IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE. CASE NO: 9/1990

In the matter between:

CONRAD MENDES Applicant

VS.

METRO CASH AND CARRY LTD Respondent

C O R A M:	J.A. HASSANALI		President
	MR. P. SHILUBANE	For	Applicant
	MR H.S. VAN JAARSVELD	For	Respondent
	MR V.N. DLAMINI & MR. A.N. MATSEBULA		Assessors.

A W A R D
(Delivered on 19/10/90)

Hassanali, P.

In this Application the Applicant is claiming from the Respondent Company for his unfair termination the following-

Compensation	E10,080.00
Leave Pay	2,326.15
1 Month's Notice Pay	1,680.00
	E14,086.15

The Respondent denied unfair termination and claimed that he was fairly terminated for gross negligence.

At the outset of the trial, the parties agreed that the salary of the Applicant was E.1450/= per month. In the circumstances the claims will be worked out on this basis.

At the close of the Respondent's case, Mr. Shilubane representing the Applicant, applied to Court to amend the prayer of his application to read as follows -

2/.....

Payment of Compensation for 6 months	E13,600.92
Payment of past salary	9,801.84
One month's notice pay	2,266.82
Additional Notice	348.72
Leave Pay	915.39
	E26,933.60

Mr Jaarsveld representing the Company objected to the amendment. In support of it Mr. Shilubane referred Court to Ex.'K' and argued that according to the salary slip (Ex.K) the applicant's salary was E.2266.82 and not E1450/= and as such the applicant was entitled to the sums reflected in his amendment. However Ex.K is not clear and no evidence was adduced in support of his amendment. Anyway it is apparent from the Applicant's own evidence, that his monthly salary was only E1450/= and at the beginning of the trial both parties agreed that it was so. Therefore in view of these, I have no other alternative but to refuse the application for amendment.

Though the applicant had not claimed any sum by way of additional notice, Mr. Jaarsveld admitted that the applicant was entitled to E223.04 which sum he was prepared to pay in the event an award is made in favour of the applicant.

I will now deal briefly with the events that eventually led to his termination.

The Applicant joined the Company as a Trainee Manager and commenced working on 2/1/1989 (Ex.G) on a monthly salary of E1200/=. On 4/4/89 at about 4.30 p.m. the Company received a delivery of mealie meal from the Swazi Milling without any documentation. The applicant who happened to act on that day, for Mr. P. Dlamini the Receiving Manager, received the delivery on a Faxed invoice which he said he obtained from the Swazi Milling on the advice of Mr. Khumalo, the Branch Manager. The goods were then unloaded into the Stores and checked by Mr. B. Saulus, the Security Manager. Apparently for some reason or other, the delivery was not entered in the books. The Respondent took up the point that it was the responsibility of the applicant to see that it had been duly entered

The Applicant however did not agree to it. The Respondent not being satisfied with his explanation, conducted a domestic Inquiry where the applicant was dismissed for gross negligence, under Sec.36(L) of the Employment Act, which reads as follows -

"It shall be fair for an employer to terminate the services of an employee for any of the following reasons -

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h)

(i)

(j)

(k)

(l) for any other reason which entails for the employer or the undertaking similar detrimental consequences to those set out in this section."

What are not relevant to this matter have been ommitted.

Mr. Shilubane argued that gross negligence upon which the applicant was dismissed did not fall within the ambit of Sec. 36 of the Employment Act and as such the termination was unfair. Mr. Jaarsveld maintained that gross negligence did fall within Sec.36(L) and therefore the Respondent was justified in dismissing the applicant.

In my view there is no necessity to use gross to negligence since negligence itself is a breach of duty and this breach entails loss and it matters

not whether it is a venial breach or a serious breach. A breach of a legal duty in any degree which causes loss is actionable.

Lynskey J. in Pentecost and Another Vs London District Auditor and Another 1951(2) All England Report at page 332 states as follows -

> **"Epithets applied to negligence, so far as the Common Law is concerned, are meaningless. Negligence is well known and well defined. A man is either guilty of negligence or he is not. Gross negligence is not known to the English common law so far as civil proceedings are concerned, and one has only to consider the phrase in Criminal cases, particularly in cases of manslaughter."**

Though gross negligence is not specifically mentioned in Sec. 36 of the Act, it is my view that negligence in any form is a misconduct, arising from a breach of duty and Sec. 36(L) is sufficiently wide enough to bring it within its ambit. Therefore I have no option but to reject Mr. Shilubane's argument on this and hold that negligence falls within Sec. 36(L).

I shall now turn to the question whether the applicant was gross negligent as alleged by the Respondent.

It is not disputed that at about 4.30 p.m. on 4/4/89 a consignment of mealie meal was received from Swazi Milling without any documentation. It is also not disputed that the consignment was received by the applicant on a faxed copy of an invoice. The consignment was then unloaded and was checked by Mr. Saulus, the Security Manager. Mr. Saulus in his evidence specifically stated that he was satisfied that the consignment he had checked corresponded with the goods reflected in the said document. Therefore the applicant's evidence is sufficiently corroborated by that of Mr. Saulus as far as it relates to the delivery of the mealie meal. Though Mr Khumalo, the Branch Manager was rather hesitant to

admit the receipt of this consignment, the Company did not produce any evidence to establish otherwise, despite the fact that another employee of the Company, one Mr. Joseph Dlamini was present with Mr. Saulus at the time of the delivery. I am satisfied that the Applicant did take delivery of the consignment and thereafter unloaded it in the Stores. However it is clear that this consignment did not go through the books of the Company. The applicant maintained that it was not his responsibility but that of the Receiving Clerk, but I am not inclined to accept his argument. It was his responsibility to see that the entries regarding this consignment were properly put through the relevant books, and his failure to do so constitutes a breach of duty though the breach may not be of a serious nature. Moreover it seems to me that the person who was responsible for maintaining the books and making entries of deliveries was one Mr. Patrick Nxumalo. At the Domestic Inquiry on 21/1/89 (Ex.B) he stated that at about 5 p.m. he saw a consignment from Swazi Milling being received on a faxed invoice, but did not process the order the following day as the documents were not submitted to him. So this Officer all along was personally aware of the consignment but very suprisingly did not bother to enquire from the applicant about the documents or remind him of it. Again since this particular delivery was of an unusual nature, Mr. Khumalo who was in overall charge of the Branch and who was aware of it should have in my view, checked on it and made sure that it was properly entered in the books as the applicant was only acting for the Receiving Manager. Therefore the omissions on the part of these two officers constitutes a lack of responsibility.

In my view any on the spot dismissal of an employee is a very strong measure. I have anxiously considered the evidence with a view to determine the degree of the applicant's negligence and to consider whether it was sufficient to justify his dismissal. On the one hand it can be in exceptional circumstances only that an employer could act properly in dismissing an employee on his committing a single act of negligence. On the other hand, I would be very loath to accept that a single breach/omission, however important it might be is a sufficient ground for dismissal. In cases of this nature one must apply the standards of men and not

those of angels and remember that men are apt to commit an error of judgment. The question in this case is whether the misconduct of the applicant merited instant dismissal. It must be remembered that the test to be applied must vary with the nature of the business and the position held by that person. In this case the business was wholesale and the applicant was a Trainee Manager, and acting as Receiving Manager on the day in question. A mistake in not following the standard procedure of the company could lead to considerable accounting problems and repetition of such errors could have disastrous consequences. There is no doubt at all that the applicant erred in his duty but unfortunately the Respondent did not take into consideration the fact that the applicant was a Trainee and also the fact that the other two officers namely Mr. Khumalo and Mr. Nxumalo were equally responsible for the accounting errors. Therefore to single out the applicant for the most severe punishment was unfair and unjust. In this connection I wish to refer to the following case.

"Day Vs. Diener & Reignolds Ltd 1975 1RLR 298

An employee bound a book in the wrong order causing substantial loss to the employer but the tribunal held that a single mistake did not merit instant dismissal. Of course it also helped the employee that he had long service and previous errors."

There is no evidence that the Applicant had any previous warning during the last two years of his employment. There is also no evidence that the Company suffered financially on account of this omission. In my view a very strongly worded written warning to the Applicant would have met the ends of justice. In the circumstances I find that the applicant had been unfairly terminated.

On the question of the Inquiry, Mr Shilubane voiced his doubts as regards to the procedure adopted by the Company, when he said that the applicant was not given an opportunity to retain a representative of his choice. He may

have been right in the first hearing but in the subsequent ones the applicant had the benefit of his own Lawyer. It must be noted that although domestic tribunals are not expected to apply and follow the strict procedures appropriate to Judicial tribunals, they must avoid a fundamental breach of the rules of Natural Justice. This is essential where a Man's job is at stake. What then are the requirements of natural justice in a case of this nature?

(a) The person accused should know the nature of the accusation made.

(b) He should be given an opportunity to state his case.

(c) The tribunal should act in good faith.

I hold that the Domestic Inquiry was properly conducted and I cannot see any fundamental breach of Natural Justice. In the circumstances the applicant's objection on this is rejected.

I will now deal with the claims -

The Applicant has claimed a sum of E2326.15 as leave pay but no evidence was led to substantiate this claim. Nevertheless the Respondent has admitted that a sum of E585.87 was due to him. As such the parties are directed to negotiate a settlement on this, more especially on the ground that this being a statutory claim.

The Applicant in his evidence has stated that he was unemployed since he was dismissed from service. The Respondent however maintained that the applicant was employed. In support of this, the Company called on Mr. Ramos who stated that the applicant was employed at his Butchery since June 1990 on a monthly salary of E1500/=. Anyway the fact remains that the applicant was without a job for about 8 months before joining Mr. Ramos.

Therefore having fully considered the evidence in this case, I have come to the conclusion that an Order for four months Compensation would be just and equitable under the circumstances, and accordingly I make the following Order -

B/.....

That the Respondent Company shall pay the Applicant the following -

Compensation for 4 months	E5,800.00
One Month Salary in lieu of Notice	1,450.00
Additional Notice	223.04
Total	**E7,473.04**

The Order is made as an Award of this Court.

My Assessors agree with my decision.

J.A. HASSANALI,
PRESIDENT.