

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 137/2001

In the matter between:

SAMSON GAMA

APPLICANT

And

CONWAY NYMAN

RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: M. SIMELANE

JUDGEMENT

30-06-03

The Applicant brought the application for resolution of unresolved dispute in terms of Section 85 (1) of the Industrial Relations Act No. 1 of 2000.

The cause of action as stated in the particulars of claim is that the Applicant on the 11th December 2000 was dismissed from his employment by the director of the Respondent Mr. Nigel Taft on allegation that he had absconded from work for a period of more than three (3) days without permission and/or without a certificate from a medical practitioner.

The Applicant allege that such dismissal was unlawful, wrongful, unfair and unreasonable in the circumstances of the case for the following reasons:

1

That on the 1st December 2000 he developed a severe testicle disorder known as (likhubalo) in Siswati and was unable to report to work on the morning of the 2nd December 2000 because he could not work.

That he sent Rose Gama his wife to his employer to report the matter. She went as instructed and reported to him that she had informed his supervisor Mr. Jameson Masilela that the Applicant was sick, was immobilized by fact of pain and could not be able to report to work and that he was to be attended to by a traditional healer and would return to work when he was well.

That Mr. Jameson Masilela was grateful to his wife for the report and had promised to report the matter to his superiors. That in fact Mr. Jameson Masilela had granted him leave of absence without stating a specific period for the absence. Rose Gama further conveyed the van keys to Mr. Masilela on the same date.

The Applicant told the court further that he was under the care of a traditional healer at Dlangeni, a Mr. Motsa until the 9th December 2000. While he was absent his son Thulane, went on the 6th and 7th December 2000 to inform his superiors that he was still unable to come back as he had not fully recovered.

He returned to work on the 11th December 2000 and was summarily dismissed by the director Mr. Nigel Taft. At the time of such dismissal, he served as a crane driver at a monthly salary of E817.98 (Eight Hundred and Seventeen Emalangeneni and Ninety Eight Cents) per month.

He was not given a hearing before the dismissal and his attempt to explain his case to Mr. Nigel fell on deaf ears. He asked him to call Mr. Jameson Masilela to enquire about the case but in vain.

He reported the matter to the Labour Commissioner who was unable to resolve it and a certificate of unresolved dispute was issued.

2

This was his first time to absent himself from work for more than three days since the respondent employed him. He had not gotten another job despite efforts to look for alternative employment. He had suffered loss and damage as a result. His five (5) children who depended on him had undergone immense suffering since his dismissal.

Mrs. Rose Gama was called to testify. She corroborated the evidence of the Applicant in all material respects, especially concerning the report she had made to Mr. Jameson Masilela about her husband's illness and inability to report to work. She also had handed to him the crane keys and he had granted the Applicant leave of absence in the circumstances. She conveyed the message accordingly.

The Respondent entered appearance in the matter and filed a Reply to the Application. A pretrial conference was held and a notice of set down was served on the Attorneys of the Respondent. However on the date of the hearing there was no appearance for the Respondent and an application by the Applicant's attorney to proceed ex parte was granted.

In terms of Section 42 (2) (a and (b) of the Employment Act No. 5 of 1980, once an employee has established as was in this case that he was an employee to whom Section 35 of the Act applied, the onus fell on the employer to show firstly that it dismissed the employee for a reason permitted by Section 36 of the Act and that it was fair and reasonable to dismiss the employee considering all the circumstances of the case.

By its default, the Respondent has failed to discharge this statutory onus with the result that the Application has succeeded. The Applicant was therefore substantively and procedurally dismissed unfairly.

Considering the circumstances of the dismissal, the loss and damage suffered by him and his dependants, the length of the service to the Respondent, that he has found no alternative employment and that the Applicant did not pray for reinstatement, the court awards him

3

ten (10) months compensation for unfair dismissal in the sum of Emalangeneni 8,170.98 cts. In addition the applicant is to be paid by the Respondent terminal benefits as follows;

| | |
|---------------------|--------------|
| Notice Pay | E 817.98 |
| Additional Notice | E 11, 997.04 |
| Severance Allowance | E 8, 569.31 |
| Leave Pay (3 days) | E 122.70 |
| TOTAL | E 29, 667.01 |

Claim for overtime was not proven.

The Respondent is to pay costs of the Application.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT