



**CONCILIATION,
MEDIATION AND
ARBITRATION
COMMISSION
(CMAC)**

MBABANE

DSPT NO. 012/05

In the matter between:-

Boy Wilmoth Kunene

Applicant

And

Cabinet Office

Respondent

ARBITRATION AWARD

RE: ALLEGED UNFAIR SUSPENSION

DATE OF ARBITRATION: 22nd March 2005

VENUE: CMAC Offices, 1st Floor, Mbabane House

1. PARTIES AND HEARING:

The Applicant is Wilmoth Boy Kunene of P.O. Box Sandla, Mbabane who I will hereinafter refer to as Applicant, the employee, simply as Wilmoth B. Kunene. Wilmoth or Mr. Kunene.

The Respondent is Cabinet Office, a government of Swaziland Ministry of under the Prime Minister's office. I will hereinafter refer to it as the Respondent, Cabinet office, Prime Minister's office or simply the Swaziland Government.

The Applicant is represented by Mr. Selby Dlamini, a Labour Consultant, while Ms Hlobisile Ndzimandze, a crown counsel from the Attorney General's office represent the Respondent.

I explained the stages and the process to the parties in order to ensure that both parties are aware of what is required from them, and what to expect from each other and from the arbitrator. The parties agreed to the procedure as explained, hence the procedure was utilized during the process accordingly.

During the pre - arbitration meeting the Respondent's attorney had raised a point in limine to the effect that the Respondent had not consented to arbitration as the process was not explained to him. However on the first day of arbitration the Respondent withdrew this objection to arbitration.

2. ISSUES IN DISPUTE

The arbitration relates to an alleged unlawful suspension of Wilmoth Boy Kunene by the Respondent on 12th June 2002. The Applicant reported a dispute with the Commissioner of Labour in terms of Section 76 of the Industrial Relations Act 2000 and the dispute was transmitted to the Conciliation, Mediation and Arbitration Commission (CMAC).

The matter was conciliated upon and remained unresolved hence **certificate no. 013/2005** issued as proof therein. The parties then requested for arbitration in terms of Section 85 (3) of the Industrial Relations Act 2000 and I was appointed arbitrator to the dispute on 31st January 2005. The Applicant claimed for the following:-

- (i) Set aside the suspension
- (ii) Reinstatement to position of accountant
- (iii) Award the payment of salary arrears from date of suspension to date of resolution of the matter
- (iv) Payment of housing allowance (E190.00) from date of suspension to date of resolution of the matter.

3. BACKGROUND OF THE DISPUTE

It is common cause that Applicant was employed by the Respondent on 19th January 1984 as an accountant and was in continuous service until suspension on 10th June 2002.

The arbitration was persuaded by Applicant to set aside the suspension and reinstate Applicant accordingly with arrear wages and arrear housing allowance, because the suspension was unlawful.

On the other hand the Respondent advanced his opening statement to the effect that the suspension was lawful and it was according to the relevant laws of the country and that the Respondents were not justified to reinstate the Applicant.

4. ISSUES TO BE DECIDED

The question I have to determine is whether or not the Respondent conducted himself in a fairly and lawfully manner when suspending Applicant. It is inevitable therefore that in order to arrive at my decision a quick recount of the facts as outlined by witnesses in their evidence needs to be done.

5. OVERVIEW OF THE EVIDENCE

The Applicant's case was that he was employed by the Swaziland Government on 19th January 1984. Applicant remained in peaceful employment until 12th June 2002 when he was suspended by the Respondent for allegations of fraud.

Under oath he stated that he was still in suspension without pay, hence he would like the arbitrator to set aside the suspension and reinstate him into his position of accountant and subsequently award payment of salary arrears from date of suspension until the resolution of this matter.

Lastly the Applicant sought the payment of housing allowance of E190.00 (One Hundred and Ninety

Emalangeneni only) per month from the date of suspension until the resolution of the matter.

Applicant continued to say that he was married with eight children and was now living on handouts.

The Respondent's case was to the effect that on 8th May 2002 the police arrested Applicant in charges of fraud and on 10th May 2002 Applicant appeared before Magistrate Court on a bail application.

The fraud was at Cabinet office. The steps that were taken by the Respondent were to seek authority from the Director of Public Prosecutions to suspend Mr. Kunene and after getting the authority the Applicant was suspended without pay by the Secretary to the Cabinet who has authority to suspend as he she was the controlling officer at Cabinet. The Respondent continued to say that Applicant was still on suspension without pay until finalization of the criminal case in Court. He confirmed that they were not going to reinstate him until the criminal case was finalized in Court and that they won't pay him his salary arrears and housing allowance as a result.

6. ANALYSIS OF THE EVIDENCE AND ARGUMENTS.

Suspension from employment has to comply with certain provisions of the law.

In terms of Section 39 (1) and (2) of the Employment Act 1980 as amended. An employer may suspend an employee from his or her Employment without pay where the employee is remanded in custody or has or is suspended of having committed an act which, if proven would

justify dismissal or disciplinary action. If the employee is suspended under Section 1 (b) the suspension without pay shall not exceed a period of one month.

However this Section does not apply to Applicant because in terms of legal notice no. 15 of 1989 “all public officers except those whose posts do not appear in the Government Establishment register are hereby together with their employers exempted from Part V, VII, XI, and XIII of The Employment Act 1980 reads:-

Part V - Termination of contracts of employment

- (i) Application
- (ii) Probationary period
- (iii) Periods of notice by employer and employee
- (iv) Severance allowance
- (v) Employee’s services not to be unfairly terminated
- (vi) Fair reasons for the termination of an employee’s services
- (vii) Termination of services due to employer’s conduct
- (viii) Certificate of employment
- (ix) Suspension of employment
- (x) Employer to give notice of redundancies
- (xi) Remedies against unfair termination of services
- (xii) Burden of proof
- (xiii) Repatriation of employees
- (xiv) Offences under Part V

Part VII - Registration of employers

- (i) Interpretation
- (ii) Delivery of documents from the Fund

- (iii) Non - contributing employers to deliver documents
- (iv) Labour Commissioner to maintain registry

Part XI - Employment Services

- (i) Interpretation
- (ii) Evidence of skill and experience and particulars of employment vacancies
- (iii) Private employment agencies to be authorized
- (iv) Power to inspect etc.
- (v) Records and registers
- (vi) Restriction on charges
- (vii) Exemptions
- (viii) Regulations
- (ix) Offences under Part XI

Part XIII - Labour clauses (public contracts)

- (i) Provisions, etc. deemed to be included in public contracts
- (ii) Wages to be paid and conditions of employment to be observed
- (iii) Labour Commissioner to prepare schedule of wages etc.
- (iv) Contractor to certify wages and conditions
- (v) Industrial Court to decide question on wages etc.
- (vi) Provisions applicable to sub contracts
- (vii) Contractor to file certificates
- (viii) Contractor to supply information
- (ix) Labour Commissioner may arrange for employees to be paid
- (x) Contractor to display notices containing conditions of work
- (xi) Failure to comply with Part XIII

In the circumstances therefore the rationale behind quoting this section was aimed at throwing some light in how other pieces of legislation view suspension. Further this is also aimed at showing the parts of the Employment Act that exempt certain categories of Public Servants.

Toney Healy & Associates, Industrial Relations Consultants in their labour tones archive 2001 have stated that:-

“ Perhaps the trust common form of employee suspension arises when an employer suspends an employee prior to and until the employee attends a disciplinary enquiry, the details of which have been included in a notice to attend a Disciplinary Enquiry issued to the employee by the employer. The suspension of an employee prior to a disciplinary enquiry would ordinarily occur when the employer believes the company would be prejudiced by the continued presence of the employee at work up until the disciplinary enquiry. For example, if an accountant was accused of fraud, his or her continued presence within the Accounting Department prior to the disciplinary hearing may well prejudice the company”.

This then helps to show that suspension must not be used indiscriminately. It has become a general rule that disciplinary hearing must be held either before suspension or after suspension depending on the gravity of a case at hand.

In this case as I have stated earlier on that the Employment Act 1980 is not applicable I am

therefore compelled to refer to *the theft and kindred offences by public officers order 1975.*

In terms of Section 3 (i) (a) of the theft and kindred offences by public officers order 1975 it is stated that “ Notwithstanding any other law or any terms and conditions of Employment, where a responsible officer has reasonable grounds to believe that a public officer has committed theft in respect of any public property, he may, after consultation with the Director of Public Prosecutions, suspend such public officer from the exercise of the powers and functions of his office with a view to instituting disciplinary or criminal proceedings against him provided that where it appears to the responsible officer that the alleged theft has resulted or is likely to result in the loss of property, the responsible officer shall immediately suspend the officer and not later than seven days after such suspension and without prejudice to any action taken or to be taken by the police in respect of the alleged theft, refer the matter to the Director of Public Prosecutions”.

It is clear from the afore - mentioned section that the legislator gave powers to the responsible officer to suspend an employee pending instituting or disciplinary proceedings or instituting of criminal proceedings.

This section does give powers to the responsible person to suspend an officer pending instituting of disciplinary proceedings and instituting of criminal proceedings.

In the circumstances therefore it goes without saying that the law gives the responsible officer a choice as to whether suspend an employee pending instituting

of disciplinary proceedings or suspend an employee pending instituting of criminal proceedings.

The period of suspension without pay must be reasonable so that the matter would be finalized at the earliest opportunity to avoid unnecessary suffering by either party. If the period of suspension without pay is too long, then such suspension appear to be a means of punishment before the actual punishment is meted out whether by a form of disciplinary enquiry or a Court of Law. When this is allowed to take place, you find out that at the end of the day an employee has suffered double jeopardy which end up being referred to an unfair labour practice. The spirit of Section 3. The Theft and Kindred offences by public officers order shows that the legislator wanted suspension to be invoked for a purpose, either for instituting disciplinary proceedings or instituting criminal proceedings so that matters could be concluded within a reasonable period, hence having justice not only being alone, but having justice also being seen to be done.

7. THE AWARD

Having considered all the evidence and arguments of the parties, I am satisfied that the suspension without pay was not reasonable as it was too long without any action being taken.

It must be noted that in the case of a Civil Servant suspension without pay is effected pending a disciplinary hearing or Criminal proceedings. The Theft and kindred offences by Public Officers Order refers.

In this case the Respondent chose the route to Criminal Proceedings, however there is no convincing

evidence to the effect that all these years the case has been pending before Court. There is evidence to the effect that at some stage this case was struck off the roll and the bail given back to Applicant. I am therefore persuaded by such evidence to deduce that during that period the case was no longer pending before Court, hence the continued suspension without pay was therefore illegal.

I have noted that Applicant requested to be reinstated and I am of the view that this request fail. However looking at the length of suspension without pay to me it appears to be unreasonable and severe punishment on its own. I have therefore decided to award the Applicant back payment of his monthly salary and housing allowance with effect from when the case was no longer pending before Court up to the period when it was then pending before Court.

DATED AT MBABANE ON THIS 19th DAY OF MAY 2005.

**SELBY THAMSANQA MAGAGULA
ARBITRATOR**