IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE Case No. 120/2018

In the matter between:

MYRNAALIBAWAN Applicant

And

JURIS MANUFACTURERS (PTY) LTD Respondent

Neutral Citation: Myrna Alibawan and Juris Manufacturers (Pty) Ltd (120/2018) [2021] SZIC 65 (10 September 2021)

CORAM: **V.Z. DLAMINI - ACTING JUDGE**
(Sitting with Ms. N. Dlamini and Mr. D. Mmango(Nominated Members of the Court)

LAST HEARD: 16 April 2021

DATE DELIVERED: 10 September 2021

Summary: Applicant filed an application for the determination of an unresolved dispute alleging that she was urifairly dismissed by the Respondent. Respondent disputes terminating the Applicant's services.

Held: *That Applicant had the onus to prove that she was dismissed by Respondent. Applicant accordingly discharged her onus by showing that the Respondent communicated the termination of her services through words and conduct.*

Held: *Further that Respondent's directive to Applicant to report for duty inconsistent with reasonable offer of reinstatement and as such Applicant justified in refusing to return to work.*

Held: *Further that Applicant's dismissal was substantively and procedurally unfair.*

JUDGMENT

INTRODUCTION

[1] The Applicant filed an application for the determination of an unresolved dispute on the 26th April 2018, alleging that she was unfairly dismissed by the Respondent on the pt March 2016; consequently, she claimed the following relief:

(a)	Notice pay	El0 600.00
(b)	Additional notice pay	E19 272.80
(c)	Severance allowance	E48 182.00
(d)	Maximum compensation for unfair dismissal	E127 200.00
(e)	Costs of suit	
(g)	Further and/or alternative relief	

[2] The trial commenced on the 2nd October 2020 and at the close of the Applicant's case, the Respondent's counsel moved an application for absolution from the instance on the basis that the Applicant's evidence did not establish a *prima facie* case against the Respondent. After considering the evidence that was led by the Applicant at that stage and arguments by Counsel for the parties, the Court dismissed the application for absolution from the instance on the 15th December 2020. The trial proceeded to the Respondent's case and was finalized on the 16th April 2021; nonetheless, Counsel filed closing submissions on the 20th April 2021.

PLEADINGS

[3] In her Statement of Claim, the Applicant alleged that having been in continuous employment as Line Supervisor since August 2004, the Respondent unfairly dismissed her on the pt March 2016 without a proper disciplinary enquiry. She was earning El 0, 600 per month at the time of dismissal. Furthermore, the Applicant claimed that the genesis of the dispute was her suspension by the Respondent prior to being afforded an opportunity to make representations; however, before her suspension her employer attempted to force her to accept an air ticket for traveling back to her country of origin and when she refused she was locked in her room for two days.

[4] According to the Applicant, there was no basis for the suspension and subsequent house arrest by the Respondent. She also claimed that the Respondent later gave her a salary advice slip which indicated that it was her final salary despite the fact that there had been no formal report on the

outcome of the disciplinary enquiry. As a result, she then reported a dispute for unfair dismissal to the Conciliation, Mediation and Arbitration Commission (CMAC) on the 7th April 2016.

[5] In its Replies, the Respondent denied that the Applicant was dismissed on the pt March 2016 or at all and contended that,in effect the Applicant abandoned her employment by insisting that she had been dismissed despite the Respondent's *bona fide* attempts to clarify the misunderstanding. According to the Respondent, the Applicant was suspended on the 17th February 2016 on suspicion of committing misconduct. Then on the pt March 2016, the Applicant was paid her salary for February 2016, but due to a misunderstanding in the Respondent's administration, the Applicant's salary advice slip was written *'final salary'*.

[6] The Respondent further alleged that the Applicant seized upon the error to mean that her services were terminated and served the Respondent a letter on the 14th March 2016, in which she demanded payment of terminal benefits and compensation for unfair dismissal. In response, the Respondent wrote to the Applicant on the pt April 2016, clarifying that her services had not been terminated and asked her to show cause why her suspension should not be converted to one without pay. Additionally, the Respondent stated that the Applicant's salary for March 2016 was enclosed in the aforesaid letter, but notwithstanding the aforesaid letter, the Applicant proceeded to report a dispute at CMAC on the th April 2016.

APPLICANT'S EVIDENCE

[7] The Applicant testified in-chief that on the 17th February 2016, one of the Respondent's directors gave her a suspension letter and asked her if she wanted to return to her country of origin. She was further asked the whereabouts of her passport because the Respondent wanted to buy her an air ticket to return to her home country the next day. She also told the Court that by the end of February 2016, her salary for February 2016 had not been deposited into her bank account as per the norm; she then called the Production Manager, a certain Mr. Carlos Viloria. Mr. Viloria refened her to the Accountant Ms. Anita who advised her to wait for one of the directors, Mr. Bester who would meet her in Mbabane to give her the February 2016 salary.

[8] It also emerged from the Applicant's testimony that Mr. Bester met her at Nandos eatery in Mbabane where he gave her a letter and enclosed was a cheque for her salary, the letter was marked exhibit ***'A2'.*** She only realized when she was at home that it was written *'final salary'*. She then wrote a letter to the Respondent on the 14th March 2016 and handed it to Mr. Bester, who refused to acknowledge receipt of the letter before seeking advice from the company's attorneys.

(9] The Applicant testified that in the letter dated 14th March 2016, which was marked exhibit *'A3* ', she sought an explanation for the words *'final salary'*, but there was no response from the Respondent; she then

· deduced that her services had been terminated. She further stated that her conclusion that she had been dismissed was further fortified by the fact that her leave pay was included in the *'final salmy* '. Moreover, her salary

for March 2016 was not deposited into her account. What also compounded issues was that she was never informed of the reasons that led to her being investigated.

[10] The Applicant also told the Court that she then reported a dispute for unfair dismissal at CMAC. When the matter was before CMAC for conciliation, the Respondent offered her two cheques in lieu of her salary for March and April 2016, but she did not accept them because she had already reported a dispute. She further declared that because she had a dependant, she looked for another job and was employed around the 21'1 April 2016 while the matter was still pending at CMAC; she was earning a sum ofE7, 000 per month in her new job. She refused to go back to the Respondent's employ because the matter was already at CMAC and she feared for her life after witnessing a certain man being assaulted inside the factory. '

[11] According to the Applicant, on or about the 4th May 2016 while at her new job at Swazi Africa Textiles (SWAT) in Matsapha, the Respondent's Director Mr. Bester, the Human Resources Officer and a police officer came to serve her a certain document. Despite being forced by the trio, she neither took nor signed the document. She revealed that she was not aware that her suspension had been lifted. Lastly, she stated that she was sixty (60) years old and had a dependant back home.

[12] Under cross-examination, the Applicant conceded that even though at the time of suspension the Respondent had undertaken to provide her with alternative lodging, she moved out of the factory to search for her own accommodation. She disclosed that the only time the Respondent offered

money for rent was when she was paid the *'final salary'* on the 1st March 2016.

[13] The Applicant also admitted having received the Respondent's letter clarifying that she had not been dismissed, but asserted that she could not return to the Respondent's employ because she feared being assaulted by the Police after she learned of the two employees that were assaulted during Police interrogation. Nevertheless, the Applicant admitted that the alleged assault was unrelated to her suspension from work.

[14] Furthermore, the Applicant admitted that the Respondent had informed her that exhibit ***'A2*** 'was issued following a misunderstanding, but she elected not to return to work because the Respondent had to pay for the mistake. In any event, the Applicant asserted that she did not accept that exhibit *'A2'was* a misunderstanding.

[15] The Applicant denied that she had deserted employment after securing an alternative job. She added that Mr. Viloria and she were the victims; she maintained that when she was suspended by one of the Respondent's directors, the latter asked the whereabouts of her passport because the company wanted to buy her an air-ticket to return to her country of origin.

[16] The Applicant acknowledged that when the Respondent's Human Resources Officer and the Police Officer came to serve her a document at Swazi Africa Textiles on the 4th May 2016, she never told them that she was already employed by that company.

RESPONDENT'S EVIDENCE

[17] The Respondent led the evidence of one witness, Elman Muzikayifani Ndlovu (RWl), its Human Resources Officer. RWl denied that the Respondent terminated the Applicant's services; he said the latter was suspended pending investigations regarding certain allegations leveled against her by other employees. RWl further disputed the fact that the Applicant was locked inside the company premises while she was on suspension.

[18] RWl told the Court that whilst the Applicant was on suspension, she reported a dispute for unfair dismissal at CMAC and conciliation was held on the 7th April 2016 and he represented the Respondent. According to RWl, the source of Applicant's complaint was the phrase *'final salary'* in exhibit ***'A2*** '; she claimed that the aforesaid words implied that she had been dismissed by the Respondent.

[19] It was RWl's evidence that to confirm that the Applicant had not been dismissed, he went to CMAC carrying a cheque for her two months' salary, which she rejected. Moreover, RWl revealed that the Applicant was ordered to return to work within three (3) days, but she refused. On the 3rd May 2016, the Respondent wrote to the Applicant reminding her that she had been expected to report for work on the 27th April 2016. He denied that the Applicant was harassed when he together with a Police Officer attempted to serve her the letter.

[20] RWl stated that exhibit ***'A2',*** which was captioned *'final salmy of Myrna Alibawan'* was written by the Respondent's Accountant based in the Republic of South Africa. The Accountant did not have a legal

background; hence, she never realized the inconvenience that would be caused by the words she wrote. As the Human Resources Officer, RWl asserted that no decision was taken by the Respondent to pay the Applicant a *'final salary'*. Furthermore, he said it was clarified to the Applicant at CMAC and through the letter dated pt April 2016, which was marked exhibit ***'R2'*** that there had been a misunderstanding, but the Applicant never accepted the explanation.

[21) RWl revealed that the Respondent decided to pay the Applicant by cheque to ensure that she quickly received her salary; other means that were normally used would have delayed her payment. RWl rebutted the allegation that there were employees who were assaulted by Police Officers at the Respondent's premises. He saidapart from that, the Applicant was never criminally charged. He therefore rejected the allegation that the Applicant feared coming back to work because of the likelihood of being assaulted while on the Respondent's premises.

[22) According to RWl, after the Applicant rejected the Respondent's explanation for the words *'final salary'*, the cheque and directive to go back to work, she was deemed to have deserted work as opposed to being dismissed by the employer. Furthermore, RWl stated that the Applicant's desertion manifested itself in her securing alternative employment without notice to the Respondent; consequently, the employer was not liable for her claims.

[23) Under cross-examination, RWl denied that he was never involved in the Applicant's suspension, and those involved were the Respondent's directors, Mr. and Mrs. Bester. RWl could not state the nature of the

allegations that led to Applicant's suspension; however, he revealed that the allegations faced by the Applicant concerned the charges that were faced by Mr. Viloria. RWl nevertheless denied that the Applicant was suspected of using strong language or insults, which were the charges Mr. Viloria faced.

[24] RWl confirmed that the Applicant was normally paid her salary through an electronic transfer into her bank account before the 30th of each month, but following her suspension she received her salary in cash, this was meant to expedite payment of her salary. He disputed that the new mode of payment of the Applicant's salary was sufficient proof that she was no longer considered an employee by the Respondent.

[25] RWl confirmed that when the Respondent wrote exhibit ***'R2'to*** the Applicant, the latter had not received her salary for March 2016, but he insisted that she was being assured in the letter that she would be paid. When RWl was asked why the Applicant was treated differently from the other employees, he replied that the situation she faced delayed payment of her salary, but what was important was that she eventually received her dues. RWl said he could not recall in respect of what months was the cheque he offered the Applicant at CMAC.

[26] RWl denied that he ordered the Applicant to return to work on the 27th April 2016, but said he issued the instruction on the 7th April 2016, but the 27th April 2016 was the second session of the conciliation where the commissioner issued the certificate of unresolved dispute. When it was put to RW I that the non-payment of her salary for March and April 2016 was an indication that she was dismissed, he replied that non-payment of

her salary did not mean that the Applicant should not report to work as instructed.

[27] RWl disputed that exhibit 'R2'was an afterthought meant to correct exhibit ***'A2'.*** He added that it was the employer's right to suspend the employee if it suspected her of wrongdoing and by extension, the employer had the right to either terminate the services of that employee or allow her to return to work. Furthermore, RWl denied that the Applicant was never charged with absenteeism despite not complying with the instruction to return to work because she was already dismissed.

CLOSING SUBMISSIONS

[28] The Applicant's counsel submitted that the following facts demonstrated that the Respondent had dismissed the Applicant:

- The Applicant was offered an air ticket to return to the Philippines within three (3) days;
- She was paid a final salary on the pt March 2016 and was never paid for two successive months;
- The Applicant's final salary included holiday pay (leave);
- Since she was out of work for two months, the Applicant successfully sought alternative employment in April 2016;
- The Respondent's Accountant (Anita) who was alleged to have made a mistake by writing on exhibit ***'A2'*** that the Applicant was receiving her final salary was never called to give evidence to clarify how she made a mistake.

[29] Furthermore, the Applicant's counsel contended that the Applicant's dismissal was substantive unfair because RWl failed to reveal the alleged misconduct for which the Applicant was suspended. He also argued that the Applicant's dismissal was procedurally unfair because she was not afforded an opportunity to state her case at a disciplinary hearing prior to the tennination of her services.

[30] Conversely, the Respondent's counsel submitted that the Court ought to determine whether an employer who had made a mistake should not be allowed to correct the mistake and whether an employee was justified in refusing to accept the rectification of that mistake, but insist that the employer should pay for the mistake. Furthermore, counsel postulated that considering the manner in which the Applicant left the Respondent's employment, the Court should decide whether this constituted a repudiation of the contract of employment and /or whether the Applicant deserted her employment.

[31] According to the Respondent's counsel, an explanation was given to the Applicant regarding the words *'final salary'* that were written in exhibit ***'A2*** 'and that she understood the explanation but nonetheless elected not to accept it because she wanted the Respondent to pay.In addition, Respondent's counsel argued that the Applicant's reasons for not returning to work despite being directed several times and refusing to take the cheque for her salary were unfounded and not attributable to Respondent's conduct.

[32] It was the Respondent counsel's contention that the Respondent had proved on a balance of probabilities that the Applicant had a fixed

intention to leave its employment and never to return, which manifested in her utterances that she was unwilling to accept the explanation; she also refused to accept her salaries and this was with a bad intention of claiming unfair dismissal. Counsel prayed for the dismissal of the Applicant's claims.

ANALYSIS

[33] The Court is called upon to determine whether the Applicant's services were terminated by the Respondent; if our finding is in the negative, then we have to decide whether the Applicant deserted her employment. In the event the Court finds that the Applicant was dismissed by the Respondent, we have to make a further finding whether the Respondent's subsequent conduct constituted correcting a mistake and whether the Applicant acted reasonably by rejecting the Respondent's overture. Finally, where the Court finds that the Applicant was dismissed, we have to determine whether the dismissal was substantively and procedurally fair.

[34] In the case of **Lawrence Vusi Dlamini v Swaziland Tyre Services (Pty) Ltd t/a Max T. Solutions (272/12) [2017] SZIC 25 (April 13, 2017),** his **Lordship Nkonyane J,** as he then was, said the following at paragraph 8:

"The legal requirement or burden of proof on the part of the Applicant is to prove that his services were terminated by the employer and that at the time of termination of his services he was an employee to whom Section 35 applied. "

[35] It is a trite principle that the act of termination of employment must be clear and unambiguous; this was held in the case of **Paul Siba Simelane v Tibiyo TakaNgwane (IC Case No. 171/1998).Even** though that Court's decision was set aside on appeal, the Court of Appeal confirmed the principle in the case of **Tibiyo TakaNgwane v Paul Siba Simelane (ICA Case No. 4/1999).**

[36] In the case of **PAULINE NKAMBULE V SPEEDY OVERBORDER SERVICES (PTY) LTD 380/2013 [2018] SZIC 106 (05 October 2018),** the Court quoted with approval a principle postulated by the learned author **John Grogan: Workplace Law, eighth edition,** that dismissal occurs when the contract of employment is terminated at the instance of the employer and involves communication by the employer to the employee that the employment has come to an end. Such communication may be in the form of words or conduct.

[37] In the determining whether the Applicant has discharged the onus of proving that ,she was dismissed, the Court is mindful of the fact that the parties' versions on the question are mutually destrnctive. In the case of **Bheki Shabalala v Maloma Colliery Xstrata (156/10) [2017] SZIC 27 (27 April 2017),** his **Lordship T.A. Dlamini J** said the following:

"Perhaps as a starting point one needs to point out that in this matter the Court is faced with t1110 mutually destructive versions fi"om both litigants. When faced with such a scenario the proper approach is for the Court to apply its mind to the merits and demerits of all the evidence before it together with the probabilities thereof Thereafter the Court would then be justified in reaching a conclusion which will dispose of the matter. "

[38] It is common cause that eleven (11) days or so after her suspension, Applicant received exhibit ***'Al',*** a letter that enclosed her *'final salary'*. The following surrounding circumstances are quite significant:

- Ther_e js no debate that the Applicant normally received her salary through a direct deposit into her bank account. No reasonable explanation was proffered by the Respondent why it elected to pay her by cheque;
- While it was proven that the Applicant communicated with the Accountant, a certain Ms. Anita about the delay in payment of her February 2016 salary, no evidence was led by the Respondent to explain the delay;
- The Respondent placed a lot of emphasis on the fact that exhibit ***'Al'*** was issued by Ms. Anita and this was corroborated by Applicant's evidence that she communicated with her. There is nothing in exhibit ***'Al'*** showing that it was issued by Ms. Anita. On the contrary, the letter was signed by Mrs. L. Bester, Respondent's co-director;
- Exhibit ***'Al'*** was handed to the Applicant by none other than Mr. Bester, Respondent's other director;
- One of the benefits that were included in the letter was holiday pay also referred to as leave pay.

[39] It is evident that exhibit ***'Al'*** was a decision of the Respondent's directors; it is therefore incorrect to attribute it to the Accountant. Even assuming that it was printed by the Accountant, the directors' act of signing it clearly meant that Ms. Anita prepared it on their instruction, otherwise they would have instructed her to remove the words *'final salary'*. We accordingly reject the Respondent's contention that the

Accountant wrote the letter and was oblivious of the legal import of the aforesaid words.

[40] The Respondent vigorously contended that the words in question were the result of a misunderstanding and that this was explained to the Applicant, but the latter elected to take advantage of the mistake. No evidence was led by the Respondent to explain the source and nature of the misunderstanding in light of the proven facts that the letter was signed and delivered by the directors to the Applicant.

[41] The Court takes a dim view to the fact that the directors who wrote exhibit ***'A2'*** were not called as witnesses to take the Court into their confidence and explain how the letter was issued. No explanation was proffered as to the reasons for not being called to give their version. Another reason that made it more compelling for the directors to clear their name was the Applicant's allegation that one of the directors offered her an air ticket back to her country of origin. Although we agree with Respondent's counsel that the Applicant never mentioned the name of the director, she however used the pronoun *'she'* while narrating the events that occurred at the Respondent's undertaking around the 1?1[11] February 2016. It is common cause that the Respondent had two directors one of whom was a female Mrs. L. Bester.

[42] Nothing more was said by RWl other than that the letter was issued pursuant to a misunderstanding. The Respondent also placed reliance on exhibit ***'R2*** ',a letter from the Respondent said to be clarifying the use of
. the words *'final salary'* in exhibit *'A2* '. While the Applicant admitted that

she received exhibit ***'R2*** ', the letter was not signed, not least by the directors who issued exhibit ***'A2'.*** In as much as its authenticity was not challenged by the Applicant's representative, it is of little value in gainsaying exhibit ***'AZ'.***

[43] The Respondent conceded that exhibit ***'R2'*** was not issued within the seven (7) day period Applicant had requested a response in exhibit **'AJ'.In** exhibit ***'R2',*** the Respondent undertook to pay the Applicant's salary for the month of March 2016; this did not happen. If exhibit ***'A2'*** had been a misunderstanding as contended by the Respondent, the normal mode of payment of the Applicant's salary (bank transfer) should have been reinstated. RWl failed to give a reasonable explanation for this anomaly. The argument that payment by cheque was quicker than a direct transfer is rejected by the Court especially because this proved not to be the case. In the Court view, it is probable that the Respondent's inability to transfer Applicant's salary into her account may have been because the Applicant had been removed from the Respondent's payroll system.

[44] RWl alleged that he went to CMAC on the 7th April 2016 carrying two cheques in respect of two months' salary, but could not recall the months in question. There was a dispute regarding whether RWl was in possession of the cheques on the 7th or 27th April 2016. It is unlikely that the Respondent would have paid the Applicant for the month of April 2016 as early as the 7th because she had not yet earned that salary. Besides *ex facie* the certificate of unresolved dispute, the 7th April 2016 was the date of appointment of the commissioner who presided over the conciliation process.

[45] In the Court's view, offering the Applicant her two months' salary in cheque form at CMAC was nothing but the Respondent's way of trying to save face and/or weaken the farmer's claim that she had been dismissed. In exhibit ***'R2'*** the Respondent advised the Applicant that charges against her would follow, but RWl failed to take the Court into his confidence by disclosing the nature of the charges she faced.

[46] RWl told the Court that while the dispute was pending at CMAC, he instructed the Applicant on two occasions to return to work. Furthermore, exhibit ***'RI'*** records that the Applicant's suspension was lifted on the 27th April 2016. Coincidentally, this was the day the certificate of unresolved dispute was issued by CMAC. The Respondent does not say what was the outcome of its investigations against the Applicant or why it changed its mind in view of the fact that in exhibit ***'R2'*** she was told that disciplinary charges would follow. Evidently, the Respondent's conduct at CMAC and thereafter was intended to obfuscate the fact that it no longer considered the Applicant as its employee.

[47] Based on the above reasons, the Court finds that the Respondent through its directors terminated the Applicant's services. We now turn to determine if the Respondent's conduct of offering the Applicant her salary in cheque form and directing her to return to work constituted a correction of a mistake. Before the Court considers the germane facts on the question under review, it is essential to affirm the law on the subject.

[48] In the case of **Rawlins v Kemp t/a Centralmed (2010) 31 ILJ 2325 (SCA) at page 2329 paragraph 14,** the Court said the following:

"The majority found that Dr Rawlins should not have been awarded compensation, while Willis JA was of the view that she should have been awarded compensation, but no more than six months' remuneration. The principal reason for the decision of the majority was that Dr Rawlins had unreasonably refused the offer of reinstatement. Zonda JP expressed that as follows: '[Dr Kemp] may have treated [Dr Rawlins] unfairly when he dismissed her in the manner in which he did but he had 'a right to seek to right the wrong' that he had committed by offering to put the respondent back in the position in which she would have been had she never been dismissed. It is what I call an employer's 'right to right a wrong'. And, if the offer was genuine and reasonable, as it has been conceded on behalf of [Dr Rawlins] it was, I cannot see why [Dr Kemp] must be ordered to pay her compensation which would not have arisen if the respondent had accepted the offer of reinstatement. In my view it is very important to affirm the employer's 'right to right a wrong' that he or she has made in these kinds of circumstances. If an employer unfairly dismisses an employee and he wishes to reverse that decision, he must be able to do so,

and if the employee fails to accept the offer for no valid reason, the employer has a strong case in support of an order denying the employee compensation. "

[49] Then in the case of **Cutts v Izinga Access (Pty) Ltd (2004) 25 ILJ 1973 (LC)at page 1978 paragraph 28,** the Court made the following observation:

"It is *against this background that the applicant's rejection of the offer of 10 September 2001, as set out in para 10 above, has to be assessed. The offer* is *preceded by an apology and* is *unconditional. On the face of it, it*

completely cures the unfairness of the retrenchment. in ordinary

commercial disputes this would have been the end of the matter and the applicant would have had no cause, nor wish, to continue with the litigation. However, the employment relationship is far removed from an arm's length commercial relationship. It is a relationship of trust, and once the trust has been broken, it would be unreasonable to expect a party to continue with the relationship. Accordingly, I find that it will be fair to reject an offer of reinstatement if the relationship of trust between the employer and the employee has been broken. "

Also see: **Mamabolo& others v Manchu Consulting CC (1999) 20 ILJ 1826 (LC)** and **Mkhonto v Ford NO & others (2000) 21 ILJ 1312 (LAC)**

[50] Unlike m the present case, the employers in the above cited cases unequivocally acknowledged that the services of their employees had been terminated unprocedurally and made genuine offers to reinstate them. In the present matter, the Respondent denied that it had terminated the Applicant's services; it contended that she was on suspension and hence had prematurely reported a dispute for unfair dismissal at CMAC.

[51] The statiing point should have been for the Respondent to admit that it had terminated her services unprocedurally, and then follow that with a genuine offer of reinstatement. Instead the opposite occurred, the Applicant was ordered to go back to work and her refusal to return to work was deemed to be absenteeism.

[52] We find that the Respondent never made a genuine offer of reinstatement to the Applicant. Accordingly, the reasonableness or otherwise of the Applicant's reasons for refusing to go back to work is not decisive. In any

event, from an objective point of view and considering all the circumstances of the case, it would be unreasonable to expect the Applicant to trust the Respondent especially because it failed to genuinely admit that she had been dismissed albeit mistakenly. In the Court's view, the Respondent only aclmowledged a typographical error of sorts, but we have found that the proven facts were inconsistent with that version.

[53] The Respondent took issue with the fact that the Applicant had looked for another job while under suspension and/or while the matter was pending at CMAC. We have already found that the Respondent never paid the Applicant her March 2016 salary. The aforegoing fact coupled with exhibit ***'A2'*** which advised her that her February 2016 salary was final, the Respondent's failure to clarify ***'A2'*** within the seven (7) days and the fact that the Applicant had a dependant must have weighed heavily on the Applicant's culminating in her looking for the job. We find that she acted reasonably under the circumstances.

[54] The Court also finds that the Applicant acted reasonably by rejected the Applicant's directive to return to work because same did not amount to a reasonably offer of reinstatement.

[55] **Section 42 (2)** of the **Employment Act of 1980** provides that the employer has the onus of proving that the reason for terminating an employee's services was one permitted by **Section 36** and that taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee.

[56] **RWl** failed to disclose the allegations for which the Applicant was being investigated. Moreover, in as much as no disciplinary hearing was held, the Respondent failed to take advantage of the fact that it could still prove anew the reason for terminating the Applicant's services. We find that the Applicant's dismissal was neither for a fair reason nor was it reasonable; consequently, the Applicant's dismissal was substantively unfair. It is beyond doubt that no disciplinary hearing was held prior to the Applicant's dismissal. The Court accordingly finds that the Applicant's dismissal was procedurally unfair.

AWARD

[57] The Court has found that the Applicant was dismissed by the Respondent and such dismissal was substantively and procedurally unfair. The Applicant is therefore entitled to the terminal benefits claimed. Furthermore, in awarding compensation to the Applicant, we have considered the following circumstances:

- She was continuously employed by the Respondent for eleven and a half years and was sixty (60) years at the time of dismissal;
- Moreover, at the time of dismissal, the Applicant had a dependant;
- She secured alternative employment within a month of being dismissed, but her earning capacity decreased by a third.

[58] The Court holds that an award of six (6) months' salary to the Applicant as compensation for unfair dismissal would be fair and equitable in all the circumstances of the case and that is what the Court shall award her.

[59] In the result, the Court orders as follows:

(a) The Respondent is directed to pay the Applicant the following terminal benefits and compensation:

Notice pay	El0,600
Additional notice	El 9,272.80
Severance allowance	E48, 182
Six months compensation	E63, 600

(b) Each party to pay its own costs.

The Members agree.

V.Z. DLAMINI

ACTING JUDGE OF THE INDUSTRIAL COURT

FOR APPLICANT : Mr. E. Dlamini

FOR RESPONDENT : Mr. S. Dlamini
(Musa M. Sibandze Attorneys)