



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

HELD AT MANZINI

SWMZ 570/09

In the matter between:-

FAKAZILE DLAMINI

APPLICANT

And

SHOPRITE CHECKERS

RESPONDENT

CORAM:

Arbitrator : K. Manana

For Applicant : Mr. J. Dlamini

For Respondent : Ms. P. Dlamini

Arbitration Award

PARTICULARS OF PROCEEDINGS AND REPRESENTATION

1. The arbitration hearing was held at the CMAC Offices 4th Floor SNAT Building, Manzini on the 25th August 2010. The Applicant **Fakazile Dlamini** was represented by **Mr. John Dlamini** a Labour Law Consultant and the Respondent was

represented by **Ms. Pamela Dlamini**, its Regional Administration & Personnel Manager.

Issue To Be Decided

2. The issue to be decided is whether the dismissal of the Applicant was substantively and procedurally fair in terms of the labour laws of the land.

Background To The Dispute

3. The Respondent operates a chain of Supermarkets in almost all the four regions of Swaziland. The Applicant commenced service with the Respondent on the 16th March 2008 as a till packer. She was promoted to the position of a cashier in December 2009, a position she held until she was dismissed on the 07th May 2009 on charges of gross negligence. At the time of her dismissal the Applicant was earning E258.00 per week. She seeks reinstatement or alternatively maximum compensation for unfair dismissal.

Survey Of Evidence And Argument

4. I have considered all the evidence and argument submitted by the parties but will only refer to the evidence and argument that I consider to be necessary to substantiate my findings and decide the dispute.
5. On the 12th February 2009 the Applicant was served with a charge sheet where she was charged with the offence of gross negligence in that she had on the 14th February 2009

incurred shortages on her daily takings in the amount of E1297.46.

- 6.** The hearing was scheduled for the 24th March 2009 and the Applicant was found guilty and dismissed. She appealed against the dismissal without success.
- 7.** Dissatisfied with the Respondent's decision, the Applicant then referred a dispute with the Commission which dispute was duly conciliated but remained unresolved. A certificate of unresolved dispute was issued and by consent between the parties, the matter was referred to arbitration hence this award.
- 8.** The Applicant's challenge to the dismissal was premised on both the procedural and substantive aspects. On the procedural aspect of the dismissal, the Applicant argued that the Respondent was inconsistent in her approach to discipline for shortages at the workplace. She testified that other employees who, like herself, once incurred shortages were not dismissed but were made to pay for the shortages.
- 9.** The Applicant gave the names of two cashiers whom, she stated, were not dismissed for their shortages. They are namely: Tshengisile Mamba and Nokulunga Tsabedze.
- 10.** On the substantive aspect, the Applicant argued that her shortages were not deliberate or due to dishonesty. She

submitted that she did not intend to cause the shortages and neither did she derive any benefit from them.

- 11.** It was the Applicant's argument that for the reason that she had just been promoted to the cashier position, there was a duty on the Respondent to accommodate her possible mistakes as she was still in the process of learning.
- 12.** On behalf of the Applicant, Mr. Dlamini argued that in terms of section 3 of the **Legal Notice No. 181 of 2006** also known as the **Gazette** or **Regulation of Wages Order**, (the current one within the retail industry) the Applicant was, by virtue of having worked for only two months in the cashier position, in law not a cashier but a trainee cashier and therefore ought to have been treated as such.
- 13.** It was Mr. Dlamini's argument that further to the above, the Applicant had not been trained before she was promoted.
- 14.** The Applicant in her testimony stated that she was only called into the office by her Front End Administration Manager, one Mrs. Dube who only asked her a few questions about tills and then made her sign some documents and promoted her to the cashier position.
- 15.** According to the Applicant, the above put a onerous duty upon the Respondent to accommodate her mistakes

and treat them as a necessary consequence of a learner-ship process.

- 16.** The Respondent, on the other hand denied the Applicant's allegations. Ms Dlamini, on behalf of the Respondent, argued that the Applicant contravened a workplace rule which she was aware of and for which other transgressing employees were consistently dismissed from employment.
- 17.** It was the Respondent's argument that it was not a requirement that one should be found to have benefited from their shortages before disciplinary action could be taken against them.
- 18.** The Respondent further argued that that being a newly promoted cashier did not necessarily absolve the Applicant from the duty to ensure compliance with the company policies and in more particular it did not grant her immunity from being disciplined for sub-standard performance.
- 19.** Ms Dlamini submitted that the Applicant was properly trained on how to operate a till before she was promoted to the position of cashier. She stated that the Applicant was also cautioned on the company cash handling policies in particular the ones relating to overages and shortages.

- 20.** The Respondent's Front End Administration Manager, Mrs. Dube was called to testify. Mrs. Dube stated that she was the officer responsible for training the Applicant and the other cashiers employed by the Respondent. Whilst she could not state the exact duration of the Applicant's training, she testified that she was certain that Applicant was fully aware and ready for the challenges associated with the position of cashier when she promoted her.
- 21.** It was Mrs. Dube's evidence that the Respondent's training schedule was quite an involved one that started when their cashiers were still packers.
- 22.** She stated that as part of their training, the packers would each be assigned a cashier to understudy. They would at different times be made to operate the tills, first under the watchful eye of the other cashiers and finally under the supervision of Mrs. Dube herself.
- 23.** Mrs. Dube maintained that it was only after she has found a packer's performance to be satisfactory that the packer could be promoted to the cashier position. This was said to have been the case with the Applicant as well.
- 24.** To demonstrate that the Applicant had been adequately trained, Ms Dlamini submitted that the Applicant assumed the position of cashier during the busiest period in Respondent's calendar. Ms Dlamini stated that the Applicant, despite the pressure caused by the peak season

that she was exposed to, proved to be equal to the challenge as she performed quite ably and met the Respondent's expectations.

25. Contrary to the provisions of the Wages Regulation Order, the Respondent apparently did not have a position of a trainee cashier in its structure. The packers upon promotion would simply jump over the stage of trainee cashier straight to the positions of fully fledged cashiers.

26. According to Ms Dlamini, on the 14th February 2009, being the day in question, the Applicant made two suspicious transactions. These transactions, despite having been made on different times of the day seemed to reflect similar items with similar sizes, flavors and values. They all appeared to have been rung in the same chronological order.

27. When asked about these transactions, the Applicant is said to have stated that they were transacted on different times of the day for or by different people. This was, according to Mrs. Dube, in her plus or minus thirty years experience in the retail industry highly unusual, unless the customers were shopping together. These transactions amounted to E1080.88.

28. With regard to the Applicant's claim that the Respondent's lacked consistency when dealing with shortages, Ms Dlamini denied that and maintained that the

Respondent had a zero tolerance to shortages and or any dishonesty by its employees. She stated that cashiers whose shortages exceeded E200.00 were dismissed.

29. Ms Dlamini clarified however that whilst it was true that Tshengisile was not dismissed for her shortages, the circumstances of her case were different from the Applicant's.

30. She stated that unlike in the Applicant's case, the shortages in Tshengisile's case were found to have been due to no fault of hers. They were found to have been caused by a systems failure.

31. Regarding the other cashier, Nokulunga, Ms Dlamini further clarified that much contrary to the Applicant's argument Nokulunga did not incur any shortages. She stated that Nokulunga left after it was discovered that she had omitted to ring a pot. It was the Respondent's case that Nokulunga did not have shortages.

32. It was the Respondent's case that when quizzed about the shortages, the Applicant could not provide a plausible explanation. The Applicant is said to have argued that she had, earlier in the day, been instructed by Mrs. Dube to take out E700.00 from her till and give to another colleague, Delly Zwane who had suffered shortages the previous day.

33. According to Mrs. Dube, this amount was retrieved from the till float before the Applicant started work for the

day and as such could not have contributed in any way to the shortages.

34. It was the Respondent's case that the Applicant might have taken advantage of the amount retrieved from the till on her Manager's instruction and then took away some for herself. There was however no evidence to this effect.

35. At the time of her dismissal, the Applicant already had two warnings relating to shortages and overages, a written warning and a final written warning.

Analysis Of Evidence And Argument

36. It is common cause that the Applicant was an employee to whom **Section 35 of the Employment Act 1980 as amended** applied. It follows therefore that in terms of **Section 42** of the same **Act**, the dismissal of the Applicant shall not be considered fair unless the Respondent proves:

- a) That the reason for the termination was one that was permitted by Section 36; and
- b) Taking into consideration all the circumstances of the case, it was reasonable to terminate the services of the Applicant.

37. Other than mere speculation that the Applicant might have taken advantage of the earlier instruction by her

Manager and took some more money for her own pocket, there was no evidence adduced, whether direct or circumstantial, to show that the Applicant did take the money for her own use.

- 38.** The same would go for the suspicious transactions. Once again the Respondent did not lead any evidence to show that it was virtually impossible to have such identical transactions; she only argued that it was highly unusual.
- 39.** On the other hand, the evidence and argument submitted seem to consistently suggest that the Applicant was barely coping with the challenges of her new position as cashier. She had, within two months in her new position, earned herself two serious warnings: a written and a final written warning.
- 40.** Whilst the Respondent maintained that the Applicant was properly trained before she was given the job, she did not submit any tangible evidence of any training programme that was followed. If at all there was a training programme, the Respondent did not submit any evidence that its content, extent and duration were clearly explained and understood by the employees, before it was rolled out. On the whole there appears, in my opinion, to have been no meeting of the minds between the Respondent and the Applicant regarding any training programme.

- 41.** With the above in mind, the crisp question that remains for determination is whether it was reasonable and fair for the Respondent to terminate the Applicant's services under these circumstances.
- 42.** It is common cause that the Applicant's previous performance as a packer was satisfactory. This was even alluded to by her Manager, Mrs. Dube, who stated that the Applicant was good at her job and had very good customer care.
- 43.** The only time that she appeared to be faltering in her duties was soon after she had been promoted to the cashier position.
- 44.** Unfortunately, other than the documented warnings there is no record of evidence that the Respondent ever took it up upon itself to establish the reasons behind the down spiral in the Applicant's performance soon after her promotion.
- 45.** There is no proof that Applicant was ever afforded any additional training, guidance or counseling in an attempt to salvage her from the impending doom.
- 46.** As correctly stated by the Applicant's representative, according to the **Regulation of Wages Order**, in the retail Industry, a cashier is a person who has been responsible for receiving and issuing money for a period exceeding six

months. Her counterpart, with a period not exceeding six months is before the eyes of the law a trainee cashier.

47. It is not in dispute that the Applicant had only been in the cashier position for only two months, which situation makes it clear that she was indeed, at the time of her dismissal, a trainee cashier, not a cashier.

48. I believe that this differentiation is a crucial one, one that we can not afford to overlook. It is not purely cosmetic. It was made for a reason.

49. The Legislator, in his wisdom, must have realized that cashiers form the heart of every enterprise and that due to the pressure inherent in their jobs, an intensive period of six months was mandatory in order to meaningfully prepare an employee for such a responsibility. Any person with experience that fell short of the six months experience could not be referred to as a cashier.

50. It would follow, logically, therefore that the standards expected from the two different categories of employees can not be the same.

51. A trainee cashier can not, due to her brief period be deemed to be fully conversant with the trade until she has been so employed for a period of six months. Until she attains the status of a cashier, she will inevitably require tutorship and coaching now and again.

- 52.** Whilst mistakes at the work place should be always be kept at a minimum, the trainee period is the only period in the employment cycle where an employee can, within reasonable bounds, be expected to make mistakes and learn from them.
- 53.** A cashier on the other hand is an employee who has stood the test of time, whilst this person may err, chances of such happening in an ideal situation can rightfully be expected to be kept to a minimum.
- 54.** With the above differentiation, it would follow, therefore that the employer's reaction to poor performance by employees from these categories would differ inevitably. Whilst a trainee cashier may get away with a verbal warning in some cases, the same may not be the case for her cashier counterpart on a similar case.
- 55.** As correctly pointed out by the Industrial Court of South Africa , as it then was, in the unreported case of **Nondzaba v Nannucci Cleaners;**
- "[w]henever a person enters into employment there is inevitably a period of adjustment especially when the employee does not bring with him or herself any previous experience required in the new workplace..."*
- See John Grogan; Dismissal Discrimination & Unfair Labor Practices, Second Edition at page 30**

- 56.** With the above in mind, it follows therefore that, ideally the Respondent in this case was expected to understand and accommodate the reality that a newly promoted cashier could, due to lack of experience and exposure, fail to perform at the same level as her experienced counterpart.
- 57.** In order to protect and safe guard his business interest, the Respondent, as opposed to jumping the steps, could to have devised a sound remedial plan and ensured that the employees were kept under close surveillance and supervision during the trainee-ship period to minimize incidents where they commit costly mistakes.
- 58.** In the event mistakes were unavoidable, as they often are, and discipline remains the only option, the Respondent would still have been expected to ensure that discipline is used in a corrective as opposed to a punitive way.
- 59.** It is a widely accepted practice that discipline that is exercised with an intention to correct the employee's flaws rather than punish him or her, would in most cases, entail the employer ensuring, before resorting to disciplinary action, that he first makes a meaningful attempt to correct and rehabilitate the employee. He must show that the employee was counseled properly and given a fair chance to improve. This was unfortunately not the case in the case at hand.

- 60.** Failure to demonstrate compliance with the above before embarking on disciplinary action that would culminate in a dismissal of an employee could taint the whole process with illegality. See **Harpet Van Seggelen v Swazi Spa Holdings Limited. Case No. 390/2004 (I.C)**
- 61.** On the above reasoning, I find the Respondent's decision to issue warnings and finally dismiss a newly promoted employee who was hardly two months old on the promotion to be so tainted and therefore unfair. More so because the Respondent could not show a demonstrated counseling programme that was aimed at giving the Applicant an opportunity to improve her performance before she was disciplined and terminated.
- 62.** As John Grogan, quite ably pointed out, in his **Workplace Law 9th Edition at page 213**, an employer that is not happy with the performance of his employee should afford that employee appropriate evaluation, instruction, training, guidance and counseling. Further to this, the employer would also be expected to give the employee a reasonable period of time within which to improve her performance.
- 63.** It is only when the employee fails to improve after the above has been done that an employer may take steps to discipline the employee.

- 64.** Having said that and of course having considered all the evidence before me, it is my view that despite the fact that the Applicant failed to meet the well known and reasonable performance standard, there is no evidence that she was afforded a reasonable opportunity to meet same. I therefore hold the view that the Respondent has failed to show that the Applicant's dismissal was the appropriate sanction under the circumstances.
- 65.** It is my view that the Respondent in this case, had an even greater duty to accommodate the Applicant. The Respondent had failed to properly introduce the Applicant to the job gradually first as a trainee cashier and allow her to progress as per the salient requirements of the Regulation of Wages Order.
- 66.** On the contrary, the Respondent simply disregarded the provisions of the Gazette and threw the Applicant (who was still in her infant stage) into the deep end of the pool and left her to fend for herself without any backup or support system. He then dismissed her when she failed to perform, without having made any meaningful effort to assist her. This flies in the face of fair labor practices.
- 67.** It is my view that whilst a dismissal was too harsh a sentence under the circumstances, it also was not the only sanction that could have been meted out. The Applicant still had the option to demote the Applicant back to her previous position of a packer.

68. Whilst it can not be said that the relationship between the parties had irretrievably broken down, I am of the view that due to the accusations and counter-accusations that have been traded between the parties, a reinstatement might not be in their best interest.

69. For this reason I will not order reinstatement. I shall, instead order compensation that will be just and equitable under the circumstances.

70. In coming up with the compensation, I have taken into consideration the fact that the Applicant also contributed to the unfortunate affair by failing to account for the Respondent's assets which were entrusted under her care. She also failed to formally communicate her areas of weakness to the attention of her employer despite having been so advised when she was given the warnings.

71. I am also mindful of the fact that the Applicant's dismissal is unfair only because of the Respondent's failure to consider the Applicant's personal circumstances which were largely due to the Respondent's own making in as much as he also failed to rehabilitate and afford the Applicant a fair and reasonable opportunity to improve. (See **Sidumo & Another v Rustenburg Platinum Mines Ltd & Others[2007] 12 BLLR 1097 (CC)**)

Award

72. I find that whilst the dismissal of the Applicant was for a reason provided in **Section 36** of the **Act**, it was not a reasonable sanction under the circumstances.

73. I order the Respondent to pay compensation to the Applicant in the amount of **E3096.00** which amount is equivalent to three months' remuneration.

74. The employer must pay the compensation through **CMAC, 4th Floor SNAT Building, Manzini**, latest by the 15th of December 2010.

SIGNED AT MANZINI ON THIS DAY OF NOVEMBER, 2010.

**KNOWLEDGE MANANA
CMAC ARBITRATOR**