

IN THE LABOUR COURT OF LESOTHO

HELD AT MASERU

LC/REV/47/2011

A0024/2011

IN THE MATTER BETWEEN

SELLO MPHOU

APPLICANT

AND

BOLIBA MULTI-PURPOSE CORPORATION 1st

RESPONDENT

DDPR - ARBITRATOR (M SENOOE)

2nd

RESPONDENT

JUDGMENT

Application for the review of arbitration award. Several grounds of review having earlier been raised on behalf of Applicant but reduced to only three - that Arbitrator failed to make relevant considerations; that Arbitrator's decision is unreasonable; and that Arbitrator's decision is arbitrary. Court finding merit in only one ground - that Arbitrator failed to make relevant considerations. Court granting the review and ordering the

remittal of the matter to the DDPR for a determination of the compensation amount before a different arbitrator. No order as to costs being made.

BACKGROUND OF THE DISPUTE

1. This is an application for the review of the arbitration award in referral A0024/2011. Several grounds of review had been raised on behalf of Applicant. However, they were only reduced to three in argument namely, failure to take into account relevant considerations, unreasonableness and arbitrariness.
2. The brief background of the matter is that Applicant was an employee of the 1st Respondent until he was dismissed for misconduct. Unhappy with in dismissal, he referred a claim for unfair dismissal with the Directorate of Dispute Prevention and Resolution (DDPR). Conciliation was duly conducted, but did not resolve the matter. It was thus arbitrated upon and an award was later issued in favour of Applicant. In terms of the award, 1st Respondent was to be paid compensation in the sum of M20,895,00. This was following a finding that the dismissal had been substantive fair but procedurally unfair.
3. Similarly unhappy with the award, Applicant referred a review application with this Court. He sought the review, correction and/or setting aside of the award in issue. The application was approved by 1st Respondent, but it delayed to file its answer. Sentient of this, 1st Respondent filed an

application for condonation for the late filing of its answer. The condonation application was duly opposed by Applicant. It was argued but dismissed by a ruling of the 11th February 2015, which effectively barred 1st Respondent from filing an answer. The matter was then set down and heard on this day unopposed. Our judgment therefore follows.

4. We wish to note that on the date of hearing of the application, Advocate Thabane for the 1st Respondent appeared together with Advocate 'Nono for Applicant, in chambers. She stated while 1st Respondent had effectively been barred, by the ruling of the 11th February 2015, from answering the Applicant's claims, she sought for it to be formally recorded that she appealed to the Court to apply its mind to the case of Applicant against automatically granting the review on account of it being unopposed. We noted her concern.

SUBMISSIONS AND ANALYSIS

5. The first ground of review was that the learned Arbitrator had failed to make relevant considerations in formulating Her award of compensation. It was argued that the considerations are spelled out under section 73 (2) of the *Labour Code Order 24 of 1992*, as mitigation of loss and a breach on the part of the parties. It was said that at paragraph 14 of the arbitration award, the learned Arbitrator has recorded Her justification of the award made. In that justification nothing is said about the requirements and/or considerations of a

breach and mitigation of loss. It was said that this is clear evidence of failure to take them into account.

6. It was argued that as a result of failure to make those considerations, the learned Arbitrator has failed to make a fair and equitable award of compensation to Applicant. It was said that if she had made these considerations, she would have found that Applicant was entitled to more than what She was awarded.

7. The provisions of section 73 (2) of the *Labour Code Order (supra)*, are mandatory and not permissive. They are couched as follows,

"...in assessing the amount of compensation to be paid, account shall also be taken of whether there has been any breach of contract by either party and whether the employee has failed to take such steps on may be reasonable to instigate his or her losses."

8. We have perused the arbitration award and do confirm that the learned Arbitrator has failed to make the relevant considerations in awarding compensation to Applicant, at least to some extent. We say this because upon perusal, We have noted that the learned Arbitrator has erred only in part by not considering mitigation of loss by the Applicant. We say this because there is evidence, in the arbitration award that learned Arbitrator has considered the breach on the part of parties.

9. This is discernable from paragraph 14 of the arbitration award, under the heading *'FORMULATION OF THE AWARD'*, where the following is recorded,

"Evidence shows that applicant was given a shorter notice than the prescribed in the respondent policy. Respondent does not deny it. Applicant filed an appeal and respondent never attended to it alleging it was filed out of time. This amounts to procedural irregularity as well. Applicant's dismissal was procedurally unfair. Applicant is entitled to three months' salary as compensation for procedural irregularity"

10. However, We do confirm that nothing has been said about mitigation of loss on the part of the Applicant. Evidently, the learned Arbitrator has acted contrary to the provisions of section 73 (2) of the *Labour Code Order (supra)*, in fixing Her award for compensation, to this extent at least. We are of a similar sentiment with Applicant that if considered, this factor could have influenced the learned Arbitrator's conclusion to either reduce or increase the compensatory award given. In law, this is sufficient to warrant the granting of a review. This ground is therefore upheld.

11. The second ground of review was that the learned Arbitrator's decision to award compensation over the principal remedy of reinstatement, under section 73 (1) of the *Labour Code Order (supra)*, was unreasonable. It was argued that in law, once a finding is made that the dismissal

is unfair, the learned Arbitrator is obliged to award reinstatement. It was submitted that an exception is where the employee does not wish to be reinstated, or if the employer has adduced factors that hinder the granting of that order. The Court was referred to the case of *Pascalis Molapi v Metro Group Ltd & others LAC/CIV/REV/09/2003*, in support of this proposition.

12. It was argued that *in casu*, Applicant, on the one hand, was clear that he wanted to be reinstated to his former position in terms of section 73(1) of the *Labour Code Order (supra)*. It was added that the 1st Respondent, on the other hand, had not led any factors that negate the granting of the principal remedy of reinstatement. It was argued that having made the conclusion that the dismissal was procedurally unfair, it logically followed that reinstatement be awarded as section 73 (1) made it mandatory. It was submitted that the award of the learned Arbitrator was unreasonable in this respect. It was prayed that the Court correct the award by ordering the reinstatement of Applicant.

13. It was submitted that although 5 years have lapsed since the dismissal of Applicant, but that the length of the period should not influence the Court into finding that reinstatement has become impracticable. It was said that in the authority of *Pascalis Molapi v Metro Group Ltd & others (supra)*, an employee was reinstated after 16 years of the

dismissal, which is 9 years more than the period that Applicant has been out of employment with 1st Respondent.

14. We have perused the arbitration award and confirm that indeed a finding was made that the dismissal of Applicant was unfair. However, this was only in relation to the procedural aspect of his dismissal. This is captured under the heading 'AWARD' as follows,

“(1) Applicant’s dismissal is substantively fair but procedurally unfair.”

15. The substantive aspect of a dismissal, on the one hand, accounts for the validity of the reason behind the dismissal. That is, whether the reason is or was sound in law, or if it was one that is sanctioned in law. The procedural aspect of the dismissal, on the other hand, accounts for the procedure adopted in finding the guilt of an employee. Therefore in Her finding, the learned Arbitrator found that the 1st Respondent was justified in dismissing Applicant, but that even so the wrong method was used, or that 1st Respondent failed to follow the due processes.

16. While We concede that reinstatement is the preferred remedy, but it cannot be awarded where the reason for dismissal has been confirmed as being valid. If this were to be done, it would create an unreasonable result. We say this because, in effect by confirming the reason for dismissal, the learned Arbitrator expresses his/her approval towards the

reasons given by an employer for dismissing an employee. It therefore, follows that with such approval, reinstatement cannot, and is not an option.

17. In Our view, it was thus not necessary for the employer to attempt to negate the reinstatement of the Applicant in this instance, for even if it had, it would only have served an academic purpose. We say this because it could neither influence the learned Arbitrator to either award reinstatement, or to refrain from doing so. We therefore find that the learned Arbitrator was rather reasonable in Her approach. This ground therefore falls.

18. The third ground of review was that the learned Arbitrator's decision that Applicant was not entitled to severance pay and leave pay was arbitrary. It argued that this is so in that the learned Arbitrator merely concluded that Applicant was not entitled to severance pay, without justifying Her decision. It was said that this conduct is in law said to be arbitrary. The Court was referred to paragraph 14 of the award.

19. It was added that section 79 of the *Labour Code Order (supra)*, regulates severance payment. It states the circumstances under which severance payment may or may not be awarded. It was said that primarily, it cannot be awarded where an employee has been fairly dismissed for misconduct. It was submitted that *in casu*, the learned

Arbitrator found that Applicant had unfairly been dismissed and that this did not disentitle him to severance pay, but the contrary.

20. We have similarly gone through the arbitration award. We have noted that at paragraph 14, the learned Arbitrator makes a finding that Applicant is not entitled to both severance payment and annual leave. This is captured as follows, *“Applicant is not entitled to severance payment and annual leave.”*

21. However, at paragraph 13 of the award, the following is recorded,

“Applicant asked for severance payment. He is not entitled to severance payment because he committed an act of gross negligence. Applicant claimed annual leave but abandon it at arbitration proceedings. It is not alleged neither in the addresses or evidence to show that he is entitled to it. There is therefore no evidence that applicant is entitled to annual leave.”

22. In Our view, the decision has been justified and it is in line with the dictates of section 79 (2) of the *Labour Code Order (supra)*. In terms of that section,

“An employee who has been fairly dismissed for misconduct shall not be entitled to a severance payment.”

In terms of the extract from paragraph 13 of the arbitration award, applicant was found guilty of gross negligence.

Section 10 (d) of the *Labour Code (Codes of Good Practice) Notice of 2003*, defines gross negligence as one of the forms of a misconduct that justify dismissal.

23. In view of this said above, the award of the learned Arbitrator that Applicant was not entitled to both severance payment and unpaid leave has been supported by reasoning. Not only has it been supported by reasoning, but one that is justified in law, for the above mentioned reasons. This ground must also fail.

24. On the strength of the Applicant's first review ground, this application must succeed. Although he had asked that We correct the award by adjusting the compensatory award, We decline by reason of incapacity to do so. We are not incapacitated by law, but by lack of sufficient facts to enable Us to conduct the exercise. We therefore find that it would only be appropriate for Us to remit the matter to the DDPR, for a determination of the compensation amount, in terms of section 73 (2) of the *Labour Code Order (supra)*.

AWARD

Our award is therefore as follows:

- 1) The award of the DDPR is reviewed and set aside only in respect of the compensation amount.
- 2) The matter is remitted to the DDPR to be heard and determined on this aspect, before a different arbitrator.
- 3) The award is to be complied with within 30 days of issuance herewith.
- 4) No order as to costs is made.

THUS DONE AND DATED AT MASERU ON THIS 10th DAY OF AUGUST 2015.

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

MR. MATELA

I CONCUR

MRS. RAMASHAMOLE

I CONCUR

FOR APPLICANT:

ADV. 'NONO

FOR RESPONDENT:

ADV.

THABANE