**IN THE INDUSTRIAL COURT OF ESWATINI**

**CASE NO. 220/15**

In the matter between:-

**JABULILE NDLOVU** Applicant

AND

**FASHION INTERNATIONAL (PTY) LTD** Respondent

**Neutral citation**: *Jabulile Ndlovu* vs *Fashion International (PTY) LTD 220/15 SZIC 89 (September 24, 2019)*

**Coram**: N.NKONYANE, J
*(Sitting with G. Ndzinisa and S. Mvubu Nominated Members of the Court)*

Heard submissions: 15/08/19

Judgement delivered: 24/09/19

*SUMMARY---Labour Law---Applicant employed by the Respondent as a Final Presser---Applicant getting permission to go to hospital and given four hours---Applicant finding long queue at the hospital and therefore unable to return to work on that same day---Applicant issued with a medical certificate giving her one day off-duty---Upon return to work on the following day Applicant charged with absence without employer's notification and permission---Respondent having issues about the authenticity of the medical certificate issued by the hospital---Applicant given few hours to get ready for disciplinary hearing on the same day that she was served with the charge---Applicant found guilty and dismissed on the same day---Applicant instituting legal proceedings claiming that the dismissal was both substantively and procedurally unfair.*

*Held---The Applicant having been issued with a medical certificate and having been granted the permission to go to hospital, substantively the dismissal of the Applicant was unfair.*

*Held further---The Applicant having not been afforded sufficient time to prepare for the disciplinary hearing, it cannot be said that the disciplinary hearing was procedurally fair.*

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**JUDGEMENT**

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1. The Applicant was employed by the Respondent in June 2007 in the Pressing Department. She remained in continuous employment until 27th January 2015 when her services were terminated by the Respondent.

2. The Applicant claims that the termination of her services by the Respondent was unlawful and unfair. She therefore reported the matter to the Conciliation, Mediation and Arbitration Commission ("CMAC") as a dispute. The dispute could not be resolved by conciliation and the Applicant filed an application for determination of the unresolved dispute with the Court after a certificate of unresolved dispute was issued by the Commission.

3. The Applicant is seeking an order for payment of maximum compensation, notice pay, additional notice pay, severance pay and leave pay.

4. The Applicant's application was opposed by the Respondent. The Respondent stated in its Reply that the dismissal of the Applicant was both substantively and procedurally fair.

5. The facts of this case are fairly simple and largely not in dispute. The Applicant was employed by the Respondent as a Final Presser. The Applicant had an injury on the leg and needed to go to hospital for

medical attention. Indeed, on the 26th January 2015 the company nurse gave her the permission to go to hospital. The company nurse gave the Applicant permission to go to the Raleigh Fitkin Memorial Hospital in Manzini, which is commonly known as the Manzini Nazarene Hospital.

6. The procedure at the Respondent's place is that after consulting the nurse, the employee then goes to the Human Resources Office to sign a leave form indicating the length of time that the employee would be away from the workstation. In this case the company nurse had told the Applicant to tell the Human Resources Office to give her the whole day off-duty as she was going to do a long procedure. The Human Resources Office however did not do that but gave the Applicant only four hours. The Applicant said she arrived at the hospital between 10:00 and 11:00 A.M, and that there was a long queue which caused her to finally meet the doctor at about 5:00 or 6:00 P.M and the whole process finished at about 7:00 P.M.

7. The Applicant was therefore unable to return to work on that day. She told the Court that she was unable to make a telephone call to work to report that she was not going to make it back to work on that day because she had no money. She returned to work on the following day on Tuesday 27th January 2015. She presented the sick note from the Doctor

to the Production Manager, Mr. Vicky Royce. The Production Manager did not accept the document because he had issues with its authenticity. The Applicant was made to sign a warning and was referred to the Human Resources Office. The Human Resources Officer, RW1, also said she had a problem with the sick note. She told the Court that the Respondent did not believe that someone could be in hospital until 7:00 P.M. RW1 prepared the charge and served the Applicant with it. In terms of the charge sheet, the Applicant was required to appear for a disciplinary hearing to be held at the Respondent's Board Room at 10:00 A.M. The disciplinary hearing however eventually started at 2:00 P.M.

8. When the charge was put to the Applicant, she pleaded guilty. The Applicant told the Court that she pleaded guilty because she was acknowledging that she did not return to work on the 26th January 2015 and not that she was admitting to having committed any misconduct on that day.

**9.** No evidence was led at the disciplinary hearing. The Applicant was found guilty on the basis of her plea. The Applicant was dismissed with immediate effect and advised of her right to file an appeal within five

working days. The Applicant indeed filed an appeal on the 30th January 2015.

*10.* The appeal hearing was presided over by RW2, Thomas Christopher Dowding. RW2 is a former employee of the Respondent. At the time relevant to these legal proceedings, RW2 was employed by the Respondent as the Financial Manager. He told the Court that he used to chair appeal hearings at the Respondent's establishment. The Applicant's appeal hearing was not completed. RW2 had queried the authenticity of the sick note and he told the Applicant to go back to the Doctor who issued the sick note. The Applicant said RW2 referred to the sick note as "rubbish". RW2 however denied that. The Applicant indeed left the hearing and went to the Doctor. The Doctor told her that she had no business enquiring about the sick note and that if the employer had a problem with the sick note, the Respondent should have summoned him to appear at the hearing.

11. The Applicant told the Court that because of the way that she had been treated by RW2, she had no doubt in her mind that she was not going to get a fair appeal hearing in the hands of RW2. The Applicant said RW2 had an attitude towards her. She therefore did not return to work as, according to her, the writing was on the wall that she was not wanted at

the Respondent's place anymore, so she went to report the matter at CMAC, Manzini Office as a dispute. At CMAC the Applicant was given a letter to serve the Respondent. The Applicant gave the letter to the Human Resources Officer. The Human Resources Officer asked her if she was going to stand for what she had started.

12. Eventually the parties met at CMAC for conciliation. The Respondent told the Applicant to come back to work, but the Applicant could not do so. She told the Court that she was scared to go back because the employment relationship between parties had irretrievably broken down.

13. The charge that the Applicant was facing was produced in Court and handed in as an exhibit. It was masked as Exhibit B. The charge appears as follows:-

> *"1.* ***Absence without Employer's Notification and Permission:*** *In that on the 26th January 2015 you were given a leave form to go hospital for 4 hours but you never returned or notify your employer of your whereabouts up until you came on Tuesday morning 27 January 2015."*

The Applicant pleaded guilty to the charge. Before the Court she explained that she pleaded guilty because it was correct that she did not return to work, not that she was admitting that she committed any offence.

14. RW1 was asked to clarify the essence of the charge in the light of the fact that the Applicant had the permission to go to hospital and the employer knew where she had gone to. RW1 told the Court that the Applicant failed to return to work on that day and also failed to make a telephone call to notify the employer that she was not going to make it back to work on that day.

15. The Applicant explained to the Court why she was unable to return to work on that day.. She told the Court there was a long queue at the Manzini Nazarene Hospital such that she was able to see the Doctor between 5:00 P.M and 6:00 P.M. She said she eventually got released at about 7:00 P.M. The Applicant's evidence that she was released at 7:00 P.M was corroborated by the Doctor's sick note. The sick note also showed that the Applicant was given one day off-duty and was to resume duty on the following day on the 27th January 2015.

16. The Applicant was therefore able to show that she had a Doctor's note certifying that she was unfit for work and was to resume duty on the following day. Despite the presence of the Doctor's sick note showing that the Applicant was given one day off-duty and was to report to work on the following day, the Respondent went ahead and preferred the charge against the Applicant for failing to return to work. The Respondent questioned the validity of the sick note. One of the queries raised about the authenticity of the sick note was that the date of examination was entered as the 26th January 2014 instead of 2015. The date of issue of the sick note was correctly entered as the 26th January 2015 and that the Applicant was to resume work on the 27th January 2015. The original document was produced in Court. This document bears the official stamp of the Raleigh Fitkin Memorial Hospital and it is dated the 26th January 2015.

17. Looking at the original document as a whole, the only reasonable conclusion that the Court can arrive at is that there was an error in the space for date and time of examination which was entered as the 26th January 2014. The Court says this because the Doctor recommended sick leave for one day and the sick note was issued on the 26th January 2015 and the Applicant was to resume work on the 27th January 2015. If the Doctor recommended one day leave and issued the sick note on the

26th January 2015 and endorsed that the patient was to resume work on the 27th January 2015, it stands a reason that the date of examination could not have been the 26th January 2014 as that would mean that the patient was being given one-year's sick leave. The respondent failed to call the Doctor who issued the sick note to testify at the hearing or in Court.

18. From the evidence led before the Court, it is not difficult to understand why the Respondent made a fuss about the sick note. At that point the Applicant was just too tempting a sheep to be shorn as she had a number of written warnings for coming late to work. The Respondent handed to Court documents showing the Applicant's first, second and final written warnings for late coming. There was no evidence however that disciplinary hearings were held before the written warnings were issued by the Respondent. Further, on the 27th January 2015 the Applicant was not facing a charge of late coming.

19. The last final written warning was issued on the 18th August 2014, (Exhibit 3). The Disciplinary Code of the Respondent was not produced in Court. There was no evidence therefore as to whether or not this warning was still valid on the 27th January 2015 when the Applicant was found guilty and dismissed. From the minutes of the disciplinary

hearing (page 16 of the Respondent's Bundle of Documents) the chairperson did take into account the Applicant's record of late coming. The minutes reflect the following;

*"Your file is very, very bad you have made written promises after promises in personal file that it won't happen again. With all that I have said above I am left with no option but to dismiss you with immediate effect and you can appeal within 5 working days to higher Management of the Company."*

20. The chairman clearly misdirected himself in taking into account the Applicant's records of late coming for the following reasons;

20.1 The Applicant was not facing a charge of late coming.

20.2 Assuming that the record could be taken into account, there was no evidence that it was still valid as the Disciplinary Code was not referred to at the hearing and it was not produced in Court.

21. The Respondent also committed an error in rejecting the sick note presented by the Applicant showing that the Doctor had recommended

one day off-duty and she was to resume duty on the following day on the 27th January 2015. The burden of proof was on the Respondent to prove on a balance of probabilities that the Applicant intentionally or unlawfully failed to return to work. The Respondent could only discharge that burden by calling the Doctor who attended to the Applicant to deny that he/she discharged the Applicant at 7:00P.M and that he/she recommended one day sick leave. The Respondent failed to lead evidence of the Doctor during the disciplinary hearing or before the Court. It cannot be said therefore that the Respondent was able to prove on a balance of probabilities that substantively, there was a fair reason to terminate the service of the Applicant. In an application for determination of unresolved dispute where the Applicant claims that he/she was unfairly dismissed, the burden of proof is on the Respondent to show that the dismissal of the Applicant was for a fair reason and that taking into account all the circumstances of the case it was reasonable to dismiss the Applicant.

**(See: Section 42 (2) of the Employment Act No. 05 of 1980 as amended).**

22. The second part of the charge was that the Applicant failed to notify the employer of her whereabouts up until she showed up on Tuesday morning on the 27th January 2015. The Applicant told the Court that she

did not call her employer to report that she was still in hospital because she did not have money and that she started at work in the morning of that day before she went to hospital. The Applicant's evidence was not challenged during cross examination. The record of the disciplinary hearing also shows that that was the Applicant's version even during the disciplinary hearing. This shows consistency on the part of the Applicant's evidence. The Court will therefore have no reason not to accept her explanation as the truth.

23. The evidence before the Court revealed that the company nurse had recommended that the Applicant be given the whole day off duty because of the procedure that was to be carried out on the Applicant. The company nurse made that recommendation from a professional point of view. The Human Resources Office however decided to go against that recommendation and gave the Applicant only four hours. The Applicant went to a public hospital which is a referral hospital for the Manzini Region. The Applicant told the Court that there was a long queue for the out patients section which led her to eventually see the Doctor after 5:00 P.M.

24. The Respondent failed to successfully challenge the Applicant's evidence that;

24.1 There was a long queue and therefore was unable to see the Doctor immediately upon her arrival at the hospital.

24.2 She eventually had consultation with the Doctor between 5:00 and 6:00 P.M and that the physiotherapy session finished at 7:00 P.M.

24.3 The sick note giving her one day sick leave on the 26th January 2015 was a genuine document that was issued to her by the Doctor at the Manzini Nazarene Hospital.

25. The evidence also revealed that upon her return to work on the following day on the 27th January 2015, the Applicant was served with a notification to attend a disciplinary hearing at 10:00 A.M. The disciplinary hearing however eventually commenced at 2:00 P.M. The Applicant was therefore given just a few hours to get ready for the disciplinary hearing taking into account that the employees at the Respondent's place resumed work at 06:30 A.M. The Applicant was clearly not afforded sufficient time to prepare for her case. The accused employee has a right to be afforded sufficient time to prepare for the hearing and to arrange for representation. The dismissal of the Applicant was therefore also procedurally unfair. **(See: Trauschweizer v Robert Skok Welding (Pty) Ltd t/a Skok Machine Tools (1991) 12 ILJ 1099 (IC).**

26. Further, on appeal the Applicant was instructed by the chairperson, RW2, to go to the Doctor who issued the sick note and obtain more written explanation why she had to spend ten hours at the hospital. That was clearly irregular and uncalled for. That conduct by RW2 confirms the Applicant's evidence that RW2 had an attitude towards her. As already pointed out in this judgement, the burden of proof was on the Respondent to establish the guilt of the Applicant on a balance of probabilities. If the Respondent had questions about the authenticity of the sick note, the burden was on the Respondent to produce proof that the sick note was not authentic by calling the Doctor to testify at the hearing.

27. The Applicant told the Court that she was unfairly treated by RW2 who referred to the document as 'rubbish'. RW2 denied this during cross examination. The Applicant also told the Court that the appeal chairperson had an attitude towards her. RW2 did not deny that the appeal hearing was not completed because he told the Applicant to go back to the Doctor to seek more explanation on the document. The evidence revealed that at CMAC the Respondent invited the Applicant to come back but she failed to do so because she felt that the way that

she was treated at the Respondent's place showed that the employment relationship had irretrievably broken down.

28. The Court will accept the Applicant's version that the appeal chairperson had an attitude towards her and that she felt that it was not worthwhile to continue with the process. The Court comes to the conclusion that the Applicant cannot be faulted for her decision not to continue with the process taking into account the cumulative effect of the Respondent's conduct towards her both at the disciplinary hearing and on appeal in that;

28.1 She was charged and hauled to a disciplinary hearing where she was found guilty and dismissed on the same day and was given just a few hours to prepare for the disciplinary hearing and to get a representative.

28.2 She was charged and found guilty even when there was a medical document certifying that she was attended to at the hospital and given one day off-duty.

28.3 The company nurse had recommended that she be given the whole day to attend to hospital but the Human Resources Office did not heed the recommendation from a medical professional and it gave her only four hours.

28.4 The Applicant had filed an appeal and stated her grounds thereof. The appeal chairman decided to deal with the Doctor's sick note and instructed the Applicant on her own to go and get more explanation about the document from the Doctor instead of the Respondent summoning the Doctor.

28.5 At the time that the Applicant did not return to the appeal hearing she was a breadwinner to her children and had no other employment. It was therefore not an easy decision for her to make.

29. RW1 told the Court that the Applicant was counselled for her late coming. She failed however to produce documentary proof of

the counselling sessions. The Respondent only referred the Court to Annexure "FI 2" (page 15 of the Book of Pleadings). This document only shows that the Applicant made an undertaking in writing not to be absent without having obtained the leave form and also that she was not going to be late for work.

30. The Applicant was not dismissed for late coming or failure to obtain a leave form. On the 26th January 2015 when the Applicant was granted permission to go to hospital, there was no evidence that she had not come to work on time in the morning on that day.

31. The Applicant explained to the Court why she did not return to work on the 26th January 2015. During cross examination she was not discredited. Her evidence was corroborated by documentary proof of the medical certificate that was issued by the Hospital that she had gone to for medical attention. The Respondent raised some issues about the medical certificate, but failed to lead evidence of the Doctor who issued the medical certificate. The Respondent therefore failed to prove that;

31.1 the Doctor's certificate was not a genuine document or that it was not properly issued by the medical practitioner who issued it.

31.2 the Applicant did not have permission to go to hospital on the 26th January 2015.

31.3 the Applicant did have money to make a telephone call and she deliberately failed to notify the employer that she was not going to come back to work on the 26th January 2015.

31.4 it was not true that she was discharged from the hospital at 7:00 P.M which was well after normal working hours at the Respondent's place and therefore could not go back to work on that same day.

32. The Applicant had worked for the Respondent for about seven years. She was found guilty even when she had produced a medical certificate showing clearly that she could not have been able to return to work on the 26th January 2015 because she left the hospital at 7:00 P.M. Even assuming for one moment that there was evidence to justify the verdict, the sentence or sanction of dismissal was too harsh in the circumstances of this case. A sentence that is too severe in a disciplinary hearing amounts to substantive unfairness.

34. The Respondent made an issue about the fact that it was willing to reinstate the Applicant. That the Respondent is willing to reinstate the Applicant does not undo the unlawfulness of the Applicant's dismissal. The Applicant is now employed by eSwatini Government. She has no desire to go back to the Respondent's employ. The Applicant made a claim for leave pay. There was no evidence led however as to how this payment is due. There was also no prayer for costs in the Applicant's application.

35. Taking into account all the evidence led before the Court, the submissions by the parties' representatives and also all the circumstances of this case, the Court will come to the conclusion that the Applicant's dismissal was substantively and procedurally unfair.

36. Consequently, the Court will make the following order;

a) The Applicant's application is granted and the Respondent is to pay to the Applicant the following amounts;

i) Maximum compensation E15, 840.00

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| ii) | Notice pay | E 1, 320.00 |
| iii) | Additional Notice pay | E 1, 461.84 |
| iv) | Severance pay | E 3, 654.82 |
| | **TOTAL** | **E22, 276.66** |

37. The members agree.

**N.NKONYANE**

**JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

For Applicant: Mr. N. Manzini
(Attorney at C. J. Littler & Company)

For Respondent: Mr. M. Mntshali
(Attorney at Simelane Mtshali Attorneys)