

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 32/98

In the matter between:

FANA MATSENJWA

APPLICANT

and

STEELMAN ENGINEERING WORKS

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR THE APPLICANT:

MR. A. SHABANGU

FOR THE RESPONDENT:

MR. L. VILAKATI

JUDGEMENT

04. 07. 2000

The Applicant claims maximum compensation for unfair dismissal, severance allowance, notice pay, Additional notice pay and leave pay.

The Applicant told the court that he was employed by the Respondent on the 1st March 1994 as a welder and was paid a monthly salary of E630.00, That he was in continuous employment with the Respondent until the 9th June, 1997.

He said that the dismissal was both substantively and procedurally unfair in that he was dismissed for not reporting to work to do overtime on a Saturday. That he had reported to the foreman that he would be attending a funeral of a relative during that weekend but the foreman was not amenable to his request.

When he reported to work the Monday that followed, the foreman, himself and a work mate by the name of Sicelo were summoned to the office of the Managing Director, Mr. Carlos Rego.

Mr. Carlos Rego spoke to the foreman in Portuguese. The Applicant did not understand what they spoke about.

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Subsequent to that discussion, Mr. Carlos asked the Applicant to sign a warning for not reporting to work on Saturday. The Applicant explained to Mr. Carlos why he had not reported to work but he insisted that the Applicant must sign the warning. The Applicant declined insisting that he had done nothing wrong since he had requested the foreman to allow him to attend a funeral at Siteki.

While the Applicant was outside ready to go to a Piggs Peak site, Mr. Carlos Rego asked him what he was waiting for as he no longer required his service since he had refused to sign a warning.

The Applicant narrated to the court how he felt hurt by the Respondent's conduct as he was bereaved and

was mourning. Mr. Sicelo was also dismissed.

The Applicant was currently working for D & B Enterprises, a construction company. He got the job in December 1997. He earned about E600.00 per month though at times it would go up to E900.00 depending on the number of hours he had worked a month. He has no children and is not married. He said he was owed twelve days (12) leave for 1997.

Adolf Santos was the foreman of the Respondent, He was the immediate supervisor of the Applicant.

He told the court that the Respondent had obtained a contract at Conco which demanded that they only work on Saturdays and Sundays as the factory was busy on week days. He was in charge of this project and worked with the Applicant as a welder. He usually informed his team on Fridays that they would be required to work on Saturdays. Only three workers were required at the Conco site. It was himself, the Applicant and Sicelo Shongwe. They were halfway through the project when the Applicant and Sicelo Shongwe both failed to turn up for work as arranged on a Saturday.

The witness told the court that the Applicant had indicated that he would be attending a night vigil on Saturday at Siteki and that he had agreed to release the Applicant from the Conco site at 1.00p.m. to enable him to board a bus from Manzini to Siteki. The Applicant had accepted that arrangement according to him.

The Applicant and Sicelo Shongwe did not turn up on Saturday as arranged and therefore the witness went home at 9.00a.m.

On Monday, the Applicant explained to him that his cousin picked him early in the morning and they went to Siteki to prepare for the night vigil. He said that the Respondent lost the contract with Conco as a result of their failure to report on the

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material Saturday, They had been contracted to install stands and steel plates and a welder was key to the completion of the project.

The Respondent had four welders but he had not informed any other welder to report to work that Saturday.

He told the court that the employees' normal working days was Monday to Friday and Saturday was overtime. Arrangements had to be made to get employees to work on projects that required to be done over the weekends.

In this case he notified the Applicant on Friday that he should report to work on Saturday.

It is common cause that the Applicant had no contractual obligation to report to work on Saturday, however, good industrial relations demand that the employer and employee have a mutual aspiration to keep the concern afloat and on going.

Where for example, the exigencies of a project dictate that employees do overtime, it would be suicidal for the employee to adopt a don't care attitude and without notification fail to report on a Saturday to do voluntary overtime. When overtime is done, the emoluments by operation of the law are one and a half time the normal pay.

This notwithstanding, if it is not part of an employees written contract to work on Saturdays as overtime, then the employer cannot force the employee to go to work, especially if adequate notice is not given to the employee for this purpose.

Failure to do overtime is not and cannot therefore be a lawful reason to dismiss an employee in terms of

Section 36 of the Act if there is no contractual obligation to do overtime.

It is for the employer to enter into a contractual arrangement with its employees where its survival depends on services rendered over the weekends. An employer will accordingly fail to do so at his own peril.

Where such an arrangement has been entered into then failure to report for overtime may be regarded as failure to obey a lawful instruction. This is the contention of the Respondent in the instant case that the Applicant failed to obey a lawful instruction of his foreman and refused to accept a written warning in respect of the offence.

Parker Le Roux and Andre Van Niekerk South African Law of Unfair Dismissal 1994 Ed at p.116 states:

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"Where an employee is absent from work without justifiable reason, that misconduct contains an element of insubordination or insolence. If the employee lies about the reason for absence from work, an element of dishonesty is present".

Where such conduct is proved against an employee, summary dismissal may be justified taking into consideration all the circumstances of the case.

It must be remembered that absence from work only includes work that the employee is contractually bound to attend and does not include non contractual overtime.

The Managing Director of the Respondent Carlos Rego in this respect told the court that the Respondent had been offered a contract in terms of which it had to do steel work at Conco's plant only over the weekends. That (Saturdays and Sundays) constituted overtime work in terms of the contract of employment between the Respondent and its employees.

Though Carlos had no first hand knowledge of what transpired between the Applicant and the foreman, he told the court that they were supposed to report to the Conco site on the material Saturday which they did not and as a consequence thereof, the Respondent's contract with Conco was withdrawn.

He called them to his office on Monday and he was informed by the foreman that the Applicant had failed to turn up for overtime inspite of having promised to do so.

The Applicant explained that he had a justifiable reason not to report to work that Saturday as he was picked up early by his relative to go and prepare for the funeral of his relative.

He said that as a result of the cancellation of the contract, the Respondent lost Fifty Eight Thousand Emalangenani (E58,000).

That it was not the first time for the Applicant to absent himself from work and report late, so he decided to give him a final warning. The Applicant refused to sign the warning insisting that he was not obliged to work on Saturdays. Incidentally, the purported final warning, also was a letter of dismissal.

According to Carlos, the warning was the final one and therefore he decided to dismiss the Applicant.

In SA Brewers Ltd v Ford and Allied Workers Union and Others 1988 (2) SA 723 at 729 Justice Goldstone relied on a judgement of Browne J in Plascon Evans Paint (Natal) Ltd v Chemical Workers Industrial Union and Others Case No. 4684/87 as follows:

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".....As far as the individual worker is concerned, the working of overtime is something which he should

be free to do or refrain from doing. The notion of a worker being compelled to work overtime as and when required is so one-sided and unfavourable to the worker that the prejudice speaks for itself This is so even if the obligation to work overtime is qualified with the words "subject to any legitimate excuse".

We agree with this enunciation and add that, it is entirely upon the employer to contractually adjust the work times of its employees when faced with a situation such as this one to ensure that its works contracts with third parties are not prejudiced as happened herein.

On the facts of the case, we do believe the foreman of the Respondent that he had made arrangements with the Applicant to report to work on Saturday, however since he had other welders at his disposal, it was unreasonable for him to insist that the Applicant work on Saturday inspite of his protestation that he needed to travel to Siteki to make arrangements for a night vigil. Since this was voluntary work, he should have simply excused the Applicant and made arrangements with the other welders. He did not advance any reason why he did not do so.

Accordingly, the dismissal of the Applicant was substantively unfair. As regards the procedure adopted by Mr. Carlos, it was wrong for him to grant the Applicant the last warning and dismiss him in the same vein.

Granting a warning is meant to give the employee an opportunity to mend his ways, failing which a dismissal would follow. A letter that purports to give a last warning and in the same vein dismisses an employee does not make any sense at all. To this extent the procedure followed by the Respondent was unfair in all the circumstances of the case.

We have considered the personal circumstances of the Applicant. That he had been re-employed. He had worked for the Respondent for a period of three (3) years prior to his dismissal and grant him seven (7) months compensation for unfair dismissal in the sum of E4,410.00.

The Applicant will also receive the following:

1.	Severance Allowance	E 572.72
2.	Notice Pay	E 630.00
3.	Additional Notice	E 229.09
4.	Payment in lieu of leave	E 315.00
	TOTAL	E6,156.01

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There will be no order as to costs.

The members Agree.

NDERI NDUMA

JUDGE PRESIDENT INDUSTRIAL COURT