



**CONCILIATION, MEDIATION & ARBITRATION
COMMISSION (CMAC)**

HELD AT MANZINI

SWMZ 184/10

In the matter between:-

THULI MOTSA

APPLICANT

And

MATSAPHA KNIT WEAR (PTY) LTD

RESPONDENT

CORAM:

Arbitrator : Ms K. Manzini

For Applicant : Mr. T. Simelane

For Respondent : Ms. S.Simelane

ARBITRATION AWARD

1. **PARTIES AND REPRESENTATION**

The Applicant herein is Ms. Thuli Motsa, a Swazi female whose postal address is P.O. Box 1158 Manzini. Ms Motsa was represented by Mr. T. Simelane, a labour consultant.

The Respondent herein is Matsapha Knitwear (Pty) Ltd, a company duly registered in terms of the laws of Swaziland. The Respondent's postal address is P.O. Box 1315, Matsapha. Ms. Sibaliwe Masuku appeared on behalf of the company, in her capacity as Personal Officer.

2. **ISSUES IN DISPUTE**

The issues in dispute according to Certificate of Unresolved Dispute No. 365/2010 are listed as follows:-

- 2.1. Reinstatement or alternatively
- 2.2. Notice pay
- 2.3. Additional notice
- 2.4. Leave pay
- 2.5. Public holiday December – January 2009
- 2.6. Unpaid wages (23½ hours)
- 2.7. Maximum Compensation for unfair dismissal.

The nature of the dispute is one of an alleged unfair dismissal, as stated in the above- cited certificate.

3. SUMMARY OF EVIDENCE

The Applicant was the only witness who was called to give oral evidence in support of her case.

A number of documents were also submitted by the Applicant's representative. The Respondent's representative chose not to call any witness to testify at the arbitration hearing, but did submit some documents as part of her evidence.

3.1. THE APPLICANT'S CASE

3.1.1 THE TESTIMONY OF MS THULI MOTSA

Ms Motsa testified under oath that she was employed by the Respondent as a machinist on the 18th of September, 1991. She stated that she worked there until she was stopped from coming to work by her employers after she fell ill and had been subjected to a disciplinary hearing on allegations of absenteeism.

The Applicant testified that she had fallen ill, and had proceeded to seek medical attention at the Raleigh Fitkin Memorial Hospital on the 5th of January, 2010.

She stated that the medical practitioner had recommended that she should be on sick leave, and had booked her off until the 11th of January, 2010. According to the Applicant, when she reported for duty after this period, her employer had taken issue with her absence from work, and accused her of failing to report that she was ill until after her return to work; despite the fact that she had duly submitted the sick sheet when she resumed work.

The Applicant testified that on the 21st of January 2010 she had been subjected to a disciplinary hearing on accusations of absenteeism in that she had not reported for work during the period between the 5th of January, 2010 up to, and including the 9th of January, 2010.

The Applicant stated that the verdict of the chairperson of the disciplinary hearing had ruled that she should be given a written warning as a penalty for not producing her sick sheet timeously. Ms Motsa stated that despite this verdict the employer had not issued to her such a warning, but had infact stopped her from resuming work on the 25th of January, 2010, as the personnel officer had told her that her superiors were reluctant to have her return to work before

they were able to consult with one Mr Maseko from the Labour Department in Manzini. Ms Motsa stated that she was told to go back home, and await a call from the employer. She stated that neither the employer, nor anyone from the Labour Department had ever contacted her despite her endeavors to solicit help from the same Department. Ms Motsa submitted a letter which she had written to the Senior Labour Commissioner of Manzini as part of her evidence. The said letter was dated the 26th of January, 2010, and the spirit of the letter was that she was soliciting the Department's intervention in her matter as she had been stopped from resuming work, and had not been receiving her salary, without any indication from the employer as to when this state of affairs would come to an end.

Ms Motsa testified that she had as a result of the Respondent's conduct, been unfairly dismissed since she had a valid medical certificate which explained her absence from work. She stated that she was currently unemployed, and is a single mother of five children, three of which are below the age of eighteen years.

It was the Applicant's prayer that she be reinstated or alternatively that she be paid her terminal benefits in terms of annexure SPA of the report of dispute.

During cross-examination, the Applicant was asked why she alleged that she was employed in 1991, as her file reflected that she was employed in 1993?

Ms. Motsa stated that she had worked under employment number 2040 in 1991 in a different department, and her boss had been named Wendy. She stated that during this period she had been a temporal employee, and had only been confirmed as a permanent employee in 1993 when she filed her employment form and was given a new employment number which is 1506. She stated that she would sometimes work as a machinist, and also as a helper during her period of temporary employment.

Ms S'waliwe Masuku stated that she had only started working for the Respondent in 1992, but did not understand how the Applicant could have worked for the company all through out the period between 1991 and 1993 on a temporal basis. Ms Motsa maintained her version, despite Ms. Masuku's queries.

Ms. Masuku asked the Applicant if she was aware of what the company policy is regarding when an employee is expected to submit a sick sheet? Ms Motsa stated that she was not aware of the provisions of the company policy pertaining to this issue, and neither was she aware of what the law states in this regard.

Ms Masuku asked the Applicant how the employer was meant to know that she was still coming back to her job after failing to report for duty after three days?

Ms. Motsa stated that she had been quite ill, and had been taken to hospital by her brother, and had not been able to send someone to report her illness to her employers.

Ms. Masuku put it to the Applicant that the company had received several bogus sick sheets from the eye department at the RFM Hospital, and asked the witness how she could prove her sick sheet was genuine? Ms Motsa stated that the authenticity of her sick sheet could easily be verified from the eye department at the hospital. She stated further that she had not asked the Doctor who gave her the days off to do so, but that he had used his own discretion.

Ms Masuku asked the witness why she had not at least telephoned her employers to explain her absence? The Applicant stated that she had forgotten the telephone number for the Respondent, despite her assertions that she had worked there since 1991. Ms. Masuku asked the witness how she had reported her absence from work in previous accessions? The Applicant stated that she had never been booked off work for being sick before this time.

4. ANALYSIS OF EVIDENCE

The key question that is up for determination herein is whether the Applicant was dismissed in a manner that was substantively and procedurally unfair. In casu, the Applicant allegedly fell ill on the 5th of January, 2010, and was given a sick sheet by a doctor at the RFM hospital, and by virtue of the said sick sheet she was to be off work until the 11th of January, 2010.

The Respondent subjected her to a disciplinary hearing for being absent from work, and the verdict of the said hearing was that she should be given a written warning. Despite the ruling of the chairperson of the disciplinary hearing the Applicant had been asked to leave the work premises, and not return to work until the employer called her. The Applicant was never called to return to work despite these assurances.

The Respondent's representative states that the Applicant had virtually terminated her own relationship with the company as she had failed to report her illness before she took the sick leave. The Respondent's representative sought

to rely on section 36 of the Employment Act, 2006 as authority for justifying the Respondent's decision not to abide by the chairperson recommendations.

I have perused the said section, and have arrived at the decision that Section 36 (f) merely states that where an employee absents himself more than three days without a medical certificate to the effect that he or she is unfit for duty, this shall constitute a fair reason for dismissal.

I am satisfied that the said section does not state when precisely the employee is to submit the medical certificate, it could therefore, be before, during or after the period he or she has been booked off for. There is therefore no legal justification for the Respondent's decision that the Applicant had terminated her own contract of employment as she had a valid reason for being away from work, and she did avail the medical certificate, albeit after she had returned from the sick leave.

I therefore do not see a reason for the Respondent's failure to abide by the ruling of the chairperson of the disciplinary hearing, especially since the chairperson had been commissioned by the employer to hear the matter. Furthermore, the chairperson did explain in the ruling that the relationship between the employer and employee had

not been materially damaged by the late submission of the sick sheet.

In light of this, I find that the Applicant was unfairly dismissed both substantively and procedurally.

As regards the date of her employment, the Applicant had alleged that she started working for the employer in 1991, but on a temporary basis. She stated that in her evidence that she had been working on and off as a machinist, and as a helper. She did not state how much she had earned during the period of temporal employment, or whether it had been same amount as she earned after she had been permanently employed. Apart from her own verbal assertions, the Applicant has no other evidence to buttress her allegation that she started working for the Respondent in 1991.

On the hand the Respondent's representative vehemently refuted the Applicant's claims that she had started working for the Respondent in 1991. Ms. Masuku stated that the Applicant according to the Respondent's records had only been employed in 1993, on 19th of January. Ms. Masuku even submitted an extract from the Respondent's Workers file which clearly reflected Ms. Motsa's date of Employment as being 1993. Since the evidentiary burden was on Ms. Motsa to prove that she was employed in 1991, she bore the onus

of establishing on a balance of probabilities abilities that this was the case.

As such, I am more inclined to believe the version of the Respondent especially in light of the evidence adduced as proves of that the Applicant was employed in 1993. The Applicant in her evidence did not adduce any evidence to support her claims of leave pay and payment for public holidays.

AWARD

Having heard the evidence of both parties, I hereby hold that the Applicant was dismissed in a manner that was both substantively and procedurally unfair.

The Respondent is hereby ordered to pay the Applicant the following amount:-

- (i) Notice Pay: - E1076.00**
- (ii) Severance Allowance (16 years × E41.38 × 10 days) =E6, 620.80**
- (iii) Additional Notice (16 years × E4.38 × 4 days)
= E2, 648.32**

**(iv) Compensation for unfair dismissal (7 months
x E1076.00) = E7, 532.00.**

(v) Unpaid wages 23.5 hours = E148.74

Total = E18, 025.86

**The stated amount is to be paid at the Manzini CMAC
offices by the 31st day of November, 2010.**

**THUS DONE AND SIGNED AT MBABANE ON THIS
.....DAY OF OCTOBER, 2010.**

**KHONTAPHI MANZINI
CMAC ARBITRATOR**