

IN THE LABOUR COURT OF LESOTHO

**LC/REV/190/06
LAC/REV/58/06**

HELD AT MASERU

IN THE MATTER BETWEEN

LETSEMA MPOLO

APPLICANT

AND

**DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION**

1ST RESPONDENT

GRAY SECURITY SERVICES (PTY) LTD

2ND RESPONDENT

JUDGMENT

Date of hearing : 12/04/07.

Review of DDPR award - Arbitrator unduly interfering with applicant's presentation of his case - Arbitrator declining jurisdiction to hear claim of the applicant - Section 226(2)(d) of Act No.3 of 2000 empowers the Arbitrator to arbitrate all disputes of right except those falling under jurisdiction of Labour Court under section 226(1)(c) - Applicant's claim not one covered in sec. 226(1)(c) therefore DDPR has jurisdiction to decide it - Award reviewed and set aside - Dispute to start de novo before a different arbitrator.

1. This is a review application. It was heard on the 12/04/07. At the close of arguments, the court ruled in favour of the

applicant and ordered that the decision of the 1st respondent in referral No.A124/03 was reviewed corrected and set aside.

The court went further to direct that the case should start *de novo* at the DDPR before a different arbitrator. The court reserved the reasons for its judgment. What now follows are those reasons.

2. The applicant was employed by the 2nd respondent on the 1st February 2000 as a patrol man, stationed at Mohale's Hoek. On the 18th November applicant was disciplinarily charged for assaulting a site commander, one Mr. Thaane. The applicant was found guilty and dismissed with "immediate effect."
3. The applicant sought to appeal against the decision. However, the person who was supposed to conduct the appeal, one Mr. Van Wyk allegedly said he would only proceed with the appeal after the police had prosecuted applicant for the assault on the site commander. Applicant avers that at that point he had not been charged for the alleged assault and he was not at any other time thereafter charged.
4. In December 2002 applicant lodged a referral with the Directorate of Dispute Prevention and Resolution challenging the fairness of his dismissal. In particular applicant was complaining that two weeks prior to the incident that led to his dismissal, Mr. Thaane had torn his (applicant's) pay slip, thereby making it impossible for applicant to know what he ought to have been paid.
5. Nothing was done by management to intervene in the matter. About two weeks later the two of them met away from work. Applicant asked Mr. Thaane why he tore his pay slip. The latter allegedly assaulted the applicant who in turn reported the matter to the police. There is no evidence that Mr. Thaane himself reported the incident to the police.

6. It would appear however, that Mr. Thaane reported the incident to the management which then charged the applicant of assault. The applicant was found guilty and dismissed. He challenged the fairness of the dismissal on a number of grounds.
7. Firstly, applicant contended that the conduct he was charged of constituted no offence under the employer's disciplinary code. Secondly, he contended that the incident took place away from work as such management had no right to charge him. Thirdly, he pointed out that he was not given the opportunity to confront his accuser at the hearing. It was instead only him and the management and the latter presented the accuser's version on his behalf. Fourthly, and lastly he contended that he was not given adequate time to prepare his defense at the hearing.
8. The referral was set down for hearing before Arbitrator Mochekoane on the 26th March 2003. The trade union representatives of the applicant sought to present his case, but they had a near impossible task as the Arbitrator would not allow them to make even a single complete statement. The record is pretty much coloured by the arbitrator's interjections which to say the least made it impossible for the representative to fulfil the task at hand, that of representing the applicant.
9. The representative attempted to give a historical background of the events that led to the applicant's dismissal (see p.11 of the paginated record). She was again stopped by the arbitrator who said she must only talk about procedure, because the representative had allegedly said she was not concerned about the substantive aspect of the dismissal. However there is nothing in the record to confirm that the representative had ever said that she was not concerned about the substantive aspect of the case. Even assuming she had said so, she could not be held strictly to that

statement, because there are no formal pleadings before the DDPR which in terms of the rules of pleadings the litigants are bound to stand and fall by them.

10. In the end, the applicant sought to take over and lead his own defence. He attempted to explain why he felt that his dismissal was unfair. He was stopped because the arbitrator said they were both talking at the sametime. The arbitrator continued to interrogate the representative, who at best was only making an opening statement and not giving evidence as such.
11. As the interrogation continued the representative was asked by the arbitrator to start all over again and give their grounds for challenging the dismissal (see p.14 of the paginated record). When he suggested that the decision made by the disciplinary committee was not correct the arbitrator again interjected; and asked; “are you challenging the decision?”

The representative answered in the affirmative. Moments thereafter the arbitrator asked her if she had finished she said she had finished. The arbitrator thanked her and said she was not going to require the respondent (the employer) to make any response.

12. The arbitrator asked for a brief adjournment after which she ruled that she did not have jurisdiction to deal with the dispute. She stated that since the representative had said they were not happy with the employer’s decision to dismiss applicant and that they were unhappy with what transpired at the hearing that amounts to asking the DDPR to review the disciplinary hearing and that the law does not give the DDPR that power.
13. As we pointed out, the arbitrator had only heard the summary of the case from the representative. The complainant had not given evidence of what the basis of his claim was. The door was shut in his face even before he could present his case. This was certainly irregular.

14. We have already shown that the interjections of the arbitrator went beyond the normal acceptable inquiry which is necessary to obtain clarity of the issues. Her interruptions as reflected by the record made it virtually impossible for the applicant's representative to present applicant's case with clarity. This was irregular and it cannot be countenanced.
15. Section 226(2)(d) of the Act provides as follows:

“(2) The following disputes of right shall be resolved by arbitration:
 “(a).....
 “(b).....
 “(c).....
 “(d) An unfair dismissal for any reason other than a reason referred to in subsection (1)(c).” (emphasis added).

We have emphasized the word “any” to underscore the fact that the only exceptions of cases of unfair dismissal that the DDPR is disqualified to hear are those listed in section 226(1)(c). All other cases of alleged unfair dismissal except those listed in section 226(1)(c) fall to be determined by the DDPR by way of arbitration.

16. The issue to decide is whether the case of the applicant falls under any of those that are listed under section 226(1)(c) so as to disqualify it from being a subject of determination under section 226(2)(d). Section 226(1)(c) lists three types of unfair dismissal which are a subject of exclusive jurisdiction of the Labour Court. Those are cases of unfair dismissal where the reason for dismissal is:
- (i) for participation in the strike;
 - (ii) as a consequence of a lock out; or
 - (iii) related to the operational requirements of the employer.
17. It is common cause that the applicant was dismissed for allegedly assaulting a station commander. The reason for

dismissal does not therefore fall under those that are listed under section 226(1)(c). That being the case it can only fall under section 226(2)(d) where the fairness of all other reasons advanced for dismissal can only be tested under arbitration before the DDPR.

18. There is no doubt that the learned arbitrator gravely misdirected herself by overlooking the provisions of the Act, which her powers as the arbitrator flow from. She went completely off course and considered complete irrelevant matters namely that because the applicant said he was unhappy with the decision, he was requiring her to review the employer's disciplinary proceedings.
19. First, the applicant and his representative are lay people. When they say they are unhappy with the decision, they are essentially saying they consider the decision to be unfair. As we know a decision can be procedurally or substantively unfair or both. Judging from the applicant's grounds for not being happy with the decision; he was challenging both the procedural and substantive fairness of his dismissal.
20. The applicant must have been given the opportunity to do so. It was totally irregular and indeed illegal for the arbitrator to have declined to exercise the jurisdiction which was bestowed on her by the law in the circumstances. Whether she called that a review, it is neither here nor there because her power flows from section 226(2)(d) and that is the section she should have just clung unto and exercised all her powers in the matter in respect thereof.
21. For these reasons we came to the conclusion that the arbitrator acted irregularly and contrary to the law firstly by unduly interfering with applicant's presentation of the case and secondly by declining to exercise the powers bestowed on her to determine whether the applicant's dismissal was fair in the circumstances. Accordingly, the award in DDPR Referral No. A0124/03 is reviewed, corrected and set aside. It is hereby ordered that the matter start *de novo* at the

DDPR before a different arbitrator. There is no order as to costs.

THUS DONE AT MASERU THIS 9TH DAY OF MAY 2007.

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. LEPELI MOLAPO
MS. L. SEPHOMOLO