

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 277/99

In the matter between:

THEMBI DLAMINI

APPLICANT

and

KELLY TRADING (PTY) LTD

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

T. MASEKO:

FOR APPLICANT

B. MAGAGULA:

FOR RESPONDENT

JUDGEMENT

5.12.2000

The Applicant seeks maximum compensation for unfair dismissal, notice pay, additional notice, severance allowance, payment in lieu of leave and payment in respect of underpayments.

She was employed on the 7th December, 1995 as a Cashier Manager at the Respondent's shop at Malkerns.

Following theft of stock involving her fellow employees, the Applicant was transferred to the Manzini branch of the Respondent in May 1997. On the 15th November, 1998 the Applicant was dismissed from work by a letter annexed to the Application and marked "TD1".

The letter briefly outlined her alleged misconduct at work and poor work performance at the O.K. restaurant. Reference was made to several warnings given to her.

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She was dismissed in terms of Section 36 (a) and (f) of the Employment Act which provide for dismissal for continued poor work performance or misconduct inspite of a written warning and absence from duty specifically for more than 3 working days without permission of the employer or a certificate signed by a medical practitioner respectfully.

The Applicant alleges that the dismissal was unfair and unreasonable in the circumstances of the case.

She denied that she was involved in the theft perpetrated by her subordinates. They were found guilty of theft and served prison terms for it. She acted as a crown witness in that matter and was not involved at all.

She refuted belated allegations by her colleagues that they at all material times acted in concert and shared the proceeds of the theft.

She further denied losing till money in the sum of E1 10.00 while a cashier at Manzini.

She was transferred to the kitchen after this incident and was washing dishes and pots therein.

While still at the kitchen, she fell pregnant and gave birth to a child. The child got sick after the maternity leave. She requested for a day off to take the baby to hospital.

The child died on the same day. She took the child to the mortuary and she sent her auntie to report that her child was dead. The auntie reported back to her that Mr. Jacobs gave her permission to continue attending to the issue.

She went to borrow money from Mr. Jacobs and he advanced her E400. She waited for the father of the child to turn up for the funeral for 4 days in vain and she buried the child.

Upon her return she was given a final written warning for her prolonged absence without permission.

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She said that on the 16th November 1998 Mr. Jacobs called her after clocking from work and asked her not to report the following day but to come a day after. When she came, she was served with a letter of dismissal.

She admitted that she was advised by Mr. Jacobs that her work performance was below expectation but she explained that her work was poor due to a motor car accident she was involved in while at work and therefore could not stand for long hours since her waist was injured.

A Dr. Vilakati had recommended that the employer provide a stool so that she could work while standing. The employer did not provide a stool. The accident was on 10th August, 1996 while she was a cashier.

She denied causing animosity between employees and said she was never called to answer such allegations.

She was still unemployed, was 32 years old and not married. She has two children. She earned E530.00 at the time of dismissal. She held a J. C. Certificate and had found it difficult to get alternative job. She has suffered hardship as result of the dismissal.

She told the court that she did not go for leave between 1995 and 1998 (3 years) and was entitled to two (2) weeks leave per year.

She was paid E530.00 at the time of dismissal and was statutorily supposed to be paid E775.00 in 1997 and 1998. She claims the difference thereof for the period.

DW1 was Moses Albert Gamedze a former employee of the Respondent. He worked with the Applicant at the Malkerns shops. He said in 1997 he was involved together with the Applicant in the theft of sugar at the shop. They kept the sugar in his house and sold it and shared the proceeds. Mr. Jacobs discovered the theft. Two of them, save for the Applicant were questioned, charged and convicted. They did not report the Applicant at the time as they expected financial help from her while they were in custody. She however never assisted them and when they were out of jail, they reported the Applicant to Mr. Jacobs.

DW2 was Lucky Dlamini. He was a buyer at O.K. restaurant and a supervisor of the Applicant.

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In October, 1998 one Sanele Ndlovu, Applicant's immediate supervisor reported that the Applicant was defying her instructions to wash pots. Sanele was a chef, whenever he asked her to wash dishes she

declined stating that she would not listen to an uneducated person. She told him to 'fuseki'.

When he requested Sanele to approach the Applicant and resolve the issue amicably, the Applicant shouted at Sanele and repeated the insults.

He reported the matter to the Manager Mr. Jacobs who called the Applicant and she was dismissed.

The Applicant meanwhile continued to threaten his life until he had to quit his employment with the Respondent. He produced a letter of resignation which detailed the threats made to his life by the Applicant.

He told the court under cross examination that he personally heard the Applicant insult the chef. She was questioned by Jacobs about the insults before the dismissal.

DW3 was the chef Sanele Ndlovu. He was an ex-employee of the Respondent. He told the court that the Applicant made his work very difficult because she was insubordinate and declined to wash pots whenever he had requested her to do so.

She told him to 'fuseki' and threatened to get people to deal with him. She incited other employees against him telling them that he was not educated.

He approached her for reconciliation but was all in vain. He then reported to DW2 his supervisor.

DW4 was Mr. Garth Desmond Jacobs, the Managing Director of the Respondent. He operated a general dealer shop and restaurant at Manzini and Malkems.

Applicant was a cashier at Malkems. On the 30th September 1997 Mr. Jacobs discovered that the stock had materially diminished and suspected theft. He went to the watchman's house and conducted a search after breaking the door. He found three (3) bales of sugar, cartons of cigarette and other items therein. At the time the Applicant was the cashier and supervisor of the rest of the staff. She was responsible for overseeing the shop. She was not directly implicated in the theft.

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Her subordinates were charged and convicted of theft. She was not disciplined in spite of the fact that she was over all responsible for the shop.

Mr. Jacobs transferred her to the O.K restaurant. When the other employees Velaphi Mamba and Moses served their sentence, they voluntarily confided in him that the Applicant was also involved in the theft at the Malkems shop.

Mr. Jacobs did not take action against her then as this was in 1998 but he questioned her about it.

At Manzini her work performance was poor. He transferred her from the cashier department to the kitchen after she had a shortage at the till. He gave her several warnings after every incidence of misconduct.

He finally gave her a final warning for absenting herself from work for nine (9) days whereas she had been granted 3 days.

Upon termination he offered her notice pay and leave pay which she declined to take. Mr. Jacobs tenders such payment to her to date.

From the evidence of DW1 and DW4, it is clear that there was theft going on at the Malkerns shop while the Applicant was the overseer of the operations of the shop. She was not disciplined for that but only received a transfer to the O.K. restaurant.

At the O.K. restaurant the testimony of DW2 and DW3 confirm that the Applicant was insubordinate to the chef and used derogatory language and threats against both DW2 and DW3 who were her supervisors.

She was confronted by DW4 Mr. Jacobs about her conduct subsequent to which she was dismissed.

It is clear to me that the conduct of the Applicant was unbecoming at the work place especially her refusal to wash the pots and use of insulting language against her supervisor.

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Having received various warnings about misconduct and poor work performance in terms of Section 36 (a) the employer cannot reasonably be expected to continue to employ her.

In my view, Mr. Jacobs was very patient with the Applicant and went beyond the legal requirement of giving one written warning before dismissing the Applicant for misconduct and poor work performance.

I find that her dismissal was fair and reasonable in the circumstances of the case.

I however award her one month's notice in the sum of E834.00 computed as follows:

(Basic salary E530, housing allowance E50.00 and food ration E254) I further award her E435.00 in lieu of leave.

The Applicant's claim for underpayments has failed in view of the evidence by Mr. Jacobs that over and above E530.00 basic wage, the Applicant received E50.00 house allowance, E50 bonus, E254 food ration per month. The total pay exceeded the minimum wage provided for the job category of the Applicant.

The Applicant will accordingly receive E1,269.00. There will be no order as to costs. The Members Agree.

NDERI NDUMA

PRESIDENT - INDUSTRIAL COURT