

**IN THE LABOUR COURT OF LESOTHO**

**HELD AT MASERU**

**LC/04/2015**

**IN THE MATTER BETWEEN**

**LINEO BULANE**

**APPLICANT**

**AND**

**NEW STAR SUPERMARKET (PTY) LTD**

**RESPONDENT**

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**JUDGMENT**

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*Claims for unfair dismissal, unpaid overtime and weekly rest days. Respondent failing to attend and court proceedings in default upon application by Applicant. Applicant successfully establishing her claims. Court finding that the dismissal of Applicant constitutes both an unfair labour practice and an automatically unfair dismissal. Court granting judgment in her favour. Court No order as to costs being made.*

**BACKGROUND OF THE DISPUTE**

**1.** These are claims for unfair dismissal for being a member of a trade union, unpaid weekly rest days and unpaid overtime.

The matter was opposed but heard in default of Respondent by reason of its non-attendance. In coming to this conclusion We were guided by the provisions of Rule 16 of the *Rules of this Court*.

- 2.** The brief background of the matter is that Applicant was an employee of Respondent until she was dismissed. Unhappy with the dismissal, she referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR), together with claims for overtime, public holidays, weekly rest days and unpaid wages.
- 3.** The matter was duly conciliated upon but failed to resolve. Having formed the opinion that the unfair dismissal claim constituted an unfair labour practice, the matter was referred to this Court in terms of section 227 (5) of the *Labour Code (Amendment) Act 3 of 2000*, presumably read with section 226(3) thereof, as it was referred together with other claims that would ordinarily lay within the jurisdiction of the DDPR. It was set before this Court on this day.
- 4.** As earlier, noted, Respondent did not attend, and as a result, Applicant applied to the Court to be heard in default of Respondent. We granted the application and directed that the matter proceed in the merits as such. Having heard the evidence of Applicant, and having considered evidence filed in support, Our judgment follows.

## **EVIDENCE AND FACTS**

**5. Applicant's evidence: Lineo Bulane**

Applicant testified that she was employed by Respondent in September 2001, until her dismissal in September 2014. She was employed in the position of a Clerk at the time of her dismissal, and earned a monthly salary of M1,608.00.

**6.** She stated that on the day in issue, she was told by Respondent manager of Chinese origin, whose names were unknown to her, that she had been terminated. It was explained to her that she had been terminated because she was a member of a troublesome union to the Respondent. Thereafter she was denied the chance to react to the accusation. She claims that she was unfairly dismissed as the reason for her dismissal is invalid and that she was denied a chance to defend herself.

**7.** Applicant asked to be reinstated without loss of remuneration and other entitlements, and alternatively 36 months wages as compensation for her unfair dismissal. She also asked the Court to consider notice and severance pay in determining her compensatory award, should it elect to award compensation as opposed to reinstatement.

**8.** Applicant further claimed overtime. She stated that during her employment with Respondent, she worked overtime of 4 hours every day. As a result in the period from July 2012 to September 2012, she worked 1274 overtime hours which amounted to M424.60. Further that from October 2012 to

September 2013, she worked 1503 overtime hours, which amounted to M2,003.90. Furthermore, that from October 2013 to September 2014, she worked 1608 overtime hours, which amounted to M2,142.40. She claimed the total overtime amount of M4,570.90.

**9.** Regarding the weekly rest days claim, Applicant testified that from July 2012 to September 2012, she worked 15 weekly rest days which amounted to M881.85. Further that from October 2012 to September 2013, she worked 52 weekly rest days which amounted to M3,607.19. Furthermore, that from October 2013 to September 2014, she also worked 52 weekly rest days, which amounted to M3,859.10. She claimed the total weekly rest days amount of M8,348.14.

## **SUBMISSIONS**

**10.** Mr. Mokhahlane for Applicant submitted that evidence had shown that the dismissal of Applicant was unfair, as she was dismissed for her membership into a trade union. He stated that this is not only unfair but also amounts to an unfair labour practice. He stated that Applicant is entitled to the principal remedy of reinstatement in terms of section 73 of the *Labour Code Order 24 of 1992*, alternatively 36 months as compensation. He asked that in determining compensation, the Court consider both notice and severance pay, as prayed by Applicant.

**11.** Regarding the weekly rest days claim and overtime claim, Mr. Mokhahlane submitted that Applicant had satisfied the requirements of section 118 of the *Labour Code Order (supra)* in that she worked both during weekly rest days and overtime. He added that in terms of the law, an employee must be paid. He asked that the Court grant judgment as shown by evidence.

## **ANALYSIS**

**12.** In terms of section 66 (1) of the *Labour Code Order (supra)*, an employee may only be fairly dismissed on the following grounds:

- “(a) Connected with the capacity of the employee to do the work the employee is employed to do (including but not limited to an employee’s fraudulent misrepresentation of having specific skills required for a skilled post);*
- (b) Connected with the conduct of the employee at the workplace; or*
- (c) based on the operational requirements of the undertaking, establishment or service.”*

**13.** Subsection (3) (a) thereof provides that:

*“The following shall not constitute valid reasons for termination of employment –*

- (a) Trade union membership or participation in trade union activities outside working hours or, with the consent of the employer, within working hours;”*

**14.** Section 196(2) of the *Labour Code Order (supra)*, provides that,

*“(2) Any person who seeks, by intimidation, threats, dismissal, imposition of a penalty, giving or offering to give a wage increase, or any other means, to induce an employee to refrain from becoming or to refrain from continuing to be a member, officer or trustee of a trade union shall commit an unfair labour practice.”*

**15.** *In casu*, the reason behind the termination of Applicant is not valid. We say this because it neither relates to her incapacity, workplace misconduct or the operational requirements of the employer. Rather, the reason is based on her membership to a trade union. A dismissal based on this reason is clearly a violation of both sections 196(2) and 66 (3) (a) of the *Labour Code Order (supra)*. It amounts to both an unfair labour practice and an automatically unfair dismissal, irrespective of whether a hearing was given or not. As a result Applicant is entitled to a relief under section 73 of the *Labour Code Order (supra)*.

**16.** Regarding, Applicant’s claim for overtime, the instructive section is section 118 of the *Labour Code Order (supra)*. In terms of subsection (3), thereof, an

*“employer may request an employee to work overtime in addition to the normal hours provided for in this section, for up to 11 additional hours during any one week. In respect of the additional hours, the employer shall pay the employee for*

*such overtime at a rate not less than one and one quarter times his or her normal wage rate.”*

**17.** In view of the dictates of the above section, Applicant is entitled to be paid for working overtime, during the period in issue. She has satisfied Us that she is entitled to be paid.

**18.** About week rest days claims, section 117 (2) of the *Labour Code Order (supra)* provides that,  
*“whenever an employee is required to work on his/her day of weekly rest or on a public holiday, the employer shall pay him or her for such work at double the employee’s wage rate for an ordinary work day.”*

**19.** In the same vein, in terms of the dictates of the above section Applicant is entitled to be paid for working on her rest days in the period in issue. We are satisfied that she has established that she is entitled to be paid.

## **FORMULATION OF THE AWARD**

### *Unfair dismissal*

**20.** Applicant has prayed for reinstatement without loss as a remedy. In terms of section 73 (1) of the *Labour code Order (supra)*,

*“If the Labour Court holds the dismissal to be unfair, it shall, if the employee so wishes, order the reinstatement of the employee in his or her job without loss of remuneration,*

*seniority or other entitlements or benefits which the employee would have received had there been no dismissal.”*

**21.** We have already determined that the dismissal of Applicant is not only unfair but automatically unfair. As a result, as in line with both her wishes to be reinstated and the dictates of section 73 (1) of the *Labour Code Order (supra)*, We award to Applicant the remedy of reinstatement as prayed, with effect from 7<sup>th</sup> October 2015.

### **OVERTIME**

**22.** In terms of section 118 of the *Labour Code Order (supra)*, an employee can only work up to 11 hours per month. This means that in the period from July 2012 to September 2014, which is 26 months, applicant could only work for 1,144 hours. This is computed as follows,

1 week = 11 hours maximum

1 month = 44 hours maximum (11 x 4 weeks)

26 months = 1144 hours (26 months x 44 hours)

Her monetary entitlement is thus

1144 hours x 1.25 x 1608.00

195

= M11,792.00

**23.** The rest of the hours in excess of the 1144 hours constitute an offence in terms of section 118 (4) of the *Labour Code Order (supra)*. Subsection (4) provides that

*“Any person who -*



- .....
- (b) Requests or permits an employee to work hours of overtime in contravention of subsection (3); or
- (c) .....shall be guilty of an offence.....”

*Weekly rest days*

**24.** Applicant claims to have worked 119 week rest days from July 2012 to September 2014. These are computed as follows:

July 2012 to September 2012	15 days
October 2012 to September 2013	52 days
October 2013 to September 2014	<u>52 days</u>
	119 days

Her entitlement is thus as follows:

$$\frac{\text{M1608.00 (salary at termination x 119 days x 8 hrs of work)}}{195 \text{ hours}}$$
$$= \text{M7,850.34}$$

*Lost wages*

**25.** Applicant was terminated in September 2014. From then to date of reinstatement are 12 full months. As a result, her lost wages entitlement is as follows:

$$\text{M1,608.00} \times 12 = \text{M19,292.00}$$

**26.** Applicant's total entitlement in monetary figures is therefore,  $\text{M11,792.00} + \text{M7,850.34} + \text{M19,296.00} =$   
**M38,938.34**

## **AWARD**

We therefore make the following finding,

- 1) The dismissal of Applicant is unfair.
- 2) Respondent is ordered to reinstate Applicant on the 7<sup>th</sup> October 2015, without loss of remuneration, seniority or other entitlements or benefits which she would have received had there been no dismissal.
- 3) Respondent is ordered to pay to Applicant the sum of **M38,938.34** being her lost wages, unpaid weekly rest days and overtime.
- 4) The order is to be complied with within 30 days of issuance herewith.
- 5) Failure to reinstate Applicant on the stated date, shall cause her to accrue an amount equal to her monthly salary for every month that Respondent fails, neglects and/or refuses to comply with this order, without prejudice to the right of Applicant to approach this Court for enforcement and/or contempt.
- 6) No order as to costs is made.

**THUS DONE AND DATED AT MASERU ON THIS 7<sup>th</sup> DAY OF SEPTEMBER 2015.**

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

**MRS. MOSEHLE**

**I CONCUR**

**MRS. THAKALEKOALA**

**I CONCUR**

**FOR APPLICANT:  
FOR RESPONDENT:  
APPEARANCE**

**MR. MOKHAHLANE  
NO**