IN THE LABOUR COURT OF LESOTHO CASE NO. LC 33/95

HELD AT MASERU

IN THE MATTER OF:

PALESA PEKO APPLICANT

AND

THE NATIONAL UNIVERSITY OF LESOTHO RESPONDENT

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J U D G M E N T

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Applicant herein was suspended by the respondent, University on the 27th February, 1995 for allegedly being absent from work without explanation. The suspension was retrospective to the 6th February, 1995 which was the date when the applicant first became absent from work. Since the suspension was without pay, the salary already paid to the applicant for the month of February was withdrawn from her bank account. When this matter was heard on the 29th May, 1995 the applicant had reportedly just returned to work on the 24/05/1995.

According to the applicant's version on the 6th February her six year old son fell sick. She took him to hospital where examinations and tests were carried out, but no results were communicated to her. On Tuesday 7th February the child was again taken to hospital. Further examinations revealed that the boy had appendicitis. He was admitted to hospital and the same evening he was operated upon. The applicant says that both on Monday and on Tuesday she rang one Ranko of the University's Institute of Southern African Studies to inform her office about the illness of her son, and that on both occasions Ranko passed the message. The respondent has not denied this allegation.

The applicant had to be together with her son in hospital during the period of hospitalisation which was the 7th to 13th February. She was given sick leave for the period up to the 17th February which she sent to her employers. Thereafter the sick leave was renewed until 24th February to enable her to be next to the child while he was recovering. On 17th February applicant's supervisor

wrote her a letter asking her to show cause why disciplinary action cannot be taken against her for unauthorised absence. The applicant responded briefly by showing that she had been sending sick leaves in respect of the illness of her son, but said she would be responding fully to the letter when she returned to work on Monday 27th February. When applicant returned to work on the 27th, she had a letter written to her supervisor by the surgeon who treated her son, confirming that her son had been hospitalised and further confirming the authenticity of the sick leaves for the period 6th February to 24th February. The applicant was served with a letter of suspension on the same day notwithstanding the Doctor's evidence.

The applicant seeks the nullification of her suspension on the grounds that it is unfair because she was not given a hearing prior to suspension and that it is unequitable in the light of the facts of the case.

The respondent on the other hand argued that the applicant absented herself without explanation. The steps she alleges to have taken to appraise the respondent of her predicament were an afterthought. The respondent had undertaken to lead viva-voce evidence to show that applicant was inventing the story about taking steps to show the respondent why she was absent from work. It is common cause that no evidence was led by the respondent as promised. Mr Mosito contended that to show that respondent did receive the sick leaves that were send to them they had even annexed them to their answering papers. It is indeed didfficult to comprehend what the respondent means when they say the applicant went missing without explanation and yet they clearly received the sick leaves that were send to them. They do not even contend that those sick leaves came late. They simply make a contradictory statement that the applicant's absence was unexplained. In our view the sick leaves were sufficient explanation of why the applicant was not coming to work. Of course the question whether to accept such sick leaves as a justifiable reason for absence from work is a different matter.

Mr Sello for the respondent, contended further that sick leave in respect of a sick son neither constitute application for sick leave by the applicant nor evidence of illness by the applicant. This is

factually correct. But in the employment context the illness of a minor child of the age of the applicant's child, will render his or her working mother to be absent in order to nurse him/her. The question is how should the indisposition of a working parent as a result of the illness of his dependent child be handled so as not to constitute unauthorised absence.

In the Code, entitlement to sick leave is governed by Section 123. The provisions of this Section do not, however, cover cases of absence as a result of the illness of the child or some other member of the immediate family of the employee. A simple way out would be to say the concerned employee should apply for leave of absence from his annual leave. This in our view would, however, be an over-simplification of the problem. Complications could arise where at the time the patient falls ill the worker has no leave days left, or having taken the leave it gets exhausted before the patient recovers. The law therefore seems to be silent on this issue.

Under Section 4 of the Code dealing with "principles used in the interpretation and administration of the Code", it is provided in paragraph (c) that:

> "in case of ambiquity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of conventions adopted by the Conference of the International Labour Organisation and of Recommendations adopted by the Conference of the International Labour Organisation".

Thus Mr Mosito for the applicant referred us to convention No. 156 of the International Labour Organisation concerning workers with family responsibilities and said the applicant herein is a worker with family responsibility of looking after a sick minor child. He contended that the Court had the duty to see that workers with family responsibilities remain part of the workforce. Article 1 (1) and (2) of the convention state that:

> "1. This convention applies to men and women workers with family responsibilities in relation to their dependent children where such responsibilities restrict their possibilities of preparing for, entering, participating

in or advancing in economic activity".

"2. The provisions of this convention shall also be applied to men and women workers with family responsibilities in relation to other members of their immediate family who clearly need their care or support, where such responsibilities restrict their possibilities of preparing for entering, participating in or advancing in economic activity".

In terms of Article 3 member states are encouraged to make it an aim of national policy to enable workers with family responsibility who are engaged in employment to exercise their right to do so without being subject to discrimination and to the extent possible, without conflict between their employment and family responsibilities. Article 4 (b) provides further that measures compatible with national conditions should be taken to take account of the needs of workers with family responsibilities in terms and conditions of employment. Article 23 of Recommendation No. 165 of 1981 concerning workers with family responsibilities provides that "it should be possible for a worker, man or woman, with family responsibilities in relation to a dependent child to obtain leave of absence in the case of its illness."

In terms of Article 9 of the convention the provisions of the convention may be applied by laws or regulations, collective agreements, works rules, arbitration awards, court decisions or a combination of these methods. This court is therefore empowered to give effect to the provisions of the convention and the recommendation. It seems to the court that the applicant was entitled to be at the side of her dependent child when the child was ill, as is envisaged in the provisions of Recommendation 165. What the medical doctor did when he gave her sick leaves was what was practicable in the circumstances. Indeed the Doctor did not pretend that the applicant herself was ill. He clearly showed that the sick leave is in respect of the sick child of the applicant. The applicant herself did not hide this fact. The respondent cannot therefore, say the applicant was cheating the system she acted in an honest and transparent manner throughout as even her letter of 21/02/95 shows.

The usual requirements as to unauthorised absence would in our view, in the case like the present have to be bent. In every terms and conditions of service of an employee with family responsibilities, men and women alike, there will always be an implied term authorising absence in cases like the one that faced the applicant. Where, however, the employees abuse the entitlement the onus will be on the employer to show that the entitlement is being abused. In the circumstances we hold that whilst the sick leave in respect of the sick child of the applicant did not constitute sickness on the part of the applicant herself, it nevertheless constituted a valid reason for her absence from work in the days in question.

Mr Sello further contended that applicant's salary was withdrawn from her account because it had been paid in error as she did not work that month. He contended that it is an implied term of applicant's contract that she would be remunerated for as long as she has performed her part of the contract by rendering services or is lawfully absent from work. We have already held that the sick leave in respect of the sickness of the applicant's son constituted a valid reason for her absence from work. Her salary for February was therefore, wrongly withdrawn as she had a lawful reason to be away from work. If the applicant has been able to prove that she had a valid reason to be absent it follows that even her suspension as a result of that absence is unfair and it cannot be allowed to stand.

Assuming, however, that the applicant had not been held to have had a valid reason to be absent, could the suspension stand the test of fairness. Mr Mosito argued that it could not stand because it is open-ended. Mr Sello countered by saying that Mr Mosito had no authority for this proposition and argued that if Mr Mosito relies on the decision of this court in Edith Mda .V. NUL LC 14/94 (unreported), the views of the court on the issue were obiter. Nobody ever stated in terms of which rule or legislation the applicant had been suspended. The letter of suspension is also silent. The suspension in the Mda case was authorised by the respondent's disciplinary rules. It could be imposed as a punishment for a period not exceeding that stipulated in the rules.

It was in relation to that stipulated period of suspension that the suspension in that case was held to be irregualr because it was open-ended. There being no rule quoted on which the suspension is based we are unable to make a finding. But if the suspension could continue for a long time it could be challenged on the ground that it is unreasonable.

Mr Mosito contended further that the suspension was unfair because applicant was not given a hearing prior to her suspension. Mr Sello on the other hand argued that there could not be any hearing as the applicant had absconded. He went further to say that after all the applicant was not facing any charges requiring her reply. Mr Mosito replied that the applicant could have been given a hearing on the 27th February, when she returned to work or any day thereafter.

The issue of the applicability of the principles of natural justice in cases of suspension prior to institution of disciplinary proceedings was discussed at length in the case of Thato Liphoto .V. Lesotho Agricultural Development Bank case No. LC 21/95 (unreported). The ratio decidendi of that case was extracted from the Cape Provincial decision case of Muller and others .V. Chairman of Ministers' Council, House of Representatives & Others (1991) 12 ILJ 761 at p. 769 where the learned judge said:

> "When the statute empowers a public body or official to give a decision prejudicially affecting an individual in his liberty, property, existing rights or legitimate expectations, he has the right to be heard before that decision is taken unless the statute expressly or impliedly indicates the contrary.....
> The question referred to therefore, has two components;
>
> (a) has there been a decision causing prejudice here and
> (b) has a hearing been excluded by the legislature".

At page 7 of the Liphoto case supra, this court, in applying the above principle said the following:

> "There is no doubt that suspension without pay is a prejudicial decision to the applicant. In the case of the respondent, powers to suspend are not statutory, but as a public institution the respondent is expected to operate with the same degree of

fairness as those officers who impose suspensions in exercise of statutory duty. Both are exercising public functions and they must act fairly".

The status of the respondent in the instant matter is the same as that of the respondent in the Liphoto case. The same principle of fairness therefore, equally applies. We agree entirely with Mr Mosito that the respondent could have given the applicant a hearing either on Monday 27th February when she returned to work or any day thereafter. The fact that the letter of suspension had already been written does not absolve the respondent from the obligation to give the applicant a hearing, for as it was held at page 8 of the Liphoto case supra, it is not an immutable rule that a suspension shall always be preceded by a hearing . If the exigencies of the situation dictate that action be taken instantly, the employee may still be suspended without a hearing and be afforded the necessary hearing immediately thereafter. In the premises the applicant's suspension by the respondent on or around 27th February, 1995 is unfair and therefore void because the applicant was not given hearing prior to that suspension, or at anytime thereafter.

AWARD

Applicant is granted her prayers as follows:

(a) The purported suspension of the applicant is declared unfair and therefore null and void.

(b) The letter of the Registrar dated 22nd February, 1995 purporting to suspend the applicant is declared null and void and of no force and effect.

(c) Applicant's absence from work between the dates 06/02/1995 to 24/02/1995 did not constitute an unauthorised absence from work.

THUS DONE AT MASERU THIS 1ST DAY OF AUGUST, 1995.

L. A LETHOBANE
PRESIDENT

K. BROWN
MEMBER

I CONCUR

A.T. KOLOBE
MEMBER

I CONCUR