

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 461/2007

In the matter between:

FRANK MNDZEBELE

Applicant

and

SWAZILAND DEVELOPMENT AND SAVINGS BANK

Respondent

CORAM:

**P. R. DUNSEITH
JOSIAH YENDE
NICHOLAS MANANA**

**PRESIDENT
MEMBER
MEMBER**

**FOR APPLICANT
FOR RESPONDENT**

**S. MAMBA M.
SIBANDZE**

J U D G E M E N T - 17/10/07

1. The Applicant was a bank teller in the employ of the Respondent.
At all times material to this application his employment was governed by the terms of a Collective Agreement and the Disciplinary Code and Procedures which forms part of the Collective Agreement.

2. Article 1.10 of the Disciplinary Code and Procedure provides as follows:

"All disciplinary action shall be taken and finalized as soon as possible after the misconduct has been brought to the attention of management, in any case not later than thirty days. However the thirty day period refers to matters dealt with up to the level of Human Resources Manager. Matters such as those involving police investigations and/or litigation or reasonable internal investigations may take longer periods as circumstances may demand."

3. On 14th June 2007 the Applicant was served with notice of a disciplinary hearing. The disciplinary charges in the notice allege that the Applicant falsified bank records on or during 21st May 2007 and 22nd May 2007 to conceal a difference of E1000-00, and he failed to declare a cash shortage of E1000-00 which was discovered on 23rd May 2007.

4. According to a letter from the Respondent's Commercial Unit Manager filed of record by the Applicant, the alleged misconduct was brought to the attention of management on 23rd May 2007. In terms of Article 1.10 of the Disciplinary Code and Procedures, any disciplinary action against the Applicant in respect of the alleged misconduct had to be taken and finalized not later than thirty days after the 23rd May 2007.

5. The disciplinary hearing was duly held, and on 22nd June 2007 the Applicant was found guilty of the disciplinary charges and summarily dismissed.

The 22nd June 2007 is the thirtieth day after the 23rd May 2007, if one includes Saturdays and Sundays.

The Applicant appealed against his summary dismissal by letter dated 2nd July 2007. The hearing of the appeal was delayed through no fault of the Applicant. The hearing was eventually held on the 14th September 2007. When the matter was argued in court on the 11th October 2007, the appeal chairman had still not delivered his findings on the appeal.

It is a matter for concern that the Applicant's appeal has not been determined after the elapse of more than three months. The Applicant has not however come to court seeking an order compelling determination of the appeal. On the contrary, he has applied for an order interdicting and restraining the Respondents from conducting and/or continuing with the disciplinary proceedings, and directing the Respondent to reinstate the Applicant to his employment.

The Applicant's argument is simply that the failure of the Respondent to conclude the disciplinary process, including the appeal, within 30 days after the 23rd May 2007, constitutes a violation of article 1.10 of its disciplinary code and procedure. Furthermore, article 5.1.3 of the code and procedure states that *"any disciplinary action taken outside the 30 days in terms of article 1.10 shall be null and void."*

The Respondent in reply has argued as a legal point in limine that, on a proper interpretation of article 1.10, it is disciplinary action instituted by the Respondent against its employee which must be taken and finalized within thirty days. An appeal against a disciplinary sanction

instituted by an employee is not disciplinary action as contemplated by article 1.10.

"Disciplinary action" in its ordinary grammatical meaning refers to action taken to enforce or promote discipline. Article 1.4 of the Respondent's Disciplinary Code and Procedure provides explicitly that "Discipline shall mean any action initiated by management in response to unacceptable employee performance or behaviour."

The term disciplinary action is generally used in the Code and Procedure to refer to the process initiated by the Respondent whereby an employee is sanctioned for a disciplinary offence. Article 4 refers to "Appeals against Disciplinary Action", and states that *"an employee who wishes to appeal against disciplinary action imposed on him shall furnish a notice of appeal..."*

Articles 2.3.5, 2.3.5 and 2.4.3 all state:

"Should the employee.... wish to challenge the fairness of the disciplinary action taken, he should lodge an appeal in accordance with the Appeal Procedure."

The language used makes it clear that an appeal is not disciplinary action, but rather a procedure initiated by an employee who wishes to challenge disciplinary action taken against him.

Bearing in mind the need for investigation of alleged misconduct, reasonable notice of a disciplinary hearing, conduct of the hearing, making a decision, submission of mitigation and imposing an appropriate sanction, thirty days is a reasonable and adequate maximum period for disciplinary action to be taken and finalized. If the appeal process had also to be finalized during this period, it would occasion undue stress on the disciplinary procedure which would not be in the interests of a fair process. It would also give rise to

uncertainty if a disciplinary sanction, fairly and timeously imposed, might be rendered null and void because the appeal could not be promptly finalized. In our view it is most improbable that the parties to the collective agreement intended articles 1.10 and 5.1.3 to have this effect.

14. It is the view of the court that the Respondent duly complied with the time limit prescribed by article 1.10 when it completed the disciplinary hearing and terminated the Applicant's services within thirty days.

15. The Respondent asks for an order that the Applicant pays the costs of the application. Although the application is without merit, we do not consider that the application is frivolous and vexatious. On the contrary we believe that the Applicant has been driven to court by the Respondent's tardy handling of his appeal. It is most unfair for an employee to be unnecessarily kept in limbo regarding his employment status. We decline to award costs to the Respondent in the circumstances.

16. The application is dismissed. There is no order as to costs.

The members agree.
PETER R. DUNSEITH

President of the Industrial Court