

HELD AT MASERU

In the matter between:

MAMOOKHO MANGOPE

APPLICANT

and

**O.K BAZAARS t/a SHOPRITE (PTY) LTD
DIRECTORATE OF DISPUTE PREVENTION
AND RESOLUTION**

1st RESPONDENT

2nd RESPONDENT

JUDGMENT

17/08/16

Severance pay claim - With the employee contending that the Arbitrator miscalculated her severance pay by failing to consider that she was paid by the hour and not monthly - Court finds the Arbitrator to have applied an appropriate formula in computing the employee's severance pay;

Underpayments - Employee further claiming underpayment for the month of October, 2012 on the basis that she was paid below the minimum prescribed by the Labour Code Wages (Amendment) Order, 2012 - Court finds that the employee was paid for hours actually worked and could get below the set minimum because of the intricacies of the employment contract she had entered into - Court found no irregularity in the Arbitrator's finding in this regard.

1. The applicant is a former employee of the respondent. She had been engaged as a Key - timer which connotes casual, part - time or flexible employment. Key - timers are usually remunerated at an hourly rate for hours actually worked. It therefore follows that their monthly wage fluctuates as it is dependent on the hours worked on any particular month.

BACKGROUND TO THE DISPUTE

2. The applicant had been in 1st respondent's employ from 2008 until her resignation in March, 2013. Following her resignation, she referred two claims of severance pay and outstanding wages to the Directorate of Disputes Prevention and Resolution (DDPR) on 27th May, 2013 wherein she claimed that the 1st respondent had miscalculated her severance pay and underpaid her for the month of October, 2012. The learned Arbitrator concluded that applicant's

severance pay had been properly computed and that she had not been underpaid. Dissatisfied with this decision, she approached this Court to have this finding reviewed, corrected or set aside. Applicant's Counsel contended that the learned Arbitrator ought not to have used the computation that he used as it related to monthly paid employees when the applicant had been paid by the hour as agreed to by the parties. This according to Counsel was a reviewable mistake of law.

3. Two issues for determination have been identified by the Court: firstly, whether the learned Arbitrator miscalculated applicant's severance pay and; secondly, whether the 1st respondent had contravened the provisions of the ***Labour Code Wages (Amendment) Order, 2012*** by paying the applicant below what was prescribed therein in respect of the Retail Sector.

Claim for Severance Pay

4. Upon her resignation, the applicant received an amount of Two Thousand, Seven Hundred and Eighty-Three Maloti (M2 783.00) towards her severance payment. She claimed that she ought to have received a sum of Four Thousand, and Seventy - Seven Maloti (M4 077.00). She contended that the computation of her severance pay was erroneous in that the learned Arbitrator divided by 195 hours to determine her hourly rate when it was already set at M9.06 rendering it unnecessary to divide by 195.

Qualifying for severance pay

5. The concept of severance pay has its roots in the ***ILO Convention 158 on Termination of Employment, 1982. Article 12 (1)*** thereof provides that:-

A worker whose employment has been terminated shall be entitled, in accordance with national law and practice to:

(a) a severance allowance or other separation benefit, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions.

6. It was indisputable that the applicant was entitled to severance pay under ***Section 79 (1) of the Labour Code Order, 1992*** having had more than one year of continuous service with the 1st respondent. The Section provides that:-

An employee who has completed more than one year of continuous service with the same employer shall be entitled to receive, upon termination of his or her services,

a severance payment equivalent to two weeks' wages for each completed year of continuous service with the employer.

The two week's wages referred to shall be wages at the rate payable at the time the services are terminated.¹ The essential components in the computation of severance pay are therefore the length of an employee's service and the wage he or she earned at the date of termination of employment.

7. In terms of *Section 3 of the Wages (Amendment) Order, 1995*, a normal hourly rate of wages for an employee other than a watchman shall be calculated as follows -

(a) where the employee is employed on a monthly contract, that employee's monthly wages shall be divided by 195;

(b) where the employee is employed on a weekly contract, that employee's weekly wages shall be divided by 45 hours; and

(c) where the employee is employed on a daily contract, that employee's daily wages shall be divided by the employee's daily normal hours of work

8. The learned Arbitrator resorted to a formula normally used in the computation of severance pay which is -

$$\frac{\text{Monthly wage} \times 2 \text{ weeks working hours (90)} \times \text{No. of years completed}}{195 \text{ (minimum monthly hours of work)}}$$

$$\frac{M906.00 \times 90 \times 5}{195} = M2\ 091.00$$

This is an administrative formula adopted by the Labour Department guide the process of computing severance pay taking into consideration all the different legal provisions relating to it. The 195 constitutes minimum hours of work in a month. According to *Section 118 of the Labour Code Order, 1992* unless specified otherwise, the normal hours of work for any employee shall not exceed forty - five (45) per week. This adds up to 195 hours in a month (45 x 4.33). The other hours are meant to cater for the differentials in the various months in a year.

9. Applicant's Counsel queried its use in applicant's case on the basis that the learned Arbitrator erroneously divided by 195 which applies to employees

¹ Section 79 (4) of the Labour Code Order, 1992

employed on a monthly contract. We think he was here referring to *Section 3(a) of the Wages (Amendment) Order, 1995* referred to above. He, however, fell short of showing the Court how he would have computed it himself. This made it very difficult for the Court to ascertain where the learned Arbitrator could have gone wrong, if he ever did.

10. Be that as it may, this case involves a basic knowledge of arithmetic and one has come to appreciate better why a basic knowledge of mathematics is necessary for lawyers. If one were to adopt just a simple computation to get applicant's two weeks' wages prescribed by *Section 79 (1) of the Labour Code Order, 1992* one could

1. Multiply (applicant's minimum hours of work) 100 x (applicant's hourly rate) of M9.06 = M906.00 (average monthly wage)
2. Then multiply this amount by 12 to get her annual salary - M906.00 x 12 = M10, 872.00
3. Then divide by 52 (as there are 52 weeks in a year) to get applicant's average weekly wage = M209.00 (one week's wage)
4. Then multiply by 2 to get two weeks' wages for severance = **M418.00**
5. Then multiply by the number of years the applicant was in employment which is 5 - M418.00 x 5 = **M2, 090.00**

11. This comes to almost the same figure of **M2091.00** found by the learned Arbitrator. He can therefore not be faulted. It is critical to note that we did not use the number 195 anywhere. It was unfortunate that the applicant did not indicate to the Court how she arrived at the sum of *Four Thousand, and Seventy - Seven Maloti (M4 077.00)* claimed.

Underpayments

12. It is common cause that the applicant was paid at an hourly rate of Nine Maloti and Six Cents (M9.06) and did not receive a consistent wage. The applicant claims that she was underpaid in the month of October, 2012 in that the minimum wage for retail at the material time was *One Thousand, Five Hundred and Three Maloti (M1, 503.00)* but she was only paid a sum of *Nine Hundred and Ninety Maloti, Thirty - Five Cents (M990. 35)* in contravention

of the *Labour Code Wages (Amendment) Order, 2012*. The learned Arbitrator ruled that she had not been underpaid. It was her case that the learned Arbitrator had erred in his ruling. She therefore prayed that the ruling be reviewed and set aside.

13. According to the 1st respondent, the applicant barely spent the minimum of forty-five hours prescribed in each week. She was therefore never underpaid. The 1st respondent maintained that this type of employment is meant to accommodate the varying peaks and troughs in demand and supply in the retail sector. It was in recognition of this factor that it had entered into a collective bargaining agreement with the applicant's union, the Lesotho Wholesalers, Catering and Allied Workers' Union (LEWCAWU), on 20th March, 2003 in order to address the terms and conditions of employees in this particular category of employment. They were referred to as hour - timers in the collective bargaining agreement, and as aforementioned offered a rate of M9.06 per hour, which according to the 1st respondent was even higher than that offered to permanent employees.

14. In reaction to applicant's claim on underpayment, the 1st respondent contended that she did not complete the month of October, 2012 and as far as they were concerned, the learned Arbitrator came to a reasonable conclusion and the award is very clear on why the applicant was found to have not been underpaid. He submitted that the learned Arbitrator had committed no irregularity.

15. It is common cause that the applicant was engaged in flexible employment in which her union had agreed on an hourly rate of M9.06. In the circumstances of applicant's case her earnings could sometimes fall below the prescribed minimum wage prescribed by law in the particular sector due to the particular nature of the employment contract she had entered into with the 1st respondent. In our opinion, the applicant was not underpaid but received a wage of M990.35 because of the intricacies of the nature of the employment contract she had entered into. In the circumstances, we find no irregularity in the learned Arbitrator's finding.

ORDER

16. In our view the learned Arbitrator made a correct finding in the circumstances of this case. The conclusion he made is one that any reasonable

decision - maker could have arrived at and we therefore make the following order:-

- i) The review application is dismissed; and
- ii) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 17th DAY OF AUGUST, 2016.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

M. THAKALEKOALA
ASSESSOR

I CONCUR

L. RAMASHAMOLE
ASSESSOR

I CONCUR

FOR THE APPLICANT : ADV., M.E. QHOMANE, ASTUTE CHAMBERS
FOR THE 1st RESPONDENT : ADV., H.P. TS`OLO, ASSOCIATION OF LESOTHO
EMPLOYERS AND BUSINESS

ANNOTATIONS

STATUTES

Labour Code Order, 1992
Wages (Amendment) Order, 1995
Labour Code Wages (Amendment) Order, 2012

INTERNATIONAL INSTRUMENTS

ILO Convention 158 on Termination of Employment, 1982