

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 219/2000

In the matter between:

PAT JELE

APPLICANT

and SWAZI OBSERVER (PTY) LTD

RESPONDENT

CORAM:

NDER1NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

E. M. HLOPHE:

FOR APPLICANT

L. MAMBA:

FOR RESPONDENT

JUDGEMENT

12.12. 2000

The Applicant's service with the Respondent was terminated on the 1st December 1999 on grounds of ill health.

The letter of termination marked exhibit 'C' reads as follows:

"Following your inconsistent availability at work due to your illhealth since 24th June, 1991, J regret to inform you that management of the company have resolved to retire you on the grounds of illhealth with effect from 1st December, 1999.

We believe that your performance over the period has been greatly affected by your illhealth and again it is to your best interest to retire at this stage

The Applicant seeks compensation for the aforesaid dismissal on the grounds that it was unlawful, unfair and unreasonable in all the circumstances in that, the Applicant was not afforded a hearing prior to the termination of his services on grounds of illhealth, that the alleged inability to work was not borne out of any medical report and that the Applicant was infact fit for duty.

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In his evidence in chief, the Applicant told the court that on the 24th June, 1999 he fell sick and reported to work on clutches.

He informed his superior of this illness and he was told to go home and seek treatment and resume when he was fit to do so.

In September, 1999 he telephoned the Financial and Administrative Controller to report about his condition and he was informed by the Controller that a letter had been sent to him through a driver.

Thereafter he received the letter marked exhibit 'A' informing him that he had been away from work for a period of 51 days on grounds of ill health. Upon receipt of the letter, the Administrative Controller Mr.

Ndzimandze asked him to go for a medical check up at the Mbabane Government hospital for a fitness test. The Applicant was seen by a Dr. Osman who declared him fit to return to work. The report from Dr Osman was submitted by the Applicant as exhibit 'B'.

Pursuant to the test by Dr. Osman, the Applicant reported to work and he told the court that he continued working until the 2nd December, 1999 when he was retired by the Respondent via exhibit 'C'.

Upon retirement, he did not receive any terminal benefits other than pension pay.

He reported the matter to the Labour Commissioner. The dispute was not resolved and he was issued with a certificate of unresolved dispute.

At the time of his dismissal, he earned E2,792.55 per month. He was married with nine (9) children. He still was unemployed. He seeks compensation and terminal benefits arising from the termination.

The Respondent called the Administrative and Financial Controller as DW1. He told the court that the Applicant was absent from work for a period of 51 days. That on the 14th July, 1999 he received a memorandum from the Editor-in-chief advising him about the absence of the Applicant. The memo was submitted as exhibit 'D'.

The Editor-in-chief suggested to him that they should consider retiring the Applicant on medical grounds, as he was a sickly person and this appeared to compromise the Respondent's operations.

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In the month of November 1999 the Applicant was called to a meeting with Mr. Ndzimandze and the Managing Director. This was prompted by exhibit 'A' that resulted in salary deduction from the Applicant for the days he was absent from work.

In this meeting the health condition of the Applicant was discussed and he was advised to opt for an early retirement to take advantage of his retirement benefits.

Mr. Ndzimandze wrote to the Government Hospital requesting that a Doctor perform a medical check up on the Applicant to ascertain his fitness or otherwise for duty.

Mr. Ndzimandze did not receive the medical report from Mbabane Government Hospital. Nevertheless, Mr. Ndzimandze terminated the employment of the Applicant on grounds of ill health without having received the medical report he had requested for.

Mr. Ndzimandze told the court that it was the policy of the Respondent to always seek medical opinion before retiring employees on medical grounds. He could not give a tangible explanation as to why he did not wait for the report of the Doctor.

He conceded that notice ought to have been paid to the Applicant but disputed that the Applicant was eligible to severance allowance and additional notice.

The Applicant was paid his pension which he would have forfeited had the Respondent opted to dismiss him for absence from work without a medical certificate or authority of his superior.

In terms of Section 35 (7) the termination of an employee shall be deemed to be unfair if it takes place because of the employee's absence from duty due to sickness certified by a medical practitioner for a period not exceeding six months or to accident or injury arising out of his employment except where the employer proves that in all the circumstances of the case, it was necessary for it to permanently replace the employee at the time his services are terminated.

It is common cause that during the period of his 51 days absence the Applicant did not obtain a medical

certificate as he was under the care of a traditional healer for an ailment known in Swaziland as "mgwebo" which entailed inflammation of the private parts and the lower limbs.

The Respondent from the testimony of Mr. Ndzimandze and exhibits 'A', 'C' and 'D' was well aware of the ailing condition of the Applicant and that is why they considered retiring him on medical grounds to enable him to get his pension.

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This being so, the sickness of the Applicant is not in dispute, It is also not in dispute that he was away from work for a period of less than six months.

There is no evidence that it was absolutely essential to replace the Applicant in all the circumstances of the case.

The Respondent further chose not to await the report of a Doctor which they had themselves requested for to find out whether or not the Applicant could resume his work.

We do accept that exhibit 'B' is a valid medical report that declared the Applicant fit for work.

This being the case, it was unfair and not reasonable in the circumstances of the case to retire him on medical grounds. This was tantamount to unfair termination of the Applicant's employment

The Applicant was a senior reporter at the time of his dismissal. He had served the Respondent continuously for a period of six (6) years . Employment opportunities in his field are rare in Swaziland there being only one daily newspaper. The Applicant was certified fit for work by a Doctor and the retirement seriously prejudiced him and his dependants financially.

In the circumstances, we award him eight (8) months salary as compensation for unfair dismissal in the sum of E 23,380.40

Notice pay	E 2,792.55
Additional Notice Pay	E 3,191.28
Severance Allowance	E 7,978.20
TOTAL	E 37,542.43

There will be no order as to costs. The Members Agree.

NDERI NDUMA

PRESIDENT - INDUSTRIAL COURT