



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

HELD AT MANZINI

SWMZ 199/2010

In the matter between:-

GUGU LUKHELE

APPLICANT

And

**RALEIGH FITKIN MEMORIAL
HOSPITAL**

RESPONDENT

CORAM:

Arbitrator : Ms K. Manzini

For Applicant : Mr. B. Mkoko

For Respondent : Mr. S. Mdladla

ARBITRATION AWARD

1. **PARTIES AND REPRESENTATION**

The Applicant herein is Ms Gugu Lukhele, a Swazi female adult, and former employee of the Respondent. The Applicant's postal address is P.O. Box 1343, Manzini.

The Respondent is the Raleigh Fitkin Memorial Hospital, and its address is P.O. Box 14 Manzini.

The Applicant was represented by Mr. B. Mkoko, a labour consultant, whilst the employer was represented by Mr. S. Mdladla, an attorney from S.V. Mdladla and Associates.

2. **ISSUES IN DISPUTE**

According to the certificate of unresolved dispute that was filed in respect of this dispute (certificate No. 343/2010); the issue in dispute is that the Applicant is claiming her salary for February, 2010 which amount to E10, 785.92. (Ten Thousand Seven Hundred and Eighty Five Emalangeneni Ninety Two cents).

3. **SUMMARY OF EVIDENCE**

3.1. **THE APPLICANT'S CASE**

3.1.1. THE TESTIMONY OF MS GUGU LUKHELE
NTSHALINTSHALI

Ms Lukhele testified under oath that she was employed as a nurse at the Respondent Hospital in July, 2007. She stated that the employment relationship with the Respondent had endured until the 29th of January, 2010 when she resigned.

According to the Applicant she had been prompted to resign by the fact that she had applied for leave so that she could further her studies with UNISA (University of South Africa), she stated that her Head of Department (Medical Department), had stated that he could not approve her leave as there would be a shortage of staff as some one else was away from the same department.

Ms Lukhele stated that she had felt that it was quite important for her to register for her programme at the point in time and had written a letter of resignation, which was dated the 29th of January, 2010 which she filed that same day which was a Friday. The Applicant explained that the letter had conveyed her intention to resign as of that very date, and she had further stated therein that the employer should take her leave days in lieu of notice.

Ms Lukhele stated that she had been owed, at least twenty-six days in terms of annual leave by her employer, and had received her salary for January, 2010.

The Applicant stated that the reason she had lodged the dispute against her employer was that she had expected to be paid money for her leave days.

During cross - examination, Mr. Mdladla asked for clarity as the Applicant, had in her evidence-in-chief, stated that she was claiming leave pay, and yet the Report of Dispute on file clearly stated that the basis of her claim is her salary for February, 2010. Ms Lukhele expressed her inability to understand the difference between the two, but did point out that she understood that a salary is normally remuneration for work done, and she had not been at work as from the time she had delivered her letter of resignation. The Applicant did however, ultimately stated that she was actually claiming her salary for February, 2010.

Ms Lukhele was also asked about whether she understood that for an employee to be regarded as being on leave that employee had to apply for leave, and that leave had to be approved by her employer. The Applicant acknowledged this, but pointed out that she had tried to apply for such leave, but her request had been turned down by her Department Head. Mr. Mdladla put it to the Applicant that she had been

given reasons for the denial of her leave application, but she had decided to go ahead and be away from work without properly approved leave.

Mr. Lukhele stated that despite the reasons given to her for the rejection of her leave application, she had needed to go to school, hence her decision to resign. She stated that she had weighed her options, and had decided that she would rather resign than to miss the opportunity to register for the course she wished to pursue.

3.2.1. THE RESPONDENT'S CASE

3.2.2. THE TESTIMONY OF MR. LEONARD DLAMINI

Mr. Dlamini testified under oath that he is presently employed by the Respondent as Hospital Administrator and Acting Human Resources Manager. He stated that his key responsibilities are to handle the day to day administration issues, and also to deal with those issues that pertain to the Human Resources department. He stated that as part of those duties, he also handle matters that relate to the leave entitlements of the employees of the hospital.

Mr. Dlamini stated that he knew the Applicant as a former employee of the hospital, and was aware that she had resigned from the Respondent's employ in or about the

month of January, 2010 behind her decision to resign, as her resignation letter did not give those details.

Mr. Dlamini stated that to his knowledge it would be incorrect for Ms. Lukhele to ask for leave pay, as she had specifically stated in her letter that she would be utilizing her leave days in lieu of the Notice that she was required by law to serve to the employer. Mr. Dlamini stated that Ms. Lukhele had submitted a leave application form, which form, is normally used to initiate the process which ultimately results in an employee either going on leave on specific dates, or the employer turning down the application.

Mr. Dlamini pointed out that the leave Application Form which had been submitted by the Applicant clearly showed in its face that that it had never been approved by the employer. Mr. Dlamini submitted this document as part of his evidence. The witness stated that Ms Lukhele's decision to submit a letter of resignation which stated that she intended to use her leave days as notice, also was a process which she should have waited out so as to see it to completion. According to the witness resignation is a process which is distinct from that of applying for leave. He stated that ordinarily an employee who resigns has to wait to see if the employer accepts that resignation letter or not, and also to

see if the employer acquiesces to the request to utilize leave days due in lieu of notice.

The witness pointed out that the Applicant did not do any of this, but had simply submitted her letter of resignation on the 29th of January, 2010, and had left the work place, never to return again.

He pointed out that the employer was never given the opportunity to accept or to reject the resignation of the Applicant.

He further stated that the Applicant had never even bothered to make a follow up on the attitude of the employer regarding her decision to resign. Mr. Dlamini admitted that the employer had not tried to contact Ms Lukhele after she left on the 29th of January, 2010.

During cross-examination, Mr. Dlamini was asked why the employer had not bothered to contact the Applicant when she failed to turn up for work on Monday. The 1st February, 2010. Mr. Dlamini stated that despite the fact that the employer viewed Ms Lukhele's absence as abscondment, nothing had been done to try and find out why she was not at work as they had been in receipt of her resignation letter. Mr. Dlamini admitted that the Applicant had had leave days due to her at the time she resigned, but did point out that

her application for leave had not been approved by her Head of Department.

Mr. Mkoko asked the witness if he could confirm that Ms Lukhele was not paid her salary for the month of February, 2010.

Mr. Dlamini stated that he was not aware of any salary that was due to the Applicant for February, 2010 because she was not at work during that month.

During re-examination Mr. Dlamini was asked if payment of salary was the same as payment in lieu of leave days? The witness stated that the two were not the same. He further pointed out that the Applicant, had not in his opinion, been entitled to a salary for February, 2010 as she had not been at work.

4. ANALYSIS OF EVIDENCE AND SUBMISSIONS

It is common cause that Ms Lukhele submitted a letter of resignation on the 29th of January, 2010, and conveyed her intention to use her leave days as notice to her employer. It is further common cause that Ms Lukhele did not return to work after this date.

The Applicant's case according to the Report of Dispute is that she is now claiming her salary for the month of

February, 2010. This is further supported by the Certificate of Unresolved Dispute, which is the document that justifies the dispute to be properly before the Arbitrator for determination.

This, it appears, is what Ms Lukhele would like the Arbitrator to order the Respondent to pay to her after determining if at all such is indeed due to her.

The evidence of the Applicant and the closing submissions of her representative are however not quite in line with what the Applicant has stated to be the basis of her claim against the Respondent in the aforementioned documents. It was the submission of Mr. Mkoko that the Respondent had not proved that the Applicant had was not entitled to leave pay, and that there was no legal basis for the allegation that the Applicant had forfeited her leave pay by resigning.

Ms Lukhele, when cross-examined admitted that she was actually not quite sure what the difference was between leave pay, and the salary that she claimed was due to her. She did however, point out that she was aware that a salary was remuneration for work done, and did also admit that she had not been at work during the month of February, 2010.

It is trite law that when an employee resigns from work that employee has to serve notice to his or her employer (see Section 33 (3)). The law also provides that either party to the employment contract, when terminating a contract of employment, may pay the other party an amount in lieu of notice, which amount is equivalent to the basic wages which would have been earned by the employee during the period of notice. (see Section 33 (5)).

In light of the foregoing, it is therefore clear that although Ms Lukhele was owed leave days at the time of her resignation, she too remained indebted to her employer, in the tune of an amount equal to her basic wages for the period of notice (which would amount to E10, 785.92).

I am in total agreement with Mr. Mkoko that her resignation did not mean that Ms Lukhele had forfeited her leave pay, but I do have to point out that the fact that when Ms Lukhele opted to use her leave days in lieu of notice that was owed to her employer, this actually had the effect of creating a set-off. Ms Lukhele actually used her leave days to pay off the amount she would ordinarily have paid, as she had not stayed to serve her notice upon resignation.

The argument that she was owed a salary for the month of February, can also not be upheld as Ms Lukhele had simply not been at work, hence she did not earn the said salary.

The law on this point is very clear, it is a fundamental legal principle that an employee is remunerated for performance of duties assigned to them. **(see J. Grogan, “WORKPLACE LAW”, 10th ed, page 55).**

This simply means that although the employer has a duty to pay the employee a salary, there is a reciprocal duty on the part of the employee to perform the duties for which they were employed.

According to J. Grogan:-

“The duty to pay, and the commensurate right to remuneration, arises From the tendering of service”. (Page 55 supra).

It is gratifying to observe that the Applicant did, when she was under cross-examination, state that she was aware that a salary is remuneration for work done, and she pointed out that she was not at work for the entire month of February. It will therefore be quite easy for the Applicant to appreciate that on the strength of the legal principles afore-mentioned,

which principles are extracted from the common law, and also from statute-law, I have come to the conclusion that the Respondent is not in anyway indebted to her in respect of either leave pay, or salary for the month of February, 2010.

6. AWARD

Having heard the evidence and submissions of both parties, it is my finding that the Applicant has failed to prove that she is owed a salary for the month of February, 2010.

The application is hereby dismissed.

**THUS DONE AND SIGNED AT MANZINI ON THIS
DAY OF APRIL, 2011.**

**KHONTAPHI MANZINI
CMAC ARBITRATOR**