

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 29/2003

In the matter between:

ANN CLARA

APPLICANT

and

SHOE CRAFT (PTY) LIMITED

RESPONDENT

CORAM:

NDERI NDUMA: PRESIDENT

JOSIAH YENDE: MEMBER

NICHOLAS MANANA: MEMBER

P. R. DUNSEITH: FOR APPLICANT

M. SIBANDZE: FOR RESPONDENT

J U D G E M E N T -18/03/05

The Applicant is an adult female widow resident at Manzini Swaziland, whereas the Respondent is a Limited liability company registered in terms of the Laws of South Africa and carrying on business in Swaziland under the name and style SNIP Feature at Ngwane Street, Manzini.

The application is one for the determination of unresolved dispute in terms of Section 85 of the Industrial Relations Act No, 1 of 2000.

Applicant's version:

The Applicant was employed by the Respondent in Swaziland on the 21 September 1992 as Manageress of the Respondent's Manzini store. She was later on deployed as a stock taker covering all the shops in Swaziland and various designated parts of South Africa. In this portfolio she traveled widely and frequently and hardly had time to be at home with the family.

She was in continuous employ of the Respondent until the 27th November 2000. she was thus an employee protected by Section 35 (2) of the Employment Act No. 5 of 1980.

The consequence of this protection was that the Respondent could only terminate her services for a reason provided under Section 36 of the Employment Act and in addition in terms of Section 42 (2) (b), the employer had to be satisfied that the ultimate sanction of dismissal was fair and reasonable considering all the circumstances of the case.

On the 27th November 2000, the Respondent summarily dismissed the Applicant from its employ on the grounds that she had failed to change locks when doing a C.O.M. (change of management) at the Respondent's Piggs Peak store.

The Applicant alleges in her papers that the dismissal was unlawful and unfair, both substantively and procedurally, and was unreasonable in all the circumstances.

In its Reply, the Respondent alleged that the Applicant was dismissed after being found guilty at a disciplinary enquiry on the charge of failing to change the locks during a C.O.M. at Piggs Peak branch. The Respondent alleged further that the Applicant pleaded guilty to the charge of failing to change the locks.

In her testimony before the court and from the record of the disciplinary proceedings, the Applicant explained that she pleaded guilty only to not recording the change of locks on the stock take summary sheet.

The Applicant testified that she infact had changed the locks. That the said locks were bought from a shop nearby by one Frank Ndzimandze who was called by the Applicant as a witness and positively confirmed having bought the locks.

The Applicant added that one Mr. Grobbelaar could confirm that the locks were changed. That she had informed Mrs. Gumbo of this fact prior to the disciplinary hearing but she did not bother to verify the issue inspite of the fact that Mr. Grobbelaar at the time was still a senior manager of the Respondent.

She told the court that no evidence at all was presented at the disciplinary enquiry. The complainant was not present. The chairman however, rejected her version without any basis. She should not have been found guilty of having failed to change locks but if at all, she had not recorded the changing of the locks in the sheet.

That according to her this made a substantial difference to the gravity of the offence committed and ought not to have been handed the ultimate sentence of dismissal, especially because of the circumstances of the case in that, she had no own transport at the time and was under pressure to complete the stock take at Piggs Peak and proceed to do another stock take in South Africa at Gauteng.

The Applicant was dependant on the Area Manager for a lift to her next destination. The Area Manager was impatient to leave. This put her under immense pressure and was the main reason why she forgot to record the change of the locks in the stock take sheet.

The form was sent to the Head office for checking. The omission was not noticed. This indicates either a failure in the Respondent's own system or that the completion of the form was not taken seriously.

Thandi Gumbo was hard placed to explain this failure if this was a serious enough omission to warrant a dismissal of the Applicant.

The Applicant emphasized that the security of the shop was not compromised by the failure to record the change of locks in anyway or at all. That in the disciplinary hearings alluded to by the Respondent against the staff at the Piggs Peak shop for stock loss, at least three (3) witnesses, including herself were available to testify that the change of locks did take place, two of these being management

employees.

It was therefore fallacious for Thandi Gumbo to blame her for the failure to dismiss the employees after a stock loss was discovered at the shop. This allegation by Thandi Gumbo according to the Applicant was far fetched and a trumped up excuse to victimize the Applicant for having refused to accept a retrenchment package.

The Applicant had served the Respondent for eight (8) years with dedication and her performance was good. At the time of the dismissal she had no current written warning and therefore was to be considered a first offender for all intent and purpose.

Furthermore in the past, employees who had committed similar offences were not dismissed. She was therefore, in her opinion discriminated against. In particular, the summary dismissal that denied her any terminal benefits was unduly harsh.

She was dismissed at the Johannesburg office and left to her own devices to seek transport home. It was submitted by counsel for the Applicant that this was a most callous and inhumane manner of dealing with a manager for apparently a minor offence.

The Applicant seeks compensation and payment of terminal benefits as a consequence thereof.

Frank Ndzimandze testified as AW2, for the Applicant. He worked at Piggs Peak branch as a security officer. He was new at the job.

He told the court that on the day the Applicant took the stock take, a new manager had arrived at the shop. He recalls that he was sent by the Applicant to buy the padlocks. He remembered the incident well because this was the first job he had to do upon being employed. He had purchased the locks at the K.K. Trading shop at Piggs Peak and brought a receipt. He got the money from a cashier by the name of Debby Shiba but was sent by the Applicant.

The witness was unfazed by intense cross examination by Mr. Sibandze for the Respondent. He was candid, and consistent. His demeanor was that of a young man, telling the truth, though he was still employed by the Respondent and risked possible victimization for testifying against the interest of the employer. He came to court under a subpoena. The court believed his testimony which largely corroborated that of the Applicant.

Respondent's case

In the endeavour to discharge its onus in terms of Section 42 (2) (a) and (b), the Respondent called RW1, Thandi Veronica Gumbo to testify.

At the time of the hearing, she was the Area Manager in charge of Mpumalanga South and part of Gauteng.

At the material time in the year 2000, she worked as the Regional Manager in charge of Gauteng, Botswana, Mpumalanga and Swaziland.

In 2000, she came to Swaziland to investigate a stock loss that had been uncovered by the financial controller.

In the course of the inquiry, some employees informed her that padlocks were not changed after change of management (C.O.M.).

She called Applicant to find out if she had changed the locks. The Applicant told her that she had instructed the staff to buy the locks during the stock take.

She went through the cash register system to check the expense for the locks purchase but that was not evident.

She then decided to charge the Applicant for failure to change the locks. All the employees at the Piggs peak shop were given final written warnings for the stock loss because they could not be dismissed without evidence of locks change. She blamed the Applicant for this.

She denied that the Applicant had told her that Mr. Grobbeller was aware that she had changed the locks so she did not call him at all on the matter. She did not attend the Applicant's disciplinary hearing though she was the complainant.

She did not call Mrs. Clara to the staff inquiry at the Piggs Peak upon discovery of the stock loss.

She denied that the Applicant had phoned her about the threat by Mr. Bucks to either accept a demotion or be retrenched prior to her dismissal.

She said she did not ask Mr. Ndzimandze AW2, whether or not the locks had been changed during the staff inquiry and the investigation of the Applicant's case.

Mrs. Gumbo did not come out as a person who was independent as far as the Applicant's case was concerned. She did not contact people she was referred to who had knowledge of the case. She was not candid in her statement that she did not know that the Applicant had been asked to accept a demotion or be retrenched prior to this incident.

It appears as if the Applicant's case was pre-determined long before she appeared before the disciplinary hearing.

That no evidence was called at all including that of the complainant Mrs. Gumbo is indicative of this.

The chairman of the disciplinary hearing who was not called to court to testify had no basis at all to reject the Applicant's evidence that she had changed the locks but had omitted to tick that particular box in the change of management stock take sheet.

It is clear that the Applicant was dismissed for failure to change the locks but not for failure to tick the sheet. The belated change in tactics by counsel for the Respondent in emphasizing that failure to tick

the sheet was as serious as failure to change the locks, was to no avail. Infact, the allegation could not hold any water.

Mrs. Gumbo was evasive when asked by the court if she could have charged the Applicant, if there was evidence that she had changed the locks but not ticked the sheet. Eventually she was non committal on this issue.

Upon a careful analysis of the entire evidence, it is clear to the court that the Applicant did change the locks on the material day. That she worked under extreme pressure and had provided reasonably good service to the Respondent for eight years.

For reasons best known to the Respondent someone wanted her to accept a demotion or be gotten rid of. This evidence appeared credible and was accepted by the court.

The Respondent has failed to establish on a balance of probabilities that it dismissed the Applicant for an offence permitted by Section 36 of the Employment Act. A single omission to tick a stock take summary sheet cannot pass as poor work performance envisaged under Section 36 (a) thereof. This is especially because the Applicant had not committed a similar omission in the past eight years and had no current written warning on her work performance and/or misconduct.

The Respondent, on the face of the credible evidence by the Applicant has also dismally failed to show that the dismissal was fair and reasonable in the circumstances of the case.

Compensation:

The Applicant was out of employment for nine (9) months. Thereafter she obtained employment at one quarter of her previous salary. She was a single parent (a widow), and breadwinner of school going children.

She lost various employment benefits on her termination, her leave pay and provident fund benefits were withheld for more than six months.

The manner in which the Applicant being a manager was handled by the Respondent left a lot to be desired, was despicable and callous to the extreme. She was literally dropped off in a 'jungle' and told to find her way home.

From the facts of the case, the dismissal was both substantively and procedurally unfair. The Applicant did not seek reinstatement. This we believe is because of the way she was mistreated by the Respondent.

The court will however award her maximum compensation of twelve (12) months salary. The accepted monthly salary by the court is that contained in her pay slip for the month of April 2000 indicating a gross salary of E5,170.50 (Emalangenzi Five Thousand, One Hundred and Seventy and Fifty Cents).

Total compensation will therefore be E62,046.00 (Emalangenzi Sixty Two Thousand and Fourty Six).

Terminal Benefits:

Flowing from the finding of unlawful dismissal, the Applicant is also entitled to payment of terminal benefits as follows:

Notice Pay : E5,170.50

Additional Notice : to be computed.

Severance Allowance : to be computed.

Leave Pay & Public Holidays:

The court is not satisfied that the leave pay allegedly owed and public holidays allegedly worked have been adequately proven on a balance of probabilities and will dismiss the claims.

Costs:

Due to the history of the case, and the callous manner in which the Applicant was treated by the Respondent, we find that fairness and equity demands that the Respondent pays the costs of the case.

The members agree.

NDERI NDUMA

JUDGE PRESIDENT - INDUSTRIAL COURT