

IN THE LABOUR COURT OF LESOTHO

LC/REV/417/2006
LAC/REV/133/05

HELD AT MASERU

IN THE MATTER BETWEEN:

THABO MOTLAMELLE

APPLICANT

AND

LESOTHO REVENUE AUTHORITY
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION

1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

Date: 03 /07/08

Review of DDPR award - evidence led without witnesses taking the prescribed oath - such is not evidence in the eyes of the law.

- 1 The applicant herein filed a referral in the DDPR challenging his dismissal by the 1st respondent for alleged incompatibility. The arbitrator found that the applicant had no right to refer a dispute of unfair dismissal as he was on probation of four months at the time of his dismissal. The finding of the arbitrator was based on section 71(1) (a) of the Labour Code Order 1992 (the code) which provides:

“(1) Subject to subsection (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.*"

2. Sub-section (2) provides that an employee covered by subsection (1) shall nonetheless have the right to file a claim of unfair dismissal if the claim alleges that the dismissal was for any of the reasons specified in section 66(3) and section 68(c). It is common cause that applicant was dismissed following an exchange of a series of e-mail communications between him and the head of Human Resources, in which he was expressing misgivings about the suitability of his immediate supervisor to be his boss and the propriety of his section falling under that supervisor's department.
3. The applicant took the award on review to the Labour Appeal Court. On review of the award the Labour Appeal Court referred to section 66(3) (c) of the code which provides that the reason for dismissal shall not be valid if the dismissal is for:

"Filing in good faith a complaint or grievance or participation in a proceeding against an employer involving alleged violation or the terms of a collective agreement or award."
4. Given the background to the applicant's dismissal and the exceptions to the provisions of section 71(1)(a) of the code the Labour Appeal Court ruled that the applicant:

"Should have been allowed to discharge onus cast on him to show on the balance of probabilities that he had been dismissed unfairly for having filed a complaint and not incompatibility as 2nd respondent alleges. All these are issues of fact upon which the arbitrator ought to have heard evidence."

The court concluded by remitting the matter to the DDPR and directing that a different arbitrator must go into the factual issue and determine whether applicant falls to be treated under section 66(3) (c).
5. The matter was placed before arbitrator Keta who proceeded to deal with the factual issue as directed by the Labour Appeal

Court. In doing so the learned arbitrator heard evidence of the applicant himself and Mr. Nelson Monyamane who was the Director of Human Resources. At the end the learned arbitrator issued an award in which he upheld the previous decision that the applicant was debarred from bringing a claim of unfair dismissal, because he (the applicant) had “...failed to substantiate that he was dismissed for filing in good faith a complaint or grievance as anticipated by section 66(3)(c) .”

6. The applicant again filed an application for the review of the learned arbitrator. He complained that the arbitrator grossly misdirected himself:

“By not fulfilling the part of the order to make a determination based on evidence whether I was dismissed for filing a complaint or for incompatibility.”

The 1st respondent filed opposing papers and the pleadings were closed.

7. On the day of hearing counsel for the parties were asked by the court to confirm whether the two witnesses who testified namely; Messrs Motlamelle and Manyamane were sworn before leading evidence. This question was asked because the record did not reflect that the witnesses took oath before leading their evidence. Since Mr.Motlamelle was one of the “witnesses” at the arbitration, he confirmed that neither he nor Mr. Monyamane was ever sworn before they testified.
8. That the witnesses were not sworn is very clear from the record. At page 45 of the transcript of the proceedings the learned arbitrator asked the applicant to tell him what entitled him to bring a case of unfair dismissal because from the file he would appear to have still been on probation. The applicant thanked him and immediately proceeded to give what turned out to be his evidence. At page 46 Mr.Kao for the 1st respondent asked in a surprised tone, “is the gentleman already giving evidence?” The learned arbitrator agreed and the would be witnesses for the respondent were asked to vacate the room and the applicant proceeded to testify. The same thing happened when Mr. Monyamane started to give his testimony at page 64 of the

record. He was put in the box asked to identify himself and that was it. He then proceeded to give evidence.

9. Both parties representatives correctly conceded that evidence not taken on oath is no evidence at all. Indeed that oversight invalidates the evidence given because it has been given in violation of rule 26 (8) of the Labour Code (Conciliation and Arbitration Guidelines) Notice 2004, which provides that, “the arbitrator must first swear or affirm the witness in and advise the witness of the process of questioning.” This rule is couched in mandatory terms as such it ought to have been complied with. Indeed regulation 18 (2) of the Labour Code (Directorate of Disputes Prevention and Resolution) Regulations 2001, enjoins the arbitrator to:

“Conduct the proceedings taking into account the provisions of the code and Conciliation and Arbitration Guidelines made under the code”

10. It is trite law that courts do not regard unsworn evidence as admissible evidence. Such evidence must as rule be struck out and this is what must happen in casu. (See Lewis Stores (PTY) LTD vs. Tlebere Makhabane and 2 Others LC/REV /387/06 (unreported)), Mahlangu V City Council of Pretoria (2001) 22 ILJ 2360 at p. 2364, Vodacom Lesotho (PTY)LTD vs. DDPR & 3 Others LAC/REV/47/05 and CGM Garments vs. DDPR & Another LC/REV/88/06) (unreported). In the circumstances the application for review must succeed. The matter is remitted to the DDPR for the evidence to be properly taken on oath by a different arbitrator. There is no order as to costs.

THUS DONE AT MASERU THIS 3rd DAY OF JULY 2008

L. A. LETHOBANE
PRESIDENT

L. MOFELEHETSI
MEMBER

I CONCUR

R. MOTHEPU
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

IN PERSON
MR.LICHABA