

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 127/06

In the matter between:

NQOBILE KHUMALO

APPLICANT

And

BHEKI MAZIBUKO

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. SELBY DLAMINI

FOR RESPONDENT: NO APPEARANCE

JUDGEMENT -08.08.08

[1] This is an unopposed application for determination of an unresolved

dispute brought by the applicant against the respondent. There is an affidavit of service filed which indicates that the respondent was served with the application on 3 April 2006. The court was therefore satisfied that the respondent was duly served and it proceeded to deal with the application on the basis that the issues raised by the applicant were not in dispute and that the application is not opposed.

[2] The applicant is a Swazi adult person of Msunduzi Township in Mbabane. She told the court that she was employed by the respondent as a hairdresser at the respondent's Hair Dressing Salon which is situated at Timele Complex at Msunduzi Township, on 5 April 2005. She said she was dismissed by the respondent on 3 January 2006 because she did not come to work during the festive season on 25th and 26th December 2005 and on 1st January 2006. The applicant said she did not come to work because of the holidays and she wanted to be at home with her children. She said that she was earning E480:00 per month.

[3] The applicant told the court that the respondent dismissed her without a disciplinary hearing being held. She said the respondent did pay her salary for December 2005. After her dismissal she went to the Conciliation, Mediation and

Arbitration Commission ("CMAC") to report a dispute. The dispute was not resolved and a certificate of unresolved dispute was

issued by the Commission's commissioner.

[4] The applicant told the court that she was working six days per week. She worked from 07:30 a.m. to 6:00 p.m. On Saturdays she worked from 08:00 a.m. to 4:00 p.m. She had an off-day once a week on Wednesdays. She said as far as she knew, she was supposed to work for eight hours and that she was never paid for working overtime. She said she was being underpaid as she was getting E480:00 per month instead of E929:00 per month as per the regulation of wages order applicable to the industry. She is therefore asking the court to make an order that the respondent pays her all her terminal benefits and also maximum compensation for the unfair dismissal.

[5] What became clear to the court was that the applicant is an employee to whom **Section 35 of the Employment Act 1980**, as amended, applies as she has been in continuous employment with the respondent for more than seven months. Her service should not therefore have been unfairly terminated by an employer. There was no evidence before the court that the applicant was supposed to come to work during the three holidays. The burden to prove that there was a substantive reason for the employer to dismiss the employee is on the employer in terms of **Section 42(2)(a) of the Employment Act**. The respondent having failed to give evidence before the court, it is clear that the burden of proof was not discharged.

[6] The evidence before the court also showed that no disciplinary hearing was held before the applicant was dismissed by the respondent. There was therefore clearly no procedural fairness in the manner that the applicant's dismissal was handled.

[7] The applicant was also being underpaid by the respondent. When she was employed in April 2005, the applicable law was **Legal Notice No. 74 of 2004** in terms of which she should have been paid E876.03 per month. When she was dismissed in January 2006, there was a new **Legal Notice No. 194 of 2005** which came into effect on 1 November 2005. In terms of this Legal Notice, the minimum wage for a hairdresser

is E929:00 per month. Because of this, the court asked the applicant's representative to make a fresh calculation of the terminal benefits due to the applicant.

[8] In light of the undisputed evidence of the applicant before court, the court will accordingly come to the conclusion that the applicant's dismissal was substantively and procedurally unfair. Judgement is accordingly entered in favour of the applicant. The court will not make any order as to costs as the application was not opposed by the respondent.

[9] The applicant told the court that she has since found new employment at Vumile Hairdressing Salon as from 7th August 2007. She now earns E975:00 per month. She was therefore without employment for a period of one year and six months. The applicant is single parent and has three minor children. Only one of these children is attending school.

[10] Taking into account all the personal circumstances of the applicant and all the circumstances of the case, the court will order the respondent to pay the applicant the following amounts as terminal benefits and compensation for the unfair dismissal;

- | | |
|--------------------------|-----------------|
| 1. Notice pay | E 929.00 |
| 2. Leave days due | E 321.00 |

3. Underpayment	E3,723.00
4. Overtime	E5J88.38
5. Compensation (E929:00 x 5)	<u>E4.645.00</u>
	<u>E15.406.95</u>

[11] There is no order for costs.

The members agree.

**NKOSINATHI NKONYANE
JUDGE OF THE INDUSTRIAL COURT**