

IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION (CMAC)

Held in Manzini CMAC REF: SWMZ 233/09

In the matter between:

Delisile Nkwanyane Applicant

AND

Miladys Swaziland Respondent

CORAM:

Arbitrator : Mr Robert S. Mhlanga

For Applicant : Mr D. Jele

For Respondent : Ms Sam Lafleur

ARBITRATION AWARD

VENUE : CMAC OFFICES, ENGULENI BUILDING, GROUND FLOOR, MANZINI

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1. DETAILS OF HEARING AND REPRESENTATION

1.1 The Applicant in this case is Delisile Nkwanyana, an adult swazi female, who was duly represented herein by Mr Derrick Jele from Robinson Betram Law Firm.

1.2 On the other hand the Respondent is Miladys which was represented herein by Ms Sam Lafleur.

2. BACKGROUND OF THE DISPUTE

2.1 The dispute at hand relates to an alleged unfair dismissal, it being alleged by the Applicant that her services were unfairly terminated by the Respondent on the 29th April, 2009, following a disciplinary enquiry which was instituted against her, wherein she was charged with gross dishonesty.

2.2 Pursuant to the alleged unfair dismissal herein, the Applicant reported a dispute to the Commission (CMAC) in terms of section 76 of the Industrial Relations Act 2000, as amended.

2.3 The dispute was conciliated upon, but unfortunately it was not resolved; consequently a certificate of unresolved dispute was issued by the Commission.

2.4 Subsequently, by consent the parties referred the matter to arbitration for determination. The main purpose of this meeting inter alia, was to enable the parties to deliberate on the number of witnesses each party intended to call, and the discovery or exchange of documents to be relied upon during the arbitration hearing.

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3. ISSUE TO BE DECIDED

The issue which I am called upon to determine herein, is whether or not the Applicant's dismissal was fair and reasonable in the circumstances of the case.

4. SUMMARY OF EVIDENCE 4.1 Applicant's case

Delisile Nkwanyane's testimony

4.1.1 The Applicant was the only witness who testified in the Applicant's case. I will refer to her as the Applicant and or Ms Nkwanyane as the case may be.

4.1.2 The Applicant testified under oath and she stated that she is the Respondent's former employee, having been employed on the 7th May, 2007 as a Retail Associate. She said that as an associate her duties inter alia, was to operate the till as a Cashier.

4.1.3 It was the Applicant's testimony that as the Respondent's employee she had a staff account, which enabled her to purchase clothes in the shop at a discount for herself and her immediate family. She said that she was entitled to 25% discount on regular priced merchandise or clothes, and 50% discount on staff uniform. She stated that she was not allowed to use her staff account to buy clothes for her friends. The Applicant said that the purchase price for clothes bought using her staff account would normally be paid through monthly instalments which were deducted from her salary.

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4.1.4 The Applicant testified that she was dismissed by the Respondent on the 29th April, 2009, on allegation of gross dishonesty. She said that she had been in continuous employment since the 7th May, 2007 to the date of her dismissal.

4.1.5 With regard to the events and circumstances which led to her dismissal; the Applicant testified that she was on maternity leave, and on the 31st March, 2009, she went back to work for purposes of extending her maternity leave days. At the workplace she was told by Mr Donald Glover (Branch Manager) that all the other employees (her colleagues) were dismissed on allegations of dishonesty. She testified that Mr Glover advised her to resign from work. She stated that she refused to resign. Mr Glover allegedly told her to go home and think about this again, and to report back on the following day.

4.1.6 On the following day, that is, on the 1st April, 2009 she came back to work. She told Mr Glover the same thing namely; that she would not resign. The Applicant alleged that Mr Glover then forced her to make a statement admitting that she committed a dishonest act to the effect that she allegedly switched off the modem and thereby made offline purchases using her staff account for customers and that she took the cash from customers for her own benefit.

4.1.7 The Applicant alleged in her testimony that Mr Glover coerced her to make the admission of guilt statement in that he (Mr Glover) told her that since her case was different from that of her colleagues, she might not be dismissed, but could

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get a lenient sanction, which is short of dismissal, like for instance, a written warning.

4.1.8 The Applicant further alleged that Mr Glover actually told her how and what to write in the statement. In other words, the contents of the said statement were allegedly dictated to her by Mr Donald Glover. Therefore, it is the Applicant's testimony that the statement was not freely and voluntarily made by her.

4.1.9 Subsequently, the Applicant was suspended from work, as per the letter of suspension dated 1st April, 2009, which is filed of record and it is marked as Annexure "A". The Applicant further stated that eventually she was invited to a disciplinary enquiry, which was held on the 25th April, 2009. The disciplinary hearing was chaired by Ms Magda Hayes. It was the Applicant's evidence that during the disciplinary enquiry, she only pleaded guilty to switching off the modem, but she denied the fact that she bought clothes for customers using her staff account in exchange for cash.

4.1.10 However, Ms Nkwanyana (Applicant) admitted that she switched off the modem and bought clothes when the system was offline. She said that she did that in order to access credit on her staff account, as it would not be possible to buy when the system was online because she had no credit on her account. She said that during an offline purchase, she was able to get a credit limit of E300-00.

4.1.11 Ms Nkwanyana testified that she did not know that she was not allowed to make offline purchases, more so because there was no rule which

specifically prohibited her from purchasing when the system was offline or when the modem was turned off.

4.1.12 The Applicant alleged that even her Manager, Dumsani Shabangu was involved in this dishonest act of switching off the computer for purposes of purchasing when the system was offline. She said that she learned from her former Manager, as to how to switch off the modem in order to make offline purchases. The Applicant testified that notwithstanding the fact that she purchased when the computer was offline, but the Respondent was able to recover the full purchase price for whatever goods purchased, through monthly installments effected on her salary. It was also the Applicant's evidence that all offline purchases were detected when the system was online, and thus there was nothing sinister about these offline purchases.

4.1.13 The Applicant stated that following the disciplinary hearing a verdict of guilty was reached by the chairperson, and subsequently she was dismissed. The Applicant said that she noted an appeal against this decision, as per the letter of appeal dated 30th April, 2009. She stated that her appeal was never entertained by the Respondent. In other words the Respondent never called her to an appeal hearing. On the other hand, the Applicant testified that she has no previous disciplinary record. She also stated that at the time of her dismissal the Respondent did not pay her all her terminal benefits.

4.1.14 In conclusion the Applicant prayed that an award be granted in her favour directing the Respondent to pay her the following terminal benefits namely;

- (a) notice pay = E2500-00 (b) additional notice pay = E384-00 (c) severance allowance = E960-00 (d) outstanding leave (10 days). With regard to reinstatement, the Applicant abandoned this claim.

CROSS EXAMINATION

4.1.15 Under cross examination the Applicant testified that the admission of guilt statement was made while she was at Miladys store, Manzini and she said that she was with Mr Donald Glover. When the Applicant was asked as to how Mr Glover forced her to make the statement, her response was that Mr Glover promised her that since her case is different from that of her colleagues, the Respondent would not impose a sanction of dismissal, but rather she would be given a lenient sanction, like for instance, a written warning.

4.1.16 It was put to the Applicant by the Respondent through its representative that she made the statement out of her own free will and without any promise or threat made to her. The Applicant disputed this; she insisted that she was induced by Mr Glover to make the aforesaid statement, and that same was not freely and voluntarily made.

4.1.17 The Applicant was asked as to why she switched off the modem. In response, she testified that she wanted to access credit, since she had already exhausted her credit limit. The Applicant further testified that it was not a dishonest act or misconduct to switch off the modem for purposes of making offline purchases. However, it was put to her that, by switching off the computer and

buying while it was offline, she acted dishonestly. The Applicant reiterated that there was nothing sinister about this, because she used to do this in the presence of her Manager and all the receipts were available as proof of the purchases made by her.

4.2 Respondent's case

4.2.1 The Respondent led the evidence of three (3) witnesses to buttress its case namely; Magda Hayes, Donald Glover and Dumsani Shabangu.

Magda Hayes' testimony

4.2.2 I will refer to this witness as Ms Hayes or RW1 as the case may be. Ms Hayes gave her testimony under oath. She testified that she presided at the disciplinary hearing held against the Applicant. She also testified that, she is the Area Manager of Miladys Stores and she is based in South Africa.

4.2.3 Ms Hayes in her testimony demonstrated that she has sufficient experience of chairing disciplinary enquiries. She testified that the disciplinary enquiry was conducted in accordance with a fair procedure, as it is shown in the minutes of the disciplinary enquiry filed herein. RW1 testified that the Applicant pleaded guilty to the charge preferred against her. It was RW1's evidence that, before entering the plea of guilty she had to satisfy herself that the Applicant fully understood what she was pleading guilty to (consequences of the plea of guilty).

4.2.4 Having satisfied herself that the Applicant understood what she was pleading guilty to, a plea of guilty was entered and thereafter she made her

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findings to the effect that the Applicant was guilty as charged. RW1 stated that the Applicant admitted that she switched off the modem so that she could purchase when the system was offline and that she processed cash transactions on her account and she took the money from customers for her own use. Ms Hayes said that dishonesty is a dismissable offence in terms of the company's disciplinary code and procedure. She said that the penalty of dismissal meted out to the Applicant was appropriate in the circumstances of the case.

4.2.5 Ms Hayes stated that the employees (Applicant inclusive) switched off till number 2 at the point of sale in order for them to buy when the system was offline. She said that till number 2 is a direct line linking the Head office with the store. She stated further that once till number 2 is switched off the communication between the Head office and the store is interrupted or cut off such that the Head Office is unable to access the information or data pertaining to the customers' transactions at the store.

4.2.6 RW1 testified that the Applicant contravened the provisions of section 3 of the Respondent's Business Code of Conduct in that she used the knowledge gained through her employment with the Respondent company to manipulate the system for her own personal benefit or advantage. RW1 testified that the company incurred financial loss in that the discounts given to the employees affected the company's profitability. She also said that the company needs the cash flow which is generated from cash sales.

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4.2.7 RW1 testified that it transpired during the disciplinary proceedings against the employees that, the reason they committed this misconduct was due to the fact that the monthly deductions effected on their respective wages in respect of their staff accounts were high such that there was little which was left for them to take home; hence they committed this offence.

Cross Examination

4.2.8 Under cross examination Ms Hayes reiterated that it was not the first time for her to chair a disciplinary enquiry.

4.2.9 Ms Hayes admitted that the minutes of the disciplinary hearing or enquiry do not contain all what was said during the hearing. She did not record everything which was said during the disciplinary hearing. However, she stated out that all the procedural requirements were met, as shown in the minutes.

4.2.10 It was put to RW1 that the minutes of the disciplinary hearing are not accurate in that there are things which the Applicant said during the hearing, but they do not appear in the minutes. Specifically it was put to her that during the disciplinary hearing, the Applicant only pleaded guilty to switching off

the modem; it is said that she (Applicant) denied the allegation that she received cash from customers. In response, RW1 disputed this; she insisted that the Applicant pleaded guilty to the charge in question. She said that following the plea of guilty, there was no need for her to hear further oral evidence, hence she was entitled to make her findings right away.

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RW1 also referred to the Applicant's admission statement which was considered in her findings.

4.2.11 RW1 reiterated that the Applicant was charged with gross dishonesty. She said that this offence or misconduct is governed by Section 3 of the Respondent's Business Code of Conduct which deals with Conflict of interest. RW1 further testified that by switching off the modem, the Applicant acted in Contravention of this section in that she used the knowledge gained in her Employment to commit this offence.

4.2.12 During cross examination, RW1 admitted that there is no written rule which specifically states that an employee is not allowed to switch off the modem. However, she pointed out that switching off the modem constitutes a dishonest act. She said that this is also contrary to the company's policies and procedures.

4.2.13 RW1 stated that the Applicant admitted in her written statement that she committed the offence in question, namely that she switched off the modem and thereby processed cash transactions into her staff account, and that she then received cash from the customers for her own use. RW1 further stated that the Applicant, during the disciplinary hearing verbally admitted that she committed this misconduct.

4.2.14 RW1 disputed the allegation that she predetermined the outcome of the disciplinary enquiry. She maintained that at the commencement of the disciplinary hearing, the Applicant was informed about all her rights to a fair hearing

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4.2.15 RW1 admitted that all the offline purchases or transactions which occurred when the computer was turned off were detected and updated on the following day. It was put to her that switching off the computer and buying when it was off was not a dishonest Act, because all the offline purchases were detected and the Respondent was able to deduct the money for such purchases from the Applicant's salary every month. In response, RW1 disputed this, and she maintained that this was a dishonest act. She further stated that the Applicant unlawfully circumvented the credit limit rule which is meant to protect her from overspending. RW1 also testified that, from the legal point of view, this is wrong because the company would find itself contravening or violating the law pertaining to authorized deduction of wages.

DONALD GLOVER'S TESTIMONY

4.2.16 The Respondent also led the evidence of Donald Glover. I will refer to this witness as Mr Glover or RW2 as the case may be. Mr Glover testified under oath and said that he is the Store Manager of Miladys Manzini; previously he was based in Mbabane. He stated that he has been in the Respondent's employ for two (2) years now.

4.2.17 It was Mr Glover's testimony that one day while he was at work in Mbabane, he received a call from his Area Manager, who advised him that there was an anomaly regarding the staff account of the employees of Miladys, Manzini. He said that the Area Manager instructed him to go to Miladys Manzini to conduct some investigation. He testified that he went to Manzini wherein he carried out his investigation, and he discovered

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that some staff members purchased when the system was offline.

4.2.18 Mr Glover testified that the Applicant, Delisile Nkwanyane was on maternity leave at the time

he conducted his investigation at the store. He said that he waited for her to come back to work, so that he could get her side of the story regarding the alleged dishonest act. Eventually the Applicant came to work, and he (Mr Glover) told her what had happened. Mr Glover stated that when the Applicant arrived at the shop, her colleagues who were also involved in the alleged dishonest act were already dismissed.

4.2.19 Mr Glover said that upon hearing that her colleagues were dismissed, the Applicant was dejected. He said that the Applicant was reluctant to attend the disciplinary hearing, because she felt that she would also be dismissed, just like her colleagues. RW2 (Mr Glover) testified that he advised the Applicant to attend the disciplinary hearing because each case depends on its own merits. He said that he told her that her case is different from that of the others. RW2 disputed the allegation that he coerced the Applicant to resign or to make the admission-of-guilt statement.

4.2.20 With regard to offline purchases, RW2 testified that, the only time when offline purchases are allowed, is when there is a technical fault or problem with the system. He said that the procedure with regard to offline purchases is that authorization should be obtained from the Head Office first, before offline purchases can be made.

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4.2.21 It was RW2's testimony that when the system is offline, customers are only entitled to a credit of E300-00.

4.2.22 RW2's said that he was an interpreter during the Applicant's disciplinary enquiry. He testified that the Applicant pleaded guilty to the charge of dishonesty during the hearing. In particular he stated that the Applicant admitted that she got cash from customers which was supposed to be received by the company. RW2 stated that offline purchases were processed manually and receipts or dockets were kept for the record. This witness then referred to the relevant receipts pertaining to offline purchases made by the Applicant.

CROSS EXAMINATION

4.2.23 RW2 denied that he coerced, or forced the Applicant to write the admission of guilt statement.

4.2.24 During cross examination it was put to RW2 that the Respondent did not suffer any financial prejudice because the full amount for the clothes purchased by the Applicant was fully recovered by the Respondent through monthly deductions, which were effected on the Applicant's salary. In response, Mr Glover (RW2) disputed this allegation. He stated that the Respondent incurred financial loss in the form of the 25% discount which was allocated to the Applicant on cash transactions which were illegally processed on her staff account. He said that the company's cash flow was also decreased because the Applicant took the money for the cash

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transactions which was meant to be received by the company.

4.2.25 RW2 reiterated that the Applicant admitted during the disciplinary hearing that she received money from the customers for her own use. He said that the Applicant also alluded to this fact, during her testimony wherein she was testifying for the Respondent against her former manager, Dumsani Shabangu, during Mr Shabangu's disciplinary enquiry. RW2 alleged that the Applicant mentioned during the said hearing that they were all involved in this dishonest act.

DUMSANI SHABANGU'S TESTIMONY

4.2.26 Dumsani Shabangu was also called by the Respondent to testify on its behalf. This witness will be referred to as Mr Shabangu and or RW3. Dumsani Shabangu also gave his testimony under oath. RW3 testified that he is the Respondent's former employee. He said that he was formerly employed by the Respondent as the Store Manager for Miladys, Manzini, having been employed in or about June, 2008.

4.2.27 With regard to the events which led to the Applicant's dismissal, RW3 testified that he received a call from Elize Van Heerdeem, who alerted him that the staff account balances or monthly deductions in respect of their staff accounts were high. RW3 stated that before this call, he was not aware of this fact. He said that when a staff member purchased any merchandise or clothes other than a staff uniforms his authorization was not necessary or required.

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4.2.28 RW3 testified that the Applicant and her colleagues were all involved in the dishonest act of switching off the computer and buying when the system was offline. RW3 admitted that he was also involved in this dishonest act. It was RW3's testimony that the reason the Applicant and the other employees resorted to this illegal and dishonest act was due to the fact that they were usually left with little money after the account deductions.

4.2.29 RW3 further testified that through this dishonest act, they benefited in that they received money from the customers for cash transactions. Over and above that, they were given 25% discount on regular priced merchandise or clothes bought with staff account.

4.2.30 Mr Shabangu (RW3) said that he was also charged with gross dishonesty, and he was subjected to a disciplinary enquiry. He said that he pleaded guilty to this charge, and consequently he was dismissed. Mr Shabangu stated that the Applicant testified on the Respondent's behalf against him during that hearing. RW3 alleged that the Applicant during the said hearing admitted that they were all involved in the commission of the dishonest act or misconduct in question.

4.2.31 RW3 testified that he was not promised anything by the Respondent to testify on its behalf. He said that he wanted to set the record straight regarding the dishonest act or what was happening at Miladys Manzini. RW3 acknowledged the fact that he betrayed his former employer's trust in that as a Manager he was also involved in the commission of this offence or misconduct yet he had an obligation to stop the perpetration of

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such dishonesty. He said that he was made a scapegoat by the other employees in that they blamed him for the termination of their services, yet they knew that what they were doing was wrong. RW3 stated that even if the Respondent were to offer him reinstatement, he would decline it because he was ashamed of what he did.

CROSS EXAMINATION

4.2.32 Under cross examination RW3 disputed the allegation that he had a vendetta against the Applicant. He also testified that the Respondent did not promise him anything for testifying on its behalf in this case. Specifically, he disputed the allegation that the Respondent promised him a reinstatement. RW3 stated that if he wanted to be reinstated to work, he would have referred a dispute to CMAC.

4.2.33 It was RW3's testimony that, although personally, he did not see the Applicant receiving money from the customers, but he maintained that to his knowledge, the Applicant committed the misconduct in question.

5. Analysis of Evidence and Submissions

5.1 In my analysis, I will look at the oral evidence adduced herein and the documentary evidence in the form of annexures or documents filed of record, as well as the parties' closing submissions.

5.2 In casu, it is common cause that the Applicant was an employee to whom Section 35 of the Employment Act, 1980, as amended, applied.

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Therefore, the onus of proving the fairness and reasonableness of the Applicant's dismissal lies with

the Respondent, as per the provisions of Section 42 (2) (a) and (b) of the Employment Act 1980, as amended. In its endeavor to discharge the onus herein, the Respondent led the evidence of three (3) witnesses namely, Magda Hayes (RW1), Donald Glover (RW2) and Dumsani Shabangu (RW3).

5.3 It is common cause that the Applicant was charged with gross misconduct in that during the period October, 2008 to December, 2008, it is alleged that she together with other associates switched off the modem in the store to ensure that the point of sale system was operating offline, and that she then processed customer's cash transactions onto her account. It is further alleged that she benefited by receiving discount and by keeping the cash received from customers for herself.

5.4 It is also common cause that the Applicant was duly notified of the foregoing allegations against her and subsequently she was invited to a disciplinary hearing, which was held on the 29th April, 2009. It is not in dispute that the verdict or outcome of the disciplinary enquiry was to the effect that the Applicant was summarily dismissed. Following her dismissal the Applicant referred a dispute of unfair dismissal to the Commission (CMAC). Since the dispute could not be resolved during conciliation, the parties by agreement referred same to arbitration for determination hereof.

5.5 The main question or issue I am called upon to decide is whether or not the Applicant's dismissal

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was fair and reasonable in terms of Section 36 read in conjunction with Section 42 (2) of the Employment Act 1980 as amended.

5.6 From the Applicant's closing submissions, it is argued on behalf of the Applicant as follows:

- (a) It is submitted on behalf of the Applicant that the 'Confession' or written statement made by the Applicant on the 1st April, 2009, whereby the Applicant admitted to have committed the gross misconduct she was charged with, should not be admitted as part of the Respondent's evidence because it was not freely and voluntarily made by the Applicant in her sound and sober senses. It is argued herein that Mr Donald Glover (RW2) being in authority over the Applicant induced the Applicant to make the statement in that he allegedly promised her that if she were to admit in writing that she committed the offence or dishonest act in question, the Respondent would impose a lenient penalty on her namely, that she would not be dismissed, but that she might be given a warning. In this regard reference was made to Hoffman and Zeffert's work, "The South African Law of Evidence", Fourth Edition at page 215, wherein these authors discuss the subject of confession.
- (b) It is also Applicant's submission that there was no rule in place at the Respondent's Workplace which made it an offence to switch off the modem and to buy while the system was offline. It is argued herein that there was no rule in place which prohibited the Applicant from switching off the modem for purposes of making offline purchases. Therefore, it is the Applicant's argument that since there was no rule that

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switching off the modem or computer and buying when the system was offline was an offence, it cannot be said that she contravened any workplace rule. It is the Applicant's submission that she was not charged with conflict of interest, and therefore it cannot be said that she contravened or breached the rule in relation to the conflict of interest.

- (c) It is further submitted on behalf of the Applicant that the Applicant never received cash from customers nor did she processed cash transactions on her account for customers. It is Applicant's submission herein that the Respondent has dimly failed to prove that she received money from customers for her own use, through the alleged dishonest act. The Applicant denies the allegations that she received cash from customers through cash transactions allegedly processed on her account. On the other hand, it is argued that the Applicant never pleaded guilty to the charge of gross misconduct. It is submitted that, during the disciplinary hearing, the Applicant only admitted that she switched off the modem to enable her to make offline purchases.

- (d) It is further submitted on behalf of the Applicant that the disciplinary hearing was procedurally unfair in that the Applicant was never asked to plead to the offence she was charged with. It is argued that the Applicant was simply told that she was guilty, because she admitted that she switched off the modem for purposes of making offline purchases. It is submitted that the Applicant was denied her right to appeal against the initial verdict, because her appeal was never entertained by the Respondent. In other words,

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the Applicant was never called for an appeal hearing, despite the fact that she lodged her appeal against the initial verdict, hence her dismissal was procedurally unfair. In this regard reference was made to the case of Nkosinathi Ndzimandze and Another V Ubombo Sugar Limited IC Case No: 476/05. In conclusion, it is the Applicant's prayer that the relief sought herein be granted.

5.7 On the other hand, the Respondent's submissions are as follows:

- (a) It is submitted on behalf of the Respondent that during the disciplinary enquiry the Applicant pleaded guilty to the offence of gross dishonesty. It is argued that notwithstanding the plea of guilty, but the chairperson (RW1) went to an extent of satisfying herself that the Applicant fully understood what she was pleading guilty to. It is submitted herein that the Applicant was facing one charge; and it is argued that she pleaded guilty to the whole charge. It is submitted that she did not plead guilty to a portion of the charge. The Respondent submits that the Applicant was advised about all her rights during the hearing.
- (b) It is further submitted on behalf of the Respondent that the sanction of dismissal was justified because the Applicant's actions amounted to gross dishonesty. It is argued that the sanction of dismissal was consistent with the company's previous decisions taken in similar cases.

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- (c) It is the Respondent's further contention that the misconduct in question is viewed in a very serious light by the Respondent, as this has led to a breakdown of trust between the Applicant and the Respondent. It is argued herein that, from the legal perspective, the Respondent was put at the risk of contravening the law regulating authorized deductions to be made from an individual employee's wages, following the circumvention of the credit limit by the Applicant (The underlined is my emphasis).
- (d) Overall, it is the Respondent's submissions that the Applicant's dismissal was both procedurally and substantively fair. It is the Respondent's argument that, in light of the evidence adduced by it in this case, it has been able to prove on a balance of probabilities that the allegations against the Applicant are true. Reference was made to an Arbitration Award, which was issued by the CCMA Commissioner in the case of Inelia Koeberg (Applicant) v Mr Price (Respondent) case No. ECPE 157/05.
- (e) In conclusion, the Respondent prays that the Applicant's case be dismissed.

5.8 In the instant case, I will first deal with the issue of the admissibility of the statement recorded by the Applicant on the 1st April, 2009, wherein she admitted that she was involved in the commission of the dishonest act, namely, switching off the modem and processing of cash transactions into her own account, as well as taking cash from the customers, which was meant to be received by the Respondent. Now I have to determine

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whether or not the statement was improperly or illegally obtained by the Respondent. The Applicant bears the onus of proving that the admission of guilt statement in question was not freely and voluntarily made by her.

5.9 The relevant portion of the Applicant's written statement is as follows: "we started down offline in 1997 (sic.) we were switching off till two, in order for us to buy. We were buying clothes using our account for customers in order for us to get the cash. But we were not doing it to every customer, to the one we know". Clearly from this statement, the Applicant admitted that she, together with her workmates were involved in the commission of the alleged gross dishonesty.

5.10 I am persuaded by the Applicant to reject or not to accept this statement because it is alleged that it was not freely and voluntarily made by the Applicant. In her testimony the Applicant stated that Mr Donald Glover (RW2) induced her to make the statement in that he (RW2) promised her that she would not be dismissed, but that the Respondent might impose a lenient penalty because her case was different from that of her colleagues.

5.11 On the contrary, the Respondent disputes the Allegation that this statement was not freely and voluntarily made by the Applicant. Mr Donald Glover (RW2) in his testimony disputed this. He stated that the Applicant was dejected or was unhappy and she was reluctant to attend the disciplinary hearing, because she thought she would also be dismissed just like her colleagues, who were already dismissed. Mr Glover said that he advised her to attend the

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disciplinary hearing because her case was different from that of the others.

5.12 In my opinion the Applicant has failed to prove that the written statement was made under undue influence or a promise that she would not be dismissed. I reject the Applicant's version regarding this issue because it is implausible. I do not see anything wrong with what Mr Glover said to the Applicant namely; the advice given to the Applicant that she should attend the disciplinary enquiry because her case was different. In my view this was not a promise, but it was a bona fide advice given to the Applicant by Mr Glover. The Applicant has failed to show that this advice constituted a promise, which unduly influenced her to make the statement. The Applicant in her testimony alleged that Mr Glover dictated the contents of this statement. In other words, it is alleged that what is contained in the statement came from Mr Glover. But surprisingly, the Applicant admitted part of the contents of the statement. The Applicant admitted in her evidence-in-chief that she switched off the modem in order to make offline purchases. This is also contained in her written statement.

5.13 During the disciplinary hearing the Applicant pleaded guilty to the charge in question. The statement was tendered as part of the Respondent's evidence against her, and on the basis of this statement she was found guilty as charged, and consequently she was dismissed. I do not accept or believe the Applicant's version that, during the hearing she only pleaded guilty to switching off the modem, and not guilty to the rest of the allegations contained in the

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charge sheet. This is just an afterthought on the part of the Applicant. If indeed the Applicant pleaded not guilty to the rest of the allegations contained in the charge sheet, the chairperson would have entered a plea of not guilty.

5.14 According to the minutes of the disciplinary hearing a plea of guilty was entered, and there is an indication that this plea of guilty was entered after the chairperson had satisfied herself that the Applicant understood what she was pleading guilty to. There is no way the chairperson would have ignored the fact that the Applicant was disputing part of the allegations contained in the charge sheet. The portion of the charge alleged to have been denied at the hearing, is the one pertaining to the cash allegedly received by the Applicant and her colleagues from customers and the processing of cash transactions in to her account for customers. The minutes of the disciplinary hearing are contained in a designed form which is user-friendly with a checklist which serves as a guideline for the chairperson to remember all the procedures to be followed during the disciplinary hearing up to the final decision or verdict.

5.15 In the minutes there are guidelines pertaining to introduction to be made by the chairperson, the parties present in the hearing, the right to legal representation; notification to attend the enquiry. There is also a question which says; do you understand the allegation(s) put forward? How do you plead to

the allegation(s). It is also stated therein that, "If the accused pleads guilty:

- (a) Ask accused why he/she is pleading guilty. Satisfy yourself that he/she knows exactly what

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he/she is pleading guilty to by ask probing questions.

- (b) If it is clear that he/she thinks that he/she is not guilty but has pleaded guilty due to lack of understanding then enter a not guilty plea. Therefore, if the Applicant pleaded guilty to part of the charge, obviously the chairperson would have entered a plea of not guilty.

5.16 Another noticeable thing is that, in her notice of appeal against the verdict of dismissal, the Applicant did not state that the chairperson wrongly entered a plea of guilty, yet she claims that she did not plead guilty to the whole charge. The fact that this was not included is an indication that it is not true that the Applicant never pleaded guilty to the whole charge. It is my considered view that the statement made by the Applicant on the 1st April, 2009 is admissible.

5.17 I am also inclined to reject the Applicant's contention that the Applicant contravened no workplace rule, since there is no rule in existence which expressly stipulates that an employee is not allowed to switch off the modem in order to make offline purchases. During the disciplinary hearing, the Applicant pleaded guilty to the commission of the offence of gross dishonesty. The Applicant's admission of guilt statement was tendered as part of the Respondent's evidence and on the basis of her own admission she was found guilty as charged and dismissed. As I have already stated above, the statement made by the Applicant is admissible and it forms part of the Respondent's evidence. There is also a corroboration of RW1 (Magda Hayes) and RW2's (Donald Glover)

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evidence to the effect that during the disciplinary hearing the Applicant pleaded guilty to the whole charge of gross dishonesty.

6. CONCLUSION

6.1 From the totality of evidence adduced in the instant case, and having taken into account the entire circumstances thereof, it is my conclusion that the Applicant was dismissed for a reason permitted under Section 36 (b) of the Employment Act 1980, as amended. In my view the Respondent has discharged the onus of proof placed on it by Section 42 (2) (a) and (b) of the Employment Act 1980 as amended. Section 42 (2) (a) and (b) provides that: "The services of an employer 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; and
- (b) That taking into account all the circumstances of the case it was reasonable to terminate the services of the employee".

6.2 It is also my conclusion that taking into account all the circumstances of the case, it was reasonable on the part of the Respondent to terminate the Applicant's services. The Respondent has been able to prove that the Applicant committed gross dishonesty in that she switched off the modem and then made her purchases when the system was offline, and she received cash from those customers who were buying with cash, and in turn the Applicant used her account to manually process the cash

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transactions to appear like it were genuine offline purchases.

6.3 During the disciplinary enquiry the Applicant pleaded guilty to the charge in question which means that she admitted as per her written statement made on the 1st April, 2009, that she was also involved in the commission of the gross dishonesty. She also admitted in her written statement that she received money from customers and that she did not do this to every customer, buy only to those she

knew. I have already stated that this statement is admissible, because there is nothing which suggests or indicates that it was improperly obtained or not made freely and voluntarily by its maker (Applicant). The written statement forms part of the Respondent's evidence. Besides this statement, the evidence of Dumsani Shabangu (RW3), the Respondent's former manager confirmed that the Applicant was also involved in this illegal or dishonest Act in question. Despite the fact that usually he was not present when money changed hands between the Applicant and the customers concerned, but his evidence is probably true, because he was part of this dishonest activity. The Applicant also testified that RW3 was involved in this dishonest act. She said that she was taught by him how to switch off the modem in order to buy when the system was offline.

6.4 I also agree with the Respondent that the offence of gross dishonesty is a very serious one, and that it has led to a breakdown of trust and employment relationship between the parties. The Applicant's dishonest act of taking money

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from the customers, which was meant to go to her employer amounted to theft.

6.5 Switching off the modem in order to make offline purchases constituted a dishonest act. The Applicant also admitted in her evidence-in-chief that she switched off the modem in order to make offline purchases. She boldly stated that she did this in order to access the E300-00 credit limit. She also admitted that she exceeded her credit limit, and that the offline purchases enabled her to purchase, because she could not make online purchases; the computer would not process the transactions, because she had exhausted her credit limit. Her dishonest Act had far-reaching consequences, because her account installment was now high, and the company (albeit unintentionally) found itself making deductions which were contrary to the law. I am surprised that the Applicant does not regard this as a serious transgression on her part. This is an indication that the Applicant is not remorseful about what she did.

6.6 In the case of Nkosinathi Ndzimandze and Another v Ubombo Sugar Limited IC No. 476/05 at page 21 the court stated that; "Calculated dishonesty cuts at the root of the Employment contract and destroys the employment relationship". In light of the foregoing, it is my finding that the termination of the Applicant's services was reasonable in all the circumstances of the case.

6.7 However, I agree with the Applicant's assertion that her dismissal was procedurally unfair in that she was not invited or called for an appeal hearing. It is not in dispute that the Applicant

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appealed against the initial decision of dismissal, as shown in her letter of appeal dated 30th April, 2009. It is also common cause that the Applicant, was never called to an appeal hearing. According to the Applicant's testimony she personally delivered her notice of appeal to Miladys, Manzini. This testimony was never denied or controverted by the Respondent. On the other hand, the minutes of the hearing do not indicate that that Applicant was advised of her right to appeal against the decision of dismissal. Notwithstanding this, she appealed against the verdict of dismissal, but her appeal was never entertained by the Respondent. The Respondent has led no evidence to justify its failure to convene the appeal hearing.

6.8 The Respondent presented a letter, dated 21st May, 2009, by which the Respondent acknowledged receipt of the Applicant's appeal. According to this letter, the Applicant's appeal was received on the 21st May, 2009. In this letter the Respondent requested the Applicant to amend her grounds of appeal, and to forward the amended grounds to Ms Sam Lafleur, Miladys Head office, P. O. Box 912 Durban or alternatively she could fax them through Fax No: 03132284089. The Applicant testified that she did not receive this letter. The Respondent has not denied the fact that the Applicant never received same. I am convinced that the Applicant never received this letter. The question which boggles my mind is, why the Respondent did not call the Applicant because it has her contact number namely; 6129694 and same was included her contact number in her letter of appeal.

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6.9 In the case of Nkosinathi Ndzimande and Another v Ubombo Sugar Limited (Supra) at page 30 the court stated that: "It is well established in our labour law that an important ingredient of a fair disciplinary hearing is the right to appeal to a higher level of management". In the same case of Nkosinathi Ndzimandze and Another v Ubombo Sugar Limited at page 30, the court quoted the passage from Edwin Cameron's article; "The right to a hearing before dismissal-part 1 (1986) ILJ 183" which is as follows: "A right to an appeal is an important safeguard, giving the affected employee a chance of persuading a second tier of authority that the adverse decision was wrong or that it should otherwise be reconsidered. In the end, the final decision will have been the subject of more careful scrutiny prolonged debate and sober reflection".

6.10 In light of the foregoing, it is my finding that the Applicant's dismissal was procedurally unfair in so far as the Respondent's failure to afford the Applicant an appeal hearing is concerned. Therefore, the Applicant is entitled to be paid a compensation which is equivalent to two (2) months' wages. In my view, the compensation of two (2) months' wages is a fair and equitable award in the circumstances of the case.

6.11 Another issue which I am called upon to determine is, leave pay. The Applicant never advanced any argument regarding same in her closing submissions. Notwithstanding that, I am still required to determine this issue as it forms part of the Applicant's prayers. In her evidence in chief, the Applicant stated that the Respondent is

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owing her leave pay for ten (10) outstanding days.

6.12 On the other hand, the Respondent asserts that in terms of the contract of employment the Applicant forfeited the ten (10) days, hence she is not entitled to leave pay. This assertion came out during cross examination. Reference was made to the written contract of employment, and the Respondent relies on the clause in respect of annual leave. However, in its closing submissions the Respondent did not advance any argument which justifies the non-payment or forfeiture of the 10 days leave.

6.13 I have read the clause dealing with leave in the parties' contract of employment. Unfortunately, it is not clear as to under what circumstances would the employee (Applicant) forfeit leave not taken. The clause only stipulates that, "any leave not taken within 6 months of the end of the leave cycle for which it is due will be forfeited unless permitted by your Head of Department in writing". In my view the Respondent's decision declaring that the Applicant's 10 days leave has been forfeited is both arbitrary and grossly unfair in that the Applicant was never afforded an opportunity to make her representations regarding same, before this decision was taken. In light of the foregoing, it is my conclusion that the Applicant is entitled to be paid in lieu of the outstanding 10 days leave.

6.14 Overall, it is my conclusion that the termination of the Applicant's services was substantively fair, but procedurally it was not fair due to the Respondent's failure to convene an appeal hearing herein.

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7. AWARD 1

7.1 Pursuant to my foregoing conclusion, I hereby make an award that;

7.2 The Respondent shall pay the Applicant the following terminal benefits;

(a) Compensation (2 months' salary) -	E5000-00
(b) Outstanding leave pay (10days) -	E961-50
TOTAL	<u>E5961-50</u>

7.3 The rest of the Applicant's terminal benefits claimed herein are dismissed.

7.4 The Respondent is ordered to pay the Applicant the above sum of E5961-50 (Five Thousand Nine Hundred and Sixty One Emalangeni Fifty Cents) within 30 days from the date of receipt of this award.

DATED AT MANZINI ON THIS 15th DAY OF January, 2010.

ROBERT S. MHLANGA

COMMISSIONER