

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 259/2005

In the matter between:

WONDER NDLELA

Applicant

and

**PAUL WANG & A. CHANG (DIRECTORS t/a
MOUNTAIN VIEW COTTAGE)**

Respondent

CORAM:

P. R. DUNSEITH: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT: MBUSO DUBE

FOR RESPONDENTS: NO APPEARANCE

J U D G E M E N T - 27/09/07

1. The Respondents were served with the application on 9 August 2005 but failed to enter an appearance to defend. When the matter came before the court for *ex parte* trial, we directed that notice of set down be served on the Respondents before the trial could proceed. On the postponed trial date, proof of service of the set down was duly filed.

There was still no appearance on behalf of the Respondents, and the trial proceeded in their absence on an unopposed basis.

2. The Applicant testified that he was employed as a security guard by Mrs. Annie Chang, the owner of Mountain View Cottage, in January 2000. He was placed under the supervision of Mr. Paul Wang, a friend of Mrs. Chang. Mountain View Cottage operated as a bed-&-breakfast establishment.

3. The Applicant testified that on 16th September 2004 he was instructed to assist the gardener in cleaning the yard in preparation for the arrival of guests. Notwithstanding that this work was not part of his job description and he was expected to perform it during his off time without compensation, he assisted the gardener. As a result, he only had two hours to sleep before he started his night shift as a guard.

4. The Applicant was tired and he fell asleep whilst on duty as a guard. Paul Wang woke him up, shouting at him, and the Applicant apologized.

5. The following day was the Applicant's day off. When he returned to work on Saturday 18th September 2004, he found another security guard employed in his place. The guard relayed a message to him that his services were no longer required, and gave him E300.00 from the employer as payment of wages for days worked.

6. The Applicant engaged a labour consultant, who accompanied him to meet with his employer. They spoke to Paul Wang, who confirmed that the Applicant had been dismissed.

7. Prior to his dismissal, the Applicant had a clean disciplinary record.

8. The Applicant reported a dispute to the Conciliation, Mediation and Arbitration Commission. The Respondents failed to honour an invitation to attend conciliation, and a certificate of unresolved dispute was issued.

9. Sleeping on duty is not *per se* a ground for dismissal. Such conduct in a security guard constitutes unacceptable work performance, but poor work performance can only be a fair reason for dismissal where the employee had first been given counseling and opportunity to improve his performance and thereafter a final written warning.

10. No disciplinary hearing was convened and the Applicant was afforded no chance to explain the reasons why he failed to stay awake. He was not given written notice of dismissal, nor the opportunity to appeal against his dismissal.

11. Having regard to the Applicant's unchallenged testimony, the court finds that:

11.1. The Applicant was employed by Mrs. A. Chang in January 2000.

11.2. The Applicant was an employee to whom section 35 of the Employment 1980 applies;

11.3. The termination of the Applicant's services was substantively and procedurally unfair and unreasonable.

12. The Applicant is entitled to payment of his statutory terminal benefits, his outstanding leave pay, and compensation for unfair dismissal.

13. The Applicant says he was entitled to 15 days statutory leave per annum. He did not take leave throughout his employment. He was due 55 days leave.

14. The Applicant was unemployed for 2 years before he found another job. The manner of his dismissal was rude and humiliating. Nevertheless he is a young man and he has recovered from his setback at the hands of the Respondent. We consider that an award of 6 months will adequately compensate hirri for his unfair dismissal.

15. Judgement is entered against the Respondent Mrs. A. Chang for payment to the applicant as follows:

Notice Pay	800.00
Additional Notice Pay	369.24
Severance allowance	923.10
Leave pay	2153.85
Compensation	4800.00.
	E9046.16

16. The Respondent Mrs. A. Chang will pay the Applicant's costs.

The members agree.

**PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT**