



IN THE CONCILIATION, MEDIATION AND ARBITRATION COMMISSION

HELD AT MBABANE

SWMB 317/11

In the Matter Between

PHETSILE DLAMINI

APPLICANT

AND

MBABANE CLINIC

RESPONDENT

Coram

ARBITRATOR	:	VELAPHI Z DLAMINI
FOR APPLICANT	:	MR SABELO MSIMANGO
RESPONDENT	:	MR MICHAEL KOEKOMOER

ARBITRATION AWARD

DATE OF ARBITRATION	:	5 th JANUARY 2012
VENUE	:	CMAC OFFICE
	:	1 st FLOOR ASAKHE HOUSE
		MBABANE

NATURE OF DISPUTE

**BREACH OF CONTRACT/UNFAIR TERMINATION OF
CONTRACT, PAYMENT OF LEAVEPAY AND NIGHT SHIFT ALLOWANCE.**

1. DETAILS OF PARTIES AND HEARING

- 1.1. The Arbitration hearing was held on the aforesaid date at the premises of the Conciliation, Mediation and Arbitration Commission (CMAC) at First Floor Asakhe House, Mbabane.
- 1.2. The Applicant is Phetsile Dlamini, an Adult Swazi Female of P.O Box 1387 Matsapha. Phetsile Dlamini was represented by Mr. Sabelo Msimango, a Labour Consultant.
- 1.3. The Respondent is Mbabane Clinic, a Medical Institution of P. O. Box 3 Mbabane. Mbabane Clinic was represented by Michael Koekemoer, its Chief Operations Officer.

2. ISSUES TO BE DECIDED

- 2.1. Firstly, whether or not the Applicant's contract of employment was unfairly terminated.
- 2.2. Secondly, whether or not nightshift allowance is due to the Applicant.
- 2.3. Lastly, whether or not leave pay is due to the Applicant.

3. BACKGROUND OF THE DISPUTE

- 3.1. The Respondent is in the business of providing medical or health services and is based in Mbabane.
- 3.2. The Applicant commenced service with the respondent in November 2009 as a Nurse Aid on a part-time basis.
- 3.3. In November, 2010 the applicant was then employed as a Trainee Carer by the Respondent on a written contract for a period of six (6) months, from the 1st November, 2010 to 30th April, 2011.
- 3.4. The Applicant's contract subsisted until the 27th May, 2011. Her services were then terminated for the reason that she had not been successful in her training and that the contract had in any event terminated by effluxion of time.
- 3.5. The Applicant reported a dispute for breach of contract/unfair termination of contract to the Commission, however the dispute remained unresolved, and a Certificate of Unresolved Dispute No.448/11 was issued. The parties referred the dispute to arbitration and I was appointed to determine same.

4. SURVEY OF EVIDENCE AND ARGUMENTS

- 4.1. I have considered all the evidence and arguments made by the parties, however because Section 17(5) of the IRA 2000(as amended)requires concise reasons, I have only referred to the evidence and arguments which I deem relevant to substantiate my findings.

Most of the facts are common cause and to a large extent the issues to be decided require the determination of questions of law.

4.1.1. APPLICANTS CASE

The Applicant was the only witness who testified in support of her case.

It was the applicant's evidence that during her service as a Part- Time Nurse Aid from 2009 to October 2010 she worked night duty however she did not file her claims for the night duty allowance with the Nursing Manager, but spoke to her co-ordinator about them.

According to the Applicant, she worked forty eight (48) hours per week for the entire period of her service as a part-timenurse aid, however she was not permitted to go on leave or paid in lieu thereof. She was not even paid her leave at the end of herfixed-term contract.

The Applicant testified that at the end of the fixed-term contract in 30th April 2011, she continued to work and was assigned duties by her supervisor until she was called by the Human Resources Manager who advised that her contract was being terminated. She was given a letter confirming what the manager had said verbally.

It was the Applicant's contention that since the Respondent had not terminated her services at the end of the written contract in April 2011, when she continued to be put on schedule, her contract was tacitly renewed for another six(6) months.

The Applicant argued that the Respondent had unfairly terminated her second contract because it had not run its course, moreover she had not committed any misconduct which would have entitled her employer to terminate her contract.

A new issue was then introduced by the Applicant during submissions. She argued that the Respondent committed an unfair labour practice against her by varying her contract of employment from indefinite employment to fixed term.

4.2. RESPONDENT`S CASE

The following witnesses gave evidence in support of the Respondent's case; Sister Ann Borrel (HRM) and Sister Shella Dollman (Training Manager). I will not narrate their evidence separately.

It was the Respondent's evidence that in terms of the Applicant's oral contract of employment (2009- 2010), she did not qualify for night duty allowance. She was not entitled to leave pay either because she did not work fulltime. The Applicant worked according to a schedule and was not compelled to work the whole week. She was free to choose the hours and days of work, if the schedule was not convenient for her.

In October, 2010 the Respondent introduced a training programme for Carers. The idea was that because qualified nurses performed clinical duties only, there was a need to employ personnel who would deal with the patients' other needs besides clinical health.

In June 2010, the Applicant applied for admission into the training program. She was accepted and was appointed as a Trainee Carer for a period of six (6) months.

The Applicant was then trained by following a programme that was designed to equip the Carers with the skills required for the job. Three (3) senior staff members were responsible for assessing the trainees. These were; sister Shella Dollman (Training Manager), Sister Ann Borrel (Human Resources Manager) and Sister Cinile Curtis.

It was the Respondent's evidence that during the training, there was a delay in the preparations of the examinations for the Carers due to a private matter involving the Training Manager. The delay resulted in the examination and assessments being done after the expiry date of the Applicant's contract. However after the assessment, the Applicant was found to be unsuitable for the position of Carer.

The Respondent argued that, although it was conceded that the Applicant's contracts had been tacitly renewed, it would not have been proper to let the Applicant continue in its employ because she had not attained the targets that were set for Carers.

Moreover, since the contract had been renewed on the same terms and condition as the written one, the contract had a clause that

provided that it could be terminated for any other reason on one (1) month notice to the other party. The Respondent gave the Applicant one month notice by paying her in lieu thereof.

The Respondent prayed for a dismissal of all the Applicant's claims.

5. ANALYSIS OF EVIDENCE AND ARGUMENTS

- 5.1. From the onset there is a need to deal with an issue that was introduced for the first time during the applicant's submissions.
- 5.2. Mr Msimango contended that since the applicant had been in the Respondent's employ from November 2009 to October 2010, the Respondent acted unlawfully by varying her terms and conditions of employment from indefinite to fixed-term. The representative then prayed for maximum compensation for unfair dismissal based on an alleged unfair labour practice.
- 5.3. The Respondent countered by arguing that the issue was not discussed during the pre-arbitration hence it is not one of the issues for determination.
- 5.4. It is common cause that this issue was never conciliated and is not one of the issues that were certified as unresolved. The report of dispute does even mention the issues as being in dispute. When these facts were put to Mr Msimango, he argued that the arbitrator was duty bound to protect the applicant against any injustice. He contended that this duty superceded the provisions of the Industrial Relations Act 2000 (as amended the Act) and Rules of the Commission relating to conciliation of all disputes. He referred to the case of **Thando S Dlamini v Swaziland Liquor distributors Ltd.(I C Case No. 240/02)**
- 5.5. First and foremost the **Thando Dlamini** case is distinguishable from the facts of this case. The issue concerning the unlawful variation of the terms and conditions of Thando Dlamini's contract were reported as a dispute by him and was conciliated by the Commissioner of Labour. This is found on pages one and two of that judgment.
- 5.6. Section 85(2) of the Act provides that, unresolved disputes that concern the application or enforcement of rights may be referred to

arbitration. The provisions of Rule 21 of the CMAC Rules give effect to the provisions of the Act.

- 5.7. In **Swaziland Fruit Cannery (Pty) Ltd v Vilakati P. and Another (1987 - 1995 vol 2 SLR 80)**, the Industrial Court of Appeal held that the Industrial Court cannot take cognisance of a dispute which has not been reported and conciliated.
- 5.8. Although the Swaziland Fruit Cannery case was about the jurisdiction of the Industrial Court, the principle also applies to arbitrations. Both Fora are creatures of statute, whose powers are stipulated by the enabling law.
- 5.9. I take cognisance of the fact that the Industrial Court has formulated principles that have circumvented the provisions of Part VIII of the Act, in that; some cases may be brought on a certificate of urgency before the Court. However an arbitrator does not have such powers to hear a dispute that has not been conciliated. The compensation base on unfair labour practice is hereby dismissed.
- 5.10. It is common cause that the fixed-term contract of employment between the parties was tacitly renewed when the Applicant was made to work beyond the 30th April, 2011.
- 5.11. The Respondent argues that, although the renewed contract had not expired, it was still entitled to terminate it at any time as long as it gave the applicant notice. The clinic referred to clause 12 of the written contract in support of its contention. Moreover, it was submitted, the Applicant had not qualified for the position of Carer.
- 5.12. Clause 12.1 of the contract provides that, the employer will give one (1) month's written notice if the contract of fixed-term employment is to be terminated for any other reason than dismissal for disciplinary reasons.

John Grogan, Workplace Law 8th Edition Juta and co at p 44 remarks as follows about fixed-term contracts.

“The life of a contract may be determined either by stipulating a date for termination, or by stipulating a particular event, the occurrence of which will terminate the contract, or with reference to completion of a particular task. Where the parties have indicated that the contract will terminate on the

occurrence of a particular event or the completion of a particular task, the onus rests on the employer to prove that the event has occurred or the task was in fact completed. Unless otherwise agreed, a fixed term contract cannot be terminated during its currency without good cause "See also JOHN GROGAN, Employment Right (2010) Juta & Co. pp 61-64.

- 5.13. In **Buthelezi v Municipality Demarcation Board (2004) 25 ILJ 2317(LAC)** at 2320 para 9, the learned Jafta AJA made the following statement;

"There is no doubt that at common law a party to a fixed term contract has no right to terminate such contract in the absence of repudiation or a material breach of the contract by the other party. In other words there is no right to terminate such contract even on notice unless its terms provide for such termination. The rationale for this is clear. When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period, they bind themselves to honour and perform those respective obligations in terms of that contract for the duration of the contract and they plan, as they are entitled to in light of their agreement, they live on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully looked into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach...Under the common law there is no right to terminate a fixed term contract of employment prematurely in the absence of a material breach of such contract by the other party"

- 5.14. The learned Judge President in **Boniface Dlamini v Swaziland United Bakeries(Pty) Ltd(IC case no.200/02)**, embraced the statement made by the learned Jafta AJA when he made the following remarks; **"The Labour Appeal Court in South Africa has held that an employer that retrenches an employee on a fixed term contract before the contract's expiry date commits a breach of contract- see Buthelezi v Municipality Demarcation Board (2004) 25 ILJ 2317 (LAC).This decision is clearly correct..."**

- 5.15. **John Grogan, Employment Right(supra) at p6223** observes that, a tacitly renewed contract, provided that an intention to renew is consistent with the parties conduct, continues on the same terms and conditions as the previous fixed-term contract. John Grogan also postulates that, some fixed term contracts provide for termination on notice before the expiry date or time. The Author continues to state that such provisions are permissible; however the contract is properly termed a “maximum-duration contract”. It endures to the agreed time, but may be terminated on notice before. Grogan further propounds that the provisions of a maximum duration contract do not confer on the employer an unfettered right to terminate in mid-term. The employee may still challenge the dismissal and argue that the termination breached his or her implied common-law entitlement to fair dealing.
- 5.16. The contract of traineeship between the Applicant and the Respondent was a contract of employment because the applicant was entitled to wages in terms of the agreement.see **Nomsa Mamba v Chrisovik Hair and Beauty Home(IC Case No.153/02)**.
- 5.17. In **William Dlamini and Another v Attorney General and Another (IC case no176/2000)**, the Court held that the terms and conditions of a contract of traineeship must be in terms of a written contract.
- 5.18. Section 2 of the Industrial and Vocational Training Act No.16/1982 defines trainee as,
- “a person, other than an apprentice, who is bound by a written contract to serve an employer for a period stipulated in the contract but not exceeding an aggregate of three years, with a view to acquiring knowledge of a trade or occupation in which the employer is reciprocally bound to instruct that person”.**
- 5.19. The life of the contract of traineeship between the parties was not dependant on the occurrence of a particular event nor was it based on the occurrence of a particular task. The parties agreed that it would endure for six (6) months.
- 5.20. Sister Shella Dollman produced Applicant’s training report which stated that she did not fulfill two criteria for passing the course. These were attaining 80% in her tests and examination, and demonstrating actions

and attitudes while working with patients that showed she had embraced the qualities of caring.

- 5.21. The report goes on to state that the applicant attained 71% and had not embraced the qualities of a carer despite having past training in nursing. However the respondent did not prove that at beginning of the training she was informed that the pass mark was 80% and that if she did not get that score or above her contract would be terminated.
- 5.22. The Respondent has also not shown that at the beginning of the programme the applicant was informed what qualities were required for her to qualify to be a carer and that if she failed to achieve these, her contract would be terminated.
- 5.23. Since the termination of the applicant`s contract was based on her incapacity it should have been demonstrated that the Applicant was given a fair opportunity to meet the required performance standards before any action was taken, including a warning **See: Harper Van Seggelen v Swazi Spa Holdings Limited (IC Case No.390/04).**
- 5.24. The Respondent submitted that, had the Applicant`s performance met the standard set by it, she would still be employed. Essentially, the Respondent relies on clause 8.1.1. of the contract which is similar to Section 36 (a) as of the Employment Act 1980.
- 5.25. Clause 8.1.1 provides that ; it will be fair for the Respondent to terminate the services of the Applicant, if her conduct or work performance has, after written warning, been such that the Respondent cannot reasonably be expected to continue to employ her.
- 5.26. The Respondent bears the onus of proving, on a balance of probabilities that; the Applicant was given written warning, that after receipt of such warnings, the Applicant`s work performance was such that the Respondent could not reasonably be expected to continue employ her; and it was reasonable in all the circumstances to terminate her services.

The Codes of Good Practice: Termination of Employment

published in terms of Section 109 of the Industrial Relations Act 2000(as amended) provides as follows with regards to a dismissal for poor work performance;

“Any person who determines whether poor work performance, justifies dismissal must consider -

- (a) Whether the employee failed to meet a performance standard.**
- (b) Whether the employee was aware, or could reasonably be expected to have been aware of the required performance standard.**
- (c) Whether the performance standard is reasonable;**
- (d) The reasons why the employee failed to meet the performance standard,**
- (e) Whether the employee was afforded a fair opportunity to meet the performance standard,**
- (f) Whether dismissal is the appropriate sanction for not meeting the performance standard”.**

5.27. The practice guidelines provided by the Codes of Good Practice are not legally binding-see Section 109(2) of the Act. However these guidelines reflect judicial notions of fair practice applicable to dismissals for poor work performance and provide a guide in determining the fairness of an incapacity dismissal.

5.28. The Respondent did not prove that; the Applicant was aware or should have been aware of the performance standard; that she was given a fair opportunity to meet the standards, that she was given a warning to improve her performance before she was dismissed. I find that the termination of the Applicant`s contract of employment was unfair.

5.29. The Applicant succeed with her claim for compensation but only to the extent of the remaining portion of her contract minus the one(1) month notice she was paid. She is only entitled to four (4) months wages as compensation.

6. NIGHT DUTY

6.1. The Applicant failed to prove, how she arrived at the sum of E1230.00 that she claimed for night duty allowance.

- 6.2. The Respondent argued the Applicant was not entitled to night duty allowance because she was not a qualified nurse and she worked part-time.
- 6.3. It was not proved by the Applicant that in terms of her part-time employment contract she was entitled to night duty allowance.

7. LEAVE ALLOWANCE

- 7.1. The Applicant claimed leave pay for 17 days. This claim was based on seventeen (17) months of Applicants service with the Respondent
- 7.2. For the period the Applicant was working part time, the Respondent contended that she was not entitled to leave, because she did not work full-time. In other words the days on which she was not at work ought to stand as her leave days.
- 7.3. The Applicant disputed the fact that she did not work full-time. However she did not dispute two letters she wrote applying for full time employment during the course of her employment. In those letters she acknowledged that she was in part-time employment with the Respondent.

The Concise, Oxford English Dictionary (2004) oxford Press defines part time as

“For only part of the usual working day or week”.

- 7.4. I find that no leave pay is due to the Applicant in respect of the period of service where she was employed on a part-time basis.
- 7.5. Regarding her period of service under the written and tacit fixed term contract, the Respondent referred to clause 7 of the contract, which provides that the Applicant would not be entitled to leave. The Respondent submitted that the rationale for clause 7 was that, the Applicant was in training, and as such it was not possible to grant her leave whilst she was attending classes most of the time.
- 7.6. By signing the contract of employment, the Applicant consented to the terms and conditions thereof. However Section 3 of the Employment Act provides that no persons are permitted to contract out of the provisions of the Act. If there are such provisions such are null and void.

- 7.8. Section 128 of the Employment Act provides that; any agreement by an employee to forego her entitlement to an annual holiday provided by the Act, even in return for compensation, shall be null and void.
- 7.9. Although the Applicant was a Trainee Carer, she was an employee working under a contract of employment. See Section 2 of the Employment Act for the definition of contract of Employment. See also **Nomsa Mamba v Chrisovik Hair & Beauty Home (supra)**.
- 7.10. Now Section 123(1) of the Employment Act provides that where an employee's services are terminated after serving at least three months, but less than twelve(12) months, that employee is entitled to not less than one (1) day's wage for each completed month of such period. I find that seven (7) days wages is due to the Applicant in respect of leave pay.

The following order is therefore made;

8. AWARD

- 8.1. I find that the termination of the Applicant's contract of employment was unfair.
- 8.2. I find that the Applicant's claim for leave pay partially succeeds.
- 8.3. The Applicant's claim for night duty allowance and ten (10) days leave are dismissed.
- 8.4. The Respondent is ordered to pay the Applicant the following claims.

8.4.1 Leave pay (7) days.

(E1500\22 days x 7) = E 477.27

8.4.2 four (4) months wages as

Compensation (E1500x4mnths) = E6000.00

Total **E6477.27**

8.5 The Respondent is directed to pay the Applicant the sum of **E6477.27** at CMAC offices, Asakhe House Mbabane not later than the 30th March 2012.

8.6 There is no order for costs

DATED AT MBABANE ON THISDAY OF FEBRUARY 2012.

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VELAPHI Z DLAMINI

CMAC ARBITRATOR