

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1/2000

In the matter between:

PIUS DLAMINI

APPLICANT

and

SWAZI SPA HOLDINGS

RESPONDENT

CORAM:

NDERI NDUMA

: PRESIDENT

JOSIAH YENDE

: MEMBER

NICHOLAS MANANA

: MEMBER

FOR APPLICANT

: S. C. MDLULI

FOR RESPONDENT

: N. J. HLOPHE

JUDGEMENT

31/07/03

The application for unresolved dispute was instituted in terms of Section 65 (1) of the Industrial Relations Act No. 1 of 1996 by the Applicant. He seeks reinstatement and/or compensation coupled with payment of terminal benefits for the alleged unfair dismissal by the employer, the Respondent herein.

According to the particulars of claim and the summary of evidence presented by the Applicant under oath, he was employed by the Respondent as a waiter in November 1981 and was in continuous employment for a period of eighteen years (18yrs) till the termination on the month of July 1998.

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The Applicant recalled the facts leading to his dismissal as follows:

That on the 20th June 1998 the Ezulwini Sun Restaurant owned by the Respondent was hosting a Chinese dinner and he was on duty as a waiter on the day until 11.00p.m. in the evening when he knocked off and went to his company residence.

When he reported to work the following day, the Assistant Manager informed him that there was a shortage of E150.00 from table 19, one of the several tables catered for by the Applicant.

The Assistant Manager, Paul Shabangu who was his immediate supervisor advised him to pay the shortage and told him that a warning letter would be issued to him for negligence.

The Applicant could not immediately recall how the shortage had occurred stating that it was a very busy day. He however borrowed money from one Dumisani Matsebula to make good the loss. On hideshow he remembered collecting the money from two Chinese customers at table 19 together with the cash register generated docket he had presented to them. He at the same time collected the utensils from the table and proceeded to the dishes station. He recalled that he must have then forgotten the docket with the money at the station. To him this was the only plausible explanation for the loss as he could not have dared to

misappropriate money from the customers assigned to him since this would have been immediately discovered as happened in this case. He added that he had not misappropriated money in his 18 years service in which he had not only served as a waiter but also acted as cashier. He had no previous warnings of misconduct or offences associated with dishonesty and believed that this was an error that could befall any human being for which he was remorseful.

After he had replaced the E150,00 he had hoped that the matter was at an end but the Food and Beverages Manager Mazwi Mango charged him with theft. A disciplinary hearing was held pursuant to which he was found guilty and summarily dismissed.

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As a consequence thereof he lost terminal benefits accumulated over a period of 18 years, lost his employment, lost employer contribution to his pension fund and had suffered loss and damage coupled with the lost support for his dependants.

He recalled that on the material day he was servicing 8 tables and it was inconceivable that he would have intentionally stolen money from one of the tables since he was directly responsible for the same. He described the decision of the employer to dismiss him as unfair, inconsiderate and unreasonable in the circumstances of the case. He however admitted that he was negligent on the day and should have been punished for that.

The Applicant appealed the dismissal but he was not successful. He was still unemployed in spite of efforts to find alternative employment. He was forty six years old and worked as a volunteer to cater for the terminally ill people for no pay. The alleged theft was not reported to the Police. He had no previous criminal record. He expresses a wish to be reinstated to his previous job.

He reported the matter to the Labour Commissioner in 1998 and a certificate of unresolved dispute was issued on the 10th March 1999. He does not know why the matter took so long to be finalized as it was in the hands of his attorneys.

The Applicant in addition seeks 14 days leave pay for the year 1998 which he had not taken prior to the dismissal.

The applicant withstood a well sustained cross examination by counsel for the Respondent Mr. N. J. Hlophe. There were however lapses in his line of thought and consistency which the court attributes to the passage of time from the date when the events occurred.

The Respondent called two witnesses namely Mazwi Mango the Food and Beverages Manager and Mr. Johannes M. Sikhosana who chaired the disciplinary hearing that led to the dismissal of the Applicant. He

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was then employed by the Respondent as the Royal Swazi Sun Estate Manager.

Mr. Mango told the court that on the material day in 1998 he was stationed at the Ezulwini Sun hotel and the Applicant was one of his waiters at the Valley Blues Restaurant. He stated that a report of lost money and docket was made to him on the 20th June 1998 in respect of table 19, one of the tables under the charge of the Applicant on the day. The hotel hosted a Chinese dinner and was relatively busy. Table 19 had two guests who were supposed to have paid E150.00 for the dinner.

According to him, the Applicant explained to him that he recalled presenting the docket to the two customers and receiving E150.00 cash. The Applicant was however not clear as to what had happened to the docket and the cash. The Applicant further told him that he had promised the supervisor to refund the money as he was negligent. The Applicant had knocked off without closing the docket and according to him he had left earlier than the rest of the waiters. He suspected that he had stolen the money and

charged him for theft.

He concluded that it was a case of theft because the Applicant had first denied receiving the money.

When the loss was discovered the waiter had knocked off but the two customers had not left. He denied that the Applicant had explained to him that he had forgotten the docket at the dishes station stating that this defence was presented in court for the first time.

As concerns the leave days due to the Applicant for the year 1998, he said he had no details on the matter. He did not check his file, nor his previous records before suspecting him for theft. He admitted that the Applicant had served the Respondent as a waiter and cashier for a long time and that he had found him in the employ of the Respondent when he himself was first employed. He told the court that he had not experienced similar problems or misconduct from the Applicant in the past nor did he have previous warnings.

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As concerns reinstatement he told the court that the Respondent had retrenched staff since 1998 and had less waiters than previously.

He denied that Paul Shabangu the assistant manager had disciplined the Applicant by cautioning him for negligence upon his repaying the lost sum of money. Paul Shabangu was not called to testify in this respect. The Applicant insisted that this was the case and ought not to have been charged for theft.

It was argued for the Respondent that Paul Shabangu had no authority to finalize the matter by cautioning the Applicant. The court was shown a document purporting to have been signed by Paul Shabangu indicating that the Applicant had replaced the docket and E150.00 but said he could not recall whether that was brought to his attention before he charged the Applicant for theft. He insisted however that the matter had not been finalized by the assistant manager.

Questioned by the court as to whether Paul Shabangu could caution his subordinate, he insisted that he had no such authority though there was no reference in the disciplinary code on the matter, he said that according to him the only explanation of the loss of E150.00 was theft by the Applicant but not negligence.

Johannes Sikhosana told the court that he chaired the disciplinary hearing against the Applicant. He said that the Applicant admitted losing the money but asked for leniency. He told the court that the Applicant had pleaded guilty to the charge but according to the notification of the hearing produced by the Respondent, it is recorded that the Applicant had pleaded not guilty to the charge of theft.

He said according to him since money and the docket had disappeared that was theft and he did not consider other options. He did not look at the past records of the Applicant even though he acknowledges that he was aware he had served the respondent for a period of many years.

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The cashier on duty was not called to the disciplinary hearing.

Upon a careful consideration of the testimony of the Applicant, and the two witnesses of the Respondent the court has arrived at the following conclusions:

1. That the 20th June 1998 was a busy day for the waiters at the Ezulwini Sun Valley Blues Restaurant.
2. That the Applicant had been allocated eight tables to serve Chinese dinner.
3. That he had served two customers at table 19 and presented to them the bill of E150.00 in the

form of a cash register docket

4. That the customers placed the cash in the docket.
5. That the Applicant picked the dishes together with the docket with cash inside that went missing.
6. That the explanation by the Applicant that he had negligently failed to present the docket and cash to the cashier before he knocked off was a plausible and reasonable explanation considering the circumstances of the case in particular the following:
 - (a) He was responsible for table 19.
 - (b) There was no room to conceal the payments by the customers since the bills had been generated for each table by the cashier.
 - (c) The docket and the cash disappeared which fact would have been as happened immediately discovered.
 - (d) The applicant had no record of theft for a period of 18 years and would not have jeopardized his job and benefits for a meager E150.00 in the court's opinion.

The approach taken by Paul Shabangu was reasonable in the circumstances of the case given that there was no evidence at all that the Applicant had stolen the money.

RW1 and RW2 have failed completely to prove to the court on a balance of probabilities that the Applicant had stolen the cash from his own table.

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This is a clear case of negligence that at most warranted a warning especially in view of the long service and clean record of the Applicant.

Consequently, the Respondent has failed to show that it dismissed the Applicant for a reason permitted by Section 36 of the Employment Act. Furthermore, the Respondent has failed to establish that such dismissal was fair and reasonable in the circumstances of the case. Indeed the matter presents a classical case of an employer's disrespect of a long standing good employee/employer relationship without proper justification.

In terms of Section 15 (3) of the 1996 Industrial Relations Act, where the services of an employee have been unlawfully or unfairly terminated the court shall in deciding which remedy to award first consider the possibility of making an award of reinstatement or re-engagement taking into account the circumstances of the termination including the extent if any to which the employee contributed to the termination, the practicability of the employer complying with the award and any other relevant factors.

It is a long time since the Applicant was dismissed. He expresses a wish to be reinstated as at the age of 46 years he is unlikely to be employed elsewhere. Considering the practicability of reinstatement, the court is hesitant to grant his wish due to the passage of time. He had served for 18 years and has greatly been prejudiced as hereinbefore stated.

The 1996 Act permitted compensation for twenty four months and the court considering the actual and future loss likely to be suffered by the Applicant as a result of the termination, loss of his pension benefits, salary, housing, his advanced age and little prospect of new employment, awards him twenty (20) months salary as compensation for unfair dismissal In the sum of E28.000. Further the Respondent will pay E933.24 in lieu of 14 days leave, E1,400.00 Notice pay.

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Additional Notice	E 266.64
Severance Allowance	E11,332.20
Total	E40,932.08

The Respondent will pay costs of the suit. The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT