CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI **MNZ 667/07**

the matter between:-

TRUELY DLUDLU APPLICANT

And

ACKERMANS STORE RESPONDENT

Coram:

Arbitrator : LORRAINE ZWANE
For Applicant : REUBEN NDLANGAMANDLA
For Respondent : MOABI MOTAUNG

ARBITRATION AWARD

1. PARTIES AT HEARING

1.1 The Applicant is Truely Dludlu, an adult Swazi female of Ezulwini, Hhohho District. Mr Ndlangamandla duly represented the applicant.

1.2 The Respondent is Ackermans Store, a company duly registered and incorporated in terms of the company laws of Swaziland, Manzini branch, District of Manzini.

2. THE ISSUE IN DISPUTE

The issue for determination is whether the Applicant was unfairly dismissed by the Respondent.

3. BACKGROUND TO THE DISPUTE

3.1 The Applicant lodged a dispute with the Commission (CMAC) on the 16th October 2007.
3.2 The dispute was certified as unresolved after conciliation and thus a certificate of unresolved dispute was issued on the 11th December 2007.

3.3 I was subsequently appointed to arbitrate in the matter.

3.4 I then scheduled a pre-arbitration meeting for the 27th October 2008. On that date both parties were in attendance and I duly explained the purpose of such meeting and process of the actual arbitration hearing.

3.5 The hearing was scheduled for the 2nd December 2008 by consent of the parties. However on that date the applicant and/or her representative made no show at the hearing.

3.6 On the 20th January 2009 and the 24th February 2009, respectively, the hearing could not proceed due to the non-attendance of respondent's representative, who on the latter occasion gave a reasonable explanation for his non-attendance.

3.7 On the 24th June 2009 the matter finally proceeded until it was accordingly finalised on the 15th July 2009, which was the agreed date for submission of written heads of argument by the parties.

4. EVIDENCE AND SUBMISSIONS APPLICANT'S CASE

4.1 Applicant alleges that she was unlawfully and unfairly dismissed from her employment by the Respondent, and she claims payment of terminal benefits and maximum compensation for unfair dismissal.

4.2 The Respondent denies that the Applicant's dismissal was unlawful and unfair and avers that the Applicant was dismissed "for gross misconduct, in that during the month of August 2006, she over and under-rang on her till which conduct was against company policy and procedure which directly causes loss in stock and monetary loss."

4.3 The applicant led evidence to prove her case.

4.4 Respondent, on the other hand called in two witnesses, namely, Hanlie Erasmus and Sonia Johnson to testify to the events leading to applicant's dismissal.

4.5 <u>TESTIMONY OF TRUELY SIBONGILE DLUDLU</u>

4.5.1 The testimony of Applicant can be summarized as follows:

4.5.1.1 She was employed on the 27th June 1999 as a shop assistant and/or cashier by the respondent earning a gross salary of E2 816.64 per month.

4.5.1.2 Sometime in October 2006 applicant was suspended and later informed of the charges preferred against her.

4.5.1.3 She was subsequently invited to a disciplinary hearing scheduled for the 15th December 2006. At the hearing those present were Hanlie Erasmus, the chairperson, Benedict Dludlu, stores manager who was the complaint and applicant.

4.5.1.4 According to Applicant she was denied the right to representation by a union official.

4.5.1.5 She further stated that the enquiry had been scheduled for 10:00 a.m. but commenced at 12 noon. She elaborated that she was amongst four (4) employees of the respondent to be tried on that date.

4.5.1.6 The evidence presented by the respondent was in the form of a video footage which was played but was initially not visible. She expatiated that she was unable to see herself as her

back was against the video but that later the video became clearer.

4.5.1.7 The chairperson compelled her to admit wrongdoing on the basis that she was in a haste to conclude the proceedings. That as a result of the compulsion she ended up admitting guilt.

4.5.1.8 Applicant said the Manager had notified all employees of the respondent that if one committed any wrongdoing he or she would sign three (3) written warnings prior to being called to a disciplinary enquiry.

4.5.1.9 That if an employee incurred a short or an over, which was against the respondent's policy, the Manager will first have discussions prior to issuing a verbal warning, which warning was issued without being called to a disciplinary hearing.

4.5.1.10 Truely stated that she saw herself visibly on the video and also due to the clothes she had donned on that date in question.

4.5.1.11 She said she had been issued with written warnings previously for under-ring which were not many as such a rare occurrence

4.5.1.12 The Respondent never afforded applicant representation when called to sign a written warning.

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4.5.1.13 The charge faced was that of gross misconduct in that on the 7th August 2006 applicant had over and under rung her till, which conduct was against company policy, resulting in monetary and stock loss.

4.5.1.14 She said that she did not understand the charge preferred against her as it was ambiguous and equivocal, in that it did not mention the precise offence she was alleged to have committed.

4.5.1.15 Applicant stated that she did not recall the items she was accused to have over and under rung due to the passage of time.

4.5.1.16 The chairperson was in control of playing the video footage and never explained what was happening on it. The customer involved in the transaction was not visible.

4.5.1.17 That the video clips were selective in that it only showed when applicant committed errors and not when it was rectified.

4.5.1.18 The video showed one transaction of over-ringing wherein a customer came to the store for a lay-bye and applicant issued a slip to the customer to sign it. Applicant then mistakenly gave the customer the lay-bye slip as if she had in cash together with the item purchased.

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4.5.1.19 No evidence shown in the video of an over-ring nor under-ring.

4.5.1.20 That the only transaction shown was for a misringing, which term existed at the respondent's undertaking.

4.5.1.21 The Respondent produced the video as the only evidence to prove and substantiate the offence applicant was alleged to have committed. No witnesses called in.

4.5.1.22 Applicant said that she admitted to wrongdoing as she was co-erced by the chairperson and not being familiar with the disciplinary process she ended up giving in.

4.5.1.23 During her time of employment when working on the till it was procedural to call the supervisor or manager to conduct an exchange or correction. However, during the enquiry the part where the manager rectified her mistakes was not displayed.

4.5.1.24 The respondent had installed cameras at the store, which all employees were aware of as they had been notified of the installation and cautioned to conduct themselves appropriately.

4.5.1.25 Applicant later recalled another transaction shown on the video which was of an exchange and had to call her supervisor to conduct it. She explained

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that the customer was not visible on the video.

4.5.1.26 Herein, applicant conducted a direct exchange. She was elaborated that at times when one requested the supervisor to do an exchange he would state that he is busy and instruct her to proceed with it, which however was against company policy.

4.5.1.27 She said in the exchange incidence the manager was at fault but that due to the selective playing of the video it was not shown when she requested authorization.

4.5.1.28 The chairperson afforded applicant an opportunity to cross-examine the complainant but

due to her state of shock she was unable to do so.

4.5.1.29 Applicant re-iterated that on the very date of her enquiry, the chairperson had other three (3) enquiries to preside over. Further, that her enquiry had been scheduled for 11:00 a.m. but only started around 12:45 p.m.

4.5.1.30 That the chairperson apologised for the late start and explained that she had to rush applicant through the proceedings.

4.5.1.31 Consequent to being rushed through the proceedings she only had an opportunity to admit to any wrongdoing showcased by the video

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but had no time to explain that she has rectified the mistakes complained about.

4.5.1.32 According to Truely, the atmosphere at the hearing was not conducive or friendly. On proceeding to the venue of the enquiry/ she did so in the presence of her colleagues and customers.

4.5.1.33 She said she was not given a chance to state her side of the story or defend herself but was permitted to state mitigating factors.

4.5.1.34 Subsequently, applicant was dismissed and she appealled to such decision. On appeal, one Sonia notified her and her representative from SCAWU that the appeal chairperson, namely, Mirriam was unavailable and had requested her to take the minutes and then fax same to her.

4.5.1.35 That the appeal chairperson upheld the verdict of dismissal.

4.5.1.36 During cross-examination applicant defined the terms over-ring as meaning ringing a higher price than the actual price of the item. Under-ring as ringing a price below that of the actual item.

4.5.1.37 She denied having committed the charges preferred against her.

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4.5.1.38 Applicant stated that she had pleaded guilty during the hearing to having caused the respondent to suffer stock loss because of the transactions shown to her on the video.

4.5.1.39 Respondent afforded her the opportunity to present her side of the story.

4.5.1.40 That the chairperson of the disciplinary enquiry explained to applicant that she could not be represented by a union official but s co-employee as per the company policy.

4.5.1.41 Respondent gave applicant short notice to attend the enquiry, 48 hours, which was not adequate time to prepare for the case, which was one of her appeal grounds.

4.5.1.42 She said the decision of dismissal metted against her was not appropriate in the circumstances as the respondent had not issued her with three (3) written warnings as provided by the law.

4.5.1.43 Respondent was inconsistent in the metting of discipline or punishment its employees, in that four (4) employees had been charged with similar offences but three (3) including applicant were dismissed and one (1), Constance Dube, not.

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4.6 TESTIMONY OF ROSE NTOMBI NGUBENI

4.6.1 She worked with applicant at the respondent's store at the Manzini branch since its inception in 1994.

4.6.2 She was dismissed together with applicant by respondent for gross misconduct, in that she ha over and under rang on her till.

4.6.3 That the respondent charged four (4) of its employees for a similar offence as stated above, namely, Applicant, Masiza, Constance and herself.

4.6.4 According to Rose, her hearing had been scheduled for the 15th December 2006 at noon but only started between 2:00 p.m. to 3:00 p. m.

4.6.5 On commencement of the hearing the chairperson, Hanlie Erasmus announced that she was in a hurry to return home at 4:00 p. m. which comes as a surprise to Rose as she had another enquiry to preside over after her own.

4.6.6 She expatiated that Erasmus further informed her to respond quickly when questions are posed as she was in a haste to conduct the proceedings.

4.6.7 All the disciplinary hearings proceeded but not on the scheduled times.

4.6.8 Subsequently the applicant, Masiza and herself were dismissed but not Constance.

4.6.9 At the time of being charged, two (2) of the charges were similar, which were the charges of Applicant and her own but had no opportunity to view that of Constance and Masiza's.

4.6.10 During cross-examination she stated that she knew that applicant and her charges were similar when they exchanged the charge sheets.

4.6.11 She said that both (applicant and herself) of them were taken aback by the charges as they did not understand them.

4.6.12 She conceded that albeit the charges being similar but the incidences in question were different.

4.6.13 She never complained to the chairperson about being rushed through the proceedings as she thought or reckoned it was procedural to do so.

4.7 TESTIMONY OF HANLIE ERASMUS RESPONDENT'S CASE

4.7.1 She was the chairperson in the disciplinary enquiry of applicant.
4.7.2 At commencement of the enquiry applicant requested to bring in a union official to represent her in the proceedings, which request she denied or refused on the ground that she could be represented by a co-

employee as per the invite to attend the hearing and company policy.

4.7.3 Applicant pleaded guilty to the charges when she read them out to her. Later, she also found her guilty of the charges.

4.7.4 She said she afforded applicant the opportunity to present her side of the story, which she did. She elaborated that applicant never called any witnesses notwithstanding being given the chance to do so.

4.7.5 Applicant was given adequate or sufficient notification of the hearing as the minimum notification period is 24 hours as entailed in the respondent's disciplinary code.

4.7.6 That applicant never raised issue about the notice given to her during the hearing.
4.7.7 Respondent relied on the video evidence only during the hearing, which evidence was presented by the initiator.

4.7.8 The video footage was played during the hearing and that applicant appeared in it.
4.7.9 At the end of the video applicant confirmed that she was the person on the video and further admitted guilt to the charges preferred against her.

4.7.10 She expatiated that applicant pleaded guilty twice, firstly, when the charges were read out. Secondly, after seeing the video footage.

4.7.11 The respondent had suffered both monetary and stock losses in the incidence of applicant.

4.7.12 She communicated her findings which she faxed through to the respondent.

4.7.13 The sanction imposed to applicant was a dismissal as the misconduct she was charged with is regarded highly at the respondent's undertaking as it causes stock and monetary loss to the company. Further, that it damages the trust relationship.

4.7.14 In the premises, dismissal was the appropriate penalty under the circumstances.

4.7.15 Throughout the proceedings applicant admitted to wrongdoing.

4.7.16 During cross-examination she stated that the charges were read by the initiator. Later she changed time and said she was not certain who read the charges between the initiator and herself.

4.7.17 She said she was not in a position to dispute that she presided in four (4) disciplinary hearings on the 15th December 2006.

4.7.18 That the people present at the hearing were, Applicant, Benedict Dludlu and herself.
4.7.19 She denied having compelled applicant to admit guilt.

4.7.20 She stated that she did not recall apologizing for the late start in the hearing and rushing applicant through the proceeding.

4.7.21 Later on, she vehemently denied having rushed applicant through the proceedings.
4.7.22 On being quizzed whether applicant had been given the opportunity to state her side of the story, she responded by stating that both the initiator and applicant were afforded the opportunity

to present opening statement.

4.7.23 The video was not audible, thus one could not hear what was being said.

4.7.24 It was not company policy that a manager could authorise his subordinates to do an exchange.

4.7.25 She explained 'under-ring' as meaning not ringing an item or stock on the till. Over-ring as not ringing the item too and thus giving the customer an additional item.

4.7.26 She elaborated that these two terms were the same terminology, as the same action is taken.

4.7.27 She had no recollection as to how many transactions Applicant admitted guilt to and the transactions she conducted.

4.7.28 She further did not recall the monetary loss incurred by the respondent as a result of the misconduct committed by applicant.

4.7.29 Similarly, with the kind of T-shirt involved in one of the transactions and its value, she had no recollection of.

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4.7.30 According to Erasmus, overs and unders resulted in both monetary and stock losses.

4.7.31 The misconduct committed by applicant damaged the trust relationship as applicant was visible on video committing the offence and further admitted guilt to wrongdoing.

4.7.32 Later stated that no monetary value had been placed on the stock in question.

4.7.33 That the customers were visible on the video footage.

4.8 <u>TESTIMONY OF SONIA JOHNSON</u>

4.8.1 She is employed by the respondent as manager responsible for the Mbabane branch.

4.8.2 She chaired the appeal hearing of the applicant.

4.8.3 Applicant attended the appeal hearing and was not represented.

4.8.4 The sanction of dismissal was appropriate in applicant's case.

4.8.5 That applicant had been afforded adequate time to prepare for the enquiry as it was company policy that employees be given twenty-four hours notice to prepare for a hearing. On this basis she dismissed this ground of appeal.

4.8.6 Similarly with the second ground of appeal, that applicant was denied representation of her choice. She dismissed it as employees

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were permitted representation internally, and not externally.

4.8.7 Applicant never requested for a change of venue or objected to the venue during the enquiry which prompted her to dismiss the third ground of appeal, that she felt embarrassed being tried in the same store in which the offence was said to have been committed.

4.8.8 She vehemently denied any inconsistency on the metting of discipline of the respondent's

employees and stated that applicant knew the company's policies and procedures regarding stock control and should not have adhered to an irregular instruction.

4.8.9 That applicant never raised any objection to being rushed through the proceedings. In any event she had pleaded guilty to the transgressions.

4.8.10 Applicant was afforded the opportunity to present her side of the story.

4.8.11 Applicant had put the company into serious risk by her actions.

4.8.12 On being slow the minutes of the appeal Sonia conceded that applicant's representative had been present at the appeal hearing.

4.8.13 She stated that the inconsistency applicant complained about related to the manager and not to Constance.

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4.8.14 Later, she stated that the respondent considered theft and fraud as a dismissable offence regardless of the value of the item in question, which was known by applicant.

4.8.15 That prior to dismissal the respondent first afforded an employee who had been charged with misconduct, three (3) counseling sessions and trainings. Afterwhich the employee will be given a verbal warning followed by a written warning, then a disciplinary hearing.

4.8.16 She conceded that the aforegoing had never been complied with in applicant's case.
4.8.17 She admitted that applicant had stated that she was a first offender when given the opportunity to state mitigating factors.

4.8.18 She stated that the reason she could not trust applicant was because she had been involved in theft and fraud.

4.8.19 On being quizzed that she had erred on concluding that applicant had committed theft as that had not been the offence she was charged with, she conceded.

4.8.20 She re-iterated that applicant had pleaded guilty to the wrongdoing as evidenced in the record of the hearing.

4.8.21 The offence committed by applicant was dismissable at first instance.

4.9 Mr Ndlangamandla argued that the dismissal of applicant on the 15th December 2006 by the

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respondent on the charge of gross misconduct was unfair both substantively and procedurally.

4.10 He further argued that the respondent had failed to present any evidence to prove the charge.

4.11 He argued further that the evidence relied on by the respondent to show that applicant had committed any wrongdoing was a video tape which was suspect as it only played selective clips.

4.12 He submitted further that both respondent's witnesses had failed to state precisely the monetary and stock losses suffered by the company.

4.13 He further submitted that the procedural irregularity related to applicant being rushed through the proceedings and being compelled to make admissions.
4.14 Mr Motaung, representative of respondent on the other hand argued that applicant's dismissal

was fair both substantively and procedurally.

4.15 He argued that the applicant had admitted in the enquiry to wrongdoing after being shown the video footage.

4.16 He further contended that the charge preferred against applicant was considered in a serious light by respondent.

4.17 He contended further that although no specific loss could be attributed to applicant directly, however evidence of stock losses suffered by the company had been led, and that the offence committed by applicant had a bearing on such losses.

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4.18 He further submitted that the respondent had a zero tolerance to offences of this nature, which justified the dismissal of applicant.

4.19 He submitted that the evidence of applicant that she had been rushed through the proceedings was baseless as it had been rebutted by that of Hanlie Erasmus.

4.20 He argued further that the arbitrator should not put much weight on the fact that Hanlie had to preside in other hearings on the same date, as applicant's proceedings were curtailed by the fact that she admitted guilt to the transgressions.

4.21 He argued further that applicant had been afforded all the rights to a fair hearing. She had been right to representation by a co-employee.

5. NALYSIS OF EVIDENCE AND SUBMISSIONS

5.1 The Applicant has applied to the Commission for determination of an unresolved dispute. She alleges in her statement of claim that she was unlawfully and unfairly dismissed from her employment by the respondent, and she claims payment of terminal benefits and maximum compensation for unfair dismissal.

5.2 In its reply, the respondent denies that the Applicant's dismissal was unlawful and unfair and avers that the Applicant was dismissed "for gross misconduct in which she over and under rang on her till during August 2006, resulting in financial losses to the company."
5.3 It is common cause that:

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5.5 Following a disciplinary hearing the Applicant was found guilty of the charges against her and summarily dismissed.

5.6 In her evidence in chief, Erasmus stated that the Applicant was dismissed for misconduct which resulted in both stock and monetary losses to the respondent. Under cross examination, she added that she was dismissed as the misconduct she committed damaged the trust relationship. Erasmus said that the Applicant admitted guilt to the charge at the disciplinary hearing. She further stated that she could not recall the transactions done by applicant and as to which ones she made an admission of guilt too. Furthermore, that she could not recall the monetary loss incurred by the respondent as a result of the alleged misconduct of applicant and the type of T-shirt involved in one of the transactions.

5.7 Johnson on the other hand evidenced that applicant was dismissed for theft and fraud.
5.8 Rather surprisingly, the respondent omitted to call as a witness any of the customers recorded in the video footage. There is nothing in the evidence to suggest that these customers could not be traced.

5.9 This omission means that there is no direct evidence to prove any mishap with the transactions conducted by applicant. The respondent instead relies on two items of direct evidence:

5.9.1 the fact that applicant admitted guilt to the charge(s); and

5.9.2 the video played showing applicant committing the misconduct

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5.10 The Applicant testified, and Mrs Erasmus agreed, that the video clips were not clear and that the sound was not audible.

5.11 In her testimony the Applicant denied that she had committed any wrongdoing, of which she was later dismissed of. She said she admitted guilt to the charges during the disciplinary enquiry as she was compelled by the chairperson to do so.

5.12 Nevertheless, the respondent has failed in my view to establish on the evidence that the Applicant was guilty of any misconduct involving under and over-ringing. No evidence was adduced in proof that she was responsible for missing stock, or that she caused the respondent to suffer any monetary loss.

5.13 Johnson said the Applicant was dismissed for theft and fraud. However, this is not the case pleaded in the Respondent's Reply. Furthermore, it is not clear ex-facie the papers on record or evidence tendered what applicant was dismissed for, whether it was negligence, failure to observe company procedures and policies.

5.14 In any event, an employee cannot be fairly terminated for poor conduct or work performance unless he or she has received three prior written warnings for such offence - see section 36 (a) of the Employment Act. It is common cause the Applicant had not been issued with three written warnings prior to her dismissal and related to the charge she was dismissed of.

5.15 Johnson said the Respondent had breached its own disciplinary code in that the sanction metted was not in line with that prescribed by the code. Which was exhibited before me, which provided that an employee

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who had been charged with the same misconduct as that of applicant, three counseling sessions, followed by a verbal and a written warning. This evidence was corroborated by Applicant.

5.16 However, courts and arbitrators are not bound by disciplinary codes as they are merely guidelines.

SEE: JOHN GROGAN "DISMISSAL", REPRINTED 2004 AT 141.

5.17 I find that the respondent has failed to prove that the reason for the dismissal of the Applicant was one permitted by section 36 pf the Employment Act. I find that her dismissal was substantively unfair.

5.18 The Applicant did not raise any material issue with regard to procedural fairness, and I find that her disciplinary hearing was procedurally fair.

5.19 She is thus entitled to her notice, additional notice pay and severance allowance.

5.20 On the question of compensation for unfair dismissal, the Applicant struck me as a rather naive and simple person who was thrust into a position of responsibility as cashier without proper training. In my view this accounts to a large extent for any short comings in her work performance. She served

the respondent faithfully for almost eight years, and her dismissal was obviously a severe setback. She has not been able to find employment subsequently. I consider that an award of six months salary is appropriate compensation in all the circumstances.

6. THE AWARD

6.1 The Respondent is hereby ordered and/or directed to pay Applicant the following:

a.	Notice pay	E 2 816.64
b.	Additional notice pay	E 2 599.98
c.	Severance allowance	E 6 499.94
d.	Compensation for unfair dismissal (6 months)	- E28 166.40
	TOTAL	E40 082.96

6.2 The above amount is due and payable at CMAC offices on or before the 16th October 2009.

6.3 No order as to costs.

DATED AT MBABANE ON THIS 10™ DAY OF SEPTEMBER 2009.

LORRAINE ZWANE ARBITRATOR