

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE.

CASE NO. 33/19B9

In the matter between:

LEORNARD THEMBA DLAMINI Applicant

VS.

SWAZILAND FRUIT CANNERS (PTY) LTD Respondent

C O R A M : J.A.

HASSANALI President

MR MALINGA For Applicant

MR FLYNN For Respondent

MR MOKGOKONG &

MR MATSEBULA Assessors.

AWARD (Delivered 15t Match, 1990)

HASSANALI, P.

In this Application the applicant is claiming from the Respondent Company the following for his unfair termination –

Severance allowance E,4945.77

Compensation EI 1022.00

Total EI 5967. 77

During the course of the trial, Mr Flyn representing the Respondent Company raised objection to a question put by an Honourable Assessor to a witness of the Respondent on a matter arising from the statement made by the applicant to the Labour Commissioner and which statement was attached to the application. After hearing Mr Flyn on this matter, I overruled the objection on the ground –

that the said statement was part of the application which was served on the Respondent. The Respondent having had notice of this, did not raise any objection to the admissibility of this statement in his reply.

The applicant is a science graduate from the University of Zambia. He first joined the University of Swaziland as a soil science technician. Thereafter on 2/1/1980 he joined the Respondent Company as a Production Trainee, attached to the Laboratory. In 1982 he was promoted as the Assistant to the Chemist and later in 1984 as the Quality Controller. In 1985 he was promoted again to the post of Quality Assurance Manager, which post he held until he was dismissed on 27/5/88 (Ex.B). There is no evidence that the applicant was lacking in capability for performing work of the kind for which he was appointed. On the contrary there is evidence that he performed his work with competence and ability. He was also very popular and held in high esteem among the workers. This was conceded by Mr. H. Van Thiel Berghuys, then Managing Director, at the Inquiry held on 8th June, 1988 (Ex. Y) which reads as follows -

"In summing up, Mr Van Thiel said that Mr Dlamini was therefore popular with fellow workers as he is well educated meticulous and can help them with finance problems."

In January, 1988 the applicant joined the Staff Association which was formed at the Respondent Company, and was elected Treasurer. He then wrote to the Managing Director requesting that the local Managers be paid the same car allowance as that had been paid to expatriate Managers. This presumably upset the Managing Director and he adopted a rather hostile attitude towards the applicant both in respect of the request for the car allowance and also in respect of his Membership with the Association. In this connection I wish to quote below relevant portion of the letter from the Managing Director to the Applicant (Ex. E) –

"Use of Private Cars by Managers.

"I further wish to point out that it can be observed from the title that you claim to be a Manager, your behaviour of the past does not

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a final warning (Ex.F). In the first place I do not think the Management acted rightly in instituting an investigation into the Applicant's Department when the applicant was away on leave. In the interest of good industrial relations the Management could have given notice to applicant of such an investigation. Secondly it seems to me that the Management overacted unnecessarily on a minor issue by threatening applicant with dismissal. I would have expected the Management to have called both Managers and discussed this issue with them.

I will now deal with the events that led to applicant's dismissal which is set out in the letter dated 27th May 1988 (Exs B & B).

On 25/5/1988 the Respondent Company conducted a disciplinary enquiry against the applicant on an allegation that he had removed from the Company premises without proper authority 142 gift packs, each pack consisting of 4 tins of pineapple, 4 tins pineapple juice and 4 tins grape Juice, valued at E.850/=. This Enquiry was chaired by Mr Hulley, then Factory Manager. However I notice that the applicant was not charge sheeted nor was an opportunity given to him to show cause against the contemplated action before the commencement of the Enquiry, This failure

constitutes a violation of the principles of natural justice. Anyway the applicant did not dispute the number of packs taken but denied that he had acted dishonestly or abused his authority in taking them. He stated that whatever packs he took out, he did with the full knowledge of the Management. In this connection he referred Court to Gate Control forms and delivery notes (Exs. K, L, M, N, O, P, Q, R, S and U) which he said he completed and delivered to the Security Officer at the gate before the packs were taken out. These were later handed over to the Management. He said that the Management was fully aware of the movement of these packs, and this was not denied by any of the Respondent's witnesses- The Company argued that the applicant had been taking an enormous number of gift packs, resulting

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reads as follows –

"Personal and Confidential.

27th May, 1988.

Mr. L.T. Dlamini

c/o Usutu Logging House

Nyanza Road

Malkerns.

Dear Leonard,

Re: Termination of Service.

Following the disciplinary enquiry held on Wednesday 25th May, 1988 and our subsequent discussions it is my sad duty to inform you of the decision to terminate your services with Swazican.

Due to your length of service with the Company, we have decided to pay you, without prejudice your full terminal benefits as set out in the attached schedule. This schedule must be signed by you as the recipient.

To give you time to look for alternative accommodation we are prepared to allow you to stay in your present residence until the 30th June, 1988 by which date you must have vacated the house.

Yours sincerely,

Swaziland Fruit Cannery (Pty) Ltd.

R.J. HULLEY FACTORY MANAGER

To this letter was attached Ex.B which sets out the nature of misconduct as

"approving the removal of 142 gift packs from Swaziland Fruit Cannery premises without proper authority to do so."

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as sufficient for dismissing the employee and it has to be answered with reference to the circumstances known to the employer at the moment of dismissal.

In *St. Anne's Board Mill Co. Ltd. Vs Brien* (1973) ICR 444, Sir Hugh Griffiths held that it was not permissible to take into account circumstances which had come to light after dismissal, of which the employers neither knew nor reasonably ought to have known, in deciding whether the employers behaved reasonably at the time of dismissal.

In another case *Abernethy Vs. Mott Hay & Anderson* (1974) IRLR 213, Cairns LJ stated "a reason for the dismissal of an employee is or set of facts known to the employer, or it may be of beliefs held by him, which caused him to dismiss employee."

Lord Denning MR said in the same case "the reason shown for dismissal must be the principal reason which operated on the employer's mind.

It follows from this that the reason shown for dismissal must be in existence at the time when the employee is given notice. Thus any matters which occur or are discovered subsequent to the dismissal will have no relevance in ascertaining the reason for dismissal, since they were not known to the employer and could not have provided a motivation for it. A tribunal must judge matters as they stand at the date of dismissal and upon information known to or available to the employer at that time.

in this case the sole reason for the Applicant's dismissal was that he took 142 gift packs valued at E850/= without proper authority. The evidence of misconduct discovered subsequently by the Managing Director is irrelevant and inadmissible on the issue whether the Respondent had acted reasonably in treating the reason for which the Respondent had dismissed the applicant as a sufficient reason for doing so. For that misconduct, if it occurred, cannot

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allowance. This was admitted by Mr. Hulley himself when he gave evidence. This is discrimination and should be totally discouraged.

(4) that the investigation carried out into the activities of the applicant's

department, especially when the applicant was away on leave was undesirable and unjust. If an investigation was necessary, it should have been done with notice to the applicant in the interest of good industrial relations.

(5) that the applicant did not act dishonestly or abuses his authority in taking 142 gift packs valued at E850.00. Whatever he took he did so after delivering notes to the Security Officer at the gate. These were later forwarded to the Management who

presumably had notice of these takings but took no action against the applicant. However the Managing Director of the Company withdrew the letter of termination issued by Mr Hulley in relation to this alleged misconduct.

(6) that the new charges formulated by the Managing Director and fresh evidence collected to substantiate those charges are irrelevant and inadmissible since they were discovered subsequent to his dismissal on 27/5/88.

(7) Contrary to the principles of Natural justice the Managing Director without going into the appeal of the applicant, personally embarked on collecting further evidence and commenced a fresh rehearing. Thus shutting the door for the applicant to appeal.

(8) that the applicant's dismissal in my view was as a result of –

- (a) his membership with the Staff Association.
- (b) his query of the enhanced car allowance paid to expatriate Managers.
- (c) his refusal to apologise to Mr C. Shepherd over a Memo written to him.