

IN THE LABOUR COURT OF LESOTHO

LC/REV/42/07

HELD AT MASERU

IN THE MATTER BETWEEN

LABOUR COMMISSIONER (OBO)
MASEMPE MAIME

APPLICANT

AND

HAREENG HIGH SCHOOL BOARD
HAREENG HIGH SCHOOL
LESOTHO EVANGELICAL CHURCH
DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

JUDGMENT

Date : 27/08/09

Reasons for judgment reserved.

Review distinguished from appeal - A court of law will not interfere with exercise of a discretion by a repository of that power even if it would itself have exercised it differently - Arbitrator having done what section 73 empowers her to do this court cannot interfere - Application dismissed.

1. This matter was heard on the 27th August 2009. At the conclusion of the submissions by Counsel for both sides, the court dismissed the review application and promised that the reasons for judgment would follow in due course. These are now the reasons.

2. The review application arises out of the award of the learned arbitrator Masheane dated 30th March 2007. The complainant had been employed by the 2nd respondent on a one year fixed term period. She was employed as a matron. In September 2005, the complainant was sent on leave as a result of misunderstandings arising out of her work. It must be recorded that by this time complainant was left with just three months prior to the expiry of her one year contract.
3. According to evidence, the complainant misused food meant for the children. She fed the children later than stipulated times and allegedly she spread negative rumours about the principal to the effect that the principal misuses school funds and that he is a paedophile. She was accused generally of being disrespectful towards the principal and not obeying his (principal) instructions. A member of the Board Mr. Matsabisa Motsapi testified that they had at least four Board meetings where they summoned the complainant in an effort to help her to resolve the problems pertaining to her work and her relations with the principal.
4. On the 29th October 2005, the Board wrote applicant a letter extending her leave and inviting her to show cause why she should not be dismissed for the infractions already referred to. She was given until the 19th November 2005 to respond. Complainant duly responded and on the 19th November 2005 she was served with a letter of dismissal and paid three months salary in lieu of notice.
5. Complainant referred a dispute of unfair dismissal to the DDPR which found that her dismissal was unfair in that she was not given a hearing. This finding was made by the arbitrator despite evidence of the principal that the complainant was given a chance to respond to the charges in writing which she admittedly did. The principal's evidence was not refuted by the complainant and it was confirmed by the member of the Board Mr. Motsapi.

6. Surely another Court would have come to a different conclusion on this aspect of the complainant's case namely, whether she was given a hearing or not. However, the arbitrator's finding cannot be interfered with as it does not constitute a reviewable irregularity. It would constitute an appealable misdirection, but we are not sitting here as an appeal court over the arbitrator's decision. We are called upon to review the proceedings.
7. Despite finding that the dismissal was unfair the learned arbitrator decided not to award reinstatement or compensation. Her reasons for so deciding were firstly that *"the applicant was left with one month before the lapse of her employment contract. On the basis of this I cannot award reinstatement because her contract was on the verge of completion."* The second reason was that:

"on the matter of compensation, it would only be fair to award compensation... for the remaining period of employment contract, but in this case it has been indicated that the applicant had already been paid her wages for the remaining month of December 2005 and this matter has not been disputed by applicant." (P.7 of the award).
8. The complainant approached the office of the Labour Commissioner, who then took up the award on review in the name of the Labour Commissioner. This was queer regard being had to the fact that the Labour Commissioner was not a party to the DDPR proceedings which form the subject of this review. However, Counsel for the respondents did not say anything about this abnormality. In the premises we cannot take it further.
9. The grounds on which the review is sought are contained in paragraphs 6.3 - 6.5. They are that:
 - (i) *The arbitrator erred in concluding that she could not award reinstatement or compensation.*
 - (ii) *The arbitrator misdirected herself in concluding that because I was paid wages for the month of*

December 2005 compensation could not be awarded.

- (iii) *The arbitrator intentionally disregarded section 73(1) and (2) of the Labour Code Order No.24 of 1992.*

The respondents neither filed the notice of intention to oppose nor any opposing papers.

10. On the 26th August 2009, the 1st to 3rd respondents filed an authority to represent in terms of which they intimated that they would be represented by G.M. Seleke Chambers. The matter was heard on the 27th August 2009. Applicant was represented by Ms. Russel while 1st - 3rd respondents were represented by Mr. Seleke. Ms. Russel for the applicant simply restated the grounds of review as shown above and nothing more.
11. Mr. Seleke on the other hand argued that the arbitrator has dully exercised the discretion vested in her in terms of section 73 of the Code which she is alleged to have ignored. He argued further that the arbitrator has duly given reasons why she was not going to reinstate the complainant or order payment of compensation.
12. This court is in full agreement with the submissions of Mr. Seleke for the 1st - 3rd respondents. The applicant and the complainant have misconstrued the relief they are seeking. Even though they desire a review of the DDPR proceedings, what they have sought in papers before this court is different. They are in effect challenging the arbitrator's exercise of the discretion vested in her by section 73 not to either reinstate the complainant or order that she be compensated. Applicant is clearly unhappy with the arbitrator's decision and not the process of reaching that decision. As it was held in *Chief Constable of the North Wales Police .v. Evans* [1982] 3 All ER 141 at 154 *"judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."*

13. In Steyn .v. City Council of Johannesburg 1934 WLD 143 at pp.146 - 147 Barry J stated the rule thus:

“Now in cases where a discretion is given to a local authority the principle is well known, and has been laid down in a number of cases, that the court will not interfere with the Council’s discretion even if the court considers that the decision arrived at by the local authority is wrong or inequitable.”

The above remarks of Barry J. have been said to constitute a general rule *“any infringement of which would be an unwarranted usurpation of authority on the part of the court and would impose upon it functions which courts of law have uniformly repudiated.”* (Per Browde J in African Reality Trust Ltd .v. Johannesburg Municipality 1905 TH 179 at 182). The learned arbitrator having exercised the discretion vested in her by the law, this court cannot interfere with that exercise of the discretion. This is so even if this court might have been inclined to award differently and order that the complainant be reinstated or compensated. For these reasons the application for review was dismissed and no costs order was made.

THUS DONE AT MASERU THIS 1st DAY OF OCTOBER, 2009.

L. A. LETHOBANE
PRESIDENT

L. MATELA
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

MS RUSSEL
MR. SELEKE