



Industrial Peace

**IN THE DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION OF
LESOTHO**

ARBITRATION AWARD

REFERRAL NO. A0625/06
DATE OF HEARING: 26/03/07
PLACE OF HEARING: MASERU

In the matter between:

TSELISO MPHETA

APPLICANT

AND

**SUN INTERNATIONAL OF LESOTHO (PTY) LTD
T/A MASERU CASINO HOTEL**

RESPONDENT

INTRODUCTION

Applicant referred a dispute of right to the DIRECTORATE OF DISPUTE PREVENTION AND RESOLUTION (hereinafter referred to as the DDPR), in September 2006. The dispute was referred against a company duly registered and operating under the laws of Lesotho with its principal place of business in Maseru – Orpen road. This was an unfair dismissal dispute in which applicant prayed for reinstatement. The hearing of this matter was finalized on 26th March 2007 after a number of sittings. Ms. Sephomolo – Deputy Executive Director for Association of Lesotho Employers and Business to which the respondent company is a member appeared on its behalf. Applicant duly represented by Mr. Matete – Secretary General for National Union of Hotels Food and Allied Workers, appeared for the hearing too.

PRELIMINARY ISSUES

Jurisdiction:

This was a dispute of right upon which the DDPR has jurisdiction and which should be resolved by arbitration, as contemplated in section 226 (2) (d) read with section 227 (4) of the Labour Code Amendment Act No. 3 of 2000.

ANALYSIS OF FACTS AND EVIDENCE

Background to the dispute:

It was common to the parties that applicant was an employee of the respondent company employed as Surveillance Officer. He started employment with the respondent in May 2002. His contract of employment was terminated on the 19th June 2006. He contested both the substantive and procedural aspects of his dismissal.

Substantive fairness:

Applicant was charged, found guilty and dismissed for unauthorized possession of respondent's property. It was stated that the respondent's property to the value of M4500.00 was found at applicant's house by security manager and police. Five witnesses were called to testify for the respondent. The first was Molapo Jonathan – Security Manager at respondent's hotel. He narrated the story that led to searching at applicant's house where a number of items belonging to the respondent were found. It was his testimony that he had had several reports of missing property from different departments. The last was that relating to tickets for Mothers' Day celebration. On the day of the occasion such tickets were found from one Rethabile Mpheta who apparently was applicant's sister. Apart from the tickets, applicant was seen wearing a jacket/sweater which had been reported missing from marketing department. All these were reported to police. It was then found necessary to go and search applicant's house. It was his case that in their search the following items were found; pool mattress, national flag, blue pull-over, two soup spoons, beer mug bearing Maseru Sun logo, spoon and three teaspoons, eleven Panasonic cassettes, bottle-opener, four piece curtains, one Sun International bath towel, five nylon curtains, apron, bed frill and two head rest cushions. Mr. Jonathan presented a list of these items which bore signatures of applicant, himself, one Rapatala – police officer and Nkuatsana confirming the items found at applicant's house. According to this list however, there was item number four – zenith camera which Mr. Jonathan indicated that was applicant's and that it had been taken by mistake.

The items in the list were displayed and shown one by one. He indicated lastly that the policy states that if an employee is given items by guests, that employee has to declare such items in the declaration book and sign for that. If the employee bought items, there shall be receipts issued to confirm such purchases. It was his contention that applicant had in this case failed to show either the declaration or any receipts.

There were four other witnesses whose testimony was based on different items belonging to their departments and had brought similar items to show that items found at applicant's house were similar to those belonging to respondent. Briefly Mr. Leabua's testimony, who is Assistant Surveillance Manager was in relation to the video tapes. He confirmed that respondent bought in bulk similar tapes as the ones found at applicant's house.

Applicant's contention was that such tapes are purchased everywhere in shops and he showed one which he said he bought at Sharp.

The other witness was Mathabo Motsamai – Executive House Keeper. She gave testimony on curtains, bed linen and the towel. She showed similar items as those found at applicant's house, which belong to the respondent, there was among them (those found at applicant's house) curtains which were marked room number 424 and 426. She contended that those are items specially designed for respondent and cannot be found anywhere else even at shops. She said the said curtains were similar to the ones which are still in the store room and not those that were sold to staff. She admitted that there are items which are at times sold to staff though. Applicant's testimony was that those curtains are found everywhere at shops such as woolworths. It was put to this witness under cross examination that such curtains can be found at shops such as woolworths and the witness stated that those are specially designed for respondent and cannot be found at any shops.

The next was Mr. Khoai – Assistant Manager (Food and Beverages). His testimony was based on the cutlery which is under his custody and he identified similar one from the items found at applicant's.

Lastly, was Mr. Makhele – Assistant Slots Manager who chaired applicant's disciplinary hearing. His testimony was to a large extent based on the procedural aspect of applicant's dismissal. He however went further to corroborate Mr. Jonathan's testimony that if items are bought at respondent's, there are three copies of the receipt book. The first copy is for the employee who purchased items, the second copy is the gate-pass while the last is left in the receipt book. Applicant and his witnesses denied this, stating that the gate-pass is the only copy given to the employee and it is left at the gate and the employee is left with nothing.

Applicant on the other side gave testimony to the effect that yes the listed items were found at his house. He submitted a similar list to the one tendered by one of respondent's witnesses. He admitted that he did not have any proof in the form of receipts whatsoever for items he alleged to have bought at respondent's because the gate-pass was left at the gate with security and nothing was given to him as his own copy. He went over the items one by one. He said he got the sweater from one Tshepo. He said this was a gift from the said Tshepo who at the time was a visitor at the hotel. He indicated that he got the beer-mug and opener from one Mohapi. He went further to show that the apron was from one Khothatso while the pool mattress was received from one Steve Moloji. He summed up by saying that items such as curtains and towel were bought from the respondent's in 2002 while tapes were bought from shops. He said he borrowed the national flag from one Mokoaleli who is an ex-employee of the respondent.

Applicant was asked under cross examination whether he was aware that the curtains he was claiming to be his bore the room numbers for the respondent hotel and he said he was not aware of that, all he knew was that those were his and he bought them from Standerton.

Two of applicant's witnesses, one Molete Molete and Thabang Khiba who are both ex-employees of respondent corroborated applicant's testimony on the contentions that gate-pass is left at the gate and there is no copy for the employee as proof of purchase. Molete indicated further under cross examination that applicant could have asked for the respondent's book copy in a situation whereby he did not have his own as prove of purchase.

Thabang Khiba on the other hand showed items which he said he bought from respondent's while he was still an employee. These were a duvet cover and a beer mug. He said the cover was sold with matching curtains.

As indicated earlier on, applicant did not deny such items having been found at his house. He indicated that he bought some of these items from shops. He did not have any proof of purchase however. I agree that the tendency with people is not to keep receipts for items purchased for a long time. There were however other items which he said he bought from respondent's. It was common cause that receipts are issued for such items. The only difference was that applicant contended that the employee is given one copy which is left at the gate while the rest are left in the book without him having his own copy. Respondent's witnesses on the other hand stated that there are three copies one of which is the employee's personal copy. Be that as it may, either way there is bound to be proof in the receipt book of such purchases but applicant did not even allege their presence; meaning he did not even say if receipt books could be shown, they would reflect such purchases. All he did was state under cross examination when asked what he would do if there were allegations of theft against him and he had misplaced any proof of purchase, that he would go back to the shop or place where he bought such item or items and ask for a copy that is left in the receipt book. He indicated however that in this case he did not approach the respondent because he was denied permission. I want to give him the benefit of the doubt because this is a point which respondent did not deal with extensively.

That as it may, there were yet other items which applicant alleged he was given by people like Tshepo, Mohapi, Khothatso and Steve Moloji. He admitted that he knew that if he received gifts from people belonging to the respondent, he should declare them. He has mentioned nothing in his testimony about declaring any one of these gifts. Having failed to do that, he has also called none of these people as his witnesses to at least confirm his allegations. In that way, he just made bare allegations which went unsupported.

Khiba's testimony in relation to the beer mug was irrelevant since applicant had not alleged buying the beer mug. Applicant had said he got the beer mug from Mohapi who was not here to confirm that. The duvet cover on the other side did not form part of the items which applicant was alleged to have been in unauthorized possession of. That was out too. He said the duvet covers were sold with matching curtains but he was able to bring with him the duvet cover and left the curtains. In that case I am not sure whether the curtains he was talking about were similar to those found in applicant's possession.

Under such circumstances, I find applicant to have been unable to show that the items complained of were rightly under his possession. This is similar on the items he alleges to have bought from shops, the same applies to those he says he bought at respondent's as well as those that he claimed were gifts. He failed to show that he obtained all these through proper means. I am inclined under such circumstances to agree with the respondent that he was not authorized to possess these items. I find respondent to have been able on a balance of probabilities to discharge its burden to show that applicant was not authorized to be in possession of such items. I therefore find his dismissal to have been substantively fair.

Procedural fairness:

The pre-dismissal procedure followed was also in contention. Applicant indicated that as a Shop steward of the union, his union was supposed to have been notified when disciplinary action was to be taken against him in terms of the Labour Code Codes of Good Practice. It was argued for the respondent company that the Codes are soft law and departure from them does not render the proceedings unfair. It was contended further that they should be applied flexibly and not legalistically.

I agree with applicant that the Codes stipulate that discipline against a trade union representative or an employee who is an office-bearer or official of a trade union should not be instituted without first informing and consulting the trade union. I also agree with respondent that the codes are soft law. They are just guidelines which describe the kind of practices that are expected of an employer before dismissing an employee. They are said to give content to the meaning of a fair procedure. In their definition, it is said that an employer may depart from the provisions of the code ***'but if it does so it will have to justify why it did so.'*** In the present case, no reasons were advanced as to why respondent did not follow the particular code dealing with instances where action is to be taken against a trade union official. All that was said was that codes are soft law and departure from them cannot render proceedings unfair. I take it that respondent did not have any specific reasons to depart from this code. I take such failure on respondent's part to have rendered the procedure irregular.

Another issue that applicant complained of regarding procedure was that he was denied opportunity to cross-examine respondent's witnesses in the hearing. All of respondent's witnesses gave testimony to the effect that applicant was allowed to cross-examine them. He did not contest these witnesses' testimony, all he said was make bare allegations that he was denied cross-examination. I therefore find respondent's side to far outweigh applicant's and the conclusion that I come to is that applicant's allegations are not likely to be true; meaning he was allowed cross-examination.

Lastly was the issue that he (applicant) was denied representation. It was his own testimony that the hearing was for the first time postponed to allow him get

representation. It however did not proceed on the date scheduled wherein he had a representative. It was rescheduled to another date at which date his representative could not be available and he asked for a postponement on that basis but he was denied such postponement.

Mr. Makhele for the respondent, who was the one who chaired the hearing indicated in his testimony that applicant never mentioned anything about a representative on the date of the hearing. He submitted as proof minutes of the hearing wherein the answer to the slot that was to be filled with the name of the employee's representative was N/A, meaning not applicable. Further in the minutes there was no indication whatsoever wherein applicant raised the issue on representation. He was asked under cross-examination what prejudice he would suffer as a result of not having a representative and he said the representative was required so that they could help each other. Obviously this does not answer the question because it does not show what prejudice he suffered. What is important however at this point is that he was not able to contradict respondent's evidence that he never asked for a chance to secure a representative. He did not even contest the truthfulness of what was contained in the minutes which means he agreed that the minutes were a true picture of what transpired in the disciplinary hearing. I therefore find his argument not to hold any water.

Costs:

Respondent's representative prayed for an order of costs to the value of M2650.00 against applicant and his representative on grounds that this was a frivolous case which applicant brought here knowing quite well what he did. She said this was the amount the hotel had paid to the employers' organization for representation. Although I find applicant's act to have been frivolous by proceeding with this case without any proof whatsoever to show how he got hold of respondent's property, the costs that respondent's representative is praying for, sound to me like costs of the suit and not costs for frivolity which section 228E (2) of the Labour Code Amendment Act 2000 gives the arbitrator powers to order. I am going to order costs jointly to applicant and his representative amounting to M500.00 as a way to stop parties from insisting on arbitration without proper evidence to defend their case and not the loss the respondent hotel went through in defending this case.

FORMULATION OF THE AWARD

I am going to award compensation to applicant for failure on respondent's part to justify departure from the code that stipulates that discipline against a union official should not be instituted without first informing and consulting the trade union. For the fact that there has not even been any prejudice shown to have been suffered on the part of the applicant for such failure, I find this departure not to have rendered the whole procedure unfair and I find applicant's one month's salary to be enough to compensate for that irregularity. Applicant earned M1900.00 per month as salary and this is the amount of compensation he is entitled to. I am however going to deduct the M500.00 of costs which they were supposed to pay to the respondent from this sum and applicant shall only be left with M1400.00 due to him.

AWARD

The respondent company is ordered to pay applicant a sum of **M1400.00** in full within ten days from the date of receipt of this award. Payment must be effected at DDPR – ACCOUNTS OFFICE (MASERU).

DONE AT MASERU, THIS 25TH DAY OF APRIL, 2007

L.MALEBANYE
ARBITRATOR