

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 104/2002

In the matter between:

MARCEL GABON

APPLICANT

and

BUFFALO SOLDIERS SECURITY

(PTY) LTD

RESPONDENT

CORAM

KENNETH NKAMBULE

: JUDGE

DAN MANGO

: MEMBER

GILBERT NDZINISA

: MEMBER

FOR APPLICATION

: MR. Z. SHABANGU

FOR RESPONDENT

: NO APPEARANCE

JUDGEMENT

7/3/03

The applicant seeks maximum compensation for unfair dismissal, payment in lieu of notice, additional notice and severance allowance. The cause of action is alleged to have arisen from the respondent's conduct of re-deploying the applicant from the position of the driver to that of a security officer without giving him a hearing.

In terms of the particulars of claim, the applicant was employed by the respondent as a driver on the 1st June, 1995 and was in the continuous employ of the respondent until 30th January 2002.

The applicant testified under oath in court wherein he stated that on the 2nd February, 2002 the respondent told him that it was re-deploying him from the driver position to a security officer position amidst accusations of bad driving.

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According to the applicant, prior to his re-deployment he was verbally told by the respondent that there would be a disciplinary hearing on the 2nd February, 2002. The verbal invitation to the hearing was not confirmed by a written one and there was no charge preferred against him.

Applicant did attend the hearing scheduled for 2nd February 2002. On his arrival at respondent's office a letter marked annexure 'A' in the application was handed to him after its contents were read to him. This letter was re-deploying the applicant from the driver position to the security position.

According to Annex 'A' the applicant was being re-deployed because of poor driving skills. There are many instances where applicant was said to have driven negligently. This was not denied by the applicant in his testimony.

According to this letter the applicant would not lose any money, benefits or hours of work. The applicant would be slotted on day shifts.

The applicant avers that the decision by the respondent to unilaterally re-deploy him without affording him a hearing was grossly irregular, procedurally wrong and amounted to constructive dismissal.

Section 26 of the Employment Act provides for changes in terms of employment. Sub-section (1) provides as follows:

"(1) Where the terms of employment specified in the copy of the form in the second schedule given to the employee under Section 22 are changed, the employer shall notify the employee in writing specifying the changes which are being made and subject to the following Sub-sections, the changed terms set out in the notification shall be deemed to be effective and to be part of the terms of service of that employee."

Sub-section (2) provides as follows;

"(2) Where in the employees opinion, the changes notified to him under Sub-section (1) would result in less favourable terms and conditions of employment than those previously enjoyed by him, the employee may, within fourteen days of such notification, request his employer in writing, (sending a copy of the request to the Labour Commissioner), to submit to the Labour Commissioner a copy of the form given to him under Section 22, together with the notification provided under Sub-section (1) and the employer shall comply with the request within three days of it being received by him."

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Sub-section (3) states that on receipt of the copy of the documents sent to him under Sub-section (2), the Labour Commissioner shall examine the changes in the terms and conditions of employment contained in the notification. Where in his opinion, the changes would result in less favourable terms and conditions of employment than those enjoyed by the employee in question prior to the changes set out in the notification, the Labour Commissioner shall, within fourteen days of the receipt of the notification, inform the employer in writing of this opinion and the written notification given to the employee under Sub-section (1) shall be void and of no effect.

The question is whether applicant on receipt of the letter of notification did comply with the provisions of Section 26 of the Employment Act. There is no evidence which suggest that he did.

He has relied on Section 37 of the Employment Act. Section 37 deals with constructive dismissal. In the instant case applicant was transferred from one department to another. Respondent did not interfere with his salary. He did not interfere with any of the benefits he had previously enjoyed. It is very difficult to say applicant has proved that the conduct of the respondent in re-deploying him had been such that applicant could no longer reasonable be expected to continue in his employment.

This is more so because the applicant failed to challenge the redeployment in terms of Section 26 of the Act.

For the foregoing it is the opinion of this court that the applicant has not succeeded in proving that he was dismissed by the respondent. Consequently the application is hereby dismissed.

No order as to costs. Members concur.

KENNETH P. NKAMBULE

JUDGE - INDUSTRIAL COURT.

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