IN THE LABOUR COURT OF LESOTHO

CASE NO LC 58/99

HELD AT MASERU

IN THE MATTER OF:

SESENE EDWIN MOSIUOA **APPLICANT**

AND

MEDICAL RESCUE INTERNATIONAL **RESPONDENT**

AWARD

Judgment in this matter was delivered on the 12th April 2002. The court left the question of appropriate relief for address by counsels on a later date. On the 15th May 2002 counsels appeared before us to address the outstanding issue of appropriate relief as well as measures taken to mitigate loss. The applicant testified briefly that since his dismissal on the 31st May 1999 he had been looking for work for no avail. He only obtained alternative employment at the Ministry of Health on the 2nd April 2002, almost three years since his dismissal.

In argument Mr. Putsoane for the applicant submitted that reinstatement of the applicant is impracticable since the respondent is about to close down. He thus asked for six months salary as compensation in lieu of reinstatement. He submitted that for the act of breach of contract which resulted in applicant's dismissal the respondent be ordered to pay applicant the salary he would have earned but for the dismissal, from the date of dismissal to the date he (applicant) obtained alternative employment. He further contended that the court orders the respondent to pay applicant his terminal benefits. This claim was based on the applicant's testimony when

testifying on the measures taken to mitigate loss. He averred in that testimony that he was not paid his terminal benefits when he was dismissed.

A litigant's case is found in their pleadings as amplified by evidence. The occasion to address the court in mitigation is not the time to make out a new case as applicant sought to do. The question of terminal benefits is totally new to the applicant's case. It cannot therefore be allowed. Equally new is the issue of reinstatement. It was neither canvassed in pleadings nor in applicant's evidence in chief. Mr. Putsoane sought to show that since the applicant's dismissal has been found both unfair and unlawful by reason of its being in breach of contract, it meant the applicant was entitled to reinstatement. It does not in our view necessarily follow. The applicant might merely have been seeking a declarator without any consequential relief. It follows therefore that a litigant must clearly spell out what relief he or she seeks. This gives the other side the opportunity to rebut the claim if they desire to do so.

What the applicant has sought in his originating application is "payment from the date of dismissal." As it can be seen it has no end. In assessing what compensation should be paid, if any, the court must be guided by the principles of fairness to both sides, reasonableness and the extent of blameworthiness on the part of the employee. I Miksch vs. Edgars Retail Trading (Pty) Ltd (1975) 16 ILJ 575 the applicant had been found to have been unfairly dismissed by reason of having not been given enough time to prepare for the case. But given the facts of the case he would, but for the mistake of not giving him enough time, have inevitably been dismissed. In assessing the compensation due the court concluded that the applicant had suffered no patrimonial loss as a result of the unfair labour practice. The court said he was only entitled to a declarator that an unfair labour practice had occurred.

We quote this case in order to distinguish it from the present matter. In casu the applicant was dismissed in circumstances where he should not have been dismissed. Disciplinary action short of dismissal would in terms of respondent's code have been appropriate. Accordingly the applicant did suffer patrimonial loss in the form of wages he would have earned had he not been unfairly dismissed. This approach finds backing in the Labour Appeal Court decision in Ferodo (Pty) Ltd. .v. De Ruiter (19993) 14 ILJ 974 (LAC) at 981C where Combrick J held:

"In my view the correct approach to be adopted is that to be found in English Law, namely that the basic principle must be that an unfairly dismissed employee is to be compensated for the financial loss caused by the decision to dismiss him. I venture to suggest the following guidelines when determining the amount of compensation to be awarded:

(a) there must be evidence before the court of actual financial loss suffered by the person claiming compensation;

(b) there must be proof that the loss was caused by the unfair labour practice;

(c) the loss must be foreseeable; i.e. not too remote or speculative;

(d) the award must endeavour to place the applicant in monetary terms in the position which he would have been had the unfair labour practice not been committed;

(e) in making the award the court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;

(f) there is a duty on the employee (if he is seeking compensation) to mitigate his damages by taking all reasonable steps to acquire alternative employment;

(g) any benefit which the applicant receives e.g. by way of a severance package must be taken into account."

In casu we do not doubt the applicant's qualification for compensation under all but one factor enumerated above. The question that we must ask ourselves is whether the applicant has taken reasonable steps to mitigate his damages. Mr. Putsoane says on the basis of his uncontroverted evidence the applicant did take such steps. In cross-examination Ms Sephomolo for the respondent challenged the applicant to produce proof that he did look for alternative employment as he alleges but he could not. In Robecor .v. Durant (1995) 16 ILJ 1519 the court was faced with the similar issue of mitigation. It is important to note that the case was on appeal against the decision of the Industrial Court. In considering the respondent's evidence on the steps taken to mitigate damages Joffe J held as follows:

"Respondent's evidence as to the efforts he made to obtain employment after his services with appellant were terminated was extremely vague. He testified that he looked for work with other

> *companies which were involved in the same type of business and that he tried one or two companies for full time employment but were not interested in somebody of his age. Save for mentioning one of these companies namely Mr. Cupboard, the respondent did not identify the other potential employers whom he approached. The vagueness of the evidence affects its cogency."* At p.1524

The evidence of the applicant herein was just as vague as regards the efforts he made to obtain alternative employment. The applicant is a nurse by profession. But he could not mention even a single potential employer he approached for employment. This he could not do even when he was challenged to say where he applied for employment. In the light of the unsatisfactory nature of his evidence in this regard, we are of the view that the compensation ordered must be limited to the salary that he would have earned for the period of time that we consider reasonable for him to secure alternative employment. We are fortified in this approach by Robecor's case supra at p.1525.

In our view twelve months is a reasonable period in which a person of applicant's qualifications can be expected to have secured alternative employment. In the premises the respondent is ordered to pay applicant twelve months' salary for the unfair dismissal. The compensation to be calculated at the rate of applicant's emoluments at the time of his dismissal. Payment to be effected within thirty days of handing down of this award.

THUS DONE AT MASERU THIS 21ST DAY OF MAY, 2002.

L.A LETHOBANE
PRESIDENT

M.S. MAKHASANE
MEMBER **I AGREE**

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

FOR APPLICANT: **MR PUTSOANE**
FOR RESPONDENT: **MS SEPHOMOLO**