

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 237/2006

In the matter between:

GERARD SHIELDS

Applicant

and

CARSON WHEELS (PTY) LTD t/a CARSON WHEELS

Respondent

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MAN ANA: MEMBER

FOR APPLICANT: M. SIBANDZE

FOR RESPONDENT: B. MAGAGULA

J U D G E M E N T -21/11/07

1. The Applicant was employed by the Respondent with effect from the 1st May 2005 as the Respondent's Sales & Marketing Manager.

2. The Applicant's letter of engagement provides for a probationary period of four months from 1st May to 30th August 2005. The letter sets out the Applicant's salary and benefits as follows:

Basic salary	E15000-00
Rent allowance	Inclusive in package
Medical aid	Inclusive in package
Transport	Demonstration vehicle
Leave	As per Government Gazette
Further incentives to be received monthly Volume, Quarterly Volume, CS1 and other incentives.	

3. On the 28th August 2005 the Respondent wrote to the Applicant, in the following terms:

"Regretfully it appears that your performance levels do not at present measure up to the standards we believe are necessary for the position. We are however willing to assist you in attaining those standards. We have accordingly drafted a more meaningful job description against which you will be assessed. In terms thereof we intend to renew your probation for a further four-month period in order for you to be given the time necessary to get to grips with the job. During this time all other conditions of employment will remain unchanged."

4. The Applicant accepted the renewal of his probation on the terms set out in this letter.

5. On 28th October 2005 the Respondent addressed a further letter to the Applicant. The letter commences with the statement, *'Your period of probation ends on 31 October 2005.'* This statement is clearly wrong. The extended probationary period ran for a further four-month period from 31st August 2005 and ended on 31st December 2005.

6. The letter goes on to propose that a new employment arrangement be negotiated with the Applicant, based on an initial three-month contract at a substantially reduced salary. It was proposed that benchmarks be negotiated to provide the Applicant with clear duties, responsibilities and targets, against which additional incentive earnings could be achieved.

7. Although the Applicant says that he was willing to participate in the negotiation of a new employment arrangement, it is common cause that these negotiations never commenced and on 4th November 2005 the Applicant received a letter informing him that a decision had been made to terminate his services with immediate effect.

8. The Applicant reported a dispute to CMAC claiming that he had been unfairly dismissed. The dispute could not be resolved by conciliation and a certificate of unresolved dispute was duly issued.

9. The Applicant has applied to the Industrial Court, claiming payment of compensation for unfair dismissal and payment of monthly and quarterly incentives on motor vehicles sold in his department in the course of his employment. Other ancillary claims were abandoned at the beginning of the trial.

10. In his particulars of claim, the Applicant avers that at the time his services were terminated on 4th November 2005 he was an employee to whom section 35 of the Employment Act 1980 applied. He alleges that the Respondent had no fair reason for the termination of his services in terms of section 36 of the Act, and such termination was unreasonable in all the circumstances.

11. In its Reply, the Respondent pleads that the Applicant's period of probation came to an end on the 31st October 2005 at which date his employment was terminated. Thereafter the parties entered into a three month fixed term contract which contract the Applicant unilaterally terminated.

12. This defence as pleaded is entirely at variance with the facts advanced by the Respondent in evidence. At the close of evidence, Respondent's counsel applied for an amendment of the Reply to substitute paragraph 4.2 with the following averment:

"The Respondent avers that the Applicant's services were terminated within the second term of his probationary period."

13. The Respondent's counsel had intimated in his opening address that his client's defence rested entirely on the proposition that the Applicant was not an employee to whom section 35 of the Employment Act applied and the Respondent was not in the circumstances required to show fair reason for the termination of his services.

14. Having received advance notice of the Respondent's intention to rely on a defence other than the one pleaded, the Applicant will not be prejudiced if the amendment is granted. Mr. Sibandze for the Applicant very properly conceded this and withdrew his opposition to the amendment. The amendment is accordingly granted.

15. Section 35 of the Employment Act provides that no employer shall terminate the services of an employee unfairly, but this does not apply to *"an employee who has not completed the period of his probationary employment provided for in section 32."*
- see section 35 (1) (a) of the Act.

16. Section 32 of the Act provides as follows:

" Probationary period:

(1) During any period of probationary employment as stipulated either in the form to be given to an employee under Section 22, or in a collective agreement governing his terms and conditions of employment, either party may terminate the contract of employment between them without notice.

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

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

17. The effect of section 35 read with section 32 is that an employer may terminate the services of an employee who has not completed his probationary period without giving notice and without any fair reason.

18. In the matter before court, the Respondent alleges that the Applicant was still serving his second term of probation when his services were terminated, hence he is not an employee to whom section 35 applies and the Respondent is not required to furnish fair reason for the termination.

19. Section 42 of the Act states that in the presentation of any complaint of unfair termination of services, the employee shall be required to prove that at the time his services were terminated he was an employee to whom section 35 applied.

20. The Applicant thus bears the burden of proving that he was not serving under a period of probationary employment when his services were terminated. If he is successful in discharging this burden, it follows that his services were terminated unfairly, since the Respondent has not pleaded that it had fair reason for termination as provided in section 36 of the Act (see section 42 (2) (a) of the Act in this regard.)

21. The Applicant was employed as Sales & Marketing Manager. His job description expressly required him to supervise staff. As an employee engaged on supervisory work, section 32 (3) of the Act required that his probation period "*shall be fixed, in writing, between the employer and employee at the time of engagement.*"

22. The Applicant argues that the probation period which was fixed in writing at the time of his engagement was for a period of 4 months, from 1st May 2005 to 30th August 2005. He submits that the renewal of the probation period for a further 4 months contravened section 32 (3) of the Act and was a legal nullity. As a result, when the lawful probation period expired on 30th August 2005 the Applicant became an employee to whom section 35 applied, and the Respondent was not entitled to terminate his services unfairly i.e. without fair reason.

23. In response to this argument, Mr. Magagula for the Respondent submits that:

23.1. section 32 of the Act does not prohibit extension of the initial probationary period; and

23.2. the Applicant accepted the extension of probation without objection; and

23.3. the Applicant was in any event never confirmed as a permanent employee, therefore he had not completed his probationary period and the Respondent was entitled to terminate his services without notice or fair reason.

24. Mr. Magaguia referred the court to page 63 of **Van Niekerk: Unfair Dismissal**, but no assistance can be obtained from the author's analysis of probationary employment in South African law - for the simple reason that the South African Labour statutes do not have a section similar to section 32 of our Act, nor do the terms of the South African Code of Good Practice which van Niekerk refers to extensively have any counterpart in our law.

25. The Swaziland legislature provides that the probation period of supervisory employees shall be fixed, in writing, at the time of engagement. Section 3 of the Act provides that:

"Except as expressly provided by fh/s Act any arrangement by any person to contract out of its provisions shall be null and void."

Section 27 of the Act provides that:

"No contract of employment shall provide for any employee any less favourable condition than is required by any law. Any condition in a contract of employment which does not conform with this Act or any other law shall be null and void and the contract shall be interpreted as if for that condition there were substituted the appropriate condition required by law."

26. Section 32 of the Employment Act 1980 was introduced to improve the status of employee in Swaziland - see the Preamble to the Act. The legislature in its wisdom considered it necessary to protect employees on probation by:

26.1. limiting the period of probation to 3 months, except in the case of employees engaged to perform work of a specialized nature, namely supervisory, technical or confidential work, where the employer may require a longer period to determine whether the probationary employee meets the required standards; and

26.2. insisting that in the case of employees engaged on supervisory, technical or confidential work the probation period must be fixed in writing in advance, to avoid any uncertainty as to the length of the period during which the employee's performance will be under scrutiny.

27. Sections 3 and 27 of the Act were promulgated in recognition of the comparatively weak bargaining position of employees and to protect employee from giving up the protections afforded them by the Act through ignorance or through pressure from the employer.

28. In the present matter, the Applicant's probation period was fixed at four months in his letter of engagement, from 1st May to 30th August 2005. The parties thereafter

entered into an arrangement whereby the probation period was renewed or extended for a further period of four months. The Applicant consented to this arrangement, and were it not for the provisions of section 3 of the Act, the renewal or extension would be valid and binding upon him.

29. There can be no doubt that an agreement to renew or extend the probation period, entered into some four months after the Applicant's engagement constitutes an arrangement to contract out of that part of section 32 (3) which requires the probation period to be fixed in writing at the time of the engagement. Section 3 provides that such an arrangement shall be null and void.

30. Since the renewal or extension of the Applicant's probation period was null and void, he completed serving his probation on the 30th August 2005. By the time the Respondent terminated his services on the 4th November 2005, the Applicant was not *"an employee who has not completed the period of probationary employment provided for in section 32."*

31. Neither section 32 of the Act nor the letter of engagement provides that completion of the period of probation requires express confirmation by the Respondent. The probation was complete when the period fixed at the time of engagement expired by effluxion of time.

32. The court finds that at the time his services were terminated by the Respondent, the Applicant was an employee to whom section 35 applied.

33. To establish that the termination was fair, the Respondent must prove that the reason for termination was one permitted by section 36, and that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee - see section 42 (2) of the Act.

34. The Respondent has neither pleaded nor argued that the Applicant's services were terminated for one of the reasons permitted by section 36 of the Act. The Respondent has relied solely on its defence that the Applicant was not an employee to whom section 35 applied and that it was accordingly entitled to terminate his services without fair reason. This defence has failed, and the court must find in accordance with section 42 (2) that the services of the Applicant were unfairly terminated.

35. The Applicant has claimed compensation for the unfair termination of his services. In assessing the amount of compensation to be awarded, the court will take into account the following factual considerations which it finds to have been proved on the evidence before it:

35:1 we find that the Respondent bona fide but mistakenly believed that it was entitled to dismiss the Applicant without fair reason or fair process. This is not a case where the Respondent acted maliciously or with reckless disregard of the law;

35.2 the Applicant was employed for only six months, and he had been informed twice during that period that he was not performing satisfactorily. The Applicant purported to consent to the extension of his probation, thereby purporting to accept further evaluation of his performance with the possibility of summary termination if he did not meet the required standards. Were it not for the provisions of section 3 of the Act, the termination of his services would have been lawful and contractual. The Applicant's position, when considering the question of compensation, cannot be equated with that of an employee who regards his employment as permanent and his prospects as secure and whose dismissal is unforeseen.

35.3 nevertheless, the Applicant was unfairly dismissed from a job which he enjoyed, in circumstances which must have injured his dignity and self-respect. He was obliged to accept another job at a substantially reduced salary in order to support his family, and it took one year before he rose to a managerial position at a salary comparative to his earnings with the Respondent.

36. Taking the above factors and the Applicant's personal circumstances into account, the court is of the view that compensation equivalent to four (4) months salary will adequately compensate the Applicant for the loss of his employment.

37. The Applicant's counsel has argued that the value of the use of a company vehicle should be included in the Applicant's remuneration for purpose of calculating compensation. The court is not required by section 16 of the Industrial Relations Act 2000 (as amended) to peg its award of compensation to a specific number of months remuneration. Section 16 (6) permits the court to award just and equitable compensation, which does not exceed 12 months remuneration.

38. In any event "remuneration" is defined in the Act to mean "*wages or salary and any additional payments payable in cash or in kind directly or indirectly by the employer in connection with the employment of an employee.*"

We do not consider that the provision of a vehicle for business and private use can be properly regarded as an additional "payment* in terms of the statutory definition of remuneration Nor is the definition of "wages" in the Employment Act 1980 of any assistance to the Applicant, since again there is an explicit reference to "remuneration or earnings including allowances which are payable by an employer to an employee ..."

39. Even if we are wrong in this regard, and the use of a vehicle can be regarded as some kind of remuneration for services rendered, it is only the private use of the vehicle which can be considered as remuneration, since use of the vehicle for carrying on the business of the employer is not a benefit which accrues to the employee in return for services rendered. The Applicant has not tendered any evidence as to the value to be attached to the private use of the demonstration vehicle allocated to him.

40. We award the Applicant four months salary in the total sum of E60,000-00 by way of compensation.

41. The Applicant has also claimed monthly and quarterly incentives on motor vehicles sold by the Respondent's motor department. The letter of engagement does not set out any terms or methods for calculating incentive commissions or bonus. The mere mention of incentives in the letter of engagement is too vague to give rise to any contractual entitlement. The Applicant has claimed a commission of E1000-00 per vehicle sold in the motor department, but this claim is not supported by any evidence of a trade custom or contractual undertaking to pay such commission.

42. The Respondent has tendered payment of a commission of 5% in respect of the net profit earned by the company on vehicles sold by the Applicant. The amount tendered is E1595-55. The Applicant has not proved his entitlement to an amount in excess of the amount tendered.

43. The court enters judgement against the Respondent for payment to the Applicant as follows;

E60.000-00 as compensation

E 1,595-55 as commission

E61,595-55 in total

The Respondent is to pay the Applicant's costs.

The members agree.

**PETER R. DUNSEITH
PRESIDENT OF INDUSTRIAL COURT**