

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 559/06**

In the matter between:

**THEMBATSABEDZE**

**Applicant**

and

**TEX-RAY SWAZILAND (PTY) LTD**

**Respondent**

**CORAM:**

**P. R. DUN^EITH JOS I**

**PRESIDENT**

**AH                    YENDE**

**MEMBER**

**NICHOLAS MAN ANA**

**MEMBER**

**FOR APPLICANT**

**S. MADZINANE NO**

**FOR RESPONDENT**

**APPEARANCE**

## **J U D G E M E N T - 7/2/2007**

1. The application papers were served on the Respondent's Personnel Officer Daniel Matsebula on the 20<sup>th</sup> September 2006, but the Respondent failed to appear before the court on the nominated date to oppose the matter.

The court is satisfied, on the basis of an affidavit of service and confirmation thereof by Attorney Madzinane from the bar, that proper service was effected on the Respondent and that the matter can properly be determined ex parte in the absence of the Respondent.

The Applicant alleges that he was unfairly dismissed by the Respondent, and he is claiming compensation for unfair dismissal, notice pay, additional notice pay, and severance allowance.

The following facts emerge from the unchallenged testimony of the Applicant:

4.1 The Applicant was employed by the Respondent in November 2002 as a cutter. He is an employee to whom Section 35 of the Employment Act 1980 applies.

4.2 His services were summarily terminated on 14<sup>th</sup> September 2005 on the grounds that he had insulted his line manager, a Mr. Wang, by calling him "silima", which is siSwati for a fool; and secondly that he failed to take instructions.

4.3 Prior to his dismissal, the Applicant attended a disciplinary hearing. The minutes of the hearing were produced in court as an exhibit.

The applicant was charged with insulting his line manager and threatening violence. He pleaded not guilty.

4.4 The line manager Mr. Wang alleged that Applicant had called him a fool in front of two witnesses. The Applicant categorically denied the allegation. The two witnesses were

called to the hearing. They both denied hearing the Applicant say anything to Mr. Wang. On the contrary, they corroborated the Applicant that Mr. Wang was shouting at him. A supervisor called Elvis also told the hearing that there was no proof that the Applicant had insulted Mr. Wang.

- 4.5 The witnesses whom Wang claimed would confirm his version did not do so. If anything, they confirmed that Wang behaved disrespectfully towards the Applicant. Faced with this evidence, the chairman of the hearing - one Bhekumuzi Zeeman - should have dismissed the charges. Instead, he made the following recommendation:

*"The disciplinary panel finds it difficult to make a decision because of witnesses who did not give them a clear picture about what transpired in the case. Therefore our superior can make a decision in this case."*

- 4.6 Underneath this recommendation a bold hand has written the instruction "**DISMISS HIM!**"

- 4.7 Presumably in accordance with this instruction, the Assistant M. D. Joe Lo wrote to the Applicant on 13<sup>th</sup> September 2005 terminating his services. The reasons for the termination are given in the letter as:

*".....you insulted your line manager. Failure to take instructions from your superiors,"*

- 4.8 The Applicant appealed against his dismissal, but no appeal hearing was ever convened.

4.9 In court the Applicant repeated his denial that he insulted Mr. Wang. He stated that Wang shouted at him when he explained that he was waiting for a marker. He said Wang could not understand Siswati.

4.10 At the time of his dismissal, the Applicant was a shop steward of the union active at the Respondent's workplace. He was earning E508.00 per fortnight. He is 30 years of age with dependants. He has been unable to obtain alternative employment.

5. In the court's view, the manner of dismissal of the Applicant indicates that the Respondent's senior management have no appreciation of fair labour practice. The chairman of a disciplinary hearing cannot abrogate his duty to make a finding on the evidence to a superior who has not attended the hearing. A fortiori where the evidence at the hearing falls short of proving the charges.
6. Joe Lo dismissed the Applicant for failure to follow instructions, but he was never charged with this offence.
7. An employee has a right of appeal against his dismissal, particularly where the decision to dismiss appears to be arbitrary and unsupported by the record of the disciplinary hearing. The failure to convene an appeal hearing for the Applicant was procedurally unfair.  
  
that the Respondent's management discriminated against the Applicant due to his status as a shop steward.



13. The court is satisfied that this is a case where maximum compensation should be awarded. The court awards the Applicant compensation in the sum of E12, 192.00.
  
14. Judgement is entered against the Respondent for payment to the Applicant of the sum of E 14,012-64. The Respondent is ordered to pay the Applicant's costs.

The members agree.

PETER R. DUNSEITH

President of the Industrial Court