

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 389/2003

In the matter between:

GERMAN DUZE LOKOTFWAKO

Applicant

and

PRINCIPAL SECRETARY FOR THE

MINISTRY OF JUSTICE

1st Respondent

THE SECRETARY CIVIL

SERVICE BOARD

2nd Respondent

THE PRINCIPAL SECRETARY OF

PUBLIC SERVICE & INFORMATION

3rd Respondent

THE ACCOUNTANT GENERAL

4th Respondent

THE ATTORNEY GENERAL

5th Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : M. FAKUDZE

FOR RESPONDENT : D. NXUMALO

J U D G E M E N T - 20/10/2008

1. The Applicant alleges that he was prematurely retired from his employment by the Swaziland Government. He alleges that he still had 9 more years to serve before he reached the compulsory

retirement age of 60 years. He submits that his retirement amounted to unfair termination of his services in the circumstances, and he claims payment of maximum compensation and terminal benefits alternatively payment of the balance of salary payable up to the date he should retire.

2. Although the matter came to court as a trial action, the parties were able to agree on the relevant facts and it was unnecessary for any witnesses to be called to testify. The court was asked to make a determination on the basis of the agreed facts and the applicable Government general orders.
3. The agreed facts may be summarized as follows:

3.1 The Applicant was appointed by the Government of Swaziland as a driver on 5th July 1993. This appointment was on monthly terms, was not pensionable and was subject to the General Orders and other laws and regulations which govern the Public Service.

3.2 At the time of this appointment, the Applicant informed the Government that his date of birth was 1st January 1940. This date was recorded in his employment file. He also gave the Government a copy of his drivers licence, which recorded his date of birth as 20th January 1940.

- 3.3 On or about 22 October 1996 the Applicant was appointed on probation to the permanent post of driver in the civil service.
- 3.4 At the time of this appointment, the Applicant was required to complete a next of kin form. He did so and in the form he recorded that his date of birth was 5th November 1949. This form was kept in the Applicant's employment file.
- 3.5 On completion of his two year probation period the Applicant's appointment to the permanent post was confirmed and he was admitted to the Pensionable Establishment with effect from 14th October 1998.
- 3.6 On 3rd March 2003 the Government compulsorily retired the Applicant on the grounds that he had reached the normal retirement age in the civil service, namely 60 years.
- 3.7 The government relied on the date of birth furnished by the Applicant on his non-pensionable "temporary" appointment as a driver in 1993 when it decided that he had reached the age of 60 years.
4. The Applicant avers that the Government should have used the date of birth which he furnished in 1996 when he was given a

permanent appointment (on probation).

5. General Order A 635 provides:

DATE OF BIRTH THAT WILL BE ACCEPTABLE BY THE CIVIL SERVICE BOARD

An officer's date of birth that will be acceptable by Government as the true date of birth is the date the officer wrote on first appointment. If an officer decides to furnish a sworn affidavit, baptism or birth certificate with the purpose of amending the original date of birth, the Civil Service Board, or Principal Secretary, Ministry of Public Service & Information shall not accept such a certificate when determining his/her retirement.

6. The General Order is clearly intended to prevent the manipulation of birth dates in order to advance or postpone an officer's date of retirement. The parties in this matter are in agreement that, in view of General Order A.635, the court is not required to determine the Applicant's actual birth date. He is bound by the date he "wrote on first appointment." The issue for determination is whether the reference to "first appointment" in General Order A.635 refers to the Applicant's "temporary" appointment in 1993 or his permanent appointment in 1996.
7. In its ordinary grammatical meaning, "appointment" means the assignment of a post or office, and "first appointment" means the assignment of a post or office which is earliest in time or order.

See **The Concise Oxford Dictionary (19th Ed)**.

8. Applying the ordinary grammatical meaning, “first appointment” in General Order A.635 would refer to the Applicant’s first assignment to a post in the Civil Service in 1993.

9. In case the Government intended the words “first appointment” in General Order A.635 to have a more restricted or specialized meaning than the ordinary grammatical meaning, the court consulted the meaning of “appointment” as defined in Regulation 2 of the Civil Service Board (General) Regulations, 1963. In terms of this definition “appointment” means (inter alia):

“(a) the conferment of an office upon a person not already in the service on probation or contract, or temporary engagement;

(b) the conferment of an office on permanent and pensionable terms, on probation or otherwise, upon a person already in the service serving on contract, temporary engagement, or in an unestablished capacity;

(c)

(d)”

10. The Regulations are an aid to interpreting the General Orders. In the Regulations, “appointment” includes both “temporary” engagements on non-pensionable month-to-month terms and permanent engagements on pensionable terms. On this basis also, the Applicant’s first appointment was in 1993.

11. Mr. Fakudze for the Applicant argues that General Order A. 182 (1) supports the Applicant's interpretation of "first appointment." This General Order provides thus:

*"It is the policy of the Government that normally an officer shall be required to retire when he reaches the age of 60 years (**depending on the date when he was admitted to the Pensionable Establishment**) unless in the opinion of the appropriate Commission it is not in the best interest of the Public Service that the officer shall be required to retire"* (emphasis added).

Mr. Fakudze argues that the words emphasized in bold make it clear that the date of birth to be used for purposes of retirement is the date given by the employee when he was admitted to the Pensionable Establishment.

12. This argument, though superficially appealing, does not withstand closer scrutiny. The words relied on by Mr. Fakudze have nothing to do with determination of an officer's date of birth. They are included in order to preserve the rights of officers admitted to the Pensionable Establishment on a date when the normal retirement age was less than 60 years.
13. This is not a case where the Applicant is a victim of an error or a bureaucratic mix-up. He himself is the architect of the confusion surrounding his birth date. He represented to the Government in 1993 that he was born in 1940. He obtained a drivers licence on the representation that he was born in 1940. He obtained a birth certificate reflecting his date of birth as 5th November 1939. When it suited him, he rejected all these dates, claimed he was born in 1949 and obtained a revised birth certificate. This is the kind of

abuse that General Order A. 635 seeks to prevent.

14. It was not argued before us, but we do note in passing that the Applicant's driving licence was issued in 1963. If he was indeed born in 1949 as he now claims, this means he obtained a drivers licence at age 14 – a most unlikely event.
15. The Applicant's case has no merit in law or equity. His claims are dismissed. We make no order as to costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT