

IN THE LABOUR COURT OF LESOTHO

LC/REV/82/09

HELD AT MASERU

IN THE MATTER BETWEEN

**SOS CHILDREN'S VILLAGE
ASSOCIATION OF LESOTHO**

APPLICANT

AND

**DIRECTORATE OF DISPUTE
PREVENTION AND RESOLUTION
L. SHALE (ARBITRATOR)
LABOUR COMMISSIONER (OBO)
KHOBOSO MOELETSI**

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

JUDGMENT

Date: 06/07/2010

Review – It is irregular for the arbitrator to allow the respondent to testify before applicant closes its testimony – Evidence of witnesses that were excluded reflected in the ruling of the disciplinary enquiry – It was irregular for the arbitrator not to consider such evidence – Respondent canvassing issues beyond those tabled during opening statement – A party is not allowed to direct attention of another to one issue and then canvass another – Arbitrator's finding that employee not guilty irrational in light of uncontroverted evidence which employee herself confirmed in material respects – Award reviewed, corrected and set aside.

1. This is an application for the review of the award of 2nd

respondent dated 29th September 2009. The arbitration proceedings giving rise to the said award are a sequel to the dismissal of Khoboso Moeletsi (the complainant) for alleged violation of the employer's code of conduct. The alleged misconduct occurred on the 12th November 2008.

2. The facts which are largely common cause are briefly that, the complainant was employed by the applicant association as Village Administrative Assistant. Her duties were essentially that of a front desk officer where she welcomed visitors and answered incoming calls and transferred such calls to appropriate persons. Generally, she provided administrative support to the Finance and Administration Department. She was answerable to the Financial Coordinator Mr. Teboho Nkoane.
3. On the 12th November 2008, the complainant was called to the office of Mr. Nkoane where she found Mr. Nkoane with another employee called Mrs. Mahlompho Mapalane. The former allegedly accused her of not doing her work in particular not attending to a visitor and not answering the telephone. Nkoane, had admittedly been given this information by Mahlompho who had found a male visitor at the reception who was not being attended to by the complainant and a telephone was ringing and not being answered.
4. Mahlompho who testified at the disciplinary hearing, testified that she had arrived at the reception at around 3.00pm on the day in question. She found a visitor waiting and a telephone ringing unanswered. The complainant was writing something, neither attending the visitor, nor answering the telephone. Mahlompho attended the visitor and thereafter went to report what she had seen to the supervisor.
5. When she was confronted with the accusation as aforesaid, complainant neither denied nor confirmed the accusation. She

instead asked where Mr. Nkoane got that information from. He frankly told her that he had been informed by Mahlompho. The complainant is said to have angrily shouted “Mahlompho!” As she did so, she took papers that were on the table of Mr. Nkoane, shrunk them and threw them down.

6. She grabbed Mahlompho by her hand and pulled her. The latter pulled herself back. Mr. Nkoane intervened and pushed the complainant away from Mahlompho. The evidence of both Mahlompho and Mr. Nkoane was that the complainant was clearly in a fighting mood. Mr. Nkoane then ordered the complainant to sit down and she retorted “ke a hana Teboho,” loosely translated “I refuse Teboho.” She then stormed out of Mr. Nkoane’s office. She went to the Project director who was in a meeting at the time and caused him to get out of the meeting so that she according to her, could report what had happened to her.
7. The Director was not at all happy as he even warned her not to disrupt him again in future when he is in a meeting. The complainant was subsequently charged with three counts as follows:
 - i) Contravention of Article G.6.8 in that on or about 12th November 2008, you shouted at Mrs. Mahlompho Mapalane in the presence of your supervisor Mr. Teboho Nkoane leading to disrespect and insubordination by storming out of Mr. Nkoane’s office without listening to what he had to say to you.
 - ii) Contravention of article G.6.10 in that on or about 12th November 2008, you struck and/or fought Mrs. Mahlompho Mapalane, a fellow staff member while on duty and within the confines of the premises of SOS.
 - iii) Contravention of Article G.6.8 in that on or about 12th November 2008, you neglected your assigned duties by leaving the reception area unattended for a considerable period of time resulting in incoming calls and visitors not being attended for that period.

8. The hearing was chaired by Advocate Sekake Malebanye. He heard evidence from Mr. Nkoane and Mrs. Mahlompho Mapalane in support of the charges. He also heard evidence of the complainant in her defence and one Mammako Lentoa who testified in support of her defence. Mr. Malebanye wrote an elaborate judgment in which he succinctly summarised the evidence of the witnesses for the applicant as hereinbefore narrated.
9. On behalf of the complainant, Mrs. Lentoa is said to have testified only in relation to count 3. She was present when Mahlompho enquired from the visitor whether he had been helped. She said she knew that by that time the complainant had already helped the visitor. She stated that the complainant always attended the reception well and that Mahlompho asked the visitor whether he had been helped to give the impression that it is only her who is capable of helping visitors.
10. In her evidence the complainant confirmed that she was called to Mr. Nkoane's office and said she was angrily instructed by Mr. Nkoane to sit down. She further confirmed that Mr. Nkoane accused her of not assisting customers and not answering the telephone. She further confirmed that upon learning that it was Mahlompho who had related the story to Mr. Nkoane she got upset and shouted "Mahlompho!" She denied that she struck and/or fought her, but conceded that Mr. Nkoane intervened. She conceded that she stormed out of Mr. Nkoane's office as the latter had testified, but said she was going to report to the Project Director as she felt victimized and discriminated.
11. Against the backdrop of this evidence Mr. Malebanye found the complainant guilty of insubordination as charged in count 1. He found that the complainant herself admitted shouting angrily at Mahlompho and storming out of the supervisor's office, notwithstanding that the supervisor wanted to speak to her. He concluded that the complaint of victimization and discrimination was not relevant to the charge and if the complainant felt victimized or discriminated against, she should have followed the grievance procedure.

12. The chairperson of the disciplinary hearing further found that the complainant was guilty as charged on count 2. He rejected the complainant's version that she did not strike Mahlompho. He accepted the version of the witnesses of the applicant. He stated that if the version of the complainant were to be believed, then an explanation would be needed why Mr. Nkoane had to intervene. On Count 3 he found the complainant not guilty relying on Ms Mammako Lentoa's testimony that during the time she was at the reception, complainant was performing her duties well.
13. The chairperson went on to hear complainant's testimony in mitigation of sentence. After ably considering evidence in mitigation, the chairperson recommended dismissal on count 1 and suspension for one month without pay on Count 2. On the basis of these recommendations the complainant was dismissed on the 2nd March 2008. She launched an internal appeal which failed.
14. It would appear that the complainant lodged a complaint of unfair dismissal with the office of the Labour Commissioner. There is no evidence that the latter initiated any investigation to establish where the fault if any lied. Ostensibly relying only on the word of the complainant the officer to whom the complaint was reported, exercised the powers vested in the office by section 16(b) of the Labour Code Order 1992 (the Code) which provides:

"16. POWER OF LABOUR OFFICER IN RELATION TO COURT PROCEEDINGS

For the purpose of enforcing or administering the provisions of the Code a labour officer may:

a)

b) 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 or thing or cause of action arising in connection with the employment of such employee or the termination of such employment."

15. The labour officer to whom the complaint of unfair dismissal was reported, referred a dispute of unfair dismissal on behalf of the complainant to the DDPR. Conciliation having failed the dispute was referred to arbitration. The procedure at the DDPR is that parties or their representatives make opening statements, whereby each party lays out its case. Thereafter the employer is called upon to start if the case is one of unfair dismissal.
16. Mr. 'Mako who represented the Labour commissioner made an opening statement in which he presented complainant's case that the applicant had to answer in a nutshell as follows:

"We are saying Ms Khoboso was unfairly dismissed on both substance and procedure.

"Okay on substance, my Lord we are saying that the first count which he stood to answer was not clear.....

"It was imprecise in that she was charged with contravening Article G.6.8 of SOS Regulations. We want to submit that the article in question was never contravened by her, instead she was charged for something else. The second point your worship is that there was no procedural fairness in that after she was liable for a disciplinary hearing she had exercised her right of appeal.

"The company employee handbook article 4.2.5 thereof says a dismissed employee may appeal to the Board of Governors..... But to her surprise she found at the hearing that the case was presided by a person who was not a member of the Board of Governors.... But that is not the big issue. The issue that we take is that we would have expected that 'Me Khoboso was to be informed of the recommendations by the person who presided over the case. Instead she got a letter signed by two members of the Board of Directors." (pp1-2 of the record.)

17. Thereafter the representative of the applicant gave a resume of what defence they have against the complainant's claim. As we said the practice is to make the employer start, if the claim is for unfair dismissal. Mr. Tseuo for the applicant proceeded to

lead evidence to answer what Mr. Mako had put across as the centre piece of their claim. In doing so Mr. Tseuo for the applicant handed in the charge sheet together with the staff handbook for the arbitrator to make a determination whether the quoted article corresponded with the charge and the alleged conduct of the complainant.

18. He went on to state that the hearing was presided by Advocate Malebanye who heard evidence from both sides. He testified that the complainant was found guilty as charged and that the chairperson recommended that she be dismissed. He handed in the copy of the judgment that Mr. Malebanye wrote, which aptly summarized the evidence of all the witnesses. He concluded by stating that he wrote the letter that informed the complainant of the outcome of the disciplinary hearing.
19. He was cross-examined by Mr. Mako for the complainant. The cross-examination did not discredit the testimony as well as the documents that Mr. Tseuo handed in. At the close of the cross-examination the arbitration adjourned for lunch with Mr. Tseuo indicating that he had two other witnesses to lead. (see p.18 of the typed record).
20. When the hearing resumed in the afternoon, nothing further was said about the two witnesses who Mr. Tseuo said he would call before closing his case. The complainant was called in to testify instead. This was clearly irregular because the applicant had not yet closed its testimony. Furthermore, that irregularity prejudices the applicant because in his award, the learned arbitrator used the alleged failure on the part of Mr. Tseuo to call those two witnesses as the reason for finding that the charges against the complainant were not proved.
21. However, even that finding itself was unreasonable in the light of the evidence that Mr. Tseuo had tendered. The judgment of Mr. Malebanye which was handed in as evidence succinctly captures the evidence of those two witnesses who were irregularly excluded. The learned arbitrator suggested in his

award that the judgment did not provide sufficient evidence. There is no reason to say the judgment is inadequate, especially when its summary of the evidence was not challenged by the complainant during cross-examination.

22. When the complainant took the stand to testify she did not follow the case that Mr. Mako had tabled during his opening statement. She was led to testify on the events that led to her dismissal which it had not been made clear that she was challenging. True enough, the judgment of Mr. Malebanye already furnished sufficient evidence regarding applicants' version of the events. It would thus have sufficed to have considered it in rebuttal of the complainant's testimony.
23. What is of even more significance is the point that is raised by the applicant in their ground of review. Applicant contends that the evidence of Mr. Tseuoa had concentrated on the challenge to the connection between the acts complainant was accused of and the article that was relied upon to charge her. They contended that their witness did not dwell on the merits of the particulars of the charge because that did not appear to be in issue when Mr. Mako presented the summary of his case.
24. What happened in casu is a classical case of trial by ambush. It has repeatedly been stated by our courts that "it is wrong to direct the attention of the other party to one issue and then attempt to canvass another." (see *Frasers Lesotho Ltd .v. Hata-Butle (Pty) Ltd* LAC (1995-1999) 698 and the cases therein cited, and *Pascal Molapi .v. Metro Group (Pty) Ltd* LAC/CIV/R/09/03 (unreported). The purpose of an opening statement is to inform the other party in advance what the case he is called upon to answer is. The applicant is thereafter enjoined to remain within the scope of the issues he would have tabled and it is a reviewable irregularity to canvass issues beyond those tabled. (see *Albert Makhutla .v. Lesotho Agricultural Development Bank* 1995-1996 LLR-LB 191 at 195).
26. Finally, it is clear from the record that the complainant was guilty of insubordination and disrespect as charged. The shrinking of the supervisor's papers and throwing them down,

the shouting, the express disrespectful refusal to sit down and answer the accusations and the storming out of the office of the supervisor; are all acts of disrespect and insubordination which no employer can be expected to tolerate from an employee. Unfortunately the learned arbitrator misdirected himself by associating himself with Mr. Mako's narrow interpretation of the word insubordination, as only meaning refusal to obey instructions, hence his finding that the complainant was not insubordinate.

27. Even in that narrow interpretation, he was wrong because complainant expressly refused when she was ordered to sit down and left the office of the supervisor without permission. But the word insubordination is not limited to refusal to take instruction. According to the Concise Oxford Dictionary it also means disobedience and rebelliousness. The behaviour of the complainant fits hand in glove into all the possible definitions of insubordination. Clearly therefore, the finding of the learned arbitrator exonerating the complainant of any wrong doing was irrational in the light of the uncontroverted evidence of her conduct which she also confirmed. In the premises we find that the award is riddled with irregularities which justifies interference by this court. Accordingly, the award is reviewed, corrected and it is set aside. In its place it is substituted the order that the referral in A0288/09 is dismissed. There is no order as to costs.

THUS DONE AT MASERU THIS 6THth DAY OF SEPTEMBER 2010

L. A. LETHOBANE
PRESIDENT

J. M. TAU
MEMBER

I CONCUR

D. TWALA
MEMBER

I CONCUR

FOR APPLICANT:
FOR 3RD RESPONDENT:

MR. NTAOTE
MS. RUSSEL