

MONARE v BOTSWANA ASH (PTY) LTD
INDUSTRIAL COURT, GABORONE
[IC NO 112 OF 1998]
28 March 2004
De Villiers J

Applicant in person for first two days; thereafter represented by
T Rubadiri.
B B Tafa for the respondent.

DE VILLIERS J:

This matter was set down for a hearing in Francistown for three days. At that stage the applicant was appearing in person. At the end of the second day, whilst still under cross-examination, the applicant applied for a postponement in order to engage the services of an attorney. He also requested that the matter not be re-enrolled for continuation of the hearing until he has informed the registrar that he was ready to proceed.

The next the court heard from the applicant was his letter dated 29 October 1999, in which he informed the court that he had been involved in a motor accident. He had been seriously injured and hospitalized for several weeks. He said that as a result of the aforesaid, he has been unable to look for legal representation. He said that his first consideration was to attend to his health and that he would keep the court informed on his progress.

The court replied and confirmed that the matter would not be re-enrolled until the registrar heard from him. The next communication was from Tengo Rubadiri Attorneys, who notified the registrar on 11 August 2002, that their firm is now

appearing for the applicant, who would like to proceed with this matter. He also asked for a transcript of the evidence taken down so far.

On completion of the transcript the matter could not be re-enrolled immediately as I was at that time chairman of a Presidential Commission, which was only completed at the end of May 2003. This matter was then re-enrolled for a hearing on 5 June 2003 and then after hearing evidence the whole day the matter was postponed to 25, 26 and 27 August 2003.

On 25 August 2003 Mr Rubadiri, for the applicant informed the court that the applicant could not attend court as he had been hospitalized again. The matter was postponed and the evidence was completed on 23 and 24 October 2003. Final submissions were heard on 31 October 2003 when judgment was reserved. The reason for setting out the above, is to inform those who read this judgment, why it took so long to finalise this matter.

At the commencement of this hearing in Francistown, I sat with two assessors for the first two days of the hearing. When the matter resumed in Gaborone on 4 June 2003, the Union assessor, Mr Dingake, was unable to continue with this case, as he had in the meantime been appointed a judge in the Industrial Court. As both representatives had no objection to me sitting with only one assessor, I directed that the matter could proceed with only one assessor.

The applicant testified that he commenced working for the respondent on 1 January 1991 as personnel officer in charge of industrial relations. He carried on working as such until 5 February 1998 when his services were terminated by the respondent. He said this was done on medical grounds. He does not dispute the number of days for which he had been booked off sick, but avers that the respondent did not follow company policy, as regards leave, when his services were terminated.

He firstly relied on cl 3.9.3 of the company policy and procedure, which provides that when an employee has used up his 15 days sick leave and he is still unfit for duty, he shall be required to take any accrued annual leave.

He said when he was dismissed he still had eight days accrued annual leave, which the respondent should have allowed him to use up first, before dismissing him.

Secondly, he relies on cl 3.7 of the same policy and procedure, which provides that the company may grant up to 15 days unpaid leave in a calendar year to an employee for reasons other than compassionate leave.

He said he was never given a chance to have this clause implemented before his dismissal, because he was not given a chance to apply for unpaid leave.

Thirdly, the applicant relies on a staff memorandum from the manpower services superintendent, dated 27 January 1997, the relevant portion of which provides as follows:

'The purpose of this memo is to bring to your attention the issue of sick leave. There are some of the employees who are on negatives, we wish to express that the Company does not normally tolerate negative sick leave balances. Please note that, in future if the employee has exhausted the sick leave and is excessively over, the Company will have no alternative but to recover those days by instructing Payroll to deduct an equivalent amount.'

A further complaint of the applicant was that his services were terminated prematurely. He said he was admitted to hospital on 16 January 1998 and was discharged on 29 January 1998. The doctor further booked him off sick from 29 January 1998 to 27 February 1998.

He said on 5 February 1998, while he was still on sick leave, a company vehicle came and fetched him at home and took him to respondent's offices. He was asked to wait until the human resources manager had finished attending a meeting. Later that afternoon he was called into the human resources manager's office, where he also found present the company doctor, the industrial relations superintendent and the human resources superintendent. He was then told that the respondent had decided to terminate his services. He was given a letter of termination, dated 2 February 1998, which gave the reason for such termination as his ill health and that he was therefore no longer capable of fulfilling his contractual obligations.

He was asked to comment on the contents of this letter. He said he did not comment. He just told them that he was too ill to comment and as he was still in pain there was nothing he could say.

He said on the day of his dismissal, which was 5 February 1998, he was still unable to perform his normal duties, but the respondent should have waited until the end of his sick leave on 27 February 1998, to see what his health condition was before dismissing him. He therefore alleges that his dismissal was premature and unprocedural. He further stated that, seeing his long service with the respondent, he feels it was unfair for the respondent 'just to throw me out like that'.

The applicant stated that as a result of this unfair and premature dismissal he would like to be reinstated in his previous post or alternatively he wants to be paid compensation.

Applicant's illness

During the first two days of this hearing in Francistown the applicant was not prepared to disclose the cause or the nature of his illness. It was only on the third day of cross-examination, after perusing the medical reports, that he conceded that he was HIV positive but denied he had AIDS. He said he never discussed

his illness with any of the numerous doctors who attended to him and they also did not tell him what was wrong with him. This the court finds highly improbable.

He said one doctor told him that he had lymph cancer. He could however not explain why that is not mentioned in any of the medical reports.

On behalf of the respondent, Dr Venter testified. He was then in the full time employment of the respondent as company doctor.

He testified that he started working for the respondent in March 1993. He first met the applicant on 31 May 1994 when the applicant complained of flu-like symptoms. He treated him and booked him off for three days.

He said he knew at that stage that the applicant was HIV positive, from a doctor's report in the applicant's medical file. On 13 January 1993 Dr Venter's predecessor referred the applicant to a surgeon for the removal of a non-cancerous growth of fat cells on his shoulder. This surgeon's report in the applicant's file shows that the surgeon refused to operate on the applicant because he was HIV positive.

Thereafter for the following few years Dr Venter treated him for various different ailments and injuries. During July 1997 Dr Venter noticed that the applicant's health was deteriorating and he noticed that he had early symptoms of AIDS which showed that his condition had deteriorated from HIV positive to AIDS. He consequently referred the applicant to a physician at Gaborone Private Hospital. There the applicant was hospitalized from 14 July 1997 and he was attended to by Dr Bialas, a consultant physician.

He sent his report, dated 28 July 1997 to Dr Venter. In his report he mentions that the applicant's CD4 cell count was low. It was 117.

Dr Venter then explained that the CD4 cell count relates to a person's immune system. A person who is HIV negative has a CD4 cell count of plus or minus 600. He said the applicant's CD4 cell count of 117 at that stage was therefore already very low.

Dr Venter then referred to an authoritative medical publication, *Primary Aids Care* (3rd ed) by Dr Clive Evian, who is a consultant in Johannesburg.

Dr Evian states that a patient with a CD4 cell count below 200 is already in the AIDS phase and such a patient is then very ill. A CD4 cell count below 50 is life threatening. Dr Venter agreed with this statement.

When the applicant returned to work Dr Venter noticed that his health was still deteriorating, so he again referred him to Dr Bialas on 26 August 1997. From the report of Dr Bialas, dated 1 September 1997, Dr Venter could see that the communication between doctor and patient was not all that good, so he decided to refer the applicant to a Motswana physician at Gaborone Private Hospital.

The applicant was admitted to this hospital on 14 November 1997 where he was attended to by Dr Makhema. His report, dated 17 November 1997, was also sent to Dr Venter. In this report Dr Makhema stated that the applicant was anorexic and that he has gradually been losing weight and he also had AIDS related tuberculosis. He stated that the applicant was receiving double antiretroviral treatment and that his CD4 cell count was then only 65.

Dr Venter said the fact that the applicant's CD4 cell count had dropped from 117 to 65 within 4 months is indicative of the applicant's AIDS status progressing rapidly.

He said the applicant was slightly better in December 1997, but in January 1998 the same pattern started showing again. The applicant was hospitalized from 15

January 1998 to 29 January 1998. He did not return to work, because he was further booked off sick from 29 January 1998 to 27 February 1998.

The opinions expressed by Dr Venter, based on authoritative medical opinions and on his own experience was not challenged in cross-examination. Only the procedural aspect of the applicant's dismissal was challenged.

In the circumstances the court accepts the evidence of Dr Venter as to the applicant's state of health as at that time.

HIV/AIDS in the workplace

At present there is still no legislation that specifically deals with HIV/AIDS in the workplace.

In 1998 the Botswana government approved and adopted the Botswana National Policy on HIV/AIDS. This policy is based on the ILO Code of Practice on HIV/AIDS and the World of Work (Geneva 2001).

Clause 1.8 of the Botswana policy provides as follows:

'The Policy has been adopted as a case to be observed by organisations, institutions, employers etc. Legislation will be developed as the need arises, to support implementation and compliance.'

As stated above no legislation has as yet been passed to implement the provisions of this national policy.

At present this policy is therefore not law. It has only a strong moral persuasive authority and not statutory authority. This was also confirmed by Legwaila JP in the case of *Jimson v Botswana Building Society* (IC 35/03), unreported dated 30

May 2003 at p 17 and by Dingake J in the case of *Diau v Botswana Building Society* [2003] 2 BLR 409, IC.

The Government adopted another policy document dated 29 November 2002, the Botswana National Strategic Framework for HIV/AIDS 2002—2003. A preamble to this policy document states as follows:

‘The Government, as an employer, as well as the private sector and parastatal organisations will have to manage staff affected by HIV/AIDS and *make decisions regarding recruitment*, deployment, training, payment of terminal benefits retirement due to ill health. etc.’ (My emphasis)

The court a quo found that, as the said national policy did not have the force of law, it was not binding on the respondent. In view of the aforesaid later policy document, which left it to employers to ‘make decisions regarding recruitment’, the respondent was entitled to demand a pre-employment HIV/AIDS test, according to the court a quo.

I know of no other HIV/AIDS related cases in Botswana, where HIV/AIDS was specifically mentioned at the hearing, except the *Jimson* case, supra, the *Diau* case, supra and the Court of Appeal judgment in the case of *Botswana Building Society v Jimson*, (Civ App 37/03), unreported, dated 30 January 2004.

In the *Jimson* case, the applicant passed the pre-employment medical examination and 19 days later received a letter requiring him to undergo a ‘further pre-employment medical examination’ for an HIV test. He consented to such a test, which showed that he was HIV positive. The respondent thereupon wrote to the applicant informing him that his probationary employment with the respondent will be terminated at the end of that month and enclosed a copy of the results of the HIV test.

The court a quo found that the second HIV testing, was not part of the pre-employment examination but was a compulsory post employment HIV testing, which was in breach of the contract of employment entered into between the parties.

The court consequently found that the applicant's dismissal was substantively and procedurally unfair and he was awarded six months' compensation, being equal to six months' wages.

On appeal, the Court of Appeal found that it was common cause that the applicant, Rapula Jimson, was dismissed because of the result of the HIV test, The court further found that the required further HIV test was not an additional post-employment requirement by the employer, but that it was part and parcel of the pre-employment medical examination.

The Court of Appeal set out in detail the findings of the court a quo regarding the status and interpretation of the said national policy and policy document but did not find that such findings were incorrect. Such findings therefore still stand.

The award of compensation, granted by the court a quo was consequently set aside.

In the *Diau* case, supra the applicant was employed by the respondent on six months' probation on condition she underwent and passed a full medical examination, which she did. Six months later a further medical examination was required. She was asked to submit a certified document of her HIV status. She thought about it for a while and then informed the respondent that she was not going to submit a document on her HIV status. The respondent then informed the applicant that she would not be confirmed to the permanent and pensionable service of the respondent, without giving any reasons for such decision.

The court found that the reason for her dismissal was because she had refused to submit a document on her HIV status, because she was not judged on her performance.

The court, agreeing with the findings of the court a quo in the *Jimson* case, however approached this dispute from a different angle, namely from a Constitutional point of view.

The court found that the conduct of the respondent, by terminating the applicant's contract of employment for refusing to undergo an HIV test, was an unjustifiable violation of the applicant's right to liberty, as contemplated by s 3(a) of the Constitution of Botswana, as well as s 7(1), which outlaws inhuman or degrading treatment.

The court consequently found the dismissal of the applicant to be substantively and procedurally unfair. The respondent was ordered to reinstate the applicant and to pay her compensation equal to four months' salary.

The aforesaid judgments are very useful as regards certain aspects of HIV/AIDS in the workplace. They are however not helpful for answering the question of how an employer should deal with a permanent employee who has AIDS or is HIV positive.

For reasons to be set out here below, the court finds that such employees should not be treated any different to employees who are suffering from any other serious illness.

Incapacity due to illness

At present there is still no sure cure for AIDS. Even when an HIV/AIDS employee is on anti-retroviral treatment, he is not restored to full health. In the long run, in

most cases, it will affect his work performance and he can then justifiably be classified as a poor work performer.

After setting out the international principles or rules of equity regarding dismissals for incapacity to perform, the court will revert to further aspects of the evidence of the applicant and of Dr Venter.

As the Industrial Court is not only a court of law but also a court of equity, it applies rules of natural justice, or rules of equity as they are sometimes called, when determining trade disputes. These rules of equity are derived from conventions and recommendations of the International Labour Organisation (ILO). These conventions and recommendations are international labour standards. The basic requirements for a substantively fair dismissal, which will include dismissal because of incapacity due to ill health, are set out in Art 4 of ILO Convention No 158 of 1982, which provides as follows:

'The employment of a worker shall not be terminated unless there is a *valid reason* for such termination connected with the *capacity* or conduct of the worker or *based on the operational requirements of the undertaking*, establishment or service' (My emphasis)

The reason for saying that ILO Convention No 158 is also applicable to incapacity due to ill health is because of the aforesaid underlined word 'capacity', which also includes incapacity.

The said Art 4 is also the origin of the equitable requirement that an employer can only dismiss an employee if he had a valid reason for doing so.

Le Roux and Van Niekerk in *The South African Law of Dismissal*, deal with incapacity arising from ill health or injury. At p 228 they quote from an English case to show the approach of the English Employment Appeal Tribunal to cases

of incapacity on account of ill health. This quote then sets out certain factors to be taken into account and to be observed by employers before making the 'difficult decision' to dismiss in such cases. This quote ends as follows:

'These, we emphasise, are not cases for disciplinary approaches; these are for approaches of understanding....'

The above quote is not based on English legislation, but on principles of equity.

The said authors then continue as follows at p 229:

'The South African industrial court has developed a similarly empathetic approach in what appears to have crystallized into the following test:

- (a) the employer is obliged to ascertain whether the employee is capable of performing the work for which he was employed;
- (b) if the employee is unable to perform the work, the extent to which he is able to perform his duties should be ascertained;
- (c) the employer is thereafter obliged to ascertain whether the employee's duties can be adapted;
- (d) if the employee cannot be placed in his former position, the employer must ascertain whether alternative work, at a reduced salary if necessary, is available.

The court has not specifically and separately imposed a requirement of procedural fairness. As we have noted, ILO Convention 158 refers specifically to the 'capacity' of a worker as a valid reason for dismissal. In Division B of the Convention, concerning procedure prior to, or at the time of, termination, procedural requirements extend only to instances where the reasons are related to 'the worker's conduct or performance'. This raises the question of whether, in terms of ILO norms, fair procedure is a requirement where incapacity assumes the form of ill health. The Convention does make reference to temporary absence from work because of illness or injury, which in terms of its provisions is not a

valid reason for termination. There are instances of incapacity which will have the consequence of absence from work, but these need not be so. The answer probably lies in the close relationship between substantive and procedural fairness which exists in cases of incapacity. Substantive requirements necessitate an assessment and a prognosis. *To satisfy either of these requirements entails the participation of the employee in some form.*' (My emphasis)

The abovementioned factors are also based on principles of equity, which have not been included in Botswana labour legislation. These factors have however been included in the South African Basic Conditions of Employment Act.

In this regard see also Rycroft and Jordaan, *A Guide to South African Labour Law* (2nd ed) at p 93, Brand et al *Labour Dispute Resolution* (1997) at p 227, Dlu Plessis et al *A Practical Guide to Labour Law* (2nd ed) at p 146 and Grogan *Workplace Law* (7th ed) at p191.

As the above factors to be taken into account and complied with are based on principles of equity, this court will also apply such principles in this dispute.

Before establishing whether the respondent has complied with the aforesaid rules of equity and with its own company policy and procedure, the court will first deal with the applicant's abovementioned complaints against his dismissal.

Sick leave

It was common cause that the applicant was entitled to 15 working days paid sick leave in any one year, which is one more day than provided for in 100(1) of the Employment Act (Cap 47:01).

Under cross-examination the applicant conceded that the company policy and procedure does not allow for sick leave to be accumulated and also conceded that the Employment Act also does not allow for such accumulation.

Yet in re-examination he came with a different story. He said he was entitled to accumulate sick leave. He said for the period 14 July 1997 to 5 February 1998 he had taken 81 days sick leave. It is in fact 82 days. He continued by saying that from 1 January 1991 to 5 February 1998, at the rate of 15 working days sick leave a year, he had accumulated 106,25 days sick leave. If one then deducts the said 81 days sick leave he had taken, that then, according to him, left him still with 25.25 days sick leave.

When cross-examined on this he conceded that he had also taken sick leave during 1992, 1993, 1994, 1995 and 1996, but he cannot remember how many days sick leave he had taken during that period.

The court therefore finds that, apart from anything else, his abovementioned calculation of 25.25 days accumulated sick leave is hopelessly wrong.

He was further asked why does he now say that sick leave can be accumulated and his reply was that cl 3.9.3 of the company policy and procedure so provides. The said clause provides as follows:

‘3.9.3 An employee shall be entitled to 15 days cumulative paid sick leave in any period of 12 months commencing from the first date of employment. After this period the employee shall, if still unfit for duty, be required to take any accrued annual leave.’

The court finds that the said clause provides nothing of the kind. The court finds that the words ‘15 days cumulative paid sick leave in any period of 12 months’ means that an employee is only entitled to a maximum of 15 days paid sick leave

which have accumulated during a period of one year. There is nothing to say that it can accumulate further than the said 12 months and therefore the court finds that unused sick leave in one year cannot be carried over to the next year.

Section 100(1) of the Employment Act provides that an employee, who produces a medical certificate, '... shall be entitled to be paid his basic pay for at least 14 days of such sick leave in any one year of continuous employment'.

The Employment Act also does not provide for sick leave to be accumulated and the court finds that sick leave in terms of the Employment Act may not be accumulated and cannot be carried over to the next year. It is a question of 'use it or lose it'. All unused sick leave is therefore forfeited at the end of each cycle of 12 months.

See in this regard also the judgment of this court in matter of *Raphoto v Matsela (Pty) Ltd*, (IC 154/98), unreported.

In the aforesaid case, the court also set out in detail why an employee needs no longer to wait for the completion of 12 months before he is entitled to the 14 days' sick leave for that specific 12 months period. Briefly it boils down to this. The previous section in the Employment Act which dealt with paid sick leave, did contain such a clause, but that section was amended by s 13(a) of Act 26 of 1962, which deleted that provision. The court therefore finds that an employee can use up his 14 days' sick leave in the very first month of any period of 12 months, if necessary.

The applicant started working for the respondent on 1 January 1991, so his sick leave cycle of 12 months therefore ran from 1 January to 31 December of each year.

Based on the court's above findings, the applicant would therefore have forfeited all unused sick leave for 1996, if he had any, on 31 December 1996. On 1 January 1997 he would have been entitled to 15 days paid sick leave for that year ending on 31 December 1997.

It is common cause that during 1997 the applicant was off on sick leave for 66 working days for that year.

On 1 January 1998 he was again entitled to 15 days sick leave for that year. The court has found that from 15 January 1998 to 5 February 1998, the applicant was in fact off sick on 16 working days, and not 15, as calculated by the applicant. He had therefore used up one day more than his annual quota of sick leave for the whole of 1998.

The court therefore rejects the applicant's evidence that he still had sick leave to his credit when he was dismissed on 5 February 1998. He in fact had a negative balance of 52 sick leave days (51 in 1997 and one in 1998), for which he was paid in full.

Accrued annual leave

The applicant stated that apart from his accrued sick leave, which the court had found to have been misconceived, he also still had eight days' accrued annual leave on the date of his dismissal. He could not say how he had arrived at this figure. It was common cause that he was entitled to 25 working days paid leave in any one year.

The respondent's company policy and procedure allows for annual leave to be accumulated and cl 3.4 of the said policy provides that an employee must take 10 days of his annual leave 'within 6 months of the period in which it was earned'.

Section 98(3) of the Employment Act contains a similar provision except for the number of days which is less. It provides that not less than eight working days shall so be taken.

Both provisions are imperative. The policy uses the word 'must' and the Employment Act uses the word 'shall'. This means that if not so taken such leave will be forfeited, as will be set out here below.

This policy and procedure forms part of the applicant's contract of employment and therefore the provisions of s 37 of the Employment Act is also applicable to the said policy and procedure. In terms of such policy the applicant stands to forfeit 10 days leave if not taken and in terms of the Act he stands to lose eight days. The 10 days is therefore less favourable to the applicant than the provisions of the Employment Act.

In terms of the said s 37 such less favourable conditions of employment shall be null and void. In such cases the provisions of the Employment Act will prevail. The court will therefore apply the provisions of the Employment Act to the applicant's accrued annual leave, as it is more favourable to the applicant.

Section 98(3) provides that of the number of days leave earned in respect of any period of 12 months, the employee shall take not less than eight working days not later than six months immediately after the end of the said period of 12 months. This means that any such eight days compulsory leave not taken shall be forfeited.

In terms of s 98(4) any balance of leave not taken as compulsory leave, may be accumulated year by year but such leave shall not be accumulated for longer than three years after the said first year in which leave was first earned, which gives you a cycle of four years.

At the end of such four years period all the accumulated leave, together with all the leave earned in respect of the immediate preceding period of 12 months shall be taken. That means that if leave is accumulated over a period of four years, all such accumulated leave must be taken at the end of each period of four years or else it is also forfeited. That further means that at the beginning of every fifth year of continuous employment, an employee starts with a clean slate, ie he starts with no accumulated leave.

The reason for saying that all accumulated leave not taken shall be forfeited, is because of the use of the imperative word 'shall' in the aforesaid § 98(3) and 98(4). See s45 of the Interpretation Act (Cap 01:04).

Based on the aforesaid interpretation of s 98 of the Employment Act, the court finds it unnecessary to deal with the applicant's accrued leave for the first four years of his employment with the respondent. He started working for the respondent on 1 January 1991 and therefore he would have completed his first cycle of four years on 31 December 1994. On 1 January 1995 he would therefore have started earning leave for that year with no accrued leave to his credit.

According to an extract from the leave register and copies of leave application forms, the applicant took 21 days annual leave during 1995. Of the 25 leave days he earned during 1995 he accumulated only four days, which was then carried over to 1996.

Before the end of June 1996 he took 12 days annual leave. He therefore did not forfeit the aforesaid eight days compulsory leave. For the whole of 1996 he had taken 22 days annual leave. Of the 25 leave days he had earned during 1996, he accumulated only three days, so on 1 January 1997 he had only seven days (four + three) accumulated leave.

During 1997 he encashed 30 days annual leave: 10 days on 10 April 1997 and 20 days on 13 November 1997. Encashment of leave days has the same effect as using such leave days. At the end of the day you no longer have that leave any more.

Apart from the encashment of the said 10 days leave on 10 April 1997, the applicant had taken 11 days annual leave before 30 June 1997. Here again he therefore did not forfeit the aforesaid eight days compulsory leave. For the whole of 1997 the applicant had taken 12 days annual leave and encashed 30 days. During 1997 he therefore used 42 days (12 + 30) days annual leave.

At the end of December 1997 the applicant had a negative balance of 17 days (42 minus 25) from the leave he had earned during 1997. He still had seven days accumulated leave and therefore at the end of December 1997 his negative balance of leave days was 10(17 minus 7).

The applicant's contract of employment was terminated on 5 February 1998. Section 98(6)(b) provides that, for purposes of calculating accrued leave, a portion of a month shall be reckoned as a full month. The applicant therefore earned leave for two further months, namely January and February 1998 at 2.08 ($25 \div 12$) days per month. For these two months he therefore earned 4.16 days annual leave.

During January 1998 he took two further days annual leave, namely on the third and the tenth. When he was dismissed he therefore had a negative balance of 7.84 ($10 + 2$ minus 4.16) days annual leave.

The court therefore finds that on 5 February 1998, when the applicant was dismissed he had no accrued leave to his credit. He in fact had a negative balance of 52 sick leave days and a negative balance of 7.84 annual leave days. The court consequently finds that there is no merit in the applicant's argument

that the respondent should have allowed him to use up all his accrued leave before dismissing him, because he had no accrued leave to fall back upon.

Unpaid leave

The applicant further stated that the respondent had failed to comply with the provisions of cl 3.7 of its company policy and procedure. The said clause provides as follows:

'3.7 Leave without pay

The Company *may* grant up to 15 working days leave without pay per calendar year to an employee who wishes to be absent from work for reasons other than those which would justify the granting of compassionate leave *if the granting of such leave does not interrupt the smooth operations of the company.*' (My emphasis)

The applicant said that even after all his leave, sick leave and annual leave, had been utilized, the respondent should have, in terms of the said clause, given him the opportunity to apply for the said unpaid leave, before dismissing him.

The underlined word 'may' clearly indicates that the said clause did not create a right available to the applicant. The granting of unpaid leave was entirely in the discretion of the respondent. It was not an obligation. It also contained a proviso, namely that the respondent would only consider granting unpaid leave 'if the granting of such leave does not interrupt the smooth operations of the company'.

As will be seen here below, the applicant's continual absenteeism because of illness, rendered him incapable of performing his duties properly, which interrupted the operations of the company, according to the respondent, which evidence the court accepts, for reasons set out here below.

The court finds that there is therefore also no merit in this submission.

Substantive fairness

Substantive fairness relates to the reason for the dismissal. The court has already pointed out that for a dismissal to be fair in terms of the rules of equity, as set out in Art 4 of ILO Convention No 158, an employer can only dismiss an employee on notice or without notice if he has a valid reason for such dismissal.

To comply with the said 'valid reason' test in cases of incapacity due to ill- health, the employer must satisfy the court that he has complied with the abovementioned guidelines, set out by Le Roux and Van Niekerk. op cit.

The court will also establish whether the respondent had also complied, in this regard with its own company policy and procedure, according to cl 6.1 and 6.4, which clauses provide as follows:

'6.1 Report of Medical Incapacity

All cases of possible medical incapacity should first be referred to the Company Doctor. The Company Doctor shall then compile a comprehensive report, backed up, where appropriate, by specialists' reports, on the cause, extent and probable duration of medical incapacity. The report should be forwarded to the Human Resources Manager who will, in turn, convene a meeting of the Medical Review Committee.'

...

6.4 Non Scheduled Occupational Disease Incapacity

The panel shall consider whether the employee is capable of performing work other than that in which the employee is currently employed and whether a

suitable vacancy exists or is likely to materialise in the near future. Should alternative employment be available the employee should have this discussed with him together with the applicable conditions of employment to determine whether he is prepared to accept a new position.

Should no alternative position be available, or should the employee decline to accept an alternative position, he shall be notified personally and in writing that his services with the Company are being terminated on the basis of medical incapacity and that he will be entitled to the following benefits:

- (i) outstanding wages and leave pay due
- (ii) two weeks pay per completed year of service plus pro rata payment of gratuity
- (iii) repatriation expenses.'

Although the applicant in this case was not dismissed because of HIV/AIDS, according to the respondent, the court would nevertheless like to pause here for a moment to set out the current international approach as regards employees suffering from HIV/AIDS.

In a publication, *An Outline of Recent Developments Concerning Equality Issues in Employment for Labour Court Judges and Assessors* (1997), Jane Hodges, who is a senior specialist in international labour standards and labour law at the ILO in Geneva, states the following at p 28:

'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 HI V-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. 158) 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 abovementioned quote is based on the aforesaid ILO Code of Practice on HIV/AIDS, which code, just like the Botswana policy on HIV/AIDS, has no force of law. They are however useful guidelines, based on internationally accepted labour standards.

As to the requirement that the employer is obliged to ascertain the cause of the employee's ill-health, in order to ascertain whether he is still capable of performing the work for which he was employed, this case differs from the usual run of the mill cases, where an employer has to battle to find out what is wrong with an HIV employee. Like in this case, such employees normally want to keep their health status a secret from their employers. The applicant even asked the physicians who attended to him when he was hospitalized not to reveal the cause of his illness to his employer.

As stated, the present case is different as Dr Venter, the company doctor, knew all along what the applicant's health stains was from his own examination of the applicant and from the reports he received from the physicians when the applicant was hospitalized.

Despite the fact that Dr Venter had been aware of the applicant's HIV status since 1993, the respondent did not dismiss the applicant then or during the following few years, because he was still able to perform his duties for some time despite absenteeisms.

From July 1997 his health however deteriorated rapidly and for the last six months in 1997 he was hospitalized a few times and he was absent from work on sick leave for 66 working days, ie from 1 July to 31 December 1997. He also took ordinary leave for four days during this period, which makes him absent from work for 70 working days in six months. During the said six months, discounting weekends and public holidays, the applicant was at work for only 62 working days.

From 1 January 1998 to 5 February 1998 when his contract of employment was terminated, he was at work for only eight working days and off sick for 16 working days. He was also booked off sick for the whole of February 1998.

The question now is, where should an employer draw the line if he has an employee with a history of prolonged illness and long absenteeism?

It was common cause that the applicant was the only employee doing this particular job. Despite no one else doing his work all the time he was absent, he still maintains that his work did not suffer whilst he was absent. He said he always took work home to do when he was off sick and at home. He did not work whilst in hospital.

The respondent's version is that the applicant never took work home and that his work was suffering and piling up during these long periods of absenteeism, especially the last seven months of his employment.

There is medical evidence that when the applicant was booked off sick he was very ill. The applicant's own evidence was that on the day he was dismissed he was very ill and in pain. The court therefore finds it improbable that he would have worked at home whilst booked off sick and finds that his work did suffer while he was absent from work.

The court finds that the respondent was very tolerant with the applicant and showed him a lot of compassion during this long period of his illness. Apart from the sick leave the applicant had taken from the beginning of 1991 to the end of 1996, particulars of which were not given to the court, the applicant exhausted all his sick leave for 1997 and 1998 during the last seven months of his employment. For this period he actually overstepped his quota of sick leave by 52 days, for which the respondent paid him in full. He received his full salary every month. The respondent never demanded that his annual leave be taken as sick leave, nor did the respondent implement its own policy, that excessive sick leave days, after exhausting their quota of sick leave, will be deducted from their salaries.

Although the applicant was not productive, the respondent throughout provided him with accommodation, saw to it that he received the best medical care, paid up his medical aid fees and provided company transport each time he had to go to and be fetched from Gaborone Private Hospital. From Sua to Gaborone is 620 kilometers.

Dr Venter said that when the applicant did return to work he was very weak and tired. As a result of this he recommended to management that the applicant only work half day. During the last few months of his employment he did in fact only work half days, while he was paid as if he had worked full days.

It is difficult to think of a case where an employee would receive more sympathy and care than the abovementioned, from his employer over such a lengthy period.

Dr Venter testified that the applicant was booked off sick from 15 January 1998 to 29 January 1998. The applicant thereafter did not return to work and a further sick leave note dated 29 January 1998, booking the applicant off sick for the whole of February was faxed to him from the Gaborone Private Hospital. He

immediately handed it to the human resources manager, who expressed concern about the applicant's productivity.

The doctor said that when an employee's sick leave has been exhausted excessively the human resources manager refers the matter to him with the sick leave record and requests a report from him which the human resources manager also did in this case. He then investigated the matter and submitted a report to the human resources manager with his recommendation. The human resources manager convened a meeting of the medical review committee for 2 February 1998, which committee consisted of the human resources manager, Dr Venter and the industrial relations officer, who was a social worker.

At this meeting on 2 February 1998 the committee discussed Dr Venter's report which contained the following recommendation:

"I recommend that Edison L. Monare be medically boarded with immediate effect due to the fact that:

1. He exhausted his sick leave balance
2. His poor sick leave record for 1997
3. His present medical condition has an unlikely permanent full recovery (poor prognosis).'

Dr Venter said he explained his report to the other two members and after careful deliberation the committee decided to terminate the applicant's contract of employment as he was no longer able to perform the work he was originally employed for, due to his ill health.

A termination letter to the applicant was written that same day, but only handed to the applicant on 5 February 1998. The letter was signed by the human resources manager and reads as follows:

'Dear Mr Monare

Re: Termination of Service (Medical Boarding) — Yourself

This letter serves to inform you that after thorough assessment of your health condition, the Company has decided to terminate your employment with Botswana Ash (Pty) Ltd, with effect from 5 February 1998 on the basis that you are no longer capable of fulfilling your contractual obligation.

You will be entitled to the following terminal benefits

- (a) One month's pay in lieu of notice;
- (b) Outstanding wages and leave pay due;
- (c) Two weeks pay for completed year of service;
- (d) Pro-rata payment of your gratuity; and
- (e) Repatriation assistance.

I would like to thank you for the services you have rendered to the Company and wish you a speedy recovery

Yours sincerely'

The applicant stated that he was prematurely dismissed and that the respondent should have waited until the end of his sick leave at the end of February 1998 to see what the condition of his health was before dismissing him.

He said after his dismissal on 5 February 1998 he has never been ill again and he was also not hospitalized again since then. The court finds this an unacceptable statement. If the applicant was well on 5 February 1998, why then did the doctor book him off sick till the end of February 1998?

Dr Venter testified that when the applicant came to the office on 5 February 1998, he could see that the applicant was very ill. He was short of breath and could hardly speak. When asked if he wanted to comment on the dismissal letter, he said he was too ill to do so at that stage.

Twice during his evidence, the applicant said that on that day he was too ill to comment and he was also in great pain. When this was pointed out to him in cross-examination, he changed his story and said what he actually meant was that he could not comment because he was in shock. The court also finds this an unacceptable statement. How could the applicant have been in great pain if he was only in shock?

His story that he has never been ill nor admitted to the hospital again since his dismissal, also does not hold water. The applicant was unable to appear at the hearing on 25 August 2003. His wife phoned and said that he was ill again and has been hospitalized.

The applicant further stated that a few months after his dismissal, a miracle happened because he was cured of his illness. This does not rhyme with the fact that he was ill again and hospitalized in August 2003.

Dr Venter said that when the applicant was dismissed in February 1998 there was as yet no antiretroviral drug on the market, it only became available in July 1998. If the applicant had then taken it, it could not have cured him, but it could have improved his health to some extent, which the applicant may have thought was a miracle.

The court accepts the medical evidence of Dr Venter that the applicant's health was fast deteriorating as from July 1997. He was a very ill man and with such a low CD4 cell count of 65, he would have been and in fact was very weak and unable to perform his duties.

The court finds that the respondent was justified in drawing the line when it did so. It looked after and pampered the applicant for a very long time, even when it received nothing in return from the applicant, The applicant was not dismissed because of his HI V/AIDS status.

John Grogan, op cit, states the following at p 195:

'When termination is fair

Apart from the above procedural requirements, it is fair to dismiss sick or injured employees only when there is no prospect of their recuperating in a time during which the employer can cope without suffering significant loss as a result of the employee's absence. In this respect, dismissal for ill health or injury is akin to dismissal for the employer's operational requirements, to which we turn in the next chapter.'

In the circumstances the court finds that the respondent was justified in terminating the applicant's contract of employment at that stage, as the applicant was no longer able to perform the duties he was employed for, due to ill-health and with no chance of recuperating and also for operational requirements, as his work could not just- stand still indefinitely.

The court therefore finds that the respondent did have a valid reason for terminating the employment of the applicant and that such termination was therefore substantively fair.

Procedural fairness

Procedural fairness relates to the procedure followed by an employer prior to dismissing an employee.

The basic requirements for a procedurally fair dismissal are set out in Art 7 of ILO Convention No 158 of 1982, which article reads as follows:

'[t]he employment of a worker shall not be terminated for reasons related to the worker's conduct or *performance* before he is provided with an opportunity to

defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity'. (My emphasis)

The court has already stated above that in order to determine whether there is a valid reason for dismissing an employee, a fair procedure must be followed by the employer prior to dismissing an employee.

As the applicant was not guilty of any misconduct, it was not necessary for the respondent to have held a disciplinary hearing prior to the applicant's dismissal. In cases of poor work performance consultation and counselling are required.

The court accepts the respondent's evidence that the applicant had been spoken to and counseled by the human resources manager and the industrial relations officer, who expressed concern about the applicant's very poor work performance.

The aforesaid Art 7 of ILO Convention No 158 also deals with the obligation of an employer and requires that an employer should listen to and discuss aspects of performance with an employee before taking a decision to terminate his contract of employment. It is a rule of equity.

The aforesaid rules of equity are not binding rules of law. They are merely guidelines to assist employers in arriving at a fair decision when an employee is charged with misconduct. The general rule is still however that an employee's contract of employment may not be terminated without having given him the opportunity to state his case. Although the said guidelines are not binding rules of law, if an employer fails to comply with such guidelines, the court could find such dismissal to be procedurally unfair.

The court finds that the respondent has substantially complied with the aforesaid procedure set out in its company policy and procedure.

The procedural rules of equity, regarding the adaptation of the employee's work and finding alternative employment for him, requires consultation with the employee and the employee should be given a final opportunity of stating his case before the final decision to terminate is taken. See John Grogan *op cit* at p 194.

It is common cause that the applicant was not even present at the meeting on 2 February 1998 where it was decided to terminate his contract of employment. It is also common cause that the applicant was not consulted, prior to this meeting or before the letter of termination was written, *inter alia* about possible adaptation of his job and more important about alternative employment.

Mr Tafa submitted that in this case any consultations with the applicant would have served no purpose, as being too ill to perform his own job, would also render him too ill to perform any other job. That is not the point. An employer cannot just assume that an employee will be unable to make any useful contributions in this regard.

There was no evidence to this effect from the respondent, but Mr Tafa put it to the applicant that there were no other suitable vacant posts available. The applicant denied this and mentioned a few posts that he thought he could possibly have coped with. That alone shows that the applicant did have something to say, which should have been consulted on and investigated.

Mr Tafa further submitted that when the applicant was handed his letter of dismissal three days after it had been written, he was given the opportunity to comment thereon. That is not prior consultation or even a final opportunity to state his case before the decision to dismiss was taken.

The court finds that the applicant was faced with a *fait accompli*. At that stage he did not say anything because he was too ill, but no matter what he would have or

could have said at that stage, it would not have altered the position, because he was already in possession of his termination letter and already dismissed as from that moment.

Although the respondent did have a valid reason for terminating the applicant's contract of employment, in doing so, it did not follow well-established procedural rules of equity. In the circumstances the court finds that the termination of the applicant's contract of employment was procedurally unfair.

Compensation

The applicant said he wanted reinstatement alternatively compensation. This court does not grant reinstatement where it has found that the dismissal of an employee was substantively fair.

As the termination of the applicant's contract was only procedurally unfair, it entitles him to some award of compensation.

The court considered the factors, set out in s 24(2) of the Trade Disputes Act (Cap 48:02), to be taken into account in assessing an appropriate amount of compensation.

In terms of s 24(1) of the Trade Disputes Act, the maximum amount of compensation that this court can award, is compensation not exceeding six months monetary wages.

The members of the court are agreed that a fair and an appropriate award of compensation, in the particular circumstances of this case, would be compensation equal to two months' monetary wages.

According to the applicant's statement of case, his salary at the time of his dismissal was P4 407.33 per month. This amount was not disputed by the respondent.

The applicant is therefore entitled to compensation in the amount of P8 814.66(2 x P4407.33).

The amount so to be awarded to the applicant, is not salary but compensation. The full amount, without any deductions, must therefore be paid to the applicant.

Determination

The court consequently makes the following determination:

1. The termination of the contract of employment of the applicant, Edison Monare, by the respondent on 5 February 1998, was substantively fair but procedurally unfair.
2. In terms of s 19(0(a) of the Trade Disputes Act, the respondent is hereby directed to pay to the applicant the amount of P8 814.66, being compensation.
3. The respondent is hereby further directed to pay the said amount of P8 814.66, to the applicant, through the office of the registrar of this court, on or before Friday, 14 May 2004.
4. No order is made as to costs.

Application upheld in part.