IN THE LABOUR COURT OF LESOTHO LC/REV/20/09

HELD AT MASERU

IN THE MATTER BETWEEN

MAMMAKO MOLAPO t/a GATEWAY RESTAURANT APPLICANT

AND

LEHLATHE MORALLANA 1ST RESPONDENT

DIRECTORATE OF DISPUTE PREVENTION & RESOLUTION 2ND RESPONDENT

JUDGMENT

Date : 09/02/10
Application for review of the award of the DDPR – Court could not find any reviewable irregularity – Application dismissed

1. The 1st respondent was employed by the applicant as an accountant on the 10th July 2007. The applicant was not satisfied with his performance. In June 2008, the employer issued him with a formal warning for what was termed unacceptable behaviour and poor performance. On the 14th October 2008, the 1st respondent was served with a one month notice of termination which would expire on the 15th November 2008.

2. It is common cause that following receipt of the notice of termination, 1st respondent disappeared from work for a week. On the 27th October 2008, he wrote a letter requesting the Managing Director to allow him to return to work and "finish up my remaining days (of notice)." The employer refused and instead processed and paid him his terminal benefits the same day.

3. 1st respondent referred a dispute of unfair dismissal to the Directorate of Dispute Prevention and Resolution (DDPR). He challenged the procedural fairness of his dismissal on the ground that he was not afforded the opportunity to be heard at the time of the dismissal as envisaged by section 66(4) of the Labour Code Order 1992 (the Code).

4. The arbitrator found that the employer followed the procedure laid out in the Codes of Good Practice Notice 2003, regarding the assistance and guidance which an employer is required to give to an employee, who is performing below required standard. She found further that the employer had however, failed to afford 1st respondent a hearing in accordance with section 66(4) of the Code. She accordingly awarded 1st respondent compensation of 3 months' salary amounting to M9000-00.

5. The award of the DDPR was handed down on the 5th February 2009. There is no record of when the applicant was served with the award. This is however, important because a party seeking to review an award is required by law to approach the Labour Court for review of such an award within 30 days of the party receiving or becoming aware of the award. The applicant owed it to the court to disclose when she became aware of the award she is seeking to bring under review.

6. In the absence of any information from the applicant as to when she received the award, this court assumes that she became aware of it on the day it was handed down namely; 5th February 2009. On the 24th March 2009, applicant filed a notice of motion out of the Registry of this court seeking review of the award of the DDPR dated 5th February 2009.

7. As said earlier section 228F(1)(a) of the Labour Code (Amendment) Act 2000, (the Act) enjoins a party seeking to review an award to apply to the Labour Court for an order setting aside the award within 30 days of the date the award was served on the applicant….". *Ex facie* the papers, the present review was filed outside the 30 days prescribed by

section 228F(1)(a). However, we take this point no further, because we do not have direct information when the applicant was served with the award and it would not be healthy to rely on assumptions; especially given that the 1st respondent himself has not said anything about the issue.

8. I must record that applicant's case at the DDPR was primarily 1st respondent's alleged incompetence and that the 1st respondent did not dispute that his performance was poor. The applicant further impressed on the learned arbitrator that she paid 1st respondent "all his terminal benefits including a payment for the notice despite the fact that he had not served the full month." This latter statement namely that 1st respondent was paid notice in full, is not true. Applicant's own annexure "D" which is a tabulation of terminal benefits shows clearly that 1st respondent was only paid for 16 days worked in the month of October and no more. It cannot therefore, be true that he was paid for a full month despite the fact that he did not serve notice. He was only paid for the days worked.

9. In amplifying her case, the applicant averred in paragraph 2.5 of her Founding Affidavit that:

> *"……in October 2008 (I advised 1st respondent) that I intended to terminate his services for poor performance. He accepted that he did not meet the standards set for him. I specifically told him to make representations but he declined. I told him that I would write him a letter which is what I did."*

In paragraph 3.2 of the Founding Affidavit applicant averred further that she was startled by 1st respondent's claim that she did not give him a hearing;

> *"because 1st respondent knows that before I could dismiss him I told him this orally and invited him to make representations which he declined to do."*

10. In his opposing affidavit 1st respondent has vehemently denied that he was invited to make representations. He further denied that he was orally invited to make representations and that he

declined to do so. The court spent considerable time with Mr. Letsika for the applicant, asking him to show it where in the record of proceedings before the DDPR, the representative of the applicant testified that she invited 1st respondent to make representations which he refused to do.

11. No such testimony could be located. In his opposing affidavit 1st respondent averred that the applicant is seeking to bring new evidence in claiming that she ever invited the 1st respondent to make representations. We are inclined to agree. The letter written to the 1st respondent does not invite him to make any representations. It gives him definite notice of termination. Neither does it purport that 1st respondent was orally invited to make representations. On the contrary applicant admits at page 31 of the paginated record that whilst she complied with other procedures, such as issuing warning letters, she failed to hold a hearing for the 1st respondent. In the light of this admission the learned arbitrator cannot be faulted for finding that the 1st respondent was not afforded a hearing as he claimed.

12. Applicant contended that the learned arbitrator disregarded evidence to the effect that 1st respondent was paid all terminal benefits after following all the necessary procedures. "In particular I gave respondent a hearing by telling him to advise me why I would not terminate his services because of poor performance." (vide para 4.2). We have already shown that it is incorrect that the 1st respondent was ever invited to make representations. The true position is that the 1st respondent was issued a letter of termination which never sought any views from him regarding the proposed termination of his services. The letter was final and it even told him when the notice would end.

13. Applicant contended further that the arbitrator disregarded evidence that the respondent suffered no prejudice because he was paid full terminal benefits including notice pay notwithstanding his desertion. We have already shown that it is not true that full notice was paid. This brings into question the truthfulness of the assertion that full terminal benefits were paid

when notice was not paid in full.

14. Be that as it may, there is no evidence in the record that the arbitrator was told that because certain benefits were paid, 1st respondent ought not to be paid any compensation, since he has suffered no prejudice. If anything the averrements to this effect amounts to new evidence which is not acceptable. It follows that the learned arbitrator is being wrongly accused of irregularity in this respect.

15. It was contended further on behalf of the applicant that the arbitrator has not applied the provisions of section 66(4) of the Code properly to the facts before her. If she had she would have realized that the oral and written accusations sufficed for purposes of the section, it was argued. The representative of the applicant has admitted at page 31 of the paginated record that she did not give 1st respondent the opportunity to defend himself. Accordingly, applicant's argument that she made oral and written accusations is contradictory of this admission and is calculated to mislead the court.

16. Finally, it was contended on behalf of the applicant that 1st respondent deserted and that the applicant accepted the desertion. That was never the issue before the learned arbitrator to determine. The issue for determination by the arbitrator is captured on page 23 of the paginated record and it is that 1st respondent was dismissed without a hearing. The desertion only arose as part of applicant's attempt to justify the 1st respondent's poor performance which was never in dispute. For these reasons we find no irregularity that call for the interference with the award of the learned arbitrator. In the premises the application for review is dismissed and the award of the DDPR is confirmed.

THUS DONE AT MASERU THIS 15TH DAY OF FEBRUARY 2010.

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

M. MOSEHLE
MEMBER

I CONCUR

FOR APPLICANT:
FOR RESPONDENT:

ADV. LETSIKA
ADV. KHALANE