

IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE

CASE NO. 320/04

In the matter between:

SIBONGILE FRUHWIRTH

APPLICANT

And

CONCO SWAZILAND

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: ACTING JUDGE

GILBERT NDZINISA : MEMBER

DAN MANGO: MEMBER

FOR APPLICANT: MR. M. MKHWANAZI

FOR RESPONDENT: MR.Z.JELE

JUDGEMENT 20.07.06

[1] This is an application for determination of an unresolved dispute in terms of Section 85(2) of the Industrial Relations Act No.1 of 2000 as amended.

[2] The applicant claims in her papers that her service was unfairly and unreasonably terminated by the respondent. The respondent in its replies denied these allegations and averred that the termination of the applicant's service was both fair and reasonable. The respondent stated in its papers that the applicant's service was terminated after the disciplinary hearing chairman found her guilty of poor work performance.

[3] The applicant's prayers are as follows:-

(i) Reinstatement; or alternatively

(ii) Compensation for unfair dismissal comprising of the following:

(a) Notice pay	E 15 522.76
(b) Additional Notice pay 3 x 4 x E710.74	E 8 528.88 ©
(c) Severance Allowance 3 x 10 x E710.74	E 21 322.20
(d) Maximum compensation (36 months	E550109.52
(e) Leave pay (18 days)	E 12 793.32
(f) 13th cheque	E 11 248.45
(g) Provident Fund contributions	<u>E 18 000.00</u>
TOTAL	E637 525.13

[4] The evidence before court revealed that the applicant was employed by the respondent on 15/03/01 as a cost accountant. She was dismissed on 10/05/04. Her salary was E15,522:00 including a car allowance. Her duties involved doing costing of new products, looking after inventories on a weekly basis, writing off of stale inventories and doing other various duties on behalf of the finance department.

[5] She was appraised on a quarterly basis. If she passed the ratings, she would be entitled to a merit increase. After her annual assessment of performance for 2001/2002 she got an SM rating. SM is an acronym for "successfully meets" the requirements. Again in 2002/2003 she got an SM rating which entitled her to a merit increase of her salary. (See annexure "A1" and "A2").

[6] Her immediate supervisor was RW1, Trevor Ncala. For some unknown reasons, after such good performance the applicant performance dropped dramatically which led to her dismissal. According to Ncala, the applicant was put on a performance improvement plan, but she failed to improve.

[7] The applicant's last assessment was done in October 2003 and she got an FM ("fails to meet requirements") rating. She said she did not agree with this rating, but signed the document for the sake of continuity. She said her supervisor this time just wanted to impose the rating. She said her performance was affected by other departments that had their own problems. She said she did not believe that she was performing badly.

[8] After she received the poor rating, the applicant was put on a performance improvement plan (PIP) in order to help her to improve. The applicant said RW1 did not do the performance improvement plan process properly with her. She said she reported this to the Human Resources Manager. She said she would bring her work to him and wait for him until he decides to look at it. She said he started the performance improvement plan to cover himself, not that he found anything wrong with her work. She said he did not provide continuous counselling. During cross-examination she told the court that they did not have time to review the reports. She further said he refused to review her work. She told the court that she submitted her work on time but he reviewed it late. She said he recorded that they were to meet, but when she came he brushed her off.

[9] When asked during re-examination as to what prompted this behaviour by RW1, she said it was as the result of her raising a grievance with the employer, after she was sidelined for a trip to Ireland, and in her place, a new employee was sent.

[10] RW1, Trevor Ncala testified and told the court that he was the budget and treasury manager and that the applicant reported to him. He said he was a member of the panel

that interviewed the applicant when she was employed by the company. He also told the court that he inducted the applicant. He denied the evidence of the applicant. He said the applicant never reported him to his superiors. He conceded that the procedures were not followed in some instances. He said the applicant started to perform poorly from June 2003. He said his observations that the applicant was not performing well was backed by audit reports which also revealed that she submitted her work late and had some errors.

[11] RW2, Gert Breemhaar told the court that he was the Finance Manager at Conco when the applicant was still employed there. RW2 chaired the disciplinary hearing. He said the evidence led before him revealed that the applicant submitted her work late and it had errors. RW2 said the evidence against the applicant at the hearing was led by RW1. He said from that evidence he found the applicant guilty of the charges. RW2 said the applicant denied most of the claims against her. RW2 also told the court that the applicant never told him that she was having a problem with RW1. He said he could only remember that she did once make an informal complaint about RW1. He said when he verified that with RW1, he found that it was about the work gaps by the applicant.

[12] RW2's evidence did not take the respondent's case any further. He made his decision during the hearing on the basis of the evidence presented by RW1. RW1 conceded that the procedure was flouted in as far as the company disciplinary code was concerned. This much was also admitted during the submissions. It was argued that this flouting of procedure was not fatal.

[13] This submission that the flouting of the disciplinary code was not fatal will be dismissed by the court. The evidence before the court revealed that the respondent is a very sophisticated company that demands that its employees should meet the set standards of operations. It cannot therefore lie in its mouth that when it comes to it the standards should be relaxed. The company having failed to follow the provisions of its

disciplinary code, the court will find that the dismissal of the applicant was procedurally unfair.

[14] The evidence revealed that the applicant had a good working relationship with the production manager, Mancoba Khumalo. The applicant also had a good working relationship with the Distribution and Warehouse Manager, Valerie Badenhorst. There was no explanation given to the court as to how did it happen that all of a sudden, the applicant having been at the respondent's undertaking for almost three years, her performance dropped. The court must therefore make an inference from the proved facts before it.

[15] In terms of the law the burden of proof is on the employer to show that the termination of the service of the employee was fair. The Employment Act provides that the service of an employee shall not be considered as having been fairly terminated unless the employer proves, (i) that the reason for the termination was one permitted by section 36; and (ii) that taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee. **(SEE SECTION 42 (2) (A) AND (B) OF THE EMPLOYMENT ACT NO.50 OF 1980).**

[16] It is not enough, therefore, for an employer to merely show that the employee was terminated for a reason permitted under section 36 of the Employment Act. The employer must also satisfy the second requirement of the burden of proof, namely; that taking into account all the circumstances of the case, it was reasonable to terminate the service of the employee.

The common thread in the applicant's evidence was that her manager RW1, was the one who deliberately failed to review her work on time when she had submitted it. The applicant said most of her reports were submitted on time. She admitted however, during cross-examination that there were a few that were not submitted on time. It seems indeed that this problem of late submission was picked up by the auditors. There

was no objection to the handing of the audit, reports to court. The court will assume therefore that the correctness of the contents is not in dispute.

[18] From the evidence presented before the court, the respondent terminated the applicant's service because of her conduct of submitting her work to RW1 late, her work had errors and that she failed to meet set objectives. The question that remains to be answered is whether taking into account all the circumstances of the case; it was reasonable to terminate the service of the applicant?

[19] During cross-examination RW1 was asked if the applicant failed to meet the set objectives because of lack of knowledge and ability to perform. RW1's answer was that it related to poor work performance. He said the applicant did have the ability and skill. There was indeed no evidence that the applicant was unwilling to perform her duties. After the applicant was given a poor rating, she was put on a performance improvement plan. She was to be monitored and mentored by RW1 to help her improve. The evidence revealed that RW1 did not do that task properly. It cannot therefore be said that the applicant has been shown to be someone who was incapable of improving.

[20] It still remains a mystery as to what led to the applicant's poor performance just four months after she had got a good rating. It cannot be said that there was a proper mentoring process of the applicant to help her to improve in the light of the evidence that the applicant's manager was only interested in seeing the bad part of her work. The evidence further revealed that she was never counseled in the presence of the Human Resources Manager.

[21] From the evidence led before the court, the inescapable conclusion is that RW1 had a fixed intention of getting rid of the applicant from the respondent's employment.

[22] The court will therefore come to the conclusion that the respondent has failed to prove on a balance of probabilities that taking into account all the circumstances of the case, it was reasonable to terminate the service of the applicant in the light of her

hitherto unblemished record, the failure of RW1 to follow the provisions of the company's disciplinary code and the fact that she had a good working relationship with other workers, that is Mancoba, Jackson and Valerie. The court does not accept that she could not be transferred to other departments of the company.

[23] The court having found that the respondent has failed to satisfy all the requirements for fair termination in terms of **SECTION 42 (2)(A) AND (B) OF THE EMPLOYMENT ACT**, the court will accordingly come to the conclusion that the applicant's service was unfairly terminated by the respondent. (See **The University of Swaziland v The President of the Industrial Court of Swaziland and Vusi Hlatshwako H.C. Case No. 3060/2001**).

[24] The applicant's application therefore succeeds.

[25] *REMEDY:-*

The applicant prays for re-instatement or alternatively maximum compensation and terminal benefits. The applicant is presently unemployed. She is married and has two children. Her husband is employed. She told the court that she is unable to get alternative employment.

[26] In the light of the evidence before court, it clearly would not be proper to make an order for re-instatement. The question of terminal benefits was not addressed by the parties in their evidence before the court. In its replies the respondent stated that the applicant was paid her leave pay, provident fund, and a pro-rated share of the thirteenth cheque. The applicant did not file a replication to deny that. The court will therefore proceed on the basis that those benefits were paid to the applicant.

[27] The court having carefully considered the personal circumstances of the applicant, the court will make an order that the respondent pays the following amounts to the applicant;

1. NOTICE PAY	E15,522.76
2. ADDITIONAL NOTICE (2 x 4 x E710.74)	E 5,685.92
3. SEVERANCE ALLOWANCE (2 x 10 x E710.74)	E14,214.80
4. COMPENSATION (E15,522.76 x 12)	<u>E186,273.12</u>
TOTAL	<u>E221,696.60</u>

No order for costs is made.

The members agree.

**NKOSINATHI NKONYANE A.J.
INDUSTRIAL COURT**