

IN THE LABOUR COURT OF LESOTHO

LAC /REV/65/06

LC /REV/524/06

HELD AT MASERU

IN THE MATTER BETWEEN

TSELISO MOILOA

APPLICANT

AND

**TOTAL PRINT HOUSE (PTY) LTD
DIRECTOR OF DISPUTE
PREVENTION AND RESOLUTION
MR. MOTLATSI**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

JUDGMENT

Date: 01st August 2007

***Review of DDPR award-conciliation achieving agreement
that employee be paid terminal benefits in the form of
notice- Acceptance of notice is acceptance of repudiation
of contract- Employee cannot subsequently challenge
fairness of the dismissal- Award reviewed and set aside.***

1. The applicant was employed by the 1st respondent as the Print Manager with effect from the 1st June 2005. The 1st respondent was a new company and the applicant was tasked with ensuring that it started its operations. That entailed *inter alia*, installing fittings and other equipment, plant and machinery and employing personnel. He also had to market the company to establish customer base.

2. According to applicant's founding affidavit, on the 12th August 2005, he was served with a letter allegedly terminating his probationary appointment with immediate effect.
3. The applicant referred a dispute to the Directorate Dispute Prevention and Resolution challenging the fairness of his dismissal. He also sought to be paid in lieu of notice and for the days worked. The dispute was conciliated and the parties reached a settlement on the

"Payment of wages for the period that the applicant worked prior to dismissal as well as on the claim for payment of wages in lieu of notice of termination."(See p.3 of the award of 3rd respondent and p.17 of the record.).

4. Following the settlement the arbitrator proceeded to arbitrate the dispute concerning unfair dismissal. A preliminary point was raised by the representative of the 1st respondent based on section 71 of the Labour Code Order 1992 (the Code) which provides :

5. **"(71.) Excluded Categories**

"(1) Subject to sub-section (2), the following categories of employees shall not have the right to bring a claim for unfair dismissal:

"(a) Employees who have been employed for a probationary period as provided under section 75;

"(b) Employees over the normal age of retirement for the type of employment involved."

6. It was contended on behalf of the 1st respondent that the applicant was a probationary employee and as such he was excluded from bringing a claim of unfair dismissal. The applicant on the other hand argued that he was not employed on probation. He referred to his letter of appointment which made no mention that he was employed on probation.

7. The learned arbitrator heard evidence on both sides. The representative of the 1st respondent testified that the applicant was informed at the interview that he would be employed on probation of three months. Even at the time that he was given his letter of appointment he was verbally told that he would only sign a written contract of employment upon successful completion of his period of probation.
8. Applicant's testimony was essentially to deny all that the 1st respondent's representative had said. He referred to his letter of appointment which made no mention that he was employed on probation. He further sought to show that his employment relationship with 1st respondent ought to be solely governed by that letter. At the conclusion of the evidence the learned arbitrator came to the conclusion that the evidence of the 1st respondent's witness was more probable than that of the applicant. He thus upheld the 1st respondent's preliminary point that the applicant fell under excluded categories as such he was not entitled to bring a claim for unfair dismissal.
9. The arbitration award was handed down on the 20th February 2006. On the 20th June 2006 applicant issued a notice of motion out of the registry of this court seeking review of the aforesaid award. The notice of motion was accompanied by an application for condonation of the late filing of the application for review.
10. The explanation advanced for the delay was that when the award was delivered the applicant already had arrangements to fly overseas for a business trip. He averred that he infact left a few days after the award was delivered. He stated further that he had just returned from that trip and that the first thing he did upon his return was to consult his attorneys for advice and the filing of this application.
11. The 1st respondent for its part raised two points in limine which if successful would deal a fatal blow to the condonation application and by necessary implication the very merits of this application. The court thus resolved to deal with that point in limine and the condonation application and dispose of them in

order to determine if it would be necessary to enter the merits after all.

12. The first point raised in limine was that the applicant is barred from challenging the fairness of the dismissal for two reasons. Firstly it was contended that the delay is too long and that the reasons advanced to explain it are not sufficient to enable the court to exercise its discretion in his favour. Secondly, it was contended that applicant accepted payment of his benefits and he cannot thereafter seek to challenge the dismissal. The second point in limine was that the so-called review is infact an appeal in disguise.
13. Section 228F (1) (a) of the Labour Code (Amendment) Act 2000 (the act) provides that:

“(1) Any party to a dispute who seeks to review any arbitration award issued under this part shall apply to the (Labour Court) for an order setting aside the award:

(a) Within 30 days of the date the award was served on the applicant unless the alleged defect involves corruption.”

The words Labour Court take the place of Labour Appeal Court which was amended by section 4 of the Labour Code (Amendment) Act no 5 of 2006.

14. It is common cause that the applicant herein was late by four months. He thus owed it to the court to satisfactorily explain his delay and to show that on the merits he had prospects of success. Applicant’s explanation was attacked on the ground that it lacked necessary details regarding dates. He was criticized for not disclosing when exactly he left for overseas and when exactly he returned.
15. The information concerning dates of departure and dates of return is one that is peculiarly within the knowledge of the applicant. Disclosure of such details by a person seeking an indulgence goes a long way to show the person’s bona fides.

On the other hand generalized explanations lacking necessary details constitute an insufficient explanation.

16. Applicant's prospects will be weighed against the points that the 1st respondent raised in limine. The first point is that since the applicant has accepted payment of his benefits he cannot later turn around and challenge the dismissal. By his own admission in his award, the learned arbitrator says his conciliation helped the parties to reach a settlement on unpaid wages and notice pay.
17. It seems to this court that once the parties had agreed on a separation package that was the end of the story. It only suffices to say that the applicant can not approbate in other words approve the termination and reprobate or disapprove of it at the sametime. This is a common law principle. This is more so when the applicant accepted the settlement before the arbitrator, where it can easily be assumed that he was free and was under no duress. Furthermore, the settlement having not been accepted without prejudice constitutes a valid defence of res judicata.
18. We are of the view that the 1st respondent's point in limine on this ground was well taken. It has been clear that the explanation of the applicant has not been satisfactory. Now with the success of the point in limine, applicant has clearly no prospects of success. It would serve only an academic purpose to seek to deal with the second point in limine as the first one suffices to rest the entire case. Accordingly the 1st respondent's point in limine is upheld and the applicant's condonation application is refused. The review application is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 25TH DAY OF JULY 2007

L. A. LETHOBANE
PRESIDENT

M. MOSEHLE
MEMBER

I CONCUR

L. MOFELEHETSI
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. LETSIKA
MR MOHAU