

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/REV/26/2014

A0626/2013

IN THE MATTER BETWEEN

SINOHYDRO CORPORATION (PTY) LTD

APPLICANT

AND

RORISANG MOREKI

1st

RESPONDENT

DDPR

2nd

RESPONDENT

JUDGMENT

Application for the review of arbitration award. Applicant claiming failure to apply a mind on the part of the learned Arbitrator. Court finding that the learned Arbitrator duly applied Her mind to the facts and evidence before Her, and the applicable legal principles. Court refusing the review application and reinstating the award of the DDPR. No order as to costs being made.

BACKGROUND OF DISPUTE

1. This is an application for the review of the arbitration award in referral A0626/2013. Two grounds of review, both involving a claim for failure to apply a mind to the facts and evidence.
2. The brief background of the matter is that 1st Respondent was an employee of Applicant until she was dismissed for misconduct. She was dismissed for driving the Applicant's motor vehicle without authorisation. Unhappy with the dismissal, 1st Respondent referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). The matter was duly heard and an award later made in favour of 1st Respondent. In terms of the award, Applicant was to pay compensation to 1st Respondent for unfair dismissal.
3. Equally unhappy with the award, Applicant initiated the current proceedings, wherein it sought the review, correction and/or setting aside of the award in issue. Both parties made representation and having heard them, Our judgment follows.

SUBMISSIONS AND ANALYSIS

4. Applicant's case is that the learned Arbitrator rightly made a finding that Applicant was not authorised to drive the Applicant vehicle. The Court was referred to paragraph 10 of the arbitration award for the finding. It was added that notwithstanding this finding, the learned Arbitrator later made a conclusion that the dismissal of 1st Respondent was substantively unfair. It was argued that this was contrary to both logic and section 10 of the *Labour Code (Codes of Good Practice) Notice of 2003*.
5. It was argued that in making this erroneous conclusion, the learned Arbitrator wrongly relied on the case of *Thabo Mpakanyane v Ministry of Communications, Science and Technology and the Attorney General LC/PS/A/01/2010*. It was submitted that the above authority related to a challenge on procedural fairness and not substantive fairness. It was added that, it was thus improper for the learned Arbitrator to have relied on this authority to determine the substantive fairness of the dismissal of 1st Respondent.
6. It was argued that the substantive and procedural fairness of a dismissal are two different aspects and that one cannot affect or influence the other. It was stated that they should therefore be dealt with independently. The Court was referred to the case of *Standard Lesotho Bank v Morahanye LAC/CIV/A/06/2008*, where a distinction was made between these two aspects of a dismissal. It was added that at best,

the learned Arbitrator should have found the dismissal substantively fair but procedurally unfair, and not as She did.

7. 1st Respondent answered that *in casu*, she had been found to have committed the misconduct but not that her dismissal was fair. It was stated that this was the also the attitude of the disciplinary panel. It was added that this was evident in its finding of misconduct, where disciplinary the panel recommended the sanction of a final written warning. It was stated that contrary to the recommendation, the sanction was altered to dismissal by Applicant management.
8. It was submitted that the learned Arbitration, having applied Her mind, found the conduct of Applicant both arbitrary and irregular and found the dismissal to be both substantively and procedurally unfair. The Court was referred to paragraph 12 of the arbitration award. It was concluded that there was no irregularity.
9. We have gone through the arbitration award and specifically at paragraph 10. In that paragraph the learned Arbitrator makes a finding that Applicant committed the misconduct and no more. This is reflected as such,
"It follows therefore that applicant has failed to discharge her burden and this tribunal can safely conclude that applicant was not authorised to drive the company vehicle, an act that led to her dismissal."

10. We have not found anywhere in the award where a conclusion was made that the dismissal was substantively fair as alleged by Applicant. As rightly pointed out by Applicant, section 10 of the *Codes of Good Practice (supra)*, provides the steps to be taken in determining the substantive fairness of a dismissal. These steps are in addition to whether or not an employee committed a misconduct.
11. In essence, this demonstrates that the determination of whether the dismissal is substantively fair or not, does not only lie in whether the misconduct was committed or not. Among the cited considerations are,
- 1) Validity of the rule,
 - 2) Whether it was dear,
 - 3) If the employee was aware reasonably,
 - 4) If the rule was consistently applied, and
 - 5) If dismissal was an appropriate sanction.
12. We have also considered the authority of *Thabo Mpakanyane v Ministry of Communications, Science and Technology and the Attorney General (supra)*. The summary of the case has been drawn in the arbitration award, rightly for that matter. In that authority, the disciplinary panel had recommended a sanction to management. Management without a hearing for the concerned employee, altered the recommendation and imposed the sanction of dismissal. The Court found the conduct of the employer, through its management, was arbitrary and irregular and ordered the reinstatement of the dismissed employee.

13. In Our view, the matter at hand falls in all four corners of the above authority. 1st Respondent was found guilty of misconduct and a final written warning was recommended. Without hearing him, Applicant through its management altered and/or deviated from the recommendation and imposed the sanction of dismissal. Consequently, the learned Arbitrator was right in relying on this authority for Her decision.
14. While We agree that the substantive and procedural fairness of a dismissal are two distinct aspects, but they cannot be treated separately or considered in isolation of one another. We say this because a procedurally unfair dismissal can affect the substantive aspect of the dismissal, in as much as a substantive unfairness of a dismissal can affect a procedural aspect of the dismissal, at least in terms of the findings.
15. In essence there may be instances where a dismissal may be found to be substantively fair but procedurally unfair, as suggested by Applicant, or where a procedural unfairness may invalidate the reason for dismissal, as has happened *in casu*. We however take note of the authority of *Standard Lesotho Bank v Morahanye (supra)*, and the distinction made between a procedural and substantive aspect of a dismissal.
16. A claim for failure to apply a mind suggests that facts and evidence were put before the decision maker and that he/she

failed to give a thought to them. A thought is an internal activity whose visibility can only come about by mention, acceptance or disqualification with reason. We are satisfied that the learned Arbitrator has done all these *in casu*.

AWARD

On the basis of the above reasons, We find that,

- 1) The learned Arbitrator committed no irregularity but fully applied Her mind.
- 2) The review application is therefore dismissed.
- 3) The award of the DDPR is reinstated.
- 4) The award must be complied with within 30 days of issuance herewith.
- 5) No order as to costs.

THUS DONE AND DATED AT MASERU ON THIS 31st DAY OF AUGUST 2015.

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

MRS. MOSEHLE

I CONCUR

MR KAO

I CONCUR

FOR APPLICANT:

ADV. THANTSI

FOR 1st RESPONDENT:

MS. MOSOLA