

HELD AT MASERU

In the matter between:

THAPELO NTOKO

APPLICANT

And

JIKELELE SERVICES

RESPONDENT

JUDGMENT

Date: 15th October 2013

Claims for unfair dismissal based on retrenchment of Applicant and unlawful deductions. Respondent failing to attend hearing. Court proceedings with the matter in default, after granting a grace period to allow Respondent to make appearance. Court finding the dismissal of Applicant to be unfair and awarding compensation and payment of unlawfully deducted monies. No order as to costs being made.

BACKGROUND OF THE ISSUE

1. This is a claim for unfair dismissal based on the operational reasons of the Respondent and unlawful deductions. It was heard on this day and judgement was reserved. Applicant was represented by Ms 'Maneo Mosola while there was no representation for Respondent. The background of the matter is that Applicant had referred claims for unfair dismissal; transport allowance; unlawful deductions; overtime and rest days, with the DDPR.
2. During conciliation, claims for overtime, rest days and transport allowance were settled. A copy of the settlement agreement is part of the record as annexure "B". The matter was then referred before this Court in terms of section 227 (5) for adjudication of the unresolved claims. A copy of the report of non-resolution is annexure "A". The matter was opposed by Respondent but it failed to attend on the date of hearing,

notwithstanding the grace period granted. The matter therefore proceeded in default.

FACTS AND EVIDENCE

3. Applicant's evidence was that he was employed by Respondent as a Carpenter, on a one year renewable contract. His contract was to span from the 23rd February 2012 to 23rd February 2013. It was a material term of his contract of employment, that its renewability would be based on the availability of the job. However, on the 15th December 2012, he was terminated through a letter dated 14th December 2012. The said letter forms part of the record and is marked "C".
4. Applicant added that prior to his dismissal, no communication was made to suggest the possibility of his retrenchment or to even consult him in term of the laws of Lesotho. He is thus asking for compensation of 10 months wages in the sum of M27,000.00. In substantiation of the claim, he stated that he earned a monthly salary of M2,700.00. Further that since his termination to date, the operations of Respondent are still continuing and his position is still in existence.
5. Applicant further testified that if he had not been dismissed, he would have continued to work with Respondent beyond the one year and he therefore feels that 10 months wages would be adequate compensation. When asked if he had made any attempt to mitigate his loss, Applicant stated that since his dismissal he applied for jobs. He was successful in his efforts as he is now working for Lesotho Steel Products, since July 2013, where he is earning a monthly wage of M2,500.00.
6. On the second claim, Applicant testified that the Respondent deducted money from his salaries in the sum of M120.00, over a period of 6 months, at the rate of M20.00 per month. He stated that this money was deducted to pay union fees in respect of a union to which he is not a member. He stated that the deductions were therefore unlawful, as he did not authorise them. Copies of the payslips of Applicant were tendered as evidence and marked "C".

ANALYSIS

7. Section 66 (1) (c) of the *Labour Code Order 24 of 1992*, recognises the right of the employer to terminate the contract of employment of its employee or employees, on account of its operational reasons. However, there are a number of requirements that must be satisfied, in order for such termination to be recognised as fair. These requirements sound in both procedure and substance and are provided for under section 19 of the *Labour Code (Codes of Good Practice) Notice of 2003*.
8. In terms of section 19 (4) the *Codes of Good Practice (supra)*, before an employee can be fairly terminated for operational reasons, such an employee must be consulted about the possibility of their termination. The said section further provides that in the consultation process, the employer is under an obligation to engage in a joint problem solving exercise with the concerned employee. In terms of the *Codes of Good Practice (supra)*, this exercise is intended for parties to explore the possible alternatives short of dismissal. Clearly, this exercise is very important as it determines the continuation or termination of an employment relationship of parties.
9. Given the manner in which Applicant was terminated, this requirement was flaunted, thus resulting in his dismissal being unfair. The flaunt of procedure on the part of the Respondent, is of such a serious nature that it is worthy of an award for reinstatement of Applicant. However, Applicant clearly does not wish to be reinstated as he has asked for compensation. This option is indeed open to Applicant in terms of section 73 of the *Labour Code Order (Supra)*. We will deal with the computation of his compensation amount at a later stage.
10. On the second claim, We are satisfied that the deductions made from Applicant's salary were unlawful. His evidence is unchallenged and as such it must be taken as a true reflection of what took place (see *Theko vs. Commissioner of Police and Another 1991-1992 LLR-LB 239*). We therefore find that Applicant is entitled to payment of monies deducted from his wages as claimed. The computations of both the claim for compensation and unlawful deductions are made hereunder.

COMPUTATION OF AWARD

Compensation

11. In terms of his initial contract of employment, Applicant was left with only three months at the time of his termination, to the date of expiry of his employment contract. If he had not been unfairly terminated, Applicant would have served until the end of the contract. He is therefore entitled to the remaining 3 months wages computed as follows,
 $M2,700.00 \times 3 = \mathbf{M8,100.00}$

12. Applicant has further alleged that after his termination, his job is still in existence. he also alleged that if it was not for the termination, and given that he had been promised renewal if the job continued, he would have continued to work with Respondent beyond the initial contract. If this is so, Applicant would be renewed by at least another year up to February 2014. However, Applicant has claimed 10 months from the date of his termination. This means he is asking for payment from December 2012 to September 2013.

13. We have already awarded him the first three months. In the remaining 7 months, Applicant was only out of employment for 4 months upon to June 2013. As for the time of claim that he was in employment, which is 3 months starting from July to September 2013, We will only award him the difference in salary. The computation of Our award is therefore as follows,
 $M2,700.00 \times 4 = \mathbf{M10,800.00}$
 $M2,700.00 - M2,500.00 = M200.0 \times 3 = \mathbf{M600.00}$

Unlawful deductions

14. If an amount of M20.00 was deducted from Applicant's wages over a period of 6 months. He is therefore entitled to repayment of M120.00 calculated as thus,
 $M20.00 \times 6 = \mathbf{M120.00}$

The total award amount is therefore as follows,
 $M8,100.00 + M10,800.00 + M600.00 + M120.00 = \mathbf{M19,620.00}$

AWARD

We therefore make an award as follows,

- a) The dismissal of Applicant is unfair;
- b) That Respondent pay Applicant the amount of M19,620.00 as compensation and unlawful deductions from his wages;
- c) That the said amount be paid to Applicant within 30 days of receipt herewith; and
- d) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 28th DAY OF OCTOBER 2013.

**T. C. RAMOSEME
DEPUTY PRESIDENT (a.i)
THE LABOUR COURT OF LESOTHO**

**Ms. P. LEBITSA
MEMBER**

I CONCUR

**Mrs. L. RAMASHAMOLE
MEMBER**

I CONCUR

**FOR APPLICANT:
FOR RESPONDENT:**

**MS. MOSOLA - CMQ
NO ATTENDANCE**