

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 75/98

In the matter between:

MARY BROWN

APPLICANT

and

J. D. GROUP t/a SCORE FURNISHERS

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR THE APPLICANT:

MR. MNISI

FOR THE RESPONDENT:

MR. Z. JELE

JUDGEMENT

12. 04. 2000

The Applicant seeks maximum compensation for unfair dismissal, notice pay, severance allowance and one month pay in lieu of leave. In the alternative the Applicant prays for reinstatement.

An Application by the Applicant to amend the citation of the Respondent to read J. D. GROUP t/a Score Furnishers was granted by consent of the parties.

The Applicant told the court that she was employed by the respondent in the capacity of sales lady on the 13th March 1988.

That she was in continuous employment until the 1st December 1997 when her services were terminated. Prior to her dismissal she had been promoted to the post of Credit Controller and her salary was raised to E2043.00 per month.

She alleges that her dismissal was based on unsubstantiated allegations of fraud it being alleged that Applicant had instructed Respondent's driver to deliver its merchandise at Applicant's residence. The goods were allegedly received by her boyfriend.

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She told the court that during the disciplinary inquiry her efforts to call her boyfriend to come and testify on her behalf was rejected by the chairman of the tribunal.

She in the circumstances alleges that her dismissal was both substantively and procedurally irregular. She reported the dispute to the Labour Commissioner who was unable to resolve it and a certificate of unresolved dispute was issued.

In her testimony in chief she narrated how on the 17th November 1997 she was summoned by the Credit Manager Miss Lomagugu Mamba. She was questioned by her about some credit transactions which were

on her desk. She could not remember the details as she handled many transactions on a daily basis though she recognised her handwriting on the documents.

She was informed by the Credit Manager that the customers who had been supplied with goods in respect of the documents she had could then not be traced. She warned the Applicant to tell the truth or she would be dismissed.

The Applicant insisted that she was not aware of anything untoward about the particular transactions and that since they were done sometime back she could not recall the exact details about each one of them.

The Credit Manager then told her she would take further action against her. The Saturday that followed she was notified that she would be required to attend a disciplinary hearing on Monday.

On Monday she was served with summons to appear before a disciplinary committee at 9.30a.m. on Tuesday. It was chaired by Mr. Coetzee. The hearing continued. She requested to call her boyfriend to testify but she was refused on the grounds that he was not an employee of the Respondent.

She asked a member of the Works Committee to represent her. The representative asked for a postponement to prepare due to the short notice but the request was turned down. They were given an hour for consultation.

Witnesses were called in, and she also testified. She was acquitted on three documents but was found guilty on one.

The charge was that of

"Creating fraudulent deals, misappropriation of property of the company or customer an act that resulted in financial loss to the company".

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The Police were not sent to search her house nor was her boyfriend questioned about the alleged receipt of Respondent's furniture unlawfully.

The driver alleged that she had instructed him to deliver furniture to her house. The delivery documents produced however show a different delivery address.

The Applicant told the court that she had worked for the Respondent for nine years. In her experience the company had previously lost property when customers changed addresses. It was the first time she had been charged though.

She appealed against the dismissal but the appeal was dismissed.

She had two dependents namely her child and mother. She was struggling as a single parent.

She said the minutes of the hearing which she had seen after she had been dismissed were not accurate. Her questions were not recorded. She was provided with the minutes before the appeal but read them after the appeal. She however said the minutes of the appeal were accurate.

Though the issue of refusal to call her boyfriend, refusal to be represented by a lawyer and short notice to prepare for the hearing were not noted in the appeal form, she insisted that she had raised this issue during the hearing of the appeal. The appeal was heard by Mr. Venter.

She denied that Mr. Robert Mabuza and Paul Shabangu made any delivery to her residence and that she had given them instructions and directions to make such a delivery. The goods to her knowledge were delivered to the customer as per the details in the contract form that had been approved by the Credit

Manager and the cashier.

Though she lived at Fairview near Msibi's shop, she said she was about one kilometre from the shops and could not be expected to know who lived near the shops as this was a populated suburb.

The name of her boyfriend was Vusie Khumalo. She said that they did not live together. It was put to her that Mr. Mabuza delivered the goods to Vusi Khumalo who accepted the goods on her behalf.

When however she was shown a delivery note signed by Vusi khumalo she insisted that it did not bear his signature and the handwriting therein was not his. She wanted to call him to explain that to the committee but she was denied the opportunity she told the court.

The customer who had purchased these goods was a Mr. Magagula. No claim of the

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goods was made by this customer though he had paid a deposit. She said that she was not aware that the customer had not received the goods.

It was put to her that she created a false transaction between herself and Mr. Magagula using particulars already in her possession. She however denied this stating that Mr. Magagula was actually interviewed by the Credit Controller or the person who signed the contract document as this was the normal procedure. She was merely a sales person then. Miss Mable confirmed the transaction by signing the document.

Transactions are ordinarily approved by the Credit Controllers after they interviewed the customer or the Credit Manager interviews and also approves the transaction. Her role was only to record details of the transaction and forwarded same to the aforesaid senior staff for interviews and approval. The customer pays a deposit before the approval of the transaction.

The approval and the interviews are the domain of the credit department headed by the Credit Manager and Credit Controllers. The sales person forwards the customer to the controllers. The responsibility of assuring that the customer is a bona fide one rests solely on the credit department. She could therefore not be held responsible for the failure to trace a customer. The controllers have to satisfy themselves that all the details are in place before the delivery, she testified.

The cashier who had approved this transaction was Mable. She was in fact dismissed before the Applicant after there was a shortage of money.

When the Applicant was informed that Magagula could not be traced at his work address, she told the court that she called the Gear Box Centre where he said he had worked but she was told that he had relocated to Simunye. She denied that there was never an Amos Magagula at the Gear Box Centre. In any event, it was the responsibility of the Credit Controller to ensure that the customer was genuine not the Applicant she insisted.

The contract document is written :

"Confirmed by Bernard Mavuso " and was signed by Mable. It meant that Mable had called Gear Box Centre and confirmed that Amos Magagula worked there.

When told that there was nobody by the name of Bernard Mavuso at the Gear Box Centre she denied knowledge of such.

She told the court further that she had not instructed Mable to confirm the deal. She had merely passed over the deal and the file to the credit department as per the company procedure.

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If the controller did not interview the customer or call to confirm his details that failure should be blamed on the credit department and not herself.

According to the Applicant, goods cannot be delivered without authorisation by the credit department. The Branch Manager further confirms the transaction after it has been approved by the Credit Manager.

The Respondent called DW1 Robert Mabuza. He worked as a driver for the Respondent. His duty mainly was to deliver goods to customers. He had started working for the Respondent in 1992. He knew the Applicant as a sales lady at Score furnishers. He told the court, regarding this transaction that he went to deliver items but could not locate the customer at the address provided. He went back to enquire from the Stock Clerk.

He explained that normally the Stock Clerk provided him with a delivery note which had the name of the customer and his delivery address. The customer signed the note in the acknowledgement of receipt upon delivery. In this case, there were two delivery notes which were produced and marked exhibit "R5".

The delivery address therein was Fairview near Msibi store. He enquired about the customer but was not successful so he went back to the store for further information.

For a second time. He revisited the place though there was some information clipped to the delivery note, he could not get the customer. He returned the items to the store for a second time.

The Stock Clerk told him to find out who the sales person was. It was then that he approached the Applicant to ask for further details.

According to him he was directed by the Applicant to deliver the goods at her place. He told the court that the Applicant had explained to them that the customer would then collect the goods from her place.

This was an unknown procedure at the shop. The delivery note was not changed to reflect this new delivery address and the whole delivery story remains suspect in the absence of any documentary proof as is the custom.

DW1 said that he was in the company of Paul Shabangu who was his assistant when he delivered the goods. He alleged one Vusi Khumalo received the goods. He changed the version of the story at a later stage and told the court that it was the Stock Clerk who gave him instructions to deliver at Mary's place while at first he had said that the instructions had been given by the Applicant.

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He explained that he confirmed the delivery with Mary afterwards but she did not respond.

He told the court that a few months after the delivery, he was called to a disciplinary hearing where he said that he had delivered the goods at Mary's place. No one asked him to show them where he had actually delivered the goods.

Again, DW1 explained that the attachment to the delivery note directed them to Mary's place where they had delivered the goods. Earlier, however he had told the court that on the second attempt to deliver the goods in spite of this attachment he had failed to locate the place of delivery. It was then that Mary directed him to her place. This appears curious and inconsistent.

The attachment was not produced in court. It was apparently given to the Stock Clerk but although the delivery note was produced, it was missing. This did not help the Respondent's case at all.

Mary denied all the allegations by DW1 and the documentary evidence would have been of much help. He had delivered a Hi-fi set, a washing machine and some dishes according to his testimony.

The minutes of the disciplinary hearing 'R1' did not show that DW1 had informed the panel that he had gone to Fairview twice without tracing the delivery place. He insisted that this was an omission and he had explained this to the Committee. The minutes did not show either that he had confirmed the delivery with Mary. He did not know who had written the attachment to the delivery note.

He said that it is the duty of the Stock Clerk to alter the delivery notes and in this case the changed address was given to him by the Stock Clerk but not by the Applicant.

Under examination by the court he said that Mary had asked him to go to Fairview North, take a right turn, look for the house with a security wall. She had not said that the house belonged to her, but he had earlier known that it was her house.

Asked why if he knew, he required directions, he was at a loss and mumbled that he did not know she lived at that house until then. His testimony as a whole left a lot to be desired.

On questioning further by Mr. Yende he said that he was not present when Mary had discussed the delivery address with the Stock Clerk. The Stock Clerk was no longer employed by the Respondent.

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Another discrepancy in his testimony was that he had initially said Mary had informed him he would find a man in her house but later said that Mary had informed him he would find some people in the house. He said he actually found a man and a lady in there but had failed to say this either in chief or under cross examination.

DW2 was Lomagugu Mamba the Credit Manager at Score Furnishers. She was a Manager for three (3) years and prior she was a Credit Controller and Stock Clerk.

She told the court that as a Credit Controller her work was that of doing customer follow ups and trade references. That this entailed confirming customer's credentials from the current employer and previous accounts. This was clearly not the duty of the sales person.

In this case the paperwork was done in 1996. Goods were delivered but when payment was due nobody turned up to pay. They contacted the customer at his work address in vain. Debt collectors also failed. She then called the sales person who was involved to seek assistance. The Applicant was not helpful in this regard and she decided to conduct investigations. She warned her that if anything cropped up she would be disciplined.

This attitude was strange knowing that the responsibility of ensuring that the customers are to be found where they allege they work or live, is on the Credit Controllers and not sales department. She relied on DW1's evidence that the goods were delivered at Applicant's place. She decided to charge the Applicant with creating fraudulent deals. She confirmed that Mable Ndlovu, a cashier had interviewed the customer and confirmed his employment details. That Mable had left the employ of the Respondent in 1997 before the Applicant. She worked for the Credit department. 'R4' was the application for credit that had been confirmed by Mable and DW2 herself had approved it. It was indeed signed by Mable Ndlovu and herself.

How could they pass the buck to the most junior of the staff when the transaction had been approved by Mable and herself? This begs for an answer.

By signing the documentation, she told the court that she was confirming that the deal had all the information required and the information was then captured into the computer. She too confirmed that the customer had been interviewed and his work address had been confirmed.

She relied on information from the personnel in the credit department including the cashier Qondile Ndwandwe who was the Credit Controller who dealt with this transaction.

She said that she confronted Applicant three times concerning this transaction and she denied that the signature of the document was that of Vusi Khumalo. Again Vusi Khumalo was never called nor arrested by the Police to answer on the whereabouts of the goods he had allegedly received.

Her evidence on how the delivery was done contradicts that of DW1. She said delivery was done on the second visit after Mary directed that the goods be delivered at her place, DW1 said on the second visit though he had details in an attachment to the delivery note he could not locate the address. On the third occasion he was given instructions by the Stocks Clerk to deliver at Mary's place. He then had obtained details from Mary to her home. After he had delivered he came back to her and confirmed.

She never interviewed the Stock Clerk nor did she visit Mary's residence. She believed the truck crew. She said she knew Vusi Khumalo was Mary's boyfriend.

Mary had been suspected of other two fraudulent deals but was acquitted upon investigation. It would appear that these are the factors that tipped the scales against her in this matter.

According to the evidence by the Respondent's witnesses all the necessary procedures were followed in the transaction the subject of Applicant's dismissal.

The blame must therefore fall on the Personnel who were supposed to ensure the authentication of the customer and not by any remote imagination on the Applicant.

The Respondent had no justification whatsoever in disregarding the role played by the Credit Department and rely on the testimony of a driver and his assistant to find the Applicant guilty of creating a fraudulent deal. If anything there was nothing fraudulent about the documentation produced to the court nor in the conduct of the Applicant.

Had the Respondent visited Mary's place and recovered the alleged items from her house then they could have had a case against her. The respondent had all the time and opportunity to conduct a search or ask the Police to do it on their behalf but they chose not to in preference to unreliable short cuts.

Section 36 of the Employment Act provides potential reasons for which an employer may dismiss an employee. It is incumbent on the employer in terms of Section 42 (2) (a) and (b) to prove that the termination of the employee was permitted by Section 36 and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

The Respondent has failed to discharge its onus aforesaid and consequently we find that the Applicant's dismissal was substantively unfair.

The Applicant is jobless to date. She is a single mother with two dependants. She was earning E2043.00 per month at the time of her dismissal. She had served the Respondent for a continuous period of nine (9) years. At the time of her dismissal she had just received a promotion into the Credit department and her career was shattered.

The Respondent's improper investigations into the matter due to the involvement of the Credit Manager who had authenticated the whole transaction in the first place greatly contributed to the arrival of a wrong decision by the Respondent.

We find that the Applicant did not contribute to her dismissal. The respondent was wholly to blame.

In the circumstances we award her eight months (8) salary as compensation for unfair dismissal in the sum of E16, 344.00

1 month notice pay	E 2, 043.00
Severance allowance	E 2, 724.00
Leave Pay	E 2,043.00
TOTAL	E23,154.00

The Members agree.

NDERI NDUMA

PRESIDENT - INDUSTRIAL