IN THE LABOUR COURT OF LESOTHO **LC/REV/62/12**

HELD AT MASERU

In the matter between:

NTHONA KOMETSI **APPLICANT**

and

C & Y GARMENTS **1st RESPONDENT**
DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION **2nd RESPONDENT**

JUDGMENT

DATE: 14/11/14

Review of an arbitral award - Double jeopardy - The employee forfeiting her wage for the day on which she was absent from work and subsequently being dismissed from work for misconduct - Employee contending the act constituted a double punishment - Arbitrator dismissing the argument and holding dismissal to have been fair - Court confirming the Arbitrator's decision on grounds that she properly applied her mind to the question that was before her in that forfeiture of a wage was not a punishment but arose as a result of her failure to render services on the particular day as opposed to dismissal which was a punishment for the misconduct of absenteeism - Arbitrator's award upheld.

INTRODUCTION

1. This is an application for the review of an award handed down by the Directorate of Dispute Prevention and Resolution (DDPR) in ***A 0160/12*** in which the learned Arbitrator had found applicant's dismissal to have been fair and had dismissed her referral for an unfair dismissal claim. It is common cause that the applicant had absented herself from work for two days but only produced a sick leave certificate in respect of one day. It is also indisputable that she was dismissed from her employment for an unauthorised absence from work for the day that was not covered by the sick leave certificate and the employer having not been satisfied with her explanation deducted the day's salary for the day. It further emerged that on the fateful day that led to her

dismissal, the applicant already had two warnings still in relation to absenteeism. Notably, the warnings were still valid.

2. The applicant deemed her dismissal to have been unfair and constituting a double jeopardy in that the employer had already withheld her pay for the day and then subsequently dismissed her. She felt she could not be dismissed as the employer had already taken punitive measures against her by withholding her wages for the day in question. The learned Arbitrator having concluded that the dismissal was fair, the applicant approached this Court seeking to have her decision reviewed and set aside.

GROUNDS OF REVIEW

3. The applicant sought to have the learned Arbitrator's award reviewed and set aside on the following grounds:-

i) That she overlooked the fact that the applicant could not be subjected to double jeopardy. Applicant's Counsel contended that the employer had already taken punitive measures against the applicant by withholding wages for the particular day in which she had absented herself from work and for them to dismiss her constituted double jeopardy or double punishment;

ii) Counsel argued further that she took into consideration irrelevant factors in arriving at the conclusion that applicant's dismissal was justified; and

iii) That she failed to apply her mind to the case that was before her by not considering that applicant's absence from work was not wilful.

4. In reaction, 1st respondent's Counsel argued that it was appropriate for the learned Arbitrator to have dismissed applicant's claim for unfair dismissal. He contended that the double jeopardy doctrine is not applicable in applicant's case because she had already had prior warnings relating to absenteeism at the time of dismissal. He brought to the Court's attention that 1st respondent's regulations were clear that absenteeism was a dismissable offence, and by absenting herself without authority the applicant violated a workplace rule.

5. Applicant's defence had been that she had gone to consult a medical doctor but due to long queues she could not be attended to and only saw a doctor the

next day during which she was given a sick leave. She contended that she ought not to have been dismissed for absenteeism because she had forfeited her wage for the day in question. The employer took exception because she had not reported that she would be absent from work.

ABSENCE FROM WORK AS A FORM OF MISCONDUCT

6. The rule against absence from work without authority has its origins in the common law obligation on an employee to make his or her services available to the employer. The requirement that employees report for work and remain there for the duration of the time they have agreed to do so is fundamental to the orderly operation of the business. An employer therefore has a right to expect an employee not to be absent from work in circumstances where the absence cannot be justified. One of the basic and primary obligations of employees under a contract of employment is to place their personal services at the disposal of the employer. Where an employee fails to render service, the employer is entitled to deduct from the employee's wage an amount proportionate to the absence. Misconduct is regarded as a valid reason for dismissal in terms of ***Section 66 (1) (b) of the Labour Code Order, 1992***.

7. Common law duties of both the employer and the employee are the most important foundations of any employment relationship, often referred to as ***'implied terms'*** of the contract of employment. These are imported into the contract of employment by operation of the law. Just as an employer has certain common law duties towards the employee in terms of the contract of employment, the employee on his or her part has common law duties towards the employer. If any of the parties is in breach of any of the terms, it gives the other party a right to terminate the contract of employment. The employer's common law duties include the duty to remunerate the employee for services rendered and to ensure that the working conditions are safe and healthy whilst the employee's common law duties include the duty to stay and remain in service; to remain efficient; to promote the employer's business interests; to be respectful and obedient and to refrain from misconduct generally.

WHETHER THERE WAS DOUBLE JEOPARDY

8. As aforesaid, applicant's Counsel argued that the fact that applicant's wages were held for the day for which she did not have a sick leave certificate coupled with dismissal amounted to double jeopardy. Double jeopardy is a procedural defence that forbids a defendant from being tried again on the same or similar

charges following an acquittal. It is basically all about fairness and emanates from the principle that it is unfair to ***"jeopardise"*** a person twice for the same offence. It emanates from the criminal law and entails being punished twice for a similar offence. To this end, ***Section 12(5) of the Constitution of Lesotho*** provides that:-

> ***No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall be tried again for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.***

9. It, however, appears to have been imported into other spheres of the law. In the employment context it connotes that if an employee has been acquitted at a disciplinary enquiry, or the presiding officer has imposed a penalty less severe than a dismissal, they cannot generally be subjected to a second enquiry in respect of the same offence. The issue of asking for permission for absence from work is a question of discipline. Hence, applicant's argument that she ought not to have been dismissed by virtue of having not been paid for the day is out of the question. If absenteeism did not constitute a dismissable offence, employees would just leave their work willy nilly, knowing that they can always sacrifice wages for days for which they were absent. This would have very serious repercussions on the economy.

10. The two issues of forfeiture of pay and dismissal are in the circumstances of this case very distinct. Dismissal in this case was a punishment meted out for the misconduct of absenteeism, whilst the withholding of pay impinged on failure to render services. The rendering of services is a prerequisite to the employee's right to claim payment of wages. In terms of the common law, an employee who does not tender service is not entitled to receive wages irrespective of the reason for failure to tender services. This is the principle of "***no work, no pay***." Exceptions are of course in cases of paid leave, sick leave or any authorised absence. There are cases where an employee may forfeit his or her pay as a form of punishment, but that was not the case ***in casu***. The applicant has not claimed that she was subjected to two disciplinary hearings, one for which she was punished by forfeiture of pay and the other by a dismissal. The double jeopardy doctrine can therefore not be applicable to this case.

11. In ***Commander LDF and Others v Ramokuena and Another C of A (CIV) N0. 19 of 2005*** the Court of Appeal had to deal, ***inter alia,*** with the doctrine of double jeopardy in an employment set-up. This was a case in which respondents had challenged their discharge (dismissal) from the Army in terms of ***Section 31 (b) and (c) of the Lesotho Defence Force Act, 1996***. They alleged, among others, that their discharge amounted to double punishment or double jeopardy in as much as they had already been charged disciplinarily and served their respective punishments. It was argued on their behalf that they had already been fully punished by the Disciplinary Committee. The Court held that the Commander was entitled under Section 31 to consider the respondents' previous convictions and punishments cumulatively in discharging them from the Force. The respondents were not dismissed for their latest disciplinary offences but for ***"several military offences"*** taken cumulatively and their discharge from duty could not be taken to be a double jeopardy. The double jeopardy principle could therefore not be invoked in the circumstances.

12. In ***Koatsa v National University of Lesotho 1985-89 LAC 335*** at ***338***, cited with approval in the above case, applicant's Counsel had argued that the Council for the respondent University was bound by the punishment which had been imposed on the appellant by the Non-Academic Staff Disciplinary Committee, and that the Council was not entitled thereafter to punish the appellant by terminating his services. The Court rejected this argument as lacking in substance. Drawing inspiration from these two cases, we feel applicant's Counsel misconstrued the double jeopardy doctrine because the applicant had not been charged twice for the same offence. As Aforementioned, the forfeiture of pay was in respect of failure to render services and the dismissal related to absenteeism as a misconduct, hence the applicant was not charged twice for a similar offence.

13. The deductions to her wages for the day she absented herself without authority were in no way a penalty or sanction for absenteeism but were for failure to render services on the particular day. They were by operation of the law and not as result of a disciplinary hearing. ***Section 85 (4) of the Labour Code Order, 1992*** entitles an employer to make deductions from the wages of an employee for periods of unauthorised absence. Furthermore, ***Section 123 (5)*** of the Code provides that [a]***n employee shall not be entitled to paid sick leave unless he or she produces to the employer a certificate of incapacity signed by***

a registered medical practitioner or by a person in charge of a dispensary or a medical aid centre acting on behalf of a registered medical practitioner....

14. We noted that the concept of double jeopardy was raised for the first time before this Court. The dispute in the DDPR mainly revolved on whether applicant's dismissal was fair or not and not on the issue of double jeopardy. Hence, the learned Arbitrator approached the question around ***Section 66 of the Labour Code*** (***supra***) and ***Section 10 of the Labour Code (Codes of Good Practice) Notice, 2003***. The latter Section provides that in determining whether a dismissal for misconduct was fair the Court should consider:-

a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;

b) if a rule or standard was contravened, whether or not

(i) the rule is a valid or reasonable rule or standard ;

(ii) the rule is clear and unambiguous;

(iii) the employee was aware, or could reasonably be expected to have been aware of the rule or standard;

(iv) the rule or standard has been consistently applied by the employer;

(v) dismissal is an appropriate sanction for the contravention of the rule or standard.

It was indisputable that absenteeism was declared a misconduct in terms of the 1st respondent's workplace rules and applicant was aware of it.

15. Applicant's Counsel averred as one of his grounds for review that the learned Arbitrator had failed to apply her mind to the case that was before her by failing to appreciate that applicant's absence from work was not wilful. In our view, the learned Arbitrator properly applied her mind to the case that was before her before arriving at the decision that the employer had a valid reason to dismiss the applicant. She pointed out that her decision was influenced by the gravity of the offence and the fact that the applicant already had two previous warnings which were still valid relating to absenteeism. It appears the two warnings exacerbated applicant's problem. Corbett JA explained the concept of

a ***"failure to apply one's mind"*** in ***Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988 (3) SA 132 (AD) at 152 C- D*** as:

> ***Proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the [***Arbitrator***] misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the [***Arbitrator***] was so grossly unreasonable as to warrant the interference that he had failed to apply his mind to the matter in the manner aforestated.***

16. The concept has been said to include: A failure to consider, alternatively, to decide, an issue - ***Lynch v Union Government (Minister of Justice) 1929 AD 281 at 285***; the misconstruing of evidence, taking into account facts that are not relevant to the issues to be considered and a failure to take into account relevant facts such that it renders the result of the entire process inappropriate and unreasonable - ***Hira and Booysen and Another 1992 (4) SA 61 (A)***.

17. This being a review application, it is trite that in a review application the Court does not necessarily have to agree with the learned Arbitrator's decision as long as he or she has considered or decided on the relevant issues or exercised the discretion conferred on him or her. In ***Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141*** at ***154 per Lord Brightman*** the Court held that ***"judicial review is concerned, not with the decision but with the decision - making process. Unless that restriction on the power of the Court is observed, the Court will in my view, under the guise of preventing abuse, be itself guilty of usurping power".*** Having found that the learned Arbitrator properly applied her mind to the case that was before her by considering all the relevant factors in the case, the Court finds nothing irregular with her award and dismisses the application for review.

DETERMINATION

a) That the double jeopardy principle is not applicable in this case;

b) That the learned Arbitrator properly applied her mind to the case that was before her;

c) The award in ***A0168/12*** is therefore allowed to stand;

d) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 14TH DAY OF NOVEMBER, 2014.

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

M.THAKALEKOALA **I CONCUR**
ASSESSOR

M. MALOISANE **I CONCUR**
ASSESSOR

FOR THE APPLICANT: **ADV., M.J RAMPAI - PHOOFOLO CHAMBERS**
FOR THE RESPONDENT: **ADV., M. KUMALO - LEGAL LINK CHAMBERS**