

HELD AT MASERU

In the matter between:

LESOTHO STEEL PRODUCTS (PTY) LTD

APPLICANT

and

**TEBOHO LEHLABAPHIRI
DIRECTORATE OF DISPUTES PREVENTION AND
RESOLUTION**

**1st RESPONDENT
2nd RESPONDENT**

JUDGMENT

19/10/17

Disciplinary hearing - Chairing thereof - Review of an arbitral award on grounds that the Arbitrator misdirected himself in concluding that it was inappropriate for the Human Resource Manager to have chaired a disciplinary hearing as he was privy to the events that led to the charge by virtue of having been informed of the alleged misconduct - Court finds bias unsubstantiated - Court further identifying an irregularity in the Arbitrator's finding in that she found that leave and bonus pay had not been challenged, when they had in fact been - Review application successful and DDPR award set aside.

INTRODUCTION

[1] The 1st respondent had been engaged by the respondent around July, 2009 as a truck driver and was dismissed on 07th December, 2011 following a disciplinary enquiry into an alleged misconduct involving a vehicle accident which culminated in a charge of reckless driving and being under the influence of alcohol. Having been found guilty and dismissed, he approached the Directorate of Disputes Prevention and Resolution (DDPR) challenging the procedural and substantive fairness of this dismissal, and further seeking payment of his accrued leave and bonus. The DDPR found the dismissal to have been substantively fair, but procedurally unfair on the basis that it was inappropriate for the chairperson of the disciplinary hearing, Mr. Lebone, the Human Resource Manager, to have chaired the hearing as he was privy to the circumstances that led to 1st respondent's charge thereby compromising his neutrality. The learned Arbitrator consequently awarded the 1st respondent compensation of three months' salary, leave pay, and a performance bonus.

GROUNDS OF REVIEW

[2] The applicant is herein seeking the review, correction and or setting aside of this DDPR award on the ground that the learned Arbitrator ignored the evidence tendered before him pointing to the 1st respondent's guilt. Applicant's Counsel contended that the Human Resource Manager had simply been informed of the accident and never even went to inspect it. He referred the Court to the DDPR record in which the 1st respondent himself averred in his evidence in chief that Mr. Mothae:

Called and talked to Mr. Lebone on his phone. He said one of their people had collided with him and that they were allowing a drunken person to drive a car. We ended there with Mr. Mothae until the police arrived ...¹

He further submitted that the learned Arbitrator erred and misdirected himself by concluding that the chairperson of the disciplinary hearing was privy to the events that led to the charge. He argued that Mr. Lebone was never at the scene of the accident nor at the Police Station where a breathalyser test was conducted leading to 1st respondent's arrest. He insisted that he was merely informed of the accident, and submitted that the learned Arbitrator failed to apply his mind to the relevant issues, principles of workplace discipline as well as the tenets of natural justice.

THE COURT'S ANALYSIS

MR LEBONE'S CHAIRMANSHIP

[3] Tenets of fairness dictate that in chairing disciplinary hearings, the chairperson must ensure a fair conduct of the hearing and compliance with the rules of natural justice. It therefore enjoins a complainant to show how this principle has been infringed. An unsubstantiated allegation of bias is not sufficient to warrant a recusal.² However, in *casu* the 1st respondent never demonstrated how he was adversely affected by Mr. Lebone's chairmanship. Generally, it is improper for the chairperson to have been directly involved in the issue giving rise to the disciplinary process. For instance, if the allegation against the employee is that he or she behaved abusively towards the Human Resource (HR) Manager, it would be inappropriate for the affected HR Manager to chair the proceedings. We were not able to establish how Mr. Lebone prejudiced 1st respondent's hearing.

[4] The learned Arbitrator found that Mr. Lebone was aware of the events that led to 1st respondent's dismissal. He pointed out that the evidence tendered "***revealed***

¹ Page 62 of the DDPR record

² Grogan J., Workplace Law 11th ed., 2014, Juta, at p. 284

not only his awareness but his role in the entire matter, that is, from being informed about the collision, being told that applicant was at fault and that he was drunk. Clearly, he was not the right party to preside over the case of applicant.”

The Court, however, discerned a contradiction in terms in that at paragraph 20 of his award the learned Arbitrator came to the following conclusion:

I am in agreement with applicant on the above contention that this was an irregularity. Mr. Lebone could not have been expected to render a fair and impartial verdict against applicant given his prior involvement in the matter.

He, however, turned around in the same paragraph to further conclude thus:

I do not find how recusal or non - recusal of Mr. Lebone would have affected the final outcome of the hearing, which was a finding of guilt. In any event, applicant has also failed to show how Mr. Lebone’s chairmanship could have altered the final verdict. In view of this, I find the irregularity committed did not go to the root of the matter so as to render the initial proceedings a nullity.

[5] Clearly, the learned Arbitrator agreed with the conclusion reached at the disciplinary hearing, but then proceeded to award the 1st respondent compensation for unfair dismissal to the tune of Eighteen Thousand Maloti (M18, 000.00). The Court finds the conclusion unreasonable. It is trite that a decision is reviewable if it is one which a reasonable decision - maker could not reach. The leading authority in this regard is *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*.³ An administrative action must be lawful, reasonable and procedurally fair.

LEAVE PAY

[6] The learned Arbitrator found that the 1st respondent had been entitled to his outstanding leave on the basis that entitlement thereto had not been challenged. As far as we are concerned, it was challenged. Applicant’s representative argued⁴ that monies due to the 1st respondent in *lieu* of leave had been deducted to defray costs for the repair of the truck. It cannot therefore be said that the claim was never contested. The legal position in respect of set - off was clearly stated by this Court in *Mahlakeng v Lesotho Bank*.⁵ The Court held that as long as a claim is ascertainable it can be set - off. The Court cited in support of this finding, among

³ [2007] 12 BLLR 1097 (CC) at p. 1101

⁴ P. 5 of the DDRP record

⁵ LC 41/98

others, the judgment of *Schierhout v Union Government*⁶ where Innes CJ., stated that:

When two parties are mutually indebted to each other both debts being liquidated and fully due then the doctrine of compensation comes into operation. The one debt extinguishes the other protanto as effectually as if payment had been made.

[7] The 1st respondent was found guilty of reckless driving which resulted in damage to applicant's vehicle and applicant's Counsel indicated⁷ before the DDPR that:

The employer was entitled to costs and if I recall well, in his dismissal letter it had been stated that part of the repair to the vehicle would be ... let me put it this way, sufficient deduction would be made towards the cost of repairing that vehicle.

Leave is a right and if not expended, there has to be payment thereof in *lieu*. However, in this case, applicant's Counsel clearly mentioned as reflected above that the applicant pointed out that it would deduct whatever was due to the 1st respondent towards the cost of repairing the vehicle. It can, therefore, not be said that leave payment was never contested as found by the learned Arbitrator at paragraph 21 of his award. We therefore find the deduction by the applicant in this regard to have been reasonable.

PERFORMANCE BONUS

[8] The 1st respondent was further awarded a performance bonus despite the learned Arbitrator's confirmation of his guilt. The learned Arbitrator ordered it on the basis that it was not challenged. In our view, it was challenged. Applicant's Counsel clearly indicated during DDPR proceedings that as far as he was concerned, a performance bonus was not due.⁸ Bonus is a reward for good performance and it is therefore earned and not automatic. Hence, it is preceded by a performance appraisal. It is an incentive to an employee to perform better in future, even beyond expectation. This Court had an opportunity to look into the issue of a performance bonus in *Ts'epang Tumahole v Boliba Multi - Purpose Co - operative*⁹ and confirmed that a performance bonus is earned upon good performance and it is only due to an employee who is still in employment. This begs the question: how could the 1st respondent be rewarded when he had been found guilty of misconduct?

⁶ 1926 AD 289 at 289 - 290

⁷ P. 5 of the DDPR record

⁸ *ibid*

⁹ LC 61/10

[9] The Court also noted that in his determination the learned Arbitrator overlooked the provisions of *Section 73 (2) of the Labour Code (Amendment) Act, 2000* which enjoins both presiding officers of the Labour Court and Arbitrators to award a just and equitable compensation in the circumstances of a particular case and to take into consideration any breach of contract by either party. Applying this provision to this case, the learned Arbitrator has failed to consider the provisions of this law in awarding compensation. The 1st respondent was found guilty as charged by applicant's disciplinary panel, which the learned Arbitrator confirmed and ruled that whatever irregularity he detected "*did not go to the root of the matter so as to render the initial proceedings a nullity.*" He, however, turned around to award compensation as if nothing had happened. We find this reviewable.

ORDER

On the basis of the above analysis, the Court comes to the following conclusion:

- i. **The DDPR award in A 1154/11 is reviewed and set aside;**
- ii. **There is no order as to costs.**

THUS DONE AND DATED AT MASERU THIS 19TH DAY OF OCTOBER, 2017.

F.M. KHABO
PRESIDENT OF THE LABOUR COURT

P. MOLAPO
ASSESSOR

I CONCUR

M. MOSEHLE
ASSESSOR

I CONCUR

FOR THE APPLICANT : ADV., H.P. TS'OLO - ASSOCIATION OF LESOTHO EMPLOYERS AND BUSINESS

FOR THE 1st RESPONDENT : ADV., M.T. THELISI - MOSUOE & ASSOCIATES

ANNOTATIONS

STATUTES REFERRED TO

Labour Code (Amendment) Act, 2000

CITED CASES

Mahlakeng v Lesotho Bank LC 41/98

Schierhout v Union Government 1926 AD 289

Sidumo & Another v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC)

Ts'epang Tumahole v Boliba Multi - Purpose Co - operative LC 61/10

LITERATURE

Grogan J., Workplace Law 11th ed., 2014, Juta