LEMO v NORTHERN AIR MAINTENANCE (PTY) LTD

INDUSTRIAL COURT, GABORONE

[IC NO 166 OF 2004]

22 November 2004

DINGAKE J

M Tabengwa for the applicant.
M Molema for the respondent.

DINGAKE J:

At the commencement of this hearing, I informed the attorneys for the parties that there was only one assessor sitting with me. As both representatives had no objection to me sitting with one assessor, I directed that the matter could proceed with only one assessor.

The applicant has brought a trade dispute to this court against the respondent alleging that he was unfairly dismissed on the grounds that he was HIV positive. The applicant seeks compensation in the form of back pay and reinstatement.

The applicant was employed by the respondent as a trainee aircraft engineer on 8 September 1998. His salary whilst so employed was P1 297.60 per month. As part of his duties, he was to undertake aircraft maintenance and service under the supervision of a qualified aircraft engineer. It is common cause that the applicant was to be elegible for further training after four years in employment with the respondent which was to be tenable in 2002. The applicant was however

not sent for further training as initially planned and or agreed as it was thought prudent that he should recuperate first, before embarking on the training.

There is sufficient evidence to indicate that between the period 1999 and 2003, the applicant's health deteriorated badly with the result that, the applicant, having exhausted up all his annual leave and paid sick leave entitlement, obtained unpaid leave on several occasions.

In terms of the pre-trial minutes signed by the parties the applicant has admitted the sick leave account given by the respondent in its statement of defence for the period commencing December 1999 to September 2002. Essentially the respondent's admitted account is that during the course of 2000-2001 the applicant used up all his annual leave and paid sick leave entitlement.

The applicant applied for unpaid leave for the three month period from 25 September 2001 to 31 December 2001, which leave was granted. The applicant returned to work in January 2002, but his attendance did not improve as he was still constantly ill, necessitating the need to apply for another unpaid leave, which leave was granted for the period from 27 May 2002 to 27 August 2002. The applicant returned to work in September 2002.

A close scrutiny of the documents filed of record, including medical certificates certifying the applicant to be unfit for duty, revealed that the applicant for the period 1999 to 2004 was persistently and intermittently on sick leave and therefore absent from duty. The applicant's attendance record fur the period aforesaid may be summarised as follows:

MONTH	YEAR	NUMBER OF DAYS TAKEN	COMMENTS
22 December—3 January	1999	10	Sick leave
23 February	2000	1	Sick leave

24 February	2000	1	Sick leave
5—8 April	2000	4	daily injections
7—9 April	2000	3	Sick leave
11—13 Apr	2000	3	Sick leave
27—30 April	2000	4	Sick leave
20—27 June	2000	4	Unsigned
10—12 October	2000	3	Sick leave
14—18 December	2000	4	Unpaid leave (unsigned)
24—26 January	2001	3	Sick leave Undated
11—16 April	2001	4	Unpaid
5—8 June	2001	5	Sick leave
9—11 April	2002	3	Sick leave
Undated		1	Sick leave
28 March—16 April	2002	10,5	Sick leave
			Undated note to Mrs Marsh
27 May—28 August	2002	3 months	Unpaid leave
19 September	2002	7 days	Sick (1 week)
25 September—2 October	2001-2002	2	Unsigned by Dept Head
7—11 November	2002	2	unsigned leave
5 December	2002		Clinic
3 January	2003	1	Clinic
21—22 January	2003	2	Sick leave
30—31 January	2003	1	3hrs Annual leave
19—20 February	2003	1	Annual leave
4—7 March	2003	2	Sick

28—30 March	2003	3	Sick
8 April to come back on 11 April	2003	1	Clinic
30 April-2 May	2003	1	Went to hospital
3-4 June	2003	1	Went to hospital
6—7 May	2003	1	Annual/sick leave
6 May	2003	1	Clinic
30 June—1 July	2003	1	Annual leave
27 July—3 August	2003	6	Not signed by Dept Head
26—29 September	2003	4	Sick leave
14 October	2003	1	Clinic
16—17 October	2003	1	Sick
31 October	2003	1	Clinic
12—13 November	2003	7 ½ hrs	(Sick) appointment with the Doctor
14 November	2003	2 hrs (10am-12hrs)	Annual
5—8 December	2003	3	Unpaid
15—16 December	2003	1	Annual leave
26 December—7 January	2003/2004	7	Compassionate
13 January	2004		Clinic
15—19 January	2004	5	Sick
20 January	2004	1	Sick
28 January	2004	1	Sick
28 January – 3 February	2004	7	Sick
TOTAL		190,5 + 9 ½ hrs	

As it would appear from the above table, in January 2004, alone, the applicant took about 14 days sick leave.

It is this poor attendance record that brought things to a head culminating in a meeting between the applicant and management on 28 January 2004, at which meeting the respondent suggested that the applicant must consult a private medical doctor ostensibly to assess his fitness to work. The applicant refused to consult a private doctor because he thought the medical personnel at Maun General Hospital was best suited to attend to his illness as they were familiar with its history.

The respondent's technical liaison officer Ms Catherine Marsh explained that she preferred the applicant to be attended by a private medical practitioner because she needed to know whether the applicant was fit to perform his duties, adding that the problem with Maun General Hospital was that they did not regard her as 'family' and therefore not entitled to know the situation of the applicant. No serious attempts were made to resolve these differences with the result that no assessment was ever made as to the applicant's fitness to continue working. It is not clear why the respondent could not trust Maun General Hospital to do the assessment. From Ms Marsh's evidence it would appear that her primary concern was not necessarily to have a qualified medical practitioner do the assessment, but wanted a medical practitioner who could regard her as 'family' and share with her the medical status of the applicant.

On 29 January 2004, the applicant disclosed to the respondent that he was HIV/AIDS positive. The applicant testified that he did not disclose his status earlier because he was afraid that if he did so he would be prejudiced.

He said the respondent's administrator, now technical liaison officer, Ms Catherine Marsh used to ridicule him that he may be HIV positive. This was before he knew his status.

Ms Catherine Marsh in her evidence indicated that there was a stage where she suspected that the applicant, given his deteriorating health, could well be HIV positive and consequently encouraged him to go for an HIV test.

On 30 January 2004, the respondent wrote a letter terminating the applicant's contract of employment. In terms of the aforesaid letter the reason for terminating the applicant's services was because of his 'continual poor attendance over the last three years'. For completeness, I reproduce hereunder the aforesaid letter:

'Northern Air Maintenance

P/Bag 159 Maun Tel/Fax + (267 6861-148

Botswana e-mailcathym@sefofane.bw

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30 January 2004

Attention: Mr. Nelson Mathodi Lemo

Dear Nelson

The letter serves to inform you that Northern Air Maintenance is terminating your contract effective from the First of February 2004 due to your continual poor attendance over the last three years. Your behaviour has been detrimental to the productivity and efficiency of the company. (Emphasis mine) This behaviour started back in 2001 when you requested three months leave and it has been continual ever since. It has been stressed to you that we needed to see some improvement in your attendance in order to secure your position with us. As you know it is vital for the company's existence to get our customers aircraft maintained on time and fulfil our obligations to them, To this date we have not seen any improvement in your attendance and thus the reason for your termination.

Please accept one months paid notice — February 2004	P1 297.60
Four leave days accumulated in 2004	P230.70
Gratuity accrued (last paid 07109103) — Six months	P692.05
	P2 220.35

I wish you all the best in the future.
Yours sincerely
Signed
Howard Marsh
Chief Engineer

Directors: J.N. Lumsden H.S. Marsh S.M. Lumsden'

It would appear that on 30 January 2004 when the above letter was written the applicant was on sick leave and in terms of the applicant's uncontradicted evidence he was served with this letter sometime in February 2004, when he reported for duty. The applicant says he was dismissed from the employ of the respondent because he had disclosed that he was HIV positive.

The respondent denies that what caused the dismissal of the applicant was the fact that the applicant disclosed his HIV status on 29 January 2004.

According to the respondent the decision to dismiss the applicant was taken on 28 January 2004, although the letter of dismissal was written on 30 January 2004. The respondent's technical liaison officer told the court that in the morning of 30 January 2004, she had a meeting with Ms Lukamba, a labour officer, at which meeting she appraised her about the circumstances surrounding the applicant's case, in particular his persistent absence and sought her advise as to whether it would be competent to dismiss the applicant.

Ms Catherine Marsh told the court that Ms Lukamba's advice was that the applicant was liable to be dismissed. When asked by the court what was the purpose of consulting the labour officer, in particular whether if the labour officer had said it would not be competent to dismiss the applicant would the respondent have gone ahead to dismiss the applicant, Ms Marsh hesitated momentarily, and said that even if the labour officer had advised against the dismissal they would

have dismissed him. This did not make sense because it negates the purpose of obtaining advice. There is nothing to suggest that the applicant was informed whether verbally or in writing on 28 January 2004 that a decision had been taken to dismiss him. The applicant was in fact on sick leave for seven days from 28 January 2004.

The applicant protested his dismissal at the district labour office, complaining that he was dismissed from the employ of the respondent because he had disclosed that he was HIV positive. The district labour office held that the applicant's dismissal was unfair and recommended that the applicant be paid compensation equivalent to his salary for three months which amounted to P3 892.80.

The applicant says that although he accepted the aforesaid payment, he was unhappy with the decision of the district labour office. The applicant disputes that the aforesaid payment was in full and final settlement of this matter. He told the court that it was his intention to appeal the decision of the district labour office as advised by the district labour office in its report dated 9 March 2004. The district labour office, in terms of the aforesaid letter, informed the applicant that he had 14 days within which to appeal to the regional labour officer, if he was unhappy with the district labour office's decision.

The applicant told the court that on the 14th day he attended at Maun District Labour Office in order to file an 'appeal' with the regional labour office. The applicant told the court that he met Ms Lukamba, a labour officer, who advised him that he could not lodge his appeal because the officer responsible for processing appeals, Mr Seleke was on an official trip. The applicant said he sought to return the cheque but was advised he was taking a risk. This was not challenged under cross-examination. The labour officer having prevailed upon him, the applicant took the cheque and encashed it.

It is in consequence of the above that the respondent has raised a point in limine, arguing that since the applicant accepted payment, the dispute between the parties has been settled and accordingly this court has no jurisdiction to entertain this trade dispute. At the commencement of this matter the attorneys for the parties advised the court that in order to save time they prefer to deal with the preliminary point and the merits at the same time. The court accepted their proposal. At this juncture it is appropriate to deal with the point in limine raised by the respondent, namely whether or not this matter has been settled.

Settlement of disputes

It is trite law that this court only has jurisdiction to determine unresolved trade disputes (*Mogale v Water Utilities Corporation (Practice Note)* [1995] BLR 798, IC and *Mbaakanvi v Botswana Meat Commission* [1999] BLR 286, IC). The learned authors, Le Roux and Van Niekerk, in their book entitled *The South African Law of Unfair Disrnissal* (1994) at p 92, para 6.7, articulate the position with respect to settlement of disputes as follows:

'In some instances, employers laced with a claim for unfair dismissal have raised the argument that the court should not hear the matter because it has been settled and that there is therefore no dispute between the parties.

An uncritical acceptance of such an argument could give rise to obvious problems. Should an unrepresented individual employee be held to a "settlement agreement" where, for example, shortly after his dismissal, he was offered a sum of money by his employer "in full and final settlement" of any claims he may have had in connection with his dismissal? The potential for abuse of the employer's stronger economic position is obvious. It is probably for this reason that the court, in *PPWAWU and Other v Delma (Pty) Ltd,* refused to countenance the employer's argument that the applicant employees could not approach the court because they had accepted a monetary payment in full and final settlement of their claim.

Nevertheless, in most decisions where the issue has arisen, the court has been prepared to consider the merits of this type of argument. This, it is submitted, is the correct approach. To suggest otherwise would mean that no dismissal disputes could be settled prior to court action. Not to accept the possibility of a settlement would also be contrary to the purpose of the Labour Relations Act, which encourages the settlement of disputes through negotiation and agreement, However, the court should be, and in fact has been, prepared to investigate whether there was a settlement and whether the agreement which led to the settlement was a voluntary and informed agreement.'

Settlement of a dispute is also referred to as a compromise. A comprise is defined as follows in Wille *Principles of South African Law* (6th ed) at p 367:

'It is an agreement between parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain;, settling the matter in dispute, each party receding from his previous position and conceding something; either diminishing his claim or creasing his liability.'

The basic principles on compromise are clearly articulated by Christie in his book *The Law of Contract in South Africa*, (3rd ed) at p 505 where he says:

Compromise, or transactio, is the settlement by agreement of disputed obligations, whether contractual or otherwise. If there is no such dispute there can be no compromise. It is a form of novation differing from ordinary novation in that the obligations novated by the compromise must previously have been disputed or uncertain, the essence of compromise being the final settlement of the dispute or uncertainty...

However the contract may be described by the parties, the court will look at the substance rather than the form in order to decide whether a particular obligation or dispute has been compromised.

The onus is on the party alleging that a compromise has been effected, and because compromise is a form of novation and involves the waiver of existing rights (or claimed rights) it must be as dearly and unambiguously proved as any other waiver or novation.'

From the evidence of the applicant we are satisfied that the applicant was clearly aggrieved by the decision of the district labour office and intended to 'appeal' it to the regional labour office. The applicant took concrete steps to do so by attending before the district labour office, but due to what clearly amounted to inefficiency and irresponsibility by the district labour office, he was told that he couldn't file his appeal' because Mr Seleke was on an official trip. He even attempted to return the cheque, but was advised it would be risky to do so, apparently suggesting that if the applicant didn't take the cheque he ran the risk of his appeal' not being processed and possibly not receiving any payment for the dismissal the labour office held to be unfair. It is our view that had the applicant not been advised by the labour officer that if he didn't take the cheque he was running the risk of not being paid and his appeal not being processed, the applicant would not have taken the cheque. The effect of the applicant's evidence as indicated above is that he unwillingly took the cheque and ended up encashing it, and or that he was forced to take the cheque in order to avoid the risk alluded to by the district labour officer aforesaid. We are satisfied that had the applicant known that the effect of taking and eventually encashing the cheque would bar him from proceeding further with his claim, he would not have accepted and eventually encashed it.

In the circumstances of this case, we hold that the applicant's acceptance of the cheque did not mean that he was entering into a settlement agreement in full and

final settlement of his claim, or that he was happy with the amount of compensation that he received. For the applicant's acceptance of the cheque to amount to a complete settlement of his claim, the applicant must have taken an informed decision, fully appreciating the consequences of what he is doing, namely, that once he has accepted the cheque he could not pursue his claim further. It is common cause that the Industrial Court is both a court of law and equity. In my view equity requires that unrepresented and or lay litigants should not be barred from pursuing their claims further because they unknowingly accepted payment without a full appreciation of the consequences of so doing. In the circumstances of this case, even assuming, without conceding, that the maxim ignorance of the law is no excuse is applicable in this matter, it would be patently iniquitous to rigidly adhere to the maxim. Such an approach would lead to miscarriage of justice and I decline to follow it. In the case of *Santsoma v Bokamoso Community Development Project* (IC 70/97), unreported, Carstens J held that this court had no jurisdiction to entertain a settled matter unless the settlement was involuntarily entered into or forced upon the applicant unwillingly or it was obtained in an improper manner. I am clear in my mind that the applicant's acceptance of the cheque was involuntary or obtained in a proper manner. In the case of *Mokute v Senn Foods (Pty) Ltd* (IC 38/98), unreported Carstens J held that the court should be prepared to investigate whether the agreement which led to a settlement was voluntary and informed, particularly where an employee is unrepresented. As I have said earlier, the applicant in accepting the cheque did not understand that to amount to a settlement of this dispute.

In any event, even if I am wrong in so holding, the respondent would still not succeed in its contention that this matter was settled, because, on a balance of probabilities the court is not satisfied that the parties in this matter reached a compromise. The respondent bore the onus to prove the compromise. In our view the respondent failed to discharge the onus that lay with it in this regard.

In the premises this court has jurisdiction to determine this dispute. Having disposed of the point in limine raised we must address the central question in this case, namely whether the dismissal of the applicant was substantively and procedurally fair.

Substantive fairness

The undisputed facts of this case point to a persistent pattern of absentee ism, mostly, if not wholly, authorised, over a three year period. The applicant, in consequence of his poor health, exhausting his annual and sick leave days per annum and having to obtain unpaid leave, often for months, in order to obtain medical assistance. This was clearly not a case of misconduct. It was a case of persistent, but intermittent absence because of ill-health. The respondent, it must be said, demonstrated the highest level of compassion and care, as it cooperated throughout the three years to ensure that the applicant got the medical attention he needed, to the extent that it even allowed him (applicant) to go on unpaid leave for months and suggesting, at one point, that the applicant consult a private doctor at its expense.

Given that the respondent tolerated the applicant's absenteeism for about three years, the question that arises is what triggered the dismissal of the applicant. The respondent's evidence is that a meeting between the applicant and respondent was held on 28 January 2004 at which meeting the respondent expressed concern about the applicant's continued absenteeism. At the said meeting the respondent suggested that the applicant consult a private medical practitioner. The applicant expressed its preference for Maun General Hospital doctors. There is no evidence to indicate that at this stage the respondent was contemplating dismissing the applicant. The applicant was not warned at that meeting that his job was in jeopardy. Yet following his refusal to consult the private medical practitioner as suggested by the respondent. the respondent allegedly took a decision to dismiss him.

There is no evidence that he was even informed on 28 January 2004 that a decision had been taken to dismiss him. As far as he was concerned he was on seven days sick leave and was still in the employ of the respondent.

On the evidence the decision to dismiss the applicant was substantively unfair because there was no valid reason for his dismissal. This is so for any or all of the four reasons herein stated. Firstly, the applicant's absence from work for the last three years as reflected in the letter dismissing him was, mostly, if not wholly, authorised by the respondent. That his absence for the last three years was mostly, if not wholly authorised by the respondent, was accepted by learned counsel for the respondent during her final submissions.

Secondly, learned counsel for the respondent conceded in her final submissions that the applicant's refusal to submit to medical examination as suggested by the respondent contributed to the decision to dismiss him. That surely cannot be a valid reason, The applicant, on the evidence did not refuse to have his fitness assessed, he just did not think it prudent to consult a private medical practitioner, when there are doctor(s) at Maun General Hospital who are and were familiar with his illness.

Thirdly, there is no evidence that as at 28 January 2004, the applicant was incapacitated on account of ill-health to perform his duties. Even assuming that it is true that the applicant was dismissed on 28 January 2004, there is no evidence to suggest that there was a valid reason for so doing.

Fourthly, the respondent by not taking action against the applicant for the last three years waived its right to take action and or condoned the applicant's conduct, at least for the preceding three years before 28 January 2004.

I must however indicate, at this juncture, that the respondent's evidence that the applicant was dismissed on 28 January 2004 appears to the court to be

improbable. This is so because there is no evidence to suggest that the meeting of 28 January 2004 was called to consider, inter alia, the possibility or option of dismissing the applicant. Further, even if it was, logic dictates that the applicant ought to have been told about his dismissal on the date the decision was taken or soon thereafter. Furthermore, the applicant was on 28 January 2004 granted seven days sick leave. It is difficult to understand the logic of allowing the applicant to go on sick leave on the day the decision to dismiss him was taken.

Having regard to the above, the probabilities are that the applicant was not dismissed on 28 January 2004 as the respondent's technical liaison officer claims. We find that the respondent's technical officer was misleading the court in saying that the applicant was dismissed on 28 January 2004. There is simply no evidence to that effect. In the normal cause, one would expect that at the very least, a record of that decision, in the form of minutes, could have been kept and produced as evidence. This was not done. Ms Catherine Marsh struck us an unreliable witness and we reject her evidence that the applicant was dismissed on the 28 January 2004 as untruthful and an afterthought.

The above conclusion leads to the question: when then was the applicant dismissed? In our view, the probabilities are that the applicant was dismissed on 30 January 2004, the date which appears in the letter of dismissal. His dismissal came a day after he disclosed to the respondent that he was HIV positive, and we do not believe that this was coincidental, This raises an inference that he was dismissed because he was HIV positive. Furthermore, the applicant, whom we considered more credible, for the reason that he was logical and unhesitant in his evidence, unlike Ms Catherine Marsh, clearly stated that he believes that he was dismissed because he was HIV positive.

He said when he confronted Ms Marsh whether he was dismissed because he was HIV positive, Ms Marsh could not admit it, nor deny it, but referred him to the letter of dismissal. Given the seriousness of the disclosure, the fact that the respondent suspected the applicant to be HIV positive at some stage and the

respondent's envious track record of compassion and care, it is to our mind probable that the confirmation by the applicant that he is HIV positive, notwithstanding the respondent's denial, was in fact the straw that broke the camel's back, and we so find.

We do not think that the applicant's refusal to consult a private medical practitioner, as suggested by the respondent triggered the dismissal. After all the respondent has no right to dictate to the applicant who he should consult. The patient being the master of his body is entitled to a medical practitioner of his choosing and it would be unreasonable for the employer to take a dim view of the applicant's refusal to consult a medical practitioner of its choice. It would be a different story if the applicant had refused to see any medical practitioner.

There is not enough evidence to indicate that the applicant frustrated the efforts to have an assessment of his fitness. Surely, for the applicant to say, at one meeting, that he prefers an assessment to be done by Maun General Hospital, because they are familiar with the history of his illness, cannot by any stretch of imagination be construed as being obstructive.

It would appear to me that Ms Marsh's insistence to have the assessment done by a private medical practitioner was actuated by the need to know the medical status of the applicant and was in the premises mala fide or done for an ulterior motive.

This case is clearly distinguishable from the case of *Sebonego V Newspaper Editorial and Management Services (Pty) Ltd* [1999] 2 BLR 120, IC because in the case of *Sebonego*, the applicant (employee) had clearly frustrated the respondent's attempt to establish what is/was wrong with his health. In this case, unlike the *Sebonego* case the applicant did not refuse to submit to medical examination, he suggested that he be attended by the medical practitioners at Maun General Hospital. This case is also distinguishable from the case of

Monare v Botswana Ash (Pty) Ltd [2004] 1 BLR 121, IC, because in the aforesaid case the applicant was dismissed because of incapacity due to ill-health and there was evidence that he was too sick to perform his functions. In this case it has not been shown, let alone suggested, that the applicant was incapacitated to perform his job.

This court has decided a number of cases involving HIV/AIDS at the workplace. Whilst the circumstances and facts of those cases differ, the golden thread that runs throughout the judgments is that it is incompetent to dismiss an employee solely on the grounds that such an employee is HIV positive. (*Diau v Botswana Building Society* [2003] 2 BLR 409, IC.) (See also *Jimson v Botswana Building Society* (IC 35/03), unreported and *Monare v Botswana Ash (Ply) Ltd* (supra).

It is my considered view that where an employee has become ill, and has in consequence been not reporting for duty for a cumulatively long period of time, whether such illness is a result of HIV/AIDS or any other illness, and is inconsequence unable to perform his duties, the normal rules as to termination of services for inability to perform the job apply. As I see it, even in the case of progressive incapacitation, the employee cannot be dismissed without first being given a fair enquiry, at which the nature of the incapacity; the cause of the incapacity; the likelihood of recovery; improvement or recurrence; the period of absence; its effect on the employer's operations; and the employee's length of service, to mention only some of the critical factors are considered.

Where an employee is HIV positive, employers should refrain from any discriminatory practices towards an HIV/AIDS positive employee, and should view the employee in the same way as it would any other employee suffering from a life threatening illness. This is so because as a general rule an HIV positive employee may for years, even decades, experience no interference with his or her capacity for service in fulfilment of the demands of his job. This is particularly so in this era where anti-retroviral drugs are readily available.

To exclude an HIV/AIDS positive employee from employment through dismissal solely because he is HIV positive and without having established that he is incapacitated, as in this case, lacks a rational foundation and is unfair.

The view I hold is that once an employee is dismissed because he is HIV positive, as in this case, the constitution is immediately implicated, in particular s 7(1) which prohibits inhuman and degrading treatment. This is so because to dismiss an employee because he is HIV positive is a violation of his right to dignity.

The value of dignity as a core value of our constitution cannot be overemphasised. Recognising the right to dignity is an acknowledgement of the intrinsic worth of a human being. It is therefore plainly impermissible to dismiss an employee because he is HIV positive, when such a status has not been shown to incapacitate him. The era of routine dismissals because an employee is HIV positive, if ever there was, is now past. It is offensive to modern thinking and must not be tolerated. The courts, need to assert and enforce this right, so as to inform the future, and invest in our legal and constitutional order the intrinsic worth of all human beings.

In the context of an individual, human dignity means having a sense of self-respect and self-worth. It is concerned with physical and psychological integrity. Human dignity is harmed by unfair treatment or discrimination based on personal traits or circumstances which have no relationship to individual capacities.

This court, being a court of equity, is entitled to have regard to international principles on rights at work. The International Labour Organisation Declaration on Fundamental Principles and Rights at Work, adopted in June 1998 reaffirms the constitutional principle of the elimination of discrimination at the workplace.

There can be no doubt in my mind that the values of human dignity and elimination of discrimination are the very essence of our constitution.

The current approach to issues of HIV/AIDS at the workplace is that it is incompetent to dismiss an employee solely because he or she is HIV positive. This position is correctly articulated, by Jane Hodges et al in their publication entitled *An Outline of Recent Developments Concerning Equality Issues in Employment for Labour Court Judges and Assessors* (1997) at p 28 as follows:

'To sum up the current international approach, it appears that HIV infection is not a valid ground for termination of employment. As with many other illnesses, persons with HIV-related illnesses should be able to work as long as they are medically fit for available and appropriate work. For example the ILO Termination of Employment Convention, 1982 (No.758) requires that there must be a valid and fair reason "connected with the capacity or conduct of the worker" for a disciplinary dismissal. Given the fact that HIV is impossible to transmit through casual contact, the mere fact that a worker has HIV is not a rational basis for discriminatory treatment or for termination of services. Enterprises should not have policies which invoke discriminatory practices towards an HIV-positive employee. They should view the worker concerned in exactly the same way as they would view any other employee suffering from a life-threatening illness.'

The above quote is based on the International Labour Organisation Code of Practice on HIV/AIDS. The above code, although not having a force of law, is persuasive in so far it is consistent with Botswana's international obligations, (see Convention no 111 (Discrimination, Employment and Occupation Convention, 1958), which Botswana has ratified).

As I earlier indicated, the employer is not expected to be saddled with an employee who is not productive, either on account of HIV/AIDS or some other ailment and is entitled to dismiss an employee who on account of illness, is

absent for unreasonably long time in the circumstances. (See *AECI Explosives Ltd (Zomerveld) v Mambulu* 1995 (16) ILJ 1505 (LAC). When a period of absenteeism is deemed unreasonably long is dependent on the circumstances of each case. The reasonableness of the employee's absence should be evaluated according to such factors as the nature of the employee's job, the extent to which the business of the employer is suffering, and or incurring losses, the prospect of the employee recovering.

None of those factors were canvassed before me by the parties.

In this case the applicant has admitted during his evidence that in October 2002 he was put on anti-retroviral drugs, but discontinued taking same in July 2003, because he had difficulty taking time off from the respondent to take the medication. This surely, explains why his health deteriorated thereafter. He was re-enrolled on anti-retroviral drugs in January 2004. That possibly explains why he was very weak that month, even necessitating being booked off sick for about 14 days or so in January 2004 alone. Since the respondent by 29 April 2004, a day before the applicant's dismissal knew that the applicant was HIV positive, it could have given the applicant an opportunity to stabilise more especially that he was now on anti-retroviral drugs, and could only have taken the decision to dismiss him when it was satisfied that there was no prospect of him recuperating in time, without the employer incurring significant loss in its business. On the evidence presented in this matter, it appears to me that the reason advanced by the respondent for dismissing the applicant, namely, his 'continual poor attendance over the last three years' was a smokescreen intended to obscure the real reason, namely, that the respondent's long held suspicion that the applicant might be HIV positive was confirmed. In any event, as I have said earlier, even assuming that the reason advanced is not a smokescreen, it would be arbitrary and unfair for the employer to tolerate the applicant's illness for so long, only to wake up one day and without consultation, decide to dismiss him. The respondent acted arbitrarily and unfairly and I refuse to accept that the

timing of the dismissal was unrelated to the applicant's disclosure of his status, and that it was merely coincidental. The totality of the evidence of this case suggests that the probabilities are that the applicant was dismissed because he was HIV positive. It may well be that the respondent thought that the disclosure came too late in the day, hence, the haste with which the respondent proceeded. If anything the disclosure should have put the spanner in the works and the respondent ought to have approached the matter of the applicant's dismissal more sensitively, because a grave issue was now placed in the knowledge of the respondent, and if would be disingenuous for the respondent to act as if it was unaware that a grave consideration and or factor has now entered the picture.

The applicant was not obliged to inform the employer that he is HIV positive. Where an employee has become too ill to perform their current work, an employer is obliged to follow fair procedure. As I said earlier, and I think it is a point worth repeating, fair procedure requires that the applicant be consulted and or warned that his or her persistent but intermittent absence on account of illness is worrisome and may lead to dismissal. He or she must be warned that if the situation does not improve the respondent may be compelled to dismiss him, and further allowing him an opportunity to improve his attendance record, with the full knowledge that, should he not improve he may be dismissed. In so saying I am not unmindful that on at least two occasions in 2003 the applicant was warned against his tendency of taking time off without advising everyone concerned. This warning was not in anyway related to the concern reflected in the letter of dismissal that for the last three years, (presumably from 2001 to 2003/2004) the applicant's attendance was poor. The aforesaid warning only related to specific incidences where the applicant had promised to report to duty on 20 April 2003, and never did.

The other one related to the applicant's taking an afternoon off to sort out his personal business.

Where an employee has been absent from duty for a long time he must be made to realise that a point of no return has been reached. Fairness requires that if the respondent understood the applicant's refusal to submit to medical examination by a private medical practitioner to be frustrating its efforts to know the applicant's fitness to work, the respondent ought to have warned the applicant that his refusal to cooperate might put his job in jeopardy. The employee should then be given a final opportunity to cooperate. In this case, the applicant was not given a final opportunity to cooperate, (See *Sebonego v Newspaper Editorial and Management Services (Pty) Ltd* (supra).

Procedural fairness

There is a plethora of authority to support the view that cases such as this one — of persistent but intermittent absenteeism — which may raise concerns or doubts with respect to the capacity of the employee, must be approached maturely and sensitively, What is required is that a fair review by the respondent of the applicant's attendance record and reasons for it should have been done, in consultation with the applicant. It is important that the applicant should have been given the opportunity to make representations. Secondly, the respondent, if unhappy with the applicant's representations should duly warn the applicant that should his attendance record not improve he may be dismissed. Thereafter, if the applicant's attendance record does not improve the respondent would be justified in treating the persistent absences as sufficient reason for dismissal (see *International Sports Co Ltd v Thomson* [1980] IRLR 340 (EAT)),

In this case, the applicant was not consulted and or engaged to show cause why, given, his persistent absenteeism on account of ill health, he should not be dismissed. This much the respondent does not dispute in its evidence. From the peculiar circumstances of this case the respondent ought to have explained fully to the applicant why it was that what had been accepted for the past three years could no longer be accepted; and should have held a proper discussion with the applicant, and if required, members of the workers committee, as to whether and

to what extent his post should be adapted. In my view the discussion of 28 January 2004 fell far short of this. Clearly, the respondent acted unfairly in not permitting the applicant that opportunity.

It follows therefore that the applicant's dismissal was procedurally unfair.

Relief sought:
In its statement of case the applicant seeks compensation for back pay and reinstatement.

The remedies this court can give if it has found the dismissal unlawful and or wrongful are provided in s 19(1) of the Trade Disputes Act (Cap 48:02), which provides that:

'19.(l) In any case where the Court determines that an employee has been wrongfully dismissed or disciplined the Court may, subject to its discretion to make any other order which it considers just —

(a) in the case of wrongful dismissal, order reinstatement of the employee, with or without compensation, or order compensation in lieu of reinstatement; or

(b) in the case of wrongful disciplinary action, order the payment of such compensation as it considers just: Provided that ——

    (i) compulsory reinstatement as a remedy for wrongful dismissal should only be considered —

        (a) where the termination was found to be unlawful, or motivated on the grounds of sex, trade union membership, trade union activity, the lodging of a complaint or grievance, or religious, tribal or political affiliation; or

        (b) where the employment relationship has not irrevocably broken down; and

(ii) in a case where reinstatement is ordered, any compensation ordered shall not exceed the actual pecuniary loss suffered by the employee as a result of wrongful dismissal, and in any other case, any compensation ordered shall not exceed six months' monetary wages.

Section 19(1) makes it clear that reinstatement is a discretionary remedy. It can only be considered where the termination was found to be unlawful or motivated on the grounds of sex, trade union membership, trade union activity, the lodging of a complaint or a grievance, or religious, tribal or political affiliation, or where the employment relationship has not irrevocably broken down. (See *Hirschfeld Express Cartage Botswana (Pty) Ltd* (IC 67/96), unreported.)

The Industrial Court's discretion, though wide, must be exercised within certain limits. The employee's employment opportunities and work security, the unfair disruption of the employer's business and the harmful effect on the employment relationship are some of the considerations within which the discretion is to be exercised. The above limits amount to a system of checks and balances which the court weighs up before making a decision.

It has also been held to be too disruptive to reinstate employees on the ground that their positions have been filled. (See the case of *Maine and Others v African Cables* 1985(6) ILJ 234 (IC) at p 245.) In this case evidence has been led to indicate that the position of the applicant has been filled. It would, in the circumstances, not be appropriate to accede to the prayer of reinstatement.

Another factor the courts have taken into account as having a possible disruptive effect is whether or not an order of reinstatement would undermine management authority. (See *FIHIA and Others Pest Control Tv! (Pty') Ltd* 1984 (5) ILJ 165 (IC) at p 169.) It has not been suggested in this case that an order of reinstatement will undermine management authority and I do not think there is any basis

whatsoever for so saying. Whether or not the relationship between the employee and the employer has irretrievably broken down is also an important factor to take into consideration.

The above factor is, of course, the same as that which is often advanced by our ordinary courts when they decide against ordering specific performance of employments contracts. The court generally examines the circumstances of each case in deciding whether or not reinstatement would be appropriate. In this case no evidence has been led on whether the relationship between has irretrievably broken-down or not.

On a balance, we are persuaded that to reinstate the applicant may be disruptive. Accordingly, the court holds the view that reinstatement would not be an appropriate relief.

In our view the applicant is entitled to compensation for the dismissal, which we have held is procedurally and substantively unfair.

Compensation

It now remains for the court to consider the appropriate compensation having regard to our conclusion that the dismissal of the applicant was procedurally and substantively unfair. We have taken into account s 19(2) (a) of the Trade Disputes Act in favour of the applicant. He is likely to have suffered some loss as a result of his wrongful dismissal. We have also taken into account factor *(b)* and *(c)* in favour of the respondent because the applicant was at the hearing of this matter aged 28 years, which means he is still young and may, hopefully, find suitable employment.

We have taken factor *(d)* in favour of the applicant. We found the circumstances of the applicant's dismissal to be procedurally and substantively unfair. It is

simply not acceptable to dismiss an employee solely on account that he is HIV positive. In our view factors *(e)*, *(f)* and *(g)* are not relevant in this matter.

In all the circumstances, we find that compensation equivalent to his salary for six months would be fair.

Determination

The court consequently makes the following determination:

1. The termination of the contract of employment of the applicant was procedurally and substantively unfair.
2. The respondent is hereby ordered and or directed to pay the applicant compensation equivalent to his salary for six months, being Fl 297.60 x 6 = P7 785.60.
3. The amount of P3 892.80, representing payment the applicant received from the respondent as per the recommendations of the district labour office, is to be deducted from the amount reflected in para 2 above.
4. The respondent is hereby ordered and or directed to pay the applicant the amount of P7 785.60 - P3 892.80 = P3 892.80 through the office of the registrar of this court, on or before 6 December 2004.
5. No order as to costs.

I agree on the facts:

E S Mabengano nominated member (Union)

Application granted.