IN THE LABOUR COURT OF LESOTHO

LC/REV/122/2007

HELD AT MASERU

IN THE MATTER BETWEEN:

BLANDINA LISENE	APPLICANT
AND	
DIRECTORATE OF DISPUTES PREVENTION AND RESOLUTION	1ST RESPONDENT
MS. R. NTENE – ARBITRATOR	2ND RESPONDENT
LEROTHOLI POLYTECHNIC	3RD RESPONDENT

JUDGMENT

Date of hearing: 24/07/08
Review – Arbitrator found that the disciplinary hearing was conducted in violation of the statute of a public institution but awarded no relief because applicant failed to show that she suffered prejudice – The violation of the statute constitute prejudice which entitled applicant to a relief – Distinction between review and appeal restated – Evidence – Arbitrator ignoring evidence that respondent had no clear rule out-lawing practice applicant was charged of – Legal representation – Arbitrator finding applicant denied representation contrary to statute of respondent but only awarding applicant one month's salary as compensation – Contravention of the statute

completely nullifies the disciplinary hearing – Award reviewed, corrected and set aside.

1. The facts giving rise to this review application are simple and they are common cause. The applicant was employed by the 3rd respondent as a lecturer in the School of Commerce in June 1979. She was dismissed in March 2007 following a disciplinary enquiry in which she was charged with neglect of duty and dishonesty as well as disorderly conduct.

2. The charges arose from the marking of the May 2006, first year final examinations. After the lecturers had completed marking the scripts, they were taken for external moderating. After completing his/her job the External Moderator would return the scripts to the Institute with comments.

3. One of the papers that was externalized was Elements of Costing. The external examiner commented that one of the students who sat for the paper (Elements of Costing), appeared to have had a teacher's solutions to the question paper. After the school had called for the relevant papers, the teacher's memo and the student's answer sheet, the concerned lecturer (applicant) was asked to make a report.

4. The applicant complied. In our view her report on "marking" is worth reproducing in full. This is what she said:

   "I usually do my marking at the office and at home. The marking of the Costing Paper was done both at the office and at home as is my usual practice and I believe all my colleagues do so. In this case, in particular, the final examinations coincided with my final examinations and I was under pressure so I took the paper home and my niece a third year BCom student at NUL, helped me partially with the marking with the Costing Paper. She marked the calculations questions and the theory part was marked by me.

   This practice is not unusual as some teachers do it with questions that are straight forward and close-ended…. I thus believe that there is nothing wrong in this practice as people who do it are professional enough and they

usually check the work done by these helping hands. Lastly, even though I was aware that the student had obtained the highest and best mark, it didn't surprise me as her course work also proves she is capable. In fact she is one of my best students in costing."

5. The concerned student was made to re-write the paper with the questions re-arranged. The finding was that:

"the student answered all the exam questions correctly. The flow of her presentation differed from that of her first seating and she did not reproduce the lecturer's memo verbatim."

The student was subsequently called for a disciplinary hearing in which she denied any involvement in examination malpractice. She was however, found guilty and was rusticated from the college for one academic year. It is however common cause that the student was reinstated following her successful challenge to the suspension in the High Court.

6. In due course the applicant's case was reported to the Governing Council of the College which decided to establish a disciplinary committee, which would charge the applicant with breach of discipline in terms of the statutes and ordinances of the College. On the 2nd February 2007, the chairperson of the Disciplinary Committee wrote applicant a notification of disciplinary hearing pursuant to Statute 18(3) of Lerotholi Polytechnic Statutes and Ordinances.

7. The applicant was charged with four counts of absence from duty without authorization, neglect of duty, dishonesty and disorderly conduct. The first count of absence from duty without authorization was subsequently withdrawn. The reason given for the action was that the committee had "…erroneously assumed that you attended to your examinations during working hours. The other charges will however remain the same."

8. The disciplinary hearing convened on the 13th February 2007 as scheduled. According to the minutes of the hearing:

"the charged officer was charged with breach of S18(3) of the Lerotholi Polytechnic Statutes in that after the

students sat at the final year examination for the year ending May 2006, she gave examination papers for Elements of Costing Year 1 to her niece who is a third year student at National University of Lesotho for marking without the knowledge and authorization of the Lerotholi Polytechnic. She was also charged with breach for disorderly behaviour in that a 3rd year student is not qualified to mark examinations for Lerotholi Polytechnic students."

As it can be readily seen, the charge read out to the applicant at the hearing as summarised above significantly differs from the charge contained in the notification of hearing.

9. It is common cause that the applicant attended the hearing accompanied by her lawyer. It is also common cause that when the lawyer requested to be given an opportunity to speak as a representative of the applicant the chairperson told him that he "would not be allowed to represent the charged officer as the disciplinary hearing was purely an internal matter as no outsiders were allowed." Had the lawyer been allowed the opportunity to speak, he probably would have brought the attention of the committee to the fact that the charge as read out was different from that which the applicant had been called to come and answer. Be that as it may, counsel for the applicant never pursued this point before us. The lawyer was then excused from the hearing.

10. When the hearing resumed the applicant, was asked to confirm that she received the letter of notification of disciplinary hearing, which she did. She went further to state that she was not ready to say anything in the absence of her legal representative as she had not prepared herself. The chairperson indicated that she was amenable to grant her a postponement to enabler her to find an alternative representative within the college.

11. The applicant insisted that she could only be part of the proceedings with her lawyer present. She relied on Statute 18(5) which provides that:

"The Staff Disciplinary Committee shall provide an opportunity to the staff member for hearing. The staff

member shall be free to appear in person and/or through a representative of his choice."

Her protestations fell on deaf ear as she was told that the Statute "….did not mean that a lawyer was permitted to represent staff members in the hearing but that "of your choice" was restricted to staff members of Lerotholi Polytechnic." She was further told that the hearing was going to proceed with or without her participation, but she could stay in the hearing even if she was not going to say anything. It is common cause that the applicant chose to leave the hearing.

12. The hearing proceeded without her. She was found guilty as charged and she was dismissed. Applicant referred a dispute of unfair dismissal to the DDPR. The grounds upon which she challenged the fairness of her dismissal can be summarised as follows:
    (i) The Disciplinary Committee failed the test of neutrality because it was the one that formulated the charges.
    (ii) It was illegal for the Labour Commissioner who was appointed Chairperson of the Disciplinary Committee to have chaired the disciplinary hearing.
    (iii) The charges were unfairly split.
    (iv) There was malice in the way applicant's case was handled in that no investigation was made prior to her being charged contrary to Statute 18(2) of the Statutes of Lerotholi Polytechnic.
    (v) There was no clear rule that applicant breached which warranted disciplinary action.
    (vi) Applicant was unfairly denied legal representation contrary to Statute 18(5).

13. The dispute was arbitrated upon and the arbitrator handed down her award on the 20th September 2007. The learned arbitrator found that the dismissal of the applicant was substantively fair. She went further to find that applicant's dismissal was procedurally unfair in as much as she was unfairly denied legal representation in contravention of the Statutes of the College. She awarded applicant one month's salary as compensation for the procedural unfairness.

14. On the 27th October 2007, applicant lodged an application for the review of the award of the learned arbitrator. The grounds on which she had challenged the fairness of her dismissal before the DDPR as listed in paragraph 12 above became the grounds on which she sought to have the award reviewed. This would immediately paint a picture of an appeal. However, counsel for the applicant wisely brought those grounds under the purview of review by alleging that the learned arbitrator disregarded evidence substantiating those claims. She added a further ground that the arbitrator acted irrationally in awarding only one month's salary as compensation for unfairly being denied such a paramount right as to legal representation.

15. The first and the second grounds of review are closely linked to each other. The impartiality of the disciplinary committee was challenged on the basis that the chairperson of the committee was the one who charged the applicant. The learned arbitrator failed to be convinced that that on its own could lead to partiality on the part of the committee. Infact she found that the alleged bias had not been proved.

16. In argument before us it was contended that the learned arbitrator "ignored evidence by the applicant regarding the fact that the disciplinary committee….could not be neutral as it was the one that formulated the charges against the applicant." Now this is not evidence. It is rather a perception, which in the absence of evidence to prove it will only remain a wild speculation. Furthermore, the chairperson of the disciplinary committee denied that she was the one who charged the applicant. She said she only informed her of the charges. Her evidence to this effect was not challenged in any manner whatsoever. Accordingly, there is no basis to disturb the finding of the learned arbitrator in this regard.

17. The second ground of review was that it was illegal for the Labour Commissioner to have acted as the chairperson of the disciplinary committee. The learned arbitrator was again not persuaded by the argument of counsel for the applicant in this regard. I do not think that she can be faulted for refusing to buy the argument.

18. The question was pointedly asked to the chairperson who testified as DW4 at the arbitration in these words:

> *"As a Labour Commissioner, was it proper for you to have chaired the disciplinary hearing?"*

Mr. Letsika for the 3rd respondent rose to warn the court that the question was not fair in as much as it was not pointing to a specific statute that prevents the witness to chair such disciplinary hearings. The question was allowed and the attitude of the witness was that it was proper.

19. Since the chairperson of the disciplinary committee is herself a qualified lawyer, the learned arbitrator cannot be faulted for allowing the question to be asked. It would have been different if the witness was a lay person. Once the witness had answered that she thought it was proper for her to have chaired the disciplinary committee, nothing further was said by counsel for the applicant. In short he conceded that there was infact nothing wrong with her chairing. Indeed in the absence of a specific law that prevents her from acting as chairperson as she did, it cannot justifiably be said she acted illegally. Accordingly, this ground ought not to succeed as well.

20. Counsel for the applicant had further argued that the charges against her had been unfairly split in order to attract a heavier penalty than would be the case if they had not been so split. The learned arbitrator did find that the charges were unfairly split in as much as evidence required to prove one charge similarly proved the other charges. She went further to find that infact the charges were also wrongly split contrary to the statute itself because the conjunction "or" is used between dishonesty and disorderly conduct. We may just add that thereafter the various infractions are separated with a comma. As it was held in Mokete Maolla .v. Lesotho Pharmaceutical Corporation LC/REV/164/07 (unreported) a comma like "or" is disjunctive. Clearly, therefore the learned arbitrator rightly found that the applicant could not fairly be charged in the main with all the infractions listed under Statute 18(3) as that was contrary to the statute itself.

21. The learned arbitrator went on to find that the applicant failed to prove that she suffered a prejudice as a consequence of the charges being unfairly split. In particular she stated that the applicant failed to prove that each charge carried a different penalty the totality of which resulted in a heavier penalty than would be the case if the charge was one. This contradicts her finding that the splitting was unfair.

22. Furthermore, the learned arbitrator failed to take into account that the recommendation that the applicant be dismissed for "gross misconduct" was based on the consideration that the applicant had been found guilty "of not only dishonest and negligence of duty, as well as disorderly behaviour but… also a material breach of contract…." (see p305 of the paginated record which is the record of the proceedings of the disciplinary hearing.). The totality of the convictions including the one she was not charged of namely; breach of contract resulted in the misconduct being elevated to "gross misconduct." This was clearly prejudicial to the applicant and the arbitrator's failure to award appropriate relief was not justifiable and accordingly calls for interference with the award.

23. Even most importantly the 3rd respondent is a public institution which is enjoined to act fairly and in accordance with the Statutes that govern it. (See Koatsa Koatsa .v. National University of Lesotho 1991-1992 LLR-LB 163.). Failure to operate within the parameters of the Statutes necessarily renders the action of the 3rd respondent illegal and as such of no legal effect. Accordingly, applicant was entitled to a relief. The learned arbitrator underplayed respondent's illegal conduct of the disciplinary hearing.

24. Counsel for the applicant contended further that the learned arbitrator ignored evidence by the applicant of reasonable suspicion of ulterior motives against the applicant. Such suspicion is demonstrated by the fact that when the chairperson withdrew the charge of unauthorized absence she had said that the committee erroneously assumed that the applicant had absented herself without authorization, counsel argued. This

demonstrated that charges were laid without prior investigation, the argument went.

25. This ground constitutes a typical example of an appeal being disguised as a review. In his heads of argument Mr. Letsika correctly referred to the recent decision of the Court of Appeal in the case of Teaching Service Commission and Others .v. The Learned Judge of the Labour Appeal Court and Others C. of A (CIV) No.21/2007, where the Court of Appeal restated the distinction between an appeal and a review as follows:

> *"Appeal is the appropriate procedure where a litigant contends that a court came to an incorrect decision whether on the law or on the facts. Review however as Schultz JA emphasized in Pretoria Portland Cement Co. Ltd and Another .v. Competition Commission and Others 2003(2) SA 385(A) at 401 to 402C, is not directed at correcting a decision on the merits. It is aimed at the maintenance of legality, being a means by which those in authority may be compelled to behave lawfully."*

26. From the very argument it is clear that the applicant is concerned with the merits namely that the learned arbitrator failed to make an inference that she would have wished her to make. There is nothing irregular or illegal about the arbitrator not deciding in accordance with one's desire. What is paramount is whether there was evidence of malice presented before the arbitrator. From the record there is none. All that applicant sought was that the arbitrator ought to have made an adverse inference from the fact that one of the charges was withdrawn. That does not constitute evidence of bad faith and the arbitrator's refusal to infer ulterior motive from it cannot be treated as a reviewable ground.

27. Counsel for the applicant argued that the learned arbitrator ignored evidence that there was no clear rule that the applicant allegedly breached. He contended that no rule existed that prevented the act that the applicant was charged of being in breach of. If at all it exited the applicant was not aware of it.

28. The learned arbitrator accepted 3rd respondent witnesses' version that even though the act was not expressly prohibited, the employer cannot always expressly state every act which the employer would deem to be an offence. She further relied on the common law principle that an offence is disciplinable even if it is not covered by the employer's disciplinary code. She concluded that the applicant ought to have known that the contract of employment is a personal contract and that she could not delegate her duties under that contract without authority of the employer.

29. What is important for the purpose of the review is not the conclusions reached. What is significant is whether the conclusions are justified by the evidence presented before the arbitrator. The 3rd respondent's direct evidence confirms applicant's own evidence that there was no express rule that prohibited the act which she was charged of breaching. That the applicant ought to have known that she could not delegate her duties without the knowledge of the authorities may be so. However, the learned arbitrator was not availed of the circumstances that would lead her to the conclusion that the applicant ought to have known as she concluded. In the absence of evidence direct or circumstantial that leads her to the conclusion the finding is not justified.

30. It is significant to note that Lerotholi Polytechnic is a public institution. It is therefore enjoined to act fairly in all the circumstances. Whilst it is not unreasonable of it to expect its staff not to act in particular ways like seeking outside help to mark students' scripts, it is fair for the employees to expect it to speak out against the practice and if need be, legislate against it, where it turns out that lecturers had been practicing it willy-nilly. Applicant's evidence that she had been habitually doing this for years and that other lecturers were doing the same, was not challenged, except that the Director said he did not know it was happening. It was then put to him that to show that they do not consider the issue of soliciting external assistance for marking as serious they have never even warned lecturers about it since applicant's dismissal. In response the Director said he had asked the management committee to see to it that

lecturers do not use outsiders to mark. (See p.128 of the record). He was clearly admitting that lecturers were only warned about the unacceptability of the practice after applicant had already been penalized. This was manifestly unjust and unfair to the applicant because she was not afforded the opportunity to correct her undesirable behaviour like others.

31. In short, it would appear that 3rd respondent acted precipitately and harshly in dismissing the applicant. This was more so when considering that it conceded that it had not warned the staff before hand that the act was not permitted. Even if it could say it expected staff to know the habit was wrong it was still enjoined to inform them that it considered it gross misconduct and that harsh measures would be taken against persons found guilty of it. In the circumstances we are of the view that the arbitrator's finding that applicant ought to have known is not supported by evidence. On the contrary the learned arbitrator ignored the concession made by the respondent that it had not regulated the practice and that of the applicant that the practice was common at the college. Furthermore learned arbitrator ignored DW3's evidence that they only mandated the management committee to warn staff about the undesirability of the practice after applicant's dismissal.

32. The last ground is that of legal representation. It is common cause that the learned arbitrator found that the applicant was unfairly denied legal representation contrary to Statute 18(5) which entitled her to such a right. The learned arbitrator compensated the applicant by awarding her one month's salary as compensation. An award is reviewable if the arbitrator ignores or misapplies relevant legal principle to an extent that is inappropriate or unreasonable. (see Standard Bank of SA Ltd .v. CCMA & Others (1998) 19 ILJ 903 and Gimini Indent Agencies cc t/a S & A Marketing .v. CCMA & Ors. (1999) 20 ILJ 2872 at 2877).

33. This is a clear case of misconstruing of the Statutes of Lerotholi Polytechnic by the learned arbitrator. If the Statute conferred a right which was denied like was the case in casu, it means the decision that was arrival at contrary to the provisions of the

Statutes and Ordinances was an unlawful decision. This elevated the impropriety beyond being merely procedural. Since the hearing violated the Statutes in more ways than one, the entire process was clearly illegal and the dismissal arising out of it was substantively unfair. In the premises the award of the learned arbitrator is reviewed, corrected and set aside. On the strength of the evidential material presented at the arbitration, the dismissal of the applicant was clearly substantively unfair.

34. In the circumstances, the suitable remedy would have been reinstatement in terms of section 73(1) of the Labour Code Order 1992 which provides:

> *"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 to his or her job without loss of remuneration, seniority or other entitlements or benefits which the employee would have received had there been no dismissal. The Court or Arbitrator shall not make such an order if it considers reinstatement of the employee to be impracticable in light of the circumstances."*

35. At page 198 of the record, the applicant testified in chief that she desires to be reinstated if her dismissal is found to be unfair. Not only was this not challenged, 3rd respondent also presented not evidence to the arbitrator pointing to impracticability of reinstatement. In the premises the arbitrator would have had nothing to prevent her from ordering reinstatement in accordance with section 73(1) of the Code. Accordingly, it is ordered that applicant be reinstated to her job as anticipated in section 73(1) of the Code. Furthermore the 3rd respondent is ordered to pay applicant her arrears of salary from the date of purported dismissal to the date of reinstatement. There is no order as to costs.

THUS DONE AT MASERU THIS 1ST DAY OF SEPTEMBER 2008.

L. A. LETHOBANE
PRESIDENT

R. MOTHEPU — I CONCUR
MEMBER

L. MOFELEHETSI — I CONCUR
MEMBER

FOR APPLICANT: MR. NTAOTE
FOR RESPONDENT: MR. LETSIKA