

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO.31/2002

In the matter between:

HENRY NDLELA

APPLICANT

and

TASTE OF TASTE RESTAURANT

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: ACTING JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. N. MTHETHWA

FOR RESPONDENT: NO APPEARANCE

JUDGEMENT

23/11/06

[1] This is an application for the determination of an unresolved dispute brought

by the applicant against the respondent.

[2] The applicant reported the dispute to the Labour Commissioner in terms of Section 41 of the Employment Act No.5 of 1980 (as amended).

[3] The dispute was not resolved and the Labour Commissioner issued a certificate of unresolved dispute in terms of Section 85(1) of the Industrial Relations Act No.1 of 2000 (as amended).

[4] The applicant in his papers claims that he was summarily dismissed by the respondent on the 15th November 1994 on the grounds that he left a pack of Russian sausages outside the refrigerator. He claims that his dismissal was unreasonable and unfair because he was not given a hearing before the dismissal.

[5] The respondent in its reply admitted that it dismissed the applicant summarily. The respondent averred that the applicant was summarily dismissed because he threatened to assault the employer in the presence of staff members when asked about a Russian sausage that was on top of the refrigerator. The respondent stated that it was entitled to summarily dismiss the applicant in terms of Section 36(b) of the Employment Act.

[6] The history of this matter is as follows; when it was called on the 20th January 2005, there was no appearance by both parties. It was accordingly struck off the roll. It was re-instated by the applicant and was called in court on the 26th January 2005. Appearing on behalf of the respondent was Mr. M. Masango. It was postponed until the 3rd February 2005. On that day it was referred to the Registrar's office for date allocation.

[8] The matter was accordingly allocated two trial dates, being the 22 and the 23rd November 2006.

[9] It appears that in the meantime the respondent's attorneys filed a notice of withdrawal. This document is dated the 11th October 2006. The notice was sent to the respondent by registered post on that same day as it appears on the certificate of posting.

[10] The respondent failed to comply with the notice. The trial therefore proceeded *ex parte* in the absence of the respondent on the 22nd November 2006 and the applicant testified in support of his case.

[11] The applicant had a burden to prove that he was an employee to whom Section 35 of the Employment Act applied. The court is satisfied that he was able to discharge this burden. His evidence revealed that he was employed by the respondent on the 1st February 1992 and was in continuous employment until the 15th November 1994 when he was summarily dismissed.

[12] In his evidence before the court the applicant said that he was working at a food outlet. The customers would come to buy fish and chips or chips with Russian sausages. He said the customers would be delayed when they came to buy chips with Russian sausages in the mornings because at that time they would still be defrosting the sausages as they were kept in the refrigerator.

[13] The applicant said one day he decided not to keep the sausages in the refrigerator in order to avoid the delays that they experienced in the defrosting process in the morning. One employee noticed that and reported him to the employer. The employer, Mr. Lloyd Howard came and scolded him and told him to leave the business premises immediately. The applicant was also told to go to the Labour Department so that the officers there could calculate all terminal benefits due to him.

[14] The applicant indeed left the respondent's premises and went to the Labour office. There he found a Labour officer who advised him that what was due to him was a notice pay and number of days worked. The officer calculated these amounts on a piece of paper that the applicant took with him to the employer. The applicant was accordingly paid money representing notice pay and the number of days worked.

[15] From the evidence of the applicant, he was never given a fair chance to explain to the employer why he did what he did. From the evidence before the court it cannot be said that the applicant's conduct was unreasonable and warranted instant dismissal. It seems to the court that what the applicant did was in the interest of the business as he wanted to avoid delays in the morning when customers came to buy chips with Russian sausages.

[16] From the unchallenged evidence of the applicant, and taking into account all the

circumstances of the case, the court will come to the conclusion that it was unreasonable to terminate the service of the applicant.

[17] The onus was on the respondent to prove that the applicant was lawfully dismissed and that taking into account all the circumstances of the case it was reasonable to terminate his service as required by Section 42(2) of the Industrial Relations Act,2000 (as amended).

[18] The respondent has not discharged that burden of proof.

[19] The applicant told the court that he is thirty-five years old and that he has three minor children. He said he is the sole supporter of these children as their mother is deceased. He said he is now self employed as a hawker.

[20] The applicant said he was abandoning the claim for overtime.

[21] The evidence revealed that the applicant was unfairly treated by the respondent. The applicant was scolded by the employer in the presence of other employees and told to leave the premises there and then. He was clearly thoroughly humiliated.

[22] Employers must be reminded that the era of treating employees with disrespect has long past and courts of law will not tolerate that kind of conduct. The court does not expect employers in the 21st century to behave in the manner that the employer did in this case.

[23] The court will accordingly enter judgement in favour of the applicant and order that the respondent pays the following amounts to the applicant:

Additional Notice (E 19.20x4x1)	E 76.80
Severance Allowance (E19.20x10x1)	E 192.00
Compensation for the unfair dismissal (12 months x E500.00)	E6000.00

Total **E6.268.80**

[24] No order for costs is made.

The members agree

NKOSINATHI NKONYANE A-J
INDUSTRIAL COURT

