IN THE LABOUR COURT OF LESOTHO **LC/REV/34/14**

HELD AT MASERU

In the matter between:

LIMKOKWING UNIVERSITY OF CREATIVE TECHNOLOGY LESOTHO (PTY) LTD **APPLICANT**

and

THATO MAFETHE **1st RESPONDENT**

DIRECTORATE OF DISPUTES PREVENTION AND RESOLUTION **2nd RESPONDENT**

JUDGMENT

21/09/17

Increase of the severity of a disciplinary sanction on appeal - Powers of employers to increase a sanction following a decision or recommendation of a disciplinary panel - Such powers must be expressly stated in the disciplinary code as a question of natural justice (audi alteram partem rule) - Court finds that the employer's disciplinary code did not expressly provide for an increase of a sanction on appeal thus the Arbitrator's finding could not be faulted in this regard - Court, however, finds the award to have failed to consider the fact that the employee had only challenged the procedural fairness of her dismissal and not the reason behind it - Matter remitted to the DDPR to be heard on quantum only.

[1] The 1st respondent was engaged by the applicant as an Administrative Assistant from 18th July, 2011 to 17th July, 2016 on a fixed term contract of five years. She was charged with misconduct on allegations of soliciting bribes from prospective students in order for them to get admission into Limkokwing University of Creative Technology even when they did not qualify for admission. She was found guilty as charged by the disciplinary panel which recommended a sanction of a suspension without pay for a period of six (6) months. Dissatisfied with this decision, applicant's Corporate Secretary appealed against this sentence and on appeal the sanction was increased to a dismissal. The applicant in turn challenged this dismissal before the Directorate of Disputes Prevention and Resolution (DDPR) citing procedural irregularities.

[2] 1st respondent's ground for challenging the dismissal was that the applicant had no right to appeal as there was no provision for such right in its Policy, namely, the Disciplinary and Grievance Policy. She maintained that this constituted a gross irregularity that vitiated the decision to dismiss her. She contended further that besides it not forming part of the employer's Policy, the right of an employer to appeal a disciplinary outcome is generally a remedy that is not available to employers. She therefore sought compensation for the remaining period of her contract including severance pay before the DDPR which ruled in her favour. It concluded that the applicant had no right to appeal against a sanction prescribed by the disciplinary panel and awarded her compensation for the remaining forty - two months of the fixed term contract in the sum of Two Hundred and Forty - Nine Thousand, Eight Hundred and Twenty - Six Maloti, and Fifty Lisente (M249 826.50). The learned Arbitrator ruled that it was irregular for the appeal panel to have increased 1st respondent's sanction from one of suspension without pay to a dismissal. She argued further that this was never raised by the 1st respondent before the DDPR and the learned Arbitrator could, therefore, not grant a relief that was not sought.

GROUNDS OF REVIEW

[3] The applicant instituted review proceedings before this Court on the following grounds, that the learned Arbitrator:

> ***(a) erred and misdirected herself by making a finding not sought by the 1st respondent to the effect that it was irregular for the appeal panel to have increased 1st respondent's sanction, a finding that was further not supported by evidence;***
>
> ***(b) failed to apply her mind to the facts…;***
>
> ***(c) made an absurd, irrational or wrong finding in law … that the applicant had no right of appeal;*** [and]
>
> ***(d) erred and misdirected herself by awarding*** [a] ***quantum of compensation … that rendered her award… irrational and unreasonable … and in utter disregard of the fact that 1st respondent did not challenge the reason for her dismissal.***

RIGHT OF APPEAL BY THE EMPLOYER FROM THE DECISION OF A DISCIPLINARY ENQUIRY - POWER TO INCREASE A SANCTION

[4] The gist of 1st respondent's claim at the DDPR was that the employer had no right to appeal a decision of a disciplinary panel because its disciplinary procedure

had no provision for such a step and it therefore acted in violation of its own disciplinary code. The learned Arbitrator ruled in her favour and concluded that the employer had no right to appeal against the decision of the chairperson of a disciplinary enquiry.

[5] The right of an employer to appeal against the decision reached by the disciplinary panel is quite a dicey one because one might be inclined to say that the employer is appealing against its own decision by virtue of the fact that the chairperson of a disciplinary enquiry is normally appointed by him or her. Be that as it may, the Court decided in ***Bhengu v Union Co - operative Ltd***[1] that in cases where the chairperson of the disciplinary enquiry only has powers to recommend a sanction, the employer reserves the right to substitute its decision. However, the employee must be aware of the possibility of an adverse decision against him or her. Hence, if an employer has an appeal procedure in place the fact that a more severe sanction could be imposed must be clearly stated in such a procedure. It is a question of fairness to the employee. The Court had in this case drawn a distinction between the Chairperson of a disciplinary panel having powers to either make a recommendation or a decision.

[6] Also in the English decision of ***Mcmillan v Airedale NHS Foundation Trust*** [2] the Court held that if an employer so wishes it can expressly reserve the right under its disciplinary procedure to increase the sanction on appeal and if there is such an express right then the employer may increase the sanction. The general rule is, therefore, that powers to increase or alter a decision of the Chairperson of a disciplinary panel on appeal must be expressly permitted by the disciplinary code but the employee should be warned of the possibility that the sanction may be increased, otherwise it may not be increased on appeal.

[7] This principle was also confirmed in ***Rennies Distribution Services (Pty) Ltd v Dieter Bierman NO and 2 Others***[3] where it was stated that an employer may only impose a harsher sanction where there is an express provision in its disciplinary code to do so. However, even if there is such a power, the employer must adhere to the fundamental principles of natural justice which require that the right to a hearing (***audi alteram partem***) be afforded employees who may be prejudiced by the imposition of a more severe sanction. In arriving at her decision that the applicant

[1] (1990) 11 ILJ 117 (IC)
[2] [2014] CWCA Civ 1031
[3] D875/06

had no right to impose the harsher sanction of a dismissal to the 1st respondent, the learned Arbitrator had drawn inspiration from this judgment.

[8] A glance at applicant's Disciplinary and Grievance Policy one observes that it only affords employees an opportunity to be heard at the appeal hearing and be represented by a co - worker of his or her choice.[4] It says nothing about the likelihood of a review of the sanction meted out by the chairperson of the disciplinary hearing. The learned Arbitrator's award cannot be faulted to this extent.

QUANTUM

[9] The 1st respondent was awarded compensation for the remainder of her contract. The applicant's complaint in this regard is that the learned Arbitrator erred in granting the 1st respondent compensation as if there was no wrongdoing on her part. It considered the decision irrational. ***Section 73 (2) of the Labour Code Order, 1992 (as amended)*** provides that in awarding compensation, presiding officers of the Labour Court and Arbitrators should consider whether it is just and equitable in the circumstances of a particular case to take into account whether there has been any breach of contract by either party. As it were, the 1st respondent did not challenge the substantive fairness of her dismissal. She was awarded all her wages up to the expiration of her contract when she had only challenged the procedural fairness thereof. It is our considered opinion that the learned Arbitrator overlooked and failed to apply her mind to this provision.

THE ORDER

[10] In light of the above analysis the Court comes to the following conclusion:

i. that the matter be remitted to the DDPR for a proper determination of the quantum regard being had to the fact that the 1st respondent did not challenge the substantive fairness of her dismissal;

ii. The matter is to be heard by a different Arbitrator;

iii. There is no order as to costs

THUS DONE AND DATED AT MASERU THIS 21st DAY OF SEPTEMBER, 2017.

[4] Clause 1.3.3 of applicant's Disciplinary and Grievance Policy

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

P. LEBITSA **I CONCUR**
ASSESSOR

L. RAMASHAMOLE **I CONCUR**
ASSESSOR

For the Applicant : Adv., T. D. Macheli - Limkokwing University of Creative Technology
For the Respondent : Adv., R. Sepiriti

ANNOTATIONS

CASES REFERRED TO

Bhengu v Union Co - operative Ltd (1990) 11 ILJ 117 (IC)
Mcmillan v Airedale NHS Foundation Trust [2014] CWCA Civ. 1031
Rennies Distribution Services (Pty) Ltd v Dieter Bierman NO and 2 Others D875/06