IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **Case No. 8/2005**

In the matter between:

GOODENOUGH ZWANE **Applicant**

and

UNITED PLANTATIONS (PTY) LTD
T/A NGONINI ESTATES **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**B. S. DLAMINI**
FOR RESPONDENT	**:**	**M. SIBANDZE**

J U D G E M E N T – 4/02/2008

1. The Applicant's services were terminated by the Respondent on the 10th June after he was found guilty by a disciplinary enquiry of drunkenness on duty and behavior unbecoming a senior security guard.

2. The Applicant complains that the termination of his services was substantively and procedurally unfair, in that:

2.1 he was not drunk on the day in question;

2.2 it was unreasonable to terminate his services instead of giving him a warning;

2.3 he was given insufficient time to prepare for the disciplinary hearing;

2.4 the charges preferred against him were vague and unclear.

3. The Applicant reported a dispute to CMAC but conciliation was unsuccessful. He has now applied to court claiming reinstatement to his employment alternatively payment of compensation for unfair dismissal and terminal benefits.

4. There is a dispute as to the Applicant's date of employment by the Respondent. Notwithstanding this dispute, it is common cause that at the date of his dismissal the Applicant was an employee to whom section 35 of the Employment Act 1980 applies. In the circumstances, the Respondent bears the onus of proving:

4.1 That the reason for termination of Applicant's services was one permitted by section 36 of the Act; and

4.2 That taking into account all the circumstances of the case, it was reasonable to terminate the Applicant's services.

5. The Applicant testified that he was employed by the Respondent on 6th April 1988 as a security guard stationed at Tambuti Estate. In 1994 he was promoted to be a supervisor. At the date of his dismissal, he was stationed

at Ngonini Estates.

6. The Applicant says that on Sunday 6th June 2004 he was not feeling well. He was sneezing and sweating. He visited the outpatient department at Piggs Peak Government hospital where he was given treatment and a sick note. Thereafter he reported on duty for the evening shift.

7. According to the Applicant, the Personnel Manager Elliot Dlamini accused him of being drunk because his eyes were bloodshot. Dlamini forced him to sign a document in which he admitted that he was drunk. He was not taken for any medical examination to verify that he was drunk. He was sent home. According to the Applicant, he was not drunk but suffering from influenza.

8. On the following day the Applicant was served with notice of a disciplinary hearing to be held on 9th June 2004 at 7.00 a.m. The charges were set out in the notice as follows:

> " (1) Drunk during working hours.
>
> 2) *Unbecoming behaviour of a security supervisor."*
>
> The notice goes on to particularize the charges as follows:
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> " In that it is alleged that on the 6*th June 2004 you were found by the Human Resources Manager at 6.30 p.m. drunk during working hours and this was discovered as something which was not supposed to be done by a supervisor."*

9. Subsequent to the disciplinary hearing, the Applicant was found guilty as charged and his services were terminated. He appealed against his dismissal. At the appeal hearing he produced his sick note from Piggs Peak Hospital outpatient department. The appeal chairman rejected the sick note because its date stamp showed 11June 2004, not 6 June 2004 when the incident occurred.

10. The Applicant explained that the sick note was given to him at the hospital on 6 June 2004 but it was not stamped because no stamp was available. He returned to the hospital and obtained an official stamp on 11 June 2004.

11. Under cross examination, the Applicant was driven to admit that he was dismissed from the Respondent's employ on 8th May 2002. He was subsequently re-engaged as a security corporal from the 15th October 2003.

12. The Applicant made a very poor impression on the court during cross examination on this issue. He was evasive, dissembling and disingenuous. He persisted in denying his dismissal in 2002 until he was forced to admit by the sheer weight of contradictory documentary evidence, including his own letter of appeal and report of dispute which referred explicitly to his dismissal. He also insisted that he was reinstated only a few days after his dismissal, but later he was again forced to agree that he was re-engaged 17 months later. The Applicant's evasive manipulation of the truth on this issue set the tone for his subsequent performance under cross-examination.

13. Asked how the Human Resources Manager 'forced' him to sign the admission of being drunk, the Applicant said the manager instructed him to sign and never gave him an opportunity to read what he was signing. He said he thought he was signing to knock-off work. Asked if he thought these

were knock-off papers, he repeatedly failed to answer the question and resorted to repeating that his supervisor told him to sign and go home.

14. The demeanor of the Applicant under cross-examination was that of an obstinate, strong willed man. We consider it improbable that he would sign a document without knowing its contents merely because he was instructed to do so by his supervisor. The Applicant is educated, intelligent and literate. We consider it improbable that he did not read the document before he signed it. He had already been accused of drunkenness. He could not have been unaware that the document related to this accusation.

15. On the question of the sick sheet, the Applicant was confronted with the hospital records. He could not explain why the records showed he had been treated and issued with medication on 11 June 2004, not 6 June 2004, save to say it must be a mistake.

16. The Respondent called its Human Resources Manager Elliot Dlamini as a witness. Dlamini described the events of 6 June 2004. He received a report that the Applicant, who was shift team leader, had not turned up for his shift. He tried to call the Applicant on the radio without success. He was later called after Applicant arrived. He found the Applicant in a condition where he could hardly stand or talk. His eyes were bloodshot. He suspected that Applicant was intoxicated. He called the company nurse to administer a breathalyzer test. Also present were the Respondent's Welfare Coordinator, the Senior Security Supervisor and the record keeper. The Applicant admitted that he had been drinking and said there was no need for the breathalyzer. Dlamini then produced a form used by the company in the event of suspected intoxication and invited the Applicant to sign the form if he admitted being drunk. The nurse asked the Applicant to take the breathalyzer, but he refused and agreed to sign the form. He signed in the

presence of the persons mentioned above, and the nurse signed as a witness. Dlamini signed as the complainant.

17. The form is headed INTOXICATION and the relevant section A reads as follows:

"(Employee admits that he/she is intoxicated)

I, …… admit that I am intoxicated "

Dlamini inserted the Applicant's name, and the Applicant signed below. In our view a reasonably literate person who can read English such as the Applicant, could not fail to appreciate that he was signing an admission of intoxication.

18. Under cross-examination, Elliot Dlamini conceded that the Applicant had a right to have his trade union representative present when he was asked to sign the admission form. Dlamini said that it was the responsibility of the Applicant to call his representative to be present.

19. It was put to Dlamini that the Applicant showed him the hospital sick sheet. This was denied by Dlamini. Moreover the Applicant did not state in his testimony that he exhibited the sick sheet to anyone on 6th June 2004, he merely said that he had it with him.

20. The Respondent called Lindiwe Nomaswazi Dlamini, its Welfare Coordinator at Ngonini Estate, to corroborate the evidence of Elliot Dlamini. She said that she called the Applicant on the radio when he failed to report for work, and he took time to respond. He could not speak properly. After some delay he came to the office. He could not walk straight. Lindiwe suspected he was drunk, and asked him how he was. He said he was just fine. His eyes were bloodshot and he smelt of liquor. She called the Human

Resources Manager because in her opinion the Applicant was not fit to work. The Manager accused the Applicant of being drunk. The Applicant did not deny this, and asked "Am I drunk?". When the nurse came to administer a breathalyzer test, the Applicant refused and requested to rather sign an admission that he was drunk. He signed in Lindiwe's presence, and then went home to sleep.

21. Lindiwe Dlamini made a favourable impression as a witness. She was not shaken in cross-examination. She gave a convincing demonstration of how the Applicant staggered. She said she knew the Applicant well, and she was convinced he was drunk.

22. The Respondent's final witness was the Piggs Peak Hospital Administrator. He displayed the hospital register and confirmed that according to the register the Applicant was attended on 11 June not 6 June 2004. He said that the unavailability of the hospital stamp would not account for the absence of an entry on the 6th June 2004. The administrator was taken to task by the Applicant's counsel for releasing confidential information to Respondent's counsel, but he was otherwise unscathed in his insistence on the reliability of the entries in the register.

23. In seeking to prove that the Applicant was drunk during working hours, the Respondent relies upon the observations of its witnesses and the Applicant's own written admission.

24. Elliot Dlamini and Lindiwe Dlamini corroborated each other as to the Applicant's bloodshot eyes, unsteady gait, inability to speak clearly and abnormal behaviour. Lindiwe also smelt liquor on Applicant's breath. They both concluded from their observations that the Applicant was drunk. They both testified in a fair and forthright manner.

25. The Applicant did not deny his abnormal behaviour but explained that he was sick. Even assuming that a severe case of influenza could explain the behaviour of the Applicant, we reject the Applicant's explanation. Firstly, he never reported at work that he was ill or requested sick leave. Secondly, we accept Elliot Dlamini's evidence that he never claimed to be sick when accused of being drunk. He told Lindiwe Dlamini that he was 'fine'. Thirdly, and most damning, we find that the Applicant never went to the hospital outpatient department on the 6th June 2004 as he testified. We find that he went to the hospital on the 11th June 2004, after he had been dismissed the previous day. He went there to obtain a sick sheet to bolster his case on appeal. In our view the Applicant attempted to deceive the appeal chairman and the court with this sick sheet, and he gave a false version regarding the date stamp. We find that his alleged illness is a mere fabrication in order to explain his drunken behaviour.

26. An admission made by a person under the influence of liquor is admissible in evidence, even in criminal cases:

R v Moiloa 1956 (4) SA 824 AD

R v Ramsay 1954 (2) SA 491 AD

However, little weight can be attached to such evidence unless it is shown that the person knew what he was saying i.e. that his mind was not so disturbed as to deprive him of reason or understanding.

27. Where a person admits to being drunk, a peculiar conundrum arises: the more drunk the person, the less weight can be attached to his admission of drunkenness.

28. Nevertheless, we are satisfied that when the Applicant signed the admission form he was sufficiently compos mertis to appreciate what he was signing and the nature and effect of his admission.

29. Medical corroboration by breathalyzer or blood shot tests is not essential provided there is other adequate evidence of drunkenness.

Le Roux & Van Niekerk : SA Law of Unfair Dismissal page 133.

30. To establish the disciplinary charge of being drunk during working hours, the Respondent must in our view prove that the Applicant was under the influence of alcohol to the extent that he was unable to properly perform his employment duties.

Le Roux & Van Niekerk: op cit. 183.

It is our finding that this has been proved on a balance of probabilities.

31. The Applicant complains that the sanction of dismissal was unreasonably harsh, and he should have received a warning. In response, the Respondent points out that the Applicant had already received a final written warning less than a month before he arrived at work drunk. The warning was given after the Applicant has been found guilty of dishonestly concealing information regarding a theft offence and failing to report the security guard implicated in the theft. The Respondent points out further that the Applicant had been given a second chance after being previously dismissed for vehicle abuse, and his conduct was expected to be exemplary in the circumstances.

32. There is no evidence to suggest that the Applicant had an alcohol addiction

problem requiring counseling or treatment. His drunkenness was an isolated act of misconduct. As a security officer and team leader, the Applicant was required to maintain a reasonable standard of personal conduct and to ensure that when he reported for work he was in a fit state to carry out his duties. Whilst a single instance of drunkenness does not necessarily warrant dismissal, the court is unable to find that it was unreasonable in the circumstances of the Applicant's employment history to terminate his services. The Applicant also did himself no favours by persisting in a false denial and showing no remorse for his behaviour.

33. In our judgement, the termination of the Applicant's services was substantively fair and lawful.

34. On the question of procedural fairness, the Applicant received 48 hours notice of the disciplinary hearing. This was not an unreasonable period of notice for the particular charge. There is no evidence that the Applicant was in any way prejudiced, or that he requested further time. The complaint of insufficient notice is groundless. As to the charges being vague and unclear, we consider that the disciplinary notice adequately described the offences charged and the Applicant was left in no doubt as to the case he had to meet.

35. In our judgement the termination of the Applicant's services was procedurally fair.

36. The Applicant's claim must fail. The application is dismissed. We make no order as to costs.

The members agree.

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PETER R. DUNSEITH

PRESIDENT OF THE INDUSTRIAL COURT