

IN THE LABOUR COURT OF LESOTHO

LC/REV/422/2006

HELD AT MASERU

IN THE MATTER BETWEEN

SUN TEXTILES (PTY) LTD

APPLICANT

AND

DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION

1ST RESPONDENT

MOOKHO MOLEKO

2ND RESPONDENT

JUDGMENT

Date 08/07/08

Review - distinguished from appeal - compensation is the discretion of the arbitrator which if properly exercised the court will not interfere with it - compensation awarded to take into account steps taken to mitigate loss.

1. The 2nd respondent was dismissed by the applicant for allegedly assaulting the Factory Manager Ms Yao. Evidence before the arbitrator was briefly that on the 16th May 2005, as the workers proceeded for lunch they were body searched in terms of the procedure. The search was being conducted behind a curtain enclosure.

2. The 2nd respondent was duly searched by a Ms Zhang a Chinese supervisor. As there were many people to go through the routine, Zhang wanted her to clear the space after being searched. She did not, as a result Ms. Yao asked her (2nd respondent) to go into the toilet to finish dressing up because the line was long. The evidence goes further that the 2nd respondent would neither go out of the enclosure nor go to the toilet. She instead hit Yao on the hand. Asked if she told her why she was hitting her, Yao said she did not say anything. She just went out. Yao reported the incident to Mr.Phakiso. She also went to hospital to fill a medical form to prove the bruise she allegedly suffered after the slap.
3. A supervisor by the name of Zhang was the one conducting the search on the 2nd respondent. She confirmed that after the search on the 2nd respondent she asked her to go out so that she could search the next person. She did not. She testified that Ms. Yao intervened and asked the 2nd respondent to go to the toilet to button up. In her own words she said that *"she didn't do it so Miss Yao told her go to the toilet and close your clothes, but she did not go. So she pushed Miss. Yao here."* Asked to explain exactly what 2nd respondent did, she apparently demonstrated to the arbitrator how 2nd respondent used her two hands, but the arbitrator failed to capture the demonstration in the record. What remains clear however is that she (2nd respondent) pushed Yao using her two hands.
4. The evidence of the 2nd respondent is that unlike other occasions, the search of the 16th May 2005 was different in that they were being required to undress. She confirmed that a curtain had been erected and that they were being search behind it. She stated that after searching her Zhang wanted her to go outside to finish dressing. She told Zhang that she would not go out before finishing dressing to which Zhang agreed. However, Yao who happened to be nearby pulled her by the clothes and said she should go outside. She stated that the place to which Yao wanted her to go and finish dressing; there were male colleagues who were going through the same routine. She alleged that she pulled herself away from Yao's grip and asked her to leave her alone. 2nd respondent's

testimony was confirmed by two co-workers Makhotso Seeisa and Mabofihla Nkoe.

5. At the close of the evidence the arbitrator handed down an award in which he accepted evidence led by the applicant that Ms. Yao was hit by the 2nd respondent. He however proceeded to say that he:

“Finds the applicant (2nd respondent) to have been more than justified to have acted in that manner. She certainly does not seem to have had an intention to inflict injury infact, I find the applicant to have reacted in the most reasonable and equal manner to the humiliation and persecution that was done to her by Ms. Yao who seems to have acted quite insensitively in the circumstances as were described.”

The learned arbitrator proceeded to award in favour of the 2nd respondent and ordered the applicant to pay her ten months salary as compensation in lieu of reinstatement.

6. The applicant filed an application for the review of the award on the grounds, that:
- a) There was no evidence of actual financial loss suffered by the 2nd respondent.
 - b) There was no proof that the loss was caused by the dismissal.
 - c) The amount of compensation awarded is not foreseeable and is therefore remote and speculative.
 - d) The award did not endeavor to place 2nd respondent in the financial position she would have been had it not been for the dismissal.
 - e) The award is Punitive especially when there is no evidence of a broken down relationship between the parties as to make reinstatement undesirable.

- f) There was no evidence of efforts made by the 2nd respondent to mitigate her damages.
- g) 1st respondent should have declined jurisdiction in as much as there was a claim in respect of severance pay as well.

7. Section 73 of the Labour Code Order 1992 (the code) provide that:

1. *“ if the Labour Court or the arbitrator holds the dismissal to be unfair, it shall, if the employee so wishes order the reinstatement of the employee in his or her job with out loss of remuneration, seniority or other entitlement or benefits which the employee would have received had there been no dismissal. The court or the arbitrator shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances.”*
2. *“If the court decides that it is impracticable in light of the circumstances for the employer to reinstate the employee or if the employee does not wish reinstatement the court or arbitrator shall fix an amount of compensation to be awarded to the employee in lieu of reinstatement. The amount of compensation awarded by the Labour Court or the arbitrator shall be such amount as the court considers just and equitable in all the circumstances of the case. In assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party or whether the employee has failed to take such reasonable steps as may be reasonable to mitigate his or her loss.”*

8. Grounds (a) to (d) of the review are clearly grounds of appeal in as much as they reflect the applicant's dissatisfaction with the quantum of compensation awarded. None of them point to any irregularity or illegality in awarding as the arbitrator did.

Section 73 quoted above empowers an arbitrator to order compensation where an arbitrator finds the dismissal of an employee to be unfair and the arbitrator does not consider it *“practicable in light of the circumstances for the employer to reinstate the employee”*

9. This is precisely what the learned arbitrator did in casu. He found the dismissal of the 2nd respondent unfair and stated that *“inasmuch as the applicant (2nd respondent) has clearly indicated her wish to be reinstated in her job, I find that it would be impracticable in the light of the circumstances of this case to reinstate her.”* He considered that in the light of the evidence he heard, her relationship with her superior Ms.Yao had broken down and that would render the employment relationship intolerable.
10. It is trite that the question of determination of compensation payable is one of an exercise of discretion. It is equally trite that a court vested with discretion is enjoined to exercise such discretion judicially. There is no complaint that the learned arbitrator did not exercise his discretion judicially and if so how. In our view the learned arbitrator has done what is vested in him by section 73. As a rule, once the court is satisfied that discretion has been properly exercised, the court will not interfere with the resulting conclusion.
11. With regard to paragraph (e) we have pointed out already that the learned arbitrator was of the view that the scuffle between 2nd respondent and Ms.Yao had broken the relationship beyond redemption. He is once again empowered by section 73 not to order reinstatement if he considers it impracticable. The learned arbitrator cannot therefore be faulted for ordering compensation instead of reinstatement.
12. Only ground (f) remains since (g) concerning severance pay has been overtaken by developments as the DDPR now has power to arbitrate severance pay claims in terms of the Labour Code (Amendment) Act No 5 of 2006. Mitigation of loss was considered at length in the case of Matseliso Matsemela Vs. Naledi Holdings (PTY) LTD t/a Naledi Service Station LAC/CIV/

02/07(unreported). It was held in that case that in terms of section 73 of the code, the respondent was guilty of breach of contract by terminating applicants contract contrary to the law as such the applicant was entitled to compensation for some period *“less the net total of income derived from employment for her failure to mitigate her loss through other employment when it was reasonably possible for her to do so.”*

13. The finding of the arbitrator that in casu the dismissal is unfair points to a breach of contract. It is common cause however, that no evidence was led on the steps taken by the 2nd respondent to mitigate her loss. The only thing asked being the question from the learned arbitrator whether she had worked anywhere since leaving the applicant. The enquiry stopped there. She was not asked whether she had taken any steps to mitigate her loss such as looking for alternative employment and whether those were reasonable steps to be taken in the circumstances. As it can be seen these are matters of evidence which the learned arbitrator ought to have solicited.
14. In the circumstance ground (f) of the grounds of review succeeds. Accordingly the matter is remitted to the learned arbitrator who dealt with this matter to enquire into and hear evidence on the steps taken by the 2nd respondent to mitigate her loss and then award compensation as seem to him fit in the light of the evidence adduced. There is no order as to costs.

THUS DONE AT MASERU THIS 15TH TH DAY OF JULY 2008

L. A. LETHOBANE
PRESIDENT

**MOSEHLE
MEMBER**

I CONCUR

**M.THAKALEKOALA
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**MS. MOK'HENA
MR.L. MOLATI**