CONCILIATION, MEDIATION & ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI SWMZ 270/08

In the matter between:-

OWEN DLAMINI **APPLICANT**

And

O.K. BAZAARS T/A SHOPRITE CHECKERS **RESPONDENT**

CORAM:
Arbitrator **:** **Ms K. Manzini**
For Applicant **:** **Mr. J. Dlamini**
For Respondent : **Ms. P. Dlamini**

ARBITRATION AWARD

1. PARTIES AND REPRESENTATION

1.1. The applicant herein is Mr. Owen Dlamini, a Swazi male adult of P.O. Box 1158, Manzini. He was represented by Mr. John Dlamini, a union official from CAWUSWA (Commercial Allied Workers Union of Swaziland)

1.2. The respondent is O.K. Bazaars t/a Shoprite Checkers, a legal entity, which obtained corporate status in terms of the Companies Act 7/1912. The respondent was represented by Mrs. Pamela Dlamini, who is the respondent's Regional Personnel/Administration Manager.

2. ISSUES IN DISPUTE

2.2. The certificate of unresolved dispute number 656/08, issued in relation to this matter provides that the issues in dispute are the following :-

2.2.1. Reinstatement or alternatively
2.2.2. Notice pay = E2 570.81
2.2.3. Additional notice = E5 932.63
2.2.4. Severance pay = E14 831.59
2.2.5. Unauthorized deductions = E642.93
2.2.6. 12 months compensation for unfair dismissal = E30 849.72

3. SUMMARY OF EVIDENCE AND ARGUMENTS

The evidence summarized herein relates only to the key aspects that have influenced the final award. The applicant himself was the only witness who was called to testify in support of his case. The respondent on the other hand called Ms Matsibo Mahlalela, and Mr. Albert Fakudze to give oral testimony in support of the respondent's case.

THE TESTIMONY OF MR. OWEN DLAMINI

Mr. Dlamini testified under oath that he was employed by the respondent company in September, 1992 as a storeroom controller. He stated that prior to his dismissal he had had a clean disciplinary record.

The applicant testified that on the 25th of June, 2008 he had been issued with a suspension letter, which effectively suspended him pending a disciplinary hearing to be held on the 7th of July, 2008. He stated that the said hearing was held on an earlier date than that which had been indicated on the

said letter, as he received a telephone call from the initiator (Ms. Matsibo Mahlalela) summoning him to attend a hearing scheduled to take place on the 1st of July, 2008.

-3-

The witness stated that the bringing forward of the hearing had caused him hardships, as he was unable to get hold of someone to represent him in time, and to prepare for the hearing. He stated that he had to secure another person to represent him, as he was unable to find his original representative and to tell him of the change in the date.

Mr. Dlamini testified that he only had about fifteen minutes to briefly talk to his new representative before the commencement of the hearing. Mr. Dlamini testified that he had informed the chairperson of the disciplinary hearing of his problems regarding the lack of preparation for the hearing, but the presiding officer had told him that he would not have the time to hear the matter at a later stage, and insisted that they proceed.

The applicant stated that according to the charge sheet he had been presented with, he had been charged with the offences of gross misconduct, in that on the 20th of June, 2008, he had allegedly requested one Colani Dlamini to swipe his card in order for him (applicant) to get paid on days on which he was not at work. He was also charged with asking one Musa Gina, on the 17th and 18th of June, 2008, to swipe his card so that he could get paid on days on which he was not at work. He was effectively charged with committing a fraudulent act.

-4-

The applicant stated that he was not aware of the existence of such a charge, or even such a workplace rule. He stated that to his knowledge the only rule that existed was one that prohibited workers from swiping other people's clocking cards. He stated that he had not swiped anyone else's card and neither had he requested anyone to swipe his card. As a result, he strongly believed that he was not guilty of the charges he had been accused of.

The applicant's testimony was that even if he had asked someone to swipe his clocking card for him, he would still not have jeopardized the company in any way. He stated that the clocking system was designed such that if a person's card was swiped before his official time this for reporting for duty, the machine would signal that this was an "unauthorized" clocking in, or it would signal that the holder of the card was "early in". The applicant stated that if the system signaled in the aforesaid manner, then there would be no payment due to the card holder. He sated that the company had not suffered any loss, and even at the hearing he was not told exactly how much money the company had lost, so as to substantiate the allegations of fraud against him.

-5-

The applicant recounted the events that led to the charges that were leveled against him. Mr. Dlamini stated that on the 19th of June, 2008 he and other people he worked with had been counting stock, and had knocked off at about five o'clock in the late afternoon. He stated that the agreement between them was that they would resume the stock - take the next morning at about seven o'clock, as this would enable them to hand the stock over to other people who reported for work at eight o'clock. According to Mr. Dlamini he was not able to make it to work at the appointed time as the bus he was traveling in had broken down. The applicant stated that he had called the gentleman he was to work with and told him of his predicament, and further requested that he should inform the sales manager of his plight if eight o'clock struck before he arrived. Mr. Dlamini stated that his official reporting time was eight o'clock, and the people he worked with reported at seven o'clock each morning.

The applicant stated that he arrived at the work place at around twenty minutes past eight, and found that the gentleman he worked with had actually clocked him in by swiping his card at twenty - five minutes to eight o'clock. Mr. Dlamini stated that he was informed by the security guard that his card had already been clocked. He stated that he enquired from the people he worked with about the whereabouts of his card and was told that one of them had

-6-

swiped him in. Mr. Dlamini stated that the person who swiped in told him that he had been trying to be helpful, as he had heard about the breakdown of his bus.

Mr. Dlamini submitted a document labeled "A5" which is a statement dated the 1st of July, 2008. He stated that he was the author of this note, wherein he tried to explain to the chairperson of the disciplinary hearing that he had simply requested that Colani Dlamini should continue with the stock - take when his bus brokedown. He stated also in the note that he had not asked Mr. Dlamini to clock him in, and explained that Mr. Dlamini had probably misunderstood him.

During the cross -examination it was put to Mr. Dlamini that the notice to appear at the disciplinary hearing had been served on him on the 20th of June, 2008 and it called him to a hearing scheduled for the 25th of June, 2008. Ms Dlamini put it to the applicant that this hearing had later been postponed to the 1st of July, 2008, according to Ms Dlamini this constituted sufficient time for the applicant to prepare for the hearing. Mr. Dlamini stated that he had only had five days to prepare, and had secured representation from a person who was not employed by the company. Mr. Dlamini stated that the chairperson had insisted that he be represented by someone who was employed by the company

-7-

and he had been forced to hastily ask someone who worked at the shop to represent him.
Ms. Dlamini asked why this was not in the minutes that had been signed by the applicant himself. The applicant insisted that this had taken place, but before the actual hearing commenced.

The applicant was referred to a statement that he had written which was marked "Exhibit 1", wherein the applicant stated that he had "asked" Colani, to do something. The applicant explained that he had not meant that he "asked" Colani to swipe his card, but had actually meant that he had asked Colani to explain to Ms Matsibo Mahlalela that he was held up by the bus which had broken down.

Ms. Dlamini referred the applicant to the second part of the statement which stated that he had asked Musa Gina to swipe him out on Monday as he was in hospital. Mr. Dlamini stated that he had written this statement on the 20th of June, 2008, after Colani had swiped his card, and had just written that paragraph to avoid an argument with Ms Matsibo Mahlalela. He stated that he had not even been a work on the 16th of June, (the alleged Monday) as he had been unwell, and had gone to hospital.

-8-

Ms Dlamini put it to the applicant that he had been at work on this day (16th June, 2008), but had disappeared from work without telling the Sales Manager (Ms. Mahlalela). She also put it to the applicant that despite the fact that he was no where to be found on this day, somehow his card had been swiped to clock him out at the end of the working day. The applicant stated that it was true that he had left work at about eleven o'clock in the morning, and had gone to hospital as he felt unwell. He stated that he had hoped to return quickly, but had found a long queue at the hospital. He stated that he had a sick sheet, but could not find it.

Ms Dlamini put it to the applicant that if he had genuinely been sick, he would have informed his supervisor, and left with the proper authority (even swiping out when he left for the hospital). Mr. Dlamini stated that he had not told his supervisor, but had told his work mates, as he thought he would return quickly. He stated that he suffers from ulcers, and hoped to get an injection from the hospital and return to work quickly. Ms Dlamini put it to the applicant that this did not explain why he had left without reporting to his supervisor, and had not swiped out at the time he left work to go hospital.

-9-

Ms. Dlamini then asked the applicant about the statements made by Musa Gina, and Colani, who all said they had been asked by the applicant to swipe his card. The applicant stated that the two gentleman had implicated him because they feared Ms Mahlalela to such an extent that they ended up writing the statements wherein they implicated him.

Under cross - examination the applicant insisted that he had tried to prevail upon the chairperson of

the disciplinary hearing to give him more time to prepare, but the chairman had insisted on proceedings with the hearing. He stated that he had been suspended on the 20th of June, 2008 and though he had until the 7th of July to look for representation. Instead, he received a call that called him to a hearing on the 1st of July, 2008 and at that point he had not had the opportunity to go to town to get someone to represent him. He stated that he resides in Gundvwini, which is some distance out of town.

The applicant further reiterated that he was not aware of the existence of a company rule that made asking someone to swipe your clocking card a dismissable offence. He stated that he had read the rules and regulations, but had not encountered such an offence at all.

-10-

THE TESTIMONY OF MS MATSIBO MAHLALELA

The witness gave evidence under oath, and testified that she is currently employed at the respondent company as a Sales Manager.

According to the witness, she had known the applicant for about two to three months, and in that time he had not been punctual in terms of reporting for work. She stated that when she checked his clock-in times, she discovered that he was nearly always late.

According to Ms Mahlalela on the 20th of June, 2008 she had meant to be off from work, but had gone there to complete a particular task that she had not finished. She stated that she had gone to the stock room to look for the applicant, but had not found him there, she stated that she instead found Musa Gina and Colani Dlamini. She stated that she enquired from the security personnel about the applicant's whereabouts, and was told that he had not yet arrived, but when she checked the clock reports, these indicated that he had been clocked in. Ms Mahlalela stated that she then asked Colani and Musa who had been responsible for clocking the applicant in. The witness stated that both these gentlemen had admitted that the applicant had at different times asked them to clock him in as he tended to be late.

-11-

Ms. Mahlalela then requested that the two gentlemen write statements regarding this, and put them in separate rooms. Ms Mahlalela stated that the two gentlemen were not pressured by her to write the statements wherein they implicated the applicant, and emphasized that she had left them to formulate what they put in their statements on their own.

The witness testified that when the applicant eventually arrived she confronted him about the allegation that he had asked the two gentlemen to clock him in, and gave him the dates on which this allegedly occurred. Ms Mahlalela stated that the applicant had apologized, and that when she asked him to write a statement, he had complied, and even proceeded to apologise in his statement, and further stated that he would not do it again.

Ms. Mahlalela stated that at the disciplinary hearing the applicant had not indicated that he had failed to secure representation. She stated that he had initially wanted to use someone from outside the company, but this was not permitted by the chairman.

-12-

The witness testified that on the 16th of June, 2008, Mr. Dlamini (the applicant) had disappeared from work without informing his superiors. She stated that his superior, Mr. Frank Sukati, had not known where he had disappeared to, yet he had reported for work in the morning. The witness stated that his supervisor had knocked off, and even at that time the applicant was still missing. The witness stated that the following day, Mr. Dlamini had not volunteered any information, or tried to explain his absence. She stated that she had to actually go to the extent of asking him where he had disappeared to, and he had told her that he had gone to hospital. Ms. Mahlalela stated that even on this day, the clock reports showed that he had been swiped out at knocking off time, yet he had been missing since the morning hours.

Ms. Mahlalela stated that even though the applicant claimed to have paid a visit to the hospital, he had failed to produce a valid medical certificate, and had produced one that had a date that did not tally with the date of his disappearance from work.

Ms. Mahlalela stated that when she laid charges against the applicant she had invoked a rule that provided that when an employee is absent from work, they have to produce a valid medical certificate, and also another rule that stated that all

-13-

employees should clock their own cards, and it further provided that a breach of this rule amounted to the commission of a fraudulent offence.

During cross - examination the witness was asked why the applicant was never issued with any written warnings, yet the witness had stated that he was habitually late, and was also generally untrustworthy? Ms. Mahlalela stated that she had still been conducting investigations into the applicant's behaviour, and stated that the events of the 16th and the 20th had confirmed her suspicious, and this was further supported by clock reports, and security reports.

Ms. Mahlalela maintained under cross - examination that Colani Dlamini and Musa Gina had not been pressured into writing their statements, as they had not been forced in anyway. She stated that the procedure at the company called upon workers to be made to write statements or reports on incidents, which reports would be kept in file. She stated that this was a common rule, known to all the staff.

Mr. Dlamini put it to the witness that the applicant had not known about this rule regarding the writing of statements, and that he further denied ever stating that he would never again commit the alleged act of asking other workers to swipe his card for him.

-14-

Mr. Dlamini also put it to the witness that it would have been more procedurally correct to have Colani and Musa testify at a proper disciplinary hearing, rather than to have them write statements. Ms. Mahlalela was asked if she was aware why the chairperson had not postponed the hearing in light of the applicant's lack of preparedness for the proceedings. Ms. Mahlalela stated that she could only state that the applicant had not been allowed to have representation from outside the company. She stated that she was aware also that the applicant had asked the chairperson to allow him this kind of representation on the 1st of July, 2008 which was the date of the hearing, but clarified that she could not explain why the chairperson had opted to proceed with the hearing, as only he could explain, since it was his decision.

Mr. Dlamini pointed out that the company rule (paragraph 6 of the Company's Rules and Regulations) pertained to employees being enjoined to swipe their own cards, and that the charge against the applicant was different as he had been charged with asking the employees to swipe his card. The witness insisted that the applicant had deliberately altered a clock report, and that his actions had been adequately covered by the said rule, since he had perpetrated a fraud against the company.

-15-

Mr. Dlamini asked the witness how much money the company is alleged to have lost on account of the alleged fraud on the part of the applicant? The witness stated that when the applicant had disappeared from work on the 16th of June, 2008, production had been lowered, as he was scheduled to be at work, and there was no one there to perform the actual duties he had been assigned to perform. She stated that even though he was not at work, he had failed to produce a valid medical certificate, and yet the employer had had to pay him for eight hours of work because his card had been swiped at the end of the working day. She also stated that the same occurred on the 20th of June because he was paid as from 8:00 a.m., yet he only arrived at 8:20 a.m.

Mr. Dlamini enquired as to the whereabouts of Colani and Musa. The witness stated that Colani's

services had been terminated, and she did not know where he was. She stated that Musa Gina, had been given a final written warning, and was still working for the respondent company.

Mr. Dlamini asked why the respondent had not called these gentlemen to testify at the hearing, especially Musa who still worked for the company? Ms. Mahlalela stated that the decisions regarding who to call at the arbitration proceedings did not lie with her.

-16-

During re - examination the witness reiterated that the applicant had had his rights read to him, and that procedures of the hearing were explained to him before the hearing commenced. She further stated that all workers at the company knew that clocking someone else in and asking someone to swipe your card constituted a fraudulent offence which was dismissible. She also explained further that the company did suffer a loss in light of Mr. Dlamini's abscondment from work, as he was a supervisor, and during his absence, the people who were subordinate to him (including Colani and Musa) were unsupervised and could have even misappropriated company assets.

THE TESTIMONY OF MR. ALBERT FAKUDZE

The witness testified under oath that he is presently employed by the respondent as Branch Manager at the Manzini (Bus rank) Branch.

The witness testified that he had been the chairperson at the disciplinary hearing which the company held, and which resulted in the applicant's dismissal. Mr. Fakudze stated that at the hearing the applicant had been made aware of all his rights, including the right to representation. Mr. Fakudze stated that Mr. Dlamini had not informed him that he did not have a representative. Mr. Fakudze stated that all that had come to his attention was that the representative who had

-17-

initially signed the notice to attend the disciplinary hearing had been unavailable, but the applicant had opted to be represented by Mr. Malungisa Dlamini.

The witness stated that he had decided to proceed with the hearing, and ultimately dismissed the applicant on account of the gravity of the offences of dishonesty, and defrauding the company which the applicant had been charged with. The witness stated that the offence of fraud was constituted by the fact that on the 16th of June, 2008, the applicant had been paid for a full day's work (7 hours and 55 minutes) yet he was not at work. Mr. Fakudze stated that on the 20th of June, 2008 the applicant had clocked in earlier than the actual time of his arrival at work, hence he was paid for a full day's work also, yet he arrived at 8:20 a.m., instead of 8:00 a.m. which was his official time for reporting for duty.

Mr. Fakudze stated that at the disciplinary hearing he had relied on the evidence of statements written by Mr. Colani Dlamini and Musa Gina. He stated that these two gentlemen had been part-timers, who were under the supervision of the applicant. Mr. Fakudze stated that he had not seen any evidence that the two gentlemen had been forced to write their statements. He stated that Colani Dlamini admitted that he had been asked by the applicant to swipe his card, whilst Musa Gina had admitted that the applicant had asked

-18-

him, but stated that despite this request, he had declined because he knew that this was against company policy.

Mr. Fakudze testified that he had relied also on the evidence of time clock sheets that were presented to him. He stated that the applicant had alleged that he had been away, and had been at the hospital, yet his card was swiped at the beginning of the day, and later at the end of the day. Mr. Fakudze stated that the applicant's story had been very contradictory because he produced a sick sheet that had a different date of the 16th of June, 2008.

Mr. Fakudze stated that Mr. Dlamini had breached rule 6 of the company rules and regulations. The witness opined that the applicant had actually abused his supervisory position to compel Colani and Musa to break company rules. He stated that as far as he was concerned, the act of asking someone to swipe your card is tantamount to swiping someone else's card. He stated that the two acts were identical, and deserved equal punishment.
Under cross - examination the witness was asked if it was made known to him that the applicant had experienced problems with securing representation. Mr. Fakudze stated that the applicant had not said anything about this, and that the issue of representation had only come up when he

-19-

himself enquired about the different signatures on the notices to attend the hearing.

Mr. Dlamini put it to the witness that the applicant had stated that he had initially secured the services of a representative from outside the company, and this was not permitted at the hearing by the chairperson. Mr. Fakudze stated that the notice that called the applicant to the hearing clearly stated that the representative of choice had to be someone who worked for the respondent.

It was put to the witness that issue of representation is very serious, and that he should have seen it fit to actually postpone the hearing to allow the applicant time to prepare for the hearing together with his new representative. Mr. Fakudze stated that the applicant had brought Mr. Malungisa Dlamini to the hearing as his representative, and it was up to them to apply for a postponement if they felt that they required more time. The witness pointed out that neither Mr. Dlamini, nor his representative had seen it fit to seek a postponement of the proceedings.

Mr. Fakudze also stated that as far as he was concerned the fact that the hearing was ultimately held on the 1st of July, 2008 had not prejudiced the applicant in any material way because, the suspension letter and the first notice to attend the disciplinary hearing had initially scheduled the hearing

-20-

for the 25th of June, 2008. He stated that the disciplinary hearing was later pushed forward to the 7th of July, 2008 because he had been on leave, and once he had returned, he was able to hear the matter sooner, hence it being held on the 1st of July, 2008.

The witness stated that he verily believed that the applicant had had plenty of time to prepare for the hearing. The applicant's representative asked the witness why he had not taken the initiative to grant a postponement of the proceedings, seeing as the applicant had had the hearing brought forward, and he had arranged for a representative from outside the company?.
The witness stated that he had not granted a postponement as neither the applicant, nor his representative has asked for one. The witness also pointed out that the issue of the representative from outside the company had never arisen at the hearing.

Mr. Dlamini also asked the witness to quantify the amount of money that the company had parted with as a result of the alleged fraud which the company insisted was perpetrated by the application. The witness stated that the company paid the applicant on an hourly rate, and had paid him even for the time he was physically away from work, simply because his card had been swiped to indicate that he was present,

-21-

and on duty. He stated that proof that the applicant was paid was that the time away was never deducted from his salary.

4. <u>ANALYSIS OF EVIDENCE AND ARGUMENT</u>

The crisp question which is to be determined is whether or not the applicant's dismissal was fair. This entails a two -prolonged approach, in that it must be established whether the dismissal was substantively fair, and also whether fair procedure was followed by the employer when the dismissal was effected.

SUBSTANTIVE FAIRNESS

The applicant was charged with gross misconduct in that he was alleged to have requested one Colani Dlamini to swipe his clock - card on the 20th of June, 2008, and also on the 17th and 18th, he is said to have asked Musa Gina to do the same. It was stated in the charge sheet that was done in order to get paid on days on which he was not at work. He is stated to have committed a fraudulent act in this regard. This charge was clearly stated on the notice to attend the disciplinary hearing which was dated 20th June, 2008.

-22-

It is trite that in order for a dismissal to be substantively fair, it has to be in keeping with Section 36 of the Employment Act, 1980. The applicant's argument, at the arbitration proceedings, was that the company had charged him with an offence that did not exist. On the other hand the respondent's witnesses both testified that the company had in charging the applicant, invoked two company rules. Ms. Matsibo Mahlalela, who was the initiator, stated that the company had invoked rule number 5, which pertains to the prohibition against workers absenting themselves without verifiable reasons (including the production of a valid medical certificate where illness is alleged). She stated that rule number 6 made it a fraudulent offence to swipe another employee's card, or altering a clock/swipe card.

In casu, the applicant was alleged to have asked two gentlemen who were under his supervision to swipe his card so that the employer would believe he was at work, when in actual fact he was not. I do not agree that this was a non -existent charge as is alleged by the applicant's representative. This charge as far as I am concerned, falls squarely within the meaning of Section 36 (b) of the Employment Act, 1980. This is because the allegation of fraud on the part of the applicant constitutes a dishonest act. It is trite that even though the company rules of the respondent company do not, in their precise wording,

-23-

encapsulate what the applicant is alleged to have done, but nonetheless, the Employment Act, being an Act of Parliament, clearly supercedes the company rules. That being the case, it is my finding that the charge against the applicant was properly constituted.

The only problem that exists in this instance however, is that the respondent, whilst it alleged that the applicant committed this offence, did not produce any cogent evidence to substantiate this. The point was raised by the applicant's representative that the two gentlemen who are alleged to have swiped the applicant's card at his request, merely wrote statements, and were not required or called to testify at the disciplinary hearing.

The reliance by the chairperson of the disciplinary hearing, on the unsworn statements of Colani Dlamini, and Musa Gina, amounted to making a finding of guilt based on purely hearsay evidence. It is trite law that oral or written statements that are made by persons who are not called as witnesses cannot be admissible as proof of the matters alleged (see S v Holshausen 1984 (4) SA 852). This is because it is contrary to the best evidence rule to rely on a reported statement, because the evidence of the person who made the statement would be better. The law of evidence requires that the cogency of evidence should be put to a

-24-

rigorous test. In this regard the authors (Colani Dlamini and Musa Gina) should have been called to give testimony under oath as to the authenticity of their statements, and the fact that the contents of the said documents are true. The presence of Mr. Dlamini and Mr. Gina at the hearing would have enabled the applicant's representative to cross -examine the witnesses so as to ensure that the evidence led before the chairperson was indeed reliable and independent. (see also L.H. Hoffman and D.T. Zeffert, (1992) "The South African law of evidence", 4th edition, pages 124 - 129).

The respondent's representative, at the arbitration proceedings made the same fatal mistake by not

calling Mr. Dlamini and Mr. Gina to testify in support of the respondent's case. It would have been prudent of the respondent to make it a point to call both these gentlemen, or at the very least Mr. Gina, who is still in the respondent's employ.

The position of the law is that a Court of first instance does not sit on a court of appeal, to decide whether or not a disciplinary hearing came to a correct finding on the evidence before it. It was stated quite succinctly by the Industrial Court of Appeal that the Industrial Court had a duty to enquire on the evidence placed before it, so as to

-25-

decide if the provisions of the Industrial Relations Act, 2000 and the Employment Act 1980 have been adhered to, and to make a fair award regarding all the circumstances of the case, (see The Central Bank of Swaziland v Memory Matiwane Case No. 110 (1993). The same can be said of arbitration proceedings because these are fresh proceedings (proceedings de novo) which call for evidence to be led so as to substantiate the case of the employer (see also Swaziland United Bakeries v Armstrong Dlamini -Case No. 117/94.)

In light of the foregoing, it is clear that there was no evidence (before the disciplinary hearing, and also the arbitration proceedings) on which it can properly be found that the applicant was guilty of dishonesty, or of the charge laid against him. On account of this, it is clear that the dismissal was substantively unfair.

PROCEDURAL FAIRNESS

The applicant contended that his dismissal was procedurally unfair because he was not afforded sufficient time to prepare.

The fact of the matter is that the applicant was suspended, with full pay, from the 20th of June, 2008 up to the 25th of June, 2008 when he was meant to face a disciplinary

-26-

hearing. This period of suspension was extended, still with full pay, from the 25th of June, 2008, up to the 7th of July, 2008. The respondent's witness testified that he was allocated this case, to act as chairman when he returned from leave. According to Mr. Fakudze, he then brought the hearing date forward to the 1st of July, 2008, but the applicant had already known of the charge he was to face as from the 20th of June, 2008.

J Grogan (2007) "Workplace Law", 9th ed, page 192 states that an employer may not take disciplinary action against employees without giving them fair hearings. This point was further developed in Oscar Mamba v Swaziland Development & Savings Bank, Industrial Court Case No. 81/96, where it was held by Judge Collins Parker, that it is a cornerstone of Labour Law that an employee be given an opportunity to state his case. This case then went on to state the minimum standards that are expected of a "fair hearing". The learned Judge pointed out that the employee must be informed of the charge (s) he is to face. This requirement flows from the need for adequate preparation, since an accused employee cannot prepare a defence if they are ignorant of the charges they are required to answer.

-27-

In casu, the applicant was charged on the 20th of June, 2008, and he signed the notice to attend the hearing on this same day. This same document clearly stated on its face that he was entitled to representation by an employee of the company of his choice. At the arbitration proceedings Mr. Dlamini, the applicant's representative contended that the applicant was not afforded a chance to prepare for the hearing since he had initially arranged for a person from outside the company to represent him.

I am unable to condone this ill - advised act of engaging the services of an outsider, when the notice to attend the hearing clearly stated that he could only be represented by a co-employee. If Mr. Dlamini

(the applicant) had had a problem with being represented by a co-worker, he should have promptly indicated his objection thereto. According to Mr. Fakudze, the issue of representation at the actual hearing was never raised by the applicant himself, nor was it raised by the representative he brought to the hearing. Neither of the two gentlemen indicated to the chairperson that there might be a problem. The chairperson, as far as I am concerned, had no reason to probe the issue further if the applicant simply introduced Mr. Malungisa Dlamini, as his representative, and this representative worked for the respondent company.

-28-

I do not see why it was then incumbent upon the chairperson to then order that the hearing be postponed if the applicant and his representative appeared to be ready to proceed. If they had not been prepared, I see no reason why they failed to state their problem, and apply for a postponement. In the premises, I find that the applicant was properly charged on the 20th of June, 2008, and that he had plenty of time to prepare his defence.

On this point, I do not find that this dismissal was procedurally unfair.

5. CLOSURE

I have considered the question of remedy, and have been persuaded by the provisions of Section 16(b), and have decided against ordering reinstatement in this matter because the circumstances involved in the decision are such that a continued, and harmonious working relationship between the employer and the employee is not envisaged. The employer's witnesses both testified to the effect that they viewed in quite a dim light Mr. Dlamini's behaviour in that he is accused of trying to use his position of being a supervisor to intimidate those junior to him to break the company rules. Ms. Matsibo Mahlalela went as far to say that she did not view him to be trustworthy individual, and that he certainly did not have a good work ethic as he was

-29-

habitually late and prone to disappearing and absconding from work.

I will not make an award as regards the claim for monies unlawfully deducted because no evidence was led to this effect at the arbitration proceedings.

6. AWARD

The respondent is hereby ordered to pay to the applicant the amounts detailed below. This money is to be paid at the Manzini CMAC Offices, on or before the 3rd day of May, 2009,

(1)	Notice pay	= E2 570.81
(2)	Additional notice	= E5 932.63
(3)	Severance allowance	= E14 831.59
(4)	Compensation for unfair dismissal (6 months)	= E15 424.86
	TOTAL	= E38 759.89

THUS DONE AND SIGNED ON THIS 14th DAY OF APRIL, 2009.

KHONTAPHI MANZINI

CMAC ARBITRATOR

-30-