

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 62/03

In the matter between:

HILTON DLAMINI

APPLICANT

And

**THE TEACHING SERVICE COMMISSION
THE ATTORNEY GENERAL**

**1ST RESPONDENT
2ND RESPONDENT**

CORAM:

P. R. DUNSEITH	:	PRESIDENT
JOSIAH YENDE	:	MEMBER
NICHOLAS MANANA FOR APPLICANT	:	MEMBER V. DLAMINI
FOR RESPONDENT	:	V. KUNENE

J U D G E M E N T – 20/11/2008

1. The applicant was employed by the 1st respondent as a teacher on 28th January 1983 and posted from time to time to different primary schools in Swaziland. From 1997 until January 2002 he was teaching at St. Gabriel's Primary School at Mphundle in the Lubombo District.

2. On or about 21st January 2002 he was suspended from duty pending the investigation of a disciplinary complaint against him. He was subsequently invited to appear before the 1st respondent on a charge of “immoral conduct of impregnating a school child at St. Gabriel’s.”

3. After the disciplinary proceedings had been concluded, the 1st respondent wrote to the applicant on 24 April 2002 directing as follows:

“You have been found guilty as charged. The Commission in correcting this undesirable and unprofessional behaviour directs that you are dismissed from Service in terms of Regulation 15 (1)(a) of the Teaching Service Regulations of 1983 read in conjunction with the Teaching Service Act of 1982 with immediate effect.”

4. The reference to Regulation 15(1)(a) in the letter of dismissal is clearly an error. The letter should have referred to Regulation 17(1)(a), which provides that:

“17(1) *a teacher found guilty of misconduct under Regulation 15*
by the Commission may –
(a) be dismissed from the service;”

5. The applicant was dissatisfied with his dismissal and he reported a dispute to CMAC. Conciliation was unsuccessful and the dispute was certified as unresolved. The applicant then instituted proceedings in this court for determination of the unresolved dispute.

6. In his particulars of claim the applicant alleges that his dismissal was both substantively and procedurally unfair.

SUBSTANTIVE FAIRNESS OF DISMISSAL

1. The Industrial Court does not sit as a court of appeal to decide whether a disciplinary hearing came to a correct finding on the evidence before it. The Industrial Court must arrive at its own decision on the facts and to that end must have regard to all the evidence led in court, including but not restricted to the evidence made available during the disciplinary enquiry.

The Central Bank of Swaziland v Memory Matiwane (Unreported ICA Case No. 11/1993)**Swaziland United Bakeries v Armstrong Dlamini (Unreported ICA Case No. 117/1994)**

1. The applicant testified in court that he had a sexual relationship with a young girl called Fikile who was 14 years of age when the relationship began in October 2000.
7. The applicant said that Fikile was a primary school pupil at St. Gabriel's until February 1999. She dropped out of school because her mother could not afford to pay her school fees. The applicant was Fikile's class teacher in Grade 7A when she dropped out of school.
8. The applicant said Fikile's mother had suggested that he marry her daughter. He subsequently met Fikile in Manzini in October 2000 and they had sexual relations. He was aware that she was only 14 years of age. After that he had no contact with Fikile until she returned to school in January 2001 for the new school year. He was again her class teacher. He said he was horrified to find that a girl with whom he had had sexual relations was again a pupil in his class. Nevertheless Fikile soon dropped out again in March 2001. It later

transpired that she had dropped out because she was pregnant with applicant's child. The baby was born on 25 July 2001.

9. The applicant took Fikile and her baby to live at his home, with the permission of her mother. He said he intended to marry Fikile by Swazi custom once she turned 16 years. He already had one wife and five children. He was about 51 years of age.
10. Consequent on his dismissal, the applicant could not support Fikile and she left him to find employment. He has not married her to date, but he paid her family customary damages for impregnating her.
11. On the applicant's own evidence, he had sexual relations with and impregnated a 14 year old girl. Section 3(1) of The Girls' and Women's Protection Act, 1920 provides that any man who has carnal connection outside wedlock with a girl under the age of sixteen commits a criminal offence for which the penalty is imprisonment not exceeding six years with or without an additional penalty of a whipping and a fine.
12. The purpose and object of section 3 of The Girls' and Women's Protection Act, 1920 is to protect girls under the age of 16 years from immoral and indecent acts. Such girls are deemed incapable of consenting to sexual intercourse.
13. The court has no hesitation in finding that the applicant was guilty of immoral conduct when he had criminal sexual relations with and impregnated the 14 year old Fikile.
14. The applicant has tried to mitigate the extent of his moral turpitude by claiming that Fikile's mother solicited him to marry her daughter and told him he could "do anything Fikile agreed to." We find this latter evidence improbable, but

even if it is true it does not diminish the applicant's moral guilt. It merely renders Fikile's mother equally guilty of betraying her moral responsibility towards Fikile.

15. As Fikile's class teacher the applicant held a position of authority over her. In the view of the court he must also have been aware of her family's financial difficulties resulting in her dropping out of school. His seduction of Fikile was not only an abuse of his position of power as her former class teacher but was also an exploitation of a vulnerable child.
16. At the time the applicant impregnated Fikile in October 2001, she was not attending school, having dropped out earlier in the year. The applicant's counsel argues that the disciplinary charge was "immoral conduct of impregnating a school child at St Gabriel's" yet Fikile was not a school child when she was impregnated. He also argues that the letter of dismissal describes the offence as very serious "because the child is under aged, you have committed a statutory offence" yet the applicant was not charged with having committed statutory rape.
17. The central element of the disciplinary charge against the Applicant was the allegation that he was guilty of immoral conduct. Disciplinary charges do not require the particularity of a criminal indictment, and the court is satisfied that the applicant was not prejudiced in the conduct of his defence by any lack of particularity as to the precise immoral conduct alleged. He was never in any doubt that the charge of immoral conduct related to his relationship with Fikile.
18. Fikile was a pupil admitted to school at St. Gabriel's. She dropped out with a view to returning when finances permitted, and she did in fact return the following year. In our view she did not cease to be a "school child of St. Gabriel's" merely because her schooling was interrupted. In any event, even

if Fikile was not technically - speaking a school child of St. Gabriel's when the applicant had sexual relations with her, he was nevertheless guilty of immoral conduct for the reasons we have given in paragraphs 13 -17 *supra*.

19. We disagree with the submission of applicant's counsel that the Teaching Service Commission does not have the power to discipline the applicant for having a relationship with a girl under the age of 16 years in the absence of an express prohibition in the Teaching Service Regulations. The Regulations lay down a minimum standard of professional conduct for teachers in Swaziland. Amongst other things, this minimum standard emphasizes that a teacher is a role model who is expected, by his own personal life, to set an example to the children under his care and to the community amongst which he works. As we have already stated, sexual exploitation of underage children is not only immoral but criminal as well. It brings the teaching profession into disrepute and compromises the integrity of the school and the education system as a whole. Children are entitled to protection against sexual predators, particularly amongst those appointed to be their moral guardians.
20. Regulation 15(1(f) of the Teaching Service Regulations provides that immoral conduct is a disciplinary offence. The Commission correctly found the applicant guilty of immoral conduct, and in the judgement of the court dismissal was a reasonable and appropriate sanction. We find that the termination of the applicant's service was substantively fair and lawful.

PROCEDURAL FAIRNESS

21. The applicant alleges that his dismissal was procedurally unfair, in that
 - 21.1 Fikile and her mother were not called as witnesses and he never had the opportunity to cross examine them;

- 21.2 The 1st respondent conducted one part of the disciplinary hearing in his absence at his own homestead.
22. A strict adversarial procedure is not required at an internal disciplinary hearing, provided the employee is given a proper opportunity to challenge the evidence against him and to put forward his defence. The 1st respondent reached its decision on the basis of facts which the applicant admitted both at the disciplinary hearing and before this court. In these circumstances the court cannot find that any procedural irregularity arose from the failure to call Fikile and her mother as witnesses. The applicant could have called them himself. He was informed of his right to call witnesses but he elected not to do so.
23. The applicant's complaint that one part of the disciplinary hearing was conducted in his absence at his home has more substance. He was given less than 24 hours notice to attend a third meeting at the Regional Education Office on 4th April 2002 at Siteki, and invited to bring Fikile, the newborn baby and his mother-in-law. He was unable to attend because he wished to first consult with his attorney. When he did not arrive, the Commission adjourned the hearing and proceeded to the applicant's home. There they found Fikile and the applicant's wife Thembi Matse. The Commission party consisted of the Chairman, three members, the Executive Secretary, the Legal Advisor and a police officer.
24. According to the Legal Advisor Nhlanhla Dlamini, the Commission proceeded to applicant's home to "visit their employee." After confirming that it was his homestead and that he was not present, they left without asking any questions of Fikile pertaining to the disciplinary case.

25. This evidence is completely at variance with the 1st respondent's Reply, in which it is specifically pleaded as follows:
- “The respondents state that upon arrival at the homestead of (sic) the applicant was not present. They found Fikile and Thembi Matse. What was asked was the whereabouts of Mr. Dlamini, how old was she, was she married, was the marriage arranged by her parents and that if she was still interested to further her studies and how old was the child.”*
26. The applicant's wife Thembi Matse testified that the Commission interviewed Fikile and asked her when she dropped out of school, when she fell pregnant, and if she wanted to go back to school. This evidence was not challenged in cross-examination
27. We prefer the unshaken evidence of Thembi Matse on this issue. We also find it improbable that a party of seven people travelled to applicant's homestead just to visit him. He had told the Commission in a written note that he intended to consult his lawyer, so they knew that he was unlikely to be at home. In our view the Commission was determined to interview Fikile. That was the primary reason for the third hearing being arranged at Siteki. The Commission wanted to verify whether Fikile was attending school when she fell pregnant. They proceeded to the applicant's homestead for this purpose, and they interviewed Fikile in the absence of the applicant.
28. Conducting an enquiry and interviewing a material witness in the absence of the applicant, albeit informally at his homestead, was a clear breach of the rules of natural justice and fair process. In that respect we find that the disciplinary process was procedurally unfair.
29. Nevertheless, in the exercise of our discretion, we decline to award any compensation to the applicant in respect of the procedural unfairness. We do

not consider that the irregular interview of Fikile materially prejudiced the applicant or influenced the outcome of the hearing to his detriment. If anything, Fikile's evidence corroborated the version applicant had already given. We also do not consider this to be the kind of case where compensation is called for in order to censure the employer or to assuage the employee's sense of grievance. The seriousness of the applicant's misconduct, his lack of moral judgement and professional ethics, and his failure to show any sincere remorse all overshadow the procedural lapse of which he complains and disincline the court to award any compensation.

30. The application is dismissed.

We make no order as to costs.

The members agree.

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT