

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD IN MBABANE CASE NO. 22/2000

In the matter between:

DUMSANI MASHININI                      APPLICANT

And

NONTEX TEXTILES                      RESPONDENT

CORAM

KENNETH NKAMBULE :                      JUDGE

DAN MANGO :                              MEMBER

GILBERT NDZINISA :                      MEMBER

MR. SICELO DLAMINI :                      FOR APPLICANT

NO APPEARANCE :                      FOR RESPONDENT

JUDGEMENT

29/9/00

In this matter the applicant has brought an application to this court in terms of the Industrial Relations Act No. 1/1996.

There is filed with the court an affidavit of service dated 8th February 2000, We were satisfied that the respondent had been duly served with a copy of the application. The respondent has not filed any replying answer as required by the Industrial Court Rules, 1984. The hearing proceeded in terms of Rule 7 (14) (b) of the Industrial Court Rules.

In his particulars of claim and evidence before court, the applicant stated that he was employed by the respondent on the 12th day of December, 1996 and was in the continuous employ of the respondent company until the 27th September, 1999 when his services were terminated for allegedly coming to work under the influence of alcohol.

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According to the papers before court, respondent summarily terminated the services of the applicant on the 27th September, 1999. At the time of his dismissal applicant was invited to a disciplinary hearing on the same day he was alleged to have committed the offence. He lodged an appeal against the procedure used to discipline him and also against the sentence eventually meted. He was refused the right to appeal.

Conciliation proceedings were effected by the Labour Department and the matter was referred back to the parties for purposes of having the appeal hearing. Respondent refused to grant applicant the right to appeal. Applicant returned to the Labour Commissioner and reported the failure by respondent to hear the appeal. A certificate of unresolved dispute was eventually issued.

According to Grogan Riecket's Basic Employment Law 2nd ed page 100, "procedural fairness' requires that the employer must have treated the employee fairly before taking the decision to dismiss, i.e. he must have given the employee an opportunity to defend himself and to plead in mitigation of sentence."

The question that the court has to answer is: Was the disciplinary hearing procedurally fair?  
In CHRISTOPHER H. DLAMINI VS INTER AFRICA SUPPLIES

Industrial Court Case No. 7/97 at page 7 Parker Judge, as he then was set out six minimum standards which must be met in order for a hearing to qualify to be procedurally fair. He had this to say: "While we do not expect an employer to handle disciplinary hearings according to the standards of a court of law .... we expect that certain basic procedures must be followed. Among these are:

- i. The employer should advise the employee in advance of the precise charge or charges that he or she is to meet at the hearing. This requirement is tied up with the need for adequate preparation.
- ii. The employee should be advised in advance about his right to representation, and the representative must be a representative

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of his own choice, not imposed by the employer or any other person.

- iii. There should be a right of appeal and this should be explained to the employee".

Of record there is no evidence that applicant was advised that he had a right to be represented by a representative of his own choice. Secondly, respondent was not given enough time to prepare his case. The offence took place and immediately he was taken to the disciplinary hearing and his services terminated. Thirdly, he was refused the right to appeal.

From all this it is our decision that the dismissed was not fair within the meaning of procedural fairness under Section 42 (2) (b) of the Employment Act.

We now make the following order:

Respondent shall on or before 6th October 2000 pay to applicant -

- a) Ten (10) months' wages as compensation = 4,100-00
- b) Notice pay = 410-00
- c) Additional notice pay = 109-32
- d) Severance pay = 273-30

TOTAL = 4,892-62

No order as to costs. The members concur.

KENNETH P. NKAMBULE

JUDGE - INDUSTRIAL COURT

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