

IN THE LABOUR COURT OF LESOTHO

LC/REV/27/04
LC/REV/164/07

HELD AT MASERU

IN THE MATTER BETWEEN

MOKETE J. MAOLLA

APPLICANT

AND

LESOTHO PHARMACEUTICAL
CORPORATION

1ST RESPONDENT

THE ARBITRATOR - DIRECTORATE
OF DISPUTES PREVENTION AND
RESOLUTION

2ND RESPONDENT

JUDGMENT

Date of hearing : 04/04/07

Review - Employee found guilty of misconduct - Disciplinary panel imposed penalty of demotion and reduction in salary -Demotion and reduction in salary are two sides of the same coin - The regulations sanction imposition of both penalties - There is no illegality involved - application dismissed.

1. This matter comes before this court for the review of the award of the Directorate of Disputes Prevention and Resolution (DDPR). The applicant was employed by the 1st respondent as a storekeeper, earning M2,783-00 per month.

2. As a storeman the applicant was responsible for procurement of material needed for the production of drugs. In particular the applicant was responsible for the purchase of paraffin for running the boiler.
3. On the 21st May 2002, applicant was sent to go and buy paraffin for the boiler. It was already after knock off time. The applicant showed some reluctance to go until one of the co-workers volunteered to go and buy the paraffin. The applicant then changed his mind and went with him.
4. They duly bought the paraffin and came back. On their return, they found that other workers had already left for home. However there were some workers in the production department who were going to work night shift. There were also security people and applicant's own supervisor Mr. Maphathe.
5. The applicant and the driver who had gone to buy paraffin with him left the paraffin on the van without unloading it and went home. The following morning he found that the paraffin had been unloaded and put in the boiler. He went to the office where he was confronted by the supervisor about whether he unloaded the paraffin and whether he put it in the boiler. It was apparently urgent that the paraffin be put in the boiler as soon as it arrived as it was about to run out.
6. The applicant responded that the paraffin had been safely put in the boiler. The supervisor told him that he was the one who unloaded the paraffin the previous evening and put it in the boiler with the help of other workers. He informed him further that he found the paraffin to be less quantity than what the applicant had been sent to go and buy. He was supposed to have bought 600 litres but only 300 litres were found when the paraffin was unloaded.
7. The applicant was later charged with two counts of inability to account for the 1st respondent's assets and monies; and negligence. He was duly represented at the hearing by the

union of which he was a member, The Lesotho Pharmaceutical and Allied Workers Union.

8. At the close of the hearing, the applicant was found guilty as charged. The penalty imposed was a demotion to a position of gardener and reduction in salary to notch 1 grade 3. The applicant then filed a referral with DDPR because:

“...he was not satisfied with the charges (that) were laid against him as well as the decision that was taken against him. He contended that he was not guilty as charged by management.” (See p.14 of paginated record).
9. The learned Arbitrator heard evidence of both sides and concluded that the applicant was rightly charged and that he was rightly found guilty. It is not necessary to get into the details of the learned arbitrator’s able analysis of the evidence, save to say that the arbitrator found that the applicant had lied when he said in chief that he could not unload the paraffin because there was no one to help him. Under cross-examination the applicant conceded that, there were security people, and the production section people who could have helped him had he sought assistance. Furthermore, he was with a driver who could have helped him and his own supervisor was there to help.
10. Furthermore the applicant was found to have been negligent by leaving the paraffin without ensuring that it was safe. The applicant had been asked how urgent it was that the paraffin be put into the boiler after it had been bought. He conceded that it was very urgent because, if the boiler had stopped, the whole night’s production would have been lost and the boiler itself would have been damaged.
11. Against the backdrop of these findings the learned arbitrator confirmed the penalty imposed by the management namely; demotion and reduction in salary. This review application is concerned with only one issue namely whether in the light of

the personnel regulations it was available to the 1st respondent to impose both a demotion and a reduction in salary.

12. I must mention that two sets of the personnel regulations were filed. The first set which was attached to the Notice Motion is a Sesotho version. It purports to have commenced operation on the 12/12/02 which was the date that they were approved by the Board. The 2nd set is an English version which commenced operation on the 9th December 1998, which is again a date of their approval by the Board.
13. On the date of hearing Mr. Thoahlane for the applicant moved the court for the amendment of the Originating Application by substituting the Sesotho version of the regulations with the English version. There was no objection and the amendment was accordingly granted.
14. Regulation 16 of the 1st respondent's Personnel Regulations provide as follows:
 - "16.1.1 The Managing Director in his sole discretion, may caution or reprimand an employee who is found guilty of misconduct; or impose any one or more of the following penalties; provided that the Managing Director in determining the guilt of an employee shall determine his own procedure as in section 18 following which shall not be repugnant to the dictate of natural justice, morality or good conscience.
 - 16.1.2 Suspension of salary increment for a period not exceeding two months.
 - 16.1.3 Suspension without pay for a period not normally exceeding three (3) months.
 - 16.1.4 Reduction of salary or demotion.
 - 16.1.5 Instant dismissal."

15. The gravamen of counsel for applicant's submission is that the use of the word "or" in paragraph 16.1.4 means that only one of the two penalties may be imposed not both at the sametime. Mr. Thoahlane contended that the Managing Director acted illegally and the learned arbitrator erred in holding that the Managing Director could impose both a demotion and a reduction in salary.
16. Mr. Shale for the 1st respondent contended that the present review is not attacking the method of trial as a review properly so called should. He argued that the applicant is in effect concerned with the correctness of the decision which is an appeallable point.
17. It is apposite at this juncture to refer to Baxter's Administrative Law, 1984 Juta & Co., 3rd impression at page 300 where the learned author states that:

"the substantive content of the principle of legality is determined as much by the process of review itself as by the formal prescriptions of the law. Judicial review is a process which entails external supervision of the way in which the executive has observed the behests of the legislature."

In Lesotho Brewing Co. t/a Maluti Mountain Brewery .v. Lesotho Labour Court President and Another CIV/APN/435/95 (unreported) Ramodibedi J. put it thus:

"In my view it all depends on the nature of the misdirection complained of in each particular case. Depending on the particular circumstances of a case a misdirection may well give rise to a ground for review."

18. It is common cause that the concern of the applicant herein is that the 1st respondent acted beyond (ultra vires) the powers vested in them by regulation 16 of the personnel

regulations. One can hardly think of a better fitting case for review than that.

19. As we said, the only issue we are called upon to decide is whether the Managing Director acted illegally and contrary to the regulations when he imposed both a demotion and reduction of salary on the applicant. Mr. Thoahlane pinned his mast on the use of the “or” and said authorities abound that it is disjunctive and as such the two penalties cannot be imposed simultaneously.
20. This much is true that “or” is disjunctive. But so is any other punctuation which may be adopted when listing penalties such as in rule 16. Whether the punctuation used is a full stop, comma or a semi-colon, in the ordinary English usage those punctuations cannot be interpreted to mean “and” unless “and” is specifically used. Where penalties are listed such as under rule 16 and the word “and” after each of them is not used any punctuation thereon used can only be interpreted as meaning “or”.
21. What this drives us at is that the word “or” already applies to all the offences listed from 16.1.1 to 16.1.7 because the Managing Director can apply one or the other or more, but certainly not all at the sametime. Clearly, the phrase that “the Managing Director in his sole discretion, may ...impose any one or more of the following penalties...” applies to sub-regulation 16.1.4 to the extent that it appears to have two penalties in one. In the premises the 1st respondent cannot be said to have acted ultra vires their powers vested in them by the regulations.
22. Mr. Thoahlane argued further that the preamble empowering the Managing Director to impose one or more penalties under rule 16 should be interpreted to mean one or more of the penalties listed under 16.1.1 to 16.1.6. He averred that when it comes to regulation 16.1.4 it should be demotion or reduction in salary. We have already said that “or” applies to all the penalties from 16.1.1 to 16.1.6. There is no reason

why 16.1.4 should be different unless we allow semantics to take precedence over fairness and equity.

23. It was also argued that imposition of both demotion and reduction in salary is a double penalty. I doubt that this should be so. As Mr. Shale correctly pointed out in his heads of argument “demotion and reduction in salary are two sides of the same coin...” Whilst as it was held in *Van Nierkerk .v. Minister of Labour and Others* (1996) 17ILJ 525 at 529, it is true that “a person has a right to his professional reputation...” we can say without any equivocation that there is no professional status at stake in casu.
24. A demotion is in the circumstances of this case a way of saying to the applicant that he had been incapable of performing the duties he was employed to do. However the employer has considered that the employment relationship is not entirely untenable. The employer then decides to give him a lesser responsibility which the employer is empowered to give by the rules. If we are a court of equity that we pride ourselves in being, where would equity be if the employer were to be required to demote an employee but continue to pay him a salary commensurate to the position he has been found incapable of performing the duties of.
25. Finally, even were the demotion and reduction in salary to be seen as double punishment, if looked at from a different approach, the fairness of the action taken would be sanctioned by the personnel regulations themselves. The fact that the regulations allow the punishment to be imposed as such; a fact which this court has established, means that there can be discerned no unfairness. Accordingly, this review application cannot succeed. It is accordingly dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 26TH DAY OF APRIL 2007.

L. A. LETHOBANE
PRESIDENT

M. THAKALEKOALA
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. THOAHLANE
MR. SHALE