

IN THE LABOUR COURT OF LESOTHO

LC/31/2008

HELD AT MASERU

IN THE MATTER BETWEEN:

LABOUR COMMISSIONER (OBO)  
SIMON LENGOASA

APPLICANT

AND

LESOTHO RED CROSS SOCIETY

RESPONDENT

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## JUDGMENT

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*Dates: 09/04/08, 14/04/08*

*Termination for operational reasons - Delay of one year to present a claim necessitate an application for condonation of late filing of the claim - Complainant retrenched due to lack of funds to pay his salary - Retrenchment substantively fair - Consultation - Evidence adduced on both sides show that consultation were held with staff - Alternatives to retrenchment were considered and offers made to complainant in an attempt to avoid retrenchment - Notice of one month is generally adequate unless the rules provide for longer period of notice - Retrenchment procedurally fair.*

1. This is a matter referred by the Labour Commissioner on behalf of Mr. Simon Lengoasa (the complainant) who was employed by the respondent as a Divisional Development Coordinator based in Leribe. The Labour Commissioner filed this application in terms of section 16(b) of the Labour Code Order 1992 which empowers the Labour Commissioner to institute and carry on civil proceedings on behalf of any employee or the employee's family or representative against any employer in respect of any

matter arising in connection with the employment of such employee or the termination of such employment.

2. The Labour Commissioner sought relief in the following terms:
  - (a) Directing respondent to pay complainant M48,365.00 and M1,256.00 as underpayments and transport respectively.
  - (b) Directing respondent to reinstate the complainant to his position.
  - (c) Directing respondent to pay the costs of suit in the event of opposing this application.
  
3. The Originating Application is drawn in a haphazard manner raising issues on which in the end no relief was sought. Briefly this matter arises out of the termination of the employment of the complainant for operational reasons on the 31<sup>st</sup> July 2006. The matter was filed out of the Registry of this Court on the 7<sup>th</sup> June 2007, approximately one year after the complainant was terminated. No explanation was advanced for this delay. Counsel for the respondent did not raise it either, probably through oversight. Delays of this magnitude in presenting a claim must be explained and a proper application for their condonation must be made.
  
4. According to the Originating Application the complainant was employed by the respondent on the 1<sup>st</sup> April 1992. It stated further that the complainant was unfairly dismissed on the 31<sup>st</sup> July 2006, under the guise of operational reasons. In support of this averments, the complainant was called to testify that on the 3<sup>rd</sup> of June 2006 he had applied for a bank loan which the respondent had supported by signing an undertaking that the complainant was a permanent employee. The same undertaking was handed in and was marked Exhibit "A".
  
5. The contention of Mr. Mochochoko for the applicant was that this was evidence that retrenchment was not anticipated. Under cross-examination it was put to the complainant that exhibit "A" is no undertaking from the respondent that he would not be liable to dismissal or retrenchment should it be necessary. He conceded correctly that that was so. In our view that

concession put to rest the unsubstantiated counsel's submission that the exhibit was proof that retrenchment was never contemplated. The submission amounted to nothing but speculation.

6. The complainant testified further that he was told of the retrenchment by the Secretary General on the 27<sup>th</sup> June 2006 when he had come to Maseru to collect first aid kits. He averred that he was told that he was being retrenched for failing to perform the work he was assigned to do in Leribe as such the society was not able to sustain payment of his salary. He was further told that in July he would be serving notice.
7. Complainant stated that he told the Secretary General that he was submitting reports of his work to head-office every month and never once was he told that he was not performing to the expected standard. He stated further that the Secretary General said the reason for his retrenchment was that they did not have funds and that some positions were going to be advertised even though they are of lower grade, but he was free to apply if he was interested. He stated that he enquired why the positions were not just assigned rather than him being required to apply.
8. Under cross-examination the complainant was asked to confirm that the respondent is a charity that survives on donor funding. He conceded that was the case. The same was confirmed by DW1 Mrs. Makatleho Mphana who went further to say the Society is also a humanitarian non-profit making organization. It was put to him that the Society faced financial crisis in 2001 which necessitated restructuring. He agreed. It was further put to him that despite that restructuring the finances of the Society did not improve which led in its being plunged into even worse crisis in 2006.
9. His response was that it improved after 2001, but he did not know the situation in 2006 as he had since left. Counsel showed him the Society's audited financial statement for the financial year ending 2006. It spoke for itself as it showed that the society had a combined deficit of approximately 2.5 million Maloti. In her

- testimony DW1 stated that she joined the respondent in March 2006. She found the organization already struggling financially. She averred that the financial situation was so bad that the Society found itself unable to pay the salaries of its staff. She handed in the financial report for 2006 to support her averments.
10. The evidence presents an unenviably difficult financial situation for the Society. It was reported to be also burdened with huge debts which it was finding increasingly difficult to service. In his submission, Mr. Phafane stated that the financial situation of the respondent constituted a valid reason for it to retrench. He contended further that had the Labour Commissioner carried out investigations as the law empowers her to do, she would have found out the difficult financial situation that the Society is faced with.
  11. Indeed section 14 (1)(e) of the Code empowers a Labour Officer to question any employer on any matter concerning the application of the Code or any written law relating to labour or employment. A Labour Officer may further require the production of any records, books or accounts relating to the employment of any person. That no investigations were made is evidenced by the fact that no Labour Officer was called to testify why the office of the applicant is of the view that the retrenchment of the complainant was not substantively justified. It is evident that the applicant acted on the information proffered by one side namely that of the complainant. The evidence presented clearly establishes that the retrenchment was substantively fair.
  12. Mr. Mochochoko for the applicant contended that the respondent actually dismissed the complainant for poor performance but disguised the dismissal as a retrenchment. This argument is not supported by complainant's own evidence. He stated in his testimony that when he pointed out that he could not be accused of poor performance when he submitted reports every month, the Secretary General told him that the reason for his termination is that there were no funds to pay his salary.

13. Furthermore, complainant was asked in chief as to how many people were retrenched he said similar positions to his were all phased out. This is confirmed by Exhibit I, which is an extract of the report on the human resources review made for the Lesotho Red Cross by the IFRC. This report clearly shows that the complainant's position was done away with and renamed "Divisional Secretary to reflect the responsibilities of the position." The Minutes of the Meeting held with the applicant on the 27<sup>th</sup> June 2006, also confirm that the Secretary General told him that "the decision was that some positions including yours be suspended subject to availability of funds at a later stage." The argument that the complainant was dismissed under the pretext of a retrenchment cannot stand in the face of this evidence.
14. The complainant claimed that he was not consulted on the retrenchment and about the possibility of avoiding a retrenchment. The evidence of DW1 was that the staff were being consulted in March 2006 when she joined the respondent. The IFRC report was being discussed with all levels of staff. She referred to page 3 of the report (Exhibit I) which shows that the views of the staff on the proposed new structure were sought and taken on board. The complainant himself conceded under cross-examination that staff were consulted through workshops. If by non-consultation complainant meant personal consultation with himself, the meeting of the 27<sup>th</sup> June 2006 served just that.
15. The complainant's claim that he was not consulted on ways to avoid him being retrenched flies in the face of his own testimony that he was invited to apply for positions that were going to be advertised and that he refused to accept the offer. Complainant testified that he told the Secretary General that he would wish to be returned to accounts where he had been working before being deployed to the District. He stated that the Secretary General still insisted that the option she could avail to him was to apply for those positions that were going to be advertised even though they were of a lower grade.

16. The evidence of the complainant is that he declined and opted to take his package and left. This evidence is confirmed by DW1 who said among the positions that were introduced were Divisional Secretaries which took the place of complainant's position. She testified that this position was lighter and cheaper to maintain. Exhibit "B" clearly shows that the complainant was told on the 27<sup>th</sup> June that in filling the positions "first preference (would) be given to officers whose positions were affected by the restructuring process." He declined because he either wanted to be appointed to the position without applying for it or to be returned to accounts where we do not know whether a vacancy existed and if it did if it had funds.
17. We are satisfied that the respondent did consider alternatives and that it explored them with the applicant. He in his wisdom declined the alternatives available in preference of being returned to Accounts. When his wish to be returned to accounts was not successful he cannot turn around and say the respondent did not consider alternatives. It clearly did.
18. Mr. Mochochoko for the applicant argued that the complainant was not given adequate notice and that in any event the notice period was disrupted by the fact that meetings between the complainant and the Secretary General still continued on the 7<sup>th</sup> July 2006. We were given no authority in support of the averment that one month's notice is not adequate notice. On the contrary a month's notice is generally considered adequate notice except where the rules, collective agreement or a statute prescribe a longer period. The fact that some meetings like that of the 7<sup>th</sup> July were being held during the notice period does not in any way affect the running of the notice period except where the parties themselves have agreed that that will be the case.
19. The complainant's concern about the inadequacy of the notice period could well be linked to his allegation in the Originating Application and in evidence that in terms of the rules of the respondent employees who are retrenched are entitled to three months notice. He handed in Exhibit "E" which is an extract of the 1996 Lesotho Red Cross Society Staff Management Regulations. Regulation 12 of the regulations stipulate that a

- period of notice for permanent staff whether given by the employer or the officer shall be one calendar month. This is consistent with the one month notice that the complainant was given.
20. Under the same regulation 12 a further clause is inserted by hand and it reads: "three months in case of retrenchment." Actually the person who made the insertion had originally written "six" but cancelled it and then wrote "three". In his evidence complainant relied on this hand inserted clause as the basis for his claim that he ought to have been given three months' notice.
21. The respondent vehemently denied the authenticity of the hand inserted clause and said they do not know it. In any event when the Society amends the regulations the decision to that effect is made by the Annual General Meeting. The complainant was asked under cross-examination who had made the hand insertion, he said it was made by Human Resources Officer Mrs. Khali. DW1 countered in evidence that not even the Secretary General who is the Chief Executive Officer of the Society has the power to amend the regulations.
22. We cannot but agree with the respondent's counsel's submission that the hand inserted clause cannot be relied upon as an authentic basis for the complainant's claim. Its authenticity lacks substantiation in as much as the person who made it was not called to testify to its authenticity. On the face of it it lacks legitimacy as it is neither initialed or signed for nor authenticated with the stamp of the respondent. Complainant's claim is therefore without merit and on the whole we are of the view that the retrenchment was substantively and procedurally fair.
23. The applicant launched two further claims on behalf of the complainant. The first one was that between 2002 and 2006 the complainant was underpaid to the tune of M48,365.00 which he is now claiming. The second one was that when the complainant was retrenched respondent failed to provide him with transport to ferry his belongings from Leribe to Maseru where he resides. The complainant alleges to have incurred

transport costs to and from Leribe in the amount of M856.00 charged at the rate of M4.00 per kilometer. He further claims M400.00 standing charge.

24. It makes no point for this Court to make any comment on the merits and demerits of these claims. Both of them are disputes of right which ought to have been referred to the Directorate of Disputes Prevention and Resolution (DDPR) for resolution in terms of section 226(2)(b)(iii) and (c) of the Labour Code (Amendment) Act No.3 of 2000. We accordingly decline jurisdiction to deal with them. In the premises this application ought not to succeed and it is accordingly dismissed.

There is no order as to costs.

THUS DONE AT MASERU THIS 12<sup>TH</sup> DAY OF SEPTEMBER 2008

**L. A. LETHOBANE**  
**PRESIDENT**

**L. MOFELEHETSI**  
**MEMBER**

**I CONCUR**

**M. MAKHETHA**  
**MEMBER**

**I CONCUR**

**FOR APPLICANT:**  
**FOR RESPONDENT:**

**MR. MOCHOCHOKO**  
**MR. PHAFANE**