

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 146/2000

In the matter between:

PATRICK NGWENYA

APPLICANT

And

MANZINI DIESEL ELECTRIC (PTY) LTD

RESPONDENT

CORAM:

NDERI NDUMA:

PRESIDENT

JOSIAH YENDE:

MEMBER

NICHOLAS MANANA:

MEMBER

FOR APPLICANT:

M. MKHWANAZI

FOR RESPONDENT:

Z. JELE

JUDGEMENT

31/05/01

The Applicant was an employee to whom Section 35 of the Employment Act No.5 of 1980 applied having been employed on the 16th February, 1981 as a sales representatives and was in continuous employ of the Respondent until November, 1999.

The Applicant was dismissed after he was found guilty of insubordination by a disciplinary panel at the work place. He contests his guilt and alleges that the dismissal was both procedurally and substantively unfair.

The dispute between the Applicant and the Respondent that eventually led to his dismissal involved use of company motor vehicles during the weekends.

Numerous correspondence on this issue was exchanged between the parties and maybe summarized as follows :

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On the 18th August 1999 Mr. Mike McGroarty wrote to the Applicant exhibit 'A1' wherein he observed that the Applicant had in the past been involved in numerous accidents with the company vehicles all of which seem to have occurred during weekends. The Applicant was accordingly instructed to use Mitsubishi colt SD 947 AW for business purposes and to and from home during Monday to Thursday. He was to leave the vehicle at the company premises at 5.00p.m. on Fridays.

The Applicant replied to this memorandum on the same date indicating that he regarded the instruction not to use the company motor vehicle over weekends as a ploy to frustrate his working life. He denied that he had caused several accidents over the weekends citing only one accident involving an indicator light and corner bumper.

The Applicant alleged he was subjected to ill treatment by Ms supervisor in front of staff and customers.

He regarded the instruction as a demotion that was unfair and embarrassing. The allegations by the Applicant are contained in exhibit 'A2' followed up by exhibit 'A3' which the Applicant wrote to the Directors of the Respondent alleging victimization and racist conduct against him.

The Respondent documented the various accidents caused by the Applicant allegedly on weekends in exhibit 'R3' The document shows the following :

"1. On the 20th February 1984 the Applicant was issued with a final written warning for driving company car whilst under the influence of alcohol. The Applicant admitted this incident.

2. on the 25th August 1989 a company vehicle was stolen whilst parked by the Applicant at a stadium during a weekend music festival. This incident was also admitted by the Applicant

3. On the 8th May 1990 whilst Applicant drove SD 295 TM he was involved in a collision. The accident happened at night on a weekend. The Applicant disputes this accident.

4. On the 2nd March 1991 the Applicant was involved in a minor motor vehicle accident. This occurred on a Sunday. Applicant did not admit this accident.

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5. On the 18th August 1994 Applicant admitted to have had an accident involving SD 983 XM wherein he knocked down a cow. The Applicant did not report the accident and therefore insurance cover was denounced. He was given a final written warning following this accident.

6. Further, the Applicant admitted being involved in an accident on the 17th September, 1996 when motor vehicle SD 983 XM rolled on its own at his compound and hit a house. The car was extensively damaged. This accident occurred on a weekend also.

7. Finally on the 2nd August 1999 the Applicant was again involved in an accident with SD 983 XM".

Following the memorandum of 18th August 1999, and upon receipt of the response from the Applicant on 27th August, 1999 Mike McGroarty wrote exhibit 'R7' to him which document precipitated the dispute that eventually led to the Applicant's dismissal.

The Applicant did not honour the instruction not to take the company motor vehicle home over the weekends with effect from 7th September, 1999 and as a consequence thereof he was served with a notice of suspension marked exhibit 'A4' and dated 13th September, 1999 pending finalization of disciplinary proceedings against him. The suspension was without pay. The Applicant had taken the company motor vehicle home over the weekend between the 10th - 13th September, 1999 in a blatant disregard of the company directive.

The disciplinary hearing was held on the 21st September 1999 and was chaired by Attorney S. C. Simelane. The Applicant having been given an opportunity to find a representative of his choice on the 16th September 1999 appeared in person on the 21st September 1999.

He faced three charges, namely:

1. refusal to obey lawful instruction
2. unauthorized use of company vehicle.
3. Poor work performance.

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According to the Respondent's case and the minutes of the disciplinary hearing introduced as exhibit 'A5' by the Applicant, the Applicant pleaded guilty to the charge of refusal to obey lawful instruction but contested the second and third charge.

It was specifically alleged that on the weekend between the 10th and the 13th September 1999 the Applicant did not return motor vehicle SD 947 AM to the company premises as per written instruction but only returned it on the morning of the Monday the 13th September, 1999.

The Applicant admitted to having received such instruction and in fact produced exhibit 'A1' containing such instruction.

The Applicant's defence was that he had raised written objection to the instruction not to use company vehicles over the weekend and therefore he was not obliged to obey the instruction pending the resolution of the matter.

The Applicant did not contest that he took motor vehicle SD 947 AM home on the 10th September 1999 stating that he intended to work on the Saturday of the 11th September, 1999. This was the reason for taking the car away. He alleged victimization by his Manager as he had been threatening to withdraw the motor vehicle from him for the past six months prior to this incident.

The disciplinary tribunal found the Applicant guilty of failure to obey lawful instruction and further found that count two was a mere duplication of the first count as disobedience of the instruction related to the failure by the Applicant not to use company motor vehicle over the weekend. He therefore acquitted the Applicant on count two for duplicity and lack of sufficient evidence to sustain the offence of misuse of the vehicle between the 10th and the 13th September 1999.

The Applicant was found guilty for poor work performance by the tribunal but it proceeded to find that the Respondent had not prior to the charge given a written warning to the Applicant concerning his poor work performance.

Upon a careful analysis of the evidence by both the Applicant and the witnesses of the Respondent, it is our view that the Applicant had caused numerous accidents involving Respondent's motor vehicles over the years and most of them occurred during weekends.

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The Applicant had been given numerous warnings about his conduct after the various motor vehicle accidents over the weekends.

The Applicant protested to such instructions and went ahead to defy them. This conduct amounted to insubordination of the first degree.

Indeed the Respondent had shown great restraint over the years in dealing with the Applicant to the extent of giving him several final warnings but to no avail.

In our view, the allegations of victimization made by the Applicant are without any basis.

There is no evidence before us to support the charge of poor work performance especially in view of the fact that no previous warning in this respect had been issued to the Applicant.

The Applicant's perennial misconduct was insubordination and misuse of Respondent's motor vehicles which he was appropriately found guilty of

In the circumstances, the Respondent has satisfied both the requirements of Section 36 and Section 42 of the Employment Act in dealing with the Applicant, He was found guilty of a dismissable offence and considering the extent of disregard of company instructions, it was fair and reasonable to dismiss him in

the circumstances of the case.

Upon dismissal the Applicant was paid funds due to him for overtime, two weeks salary in lieu of notice and a payment of three months salary as a final package.

In the circumstances the Application must fail in its entirety and we so order.