

IN THE LABOUR COURT OF LESOTHO

LC/REV/36/11

HELD AT MASERU

In the matter between:

LESOTHO PUBLIC SERVICE STAFF ASSOCIATION APPLICANT

and

**SKHULUMI NTSOAOLE
DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

DATE: 09/05/14

Review of an arbitral award - Termination of a fixed term contract prior to its expiration on alleged misconduct - Allegations of gross irregularities on the part of the Arbitrator not proved - Review application dismissed.

INTRODUCTION

1. The applicant is an Association representing public officers, and the 1st respondent had been engaged by it as an Executive Secretary on a three year fixed term contract from 1st December, 2007 to 30th November, 2010. He was, however, dismissed on 30th July, 2009, prior to the expiry of this contract following a disciplinary hearing over a series of charges including fraud. The 1st respondent successfully challenged the fairness of the said dismissal before the Directorate of Dispute Prevention and Resolution (DDPR) and it ordered that he be paid a sum of One Hundred and Seventy-Six Thousand and Hundred Maloti (M176 100.00) being wages for the remainder of the contract period. It is against this order that the applicant has lodged the present review application.

APPLICANT'S CASE

2. In order to put the issue at hand into its proper perspective, we found it prudent to have an overview of the circumstances that gave rise to this review application. A series of charges had been levelled against the 1st respondent by

the applicant ranging from fraud, dishonesty, insubordination to failure to account.

(i) Unauthorised printing of members' identity cards

Evidence led on behalf of the applicant at the DDPR was, *inter alia*, that following applicant's National Executive Committee's resolution that its members be issued with identity cards, the applicant was ordered to secure three quotations in order to facilitate the printing of such cards. The applicant managed to get two, one for Forty-Five Maloti (M45.00) per card and the other for Fifteen Maloti (M15.00) per card. The third one was secured by a colleague and amounted to Twenty - Five Maloti (M25.00) per card. The Executive Committee pleaded with the 1st respondent to try to bargain for Ten Maloti (M10.00) per card.

It was testified on behalf of the applicant that despite this decision to negotiate for a lower bid, the 1st respondent went ahead to have the cards printed at Fifteen Maloti (M15.00) per card, without the Association's approval. The Company that offered the bid was RHA Consultants and was apparently paid a sum of Ninety-Thousand Maloti (M90 000.00) for the job. A number of irregularities regarding these transaction were alleged against the 1st respondent, for instance, that the invoice had been generated on the Association's computer and that he had signed it on behalf of the manager of RHA. The applicant suspected in the circumstances that the 1st respondent had personally benefitted from the transaction.

(ii) Unauthorised installation of a gate by the 1st respondent at his home at applicant's expense

The applicant was also accused of having installed a gate at his private residence with applicant's funds without the authorisation of the National Executive Committee. Confronted with this allegation, the 1st respondent had stated that he had installed the gate for the safe keeping of applicant's vehicle that he was using. He averred that this had been done with the full approval of the President and the Treasurer of the Association and it had been agreed that the cost of the installation would be treated as a loan. According to the applicant, the 1st respondent had failed to pay the loan.

(iii) Insubordination

On this charge, the applicant alleged that following 1st respondent's suspension from the Association he went to the media and alleged that there was a faction in the Executive Committee which wanted to hijack the Association. According to the applicant, this constituted gross insubordination as it violated his contract of employment.

(iv) Failure to account for M5 681.13

On this point, it was testified on behalf of the applicant that the 1st respondent had been issued with a cheque for Twenty-Two Thousand Maloti (M22 000.00) for the purchase of office equipment for the Association in Bloemfontein and the 1st respondent failed to account for a sum of Five Thousand, Six Hundred and Eighty-One Maloti, Thirteen Cents (M5 681.13).

IN DEFENCE - 1st RESPONDENT'S CASE

3. In reaction, 1st respondent contended that he had a general mandate from the Executive Committee to print the identity cards. He pointed out that it was not clearly defined how he should carry out his duties as an Executive Secretary, and more often than not he used his discretion. He confirmed receiving the three quotations and acceded that he indeed used RHA Consultants to print the said cards. His basis of selecting them was that he knew the owner of the Consultancy firm, a Mr du Plessis who he alleged helped the Association with some finances. He indicated that he did not benefit personally from the transaction. On the installation of the gate, his defence was that one of the conditions of the insurance of the vehicle was that it should be kept in a safe place. He maintained that his residence was not secure and he approached the President and the Treasurer about the matter, and they suggested that the issue be tabled before the National Executive Committee.

4. The 1st respondent was charged with these offences, found guilty and dismissed. As aforesaid, he successfully challenged the substantive and procedural fairness of the said dismissal before the DDPR. He was awarded compensation to the tune of One Hundred and Seventy-Six Thousand and Hundred Maloti (M176 100.00) representing wages for the remainder of his contract period less monies paid for the installation of the gate. Dissatisfied with this order, the applicant lodged the present review application.

GROUNDS OF REVIEW

5. Applicants contended that the learned Arbitrator erred and misdirected himself and committed a mistake of law that materially affected his decision in:

- a) holding that the onus was on the applicant to furnish proof that it had given an instruction barring the 1st respondent from printing the cards and that such a decision had to be supported by a resolution of the National Executive Committee (NEC). According to them, there was no dispute that such an instruction had been issued and by so deciding the learned Arbitrator considered irrelevant issues;
- b) concluding that the charge of fraud is a criminal offence which has to be proven beyond reasonable doubt;
- c) setting-off an amount of M3,900.00 for the unlawful installation of the gate thereby substituting his own punishment to that imposed by the applicant's disciplinary panel;
- d) that it was the applicant who ought to produce receipts that were handed in against the money that the 1st respondent had been given, and that the applicant could have deducted the money from applicant's salary;
- e) infringing the provisions of ***Section 73 of the Labour Code Order, 1992 (as amended)*** by, among others, failing to consider mitigation of loss.

6. In reaction, 1st respondent's Counsel argued that the question of compensation was being raised for the first time from the bar, and this should not be allowed as he ought to be given an opportunity to address it. He further argued that the onus is always on the employer to prove the fairness of the dismissal and there was therefore no mistake of law on the part of the learned Arbitrator.

7. On the issue of the authority to print the cards, he submitted that the National Executive Committee ought to have adduced proof that it made a resolution barring the 1st respondent from printing the cards and that the 1st respondent benefitted from the transaction. He submitted that the applicant failed to prove any of the recognised grounds of review, and mainly made bare statements of

mistake of law without substantiating them. As far as he was concerned, the applicant was simply unhappy with the DDPR award.

THE COURT'S ANALYSIS

8. In terms of ***Section 66 (1) of the Labour Code Order, 1992 (as amended)***, the onus for proving the validity of a dismissal rests with the employer. The Section provides that an employee may not be dismissed ***“whether adequate notice is given or not, unless there is a valid reason for termination of employment ...”*** It was indeed incumbent upon the applicant to adduce proof that the National Executive Committee had instructed the applicant not to proceed with the printing of the cards at a bid higher than M15.00 per card and that despite this instruction, he went ahead to print them. The learned Arbitrator indicated at paragraph 12 of his award that the applicant failed to furnish proof of a resolution of the National Executive Committee barring the 1st respondent from printing the identity cards and concluded that they could not prove their allegation against the 1st respondent on a balance of probabilities.

9. As far as we are concerned, the learned Arbitrator applied his mind to the issue. We could have perhaps reached a different conclusion, but it must be borne in mind that DDPR proceedings are only subject to review. We discern no irregularity here on the part of the learned Arbitrator. In review proceedings the Court concerns itself with the method of the trial and not with the outcome. It is grave irregularities that occur during the course of proceedings that become a subject of review - See ***Johannesburg Consolidated Investment Co., v Johannesburg Town Council 1903 TS 111***. The learned Arbitrator indicated further that the applicant had also failed to show how the 1st respondent personally benefitted from the printing of the identity cards as it had alleged. It just appears to have made bare allegations or unsubstantiated assumptions. Having not been the trier of facts in this case, we cannot overturn the learned Arbitrator's ruling on the issue as he applied his mind to it and arrived at the decision that he arrived at.

10. The DDPR record reveals at Page 94 of the paginated record that some members of the National Executive Committee knew of the arrangement regarding the printing of cards. The record (quoted ***verbatim***) reads:-

Prosecutor: Were other members of the association inclusive of the Executive Committee know (sic) about this issue because if you have been listening they said you were doing this without their concern.

Ntsoaole: Others knew but others didn't know.

Prosecutor: Example of people who knew this.

Ntsoaole: Mr Ts'epo Mofana, the President knew and Ms Ts'aletseng who was a Treasurer.

Prosecutor: So they didn't have a problem with this?

Ntsoaole: No even by the time we were at one of the districts Mr Ts'epo used to help me with some work on the cards after work and dinner.

11. Testifying against the 1st respondent were the then General Secretary, Ms Boitumelo Manong, Mr Libenyane Mofoka and Mr Mohale Thipe, then Vice President. Ms Ts'aletseng testified on behalf of the 1st respondent. It appears as the learned Arbitrator observed that the National Executive Committee was divided on the alleged misconduct against the 1st respondent.

12. It does not appear to be a substitution of the punishment meted out by the applicant to the 1st respondent when the learned Arbitrator concluded that the 1st respondent ought to pay for the gate which had been installed at his private residence. As far as we are concerned, it was just a question of fairness to the applicant.

13. In his judgment, the learned Arbitrator did allude to fraud being a criminal offence, but the statement does not appear to have been the basis of his finding. He therefore cannot be accused of having used a criminal standard. He stated at paragraph 12 of his award that fraud constitutes a criminal offence which has to be proved beyond reasonable doubt. The relevant portion read:-

The charge of fraud is a criminal offence which has to be proven beyond reasonable doubt, and the respondent did not satisfy the court as to what misrepresentation applicant made, how that misrepresentation induced respondent to contract with RHA and how applicant benefitted from the transaction.

The applicant failed to substantiate this statement as a ground of review. In our view, it appears to have been a loose statement. Applicant's Counsel failed to show how this formed part of the learned Arbitrator's considerations in arriving at his decision. As he continued with his statement, the latter appears to have placed emphasis on misrepresentation, and pointed out that it was not proven that the 1st respondent had benefitted from the RHA transaction as it had been alleged by the applicant.

14. Addressing the issue of the installation of the gate the learned Arbitrator pointed out at paragraph 13 of his award that:-

What ought to have happened then is that the respondent should have deducted from the applicant's salary, money used to install the gate. This too does not fit the requirements of the crime of fraud.

The applicant had a duty to show the Court that the learned Arbitrator indeed adopted a criminal standard in his determination. Our problem also seems to be that the statement about fraud does not seem to relate to what was said in the preceding statement. It was indicated in the papers filed of record and during proceedings that the learned Arbitrator applied a criminal standard, but it was not shown to the Court how. Was it by uttering the above statement? The statement might be confusing, but in our opinion it is not so gross as to vitiate the whole award. To us, it appears more of inelegance in writing than an irregularity.

15. The issue of mitigation of loss being raised for the first time from the bar is disregarded. It is trite law that parties stand and fall by their pleadings. A defendant is entitled to know the case that he or she has to meet - **Beck's Theory and Principles in Civil Actions 6th ed., at p. 49**. There's a plethora of authorities on the issue including the decision of the Court of Appeal in ***Fraser's Lesotho Ltd v Hata - Butle (Pty) Ltd 1999 - 2000 LLRLB 65***. Generally speaking, issues in civil cases should be raised in the pleadings and if an issue arises which does not appear from the pleadings in their original form, an amendment should be sought - ***Middleton v Carr 1949 (2) SA 374 at 385-6*** per Schreiner JA.

16. The learned Arbitrator appreciated that the standard of proof in the case before him was on a balance of probabilities. He correctly stated at paragraph 11 of his award that in dismissal disputes the onus is always on the employer to prove that the dismissal was fair and such has to be on a balance of probabilities. It was also incumbent upon the applicant to show that the 1st respondent failed to account for the money that he had been given for the purchase of furniture in Bloemfontein. Irrespective of how the learned Arbitrator put it at paragraph 14 of the award, it ultimately boiled down to the question of evidence.

17. The Court having failed to find fault with the learned Arbitrator's award comes to the following conclusion:-

- a) That the review application is dismissed;
- b) That the DDPR award in AO 589/09 is allowed to stand;

- c) Applicants have to abide by the award within thirty (30) days from the handing down of this judgment;
- d) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 09TH DAY OF MAY, 2014.

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

L. MATELA
ASSESSOR

I CONCUR

M.MOSEHLE
ASSESSOR

I CONCUR

For the applicant: Adv., B. Sekonyela

For the 1st respondent: Adv., N.T Ntaote