

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI SWMZ 201/09

In the matter between:

Allan Coleman Applicant

And

National Chicks Swaziland (Pty) Ltd Respondent

CORAM:

ARBITRATOR : Khanyakwezwe Khumalo
FOR APPLICANT : Lindelwa Mngomezulu
FOR RESPONDENT : F. M. Snyman

NATURE OF DISPUTE : Alleged Unfair Dismissal

DATE OF ARBITRATION : 11th September 2009

ARBITRATION AWARD

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1. DETAILS OF HEARING AND REPRESENTATION

1.1 This arbitration hearing was held at the Conciliation, Mediation and Arbitration Commission (CMAC) offices, situated at Manzini on the 11th September 2009.

1.2 The Applicant in this matter is Mr. Allan Coleman of P. O. Box A240 Swazi Plaza, Mbabane. For ease of reference, the Applicant shall be referred to as the Applicant or Mr. Coleman. The Applicant was represented by Ms. Lindelwa Mngomezulu, a practicing attorney from Currie and Sibandze Associates who hereinafter shall be referred to as Ms. Mngomezulu or Applicant's representative. The Respondent, on the other hand is the National Chicks Swaziland (Pty) Ltd, a juristic person of P. O. Box 1124, Matsapha.

1.3 This arbitration hearing emanates from an allegation of unfair dismissal by the Applicant against the Respondent. Following the allegation that the Applicant' was unfairly terminated by the Respondent on the 17th February 2009; the Applicant reported a dispute to the Commission on the 13th April 2009. The dispute was conciliated upon by the Commission; and as it turned out, the conciliation attempt was not successful, and hence a Certificate of Unresolved dispute was issued by the Commission on the 15th June 2009. Following the completion of the conciliation proceedings, both parties requested that their matter must be finally determined at arbitration.

1.4 The arbitration hearing was preceded by a pre-arbitration meeting whose main purpose was to:

- Enable parties to familiarize themselves with the arbitration process.
- Remind parties of their right to representation.
- Establish the need for an interpreter.

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- Agree on the bundle of documents to be exchanged between the parties.
- Establish if witnesses were to be called, including the number of witnesses.

1.5 At the commencement of the pre-arbitration and substantive arbitration hearing respectively, the parties did not object to my appointment by the CMAC to be an arbitrator in this matter. Quite notably, the arbitration hearing went on smoothly.

2. BACKGROUND TO THE DISPUTE

2.1 The Applicant states that the Respondent unfairly dismissed him from work, consequent to an allegation of poor work performance.. The Applicant was therefore of the view that the Respondent dismissed him from employment procedurally and substantively unfairly as well as unlawfully.

2.2 It is against the foregoing background that the Applicant sought the following relief from the Respondent:

2.2.1	Reinstatement or alternatively;	
2.2.2	Notice pay	E 4 400.00
2.2.3	Leave pay (16 days)	E 2 933.33
2.2.4	Underpayments	E 1 500.00
2.2.5	Compensation for unfair dismissal (12 months)	E52 800.00
Total		E61 633.00

2.3. The Respondent on the other hand argues that the Applicant was dismissed fairly. The Respondent continued to state that the Applicant was terminated for poor work performance.

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3. ISSUES TO BE DECIDED

I am required to decide whether or not the Applicant's dismissal by the Respondent was fair and lawful.

4. SUMMARY OF EVIDENCE AND ARGUMENT 4.1 THE CASE OF THE APPLICANT

4.1.1 The Applicant was represented by Ms Mngomezulu from Currie and Sibandze Associates. Furthermore, the Applicant was the only witness in support of his case. The Applicant testified under oath that prior to his verbal dismissal on the 17th February 2009 and which was formalized in writing on the 19th February 2009; the Respondent employed him as a Breeder Foreman on the 28th April 2008. It was also the Applicant's testimony that while still employed by the Respondent, he earned a monthly salary of E4 331.14. Mr. Coleman further stated that his dismissal from employment by the Respondent was in writing. The Applicant stated that after successfully completing his three months probation period, he was on an indefinite contract of employment.

4.1.2 Mr. Coleman submitted that following his successful completion of his probationary period of three months, he was two months old into his indefinite contract of employment, when on the 22nd October 2008, the Regional Manager, a one Mr. Mackie served him with a Written warning/counseling letter claiming that it was in connection with poor work performance. The Applicant continued to state that strangely, the Respondent had not at any stage invited him to an evaluation session whatsoever in regard to poor work performance prior to the written warning.

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4.1.3 The Applicant argued that the warning letter was, infact left at the security gate with a caption: "find written warning"; something that reflected that the Respondent had no regard to the confidential nature of the document.

4.1.4 It was the submission of the Applicant that on the 9th February 2009, he received a memorandum from the Respondent, purporting to be a performance review. The same memorandum also stated that the Applicant must accept a demotion from a Foreman to a Supervisor together with a salary decrease.

4.1.5 The Applicant further alleged that in all the foregoing developments pertaining to the memorandum of the 9th February 2009, he was neither consulted nor were his views solicited.

4.1.6 According to the Applicant, again, on the 9th February 2009, the Regional Manager, a one Mr. Ross verbally suspended him and was told to return on the 11th February 2009 to pick up his suspension letter and invitation to a disciplinary hearing on the 17th February 2009. The Applicant averred that on the 17th February 2009 he was verbally dismissed from work by the Chairman after Mr. Mackie had had a five minutes break with the Chairman. The Applicant stated that a letter of dismissal was given to him on the 19th February 2009. The Applicant further averred that the Respondent's code of conduct does not provide for an appeal and hence he reported his dispute to the Commission.

4.1.7 It is the case of the Applicant that all was well until he received a counseling letter from the Respondent on the 22nd October 2009. It is also the Applicant's case that subsequent to this counseling letter, there was never any meeting to consider and discuss issues

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pertaining to poor work performance on the part of the Applicant. The Applicant continues to aver that, instead, evidence derived from the Respondent's counseling letter of the 22nd October 2009 clearly demonstrates that the Applicant was in fact doing a commendable job for the Respondent's undertaking.

4.1.8 The Applicant further states that the 2nd paragraph of counseling letter, in essence, gives prominence to a list of items the Applicant ought to consider and the procedure to be followed. The Applicant continues to aver that nothing in the counseling letter insinuates poor work performance and ways in which the status quo could be improved.

4.1.9 The Applicant pointed out that on the 6th November 2008, he received a final written warning, stating that a warning letter had been left at the gate awaiting his collection. The Applicant is of the opinion that the warning letter was not in any way a product of a poor work performance meeting between the parties.

4.1.10 The Applicant submitted that on the 3rd February 2009 he received a site visit report from Mr. Mackie, informing him of his poor work performance making reference to the final written warning of the 6th November 2008.

4.1.11 Mr. Coleman stated that on the 9th February 2009, he again, received a Performance Review from Mr. Mackie, stating that not only had he been demoted from his position but also that he would suffer a salary cut as well.

4.1.12 Furthermore, the Applicant argued that this performance Review document was again left at the gate. Besides, the Applicant argued at the routine meeting, he informed Mr. Mackie that he did not

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accept the demotion and salary cut because he was not aware of any transgression that he had committed. The Applicant alleged that, instead, Mr. Mackie said that he must go home as refusal was tantamount to insubordination.

4.1.13 The Applicant submitted that the 11th February 2009 was a fateful day for him because the Respondent served him with a suspension letter as well as a notification to attend a disciplinary action on the 17th February 2009.

4.1.14 The Applicant mentioned that the charges that culminated in his dismissal by the Respondent were as follows:

- Failure to accept demotion after performance enquiry.
- Failure to meet company standard.
- Failure to follow reasonable instructions and insubordination.
- Failure to follow breeder manual.
- Gross negligence.
- Feed misallocation, feed discrepancies and loss.

4.1.15 The Applicant's representative contended that Mr. Coleman's dismissal by the Respondent was both procedurally and substantively unfair and unlawful, especially because the Respondent was not successful in proving, on a balance of probabilities that he was guilty of poor work performance.

4.1.16 The Applicant's representative alleged that the Respondent failed to prove that the Applicant performed poorly on the job that he was employed to do, particularly in the absence of a Procedure Manual that was not a constituent part of the bundle of documents that was brought to the attention of the Commission. The Applicant's representative argued

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that, had this been brought to the attention of the Commission, it was going to come handy in clarifying whether or not the Applicant failed to meet the performance standard of the Respondent's undertaking.

4.1.17 The Applicant's representative stated that the Chairman of the disciplinary hearing connived with the initiator in order to find the Applicant guilty as charged by the Respondent. In order to dispel the submission of the Applicant that the Chairperson was biased against the Applicant, Mrs. Julia Saulus was called to support the case of the Respondent. In fact, he was called to dispute that there was no communication between the Chairperson and Mr. Mackie the initiator.

4.1.18 The Applicant believed that the evidence of Mrs. Julia Saulus was that on the day in question, she was doing her daily administrative work and only saw through the window that the two were not in a meeting. It is the submission of Applicant's representative that the evidence of the Respondent's witness must be disregarded because during cross examination the witness clearly failed to explain how it was humanly possible for her to simultaneously attend to customers on the one hand and concentrate on whether or not the Chairperson and the initiator were conversing on the other hand. In the end, the Applicant's representative maintains her view that the Chairperson of the disciplinary hearing was overcome by bias that transpired from his meeting with the initiator.

4.1.19 Pertaining to the question of representation, the Applicant's representative argued that the Applicant was denied by the Respondent of his inalienable right to be represented by a person of his choice, it be an

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outsider or not. The Applicant's representative submitted that it was compelling for the Applicant to procure an outside representative because there was no employee in a similar position to that of the Applicant. This best practice, according to the Applicant, is supported by the case of Sazikazi Mabuza v Standard Bank, Industrial Court case 311/2007.

4.1.20 The Applicant's representative averred that the Applicant was not afforded an opportunity to plead in mitigation thus the verdict did not take into account the Applicant's personal circumstances, and hence posing procedural lapses.

4.1.21 In respect of underpayments, in his own cognizance, the Applicant stated that the contract of employment does not make provision for increments in the region of E500.00 but impressed upon this arbitration hearing that Mr. Mackie promised the Applicant increments in the sum of E500.00 consequent to his employment by the Respondent.

4.1.22 Acting on behalf of the Applicant, Ms. Mngomezulu stated that any person desirous of deciding whether an allegation of poor work performance warrants a dismissal decision must seriously consider the following:

- Whether an employee failed to meet a performance criterion.
- Whether the employee was aware or could reasonably be expected to have been aware of the required performance standard.
- Whether the performance standard was reasonable.

- Reason(s) for employee's failure to meet the performance standard.

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- Whether the employee was given a fair opportunity to meet the performance standard.
- Whether dismissal is the appropriate sanction for not meeting the performance standard.

4.1.23 Making reference to John Grogan in his book entitled Workplace Law 9th edition, page 213, the Applicant's representative quoted the following text:

"an employee should not be dismissed for unsatisfactory work performance unless the employer has given the employee appropriate evaluation, instruction, training, guidance or counseling"

4.1.24 The Applicant's representative also pointed out that a dismissal for poor work performance cannot be regarded as being fair unless a written warning has been given to an employee, clearly stating the possibility of dismissal in the event that performance does not improve within a stipulated period of time (Harpet Va Segglen V Swazi Spa Holding Limited Industrial Court of Swaziland case 390/2004, page 331).

4.1.25 In addition, the Applicant submitted that on the 25th August 2009 the Respondent increased his salary as demonstrated by page 21 of the Applicant's bundle of documents. Furthermore, the Applicant stated that on the 25th October 2008 the Respondent increased his salary once more. The Applicant came to the conclusion that the increments that he received made the verbal promise undertaken by Mr. Mackie come true. The Applicant noted and submitted that he realized the Respondent short paid him by E10.25 for August 2009 and E56.40 for October 2008 respectively.

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4.2 THE CASE OF THE RESPONDENT

4.2.1 The Respondent was represented by Mr. F.M. Snyman Mr. R. Mackie. Ms. Julia Saulus was called by the Respondent in support of his case. In its papers, the Respondent pointed out that the Applicant was appointed to the position of Trainee Breeder Supervisor on or about the 28th April 2008. The Respondent added that the position of the Applicant was so important that it carried a large amount of responsibility.

4.2.2 Also, the Respondent stated that the Applicant's appointment was on a three months probationary period and it expired on the 23rd August 2008. It was the submission of the Respondent that the Applicant underwent in depth training on the job from date of appointment until approximately the end of July 2008. The Respondent submitted that, on his own volition, the Applicant signed the contract of employment on the 23rd May 2008. Prior to his dismissal, the Applicant had been employed by the Respondent for a total period of nine months.

4.2.3 The Respondent stated that the Applicant was suspended from employment for an allegation of poor work performance on full pay and benefits on the 11th February 2009 and such suspension was in writing. According to the Respondent, the Applicant was duly informed of his disciplinary hearing on the 17th February 2009 and it was in writing.

4.2.4 The Respondent stated that on the 17th February 2009, the Applicant was informed by chairperson of

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the disciplinary hearing that he would recommend that the Applicant be dismissed from work after having considered mitigating and aggravating factors.

4.2.5 The Respondent submitted that the Applicant's dismissal was verified by the Respondent on the 19th February 2009 and the Applicant was subsequently dismissed from work by the Respondent and it was in writing. In the same vein, the Applicant received his notice pay.

4.2.6 The Respondent argued that the dismissal of the Applicant for poor work performance was a fair

and just sanction considering that the Applicant had already had a final written warning that was still active. The Respondent also noted that at the time of dismissal, the Applicant was a Trainee Breeder Supervisor.

4.2.7 Stemming from the alleged poor work performance, on the 22nd October 2008, the Respondent had a counseling session with the Applicant and was duly informed that he must improve his performance not later than the 26th October 2008.

4.2.8 Consequent to a disciplinary interview with Respondent's Mr. Mackie, on the 6th November 2008, the Respondent issued the Applicant with a final written warning.

4.2.9 The Respondent issued the Applicant with a site visit report on the 3rd February 2009 wherein concerns relating to poor work performance were expressed. Yet again, on the 9th February 2009, the Applicant was issued with a performance review report expressing sentiments about poor work performance.

4.2.10 The Respondent stated that the Applicant did not

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dispute that performance requirements were conveyed to him and the fact that he did not dispute the importance of the performance requirements demanded from him for the duration of his employment. In addition, no reason was furnished by the Applicant for his failure to adhere to the specific performance demands relating to the rearing operations.

4.2.11 In respect of procedural fairness of the dismissal of the Applicant, the Respondent argued that a departure from some of the checklist of procedural fairness should not necessary lead to the conclusion that there were procedural defects and therefore the dismissal was unfair and unlawful. Instead, primacy must be put on whether or not the employer has complied with substantially with the overall set of requirements (see Du Troit et al. The Labour Relations Act 1995. (2nd ed.).

4.2.12 The Respondent submitted that any person contemplating to dismiss for poor work performance must consider the following:

- Whether or not an employer failed to meet a performance standard; and
- If the employee did not meet a performance standard whether or not
- The employee was aware or could reasonably be expected to have been aware of the required standard.
- The employee was given a fair opportunity to meet the required performance standard.
- Dismissal was the appropriate sanction for meeting the required performance standard.

4.2.13 The Respondent argued that he adhered to all the procedural requirements of a fair and lawful hearing. The Respondent vehemently denied that the

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Applicant was denied representation and stated that, besides, he was provided with the opportunity to mitigate.

4.2.14 Regarding the allegation of the Applicant that the disciplinary enquiry of the 17th February 2009 was fraught with bias because the chairperson and Mr. Mackie the initiator discussed the outcome of the hearing between themselves during mid term break; and such was referred to by the Respondent as having been unfounded and unsubstantiated.

4.2.15 It is the contention of the Respondent that the Applicant failed to prove before the Commission that the Chairperson and Mr. Mackie pre-empted the outcome of the disciplinary hearing to the detriment of the Applicant. The Respondent went on to argue that the testimony of the Respondent's witness, Ms. Julia Saulus, pointed to the fact that there was never any conversation between the Chairperson and the initiator.

4.2.16 The Respondent stated that the dismissal of the Applicant was also substantively fair and

according to law. The Respondent maintained the view that the Applicant continued to perform poorly on his job despite elaborate steps that were put in place by the Respondent to remedy the situation. In accordance with the Respondent, the Applicant continued to cost him dearly in terms of damages.

4.2.17 It was the Respondent's argument that it was common cause that the Applicant went through a detailed course at the Respondent's operations in the Republic of South Africa. The Respondent averred that such training was attended by the Applicant over an extended period of three months.

TESTIMONY OF Ms. Julia Saulus

4.2.18 Disputing the fact that Mr. Snyman was biased and colluded with Mr. Mackie during the comfort break, in finding the Applicant guilty of poor work performance, the Respondent called Ms. Julia Saulus to support his case. Testifying under oath, Ms. Saulus stated that she is employed by Respondent as an administrative Secretary. Ms. Saulus continued to say that she is responsible for the day to day operations of the office. Ms. Saulus's testimony was that as she was doing her daily administrative duties on the 17th February 2009, she saw through the window Mr. Snyman and Mr. Mackie standing but did not at any point talk to each other.

5. ANALYSIS OF EVIDENCE AND ARGUMENT

5.1 In summarizing the evidence of the parties, I have not endeavoured to take stock of all the evidence that was adduced by the parties in this arbitration hearing. Instead, I have simply focused on relevant evidence of the parties in relation to my award in this matter.

5.2 The parties discovered and exchanged documents, which included the following:

- Letter of employment dated 28th February 2008.
- Shavings turning procedure dated 11th June 2008.
- Scale calibration dated 11th June 2008.
- Tip scale dated 11th June 2008.
- Counseling letter dated 22nd October 2008.
- Curtain procedure dated 23rd October 2008.
- Final written warning dated 6th November 2009.
- Site Visit dated 3rd February 2009.
- Demotion letter dated 9th February 2009.
- Performance review dated 9th February 2009.
- Notice of disciplinary hearing dated 11th February 2009.

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- Suspension letter dated 11th February 2009.
- Pay slips dated 25th February 2009.
- Pay slips dated 25th March 2009.
- Written dismissal letter dated 19th February 2009.
- Pay slips dated 25th May 2008 to 25 February 2009.
- National Chicks disciplinary code.
- Training session attendance register.
- Activity book.

5.3 In this matter, the Respondent, must, on the balance of probabilities, prove that in terminating the services of the Applicant, he complied with section 42 (2) of the Employment Act, 1980 (as amended). Section 42 (2) (a) and (b) of the Act makes the following provision:

"The services of the employee shall not be considered as having been fairly terminated unless the employer proves-

- (a) that the reason for the termination was one permitted by section 36;
- (b) that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee".

5.4 The Respondent alleged that the Applicant was fairly and lawfully dismissed for poor work performance on the 19th February 2009. In essence, the Respondent argued that not only was the dismissal of the Applicant procedurally fair and according to law but it was also substantively fair and lawful. The Applicant, on the other hand, argued that his dismissal by the Respondent was procedurally and substantively unfair and unlawful.

5.5 The Respondent completely failed to conform to the requirement that clearly states that it is incumbent

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upon the Respondent to explain to the Applicant that he has an inalienable right to note an application for appeal (see John Grogan, 2005, Work Place Law, 8th edition 193-198). It is my finding therefore that the Respondent committed a procedural defect, especially because the Respondent's disciplinary code provides for an appeal. The National Chicks Disciplinary Code on page 3, clause 3.2.10 states as follows:

"if a disciplinary action is taken against the employee, the person conducting the disciplinary enquiry will advise the and his representative of the employee's right to appeal."

I find that the Respondent, in fact, flouted his own disciplinary code by not extending such facility to the Applicant. It was certainly inadequate for the Respondent in his notice of dismissal letter of the 19th February 2009, page 18, to merely state as follows:

"You are hereby reminded that you have the right, should you be dissatisfied with decision, to refer this dispute to the relevant forum."

5.6 Most probably than not, the above excerpt does not insinuate by any standards of remote possibility that it was specifically referring to an appeal. Besides, the Respondent had the burden to disseminate information of the appeal to the Applicant.

5.7 In addition, I find it an irregularity and against the principles natural justice that the Chairman of the Disciplinary hearing was the same person that terminated the services of the Applicant on the 19th February 2009.

5.8 I am also alive to the fact that the following were the charges laid against the Applicant by the Respondent:

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- Failure to accept demotion after performance enquiry.
- Failure to meet company standard.
- Failure to follow reasonable instructions and insubordination.
- Failure to follow breeder manual.
- Gross negligence.
- Feed misallocation. Feed discrepancies and loss

5.9 I find it very strange that in the notice of dismissal of the 19th February 2009, the Respondent did not make an attempt to indicate to the Applicant the various sanctions that were meted out to him in respect of the six charges that he had to answer at the disciplinary hearing of the 17th February 2009. Besides, the absence of the minutes of the disciplinary hearing further compounded this challenge.

5.10 It is the view of the Applicant that the disciplinary hearing that culminated in his dismissal on the 19th February 2009 was seriously procedurally flawed because during the "comfort break", Mr. Snyman and Mr. Mackie met in front of the administration block and shared ideas about the outcome of the disciplinary hearing; something that was totally opposed by the Applicant. The testimony of Ms. Saulus that Mr. Mackie and Snyman never had a meeting was neither here nor there as her evidence was not corroborated. Besides, I do not find the evidence of Ms. Saulus credible and independent because she was the employee of the Respondent. In addition, her nuances and demeanor demonstrated that he was "schooled" on what to submit as he did not have a good time in the witness

box. In the same vein, I do not accept the testimony of the Applicant that Mr. Mackie and Mr. Snyman met to discuss the fate of the Applicant during the "comfort break" as there is no compelling evidence before to rule in his favour.

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5.11 The Applicant's representative argued that the Applicant was unfairly denied representation by an outsider, especially in a form of an attorney despite the fact that there was no employee in a similar or higher position to represent the Applicant. Ms. Mngomezulu went further to argue that in the case of Sazikazi Mabuza v Standard Bank, Industrial Court Case 311/2007, the court held that in a case of a senior employee, legal representation must be allowed.

5.12 On the other hand, the Respondent contended that the Applicant was economical with the truth that he was denied the right to be represented, arguing that on the notification of a disciplinary hearing letter dated 11th February 2009, it was clearly stated in number 3 that the Applicant had:

"The right to be represented by a fellow employee/Shop steward who must be an employee of the company".

5.13 It is my considered opinion that even though the Respondent followed his disciplinary code to the letter in this regard; concessions should have been made because, indeed, the Applicant was the most senior employee in the circumstances and should have been allowed to seek representation outside the ambit of the Respondent's undertaking.

5.14 The Applicant stated that he was not given an opportunity to mitigate before the verdict was passed to the extent that his personal circumstances were not taken into account before the sanction was issued. For the Applicant, that alone is tantamount to a procedural lapse. The Respondent, at the other end of the spectrum, disputes that the Applicant was never given an opportunity to mitigate before the verdict. In

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addition to that, the Respondent argued that the Applicant failed to submit evidence to the Commission with respect to the nature of mitigation. In the absence of a record of the disciplinary hearing of the 17th February 2009, I find that, on a balance of probabilities, the Applicant was denied his inalienable right to mitigate before the verdict was issued.

5.15 The Applicant was dismissed by the Respondent on the 19th February 2009 on an allegation of poor work performance. The Applicant argued that his dismissal was substantively unfair and unlawful whereas the Respondent equally contended that the Applicant's dismissal was substantively fair and lawful. The Applicant stated that prior to receiving the counseling of the 22nd October 2009, he performed on the job that he was employed by the Respondent to do to the satisfaction of the employer. The Applicant further submitted that there was never any counseling meeting prior to, and after the counseling letter of the 22nd February 2009 to discuss issues relating to poor work performance.

5.16 It is also the Applicant's argument that the first paragraph of the counseling letter simply commends the Applicant for a job well done. The same paragraph of the letter also goes on to pledge management's support for the Applicant where necessary.

5.17 The Applicant stated that, clearly, the letter makes no reference to a prior counseling session and/or future counseling sessions. Additionally, the Applicant argued that the counseling letter does not address itself to serious concerns about poor work performance but rather an endeavour by Respondent's management to clarify some of the issues relating to work performance.

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5.18 It is my finding that the counseling letter of the 22nd October 2009, contrary to the submission of the Applicant, is in fact valid and acceptable because it does give prominence to areas of concern and suggests ways in which these challenges can be remedied. Invariably, I also find that ideally, it should

have been preceded by a one-on-one counseling meeting.

5.19 The Applicant stated that on the 6th November 2008, he received a final written warning letter that was apparently left at the gate. Notably, the Applicant averred that this final warning letter was not consequent to a performance enquiry between the parties.

5.20 There is no evidence before me indicating that the Respondent ever held a disciplinary hearing enquiry in respect of the Applicant's poor work performance. Nothing suggests that the Applicant was ever afforded an opportunity to state his side of the story in rebuttal to the allegations of poor work performance.

5.21 The Applicant mentioned during the arbitration proceedings that on the 3rd February 2009 he received a site report from Mr. Mackie where he was expressing concerns pertaining to poor work performance that had gone from bad to worse. Reference was also made by Mr. Mackie to the written warning letter of the 6th November 2008.

5.22 It is my finding that the site visit report of the 3rd February 2009 does not state the date on which the site visit itself was done but merely states the date on which it was sent to Mr. Coleman. Besides, the site visit report does not state whether or not it benefited from a joint consultative meeting between Mr. Mackie and Mr. Coleman. On a balance of probabilities, I am inclined to believe that there was never any consultative site visit

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carried out by Mr. Mackie and Mr. Coleman and that if Mr. Mackie did carry it out, it was clearly in the absence of Mr. Coleman. I therefore find that the text contained in the site visit report must not adversely affect the Applicant.

5.23 The Applicant's evidence is that no sooner had he received the site visit report letter on the 3rd February 2009 than he had yet again received a performance review letter dated the 9th February 2009. By and large, the main contents of this letter were conveying the message to the Applicant that his performance on the job was retrogressing rather than progressing; as well as the fact that the Applicant was being demoted from the position of Foreman to that of Supervisor. The letter also clearly stated that the downgrading of the Applicant would be accompanied by a salary cut.

5.24 Pertaining to the demotion of the Applicant, I believe that his demotion by the Respondent was unfair and unlawful because not only was it unilaterally varied by the Respondent but also that the Applicant was said to have been insubordinate when he refused to accept it [demotion]. Besides, the National Chicks Disciplinary code document does not indicate that demotion and salary cuts would be effected as a disciplinary measure (see John Grogan on Work Place Law, 9th edition, page 104).

5.25 It is the version of the Applicant's evidence that there was never ever a performance review between Mr. Mackie and the Applicant held to discuss performance issues. The Applicant Argued that the foregoing evidence is supported by the letter of the 9th February 2009 which does not make any reference to any consultative meeting.

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5.26 It is Applicant's evidence that at the routine meeting with Mr. Mackie, he was clearly told that the Applicant does not accept the demotion as he does not know his wrongful act. The Applicant further stated that Mr. Mackie asked him to go home as his refusal to accept the demotion amounted to insubordination. He was also asked by Mr. Mackie to fetch a letter on the 11th February 2009.

5.27 The Applicant further stated that, as it turned out, on the 11th February 2009, the Applicant was served by the Respondent with a notification letter, informing him that he had been suspended from work as well as that he had to attend a disciplinary hearing on the 17th February 2009.

5.28 The Applicant submitted that the Chairman of the disciplinary hearing, Mr. Snyman, verbally informed him on the 17th February 2009 that he was found guilty as charged and therefore dismissed. The Applicant also submitted that he was advised by Mr. Snyman on the 17th February 2009 that he should come to collect his dismissal letter on the 19th February 2009 which he finally received on the

20th February 2009.

5.29 The Applicant stated that on the 11th February 2009, the following were charges preferred against him by the Respondent:

- Failure to accept demotion after performance enquiry.
- Failure to meet company standard.
- Failure to follow reasonable instructions and insubordination.
- Failure to follow breeder manual.
- Gross negligence.
- Feed misallocation, feed discrepancies and loss.

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5.30 It is my finding that it was a procedural lapse on the part of the Respondent not to have clearly stated the findings on each of the charges laid against the Applicant. For instance, It would have been helpful to find out the chairman's findings on failure to accept demotion after performance enquiry as well as the attitude of the National Chicks Disciplinary code.

5.31 According to the Applicant, the Respondent made reference to the breeding procedure manual which the Applicant failed to follow. The Applicant, however, lamented that Respondent failed to bring this important document before the Commission in an attempt to assist whether or not the document existed in the first place; whether or not the concerns expressed were genuine and authentic as well as whether or not the Applicant failed to follow. The Respondent, on the other hand, argued that stated that the Applicant performed poorly on his job to an extent that on the 22nd October 2008 he was invited to a counseling session where his attention was drawn to areas of his job that needed his attention and such areas of concern had to be rectified by the 26th October 2008.

5.32 The Applicant's representative argued that even if it were to be established that the Applicant performed poorly on the job, he was not given enough opportunity to improve on his poor work performance. The Applicant's representative argued that the complaints raised against the Applicant on the 22nd October 2008 are fundamentally different from those raised on the 6th November 2008 and February 2009 [various dates]. Furthermore, the Applicant's representative argued that the Applicant was not given enough opportunity to improve his performance as Mr. Mackie's evidence supported the Applicant's case when he stated that he requested to be sent for training so that he could be able to perform his duties in respect of the laying

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section of the farm which was the major concern of the Respondent. The Applicant's representative argued that, instead, Mr. Mackie sent someone else for training, and who upon return, was not deployed to the relevant section of the farm. It is my finding that such evidence of the Applicant continues to glare the Respondent at his face, begging for an answer. Accordingly, this goes to show that the Applicant was not given ample opportunity to improve on his poor work performance.

5.33 In respect of whether or not the final written warning dated the 6th November 2008, was valid, I still maintain the view that it is not a valid warning, considering that no disciplinary enquiry was conducted prior to the written warning letter see *Fikile Nkambule v Trasnworld Radio, Industrial Court case 311/2007*).

5.34 Much as the employer is at liberty to determine his/her work performance standards at work, however focus made be on the extent to which these standards can be achieved. In the circumstances, I find that it was incumbent upon the Respondent to make reference to a document that forms a constituent part of the bundle of documents and this is in the interests of fairness. It is my finding that the reference made to the breeding procedure manual by Respondent was therefore an irregularity on the part of the Respondent.

5.35 In terms of the Prayers, the Applicant submitted that he is no longer interested in reinstatement. The Respondent also stated that it would not be possible to reinstate the Applicant because the trust relationship is no longer prevalent between the parties.

5.36 Concerning notice pay, it is common cause that it is no longer an issue in dispute because both parties agreed that it was paid. In terms of underpayments, the

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Applicant submitted that Mr. Mackie promised him an increment of E500.00 upon employment. First of all, it is not clear as what the Applicant means by "upon employment". That it refers to probationary employment or employment after the probation is anyone's guess. On a balance of probabilities, I find that there is no compelling evidence before me that there was ever a promise that was not fulfilled by the Respondent.

6. CONCLUSION

6.11 conclude that the Applicant was not afforded enough opportunity to improve his performance on the job he was employed to do as most of his stay at the Respondent undertaking was characterized by an array Correspondences on poor work performance.

6.2 I am also convinced by the evidence at my disposal that the poor work performance letters were not preceded by disciplinary hearings.

6.3 In the final analysis and on a balance of probabilities, I take the view that taking all the circumstances of this case, it was unfair, unreasonable and unlawful for the Respondent to terminate the contract of employment of the Applicant.

6.4 I also find that there is no evidence compelling me to rule in favour of the Applicant's prayer in respect of underpayments.

7. AWARD

7.1 This award has taken into account the Applicant's track record, length of service and the circumstances of this case.

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7.2 The Respondent is hereby ordered to pay the Applicant a total amount of E25 986.84 (Two, Five, Nine Eight Six Emalangeneni and Eight Four Cents).

7.3 The Respondent is hereby ordered to pay the Applicant the aforesaid amount of money above on/or before the 22nd January 2010.

DATED AT MANZINI ON THIS 18th DAY OF DECEMBER 2009.

KHANYAKWEZWE KHUMALO

CMAC ARBITRATOR

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