

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

In the matter between:

CASE NO. 335/2000

PHILEMON KUNENE                      APPLICANT

and

SWAZI OXYGEN (PTY) LTD    RESPONDENT

CORAM

N. NKONYANE:ACTING JUDGE

FOR APPLICANT: MR. D. MSIBI

FOR RESPONDENT: MR. K. MOTSA

JUDGEMENT - 28/04/05

The applicant in this matter is a former employee of the respondent company.

He stopped working for the respondent on 29.09.1999 when he retired.

Upon retirement, he was paid all his benefits. He was not, however, paid additional notice.

He has instituted these proceedings therefore because he wants the court to order the respondent to pay him additional notice, which he claims should have been paid to him together with the other retirement benefits when he retired.

He reported a dispute to the Commissioner of Labour. The report was transmitted to the Conciliation, Mediation and Arbitration Commission (CMAC). The dispute was not resolved and a certificate of unresolved dispute was issued certifying the dispute as an "unresolved dispute" in terms of Section 85 (1) of the Industrial Relations Act, No.1 of 2000.

The certificate of the unresolved dispute is annexed to the applicant's papers.

Before the court the parties' representatives agreed that the facts of the matter were not in dispute. They agreed that the only issue for the court to determine was whether additional notice was payable to the applicant upon retirement.

The representative for the applicant argued that upon his retirement, the applicant was entitled to be paid additional notice. He relied on section 33(1)© of the Employment Act No. 5 of 1980.

On behalf of the respondent it was argued that the applicant was not entitled to additional notice as he had retired and was not terminated by the respondent. The court was referred to several authorities in support of that proposition.

As already pointed out above, the facts are not in dispute. It is not in dispute that the applicant had reached the agreed retirement age. He was therefore not terminated by the employer. The period of his engagement by the employer had simply come to an end.

Section 33 of the Employment of Act deals with periods of notice by employer and employee. The section clearly envisages or caters for situations where either the employer or the employee terminates the employment relationship. It provides for minimum notice that any of the parties should give to the other.

The question that the court must determine is whether an employee whose employment contract comes to an end because he has reached the retirement age can be said to have been terminated by the employer.

John Grogan, in his book "Workplace Law" 6<sup>th</sup> ed (2001) at pages 134 to 135 addressed this subject. At page 135 after referring to the cases of Schmahmann V. Cencent Communications Natal (Pty) Ltd [1997] 9 BLLR 1092 (L.C.) and Coetzee V Moreesburgse Koringboere Kooperatief BPK ([1997] 9 BLLR 1167 (L.C)), the learned author pointed out that:

"It appears therefore that when an employee has reached an agreed retirement age, it will be found that he or she was not dismissed but that the contract had lapsed"

It is clear therefore that where an employee reaches the agreed retirement age, the contract of employment terminates automatically.

In the Schmahnnann case at page 1338 H-I the Labour court held that:-

"When an employer and an employee agree specifically or by implication in advance that the effluxion of time is to operate as the guillotine which severs their employment relationship then it cannot be said that when this date arrives that there has been a dismissal by the employer although the relationship and the contractual obligations terminate."

In the present application neither party terminated the employment relationship. It terminated automatically upon the arrival of the retirement date.

Section 33(1) of the Employment Act is therefore not applicable. The employer had no obligation to give any notice to the applicant as the employer did not terminate the employment relationship, but it lapsed when the applicant reached the retirement age.

The respondent in this case therefore had no legal obligation to pay any amount of money for

additional notice to the applicant.

It follows therefore that the application must fail, and it is accordingly dismissed with no order as to costs.

N.NKONYANE

ACTING JUDGE - INDUSTRIAL COURT