

CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI SWMZ 560/09

In the matter between:-

SMAWU: O.B.O. 58 UNION MEMBERS APPLICANT

And

SPINTEX SWAZILAND (Pty) LTD RESPONDENT

CORAM:

Arbitrator : Ms K. Manzini
For Applicant : Mr. A. Fakudze
For Respondent : Mr. E. Magongo

ARBITRATION AWARD

1. PARTIES AND REPRESENTATION

The Applicant herein is the Swaziland Manufacturing and Allied Workers Union (SMAWU), on behalf of fifty-eight (58) Union members. The Applicant's postal address is P.O. Box 2379, Manzini. The Applicant's representative was Mr. Alex Fakudze, a union official.

The Respondent is Spintex Swaziland (PTY) LTD. The Respondent's postal address is P.O. Box 6, Matsapha. Mr. Elliot Magongo, from E. Magongo Consultants, appeared on behalf of the Respondent. Mr. Pius Dlamini was also in attendance.

2. BACKGROUND INFORMATION

According to the Certificate of unresolved dispute filed herein (No. 40/2010), the issue in dispute is unpaid wages amounting to E6448.44 (Six Thousand Four Hundred and Forty Eight Emalangenzi Forty Four Cents).

The Applicant alleges that the 58 members are owed the sum of E6, 448.44 (Six Thousand Four Hundred and Forty Eight Emalangenzi Forty Four Cents) by the Respondent, in respect of unpaid wages for 17 hours.

-2-

On the other hand, the Respondent refutes the said claim. It is the Respondent's contention that the said workers did not work for the 17 hours on account of a power interruption which was effected by the Swaziland Electricity Company, (SEC), and that this was completely beyond the Respondent's own control.

3. SUMMARY OF EVIDENCE AND SUBMISSIONS

The Representative submitted documents as part of their evidence, and also made oral submissions in support of their respective cases.

3.1. THE APPLICANT'S CASE

It was Mr. Fakudze's submission that on or about the 24th of July, 2009, the Respondent's management had posted an internal memorandum on the walls of the premises, which memorandum informed the workers that the Swaziland Electricity Company would be installing pre-paid meters at the workplace. According to Mr. Fakudze the said memorandum also informed the workers that there would be an interruption of the power supply on Saturday the 1st of August, 2009 from 1:00 p.m. to 5:00 p.m., and also on Sunday, the 2nd of August, 2009 from 8:00 a.m. to 5:00 p.m.

The contention of Mr. Fakudze was that the Respondent had then decided that the workers should not report for work during the times of the power outage. He stated that the workers had written to the employer on the 31st of July, 2009 to lodge their concern about being made to stay away from work on the said dates, as the employer had indicated that they would not be paid, as they were not going to be working during the power outage.

The Applicant's representative further stated that the employer had responded by way of a letter, dated the 1st of August, 2009 and informed the workers that indeed the company was adopting the "no work - no pay" rule as it could not afford the expense of paying workers when they had not done any work. The employer, in the letter, cited the workers contracts of employment, as being the basis of this decision. The said contracts make reference to how the company will pay wages at an agreed rate for hours worked.

Mr. Fakudze stated that the workers representatives had again written to the employer, in response, on the 12th of August, 2009 to record their dissatisfaction at the stance taken by management on the following grounds:-

-4-

- i) The workers had not voluntarily abandoned work, hence the "no work-no pay" rule should not be invoked.
- ii) They were not responsible for the Respondent's losses that were suffered during it's operations.
- iii) They were willing to work to make up for the 17 hours that was lost during the power cut at any given time to be determined by the employer.

Mr. Fakudze submitted that despite all this the employer had adamantly decided that "shift A" would only report for work from 6 a.m. to 1 p.m. on the 1st of August, 2009, and would not report for work at all on the next day. He related that as a result the employees on this shift had suffered a 17 hour shortfall, and had as a result been placed on short time by the employer. According to Mr. Fakudze the Wages Regulation Order (Legal Notice No. 5/2008) at Section 16 (3) stated what would occur if an employer had to place an employee on short time. He stated that the law did not allow the employer to then effect a reduction on the employee's earnings except in the manner in which it was stated in the provision.

It was also Mr. Fakudze's contention that the employees' contracts of employment merely indicated that the workers were permanently employed, and also reflected their rate of

-5-

remuneration per hour. He stated that this contract only served as a source of how to calculate the workers' hourly rate, and by no means meant that the workers were not going to be paid for hours they were not able to render their services, due to a problem that was at the instance of the employer.

3.2. THE RESPONDENTS CASE

3.2.1. STATEMENT BY MR. PIUS DLAMINI

Mr. Dlamini submitted that when the employer received notice of the impending power cuts, they had called a meeting with the shop stewards, and had informed them that the workers could take the time of the power outages as part of their leave. He stated that this was done so as to defray the expenses caused by the workers' inability to work during that time. He stated that the workers had refused to complete and sign leave forms, and to take the time off as leave. He stated that they had told the shop stewards that the company could not afford to pay the workers "ex gratia". Mr. Dlamini stated that unfortunately he did not have the minutes of the said meeting. Mr. Dlamini stated that the employer had worked out that the employees had missed what was equivalent of one and a half day's work.

-6-

3.2.2 STATEMENT BY MR. ELLIOT MAGONGO

It was Mr. Magongo's submission that the Respondent's establishment could simply not operate without electricity hence the workers could not be given alternative tasks due to the nature of their jobs. He stated that the employer had also not envisaged a situation where the issue of the workers being placed on short time would arise because they were told not to come to work during the power outages. He stated that the employer had simply considered that the employees' contracts of employment envisaged a simple situation of payment for hours worked, and the rate payable per hour, despite permanent employment.

He acknowledged that the power cuts were not within the control of the workers, but pointed out that the employer also had not been able to prevent this situation. He stated that it was unfortunate that the Swaziland Electricity Company needed to do their maintenance work during the shift of the affected workers. He stated that at the time it had not seemed to be such a big problem, in that the workers were unable to fulfill their part of the employment contract (in that they could not render their services). He stated that the workers had merely complicated the issue by refusing to take the time away from work as leave, and this

-7-

had resulted in the unfortunate circumstances they now found themselves in.

Mr. Magongo stated further that it would amount to unjust enrichment on the part of the workers, if they were to be paid for work they had not done.

4. ANALYSIS OF EVIDENCE AND SUBMISSIONS

The crisp question that is the subject determination herein is whether or not the Respondent owes the Applicants' unpaid wages on account of their inability to render their services for 17 hours between the 1st and 2nd of August, 2009.

It is an undisputed fact and common cause that the said workers who constituted "shift A" were not able to render their services to their employer on the said dates, and for what amounted to a total of 17 hours. The Applicants' representative stated that the workers had even offered to work an alternative 17 hours on any other allocated time, to cover the time that they had missed. This offer was not disputed by the Respondent's representative.

The position of the law on this issue is clear. The workers did not abandon their duties voluntarily, and therefore the "no work-no pay rule" is not applicable herein. (See J. Grogan "Workplace Law", 9th edition at page 61).

-8-

Infact the same author at page 60 expressly states that it is the employer's duty, under a contract of employment, to receive the employee into service. It is stated therein that service is a pre-requisite for remuneration under the employment contract; and if the employer refuses to accept an employee's tender of service, it commits a serious breach of the employment contract.

It is a given that the employment contracts in this particular case at hand provide how wages are to be paid at E6.00 per hour for services "actually" rendered. Nevertheless, this contract is silent on the aspects of what should occur where the employee is ready and able to work, but is denied this opportunity. The point to be noted also is that what the said contracts may have provided can never be in contravention of established law as stated above (see J. Grogan (supra). It is also stated at page 61 of the same text that the duty on the part of the employer to pay the worker, and the commensurate right to remuneration on the part of the worker, does not arise from the actual performance of work, but from the tendering of service (see also Johannesburg Municipality v O'Sullivan 1923 AD 201).

On the basis of the legal position stated above, the Respondent clearly had a duty to provide the workers with tasks to perform when they rendered their services, via the

offer to perform the work they should have performed during the 17 hours of the power outage.

This finding is further buttressed by The Wages Act, 1964 (Legal Notice No.5 of 2005) which governs the Manufacturing and Processing Industry. This law being legislation promulgated by the Parliament of Swaziland clearly reigns supreme over anything that may have been contained in the various Applicants' employment contracts. Section 16 (1) of the said Act provides that an employer is enjoined to seek the written consent of the Labour Commissioner when that employer finds itself in a position where for reasons beyond its control it has to place a worker on short time. In casu, the Respondent did not seek the consent of the Labour Commissioner, but still went ahead to place the Applicants on short time.

Section 16 (3) further provides that an employer shall not be permitted to effect a reduction on the employee's wage where that employee was placed on short-time, and works in aggregate, more than fifty percent of his normal weekly hours of work during any week he has been placed on short time.

In casu, the Applicants were placed on short time for 17 hours which was clearly more than fifty percent of their weekly hours of work. From the statement of Mr. Pius Dlamini, the workers in question missed the equivalent of a day and a half. In view of this it is clear that the Respondent, according to Section 16 (3) did not have the right to effect any kind of reduction on the earnings of the Applicants.

This law is in place to regulate the sector of industry that the Respondent and its employees are engaged in, and the Respondent is therefore obliged to respect this piece of legislation. It is therefore my finding that the fifty-eight Applicants in this case were indeed placed on short time, and the Respondent is thereby indebted to them in respect of the 17 hours that they were not able to render their services to the employer. Furthermore, there is no provision in the law that the workers were under any compulsion to take leave in lieu of working the 17 hours, more especially as it would appear that the said leave would be unpaid. It is not clear why the Respondent would have expected the workers to take this option which would, in effect, have been to their detriment.

5. AWARD

Having heard the submissions, and evidence of both parties, I hereby find that the Respondent is indebted to the fifty-eight (58) Applicants in terms of unpaid wages.

The Respondent is hereby ordered to pay the Applicants the following amount:

17 hours x E6.54 = E111.18
(E111.18 x 58 workers=) TOTAL = E6, 448.28.

The said amount is calculated in terms of the hourly rate of remuneration of the workers, multiplied by the number of hours that were not worked by the Applicants on account of the power outage. Each Applicant is therefore entitled to E111.18.

The said amount of E6, 448.28 is to be paid to the Manzini CMAC Offices on or before the 30th day of June, 2010.

THUS DONE AND SIGNED AT MBABANE ON THIS 19th DAY OF MAY, 2010.

KHONTAPHI MANZINI

CMAC ARBITRATOR