THE INDUSTRIAL COURT OF SWAZILAND

In the matter between:	CASE NO. 25/1983
SIPHO MOTSA	Applicant
vs.	
SWAZILAND MEM CORPORATION	Respondent
FOR APPLICANT:	IN PERSON
FOR RESPONDENT:	MR. P. DODDS - FEDERATION OF SWAZILAND EMPLOYERS.
Issue in Dispute:	Wrongful retrenchment - seeks re-instatement

AWARD

The Applicant seeks re-instatement on the ground that he had been wrongfully retrenched.

The Respondent Corporation, acting under Sec. 50 of the Employments Act No. 5 of 1980 informed the Labour Commissioner on 12/10/82 of its intention to retrench 50 of its employees on the ground of redundancy and that the retrenchment will take effect as from 19/11/82. The applicant was one of those to be retrenched.

The Applicant was employed by the Corporation in 1977 as a general labourer. vie later worked at the Pet Food Section, in the same capacity. Due to the Respondent's business being hard hit by recession and drought over the past two years, the Management decided to reduce the labour force. To achieve this end the supervisor of each Section was asked to submit to the Management a list with the names of persons, whom he thought to be the least productive. The applicant's name was included in the list but he refuted the allegation He was supported in this

by his witness Amos Madzinane, Vice Chairman of the Workers Committee. In ray view there should have been at least some evidence to show as to the reason why the applicant was considered to be least productive. Since this was not established, I cannot place any reliance. on the Supervisor's finding on this matter.

The other reason that was advanced towards the applicants retrenchment was that he frequented the other sections and talked to the workmen there. He had been warned on this on several occasions by one Simelane, but here again no evidence was called to substantiate these allegations. Hence I am justified in rejecting this evidence.

According to the evidence, it appears that the applicant was an active member of the Workers Committee which caused much annoyance and sometimes embarrassment to the Management. Therefore in my view, this could have been the sole reason for his retrenchment.

I must state that the right of the employer to retrench his men is his fundamental, inherent and unfettered right, but the retrenchment has to be genuine and bona fide in the sense, that it should be a retrenchment in fact and not a mere pretence of a retrenchment.

I must also stress that it is the prima facie right of the Management to determine its labour force, and the Management would be the best judge to determine the number of workmen who would become surplus

on the ground of rationalisation, economy or other reasons on which retrenchment can be sustained. Where in' effecting the retrenchment, the Management acts in a bona fide manner, then the

number declared redundant by it should be accepted. Victimisation or unfair labour practice in effecting retrenchment will definitely constitute instances of improper' motive. Where the Management is influenced by extraneous considerations or improper motive, it is then the duty of the court to scrutinise every matter with great circumspection and the Management must justify such retrenchment with evidence. The only limitation to retrenchment is that he should do it bona fide and not for the purpose of victimising his employees and in order to get rid of their services.

Another aspect of retrenchment is that the employer must first endeavour, if possible, to fit in the redundant employees into an alternative employments.

In this case I find that there is no justifiable evidence to show that the retrenchment of the applicant was genuine and was done in good faith. On the contrary there is evidence to show that his retrenchment was due to his active participation in the Workers Committee and therefore his retrenchment definitely constitutes victimisation or unfair labour practice.

In Swaziland, unlike in some other countries, there is no statutory requirement that an employer should abserve the principle of "Last come first go." But this Court will however recognise this principle as forming part of the Industrial Law, and will apply only where all things are equal- An employer can therefore take into account considerations of efficiency and trust worthiness, so that if an employee with long years of service is inefficient and unreliable, the employer can retrench him rather than a

yee who is efficient and reliable. These principles state 1 by the Supreme Court of India in Swadesmitran Their Workmen 1960(1) LLJ 504.

Another matter I wish to state is that a retreneh -nt especially relating to labour force should be effected a "the last come, first go" principle treating all the. labourers in the establishment as one category irrespective of whether they were in the day shift or night shift or whether they were in one department or another.

The Applicant took up a further point that the procedure adopted by the Corporation regarding redundancy had not been rightly followed and therefore his retrenchment was ab intio void. He stated that no proper notice under Sec. 40 (2) of Act No. S of 1980 was given to the Workers Committee.

Sec. 40(2) reads as follows -

"Where an employer contemplates terminating the contracts of employment of five or more of his employees for reasons of redundancy, he shall give not less than one months notice thereof in writing to the Labour Commissioner and to the Organisation (if any) with which he is a party to a Collective Agreement and such notice shall include the following information.

(a) the number of employees likely to become redundant

(b) the occupations and remunerations of the employees affected.

(c) the reasons for the redundancies and

(d) the date when the redundancies are likely to take effect.

Sec. 2 of the Act No. 5 of 1980 states that Organisation has the sane meaning as in the Industrial

Relations Act.

The Organisation is therefore defined in Sec. 2 of Act No. 4 of 1980 to mean an industry Union or Staff association or an employers association as the context may require.

Mr. Dodds said that the Workers Committee is not an Industry Union, and he is technically correct. Although the Workers Committee is strictly not an Union, it will be in the interests of good Employers/Employees relationship if the employers give due recognition to such committees until such times Unions are formed.

Having considered that evidence and the other factors in this case, I have come to the conclusion that the retrenchment of the applicant was not genuine and not done in good faith. Therefore his retrenchment is wrongful.

Coming to the question of re-instatement, this Court has absolute discretion under Sec. 13(1) of Act No. 4 of 1980 to do what it considers to be right and fair.

It is a well recognised principle of Industrial law that the normal remedy for wrongful dismissal is re-instatement and compensation is awarded only in special or exceptional circumstances.

In Sri Lanka the principle was succintly stated by the Industrial Court in the Hotel, Bakery & Beverages Workers Union vs. New Grand Hotels Ltd. 14 I.D. 97 -

"It is a well recognised principle of Industrial Law that the normal remedy for wrongful dismissal is re-instatement. It is also clear from the Act itself that in the industrial sphere such an order cannot with impunity

be made in all cases, regardless of the particular set of circumstances concerning each case, and the type of work the employees are engaged in what is contemplated by the Legislature is that compensation as an alternative to re-instatement, is both expedient and desirable when either party is averse to the proposition of re-instatement. It is not conducive to the maintenance of cordial employer/ employee relations and the preservation of industrial peace to order re-instatement indiscriminately, though an Industrial Court has the power to do so in come circumstances."

Having considered the pros and cons of re-instatement of the applicant, I have come to the conclusion that the ends of justice will be well met if an appropriate Order for compensation is made.

The applicant stated that he was unemployed since he was retrenched but did not give any evidence to substantiate this. He further said that he received B7.50 per day as wages plus E2.12 made up of as follows - E1.20 for food, EO.36 transport, E0.56 ration. He worked for 5 days in a week. Therefore he received E9.72 per day or E48.60 per week.

Having considered all the facts in this case an order for compensation for the sum of E1166.40 being 6 months wages will be just and equitable and I make the Award accordingly.

JUDGE PRESIDENT