

IN THE LABOUR COURT OF LESOTHO LC/58/2007

HELD AT MASERU

IN THE MATTER BETWEEN:

NTHABISENG MATHIBELI

APPLICANT

AND

NATIONAL UNIVERSITY OF LESOTHO

RESPONDENT

JUDGMENT

Dates: 27/03/08, 06/08/08, 11/09/08, 21/10/08

Restructuring pertains to business restructuring which is likely to result in job losses. Internal transfer of staff does not amount to restructuring - Transfer - An employee is entitled to a hearing/consultation prior to transfer if he is able to prove possible prejudice he is likely to suffer - Absent the foreseeability of prejudice there is no obligation to consult prior to transfer - Application dismissed.

1. The applicant was employed by the respondent as a chemistry lecturer for the Pre Entry Science Programme (PESP). The precursor to PESP was the Lesotho Science Pre-Entry Course (LESPEC) which was introduced in 1979 “with the aim of identifying and upgrading the science and mathematics knowledge and skills of potential high school students for entry into the Faculty of Science....” (See Exhibit “L”). LESPEC was borne out of the realization by the Government of Lesotho that the number of high school students who qualified for direct entry into science based programmes at tertiary institutions was very low.
2. LESPEC was introduced with the financial backing of the European Economic Community, (EEC), The Netherlands

- University Foundation for International Cooperation (NUFFIC) and Vrije Universiteit Amsterdam (VUA). The external funding came to an end in 1992. In 1993, the respondent -through the Faculty of Science established PESP as a short term solution and the Government of Lesotho sought short term funding for the programme which it obtained from the EEC.
3. The EEC funding gradually decreased and in 1996/97 the respondent assumed full responsibility for the funding of the programme. NUL also gradually experienced budgetary constraints to support the programme with the result that the students were required to fund themselves. In 2005/2006 academic year the University was able to secure financial support for the PESP programme from the Government of Lesotho through the National Manpower Development Secretariat.
 4. Due to the short term nature of PESP, applicant and all her colleagues who taught PESP students were employed on two year fixed term contracts. The contract had always been extended by another two years upon its expiry. The PESP unit as well as the PESP staff were answerable to the Dean of the Faculty of Science and Technology through the PESP coordinator who acted as the head of the unit. Since the programme ran from May to July, during the academic year proper which runs from August to May, the PESP lecturers were deployed to their subject departments, to assist the full time lecturers with demonstrations and tutorials. (See Exhibit "L").
 5. The assumption of funding of PESP by the Government necessitated that the short term nature of PESP be looked into. According to the evidence of Dr. Tlali, (DW3) the funding of the programme meant that the common first year for the Faculty of Science was going to run from May when PESP starts, and no more in August when the University academic year normally starts. In the circumstances, the Dean set up a task team to review the future of PESP and its staff. The team was to also look into the temporary contracts of the staff. The team was made up of the heads of the five departments of the Faculty of Science and technology and the PESP Coordinator. Dr. Tlali

- was at the time the Deputy Dean of the Faculty and he chaired the committee.
6. DW3 testified that at the first meeting, they familiarized themselves with the terms of reference in order to make sure that they all understood them. Thereafter they decided that each head of department should go back to their department and solicit the views of the members of their department on the way they would like the committee to deal with the task at hand.
 7. At the next meeting all heads of departments came back with a report that PESP was a valuable part of the Faculty which must be retained, but that there were challenges that required restructuring in the way things were done. The committee agreed to recommend that the functions of PESP should continue but the management should change. This led to the recommendation which was accepted, to phase out PESP as a unit. Its functions were taken over by the subject departments.
 8. This meant that the five courses which PESP offered as a unit were interspersed among their respective subject departments. Furthermore, the departments were now going to “take full responsibility of running the pre-entry science programme.” (See Exhibit “J” recommendation 3). In terms of recommendation 4 “all staff positions in PESP (would) be absorbed into their respective subject departments.” Their positions would however “...still be designated as PESP positions in departments to avoid any job description confusion that may arise later.”
 9. The evidence of DW3 that members of the departments including PESP staff were asked to give their input on the terms of reference is confirmed by exhibit “L” which is the report of the task committee on the future of the unit and its staff. It further turns out from exhibit “H” that PESP staff were again required to make a further input on whether PESP should remain a separate unit or be absorbed by the respective departments. In her testimony the applicant also says the PESP Coordinator was tasked to get their views on the future of PESP. Their view had been that PESP as a unit be retained.

10. It is common cause that the task team recommended that it (PESP) be dissolved and that its functions be absorbed into respective subject departments. The recommendation was approved by the Science Faculty Board and finally by the Senate of the University at its 273rd Ordinary Meeting. On the 23rd November 2005, the Dean formally wrote to the Coordinator PESP to communicate the decision of Senate to dissolve PESP while retaining its functions which were now going to be carried out by the subject departments. On the 2nd December 2005, the Deputy Dean held a meeting with the PESP staff to brief them about recent developments regarding PESP, in particular the implementation strategy as contained in the memorandum of the Dean to the PESP Coordinator.
11. On the 9th January 2006, the applicant received exhibit "D" titled "Re: Your Transfer To The Department Of Chemistry." The letter was written in the following terms:

"Kindly note that Senate at its 273rd meeting which was held on the 10th November, 2005 took a decision that PESP program be phased out and its staff be absorbed into the Faculty of Science. You are therefore informed that you are being redeployed to the Department of Chemistry with retrospective effect from 10th November 2005.

You will be directly responsible to the Head of Department of Chemistry.

Yours faithfully,

*R. C. Mokoma
Senior Assistant Registrar (Appointments)"*

12. On the 17th January 2008, applicant wrote a letter to the Senior Assistant Registrar which read in part as follows:

"I am disturbed by this major decision of the Senate that puts my job prospects with the University and my career

in jeopardy. I have not been afforded a fair opportunity to state my case about the redeployment as such I find this decision prejudicial for my continued stay at NUL.

Consequently, I feel I am left with no option but to terminate my employment with the National University of Lesotho with immediate effect.” (See exhibit “E”).

The Registrar responded per exhibit “F” in which she sought, inter alia, to persuade applicant to invoke the grievance procedure to highlight her dissatisfaction or alternatively to refer a case of constructive dismissal to the DDPR. The Registrar warned her that if she did neither of the two options and insisted on her immediate resignation, “the University will institute legal proceedings against you requiring you to serve six months notice or pay in lieu of notice.”

13. It would appear that applicant neither instituted a grievance nor referred a case of constructive dismissal as advised. She wrote annexure “G” in which she averred that the University ought to have consulted her prior to her redeployment. She contended that the failure to consult her constituted procedural unfairness as such she “felt compelled to tender my resignation forthwith.” The letter was dated 20th January 2006.
14. Both the Originating Application and applicant’s own testimony are silent on what transpired after the writing of this letter. However, in her evidence in chief, she (applicant) said that she left the University and the benefits she was paid were less by the six months that the University said she should have served as notice. On the 16th October 2007, applicant filed an Originating Application in this Court in which she sought an order in the following terms:
 - (a) An order declaring the respondent’s withholding of applicant’s terminal benefits null and void.
 - (b) An order directing the respondent to release forthwith all terminal benefits due and payable to applicant.
15. It is common cause that in her Originating Application the applicant styled her resignation as having been in terms of

- section 68(c) of the Labour Code Order 1992 (the Code). That section makes resignation of an employee a (constructive) dismissal if the resignation is “in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer’s breach of a term of the contract.”
16. At the start of the hearing of this matter, Mr. Letsika for the applicant was asked to clarify whether his claim lies in alleged constructive dismissal. He averred that applicant’s claim is on restructuring of the PESP Unit, which has rendered her position of lecturer as redundant and that in the alternative, applicant claims constructive dismissal. The court was forced to adjourn to consult with parties on the exact nature of the relief sought in order to avoid a situation where the court may be indirectly called upon to adjudicate a dispute that should by law be determined by arbitration at the DDPR. After a brief pre-trial conference, Mr. Letsika for the applicant put across the agreed issue for the determination of the court as: “whether there was reorganization and whether in the process the position of the applicant became redundant?”
 17. In evidence before this Court applicant went further to state that when she received the letter informing her of the transfer to the department of Chemistry, she interpreted that as suggesting that her job had come to an end and it was upon her to accept or not to accept the transfer. She testified further that she felt that her job was in jeopardy now that her contract would be subject to renewal by the department of chemistry, given that her relations with the head of that department were already bad. She testified that she resigned without serving the contractual six months notice because she had a problem working with that department.
 18. In advance of dealing with other pertinent issues that are raised by this case, it is appropriate to first tackle the question whether there was reorganization or restructuring which could be said to have led to the job of the applicant being rendered redundant. The Concise Oxford Dictionary defines “reorganize” as to

“organize differently.” It defines “restructure” as to “rebuild or to rearrange.” The view that we hold is that these two terms can be used interchangeably.

19. In the employment context the two words are used in relation to restructuring or reorganization of the business which is likely to carry with it job losses through operational requirements. These are job losses which are classified “termination of employment for economic, technological, structural or similar reasons.” (See Convention No.158 concerning Termination of Employment at the Initiative of the Employer - Part III thereof). In his Article Bargaining, Business Restructuring and the Operational Requirements Dismissal (1999) 20 ILJ 755 Clive Thompson underscores the rationale for restructuring business as being “for survival or growth in the product and services market - the operational requirements of an employer.” (At p.755).
20. At p.761 of the Article the learned author seeks to define restructuring further in these words:

“business restructuring is part of market economics, the more so in an era of globalization. Its key objective is to improve or save the competitive position of the business in its product or services market. Restructuring takes many shapes, including business acquisitions, mergers, relocations, outsourcing, downsizing and closures.”

What happened with regard to the respondent herein is certainly not anything close to what Thompson defines above. The NUL in its core business has remained and so has the Faculty of Science and Technology under which PESP has always fallen.

21. According to the evidence of all three witness of the respondent, nothing really changed except for the management of the programs that PESP used to run. DW1 Lerato Kosie made it clear that even though she was now answerable to the Department of Biology, she still considered herself PESP Biology lecturer. This was also in line with the resolution taken

- that PESP staff would continue to hold “designated PESP positions in each department.” (See exhibit “K”) DW2, Mr. Clarke Mokoma also testified that, there were no changes in functions as staff were being transferred with the subjects they had been teaching, save that they would now be answerable to their respective subject departments. DW3 also confirmed that save for the management which was being transferred to the subject departments everything remained the same.
22. Quite clearly there was no restructuring of the business of the University. There was however, transfer of roles, in particular the management of the functions of PESP as a temporary unit of the faculty to the permanent departments of the faculty. Applicant argued that throughout the review exercise she was on leave as such she was not consulted. She averred that she had been on leave from March 2005 to the 8th December 2005.
 23. There are two possible answers to this argument. The first is based on applicant’s own testimony that the Coordinator of PESP was tasked to solicit their inputs which they furnished. She never mentioned that she was not present at that forum, which gave rise to exhibit “H” which contains the views of PESP staff on the future of PESP. Furthermore, applicant was present at the meeting of 2nd December 2005, where they were told of the dissolution of PESP and what was going to happen to the staff and their contracts. There is no indication that applicant objected that the exercise was done during her absence as such she was being ambushed. Judging by everybody’s ostensible silence at that meeting, it does not appear as though any one was being taken by surprise. In any event applicant could not claim surprise because she had always been answerable to the Department of Chemistry during PESP off-season.
 24. Assuming she indeed was not consulted, as she alleges the question is whether she was entitled to such consultation, given that this was a case of a transfer. In the case of *Selikane & 33 Ors .v. LTC & Ors 1999-2000 LLR-LB 127*, the Court of Appeal overturned an over-generalization by Ramodibedi J. as he then was that there was no pre-transfer hearing needed in the

transfers of the appellants. The Court per Browde AJA stated that:

“the rule is rather that the right to a hearing in relation to a potentially prejudicial decision applies unless excluded either expressly or by necessary implication.”

In the case of Mpho Molapo .v. Makalo Ntlaloe & Another LC54/95 (unreported) this Court held that “where the proposed transfer might impinge on the existing rights of the employee like reduction in salary, consultation in the form of a hearing is inevitable.” (at p.5 of the typed Judgment).

25. The rule is clear that consultation is imperative where the proposed action is going to harm the person’s rights. a retrenchment is a plainly harmful act in which an employee loses a job due to no fault on his part. It is inevitable to consult as a result. In a transfer a person would have to show that there is prejudice that he will suffer. It is only then the hearing becomes necessary. (See Atlantis Diesel Engines (Pty) Ltd .v. NUMSA (1994) 15 ILJ 1247 at 1253 where it was stressed that consultation:

“is rooted in pragmatism because the main objective must be to avoid retrenchments altogether, alternatively, to reduce the number of dismissals and mitigate their consequences. Consultation provides employees or their union with a fair opportunity to make meaningful and effective proposals relating to the need for retrenchment or if such need is accepted the extent and implementation of the retrenchment process. It satisfies principle because it gives effect to the desire of employees who may be affected to be heard. Where retrenchment looms employees face the daunting prospect of losing their employment through no fault of their own.”

26. In the case of Air Products (Pty) Ltd .v. CWIU & Another, an employee who was being transferred from one plant to another with exactly the same duties save that in the second plant he would rotate and work night shift every second week, refused

the transfer because he wanted to remain working day shift only. When the company insisted that he took the transfer he asked to be retrenched. The company refused and the employee was dismissed.

27. In argument before the Labour Court, it was submitted that the transfer constituted unilateral amendment to the terms of the contract of employment and further that the company failed the obligation to consult with the employee or his union. It was held that “the transfer of Mmadi did not constitute an amendment to Mmadi’s contract.” It was found that the job he was going to do at the second plant was exactly the same the only difference being that in the other plant he was required to work night shift every second week. Applicant’s job herein had also not changed. The only difference was that she was now going to be answerable to the Head of Department of Chemistry as opposed to the PESP Coordinator.
28. With regard to retrenchment, of Mmadi, the Court found that on the facts of the case the company never intended to retrench him. The Court went on to hold that:

“It is, in my view of no moment that the company regarded Mmadi’s post at the cylinder testing plant to be redundant and that it created a post for him at the hp plant. The fact is that the company did not contemplate retrenching Mmadi his services were no longer needed in one division of the company whereas they were needed at another division. Absent the foreseeability of retrenchment, the company was under no obligation to consult the union prior to taking the decision to transfer Mmadi.” (emphasis added).

It is common cause that even in the present matter the respondent never contemplated to retrench applicant let alone to render her position redundant. Clearly therefore the respondent was under no obligation to consult her unless she discharged the onus which lied on her to show that the transfer was potentially prejudicial to her. This is despite this Court finding that on her own evidence applicant was infact consulted.

29. It was put to the applicant during cross-examination that the respondent never at any time said her position is redundant. She in response said that was implied in exhibit "D". She was invited to read the part of exhibit "D" that said her position was redundant. She read where the letter said "you are informed that you are redeployed to the Department of Chemistry with retrospective effect from 10th November 2005." It is a moot issue whether the respondent was correct to purport to effect the redeployment retrospectively. In any event we are not called upon to make any pronouncement on it. However, there is nothing in the part of the exhibit that was quoted that can be interpreted as rendering applicant's position redundant.
30. By all accounts applicant's position still existed and she was expected to continue to serve the respondent as PESP chemistry lecturer. It follows that there was no justification for applicant to leave on the basis that her position had become redundant because it had not.
31. It is trite that the relief sought by the applicant was that this court declares the withholding of part of her terminal benefits as null and void. That order is not sustainable in the light of the facts and the findings we have made. Equally incapable of sustenance is the prayer that the respondent be ordered to release her benefits. We have carefully avoided getting trapped into commenting whether the facts of this case support or do not support a claim of constructive dismissal. The applicant, through her counsel, wisely abandoned that leg of her claim when it became clear that this court is not the correct forum to deal with it. In the circumstances this application is dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 18TH DAY OF NOVEMBER 2008

L. A. LETHOBANE
PRESIDENT

D. TWALA
MEMBER

I CONCUR

L. MOFELEHETSI
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MR. LETSIKA
MR. KOTO