

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 174/98

In the matter between:

JEROTH KHUMALO

APPLICANT

and

SWAZILAND GOVERNMENT MINISTRY

OF AGRICULTURE & CO-OPERATIVES

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR THE APPLICANT:

MR. SIFISO SIBANDZE

FOR THE RESPONDENT:

M/S SYLVIA MASEKO

JUDGEMENT

28. 06. 2000

The Applicant retired from Government service voluntarily at the age of forty five (45) years. In 1992 he was re-employed by Government on a temporary basis as a heavy duty driver. On the 5 th August 1994 the employment of the Applicant was varied to one on permanent basis and he was placed on three (3) months probation.

The Applicant served the probation period and became a permanent and pensionable employee by operation of the law. He consequently began and continued to make contribution to the pensions fund in terms of the Public Service Pension Order, 1993. In support of this evidence the Applicant produced his payslip for the month ended 29th September 1997 which bears the heading "SGS Permanent", From the payslip thereof it is clear that the Applicant contributed E71.25 per month to the Government Pension Fund.

The contribution to the Pension Fund continued up to the time his services were terminated with effect from the 30th September 1997. Indeed exhibit "A' the payslip referred to earlier was his last pay upon termination.

It is noteworthy that by a letter dated the 2nd July 1996 the Civil Service Board withdrew the appointment of the Applicant from permanent and pensionable terras as heavy duty driver Grade 5 to one of temporary and non pensionable.

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Notwithstanding this purported withdrawal the Applicant continued to contribute to the Pension Fund until the time of his dismissal.

In its Answering Affidavit deponed to by Mr. Joel Lukhele the Principal Personnel Officer in the Ministry of

Agriculture and Co-operatives, the Respondent states that the variation of the Applicant's appointment to permanent and pensionable terms was done in error. The letter that purported to withdraw the Applicant's permanent appointment is annexed to the Answering Affidavit and marked "C ". The letter did not give any reason why the variation of appointment was made by the Civil Service Board, At the Lime of retirement in 1992 the Applicant was 45 years old. It follows that at the time when he was re-employed on permanent and pensionable terms in 1994 he was 47 years old. The Applicant had not attained the compulsory retirement age in terms of the law and he was still eligible for re-employment into Public Service.

The Applicant continued to receive his pension following his early retirement todate.

The Respondent did not call any witnesses and relies entirely on the Answering Affidavit of Joel Lukhele. The Respondent insists that at the time of his termination, the Applicant was a temporary employee, consequently, he could be dismissed at any time provided that he was given one month notice. The Respondent followed the procedure and was not in violation of any law thereof, it was submitted by counsel.

The main issue herein is whether or not the action by the Civil Service Board to vary the appointment from permanent to temporary invalidated the Applicant's appointment to permanent and pensionable terms.

The Respondent claims that it mistakenly re-appointed the Applicant to a pensionable and permanent terms and that its action violated General Order 122 (1) which states that re-employment of an officer who is on pension shall be on a temporary basis. M/S Maseko submitted that upon realising its mistake, the Respondent was well within its mandate to revoke the appointment as it was contrary to the law and such confirmation would have entitled the Applicant to a second pension and therefore enrich him unjustly which in itself is contra bonus mores. She urged the court to dismiss the Application.

The question to be answered by the court is whether the Respondent conducted itself in such a manner as to give the Applicant reasonable belief that he had been lawfully appointed on permanent and pensionable terms. If this is the case, then the Respondent is bound by its action. According to R H Christie in his book. The Law of Contract in South Africa at page 353.

"Unless, the mistaken party can prove that the other party knew of his mistake, or that as a reasonable man, he ought to have known it, or that he caused it, the anus

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of showing that the mistake was a reasonable one justifying release from the contracted bond will not be easy to discharge".

No evidence has been led by the Respondent to show this was the case here, instead the Respondent has argued that holding it to the contract would violate the Public Service General Orders and would be against Public Policy to have one person draw pension twice. We note that Government General Orders are guidelines and are neither statutory nor subsidiary Legislation.

It has not been said by the Respondent that the Applicant was beyond the retirement age. In terms of Section 8 (1) of the Public Service Pensions Fund Regulations, 1993 the compulsory retirement age for the civil servants is sixty (60) years. At the time of his termination, the Applicant was only 50 years old.

Furthermore, in terms of Section 7(1) of the Public Service Pension Fund Regulations 1993. the Applicant would only have been entitled to the full pension benefits if he had served for ten (10) years and over after the re-appointment. This would then be in addition to any other benefits he was enjoying under the early retirement. We do not see how this would amount to a double payment of the pension benefits as it would only relate to the period of re-engagement.

The argument that this would be contra bonos mores cannot stand in the circumstances. Since the

Applicant did not serve ten (10) years upon re-engagement, this issue is only academic. The Applicant is only entitled to the refund of his contribution to the pension fund from April 1992 to 30th September 1997, when his services were terminated.

It has not been demonstrated that the contract of re-engagement was void or voidable by reason of an illegality. The Respondent was aware of its General Orders when it reengaged the Applicant. He had not reached the compulsory retirement age therefore the contract did not violate retirement law.

The Respondent must accordingly be held to the contract.

We must add that, upon early retirement in terms of Section 9(1) of the Pensions Fund Regulations, the pension benefit is calculated at 2% of the final pensionable salary for the number of years of service to the employee's credit at the time of retirement. Upon re-engagement therefore, computation would be done for that period only if it exceeded ten (10) years. The argument of double benefit becomes a fallacy to that extent.

We do find that the Applicant at the time of his dismissal was an employee to whom Section 15 of the Employment Act applied.

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For the termination to be Fair and lawful, the Respondent must demonstrate that it was for a reason provided under Section 36 of the Employment Act and in addition taking all the circumstances of the case into consideration, it was fair and reasonable to terminate.

Not an iota of evidence has been adduced by the Applicant to discharge this onus placed on it in terms of Section 42 (2) (a) and (b).

We accordingly find that the dismissal of the Applicant was substantively and procedurally unfair.

In considering the compensation to be awarded the Applicant, we take into consideration that he had voluntarily retired in 1992. He was still enjoying the pension benefits during the lime of re-cngagement. He was fifty two years old. He was dismissed for technical reasons and did not at all contribute to the termination. He had been led to believe that he would be employed until he attained the compulsory retirement age of 60 years. We accordingly award him ten (10) months salary as compensation for the unfair dismissal in the sum of E1 4,249.20. The Applicant is further entitled to:

Additional Notice	E	876.00
Severance Allowance	E	2,192.00
TOTAL	E	17,317.20

In addition, the Respondent is to refund all the Applicant's contribution to the Government Pension Fund from April 1992 to the date of his termination in September 1997.

There will be no order as to costs.

The members Agree.

NDERI NDUMA

JUDGE- PRESIDENT - INDUSTRIAL COURT