IN THE LABOUR COURT OF LESOTHO LC/REV/50/08

HELD AT MASERU

IN THE MATTER BETWEEN

JUDITH REFILOE MOTAUNG APPLICANT

AND

NATIONAL UNIVERSITY OF LESOTHO 1ST RESPONDENT
DDPR 2ND RESPONDENT

JUDGMENT

Date: 04/08/10
Review of DDPR award – Arbitrator making finding to uphold dismissal despite finding that applicant had good reason not to execute instruction given by supervisor – arbitrator failing to consider evidence of malafide in the instruction given to applicant – Hearing – Representative of applicant chased from hearing – Applicant justified in not participating in the hearing without her representative – Arbitrator failed to consider evidence that showed that the hearing was unfair as applicant was denied opportunity to present her case through her duly authorized representative – Bias – Applicant's perception of bias not unfounded when regard is had to the manner hearing was handled – Award reviewed, corrected and set aside – Reinstatement ordered.

BACKGROUND

1. This is an application for the review and setting aside of the Award of the 2nd respondent dated 7th August 2007. The applicant seeks an order that her dismissal on the 2nd May 2006, was unfair and that she be reinstated in her position as Director of Security and Safety.

2. The applicant sought the assistance of the office of the Labour Commissioner and the latter launched the Review Application on the 13th June 2008. The application for review was made in the name of the Labour Commissioner who had not been a party in the arbitration proceedings before the 2nd respondent. The 1st respondent filed its Answer and the Record of the arbitration proceedings was filed as well.

3. The Review Application was set down for hearing on the 28th October 2009. On the date of hearing, I brought the anomaly of the Labour Commissioner appearing as an aggrieved party in review proceedings when she did not feature in proceedings in a lower court to the attention of the parties. Mr. Lerotholi for the applicant applied for leave to go and amend the Notice of Motion in order that the then complainant, Major Refiloe Motaung is substituted as the applicant. Leave was granted and the matter was postponed sine die.

4. On the 9th of November 2009, applicant filed an Authority to Represent substituting the office of her present attorneys in place of the Labour Commissioner. She also filed a supplementary affidavit of additional grounds of review. On the 14th April 2010, she applied for her substitution as the applicant in place of the Labour Commissioner. The application was not opposed as such it was granted as prayed.

CONDONATION

5. It is common cause that this Review Application was filed some nine months after the Award of the DDPR was issued. It is further common cause that the Labour Code (Amendment) Act 2000 provides that a party who seeks to review a DDPR award must 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. (vide sec. 228F(1)(a)). For this reason the applicant accompanied his Review Application with an Application for Condonation.

6. The test for consideration whether to grant a condonation application is well known. It is embodied in a number of decisions, key among them is the case of Melane .v. Santam Insurance Co. Ltd 1962(4) SA 531. It was held in that case that a party seeking a condonation of late filing must show sufficient cause why the court should exercise the

discretion whether to condone in his favour. The learned Judge of Appeal went on to state that:

> *"In deciding whether sufficient cause has been shown the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated; they are compatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of the thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."*

7. The present applicant filed the Review Application some nine months and two weeks after the Award was issued. It is not clear as to when exactly the applicant became aware of the Award. She furnished an explanation that after she received the Award she took ill and that she could not as a result do anything productive. She only started to feel a recovery around April this year, but even then she still could not move a distance as she was experiencing a fatigue. She averred that the doctor attending her illness told her that she was suffering from trauma and depression. Dr. Simon G. Marealle of Queen Elizabeth II Hospital has written a confirmation report that applicant has been their patient since August 2007 and has since been attending checkups.

8. The 1st respondent has not disputed applicant's explanation for her lateness in filing the Review application. On its own the explanation is satisfactory. However, we have no doubt that the delay nine months is inordinate. It is however, satisfactorily compensated by the explanation. That the issue raised by this case in important does not beg the question. Dismissal of an employee in circumstances which the employee perceives to be unjustified as is the case in casu, is

extremely important to the employee concerned. Having glanced at the founding papers the applicant cannot be said to be pursuing a futile case. For these reasons we are of the view that applicant's late filing of the Review Application be and it is hereby condoned.

THE FACTS

9. The applicant was employed by the 1st respondent as the Director of Security and Safety. She was directly answerable to the Registrar Ms. Mafina Mphuthing. Her office was at the main entrance gate to the University. She testified, supported by her erstwhile Deputy Mr. Mohanoe Mabesa that the main gate is the strategic place for her office to be located at, because it is a "beehive of activity consisting of incoming and outgoing traffic of students, visitors, vehicles, pedestrians, passersby and bystanders." (see p.363 of the Record).

10. In 2004, the building that applicant used as her office at the main gate, was leased to a bank. She was then directed to move her office to the Registry at the Administration Block. She raised a concern that such a move was going to undermine and compromise optimal functions of security and its management. A meeting was arranged involving the Vice Chancellor, the Registrar and the applicant as Director of Security. The meeting debated the issue of suitable location for NUL security.

11. It turned out that the main gate was an ideal location. The applicant was ordered to write a proposal for consideration by the Board of Development motivating why the security office should be built at the main gate. She duly wrote a proposal and was in attendance at a meeting of the Board of Development which considered the proposal on the 17th January 2005. The proposal was approved in principle.

12. The move from the main gate to the administration block was effected towards the end of June 2004. According to the evidence of the applicant in April 2005, the Registrar wrote her a letter directing that Security Office be moved yet again to a building called ex-Biemens residence. On receipt of the letter applicant says she went to the Registrar and told her that the building is far from the gate which is the area which they must constantly monitor as the centre of traffic flow. She testified that she later confirmed the discussion in writing emphasizing that she is not refusing instructions, but that she was

concerned that this particular instruction was fraught with problems.

13. The Registrar wrote back to her giving her an ultimatum that she must move as directed by the 8th June 2005. She said she went to inspect the building and found that it had no lights, no telephone and it was dilapidated. But comfort aside the place was far, she testified. Another letter instructing her to move or risk facing disciplinary action was written on the 13th June 2005. It is common cause that the applicant still did not move.

14. The applicant was charged with insubordination in that she refused to obey lawful and reasonable instruction of her supervisor. A three member panel was appointed to deal with the case. Applicant testified that she appeared before the panel and pleaded not guilty to the charge. She was represented by her attorney of record Mr. Letsika. It would appear that Mr. Letsika raised a point concerning the lawfulness of the panel. The point was argued and at the end the hearing was adjourned without a ruling being made on the point raised.

15. Whilst still waiting for a ruling, the applicant received a letter from the Registrar dated 17th November 2005. The message was as follows:

> *"I write to inform you that due to the circumstances surrounding the above case the Acting Vice Chancellor has in terms of his powers removed the case from me, who is your immediate supervisor. Whilst the format of the charge will change the substance of this allegation remains the same.*
>
> *You will be informed of the date, time and venue of the hearing in due course."*

16. On the 2nd December 2005, the applicant was served with the second notice of disciplinary hearing. Applicant testified that she declined to accept service of the charge, because she felt she had already been charged and she had already pleaded to the charge. Furthermore, she needed to consult her lawyer. On the 9th December she was again served with notification of hearing which had an additional charge that said she failed to deploy security personnel to prevent disruption of Council Meeting on the 5th December 2005. The applicant was to

appear before a disciplinary panel on the 13th December 2005.

17. The applicant testified that she again refused to sign an acknowledgment of receipt of the notification, because her case was already in progress. She testified further that she told Mr. Mokoma who effected the service that the 13th December 2005 would not be suitable for her representative. Mr. Mokoma promised to convey the message to the panel.

18. However, on the 13th December she received a phone call from Mr. Mokoma telling her that the panel was waiting for her. She rushed to the hearing room where she found that the disciplinary panel had changed. It was now made up of one member, one Mr. Ranganathan. Mr. Koto who had previously been the prosecutor was the Secretary and Mr. Thloeli was the new prosecutor.

19. Applicant testified that she protested that she was being taken by surprise as her representative was not in attendance and she also needed time to prepare herself. Applicant further recorded her dismay at the proceedings because her case was already pending before another tribunal. The prosecutor explained that:

> *"the immediate supervisor was instructed not to proceed further with the case. She was also instructed to dismantle the committee she had formed. Therefore there is no longer any committee. My appointment letter is actually transferring the case from Mr. Koto to Mr. Tlhoeli. The case has been made a new case altogether. The committee was dismantled." (* P.330 of the Record.)

20. The Registrar was called in to confirm in a sworn evidence that the previous proceedings were abandoned and she did. The applicant protested that she was not aware of the removal of the case whereupon the chairperson responded: *"the committee is disbanded. We are giving you the information."* The chair enquired whether applicant had a representative and she answered that her representative is Mr. Letsika who is an employee of the University. Mr. Tlhoeli for the 1st respondent did not dispute that Mr. Letsika is a staff member as alleged. The Chairperson nonetheless said:

> *"he must be co-employee and he must have an employment number. I want certification of the representative from appointments Office that he is an employee in the University with a clear employment number marked therein. You must have full proof that he/she is an employee of the University."* *(*P.333 of the Record.)

The hearing was then postponed to the 14th Dec. 2005.

21. Applicant testified that it was in the afternoon when the hearing was postponed to 8.00am the following day. Mr. Letsika was not on campus so she sought to obtain proof of his employment from the appointments Office. The response she got was that such information was confidential as such it could only be released to its owner. The following day applicant was at the venue of the hearing with her representative even before 7.30am. She testified that Mr. Ranganathan was also in the hearing room early. They exchanged greetings with him and they appeared to know each other with Mr. Letsika.

22. When the hearing resumed Mr. Letsika rose to introduce himself. Applicant testified that the Chairperson addressed her instead and asked her if she had brought the letter of appointment of her representative. She testified that she related the difficulty she came across. The chairperson said in the absence of such a letter he was not going to hear anything from Mr. Letsika and that he did not consider him part of the process. He ordered him to leave the hearing room. Mr. Letsika then left and applicant decided to leave as well.

23. The hearing proceeded in the absence of applicant and her representative. Two witnesses namely the Registrar and the Pro Vice chancellor testified on the first and the second charge respectively. As would be expected, she was found guilty and a recommendation of dismissal was made to the Academic Staff Appointments Committee. (ASAC). On the 2nd May 2006, the vice chancellor wrote her a letter informing her that ASAC had decided to dismiss her in accordance with the recommendation of the disciplinary panel.

24. She launched an appeal to Council Appeals Committee, which confirmed the guilty finding of the disciplinary hearing as well as the

ASAC decision to dismiss her. Applicant filed a referral with the DDPR challenging both the substantive and procedural fairness of her dismissal. At the arbitration parties dwelt only on the alleged insubordination. The charge of dereliction of duty in that applicant failed to deploy security personnel to thwart disruption of Council Meeting was all but abandoned.

25. The key witness was the Registrar, whose testimony was essentially that applicant was dismissed for insubordination in that she refused to move her office to ex-Biemen's residence as directed. She confirmed that she as applicant's supervisor nominated a three member panel to deal with the applicant's disciplinary case. She testified that she disbanded the panel before it completed its work because it did not conform to a disciplinary code which states that when disciplinary action is instituted there should be a presiding officer (see p.157 of the record).

26. The Registrar went on to state that after she disbanded the panel the Vice Chancellor took over the case in terms of the powers vested in him by the disciplinary code. There is no doubt that the evidence of the Registrar in this regard is in direct conflict with what she told the applicant when she informed her of the disbanding of the disciplinary panel. In that letter that she wrote to the applicant she said the case has been removed from her by the Vice Chancellor. This is completely different from what she later told the arbitrator that she disbanded the panel because it did not have a presiding officer. Unfortunately the learned arbitrator does not seem to have picked this contradiction.

27. He (the arbitrator) was concerned with whether the instruction to move was a valid and reasonable instruction. He found that the instruction was reasonable, as such it ought to have been obeyed. He made a finding further that applicant's reason for not moving as instructed was not anticipated by the rule that an employee must obey lawful instructions of the employer. This is a queer finding, however, it is not for this court to interfere with it in a review no matter how much we disagree with it. For this reason he found the dismissal of applicant substantively fair.

28. Notwithstanding the finding as aforesaid the learned arbitrator went

further to say the reasons that resulted in applicant failing to move her office as directed were very reasonable and just. He however said the applicant herself did not say the instruction was unreasonable.

29. Now the learned arbitrator makes himself guilty of gross unreasonableness, which *ex facie* makes the award reviewable. If the reasons advanced by applicant were reasonable it follows that the 1st respondent acted unreasonably in not considering them. It means further that the charge of insubordination which resulted in the dismissal of the applicant is not sustainable. Equally unsustainable would be the decision to dismiss the applicant. This court would have no hesitation to review and set aside the award on this ground, even though it is not pleaded because the award is grossly unreasonable in as much as it upholds a dismissal which evidence, which the arbitrator accepted proves it could not be sustained.

30. The learned arbitrator went further to consider the procedural fairness of applicant's dismissal. He found that the dismissal was procedurally unfair and awarded applicant compensation of two months' salary. The learned arbitrator concluded that there was procedural unfairness because 1st respondent took too long to hear applicant's appeal and further that the appeals committee had not been gazetted according to law, as such it had no power to hear the appeal or even to confirm the dismissal of the applicant by ASAC.

31. Applicant applied for the review of the entire award on the following grounds:

a) By finding that the applicant was dismissed by illegally constituted Council Appeals Committee in as much as it was not gazetted instead of The Council itself, the arbitrator ought to have found that the dismissal of applicant was illegal and ordered reinstatement.

b) Arbitrator did not consider applicant's evidence that her representative was denied audience by the disciplinary committee.

c) The learned arbitrator's finding that applicant was insubordinate is not supported by evidence tendered of record. The instruction to move office was not genuine because even after applicant's

dismissal those who succeeded her were not ordered to move to ex Biemens like her.

d) The learned arbitrator failed to consider evidence tendered that applicant was charged before a committee on a previous occasion and that for unknown reasons the committee was disbanded and a one man committee was put in place which she contended was biased against her.

32. There are more grounds listed but the above should suffice for our purposes. We have already dealt with ground (c) in paragraph 29 of this award. There we showed that the learned arbitrator upheld the dismissal of the applicant against the evidence of valid and reasonable reasons advanced by the applicant which he accepted were reasonable. Now applicant in her Founding Affidavit goes further to stipulate that she tendered evidence that the instruction to move her office to ex-Biemens was malafide because her successor was not ordered to move after she was dismissed. Indeed the Award does not suggest that such evidence was considered and yet it was tendered.

33. We agree that the learned arbitrator failed to consider the evidence of the applicant concerning possible ulterior motive in the instruction to move her office to the undeniably dilapidated and isolated building. This was clearly irregular. Equally irregular is the finding that the dismissal of applicant by an illegally constituted Appeals Committee renders the dismissal procedurally unfair. If the appeals Committee was illegal as he found in his award it follows that even the decisions it purported to make are not sustainable in law. What this means is that the dismissal is not just procedurally flawed but even substantively it is unfair.

34. Applicant contended further that the arbitrator had failed to consider evidence to the effect that her representative was denied a hearing at the disciplinary hearing. Indeed the learned arbitrator has not considered this evidence which showed that the so-called disciplinary enquiry was a farce which could not deliver a fair hearing to the applicant. The circumstances which resulted in Mr. Letsika being dismissed from the hearing and the applicant justifiably following him, ought to have been considered by the learned arbitrator to enable him to determine whether the disciplinary hearing was fair.

35. First respondent's own disciplinary code gives applicant the right to representation by a co-employee or a shop steward. At the hearing of the 13th December 2005, applicant reported that she would be represented the following day by Mr. Letsika who is an employee of the University. Mr. Tlhoeli for the respondent did not dispute that Mr. Letsika is an employee of the University, but the chairman went out of the way to demand proof of his employment which was not in dispute. Even assuming it was necessary to produce it, it was peculiarly within the knowledge of the representatives and witnesses of 1st respondent whether Mr. Letsika was or was not an employee of the University.

36. Mr. Mokoma who is the Senior Assistant Registrar (Appointments) was a key witness at the disciplinary hearing. If the confirmation of Mr. Letsika's employment was genuine, he could have been asked to confirm it. The Registrar who heads the administration of the University was also there as a witness. She could have easily been asked to confirm if Mr. Letsika is an employee. Lastly, both the chairperson and Mr. Letsika are lecturers at the University. It is not unreasonable therefore to conclude that they know each other. All indications are that the chairperson was hell bent to deny applicant a fair hearing. The expulsion of Mr. Letsika from the hearing was totally wrong and thus violated the fairness of the disciplinary proceedings. Any verdict arising out of the said proceedings was completely unfair and it should not have been upheld. (see Blandina Lisene .v. Lerotholi Polytechnic LC/REV/122.09.).

37. We could end this review application on this note and correct and set aside the Award of the learned arbitrator as not only unreasonable but also grossly irregular for totally ignoring evidence which shows that the hearing was simply going through motions and that in any event applicant had good reasons for not moving her office. It is however necessary that we also address the last ground of review raised in this judgment due to its singular importance.

38. Applicant complained that the learned arbitrator ignored her evidence that she was charged before a committee which for reasons she did not know "was disbanded and a one man committee was put in place, which I showed was biased against me." This Court does not easily

embrace complaints of bias by people who are found guilty and later seek to challenge the fairness of the proceedings. In hoc casu one cannot avoid to entertain the complaint of bias as justified.

39. Initially a committee made up of three members which included two lawyers was set up. Applicant appeared before this committee and pleaded not guilty to the charge of insubordination. In what I consider the first improper act of its kind by an employer, the committee was disbanded without consultation with the applicant or her representative. It was alleged that the Vice chancellor had decided to remove the case from the Registrar and he was going to take charge of the proceedings.

40. The question is why it was necessary to do this clearly irregular thing. When the applicant raised the concern about the alleged disbanding of the tribunal before the one man disciplinary hearing, it was only the Registrar who was moderate. She said "the Vice-Chancellor removed the case before me. I wrote to those that the case has been removed from my office." (p.330). The question that immediately comes to mind is what interest did the Vice Chancellor have which made him to remove the case from the office that had the right to handle it in terms of the disciplinary code.

41. We do not have an express answer, but it can be gleaned from the attitude of the representative Mr. Tlhoeli and the chairperson Mr. Ranganathan. From their responses it is clear that they were no nonsense persons. They had probably been substituted precisely for that. At p.330 of the Record Mr. Tlhoeli says:

> *"the immediate supervisor was instructed not to proceed with the case. She was also instructed to dismantle the committee she had formed."*

At p.331 he states further *"I do not see any prejudice if she is not informed that the committee is disbanded."*
The Chairperson then made a statement which can be said to be a ruling: *"the committee is disbanded. We are giving you the information."*

42. Applicant sought to insist that as far as she is concerned the previous committee is still seized with the case. Mr. Tlhoeli's response was not only inconsiderate but arrogant:

> *"Regarding the disbanding, my submission is that she must remember that she is an employee here. She is a manager in her department not the entire University."* (see p.331).

Significantly however Mr. Tlhoeli did not point to a rule in the code that permits the unorthodox manner in which the case of the applicant was handled. The applicant was entitled to insist that the case proceed before a panel initially appointed by the Registrar. The disbanding of that committee and appointment of one man committee without consulting her justifiably led her to believe that the new committee would be biased and indeed it was if regard is had to the manner in which the hearing was conducted.

43. We are of the view that once again the arbitrator failed to consider crucial evidence which pointed to undue tempering with the disciplinary process by the authorities of the University. The whole disciplinary process was clearly flawed and there was no way it could result in a just and fair conclusion. Clearly, the dismissal of the applicant was procedurally and substantively unfair. If the arbitrator had applied his mind to the evidence he ought to have so found. Accordingly, the Award of the learned arbitrator in A0181/07 is reviewed corrected and set aside and in its place is substituted the order that the purported dismissal of the applicant on the 2nd May 2006, is procedurally and substantively unfair.

44. The relief that applicant sought was and still is reinstatement. The Registrar who testified as DW3 at the arbitration did not adduce evidence regarding impracticability of reinstatement. She was the person best suited as applicant's immediate supervisor to say if the relief of reinstatement applicant seeks is no longer practicable.

45. Given that reinstatement was not opposed in the event of applicant being successful, it follows that the appropriate remedy that the learned arbitrator would have awarded, had he applied his mind properly to the evidence would have been reinstatement. In his heads

of argument as well as in oral submissions Mr. Letsika for the applicant relied on the remarks of Mosito A.J in Lerotholi Polytechnic .v. Lisene LAC/CIV/05/2008 where the learned Judge stated:

> *"We are of the view that in reviewing the awards of the DDPR the Labour Court must, generally speaking make such decisions as it thinks the DDPR should have made on the evidence before it at the time that it made the decision. Generally speaking it cannot make an order that the DDPR could not have made at the time but which may be, it can make now."*

He impressed on us to proceed to order that the applicant be reinstated as that is the order the DDPR ought to have ordered on the basis of the evidence before it.

46. For his part Mr. Koto for the 1st respondent argued that the arbitrator awarded the applicant compensation because he deemed reinstatement unsuitable in the circumstances of the case. This is a valid submission, save that this Court has found that the learned arbitrator acted irregularly in exercising his discretion against the granting of reinstatement because the evidence before him dictated that reinstatement be granted. Accordingly, this Court orders that the applicant be reinstated in her position without loss of seniority, remuneration or other benefits attendant to her position with effect from the date of her purported dismissal. There is no order as to costs.

THUS DONE AT MASERU THIS 7th DAY OF OCTOBER, 2010.

L. A. LETHOBANE
PRESIDENT

J. M. TAU **MEMBER**	**I CONCUR**
M. MAKHETHA **MEMBER**	**I CONCUR**
FOR APPLICANT:	**MR. LETSIKA**
FOR RESPONDENT:	**MR. KOTO**