

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 194/99

In the matter between:

JERRY DUNGAZELA DLAMINI

APPLICANT

And

CARGO CARRIERS SWAZILAND

(PTY) LIMITED

RESPONDENT

CORAM

KENNETH NKAMBULE:

JUDGE

DAN MANGO:

MEMBER

GILBERT NDZINISA:

MEMBER

MR. E. HLOPHE:

FOR APPLICANT

MR. Z. JELE:

FOR RESPONDENT

JUDGEMENT

11/8/00

In his application for the determination of an unresolved dispute the applicant claims compensation for unfair and unlawful termination of his services by the respondent. The respondent denies that the termination was unlawful or unfair. According to the respondent the termination of the applicant is fair and lawful under circumstances.

The brief history of the matter is that applicant was employed by respondent from February 1999 until June 1999. The employment was in terms of a written contract. According to the contract it was agreed that the applicant would serve an initial three months probation and thereafter be drafted as permanent.

According to applicant the contract of employment was terminated on the fourth month -after the probationary period had expired. For this reason applicant avers that he had moved out of employees categorised under Section 32 of the Employment Act and entered into the category of employees under Section 35 and 36 of the Employment Act.

2

month after the probationary period had expired. For this reason he states that Applicant had moved out of employees under Section 32 and entered on employees under Section 35 and 36 of the Act.

Section 32 (1) states "During any period of probationary employment....., either party may terminate the contract of employment between them without notice."

Section 32 (2) reads as follows:

"No probationary period shall, except in the case of employees engaged on supervisory, technical or confidential work, extend beyond three months.

Section 32 (3) provides as follows:

"In the case of employees engaged on supervisory technical or confidential work, the probation period shall be fixed, in writing between the employer and the employee at the time of engagement.

Looking at the issue at hand and also looking at paragraph two from the bottom of page 2 of the agreement one sees a contract of confidentiality. Applicant can also be classified as a supervisor. This, therefore, removes Applicant from those employees whose probationary period is limited at three (3) months.

Applicant falls under Section 32 (3). His contract was supposed to be fixed in writing at the commencement of his employment and that was 1/2/99. Indeed the contract was fixed at three months by both parties.

The bone of contention therefore is whether the extension of the period was legal or not. Applicant says it was illegal. Respondent says it was legal because it was communicated to Applicant in writing and he accepted it.

According to the agreement the probationary period is three months. The agreement further states that during the first two weeks of this period two working days, written notice of termination of employment may be tendered by either party to this contract. For the remainder of the period (three months) either party may tender ten (10) working days - Notice, in writing, of termination of employment.

Nowhere in this agreement does it state that there shall be extension of the probationary period by the employer. Even Section 32 of the Act does not support this view.

The proper interpretation to be based on the agreement is that the contractual period

3

was three months. Respondent was supposed to either confirm or terminate the services of Applicant at the end of this period. Any agreement entered into between the two outside the scope of the written contract and also outside the purview of Section 32 is ultra vires and as such of no force or effect.

For these reasons Applicant should be treated as employee falling under Section 35 and Section 36 of the Act.

In the circumstances the application for absolution from the instance fails.

K.P. NKAMBULE

JUDGE - INDUSTRIAL COURT