IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE **CASE NO. 329/03**

In the matter between:

THOMAS MAPHOSA **Applicant**

and

MAX ENTERPRISES (PTY) LTD **Respondent**

CORAM:

P. R. DUNSEITH	**:**	**PRESIDENT**
JOSIAH YENDE	**:**	**MEMBER**
NICHOLAS MANANA	**:**	**MEMBER**
FOR APPLICANT	**:**	**MBUSO DUBE**
FOR RESPONDENT	**:**	**MUSA SIBANDZE**

JUDGEMENT – 29/01/2009

1. The Applicant has applied to court claiming payment of statutory benefits and compensation for unfair dismissal.

2. The Respondent raised a special defence in its Reply, namely that the Applicant is a citizen of Mozambique and at all relevant times during his employment he was not in possession of a valid entry permit allowing him to be employed in Swaziland as required by the

Immigration Laws of the Kingdom. In these circumstances the Respondents pleads that the contract of employment between the Applicant and the Respondent was unlawful and/or *contra bonos mores* and therefore void *ab initio* in terms of the *ex turpi causa* rule.

3. The Respondent pleaded further that in any event, the termination of the Applicant's services was substantively and procedurally fair and reasonable in all the circumstances.

4. At the close of the Applicant's case, the Respondent's representative applied for absolution from the instance. He argued that :

4.1 the Applicant failed to establish that he is a Swazi Citizen and entitled to work in Swaziland without a work permit;

4.2 it is common cause that the Applicant did not have a valid work permit at the time of his employment with the Respondent;

4.3 Sections 14 (2) (f) and (g) of the Immigration Act of 1964 penalizes the employment of a migrant who does not have a valid work permit;

4.4 the purported contract of employment between the Applicant and the Respondent is impliedly prohibited by the penal provisions of the Immigration Act and thereby rendered illegal;

4.5 the maxim *ex turpi causa non oritur actio* applies to contracts of employment. If the contract is illegal, then it is void and of no force and effect.

4.6 In the premises, the Applicant's contract of employment with the Respondent was null and void and the Applicant is not an employee to whom section 35 of the Employment Act 1980 applies.

4.7 If the applicant is not an employee to whom section 35 applies, he is not protected against unfair dismissal and he has no cause of action based on unfair dismissal.

5. The court dismissed the application for absolution from the instance, holding that a reasonable person might be prepared to find on the facts, in the absence of any further evidence, that the Applicant is a Swazi citizen by birth; that the employment contract he entered into with the Respondent was lawful and valid; and that he is an employee to whom section 35 of the Employment Act 1980 applies – see our judgement dated 4th June 2008.

6. In view of this finding, it was not necessary for the court to determine at that stage the merits of the legal argument advanced by the Respondent, namely that a foreign migrant who works illegally in Swaziland without a work permit is not entitled to the protection of Part V of the Employment Act 1980.

7. The enquiry that arose on the Respondent's application for absolution at the close of the Applicant's case was: *is there evidence upon which a reasonable person might find for the Applicant?* In other words, was there sufficient evidence before the court at the close of the Applicant's case upon which a reasonable person might (but not should) find that at the time of his dismissal the Applicant was a person to whom section 35 of the Employment Act applied? (see **Gascoyne v**

Paul Hunter 1917 TPD 170). The enquiry that now arises at the end of the trial, and after the Respondent has closed its case, is whether the Applicant has proved on a balance of probabilities that he is a person entitled to the protection of section 35.

8. At the outset, we shall address the legal argument of the Respondent. The argument raises a difficult and controversial question: is a migrant foreigner in Swaziland who works for another person without a valid work permit issued under the Immigration Act an employee to whom section 35 of the Employment Act 1980 applies? In other words, is he entitled to the protection of Part V of the Employment Act.

9. "Employee" is defined in the Employment Act 1980 to mean *"any person to whom wages are paid or are payable* *__under a contract of employment__* *"* (emphasis added).

10. The Employment Act defines a contract of employment to mean *"a contract of service ………… whether it is express or implied and, if it is express, whether it is oral or in writing."*

11. From these definitions it appears that section 35 of the Act applies only to persons who are employees under a common law contract of employment – *locatio conductio operarum.*

12. Section 14 (2) (f) of the Immigration Act, 1982 makes it a criminal offence for a person who is not a Swazi citizen (or exempted by the immigration regulations) to engage in any employment without being authorized to do so by a work permit (referred to as an 'entry permit') issued under section 5 of the Act.

13. Likewise, section 14 (2) (g) of the Immigration Act makes it a criminal offence to employ any such person (provided the necessary mens rea is present).

14. In the case of **Ronald Henry Williams v L. C. Von Wissel (Pty) Ltd (Unreported IC Case No, 284/2000)** the late Nkambule J held that binding and enforceable contracts of employment cannot be entered into by migrants without work permits, and any such contract is void *ab initio.* Nkambule J relied on the following passage in **Basson et al : "Essential Labour Law' (2nd Ed) at page 33.**

"*The conclusion of the contract and the obligations in terms of the contract must be lawful. This simply means that one may not conclude a contract that is illegal (contrary to a law). One cannot conclude a contract with someone in order to have that person's services as a prostitute, for example. Nor will a contract of employment with an illegal migrant be valid. ………"*

15. An appeal from this judgement was dismissed by the High Court, Sapire C.J. presiding, without any reasons given.

16. A different approach was adopted by Nderi Nduma, JP in **Willem Jacobus De Kock (deceased) and Another v USA Distillers (Pty) Ltd (unreported IC Case No. 97/2002).** The learned President states in his judgement that if it was the intention of the legislature to deny protection against unfair termination to an illegal migrant who has entered into a contract of employment, section 35 of the Employment Act would have expressly excluded illegal migrants from its ambit.

17. With the greatest respect to the learned President, this statement

simply begs the question. If the contract of employment is void *ab initio* for illegality, then the illegal migrant is not an employee in terms of the definition under the Act and he is not entitled to the protection of section 35.

18. The learned President confuses the issue even further when he introduces and relies on the extended definition of an employee as contained in the Industrial Relations Act 2000. In interpreting and applying section 35 of the Employment Act, it is necessary to have regard to the definition of employee contained in that Act, not some other piece of legislation.

19. We respectfully disagree with the reasoning and approach adopted in the **USA Distillers** judgement. This does not however prevent us from interrogating the conclusion of Nkambule J in the **L.C. Von Wissel** case (*supra*), particularly as that conclusion (and its possible endorsement by the High Court) was reached before the promulgation of the new Constitution of Swaziland with its Chapter 111 of entrenched rights and freedoms.

20. Mr. Sibandze for the Respondent has referred the court to the judgement of the CCMA Commissioner in the South African case of **Moses v Safika Holdings (Pty) Ltd (2001) 22 ILJ 1261 (CCMA).** In this case, the CCMA Commissioner found that the general principles of contract apply to employment contracts, including the legal maxim *ex turpi causa non oritur actio*. He held that where a contract is not expressly prohibited by a statute but it is penalized by being made a criminal offence, then it is impliedly prohibited and so rendered void, especially if the object of penalizing the contract is to protect the public by discouraging such contracts. On this basis the Commissioner held

that the penalizing of a foreigner working without a permit impliedly prohibits such work and invalidates any contract to render such work.

21. The CCMA Commissioner dismissed the constitutional argument that illegal migrants are protected against unfair dismissal because "*every one has the right to fair labour practices."* He found that this constitutional right does not apply to illegal migrants and to hold otherwise would *"open floodgates for all illegal immigrants to challenge the fairness of their dismissal."*

22. Mr. Sibandze asks the court to follow the reasoning in the **Safika Holdings** judgment, which supports the judgement of the late Nkambule J in the **L.C. Von Wissel** case (*supra*).

23. The court drew the attention of the parties to a recent judgement of the South African Labour Court in the matter of **Discovery Health Limited v CCMA & Others (unreported judgement in Case No. JR 2877/06).** In this case, the Labour Court Judge rejected the reasoning applied by the CCMA Commissioner in the **Safika Holdings'** judgment (*supra*) and held that "*by criminalizing only the conduct of an employer who employs a foreign national without a valid permit and by failing to proscribe explicitly a contract of employment concluded in these circumstances, the legislature did not intend to render invalid the underlying contract*."

24. The Swaziland Immigration Act does not expressly prohibit a migrant from engaging in employment without a work permit. It merely provides that it is a criminal offence for him to do. Nor does the Act declare in express terms that a contract of employment entered into by an illegal migrant is invalid.

25. Whilst a contravention of a statute is generally treated as a nullity, the wording and purview of the legislation in question may indicate that the legislature did not intend this result.

Swart v Smuts 1971 (1) SA 819 A.

26. Provision of a penalty in the statute may indicate that the legislature is content with the penalty as sufficient sanction without also intending that the contract should be void.

Christie: The Law of Contract in SA (2nd Ed) at 412.
Swart v Smuts (supra) at 831.

27. When interpreting any legislation, the court must have regard to the provisions and values of the Constitution and should prefer an interpretation which promotes and protects the fundamental rights and freedoms contained in Chapter 111.

28. In **NUMSA & Others v Bader Bop (Pty) Ltd & Another (2003) 24 ILJ 305 CC** the SA Constitutional Court emphasized that if a statute is capable of interpretation in a manner that does not limit the fundamental rights, then that interpretation should be preferred.

29. Section 32 (4) of the Swaziland Constitution (under Chapter 111) provides:

"*Parliament shall enact laws to –*

(a) *…………*

…………

…………

protect employees from victimization and unfair dismissal or treatment."

30. This Constitutional direction not only requires such laws to be enacted, but in our view also requires the courts to interpret existing laws in such a way as to achieve the protection guaranteed by the Constitution.

31. The protection guaranteed by section 32 (4) (d) of the Constitution extends to all employees in Swaziland whatever their gender, race and place of origin – see section 14 (3) of the Constitution.

32. If one has regard to subsections 14(2)(f) and (g) of the Immigration Act standing alone, it might be reasonable to infer that - by penalizing a migrant who engages in employment without a work permit – the legislature intended to prohibit such employment and to render invalid any contract to engage in such employment. This is the basis of Nkambule J's judgement in the **L.C. Von Wissel** case (*supra*).

33. When one has regard to section 32 (4) (d) of the Constitution, however, the inference cannot be so easily drawn. The right of an employee to protection from unfair dismissal and unfair treatment is a fundamental right. It can only be limited where it infringes on a conflicting fundamental right or where the limitation is in the public interest – see section 14 (3) of the Constitution.

34. It is accordingly necessary to examine whether it is constitutionally justifiable to deny the fundamental right to fair labour treatment to employees who are illegal migrants.

35. Nkambule J in the **L. C. Von Wissel** case (*supra*) stated that the rationale for section 14 (2) (f) and (g) of the Immigration Act is "*to stop foreigners to compete with local citizens on jobs in which the locals possess the necessary skills."* This may certainly be the objective of penalizing foreigners who work without permits, but can it be said that this objective will be better achieved by invalidating an illegal migrant's contract of employment so that he is deprived of all the rights and protections to which employees are entitled? In our view, denying rights and protection to employees who are illegal migrants is more likely to achieve the opposite effect. The temptation to employ illegal migrants in preference to local citizens is all the greater if the employer is thereby exempt from the obligations of the employment and industrial relations laws.

36. In the **Discovery Health** case (*supra*), the Labour Court stated the following, with reference to analogous provisions of the S.A. Immigration and employment laws:

"There is a sound policy reason for adopting a construction of s 38(1) that does not limit the right to fair labour practices. If s 38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and if Discovery Health's contention is correct, she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring work to be performed in breach of the BCEA, for

example, by requiring the employee to work hours in excess of the statutory maximum and by denying her the required time off and rights to annual leave, sick leave and family responsibility leave. It does not require much imagination to construct other examples of the abuse that might easily follow a conclusion to the effect that the legislature intended that the contract be invalid where the employer party acted in breach of s 38(1) of the Act. This is particularly so when persons without the required authorization accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorized engagement) to initiate any right of recourse against those who engage them.

Far from defeating the purposes of the Immigration Act, to sanction a claim of contractual invalidity in these circumstances would defeat the primary purpose of s 23(1) of the Constitution which is to give effect through the medium of labour legislation, to the right to fair labour practices."

37. In the **USA Distillers'** judgement (*supra*) at page 11 Nderi Nduma JP refers to the ILO Labour Conventions that prohibit exploitation of migrant workers *"by denying them rights to which every employee is entitled simply because of non-fulfilled technical requirements, over which the employee has no control."*

38. Article 9 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975 states as follows:

"Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and

regulations, the migrant worker shall, in cases in which these laws and regulations have not been respected and in which his position cannot be regularized, enjoy equality of treatment for himself and his family in respect of rights arising out of past *employment as regards remuneration, social security and other benefits."*

39. This ILO Convention, to which Swaziland is a party, expressly provides that where laws and regulations which control the movement of migrants for employment - such as the Immigration Act – have not been respected, the migrant worker shall nevertheless enjoy equality of treatment in respect of rights arising out of past employment. This is the international labour standard prescribed by the ILO.

40. In deciding a matter, the Industrial court is required to promote the purpose and objects of the Industrial Relations Act 2000 – see section 8 of the Industrial Relations Act, 2000. One of those purposes and objectives is to ensure adherence to international labour standards – see section 4 of the Act.

41. In the **Safika Holdings** case (*supra*) at 1268, the CCMA Commissioner expresses the view that the purpose of denying the right to fair labour practices to illegal migrants is that otherwise *"the resources of the CCMA and the Labour Court would be stretched to the limit as it would open floodgates for all illegal immigrants to challenge the fairness of their dismissal."* The Commissioner appears to be saying that although there are "floods" of illegal immigrants engaged in employment they should be denied recourse for unfair dismissal simply because this will tax the resources of the court. This argument cannot be sustained when the Constitution guarantees all persons in Swaziland equality before the law, equal protection of the

law, and the right to a fair hearing.

42. It is our view that allowing illegal migrants equal protection and remedies against unfair labour dismissal and treatment will discourage the employment of illegal migrants by removing the incentive to exploitation. Furthermore, if illegal migrants challenge the fairness of their dismissal in court, this will have the effect of exposing any illegality that exists. If employers are made aware that illegal migrants have a right of recourse to CMAC and the Industrial Court, they are less likely to breach the provisions of the Immigration Act.

43. It does not seem to the court to be in the public interest to deny the fundamental right to protection against unfair labour treatment to employees who are illegal migrants, nor does enforcing such protection conflict with the fundamental rights and freedoms of others. In the light of the Constitution, it is our view that in promulgating section 14 of the Immigration Act the legislature was content to penalize infringements of the section without the need to prohibit or render unenforceable any contract to engage an illegal migrant in employment. This interpretation is consistent with the international labour standards the Industrial Court is enjoined by the same legislature to uphold.

44. We accordingly hold that migrants may be employees to whom section 35 of the Employment Act applies, even if they are not in possession of a valid work permit at the time of their engagement.

45. It follows that in our judgement it is irrelevant whether the Applicant is a Swazi citizen or a foreign migrant without a valid work permit. In either event he is an employee to whom section 35 applies, and he is entitled to the protection from unfair dismissal conferred by Part V of

the Employment Act.

46. Should we be wrong in our view of the law, we consider in any event that the Applicant has proved on a balance of probabilities that he is a citizen of Swaziland by birth and that he does not require an entry permit in order to work in Swaziland. We refer in this regard to our analysis of the Applicant's evidence contained in our judgement on the application for absolution from the instance. The Respondent led no evidence in rebuttal of the Applicant's testimony, and in its closing argument relied solely on the same inferences, anomalies and improbabilities which it previously argued when applying for absolution. We held in our absolution judgement that the Applicant's testimony was not inherently improbable or incredible. Applying a more rigorous burden of proof to the Applicant at the end of the trial, we are still unable to reject his version as untrue. Whilst his version is extraordinary, experience shows that true events are not always ordinary. Moreover his version is supported by a Swazi birth certificate which has not been shown to be false or fraudulently obtained.

47. Whilst we deprecate the Applicant's apparent lack of candour with the Mocambican immigration officials, this does not mean that his evidence on oath before court should be rejected as false. The failure to disclose his Swazi birth to the Mocambican authorities is more likely motivated by an understandable desire to avoid the bureaucratic consequences of a change in status.

48. We find that the employment contract the Applicant entered into with the Respondent was lawful and valid and that he is an employee to whom section 35 of the Employment Act 1980 applies.

49. The Respondent bears the burden of proving that the termination of the Applicant's services was fair and reasonable – see section 42 of the Employment Act 1980.

50. It is common cause that the Applicant was in the continuous employment of the Respondent as a security guard from 26th May 1997 to 30th January 2002. He had a medical problem with his knees that increasingly handicapped him in the performance of his duties. He was even excused from parading with the other guards because of this handicap. On about 13th January 2002 he attended at Mbabane Government Hospital, having been referred by a doctor at Lobamba Clinic. The specialist at the hospital said that he had no lubrication in his knee joints and the prognosis was poor. On 13th January 2002 he delivered the doctor's certificate to his employer, and requested leave to enable him to consult a traditional healer in Mocambique. According to the Applicant, he was granted permission to proceed on indefinite unpaid leave of absence for this purpose.

51. He underwent treatment by a traditional healer in Mocambique and the ailment in his knees was cured. When he returned to work on the 9th April 2002 he was informed that he had been dismissed in his absence. He was given a letter signed by the Personnel Manager Lawrence Hermansson confirming that his services were terminated on the 30th January 2002. The letter states *inter alia*:

"*According to our records, you absented yourself from your duties on January 14th, 2002 without the consent of a supervisor and/or a*

manager. By February 1st, 2002, you did not return and by your actions, we believe that you left your employment. On April 10th, you returned requesting your job, which was a total surprise to us. During your absence you did not keep us informed or submit any certified medical certificate. Your actions were against Company Rules and Regulations, and left us with no alternative but to apply Section 36(f) of the Employment Act 1980."

52. The Applicant appealed against the decision to dismiss him in absentia. The chairman of the appeal hearing directed that a disciplinary enquiry be held. The Applicant was subsequently called to a disciplinary enquiry on a charge of "*unauthorized absence from duty from January 20th, 2002 to April 10th, 2002*". Following the hearing, his dismissal was confirmed.

53. The Respondent relies upon Section 36(f) of the Employment Act, which provides that it shall be fair for an employer to terminate the services of an employee "*because the employee has absented himself from work for more than a total of three working days in any period of thirty days without either the permission of the employer or a certificate signed by a medical practitioner certifying that he was unfit for work on those occasions.*"

54. It is common cause that the Applicant never produced a medical certificate signed by a medical practitioner. (It is rather ironic that the traditional healer who successfully treated his ailment is not regarded as a medical practitioner for purposes of Section 36(f).) The crisp question for determination in this matter is whether the Applicant had the permission of the Respondent to absent himself from work for the

period 20th January to 10th April 2002.

55. The Applicant gave the following testimony with regard to obtaining the permission of the Respondent:

55.1 On 13th January 2002 he gave the medical certificate to Mr. Vilakati, the Mbabane Base Station Manager and requested permission to go to Mocambique to consult a traditional healer. He did not know how long he would be away, so he did not request for any particular period of absence.

55.2 Vilakati told the Applicant to report at his duty base station at Matsapha where he would get the response to his request.

55.3 The Matsapha manager Mathabela was away on sick leave, so on 14th January 2002 he raised the matter at the morning parade with one Donald Masangane, who was a corporal and the supervisor in charge of the parade. Masangane discussed the matter with one Zwane, who was a corporal in charge of the office in the absence of Mathabela.

55.4 The patrol supervisor later relayed a message from Zwane that the Applicant had been given permission by head office in Mbabane to take leave from 16th January 2002. Nothing was mentioned with regard to the date on which he was expected to return from leave. He heard Masangane shout

to Zwane in the office to be sure to record in the occurrence book that the Applicant had been granted unpaid leave.

55.5 The Applicant went on leave on 16th January 2002. His replacement attended the morning parade.

55.6 The Applicant believed that he had been given indefinite leave. Nothing to the contrary was communicated to him.

56. In cross-examination the Applicant was shown an entry in the occurrence book for the 14th January 2002. The entry reads: "*Thomas Maphosa had been granted unpaid leave from the 16th January 2002 until the 19/01/02 he is expected to be on duty on the 20 Jan 02 he has to go to Mozambique for a cocas* (sic) *at his parental home SIGNED*". The entry is not signed.

57. The Respondent called Donald Masangane. This witness denied informing the Applicant that he had permission to go on leave. He said he had no authority to do so. He said he knew nothing about the circumstances under which the Applicant was granted permission to take unpaid leave. He confirmed that the entry in the occurrence book could only have been made with the authority of senior management.

58. The Respondent also called Lawrence Hermansson, its former Personnel Manager, as a witness. Mr. Hermansson said the proper procedure for leave applications was that a leave application form had to be filled in and forwarded to him at Mbabane head office for his approval. This procedure had been introduced by him. No such application form completed by the Applicant could be located. The

difficulty with Mr. Hermansson's evidence is that he could not remember whether he started working for the Respondent in April 2001 or 2002. If he started in 2002, then the procedure he describes had not yet been introduced when the Applicant requested permission to take leave in January 2002.

59. The Respondent also called one Xolile Mhlanga as a witness. Although Mr. Hermansson had identified the entry in the occurrence book as having been written by one Sindie, the witness testified that she made the entry. She said she did so on the instructions of the patrolman supervisor on duty at the time, but she could not remember who he was.

60. The Respondent has not challenged the Applicant's evidence that he approached the Mbabane Base Manager Mr. Vilakati and requested permission to go to Mocambique to consult a traditional healer, and that he was told to report to Matsapa base station where he would get the response. Mr. Vilakati was not called as a witness. It is also established that the Applicant was granted permission to proceed on leave by senior management, since this is recorded in the occurrence book.

61. The Respondent has not suggested who granted the permission or caused the entry in the occurrence book to be made, nor has it suggested who, if it was not Masangane, conveyed to the Applicant that his request for leave had been granted. Most importantly, the Respondent has failed to call any witness who can tell the court what precisely was communicated to the Applicant with regard to the nature of the permission given to him.

62. The Applicant says he was not told that he had to return to work on 20th January 2002. As far as he was concerned, he was given indefinite leave to attend to his medical problem. He was aware that an entry was made in the occurrence book, but the details of the entry were not conveyed to him. The court finds no reason to disbelieve his evidence in this regard.

63. It is common cause that the Applicant was given permission to proceed on unpaid leave as from the 16th January 2002, but the Respondent has failed to establish that it communicated to the Applicant that the permission was only granted for the period from 16th January to 19th January 2002.

64. Respondent's counsel submits that the Applicant could not reasonably have believed he was being given indefinite leave. We do not agree. The purpose of the leave was to consult a traditional healer for help with a chronic medical condition. Such an enterprise is not usually subject to strict time constraints. The leave was unpaid, so the Respondent would not be financially disadvantaged if the Applicant's absence was protracted. Furthermore, the Applicant's position as a security guard lent itself to being filled on an *ad hoc* basis pending the Applicant's return.

65. In the judgement of the court, the Respondent has failed to prove that the Applicant absented himself from work without the permission of the Respondent. In the premises, we find that the termination of the Applicant's services was substantively unfair.

66. The Applicant also alleges that the termination of his services was procedurally unfair. In this regard he avers that:

66.1 The Applicant was denied representation at the first 'appeal'

hearing on the grounds that he was no longer an employee;

66.2 The Applicant was not given enough time to prepare for his disciplinary hearing;

66.3 The outcome of the disciplinary hearing was predetermined because the decision to dismiss the Applicant had already been taken;

66.4 It was irregular for the Personnel Manager Hermansson to write the initial letter of dismissal, and thereafter to represent the Respondent as the initiator at the appeal hearing and the disciplinary hearing.

67. The court does not consider that any of these averments has any substance:

67.1 The first 'appeal' was really just an opportunity given to the Applicant to make representations to show that he had not repudiated his employment contract by absenting himself for a protracted period of time. The chairman correctly concluded that a formal disciplinary hearing should be convened, and the Applicant was given the opportunity to be represented at the hearing – an opportunity which he declined;

67.2 The Applicant was given fairly short notice of the hearing,

but he did not request a postponement to enable him to prepare and he acquiesced in the hearing proceeding;

67.3 The initial decision to dismiss the Applicant was taken because the Respondent did not keep proper leave records and it believed that the Applicant had absconded. This decision was revoked so as to give the Applicant a hearing. The disciplinary hearing was conducted before a chairman who took no part in the original decision to dismiss, and there is no evidence that his impartiality or judgement was compromised in any way by the earlier decision;

67.4 The Personnel Manager Mr. Hermansson did not exercise any adjudicative role at the appeal and the disciplinary hearing and the fact that he wrote the initial dismissal letter did not disqualify him from participating in the disciplinary process as initiator.

68. In the view of the court the disciplinary process was procedurally fair.

69. The Applicant has not claimed reinstatement to his employment. He is entitled to be paid his statutory terminal benefits and compensation for his substantively unfair dismissal. After carefully considering the Applicant's personal circumstances, his length of service, his clean record and the manner of his dismissal, and taking into account that he could in all likelihood have avoided the termination of his services if he had made a

greater effort to keep his employer informed of the progress of his medical treatment and when he was likely to return to work, the court awards the Applicant 8 months wages as compensation.

70. **Judgement is entered against the Respondent for payment to the Applicant as follows:**

Notice	**817.44**
Additional notice	**377.28**
Severance allowance	**943.20**
Compensation	**6539.52**
TOTAL AWARD	**E 8677.44**

The Respondent is also to pay the costs of the application.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT