not necessary in that it is not the qualifications that perform the work, it is the person.” We note that the applicant never expounded on this novelty in her evidence. Neither did her counsel pursue it in his heads of argument.

This could well mean that the applicant has abandoned it as one of the grounds on which she relied. However, we feel obliged to record that the decision to retrench is always a business decision. We are in full agreement with Mr. Makeka’s argument that what should be in issue should not be the correctness of the decision to retrench itself. That is a business decision based on commercial rationale and the employer is the person best placed to take the decision. The Court’s function is only to look into the fairness of the decision whether in taking it due regard was paid to the guiding principles. Equally, it is the employer’s prerogative to state the required qualifications for a job. It is untenable for job-seekers or the courts for that matter to fault employers for determining skills requirements and job specifications merely because we perceive that even persons without those qualifications may cope. That would infact be venturing into the realm of conjecture, which this Court is not prepared to do. For these reasons we find no reason to disturb the decision of the respondent to terminate the applicant’s employment. Accordingly the application is dismissed. This being a case of unfair dismissal and there being no evidence of any untoward conduct on the part of the applicant to warrant her to be penalized with costs, there is no order as to costs.

THUS DONE AT MASERU THIS 17TH DAY OF
MAY, 2000.

L.A LETHOBANE
PRESIDENT

G.K. LIETA
MEMBER

I AGREE

P.K. LEROTHOLI
MEMBER

I AGREE

FOR APPLICANT : MR RAKUOANE
FOR RESPONDENT: MR MAKEKA

