



**IN THE CONCILIATION, MEDIATION & ARBITRATION
COMMISSION (CMAC)**

HELD AT MANZINI

SWMZ 354/11

In the matter between:-

KHANYISILE HLETA & 30 OTHERS

APPLICANT

And

KARTAT INVESTMENTS (PTY) LTD

RESPONDENT

CORAM:

Arbitrator : Commissioner Mthunzi
Shabangu

For Applicant : Mr. Tom Simelane

For Respondent : Mr. Sanele Dlamini
(Personnel Officer)

Nature of Dispute : Unfair dismissal

Dates of Hearing : 8th& 9th December, 2011;
19th& 20th January, 2012;
3rd&23rd February, 2012.

ARBITRATION AWARD

DETAILS OF THE PARTIES AND REPRESENTATION

1. The Applicants are Khanyisile Hleta and 31 others whose full and further particulars are contained in **Annexure "A"** to the Report of Dispute Form (i.e. CMAC Form 1). The identity of the Applicants, their dates of employment and dismissal, wages and capacities as reflected in the said Annexure "A" were confirmed as correct by the Respondent's representative during a pre-arbitration hearing held on the 20th October, 2011 and its minute read into the record of the arbitration proceedings on the first day of the arbitration. The Applicants were represented by Mr. Tom Simelane during the course of the arbitration proceedings, their rights to legal representation having been duly explained.

2. The Respondent is Kartat Investments (Pty) Ltd, a company duly registered according to the company laws of Swaziland, whose principal place of business is at the Industrial Site - Matsapha. Mr. Sanele Dlamini, a Personnel Officer for Respondent represented the latter during the course of these arbitration proceedings, the right to legal representation having been explained to Mr. Dlamini.

3. The arbitration hearing was held at the CMAC Offices - Manzini and the matter had six (6) sittings as follows: 8th and 9th December, 2011; 19th and 20th January, 2012; 3rd and 23rd February, 2012.

ISSUE TO BE DECIDED

4. The issue for determination is whether or not the Applicants were unfairly dismissed from their employment.

BACKGROUND TO THE ISSUE

5. The Applicants are ex-employees of the Respondent, having been employed on various dates between the year 2003 and 2010. A majority of them (i.e. 30 of them) were Machinists save for Primrose Masango who was a Supervisor. They were all earning an equal wage of **E531.96** per fortnight (gross). They were all dismissed on various dates during the month of March 2011, allegedly for engaging in an unprotected strike action either on the 24th February, 2011 and/or on the 1st March, 2011 (i.e. on either of the two dates).
6. The Applicants' dismissal was in writing as all were given letters of dismissal pursuant to some disciplinary enquiries. They were all afforded an opportunity to appeal against the dismissals though their appeals did not succeed. Non-the-less Applicants are challenging the fairness of their dismissals both substantively and procedurally. They are accordingly claiming re-instatement and/or, alternatively, compensation for unfair dismissal.

7. The Respondent is a textile manufacturing company. It manufactures clothing for various customers (or companies) on bulk orders. It is one in a group of nine (9) companies which form part of the Tex-Ray Group of Companies. The others are Tex-Ray Swaziland, Union Industrial Washing, Kasumi Apparels, T.Q.M Textile, United Knitting, Wahtec Embroidery, Smooth International and Superfaith. The Respondent's factory consists of sixteen (16) sewing lines, ranging from D1 to D16. Each line is composed of about 48 employees, around 40 of these being Machinists. The rest are Helpers, Trimmers, Score-Takers, Line Feeders, Quality Controllers and Supervisors.
8. The Respondent disputes the alleged unfairness in the Applicants' dismissals whom it admits that they are its former employees. Respondent contends that Applicants were dismissed for engaging in an unprotected strike action either on the 24th February, 2011 or on the 1st March, 2011 and that they were afforded the right to be heard as their dismissals were preceded by disciplinary enquiries, including an appeal hearing. Consequently, the Respondent's argument is that the Applicants' dismissals were fair both substantively and procedurally and that the application ought to be dismissed.

SUMMARY OF THE EVIDENCE

The Applicants' Version;

9. Mr. Simelane paraded five (5) witnesses in an effort to establish the alleged unfairness in the Applicants' dismissals, four of whom were Machinists and one being a Supervisor. The intention was not to prove that Applicants were employees to whom **Section 35** of the **Employment Act No. 5 of 1980** applied as this fact had been agreed by both representatives as common cause. Rather it was to establish the alleged substantive and procedural unfairness in the dismissals. A summary of the most important aspects of the Applicants witnesses' evidence in influencing the outcome of this matter is as follows, per the chronology of the witnesses (i.e. from AW1 to 5).

KHANYISILE NTOMBIFUTHI HLETA (AW 1):

10. She was a Machinist and was based on line D1. She is amongst those who were dismissed for allegedly engaging in an unprotected strike (a go-slow) on the 1st March, 2011. She denied that herself and her co-Applicants ever participated in the alleged strike on that day in question inasmuch as she admitted that along those days beginning from the 24th February, 2011 up to the 1st March, 2011 work was not normal as the supply of work from one sewing line to the other was slow. She declined though to attribute the slow supply of work to a strike action.

11. Further, AW 1 confirmed that each sewing line had a daily target to reach in terms of production and that if that target was reached, that line would get a bonus. For example, she said her line (i.e. D1) had a target of 1200 pieces of clothing per day. When confronted under cross-examination if she recalls whether her line did reach its target on those days beginning from the 24th February, 2011 up to the 1st March, 2011 she passionately avoided that question, saying she did not check the score board on those days but only concentrated on her work. This response she maintained notwithstanding the fact that she admitted that it was normal for them to constantly check their scores to see if they would get a bonus. For example, AW 1 confirmed that on the 23rd February, 2011 they did reach their set target and got bonuses of E5.00 each.

12. AW1 admitted that the Respondent made numerous attempts to get employees back to normal production along those days. Starting from the 24th February, 2011 two written notices were issued by the employer on that day. The first notice was promising the employees a 3% wage increment pending the issuance of the revised wages regulation gazette. The second notice, written in both English and Siswati, was giving the employees an ultimatum to start normal work as from 11:15 hours on that day failing which face disciplinary measures.

These notices are **“KP 1 and 2”** respectively in the Respondent’s bundle of documents.

13. Over and above these mentioned notices, the company’s Managing Director- Mason Ma as well as two officials from the department of Labour under the Ministry of Labour and Social Security-Manzini Labour Office, named Mr. Mkhonta and Dube, did address all the workers on the 24th February, 2011 pleading with them to continue with normal work as the revised wages gazette was being finalized by the Wages Council. Moreover, certain Court orders were served on the employees by Deputy Sheriffs interdicting the employees from proceeding with the strike; the last of these was served on the employees outside the main gate on the 1st March, 2011 after the Respondent had effected a lock-out. AW1 acknowledged all the foregoing measures invoked by the Respondent, though persistently denying that they were in response to any strike action by herself and her co-workers.

14. This witness further challenged the procedural fairness of the dismissals saying, for one, they were discriminatory in that only Machinists were dismissed to the exclusion of the other co-workers in each line, being Helpers and Quality Controllers to mention but a few. She described Helpers as those who feed the Machinists with work and that thus Machinists cannot produce any work unless supplied by the Helpers and, the

supply of work from Helpers was low along those days, so she submitted.

15. Lastly, AW1 stated that immediately after being served with letters of dismissals on the 18th March, 2011 herself and the other Applicants were called back to work by the Respondent who offered some re-engagements, though on certain conditions. One of the conditions was that the Applicants had to abandon pursuit of their appeals against their dismissals. Further, that they would be considered as new employees and thus had to undergo a probationary period before being confirmed into permanent employ. The Applicants rejected the re-engagement offers so long as it had these conditions and were stopped from proceeding with work and duly paid for those three days worked after being re-called back to work after their dismissals.

STHEMBILE MAZIYA (AW2):

16. She was also dismissed for engaging in an unlawful strike on the 1st March, 2011. She was a Machinist based in line D 1.
17. This witness denied almost everything that happened along those days spanning from the 24th February, 2011 up to the 1st March, 2011 inasmuch as she confirmed being present at work along those days. She denied seeing the employer's notices -

“KP1 and 2”. Inasmuch as she confirms that the company’s Managing Director – Mason Ma as well as two officials from the Manzini Labour Office did address the workers in a group on the 24th February, 2011 she claimed not to have heard what they said, saying she only heard it from her co-workers. She confirmed that certain Deputy Sheriffs did come to the company to serve certain Court Orders. Regardless of all the foregoing occurrences, she denied any abnormality at work, maintaining that all was normal.

18. When asked what score she made on the 24th February, 2011 she said she did not check it as she was concentrating on her work. This she said notwithstanding the fact that ordinarily their daily scores were important as they determined if they would get bonuses, that is, if they had reached their set target entitling them to a bonus.
19. AW2 testified that her appeal hearing was presided over by Mr. Makhosi Vilakati and the appeal ruling was submitted as part of this witness’s evidence, marked **“KH2”**. She argued that this was irregular as Mr. Makhosi Vilakati was one of the two men who had introduced themselves as Deputy Sheriffs when serving a court order on the employees in the morning of the 1st March, 2011 by the company’s main gate.

NONHLANHLA MNDawe (AW3):

20. This one was stationed at line D10 and was dismissed for engaging on an unprotected strike which allegedly took place on the 24th February, 2011. She was the only Machinist dismissed in her line. However, just like the others, her dismissal was preceded by a disciplinary hearing and an appeal hearing.

21. She denied participating in any unlawful strike on that day, saying she was placed in middle of that line (D10) doing what she termed “binding” on that day (i.e. 24th February, 2011) and that the others next to her within the line were doing “flat” using a Flat machine. Work was supplied to her by the one next to her on the one hand and she would supply the next in line on the other hand as each person would do only a part of the sewing on any piece of clothing item and hand over the work to the next in line to do her part up until the last person within the line.

22. She cried unfairness for her dismissal, arguing as to how could she be on strike alone within her line as both the one supplying her with work on the one hand and the one she (AW3) supplied with work on the other hand were not charged nor dismissed, which only goes to show that work was not stuck with her in her line. Moreover, no one from her co-workers going up to the

Supervisor and Line Manager ever complained to her of being slow on the day in question.

23. She says after finishing her work, she would then wait for a Helper for a more supply and that on the 24th February, 2011 she had waited hardly three (3) minutes for a Helper to bring some work when she was called into office and suspended by Mr. Mamba, a Personnel Officer for being on strike.
24. AW3 further complained that the charge sheet was not read to her and she did not understand it, though admitting that the Chairman of her disciplinary hearing, Mr. Bhekumuzi Zeemans, did ask her if she understood the charges preferred against her. She further testified that no witness gave evidence about her wrongdoing during the disciplinary hearing.
25. Under cross-examination, AW3 admitted that work was not normal on that day as the supply of work to her was slow, though denying that it was her responsibility to raise an alarm on that issue, saying that was the duty of the Supervisor. She corroborated the other witnesses as with regards to the issue of getting bonuses if the set daily production targets were reached by each line.
26. She further admitted seeing the notices plucked by the employer on the notice board on that day, i.e. 24th February,

2011 as well as the special address by the company's Managing Director and some two Labour Officials to all the employees on that day, pleading with them to proceed with normal work as the wages issue was being deliberated upon.

27. AW3 denied tendering a plea of guilty to the charges during the disciplinary enquiry, saying she tendered a plea of not guilty.

PRIMROSE SHABANGU (nee MAGONGO) (AW4):

28. This one was a Supervisor for line D1 and was dismissed for allegedly engaging in an unprotected strike which took place on the 24th February, 2011. She denied that herself and her co-employees engaged in a strike on that day. However, she admitted that production was not good as from the 24th February up to the 1st March, 2011 as evidenced by the low scores seen on the score-sheet "**KP7**" in the Respondent's bundle of documents. She imputed the low scores mainly to a poor supply of cuffs from the Cutting Department as well as problems with colour shading (i.e. not corresponding cuffs) recurrent on that day such that she sent a Line Feeder - Gcinile Nxumalo to the Cutting Department to get more appropriate cuffs. She denied that these problems were due to a strike action.

29. AW4 defended the problem of cuffs as not occurring for the first time on the 24th February, saying it was a recurring problem and that it did not affect her line only, but even the other sewing lines up to D16. She testified that the low production scores were such that all the Supervisors were called into office by Personnel Managers wherein they (Supervisors) were put to terms to go and ensure that the employees improve their production scores to the usual scores, but all in vain as the scores continued to be low.
30. She made an example of her line, saying its set target was 130 pieces per hour, but they would make up to 150 pieces per hour if the supply of work was flowing constantly. However, during these controversial days her line would make as low as 6 pieces per hour as evidenced by the score-sheet for the 1st March, 2011 - **"KP7"**, much against the production scores of the 23rd February, 2011 which are as high as 150 pieces per hour (as also seen from "KP7").
31. Mrs. Shabangu corroborated the other witnesses in all material respects as with regards to the notices and ultimatum issued by the company on the 24th February, 2011, the special address to all employees by the Managing Director and by officials from the department of Labour- Manzini Labour office, the lock-out and the Court orders served on employees by Deputy Sheriffs.

32. She said she was suspended on the 1st March, 2011, eventually charged and dismissed for engaging in an unlawful strike action on the 24th February, 2011. Her appeal against the dismissal was not successful as the dismissal decision was sustained. She argued that her dismissal with only the Machinists in her line was segregational since Line Feeders, Trimmers, Helpers and Score Takers were excluded and they escaped the dismissals. She further accused the Chairperson of her disciplinary hearing of biasness in that he (chairperson) allegedly told her to admit the offence, something which she refused and maintained her innocence.
33. One significant fact for mention which transpired during cross-examination is that AW4 was dismissed and re-engaged by the same company sometime in August, 2010. This fact, which she confirmed sought to correct that her employment does not necessarily date back to February, 2009 as captured on Annexure "A" but rather August, 2010.

CEBILE KUNENE (AW5):

34. This one was suspended on the first day of the alleged strike, i.e. in the afternoon of the 24th February, 2011. She was eventually charged and dismissed for engaging in an unlawful strike which allegedly happened on that day. She was a

Machinist stationed at Line D14 and her sewing machine was the first on that line.

35. Like the others, she denied being on strike on the 24th February, 2011 inasmuch as she admits that production was low on that day. She shifted responsibility for the low scores to the poor supply of appropriate cuffs. She said the problem of shortage of matching cuffs was so severe such that the Line Manager sent a Helper to the other sister textile factories nearby to get matching cuffs. In the interim, i.e. as they were waiting for the supply of appropriate cuffs, her Line Manager took her to the middle of the line, about four sewing machines away from hers, to “mark placket” as she had no work to do by then.
36. AW5 confirmed the issuance of certain notices and an ultimatum on that day, i.e. 24th February, as well as the employees meeting with the Managing Director and two officials from the Manzini Labour Office.
37. Besides denying that she was on strike on that day, she accused the Chairperson of her disciplinary enquiry of being biased in that he was apparently in a hurry to conduct as many disciplinary hearings as he could for money. He kept reminding them to rush through as there were many employees to deal with, so goes AW5’s evidence, thus demonstrating biasness.

38. This witness confirmed the subsequent offers for re-engagements which were soon revoked after Applicants submitted their appeal letters challenging their dismissals.

The Respondent's Version;

39. In an earnest attempt to prove the fairness of the Applicants' dismissals, the Respondent led four (4) witnesses in evidence. Below is a summary of the most important aspects of their evidence.

JACKIE XU (RW1):

40. Testifying in his capacity as Personnel Section Manager for the whole of Tex-Ray group of Companies (nine of them), Mr. Xu stated that his office is based at Tex-Ray Swaziland.

41. On the 24th February, 2011 whilst in his office, he received a call from Kartat Investments' factory manager to the effect that employees in the latter company were on strike. On getting there (i.e. at Kartat Investments), he says he found all sewing lines employees doing no work.

42. In trying to remedy the situation, Mr. Xu says he started by calling members of the Workers' Council into office for a

meeting, though he would not recall their names as they were Swazi by nationality (Xu is of Chinese nationality). He then called all the Supervisors and Personnel Officers into office for a meeting as well, all in an effort to find out the real problem or cause for the abrupt work stoppage.

43. On being informed that wage increment was the cause for the strike, Mr. Xu told both the Workers' Council members and Supervisors that the issue was still being deliberated upon by the Wages Council and a final decision was due to be made on the 2nd March, 2011. The Workers' Council and Supervisors were instructed to go and advise the employees accordingly and order them to proceed with work as they wait for the final decision from the Wages' Council. That as it may, the employees did not heed to this instruction but proceeded with the unprotected strike.
44. Eventually, the company's Managing Director - Ms. Mason Ma was also roped in followed by the Department of Labour - Manzini office. Both the Managing Director and two officials from the Labour office - being Mr. Mkhonta and Dube, had an occasion to address the workers in a group telling them to stop the strike and proceed with work pending a final decision by the Wages' Council. Moreover, employees were offered 3% increment as an interim relief. An ultimatum notice was subsequently issued by the company, written both in English

and Siswati, cautioning all employees about the drastic consequences of the unlawful strike.

45. All these fortified efforts to stop the strike did not yield any positive results. Instead, word started doing rounds that employees from the other sister textile factories, particularly Tex-Ray Swaziland and Union Industrial Washing, had also joined the strike, which was unlawful in that all the necessary legal procedures to get to a strike action had not been followed by the workers.
46. The company's next stop was the Industrial Court to get some interdicts, which were successfully obtained through the legal services of Mr. Makhosi Vilakati. A set of two separate Court orders interdicting the strikes were secured by the company on different dates, the first one involving employees of Kartat Investments and the two other textile factories which had joined the strike. The last one only involved employees from Kartat Investments as these persisted with the strike even after the first Court order had been served on them. Copies of these Court Orders were filed as **"KP 3 and 5"** in the Respondent's bundle of documents. These Court orders were served by Deputy Sheriff, Melusi Qwabe.
47. On the 1st March, 2011 after the company had invoked a lock-out of all the employees, allowing in only those who undertook

to diligently proceed with work, a majority of the employees did enter the gate but still did not proceed with work. Mr. Xu stated that inasmuch as the employees did work on that day, i.e. 1st March, production scores were very low indicating that the employees were on a go-slow strike even on that day. That was further evidenced by some funny booing noise they were making, much of which was coming from line D1's direction. That is one reason why all the Machinists in that line were dismissed, according to Xu. The other reason was that line D1 suffered for being the first line as the others were still to be charged if they did not improve their scores. He, however, admitted that the scores for the other lines were low on that day as well.

48. Referring to the score sheet ("KP 7") with particular reference to those of the 1st March, 2011 RW1 testified that those scores reflect that all the sewing lines (including line D1) had low production scores, though he argued that the scores improved after line D1 had been suspended.
49. Mr. Xu went on to testify as to the negative affects which the company incurred as a result of that strike action, saying amongst other effects, the company lost half of the orders from a German based company - PUMA. It also lost orders from HBI, an American buyer. Two sewing lines were closed from then due to the shortage of orders, being line D1 and D15 which

remain non-operational to date, according to Mr. Xu. He went on to state that the financial loss incurred could not be quantified in figures as up to now their buyers are still hesitant from placing orders with his company.

50. RW1 confirmed that after the Applicants' dismissals the company did make an offer to re-engage them, though on new terms and conditions, which offer was rejected by the Applicants, save for one or two of the dismissed employees.
51. Under cross-examination, Mr. Xu further confirmed that if supply of work from one person to the other is poor or slow, production automatically goes down since sewing is done more like a chain -one employee does her part and pass the work to the next to also do her part till the last in the line.
52. Mr. Xu confirmed even under cross examination that when he charged line D1 on the 1st March, 2011 the scores for the other lines was also poor, saying the justification to charge D1 line only was because much of the irritating or clumsy noise was coming from that line and argued that this was the noise which was disturbing the other lines, hence the low scores even on them (i.e. the other lines). He denied, however, that if then the other sewing lines' scores were also poor, just like D1, then the only reason why he charged line D1 was because of the alleged

noise rather than that line D1 was on a go slow strike on that day.

53. Mr. Xu denied being discriminatory in charging D1 line only and yet leaving the rest notwithstanding the fact that even the other lines' scores were poor. He further confirmed that Trimmers, Helpers, Quality Controllers as well as casual employees were not charged.

DUMILE DLAMINI (RW2):

54. Testifying as a Supervisor – Quality Control department, this witness started off by reciting the events preceding the strike action. She said on the 23rd February, 2011, after lunch, she was seated on a table in line D3 when she saw a “carton” (*sic*), being a piece of a card box, allegedly coming from the “Top Five” (being employees’ elected representatives or Workers Council), written that there was a strike the following day, i.e. on the 24th February, 2011. She took this “carton”, read it and passed it on to the other lines.
55. True to the “carton’s” word, employees, including herself, did not work as from the 24th February, 2011 up to the 1st March, 2011. She corroborated the other witnesses as to the measures effected by the company to stop the strike, all of which did not work.

56. She maintained even under cross examination that she is also part of the employees who did not work as from the 24th February but was not charged nor dismissed by the company.
57. RW2 confirmed that along those strike days, there was some work done though the scores were low indicating that the employees were on a go-slow strike. She denied that the low scores were caused by the poor supply of matching cuffs and problems with colour shading, saying such problems would have been reported to her as a Supervisor if they were true.
58. When it was put to her that the reason why she did not escalate to senior management the issue of the “carton” inciting workers to go on strike was because she also had an interest in the outcome of the strike, she denied that, though failing to give any explanation as to why she did not alert senior management as a supervisor about the then intended strike action.

NCAMSILE DLAMINI (RW3):

59. Testifying as a Machinist who was stationed at Line D4, this witness corroborated RW2 in that all the employees at Kartat Investments, including herself, did not do work as from the 24th February, 2011 up to the 1st March, 2011. She also stated that

the strike was pre-planned as employees agreed the previous day, i.e. on the 23rd February, 2011 whilst in a kombi back to their residential places that they would embark on a strike as from the 24th February, 2011. She says leading the discussion in the kombi was one Sthembile Dlamini who was Supervisor for line D6.

60. RW3 also confirmed that it was not like there was total stoppage of work as there was some production going on though very low scores than usual were produced per hour. This witness further stated that she was also neither charged nor dismissed for engaging in the unlawful strike action and that no one in her line was charged or dismissed for this.

HARRY MAMBA (RW4):

61. Mr. Mamba gave evidence in his capacity as one of the Personnel Officers under the Respondent's employ. His evidence corroborated the other witnesses in many material respects as regarding the events of the 24th February, 2011 through to the 1st March, 2011 at Kartat Investments.
62. However, regarding charging the employees who were on strike Mr. Mamba testified that about two employees were charged for being on strike on the first day of the strike per line, though in not all the sewing lines. That was on the 24th

February, 2011. He says those that were charged were those that were stationed at the beginning of the sewing lines. The justification in charging them only was that they were the ones who were stalling work for their entire sewing lines, according to Mr. Mamba.

63. The complaints of unmatching cuffs and colour shading were dismissed as baseless by RW4, arguing that on the 23rd February, 2011 the company did not have these problems and production scores were very high on that day.
64. On the 1st March, 2011 Mamba says production scores were still very low save only for line D9 and 10 who managed to reach their targets. He argued that this was caused by the fact that these two lines were quite distant from the first lines, i.e. D1 & 2 where much of the noise was coming from on that day. Mr. Mamba went on to testify that after D1 was charged the other lines improved their production scores in fear of being charged as well.
65. RW4 confirmed that offers for re-engagements were made by the company for all the dismissed employees though on condition that: one; they had to abandon pursuit of their appeals against their dismissals. Two; they would be considered as fresh or new recruits and thus had to undergo the company's six (6) months probation period which is divided

into two- the first three months being normal probation and the last three months being a training period.

66. Under cross-examination, Mamba changed his tune as to who was on strike on the 24th February to say everybody. To quote him verbatim, he said “**wonkhemuntfu**”, meaning everybody. He went on to say the same applied on the 25th February and the subsequent dates.
67. Another significant admission that RW4 made under cross-examination is that besides the fact that Line D1 was charged simply because much of the noise was coming from this line on the 1st March 2011, the other reason why this line fell victims to be charged was because it was the first sewing line. He said even the others were still to be charged, but on observing Line D1 being suspended the others noted that the employer was then serious in charging them and began to improve their production scores, hence avoiding being charged.

ANALYSIS OF THE EVIDENCE AND ARGUMENTS

68. It was agreed as common cause that at the date of termination, all Applicants were employees to whom the provisions of **Section 35** of the **Employment Act No. 5 of 1980** applied. Their capacities, dates of engagement and termination as well as their monthly wages; all these facts were agreed upon to be

common cause, as captured on Annexure “A” of the Report of Dispute Form (i.e. CMAC Form 1). This should exclude Primrose Shabangu-Magongo (AW 4) whom it transpired during her evidence that her correct date of employment is August, 2010 and not February, 2009 as it appears on Annexure “A”.

69. From the outcome of these proceedings, all the Applicants are seeking re-instatement, or, alternatively, notice pay, additional notice pay, severance pay, maximum compensation for unfair dismissal as well as payment in lieu of leave.
70. The onus is therefore upon the Respondent to prove that the termination of the Applicants’ services was fair both substantively and procedurally and having regard to all the circumstances. This is in terms of **Section 42(2)** of the **Employment Act**. It is now left to be seen if the Respondent has succeeded in discharging this onus in light of the totality of the evidence led and the supporting arguments made by both parties.
71. On the question of substantive fairness of the dismissals, the principal contention of Mr. Simelane on behalf of the Applicants was that the work stoppages, if any, and/or low production scores on each of those days falling within the period of the 24th February up to the 1st March, 2011 did not constitute a strike action. On each of those days Applicants contended that

there was low production only because of one or all of the following reasons: poor or no supply of cuffs, problems with colour shading, unmatching cuffs and inconsistent supply of work from Helpers.

72. Quite apart from the foregoing argument, Applicants contends that their recall back to work after being served with dismissal letters amounts to a re-instatement in law, on the same terms and conditions as obtaining before the purported termination of their services. Therefore, so goes the argument, the subsequent 'dismissals' which occurred some three days thereafter constitute an unfair dismissal insofar as there was no substance or valid reasons there for. This argument was maintained notwithstanding undisputed evidence to the effect that the re-engagements which followed the dismissals had certain conditions attached, one of which being that Applicants had to abandon pursuit of their appeals against the dismissals. The other condition which only came from the Respondent's fourth witness (Harry Mamba) was that the Applicants were to start afresh their service history for the Respondent in that they were to be placed on a six (6) months' probation period before confirmation into permanent employment.

73. Both of Applicants' arguments are out rightly rejected. In my view, the evidence and probabilities that arise from it overwhelmingly favour the Respondent's contentions in

relation to the question of substantive fairness of the dismissals. Just a mere reading of the evidence of both the Applicants' and Respondent's witnesses removes from being in dispute the question of whether or not there was a strike at Kartat Investments along those days spanning from the 24th February up to the 1st March, 2011.

74. The evidence before me is more than sufficient to prove that the period in question was characterized by partial work stoppages and/or slow down of work resultant from a concerted effort by all the employees at Kartat Investments. Partial in the sense that the employees did report for duty but deliberately decided to stifle their production output in an attempt to induce their employer to accede to their demand for a wage increment.
75. The justification advanced for the poor production scores, being poor or no supply of appropriately matching cuffs and inconsistent supply of work from Helpers were but only a part of the joint or concerted strike action, in my judgment. The probability that the low production scores were as a result of recurrent operational cuffs problems is too remote when a comparison of the scores of the 1st of March, 2011 and those of 23rd February, 2011 (the day preceding the commencement of the strike) is made.

76. All the employer's witnesses have admitted that "everyone" participated in the strike. The Applicants' witnesses, AW3, 4 and 5, unequivocally admitted that production scores were very low along those days, though denying imputing the cause thereof to any strike. I dare say, that this denial only remains bare in the absence of anything to gainsay the employer's undisputed notice (KP1), the ultimatum (KP2) issued on the 24th February coupled with the subsequent Court Orders (KP3 and 5), the last one having been read to all the employees by a Deputy Sheriff at the Company's main gate on the 1st March, 2011 interdicting and restraining the employees from proceeding with their unprotected strike action.
77. AW 1 and 2 openly and sheepishly evaded responding to the question of whether their production scores were on target within that period in question. These two witnesses' conducts served no purpose save only to damage their credibility as witnesses. Admitting that under normal circumstances they would constantly check their production scores on the score board to see if they were reaching their set targets entitling them to a daily bonus and yet denying ever checking their scores on those controversial days under the disguise that they did not have time for that as they were concentrating on their work was indeed sheepish. It was just an ungainly attempt to evade the obvious, that the employees' production scores were

alarming low on those days, a fact that their colleagues (AW 3, 4 and 5) admitted.

78. The employees' conduct of intentionally suppressing production in an effort to persuade their employer to accede to their wage increment demand tallies at all fours with the definition of a strike as provided for in **Section 2** of the **Industrial Relations Act 2000 (as amended)** which reads as follows:

“Strike means a complete or partial stoppage of work or slow down of work carried out in concert by two or more employees or any other concerted action on their part designed to restrict their output of work against their employer, if such action is done with a view to inducing compliance with any demand or with a view to inducing the abandonment or modification of any demand concerned with the employer - employee relationship.”

79. Now, it being common cause that this strike action was not preceded by the legal requisites stipulated in the Industrial Relations Act, it therefore remained an unprotected strike in law, enabling the employer to reserve her prerogative to dismiss the strikers. In this case the Applicants' dismissals are

a direct consequence of the employer having wielded that prerogative.

80. The workers have not based their case on a claim that the strike action was a response to unjustified conduct by the Respondent. No dispute had been declared and the matter had not been referred to CMAC in terms of **Section 76** as read together with **Sections 80, 81** and **86** of the same **Act**. Having regard to the seriousness of the strikers' contravention of the Industrial Relations Act, I hold that there was a fair reason to dismiss them.
81. Coming to the alternative argument of the alleged reinstatement prolonging the Applicants' employment service post their dismissals, this argument should fail as well for the reasons that follow herein below.
82. The Applicants had been dismissed in writing. If there was any revocation of the dismissals, surely that also had to be in writing. The employer is saying, through evidence, she recalled the Applicants and made an offer for re-engagements predicated on two conditions as already highlighted herein above. Only a few of the dismissed employees (about one or two) accepted the conditions for the re-engagements. The employer's argument is that this was only an attempt by the employer for the parties to burry hatchets and opens a fresh

page, not to be construed as an admission of a wrong or unlawfulness in the dismissals. The re-engagement offers were withdrawn three days after Applicants had started working from the dates of their dismissals simply because the Applicants refused to accept the conditions for the re-engagements which they viewed either as stringent or unfavourable to them.

83. I am persuaded by the employer's evidence and arguments in this regard. This is more so because even in the Report of Dispute itself (CMAC Form 1), Applicants stated clearly in paragraph 4.2 that their dismissals were in writing and that the reasons for the dismissals was engaging in a unlawful strike action which occurred either on the 24th February, 2011 and/or up to 1st March, 2011 as the case may be. The Report of Dispute makes no reference whatsoever to any verbal dismissal which makes it obvious that the Applicants did not perceive the latter verbal instruction to vacate the employer's premises after filing their appeals against the written dismissal letters as a 'further' or subsequent dismissal.
84. It only suffices to comment at this stage that the Applicants cannot, however, be faltered for rejecting the conditional offers for re-engagement. They had no legal obligation to accept the re-engagement offers if they viewed its conditions to be too stringent and thus unfavourable to them. But that cannot mean

they were dismissed for the second time when the employer verbally told them to be excused after filing their appeal letters in defiance of the re-engagement conditions.

85. It is within this premise that even the alternative argument as pertaining to the alleged substantive unfairness of the dismissals is also dismissed.
86. As to procedural fairness, the Applicants' main argument is the discrimination or inconsistency demonstrated by the Respondent in dismissing the Applicants to the exclusion of the rest of the employees and yet it is undisputed that all of them participated in the strike. Ancillary arguments bordered on some alleged biasness on the part of the chairpersons who presided over the Applicants' initial and appeal hearing proceedings.
87. As with regards to the chairpersons of the initial enquiry, one of the accusations is that they would pressure that the proceedings be conducted in a fast pace saying there were too many other people to deal with, demonstrating biasness in favour of handling as many disciplinary hearings as they could for their personal monetary gains as opposed to discharging with justice and fairness.

88. Regarding the appeal chairpersons, the main salvo is that some of the appeal hearings were presided over by Mr. Makhosi Vilakati, and yet he was the very same lawyer whom Respondent had used to secure the court orders (interdicts) against the striking employees. The argument was that when the strikers were subsequently dismissed for engaging in an unlawful strike, there was no way that such a lawyer, who had advised the company that the strike was indeed unlawful and further approached the courts for some interdicts, and was in the company of the Deputy Sheriff when the Court orders were served on the employees, in particular the one which was read to the employees by the main gate on the 1st March, 2011, that such a lawyer then could turn around and say the dismissals were unfair and overrule the initial Chairpersons' decisions.
89. Mr. Dlamini, for the Respondent, did make some spirited opposing arguments in an attempt to deny any segregation or inconsistency in the manner in which the Applicants were dismissed as well as the absence of biasness on the chairpersons of the disciplinary proceedings. He conceded, as per the evidence, that all the employees were on strike on the 24th February, 2011 and that even on the 1st March, 2011 all the sewing lines' production scores were very low. He struggled to justify why only a few people were charged on the 24th February if everyone was on strike.

90. Mr. Dlamini further stammered to advance any convincing justification for charging Line D1 only on the 1st March, 2011 and a selected very few from the other sewing lines and yet evidence shows that the output production scores for all the sewing lines remained below par for the whole of that day (as seen from the score-sheet - **KP7**). The justification was that much of the noise was coming from that sewing line. Mr. Dlamini argued further that the other sewing lines were not charged because their production scores improved to the normal or targeted levels on the 2nd March, 2011.
91. From the foregoing explanation, the employer is saying she should not be accused of any unjustifiable segregation or inconsistency in the manner in which the strikers were charged and dismissed. Surely the employer's argument in this regard is untenable.
92. **Item 12.5** of the **Code of Good Practice: Termination of Employment - Unprotected Strikes** should set the tone of my reasoning for this enquiry. It reads as follows:

"The employer may not discriminate between striking employees by dismissing or re-instating only some of them without good reason. If, however, the reason for the difference in treatment is based on grounds of participation in strike related misconduct such as

picket violence or malicious damage to property, to other justifiable reasons, the different treatment may be fair". (My emphasis).

93. **Section 109(3)** of the **Industrial Relations Act 2000 (as amended)** states that ***"... the Court, Commission or any other person shall take the Code into account in arriving at its decision in proceedings under this Act."*** This provision was made mandatory by the substitution of the word "may" and replacing it with "shall" in the 2005 amendment of the Act.
94. The Respondent did not base its argument for the differential treatment on the grounds of participation in strike related misconduct such as violence or malicious damage to property, as per Article 12.5 of the Code. The question then is: are the reasons advanced by the Respondent to explain the discriminatory manner in which these dismissals were done justifiable in terms of the Code or at law? I would be quick not to answer this question in the affirmative.
95. To start with those employees who were suspended and dismissed for engaging in an unprotected strike on the 24th February 2011. These include AW3, 4 and 5, amongst others. No reason at all has been advanced as to why these were treated differently from the rest of the strikers, more in the

presence of common cause evidence that everyone was on strike on that day. Clearly, this was unjustified segregation.

96. The only attempt made to advance certain reasons for the differential treatment pertained to those suspended and dismissed for engaging in an unprotected strike on the 1st March, 2011. Mainly these were the Machinists stationed on sewing Line D1. Two alternating reasons were given as to why only these were dismissed to the exclusion of the others, to wit: one, much of the disturbing booing noise was coming from this line. Alternatively, this line fell victim for being the first line as the employer was still to charge the other subsequent sewing lines, per the evidence of RW4 under cross-examination.
97. Non-the-less, no explanation was advanced for excluding casual employees when the rest of sewing line D1 employees were dismissed. RW1 testified that those who were suspended and charged on the 1st March, 2011 in this line were permanent sewing employees at line D1 except for casuals. This further disparity in treatment brings about another inconsistency in the dismissals of the strikers which cannot be countenanced by this Commission. It was not said that the noise was made by the permanent employees only in this line or that the casual employees were not on strike. No piece of evidence was led to this effect. For this unexplained segregation alone, the dismissal of line D1 permanent employees to the exclusion of

the casuals should be ruled as amounting to unfair differential treatment of strikers by the Respondent.

98. Our law requires that employees who have committed similar misconduct must be treated equally. This principle, also referred to as the “parity principle”, was aptly enunciated in **National Union of Metalworkers of SA and others vs. Henred Fruehauf Trailers (Pty) Ltd (1994) 15 ILJ 1257 (A)** where the Court stated at 1264 A-D:

“Equity requires that the Courts should have regard to the so-called ‘parity principle’. This has been described as the basic tenet of fairness which requires that like cases should be treated alike.... So it has been held by the English Court of Appeal that the word ‘equity’ as used in the United Kingdom statute dealing with the fairness of dismissals, ‘comprehends the concept that the employees who behave in much the same way should have meted out to them much the same punishment’ (Post office vs. Fennell [1981] IRLR 221 at 223). The parity principle has been applied in numerous judgments in the Industrial Court and the LAC in which it has been held for example that an unjustified selective dismissal constitutes an unfair labour practice.”

99. In **Cape Town Council vs. Masitho and others (2000) 21 ILJ 1957 (LAC)** the South African Labour Appeal Court was confronted with a case where an employer had dismissed some employees but issued a warning to another employee who was involved in the same disciplinary infraction. The Court (per Nugent AJA) stated at page 1961 of that judgment that: ***“In the absence of material distinguishing features equity would generally demand parity treatment”*** and further went on to say:

“Fairness, of course, is a value judgment, to be determined in the circumstances of the particular case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way.... Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias.”

See also: **CEPPWAWU & others vs. Metrofile (Pty) Ltd [2004] 2 BLLR 103 (LAC).**

100. The principle as enunciated in the cases above applies with equal force to the unfair selective dismissals claim advanced by the Applicants in this case.
101. Furthermore, as if the reasoning made in the preceding paragraphs is not sufficient, the alleged noise issue as the basis for the differential treatment of the strikers on the 1st March, 2011 has a further controversy. It is not submitted that all the noise was made by line D1 only, but rather the evidence says that much of the noise was coming from this line. This serves to mean that even the others were making their own fair share of noise inasmuch as everyone else was still on a go-slow strike on that day, as proven by their low production scores.
102. Consequently, in my view, even if everyone on line D1 could have been charged (i.e. both permanent and casuals), that sill could not have cured the unfair disparity so long as it was not ruled out that some of the noise was also made by the other sewing lines though not to the level of line D1, and also in the face of undisputed evidence that the production scores of all the sewing lines remained below target for the whole of the 1st March, 2011.
103. This is a classic scenario where the employer had to issue a second dismissal ultimatum on that day before resorting to charging certain strikers and yet leaving out others. As a

matter of fact several days had elapsed from the date of issuance of the first ultimatum which was issued on the 24th February, 2011, the first day of the strike and the 1st March, 2011 being the date on which employees on line D1 were suspended and subsequently charged. The strike action had continued unabated as between that date and the 1st March, 2011 and yet none of the strikers had been dismissed, save only the selected very few who were suspended on the first day of the strike (24th February, 2011). The rest of the employees had continued to jointly participate in the strike post issuance of the first ultimatum and the Court interdicts, that being on the 25th February, 2011 and the subsequent dates up to and including the 1st March, 2011. To put it in simple terms, all the employees without differentiation had rejected the first ultimatum and defied even the Court Orders.

104. That as it may the employer had, by its own conduct, waived its right to dismiss on the basis of defiance of that ultimatum. The employer could not, therefore, in my view, all of a sudden suspend and dismiss some of the strikers without issuing a further dismissal ultimatum, give the employees sufficient time to reflect and respond on it, either by complying with it or rejecting it, and then deal with the latter accordingly. This is more so because even on the 1st March, 2011 all the employees were still on go-slow in perpetrated joint defiance of the first ultimatum and the interdicts.

105. The requirement of issuing an ultimatum against unprotected strikers is mandatory as it is sanctioned by **Article 12.3** of the **Code Of Good Practice: Termination of Employment- Unprotected Strikes** which reads as follows:-

“If dismissals are contemplated, the employer should issue to employees a written ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it”.

106. In **NUM and others vs. Billard Contractors CC & Another [2006] 12 BLLR 1191 (LC)**, Todd AJ, making reference to **Modise & Others vs. Steve’s Spar Blackheath [2000] 21 ILJ 519 (LAC)** stated that:

“...A pre-dismissal ultimatum appears to have more in common with a final warning to striking employees of the consequences of continuing with their misconduct. By this I do not mean to equate an ultimatum with a formal disciplinary warning. It

seems to me that a disciplinary warning for misconduct may subsequently be issued even where an ultimatum has been complied with. An ultimatum is, rather, a special kind of warning issued in the context, usually, of collective industrial action. Its purpose...is to provide a cooling off period for striking workers before any final decision is taken to dismiss. This may explain why the requirement of a pre-dismissal ultimatum finds itself among the procedural steps described in item 6 of Schedule 8 to the LRA, the Code of Good Practice: Dismissal.“(At page 1201, paragraph 48).

107. As with regards to the argument of a perception of biasness on the chairpersons of the disciplinary enquiries and appeals, a comment can only be made regarding those appeals which were presided over by Mr. Makhosi Vilakati. The fact that some of the appeals were handled by Mr. Vilakati was admitted as common cause. And that this Vilakati is the very same lawyer whom the Respondent used to secure the Court orders was also admitted as common cause. Mr. Dlamini for the Respondent argued that Mr. Vilakati's impartiality and neutrality could not be compromised by the mere fact that he acted as the Company lawyer in securing the Court orders interdicting continuation with the strike by the employees on the basis of its unlawfulness.

108. In my judgment I would not hesitate to dismiss the Respondent's argument again on this aspect of procedural fairness of the dismissals. Surely, there was no way in which a suspicion of biasness could be avoided in these circumstances, and that suspicion or perception could obviously be reasonable. I mean, this is a matter that should speak for itself that there was no way by which Mr. Vilakati, the very same lawyer who had prepared papers, argued and won two Court interdicts against the Applicants, that he could turn around and hold against his client now that he was sitting as a presiding chairman over some of the Applicants' appeals. This is a further irregularity or flaw on the procedural aspect of the Applicants' dismissals.

109. Emphasizing the importance of an appeal hearing, the Industrial Court had this to say in the decided case of **Nkosinathi Ndzimandze and Another vs. Ubombo Sugar Ltd, Case No: 476/2005** (per Dunseith P.R. the then Judge President):

“It is well established in our labour law that an important ingredient of a fair disciplinary hearing is the right to appeal to a higher level of management. As was stated by the eminent Jurist and Judge Edwin Cameron in his article “The Right to a Hearing Before

Dismissal- Part 1” (1986) 7 ILJ 183: a right to an appeal is an important safeguard, giving the affected employee a chance of persuading a second tier of authority that the adverse decision was wrong or that it should otherwise be reconsidered. In the end, the final decision will have been the subject of a more careful scrutiny, prolonged debate and sober reflection”.

110. The learned Judge President went on to conclude as follows:

“It has also been held that disciplinary appeal proceedings must be more than a mere formality, and the members of the appeal panel must apply their minds fairly and impartially to all the relevant facts and considerations in the same manner as the labour Courts have long required of the disciplinary enquiry itself “. (My emphasis.)

111. In the circumstances, I find that the dismissals of the Applicants were procedurally unfair. The degree of unfairness was not, however, significant in the context of the reported acts of unprotected strike action that I have described above. That is something which will weigh in my assessment of what compensation should be awarded to the Applicants, if any.

RELIEF

112. The Applicants are seeking re-instatement. However, since I have found that their dismissals were for a fair reason but that a fair procedure was not followed in dismissing them, I am bound by the provisions of **Section 16(2)** of the **Industrial Relation Act**. This section prohibits the granting of re-instatement if a ***“dismissal is unfair only because the employer did not follow a fair procedure”***.

113. The appropriate relief, therefore, would be compensation. **Subsection (4)** of **Section 16** of the same Act stand as a guideline as to the fair and equitable amount of compensation to grant if a dismissal is unfair only because the employer did not follow a fair procedure. It reads as follows:

“If a dismissal is unfair only because the employer did not follow a fair procedure, compensation payable may be varied as the Court deems just and equitable and be calculated at the employee’s rate of remuneration on the date of dismissal”.

114. I have reached the conclusion, on a careful consideration of all the relevant factors, that the Applicants should each be paid compensation in an amount equivalent to three (3) months’ remuneration, calculated at the rate applicable at the time of

their dismissal. My reasons for concluding that this compensation is just and equitable in the circumstances are as follows:

114.1 The employees committed a very serious breach of their employment obligations. The employer, at a cost, approached the Industrial Court not once but twice, to obtain interdicts restraining the employees from proceeding with their illegitimate strike action.

114.2 The employees' representatives were engaged by the employer and advised to warn the employees about the consequences of the unprotected strike, but in vein.

114.3 The Respondent went to considerable lengths of having its Managing Director and officials from the department of Labour being invited to address the workers who had been assembled outside the factory, about both the illegality of the strike as well as the stage where the negotiations were at the Wages Council pertaining to their annual wage increment. All these unrelented efforts came to a naught.

114.4 The extent of the Applicants' breach of the Industrial Relations Act is quite alarming. There was no breakdown in wages negotiations between the parties.

No dispute had been reported to CMAC, no certificate of unresolved dispute had been issued, no strike notice given to the employer and no balloting had been done. The employees had virtually not done even the slightest effort to comply with the provisions of the Industrial Relations Act.

114.5 The gross negative impact of the unprotected strike action on Respondent's corporate image, more especially to its clientele both locally and internationally. Moreover, this negatively affected production.

114.6 The fact that the employer did offer the Applicants re-employment immediately after their dismissals- if accepted, this would have mitigated the negative economic effects of the dismissals on Applicants.

114.7 There was no immediate and urgent need to embark on the strike. The employees were advised that the Wages Council was due to meet the following week on the 2nd March, 2011 to finalize the issue of the wage increment.

115. The reason for the Applicants' dismissals warrants the immediate cessation of the employer/employee relationship,

hence, no notice pay and additional notice pay should be ordered.

116. I also order payment of severance pay and the three (3) days leave agreed upon by both representatives to have been accumulated by Applicants as at the date of their dismissals. The legal question of whether or not an annual holiday untaken by an employee is payable if the employment contract is terminated is answered in the affirmative by the provisions of **Section 123** of the **Employment Act No: 5 of 1980**. This provision makes no distinction even if the termination is by dismissal.

AWARD/ORDER

117. The order that I make is as follows:

117.1 The Respondent is ordered to pay compensation to the Applicants in an amount equal to three (3) months' remuneration calculated at the rate applicable to the Applicants at the date of dismissal.

117.2 The Respondent is further ordered to pay Applicants severance pay also at the rate of remuneration applicable to them at the date of dismissal and as per

the formula stated in **Section 34(1)** of the **Employment Act No: 5 of 1980**.

117.3 The Respondent is further ordered to pay the Applicants a sum equal to three (3) days' wages, being in respect of accumulated leave as at the date of dismissals.

117.4 It is further ordered that calculation of the composite amounts to be paid to each Applicant should be done by the Respondent and confirmed with the Applicants' representative before payment is done. In case of disagreements, the assistance of the Arbitrator can be sought for through the Case Management Officer-Manzini.

117.5 Payment, which should be accompanied by a schedule or spread-sheet clearly indicating the monies to be paid to each individual Applicant, should be done at CMAC Offices-Manzini within three (3) months from the date of service of this Award upon Respondent.

117.6 No costs order is made.

Dated at Manzini this Day of May, 2012.

.....
Mr. Mthunzi Shabangu
COMMSSSIONER-CMAC