

HELD AT MASERU

In the matter between:

PUSELETSO LESUPI

APPLICANT

and

**ACTION STATISTICAL INVESTMENT (PTY) LTD
t/a PICK N PAY**

RESPONDENT

JUDGMENT

DATE: 17/05/16

Jurisdiction - Employee having pleaded guilty to unauthorised absence on account of extension of maternity leave - Question of whether public holidays and rest days were included in the computation of maternity leave not an issue - Applicant further challenging the severity of the sanction and pleading that she was not afforded an opportunity to mitigate the sentence - Court finds the case to revolve on an unfair dismissal claim that falls squarely within the jurisdiction of the DDP in terms of Section 226 (2) of the Labour Code (Amendment) Act, 2000.

BACKGROUND TO THE DISPUTE

1. This is a case in which the applicant had approached the Directorate of Dispute Prevention and Resolution (DDPR) to have her dismissal declared unfair and seeking reinstatement to her former position. The DDPR declined jurisdiction and referred it to this Court. The applicant had been engaged by the respondent as a Cashier on 1st February, 2010 until 28th August, 2013 when she was dismissed. Circumstances that led to her dismissal were briefly that when she was due for confinement, she signed a maternity leave on 6th May, 2013. She alleges that she was advised by one Ms Michel Beukes on behalf of the respondent that her leave would expire on 22nd September, 2013.

2. She alleges that on 21st September, 2013 she received a telephone call from a Mrs Cashiwe Majwabe, her supervisor, alerting her that she ought to have reported to work on 9th August, 2013 when she knew her leave to be ending on 22nd September, 2013 as discussed with Ms Beukes. She related this information to Mrs Majwabe who undertook to investigate the matter. She says to her surprise the latter came back to her on 22nd September, 2013 informing her that

they were taking disciplinary measures against her for unauthorised absence from work and that she should come to work to collect her Notice for the disciplinary hearing.

3. The hearing went ahead, and the applicant pleaded guilty to the charge levelled against her following which she was dismissed. Her case is that the punishment meted out to her by the employer was too harsh and that she ought to have at least been given a lesser sentence such as a verbal warning because she had not been afforded an opportunity to mitigate the sentence, and that holidays and rest days had erroneously been included in the days said to be constituting the unauthorised absence.

4. Subsequent to the dismissal, she filed an unfair dismissal claim with the DDPR. The learned Arbitrator ruled that the issue regarding holidays and rest days involved the interpretation of *Section 133 of the Labour Code Order, 1992*, and she referred the case to the Labour Court for want of jurisdiction. The Section, generally, regulates absence from work in connection with confinement.

5. Respondent's Counsel raised an objection to the learned Arbitrator's finding contending that it was improper for her to have referred the case to this Court, as it had no jurisdiction over it. She insisted that interpretation of *Section 133* was not the determining factor in applicant's case. Reacting to applicant's originating application, she had pointed out in her answer to paragraphs 17, 18, 19, and 20 of the application that "*... the applicant sought the interpretation of the law instead of pursuing a case of unfair dismissal.*" Applicant's Counsel submitted, on the other hand, that the learned Arbitrator committed no error and that it was critical that it be determined whether in computing maternity leave rest days and public holidays be included. It is important to note that in terms of the leave form ("*annexure PNP*" to the answer) applicant's maternity leave was to run from 06th May, 2013 to 07th August, 2013, a total of ninety (90) days with the applicant having to resume duty on 09th September, 2013.

JURISDICTION OF THE LABOUR COURT IN CONTEXT

6. The jurisdiction of the Labour Court *vis a` vis* that of the DDPR is clearly delineated by *Section 226 of the Labour Code (Amendment) Act, 2000*. We initially proceeded on the premise that we had jurisdiction over the matter and it was only when the applicant was testifying that the bone of contention became crisp, and we discerned that jurisdiction could be an issue. We immediately

discontinued the proceedings, and requested that parties hold a pre - trial conference to streamline the issues at hand. Unfortunately, the Court was only presented with the minutes of the conference on the day of hearing. The minutes proved to be not very helpful to the Court on the question of whether it had jurisdiction or not. Upon a closer scrutiny of the case and having partly heard applicant's evidence, we concluded that we did not have jurisdiction to hear the matter. Jurisdiction is a point of law and can be raised at any stage of the proceedings because it can be fatal to a case.

7. The basis of declining jurisdiction was that the issue of whether in computing applicant's maternity leave, rest days and holidays were included was not in dispute because the applicant had already pleaded guilty to unauthorised absence from duty. It should be noted that the said public holidays and the rest days alleged to have been wrongly included in the computation of the maternity leave were not even pleaded. Assuming, without conceding, that public holidays and rest days were erroneously counted as part of the maternity leave, it emerged that the only public holiday during the period in question was King's Birthday on Monday, 17th June, 2013.

8. Furthermore, it was not even pleaded what applicant's take on rest days was. Besides the said rest days not being pleaded, it still remained an issue whether the concept of "*rest*" can arise when a person is on leave. We felt the determination of whether or not maternity leave included rest days or public holidays could not take this Court anywhere in respect of applicant's case. As far as we are concerned, what remained an issue was the severity of the penalty of a dismissal in applicant's circumstances and whether or not the applicant had been given an opportunity to mitigate the sanction meted out to her by the employer.

9. The applicant had challenged the fairness of her dismissal on three grounds which are, simply put,

- i) That the charge of unauthorised absence was inappropriate as it included both holidays and rest days;
- ii) That she was not afforded an opportunity to mitigate her sentence; and lastly, that
- iii) The punishment of a dismissal was too harsh.

Following the legal analysis we have made, we feel the last two grounds are the ones that are worth a determination.

10. *Section 226 (1) (a) of the Labour Code (Amendment) Act, 2000* empowers this Court to resolve disputes that revolve on the “*application or interpretation of any provision of the Labour Code or any other labour law.*” We have, however, ruled out this Section as a non - starter in applicant’s case, and are therefore left with *Section 226 (2)* of the same Act which gives the DDPR power to determine any unfair dismissal case which is for any reason other than one that falls under *Subsection (1) (c)* of the Act comprising dismissals:-

(a) *for participation in a strike;*

(b) *as a consequence of a lockout; or*

(c) *related to the operational requirements of the employer.*

11. It is our considered opinion that applicant’s case falls squarely within the jurisdiction of the DDPR, it being based on an unfair dismissal falling outside the scope of *Section 226(1) (c) of the Labour Code (Amendment) Act, 2000*. The case before the learned Arbitrator was to ascertain whether in the circumstances of applicant’s case, the employer had meted out a harsh sentence. This issue is not dependent on the interpretation of *Section 133*. It was therefore a misdirection on her part to have referred this case to this Court on the basis that it impinged on the interpretation of *Section 133* whether the computation of maternity leave included rest days and public holidays. The issue is a non-starter in applicant’s case.

12. The interpretation of whether the computation of maternity leave includes rest days and holidays would just be an academic exercise for the Court as it does not go to the root of applicant’s case. For the determination of applicant’s case this issue is irrelevant. “*Courts of law exist for the settlement of concrete controversies and actual infringement of rights, not to pronounce upon abstract questions or to advise upon differing contentions...*”¹

DETERMINATION

We come to the following conclusion:-

- i) The matter is dismissed for want of jurisdiction;

¹ Geldenhys and Neethling v Beuthin 1918 AD 426 at 441 per Innes CJ.,

- ii) If the applicant still wishes to pursue it, she may approach the DDPR for relief; and
- iii) There is no order as to costs.

THUS DONE AND DATED AT MASERU THIS 17TH DAY OF MAY, 2016.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

M. THAKALEKOALA
ASSESSOR

I CONCUR

L.RAMASHAMOLE
ASSESSOR

I CONCUR

For the applicant : Adv., P.A. `Nono
For the respondent : Adv., L. Sephomolo (KC)

ANNOTATIONS

STATUTES

Labour Code Order, 1992
Labour Code (Amendment) Act, 2000

CITED CASES

Geldenhys and Neethling v Beuthin 1918 AD 426