IN THE LABOUR COURT OF LESOTHO **LC/PS/A/02/10**

HELD AT MASERU

In the matter between:

MINISTRY OF COMMUNICATIONS, SCIENCE AND TECHNOLOGY **1ST APPLICANT**

ATTORNEY GENERAL **2ND APPLICANT**

and

LYDIA MOHLOLI **1ST RESPONDENT**
`MALEBOHANG RAMAKAU **2ND RESPONDENT**
MOROESI RAKHETLA **3RD RESPONDENT**
`MAMOTHEPANE RANTHLOISI **4THRESPONDENT**
LEBOHANG THULO **5TH RESPONDENT**

JUDGMENT

DATE: 21/10/13

Appeal against the decision of the Public Service Tribunal - On mainly two grounds

(i) That the Tribunal failed to appreciate the purport of Section 8(6) and (9) of the Public Service Codes of Good Practice, 2008; and

(ii) that it was inappropriate for the Tribunal to have ordered reinstatement in circumstances where the respondents had been found guilty of negligence in handling public funds - Applicants felt the sanction was too lenient and it would set a very bad precedence - Having considered the record of proceedings, the Court finds no misdirection on the part of the Tribunal - The appeal is therefore dismissed.

1. Respondents are all former employees of the Department of Postal Services which falls under the auspices of the Ministry of Communications, Science and Technology. They were stationed in the Berea District. It is common cause that following an audit of the Berea Postmaster's books for the period January, 2005 to December, 2007, certain shortages were identified in relation to old age pensions. The respondents failed to account for these shortages. The incidents occurred at

different times but they were consolidated at the Public Service Tribunal (hereinafter referred to as the Tribunal) as they appeared to arise from a similar set of facts. They were charged, ***inter alia***, with failure to account for these monies, and were found guilty as charged. They had all pleaded guilty. They were dismissed in terms of ***Section 3 (1) (f) of the Codes of Good Practice, 2008*** (hereinafter referred to as the Codes) following disciplinary hearings. The said Section provides that:

> ***A public officer shall -***
>
> > ***in relation to his or her official duties, account for and make prompt or true return of, any money or property for which he or she is responsible.***

2. They challenged the said dismissal before the Tribunal in case No PST/8/2010. The latter upheld their appeal and ordered that they be reinstated to their positions without loss of remuneration and seniority; and secondly, that they be surcharged to make good the loss incurred by the Government as a result of their negligence in the discharge of their duties. Applicants are before this Court to challenge this decision. Appeals against decisions of the Tribunal are heard by this Court in terms of ***Section 20 (11) of the Public Service Act, 2005 (as amended in 2007)***.

GROUNDS OF APPEAL

3. Numerous grounds of appeal were raised and were summarised as follows:

(i) That the Public Service Tribunal erred by misunderstanding the provisions of Clause ***8(6) and (9) of the Codes of Good Practice, 2008*** in that the respondents approached the Public Service Tribunal prematurely as the Head of Department had not yet exercised his powers to determine the appeal as contemplated by the Clause;

(ii) That the Tribunal erred in coming to a conclusion which no reasonable Tribunal would have arrived at in ordering reinstatement. The Tribunal further ordered that the respondents be surcharged to make good the loss incurred by the Government of Lesotho as a result of their negligence. Applicant's Counsel felt this was too lenient a sanction.

The points will be dealt with ***seriatim***.

MISCONSTRUCTION OF SECTION 8(6) AND (9) OF THE CODES OF GOOD PRACTICE, 2008

4. The appellants contended that the learned Chairperson of the Tribunal misunderstood the purport of ***Section 8(6)*** and ***(9)(1) of the Codes*** in that the respondents were allowed to appeal to it prior to lodging an appeal with the Head of Department as envisaged by the Section. According to applicant's Counsel, the respondents approached the Tribunal prematurely as they were appealing against a recommendation which was not a final decision. The final decision is only reached after adequate investigations have been made by the Head of Department. Applicant's Counsel further argued that the Section does not say the Head of Department should hold another hearing before considering the recommendation of the disciplinary panel.

5. He therefore submitted that it was misdirection on the part of the learned Chairperson of the Tribunal to have concluded that the Head of Department did not give the appellants a fair hearing, when he was never given an opportunity to do so. An appeal to the Head of Department has to be within five (5) working days if an employee so decides to lodge an appeal.

Section 8(6) of the Codes provides that:

> ***Where dismissal of a public officer is being contemplated, the Head of Section shall recommend such dismissal to the Head of Department who shall after adequate investigation confirm the dismissal.***

6. Just by way of an observation, this Section appears not to leave the Head of Department with much of a discretion in that it does not empower him to either confirm or reverse the decision of the Head of Section. It is very absurd that one appeals to someone who has not been vested with a discretion. The Section is too limiting as it is couched in mandatory terms. According to ***Section 5 of the Public Service Act, 2005***, the Head of Department is a public officer who is in charge of a department or agency under his or her supervision or any other public officer designated as such by the Minister.

Section 9 (1) of the Codes provides that:

> ***If the Public Officer is dissatisfied with the decision reached at the disciplinary enquiry he or she shall file an appeal with the Head of Department within 5 working days from the date on which the decision was made.***

7. Clearly, an appeal has to be lodged subsequent to a sanction from the Head of Section basing himself or herself on the findings of the disciplinary panel. If a dismissal is preferred, a recommendation has to be submitted to the Head of Department. After the Tribunal has pronounced its verdict, the Head of Section has to decide on an appropriate penalty and submit his or her recommended sanction to the Head of Department. It is only logical that the preferred sanction be communicated to an affected employee prior to seeking the Head of Department's confirmation in order to facilitate an appeal if such an officer is aggrieved by the finding. In this case, the chairperson of the Tribunal actually told the parties that he would communicate the final decision to them as soon as he had made recommendations to the Head of Department. This was not in order as he is not the one who makes recommendations to the Head of Department but the Head of Section, in this case, the head of Postal Services. This appears to have been where problems arose precipitated by the fact that there is no evidence that the recommendation of the sanction meted out by the Head of Section was ever communicated to the respondents.

8. In reaction, a number of arguments which were aimed at quashing applicant's case were advanced on behalf of the respondents. Respondents' Counsel argued that they did not appeal against a recommendation by the disciplinary enquiry but against a final decision made by the Principal Secretary. They averred that they never even knew what the recommendation made by the disciplinary panel was but merely received letters of dismissal. They further alleged that they were never given an opportunity to table mitigating factors. The record of disciplinary proceedings, however, reflects otherwise. Respondents were afforded an opportunity to mitigate their punishment immediately after they were found guilty of negligence. Respondents further complained that the Principal Secretary never entertained their appeals.

9. It emerged from the record that the Chairperson of the Tribunal pronounced the guilty verdict in respect of all the respondents respectively. There is no mention that the recommended sanction was ever communicated to them. One cannot appeal against a sanction he or she has no knowledge of. The chairperson of the Tribunal aptly put it when he enquired in his judgment how the respondents were then expected to know that a sanction of a dismissal was contemplated so that they could appeal to the Head of Department for leniency. ***Section 8 (5) of the Code*** under Division 2 on Disciplinary Procedure, explicitly enjoins the Head of Section

to prefer a sanction which would ultimately be recommended to the Head of Department. It provides:

> ***At the end of the inquiry the Head of Section shall decide on a penalty which may be -***
>
> ***(a) a final written warning, which shall be signed by the officer, and be recorded in his or her file and is valid for a period of twelve months from the date of issue;***
>
> ***(b) any other sanction that may be reasonable in the circumstances.***

10. The ***Codes*** have been promulgated in order to set normative standards for public officers and to provide guidance to management in respect of handling grievances and disputes. The Codes have to be adhered to the letter irrespective of whether a party pleads guilty or not. Confirming this principle, this Court held in ***Matee Phatela v Lesotho Highlands Development Authority (LHDA) LC 115/00 (lesotholii)*** that employers should be held to their own rules and regulations particularly when no reasons are given for not complying with them. In ***National Education, Health & Allied Workers' Union & Others v Director General of Agriculture & Another (1993) 14 ILJ 1488 at 1500*** the Court laid down the principle that ***"an employer should live up to the expectations created amongst his staff by his unilateral code."*** Disciplinary proceedings have to meet the tenets of justice as envisaged by ***Section 4 of the Codes*** (Interpretation Section) which reads (quoted ***verbatim***)-:

> ***The following are the guiding principles which shall be adhered to in handling a grievance under this Code***
>
> ***(a) A public officer shall have a fair hearing;***
>
> ***(b) The rules of natural justice shall apply.***

11. In the employment context, fairness dictates that on issues of discipline employers must comply with principles of both substantive (the reason for the dismissal/other sanction) and procedural fairness (the procedure adopted prior to and at the time of termination). In this case the Department of Postal Services failed to follow the process laid down in the Codes by not communicating to the respondents the punishment that had been meted out to them for their misdemeanour.

12. The Codes affords employees an opportunity to lodge an appeal to the head of Department if dissatisfied by the outcome of the disciplinary enquiry. In ***casu***, the applicants lodged their appeals ***albeit*** only after receipt of dismissal letters from the Principal Secretary of the Ministry of Communications, Science and Technology. The latter decided not to consider the appeals. Section 9(2) of the Codes actually obliges the Head of Department to determine the appeal. It reads:

> ***On receipt of the appeal, the Head of Department shall arrange for the appeal to be heard within 5 working days of the receipt.***

13. In our view the Ministry committed a procedural impropriety by not informing the respondents of their fate, and secondly, for failing to give them an opportunity to be heard on appeal. Evidence clearly shows that respondents noted appeals to which the Principal Secretary never reacted, hence the contention by the applicant that the matter was brought before the Tribunal prematurely does not hold water.

WHETHER REINSTATEMENT WAS AN APPROPRIATE REMEDY

14. The respondents having appealed to the Tribunal, the learned Chairperson held, among others, that the dismissal for failure to account for monies due to negligence on the part of the respondents was not an appropriate sanction. Applicant's Counsel contended that the Tribunal failed to take into account that negligence is a serious offence that warranted a dismissal especially when public funds are concerned. Applicant's Counsel contended that the Tribunal lost sight of the fact that the respondents did not dispute the substantive fairness of their dismissal but only challenged the procedural impropriety thereof by claiming that they were not afforded a hearing. He therefore he submitted that the sanction imposed by the Tribunal was disproportionate to the offence committed. By ordering reinstatement the Tribunal set a very bad precedence. Applicant s submitted that the appropriate penalty in the circumstances ought to have been a dismissal.

15. Applicant's Counsel contended that if this judgment is left unchallenged, it would set a very bad precedence in that officers would just improperly use Government funds they are responsible for knowing that they would be reinstated or expect reinstatement in similar circumstances. He underscored the fact that there is a dire need to curb improper use of Government funds by public officers.

Furthermore, he felt that the employer/employee relationship between the applicant and the respondents had broken down and implored the Court to be mindful of the fact that the relationship is premised on mutual trust and confidence. In the circumstances he submitted an order of reinstatement was misplaced. On this issue respondent's Counsel submitted that reinstatement was not an appropriate remedy.

16. Imposition of a sanction is a managerial prerogative. As aptly put by Ngcobo J.A in ***Nampak Corrugated Wadeville v Khoza (1999), 20 ILJ, 578*** at paragraph ***33,*** the discretion to impose a sanction belongs in the first instance to the employer. As he put it;

> ***The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction by the employer, but whether in the circumstances of the case the sanction was reasonable.***

17. In conclusion the Court held that:

> ***The fact that the Commissioner may think that a different sanction would also be fair, or fairer, or even more than fair, does not justify setting aside the employer's sanction.***

In this case the Court found the employee to have been fairly dismissed in the circumstances of the case. He was found guilty of gross dereliction of duty for having deliberately neglected his duties. The Court pointed out that the employee knew the repercussions of the neglect of his work. A brief narration of the facts of this case would be worthwhile. The employee was engaged as a boiler attendant. He had to make sure that not only was the boiler functioning properly but also that no damage was caused to it. He was a very experienced boiler attendant. He knew he had to remove burning coal from the grate once the motor was switched off. He knew that failure to do this might cause not only damage to the boiler but endanger lives as well. Failure to attend the boiler was therefore considered by the Court to have been a gross neglect of duty.

18. The principle of the imposition of a sanction being a managerial prerogative is however not cast in stone; the determination of each case depends on its merits. The test according to the case of ***British Leyland UK Limited v Swift [1981] IRLR, 91 at p.93*** paragraph 11(cited with approval in the ***Nampak*** case) is:

Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him, then the dismissal was fair.

In the case before us, the Tribunal had a duty to determine the fairness or otherwise of the imposed sanction. Applicant's Counsel submitted that it was only reasonable that the employer dismissed the employees for failure to account for public funds. Without undermining the gravity of respondents' misconduct the fundamental principle is that each and every case is decided on its surrounding circumstances.

19. Appropriateness of the sanction of a dismissal was one of the issues for determination before the Tribunal, and the Court discerned no irregularity in the learned Chairperson's finding or on how the proceedings were conducted. We appreciate applicant's Counsel's concern over the incessant erosion of public funds. We, as administrators of justice, however, have a duty to maintain justice. Managers also have to carry out disciplinary proceedings diligently and acquaint themselves with set out procedures.

DETERMINATION

20. On the basis of the evaluation above, the Court finds the Tribunal to have committed no irregularity in handling respondent's case. The appeal is therefore dismissed and the finding of the Tribunal is therefore upheld.

Respondents' Counsel prayed that the appeal be dismissed with costs on an attorney and client scale on account of its frivolity. The Court having looked at all the circumstances of this case identified no frivolity on the part of the applicant. There is therefore no order as to costs.

THUS DONE AND DATED AT MASERU THIS 21ST DAY OF OCTOBER, 2013.

F.M KHABO
PRESIDENT OF THE LABOUR COURT (a.i)

S.KAO **I CONCUR**
MEMBER

R.MOTHEPU **I CONCUR**
MEMBER

FOR THE APPLICANT: **ADV., L.P MOSHOESHOE - ATTORNEYGENERAL'S CHAMBERS**

FOR THE RESPONDENTS: **ADV., R.D SETLOJOANE - KEM CHAMBERS**