IN THE LABOUR COURT OF LESOTHO

LC /REV/ 78/06
(LAC/REV/27/03)

HELD AT MASERU

IN THE MATTER BETWEEN

KETSO MOLETSANE	**APPLICANT**
AND	
TELECOM LESOTHO	**1ST RESPONDENT**
DIRECTORATE OF DIPUTES PREVENTION AND RESOLUTION	**2ND RESPONDENT**

JUDGMENT

Date of hearing: 06/11/06

Review – Employer's regulation requiring that an employee qualifies for gratuity if he has served ten years – The employee falling short of ten years by four days – Ten years not achieved and the court cannot write off the unserved four days.

Documents referred to at arbitration not attached to the record – The omission not fatal – In any event the arbitrator made reference to them a fact which shows he considered them in his decision.

Application dismissed.

1. The applicant herein made a referral to the Directorate of Disputes Prevention and Resolution (DDPR) in which he sought an award directing the first respondent to pay him his gratuity in terms of its personnel regulations. The referral was dismissed hence this review application.

2. The applicant was initially engaged to undergo a sixteen (16) weeks training course in April, 1989. He was successful in the course and was offered a permanent but non-pensionable appointment as a technician on the 18th August, 1989.

3. On the 14 July 1999 the applicant applied and was granted voluntary severance effective from 21st July 1999.

4. On the 24th July 1999, the applicant wrote the following note to the Human Resources Manager:

"To: Human Resources
From: B.K. Moletsane
Empl: 973

"I had applied for voluntary severance whereby it was approved with effect from 21st of July, 1999 and my terminal benefits shall be forwarded on the 12th August, 1999. This date is only four days away from my tenth anniversary. I hereby make a formal request to the management to please consider me for having completed ten years of service. I shall appreciate your kindness.

Regards!

Signed: B.K. Moletsane."

5. There is no evidence of any formal response to this memo. It can however, be safely assumed that the request was not acceded to; regard being had to the referral of a claim for the payment of the gratuity to the DDPR.

6. Evidence regarding applicant's entitlement or non-entitlement to the gratuity was led before the DDPR. In particular Clause 22.10.1 and 22.10.3 which were presented before the arbitrator are worth quoting;

> ***"22.10.1. Gratuity shall be paid to employees who have served LTC continuously for a minimum of ten (10) years only at the time of the termination of their employment with LTC.***
>
> ***22.10.3 LTC total contributions plus accrued interest starting with the year when the employee joined LTC but not earlier than the year 1990 shall be paid on termination of employment."***

7. At the hearing before the DDPR the applicant testified that when he left LTC on the 12/08/1999, "I had completed ten (10) years uninterrupted (service) and therefore (I was) entitled to gratuity. When I opted for voluntary retirement my ten (10) years service was not taken into consideration which is why I have lodged my case with DDPR." (See para 4 of the transcribed record).

8. The respondent's version was that the applicant had not served ten (10) years qualifying period because the other months when he was undergoing induction did not qualify for computation of gratuity. (See paragraphs 42 and 58 of the record).

9. After evaluation of the evidence the arbitrator came to the conclusion that applicant's period of permanent employment did not satisfy the minimum ten (10) years required for one to qualify for gratuity. He found further that since the LTC had not exercised its discretion to consider the applicant to have completed ten (10) years, applicant's service period was insufficient and therefore failed to qualify him for gratuity.

10. Applicant applied for the review and setting aside of the aforesaid decision. There are essentially two grounds that the

applicant advances for seeking that the decision of the DDPR be reviewed. The third was raised from the bar.

11. Firstly, the applicant avers that the award wrongly says he started to work for the first respondent on 3rd April, 1983 when the correct date is the 10th April, 1989. From paragraph 3 of the record of DDPR proceedings it appears that the date of 3rd April, 1983 was introduced by applicant's own apparent slip of the tongue. He is himself recorded to have suggested that date as the date that he started to work for the 1st respondent.

12. That this date is wrong is evident from paragraphs 22 and 31 of the transcribed record of the DDPR proceedings. In both those paragraphs the applicant makes it clear that he started to work for 1st respondent in 1989. There is no clear date when he started but the 10th April was the date on which the induction course was scheduled to begin.

13. There is no evidence that it infact started on that date. In his own evidence under cross examination, before the DDPR applicant said the training started on the 16 April, 1989. It is not disputed that the training period does not count for purposes of entitlement to gratuity. It follows therefore, that the error in dates has not prejudiced the applicant in as much as that error has not resulted in the reduction of his qualifying service period.

14. It is applicant's second submission that his service record was wrong. He accordingly sought the permission of management to patch up his service with his outstanding leave days. He had been advised by the Human Resources Manager to follow that procedure as to seek to correct his record would take a long time.

15. According to the evidence which has not been disputed only employees who have been continuously employed on a permanent basis for a least ten (10) years qualify for gratuity. Evidence is further that applicant was offered permanent but non-pensionable employment on the 18/08/1989. (See annexure

"BK 2"). Clearly therefore his tenth anniversary would be attained on the 18th August, 1999.

16. It is common cause that the applicant applied for and was granted voluntary termination with effect from 21st July, 1999. Upon application for voluntary severance the applicant made no mention about any outstanding leave and how he would apply it towards satisfaction of the remaining few days to complete his ten years of service.

17. Having made no mention of his leave, at the time of tendering his application for voluntary separation, the applicant has continued to fail to make any claim for outstanding leave that is due to him. There is infact not an iota of evidence to show that at the time that he retired applicant had any outstanding leave.

18. In a surprising turn of events, the applicant wrote an undated memo to the Human Resources Manager. The memo is attached to the founding affidavit of the applicant as annexure "BK 4". In it the applicant recalls his application for voluntary severance and that it is effective from 21st July, 1999 even though his terminal benefits are to be paid on the 12th August, 1999. The applicant then makes a plea to the management "*to please consider (him) for having completed ten years of service.*"

19. It is significant that even in this memo the applicant makes no mention of leave. He instead is pleading with management to use its discretion to write off the remaining few days and consider him to have completed ten years of service. The management, it would appear declined the request.

20. There is no suggestion that in declining to consider him to have completed ten years the management was actuated by malice, or that its decision should be declared void or illegal for any recognized lawful cause.

21. Similarly no suggestion is made that the award of the arbitrator is in any way assailable for failing to consider any

material placed before him or any other lawfully recognized ground. By his own admission, the applicant fell short of the required ten years service by four days.

22. For him to claim that his service record was wrong, is clearly a falsehood if regard is had to his admission that his service fell short by four days. Those four days are clearly a requirement which must be met. Neither the DDPR nor this court or any other court for that matter can read those days into his service record when he did not serve them.

23. Finally, Mr. Mohaleroe for the applicant argued from the bar that the review application should be granted and the proceedings before the DDPR quashed for want of a proper record. He had promised an authority for this proposition but until the time of the writing of this judgment none had been availed.

24. The thrust of the argument was that the record was not proper because a number of documents which were referred to and produced at the DDPR did not form part of the transcribed record. Whilst this is so, the argument however does not go far enough.

25. It is not suggested, for instance that the DDPR made a decision without seeing those documents that were referred to or that it did not consider them. (See L. Baxter Administrative Law, 1996 Juta & Co., P. 259). Looking at the award of the arbitrator, it is clear that he considered those documents and has made extensive references drawn from them (the referred documents).

26. The fact alone that they were not attached to the transcribed record is not in our view fatal. It is infact an omission which could very easily be cured by simply calling for those documents to be transferred to the court by the DDPR if it became necessary to do so.

27. For these reasons we have come to the conclusion that there is no merit in this application. It is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 11TH DAY OF DECEMBER,2006

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI **I AGREE**
MEMBER

R. MOTHEPU **I AGREE**
MEMBER

FOR APPLICANT: **MR MOHALEROE**
FOR RESPONDENT: **MS TOHLANG**