



**IN THE INDUSTRIAL COURT OF SWAZILAND**

**JUDGMENT**

Case NO. 368/10

In the matter between:

**HEALY RHONA INGRID**

**Applicant**

And

**SIYEMBILI MOTORS t/a LEITES TOYOTA**

**Respondent**

**Neutral citation:** *Healy Rhona Ingrid v Siyembili Motors t/a Leites Toyota (368/10) [2014] SZIC 02 (February 2014)*

**Coram:** NKONYANE J,  
*(Sitting with G. Ndzinisa & S. Mvubu  
Nominated Members of the Court)*

**Heard submissions :** **03 DECEMBER 2013**

**Judgment delivered:** **11 FEBRUARY 2014**

**Summary:**

**The Applicant was employed by the Respondent as a Sales Executive. She failed to meet the sales targets per month set for her. She was retrenched by the Respondent because the Respondent claimed that the sales department in which she was employed was making a loss.**

**Held—the employer must provide a bona fide reason to justify the retrenchment. The retrenchment must not be used as guise to get rid of an unwanted employee.**

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**JUDGMENT  
07.02.2014**

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- [1] This is an application for determination of an unresolved dispute brought by the Applicant against the Respondent in terms of **Section 85(2) of the Industrial Relations Act, 2000** as amended.
- [2] The Applicant is an adult Swazi female of Sidvokodvo area in the Manzini District.
- [3] The Respondent is a limited liability company duly registered in terms of the company laws of the country situated at Helemisi area in the Manzini District.

[4] **BACKGROUND:-**

The Respondent company is a Toyota car dealer. It specializes in sales and service of Toyota motor vehicles in Swaziland. It has another local branch in Mbabane. The Applicant was first employed by the Manzini branch as a Receptionist/Switchboard Operator on 25<sup>th</sup> September 1996. She progressed through the ranks until she got appointed to the position of Sales Executive. She held this position until the time of her dismissal by the Respondent on 04<sup>th</sup> February 2010.

[5] The Applicant claimed that she was unfairly dismissed by the Respondent. This claim was denied by the Respondent. The Applicant accordingly reported the matter as a dispute to the Conciliation Mediation and Arbitration Commission (CMAC). The dispute could not be resolved hence the present application before the court.

[6] **APPLICANT'S STATEMENT OF CLAIM:**

In her papers the Applicant stated as follows:-

“5.

*The Applicant was unfairly dismissed by the Respondent through a process that Respondent termed retrenchment. Prior to this Applicant was served*

*with a letter of possible retrenchment allegedly for her failure to meet sales targets.*

6.

*The termination of the Applicant was procedurally unfair in that:*

6.1 *Prior to her dismissal Applicant had intimated to the Respondent her wish to be moved to a position wherein she could cope if her services in her present work station were considered unsatisfactory but was refused.*

6.2 *Despite Applicant's explicit wish to be moved to another position and management's refusal to grant it, other workers were being continually moved to the position she had suggested.*

7.

*Since the commencement of Applicant's position as Sales Executive from October 2008 to September 2009, Applicant was underpaid, with the underpayments from October 2008 to September 2009 totalling up to about E13,000.00 (Thirteen Thousand Emalangi).*

8.

*The dismissal was substantively unfair in that:*

- 8.1 *The Applicant was not awarded the opportunity of growth or aided in effectively executing her duties despite the obvious technical and demanding nature of the position.*
- 8.2 *The Respondent offered the position to Applicant and failed to anticipate the obvious need for acclimatization amongst other needs especially since the Applicant was offered with same (the position).*
- 8.3 *Immediately after Applicant’s retrenchment another person was called to fill her position.*
- 8.4 *The Applicant’s dismissal was therefore unlawful and unreasonable in the circumstances.”*

[7] The Applicant is accordingly claiming payment of the following:

|                                |                          |
|--------------------------------|--------------------------|
| - <b>Notice pay</b>            | <b>E4,600.00</b>         |
| - <b>Additional Notice Pay</b> | <b>E9,966.32</b>         |
| - <b>Underpayment</b>          | <b>E13,000.00</b>        |
| - <b>Maximum compensation</b>  |                          |
| <b>For unfair dismissal</b>    | <b><u>E55,200.00</u></b> |
| <b>TOTAL</b>                   | <b><u>E87,766.32</u></b> |

[8] The Respondent denied that the dismissal of the Applicant was unlawful. The Respondent stated in its Reply that:

“ 3.2 *The dismissal of the Applicant was fair and reasonable in all circumstances in one or more of the following basis;*

3.2.1 *The Applicant's duties entailed primarily the sale of vehicles in the Respondent.*

3.2.2 *Her position was target and performance based in that she was required to sell a minimum of 12 motor vehicles per quarter of a year.*

3.2.3 *The Applicant consistently and without any lawful and reasonable justification, failed to meet her target and minimum standard of performance in that;*

3.2.3.1 *In a period of 11 consecutive months, she sold only 10 vehicles, and as such displayed a highly sub standard level of work performance.*

3.2.4 *Despite the Respondent's intervention and efforts to place the Applicant in a target achievement program aimed at assisting her to improve her incompatibility and sub standard performance, the Applicant failed to improve her performance and proved to be incompatible in her work position. (A copy of a training document is annexure LT1 hereto)."*

[9] The Respondent further stated in its Reply that it became inevitable that the services of the Applicant be terminated because;

"3.2.6.1 *There was a commercial rationale for reduction of staff and particularly non performing staff;*

3.2.6.2 *The Applicant had been given a fair opportunity to state her side of the matter and particularly to show cause why her employment should not be terminated.*

3.6.6.3 *A fair and reasonable selection criteria, based on historical work performance level, was used to select the Applicant.*

3.2.6.4 *The Respondent had no other available and vacant work position to which the Applicant would have been transferred to hence termination of her services became the only available option to the Respondent.”*

[10] The Applicant duly filed a Replication to the Respondent’s Reply. In her Replication the Applicant denied that there were conditions that she agreed to prior to accepting the position of Sales Executive. She also denied that she agreed to the salary change from E4,600.00 to E3,600.00. She further denied that she was informed of any targets when she was appointed to the position of Sales Executive.

[11] **EVIDENCE LED IN COURT:-**

Two witnesses testified before the court. It was the Applicant and RW1, Theunis Els, who testified on behalf of the Respondent. The evidence of these two witnesses was largely common cause. Their evidence only differed in certain specific areas, for example, whether there was consultation before the Applicant was retrenched and whether the Applicant accepted the new terms and conditions that came with the new position of Sales Executive.

[12] The Applicant's evidence revealed that she was first employed by the Respondent in 1996 as a Receptionist. This was in terms of a written contract between the parties. She was earning E760.00 per month. In 1998 there was an upward movement as she was promoted to the position of Personal Assistant. During the year 2000, she again moved to the position of Stock Controller. She held this position until 2008 when she assumed the position of Sales Executive. She held this position until her dismissal on 04<sup>th</sup> February 2010.

[13] The position of Sales Executive included mainly the sale of new Toyota motor vehicles. These motor vehicles are not manufactured in Swaziland but they are sourced from South Africa. As a Personal Assistant the Applicant was earning E4,600.00 per month. The basic salary of Sales Executive was E3,600.00. The total package of the Sales Executive position was however more than that of Personal Assistant. The total package included commission, use of company motor vehicle, petrol allowance and cellphone allowance. The evidence revealed that Sales Executives have stipulated monthly sales targets to meet. The maximum target is eight Toyota motor vehicles per month. The Applicant was however not required to meet this target at first. She was given three months to acclimatize. During this period she continued to receive the salary of E4,600.00. The Applicant was also made to go through an induction course. She also trained herself as the Sales Executive courses of the Respondent are available on the internet. The Applicant however failed to meet the targets set for her. Although the Applicant herself admitted that she failed to meet the target, she said she felt that she was unfairly treated by the dismissal as she managed to sell top of the range Toyota motor vehicles like Fortuners, Prados and RAV 4s. She also said that the Respondent failed to take into account that she was also being required to do other duties as and when



required to do so by the Dealer Principal which impacted on her main duties as a Sales Executive.

[14] The Applicant was called by the Dealer Principal to discuss the issue of her failure to meet the monthly targets. The Applicant requested to be moved to other departments of the Respondent. She was told that there were no other positions available to which she could be redeployed. The Applicant told the court however that the position of Sales Advisor was available. The Applicant said there was no consultation that took place between her and the Respondent. She said she was just called by the Dealer Principal to vacate the company premises. She said she felt like she was being treated like a criminal when she had worked for the Respondent for over thirteen years.

[15] During cross examination the Applicant admitted that she was paid her terminal benefits. She also admitted that she enjoyed other benefits that she did not enjoy in her former position as a Personal Assistant. She also revealed that the highest commission ever paid to her was E9,000.00. She also admitted that she benefitted from the sharing of the commission paid by the bank to the Respondent.

[16] The Respondent's evidence was led by RW1, Theunis Els. The evidence revealed that when the Applicant was appointed to the position of Sales Executive, there were three other Sales Executives. The Applicant was the fourth one. He said the Applicant was not expected or required to sell any motor vehicle within the first month. He said during the second month they expected her to make at least one or two sales. He said the Applicant was trained to perform her job. He said the company made a decision to employ another sales person in-house. He said the scale of Sales Executives at the

Respondent is E3,600.00, and that the Applicant was aware of the scale when she accepted the job and never said that she was not happy. RW1 also told the court that the company could not have offered the Applicant the position of Sales Executive if she had not agreed to take it.

[17] RW1's evidence further revealed that in about September and October 2009 they realized that the Respondent was running at a loss. This problem was attributed to the Applicant's poor performance. RW1 said he engaged the Applicant on a bi-weekly performance improvement programme. The Applicant was unable to improve. RW1 said the Applicant requested to be redeployed to the position of Service Advisor. This position was however not available as it had been filled by someone that had been promoted from the Parts Department. RW1 told the court that in any event, the Applicant did not qualify for that position as it was a technical job. He said Sales Advisors are trained motor vehicle mechanics, and the Applicant was not one. RW1 said the Applicant was told that she would not be allowed to go back to her former position if she accepted the offer. He said the Applicant's sales were very low and did not even cover the costs to the company. He said the Applicant was given one month's notice which she was not required to work as per the trade custom. He denied that the Applicant was treated like a criminal when she was dismissed. He said the criterion used when the Applicant was retrenched was the last in first out (LIFO).

[18] During cross examination RW1 confirmed that he did not show the Applicant any audited financial statement of the company. RW1 also confirmed that there is an online programme for Toyota which any employee in the Sales Department can log on for further training.

[19] **ANALYSIS OF THE EVIDENCE AND THE LAW APPLICABLE**

There was a dispute whether the Applicant applied for the position or that she was approached by RW1 to take the position. This dispute is however of no consequence as the evidence showed that the Applicant was appointed and she accepted the position. The letter of appointment appears on page 10 of the Book of Pleadings and it reads as follows:

*29 September 2008*

**LETTER OF APPOINTMENT**

*Miss R. Healy*

*Dear Rhona*

*We hereby confirm your appointment with Leites Toyota Manzini as a Sales Executive. Your starting date will be 01/10/08.*

*I would be grateful if you would please signify your agreement to the above by signing the attached copy.*

*Yours Sincerely*

*MR. T. ELS*

*DEALER PRINCIPAL*

*I agree to the above*

*SIGNED (signed by the Applicant) DATE 30/09/08”*

[20] The Applicant duly signed the letter of appointment on 30/09/08 signifying her acceptance of the appointment. There was therefore a binding contract of employment between the parties. There was no evidence or any suggestion that the Applicant signed the letter of appointment under duress.

[21] By accepting the appointment, the Applicant also accepted the conditions of service that go with the position. The trade custom at the Respondent’s undertaking was that Sales Executives earned a basic salary of E3,600.00 plus benefits and commission based on sales. The total package of the Sales Executives was lucrative when compared to the former position that the Applicant held. The Sales Executives over and above the basic salary of E3,600.00 also got;

- **Commission on car(s) sold**
- **Share of commission paid to the Respondent by Financial institutions for cars sold financed by those Financial institutions and this commission was shared equally by all the Sales Executives.**
- **Free use of company motor vehicle.**
- **Fuel allowance**
- **Air time allowance**

[22] The evidence showed that the Applicant did not meet the sales target set for her. The Applicant herself admitted that she did not meet the sales target.

She attributed her failure to lack of training by the Respondent. The evidence however revealed that when she assumed the new position, she was sent to South Africa to attend an induction course. The evidence also revealed that there is a training module on the internet for Sales Executives. Despite all these, the Applicant's sales target did not improve. The General Manager of the Respondent, Mr. Wynand Louw, wrote a letter to the Applicant complaining about her failure to meet the sales target. The letter is on page 12 of the Book of Pleadings. The letter appears in part as follows:-

*Dear Rhona*

***Re: Target Achievement***

*Your performance as Vehicle Sales Executive has been less than satisfactory since you were appointed to this position on the 1<sup>st</sup> of October 2008. You have sold a total of 11 vehicles in 11 months, an average of 1 per month. You did not sell one vehicle in the month of August 2009.*

*You were given sufficient training and support to establish yourself in this position and more than enough time to build a customer base. It came to my attention that you received a warning letter in May of this year for not carrying out the required fleet visits.*

*We can unfortunately not accept these sales levels and you are now placed on a target achievement program, failure of which would lead to termination of employment. Your position is a performance based .....*"

[23] There was no evidence of a reply to this letter by the Applicant. The conclusion that the court would arrive at therefore is that the Applicant did not deny that she was given sufficient training and support to establish herself in this position.

[24] The evidence before the court clearly revealed a situation of poor work performance on the part of the Applicant as she failed to meet the sales target. The Applicant however was not dismissed for failure to meet the sales target. She was retrenched. In terms of **Section 36 (J) of the Employment Act No.5 of 1980** as amended, an employer is entitled to undertake a retrenchment exercise. The employer however, must provide a *bona fide* reason to retrench. The retrenchment must not be used as a guise to remove an unwanted employee.

See: **Mecco Maseko and Siphon J. Mamba  
V. Inyatsi Construction Limited Case  
No. 64/2003 (IC).**

[25] The employer who intends to retrench must consult the employee(s) to be affected or their representative(s). The consultation gives the employer an opportunity to explain the reasons for the proposed retrenchment. The employer must demonstrate to the affected employee(s) with supporting evidence that the proposed retrenchment is *bona fide* and necessary for the survival of the undertaking.

[26] In the present matter, RW1 told the court that there was a need for retrenchment because the sales in Leites Toyota Manzini were low.

RW1 however failed to produce supporting documentary evidence to prove that the retrenchment was *bona fide* and not merely an indirect means to get rid of the Applicant who was failing to meet her sales targets. No latest financial statements and audited accounts of the Respondent were shown to the Applicant or produced in court as proof that the Sales Department at Leites Motors in Manzini was on a downward trend.

- [27] What was clear from the evidence led in court was that the Applicant was underperforming in the sense that she was not meeting the sales target. The Respondent should thereafter have investigated the cause of the poor performance of the Applicant. Poor work performance that arises from misconduct or willful negligence, and poor work performance caused by circumstances beyond the employees control may be treated differently. The former is a disciplinary issue; the latter requires different and more sympathetic treatment.

(See:- **John Grogan: “Workplace Law”. 10<sup>th</sup> edition p. 259.**)

- [28] The Applicant was not however dismissed for poor work performance. This was also confirmed by the Respondent’s heads of argument at paragraph 4.5 where it stated that:-

*“However, it must be understood that Applicant was not eventually retrenched for poor work performance, although her performance was not satisfactory, but she was retrenched because the Sales Department, in which she was employed made consistent losses from September 2009 to January 2010 and as such productivity of the*

*Sales Executive (Applicant) was considered in the selection of employees to be retrenched.”*

- [29] The Respondent relies on certain annexures marked “LT2” attached to the heads of argument as proof that the Sales Department in Manzini was making a loss in September 2009 to January 2010. These annexures constitute new evidence which was never referred to by RW1 in court, nor were they part of the pleadings before the court. There was no application to amend the papers filed in court. They will therefore not be considered by the court as part of the evidence before it. Furthermore, there was no evidence that these annexures were shown to the Applicant before she was retrenched as proof that there was a *bona fide* reason for the retrenchment. The Respondent had the chance do that in court but, RW1 never alluded to these documents when giving his evidence in court. There was also no evidence as to who was the author of these documents. The financial officer or accountant of the Respondent did not testify in court.
- [30] The court is alive to the provisions of **Section 40 (2) of the Employment Act** dealing with giving of notice of redundancies to the Labour Commissioner. That section provides that if an employer intends to terminate the contracts of five or more employees, that employer shall, inter alia, provide the latest financial statements and audited accounts of the undertaking. In the present case only one employee was terminated. It was argued on behalf of the Respondent that the Respondent was not obliged to comply with the requirement of Section 40(2).



- [31] In as much as only one employee was affected in the present case, there was nonetheless a need for the Respondent to produce the financial statements and audited accounts to the Applicant or the court in order to justify the reasons advanced for the retrenchment.
- [32] The evidence before the court revealed that on 29<sup>th</sup> January 2010, the Respondent wrote a letter to the Applicant informing her about a possibility of retrenchment. The letter appears on page 13 of the book of pleadings as follows;

*“Dear Miss Healy*

***RE: NOTIFICATION OF POSSIBLE RETRENCHMENT***

*In the recent past, and in order to address financial and productivity concerns, the company has been looking at ways and means of reducing costs and improving productivity.*

*In view of the fact that your position is affected, the company would like to invite you to a meeting to be held at Leites manzini on Wednesday 3<sup>rd</sup> February 2010 at 11 00 hours in order to consult with you on ways and means on how your retrenchment may be avoided.*

*We can confirm that the company has considered various options including your possible re-deployment to other suitable positions within the company or transfer to any other departments, and unfortunately has not been able to find any suitable alternatives ....”*

[33] It is clear from this letter of invitation to consultation that the Respondent had already made the decision that the Applicant would be terminated and that there were no suitable alternatives. The consultation was therefore a mere sham and not *bona fide*. It cannot be said therefore that the dismissal of the Applicant was procedurally fair. Furthermore, there was no evidence that the other employees in the sales department were consulted. There was therefore a possibility that they could have made some sacrifices, for example, agreeing to a salary reduction, taking early retirement or any other lawful cost saving measure. As a matter of fact, the Respondent does not know what would have been the result had the Respondent consulted all the employees in the sales department. It is however not hard to see why only the Applicant was targeted. Her performance as a Sales Executive was less than satisfactory as she continually failed to meet the monthly sales targets. The Respondent therefore should have simply and lawfully terminated the Applicant on the basis of poor work performance and failure to meet the monthly sales targets as per her job description or job requirement if she failed to improve even after counselling.

[34] RW1 also told the court that the Applicant did suggest the position of part picker. RW1 said that was clearly not a woman's job. There was no evidence however that it was impossible for the Applicant to perform that job.

[35] The court will accordingly come to the conclusion that the dismissal of the Applicant was substantively and procedurally unfair.

[36] The evidence before the court showed that the Applicant was paid all her terminal benefits. The record of the payout was not in dispute and it appears on page 25 of the book of pleadings. The outstanding claims therefore are underpayment and maximum compensation. The Applicant accepted the position on her own volition. The position attracted the basic salary of E3,600.00 plus benefits and commissions. This is a trade custom at the Respondent's place. There was no evidence placed before the court to persuade it to interfere with this trade custom. The claim for underpayment therefore fails.

[37] The evidence revealed that the Applicant had worked for the Respondent for about thirteen years when she was dismissed. She has two children. She is a bookkeeper. After her dismissal she did immediately get another employment. She told the court that she survived by making and selling jewellery. The Applicant worked for the Respondent for a long time without a disciplinary record. The court taking into account all the personal circumstances of the Applicant, the interests of justice and fairness will award the Applicant maximum compensation.

[38] The court will accordingly enter judgment in favour of the Applicant and order the Respondent to pay to the Applicant the following amounts within a period of fourteen days from the date of the judgement;

**1. Compensation for the unfair dismissal**

**(E3,600.00 x 12) E43,200.00**

**2. Costs of suit.**

The members agree.

**N. NKONYANE  
JUDGE OF THE INDUSTRIAL COURT**

**FOR APPLICANT: MR. S.J. SIMELANE  
(S.P MAMBA ATTORNEYS)**

**FOR RESPONDENT: MR. S. M. SIMELANE  
(MADAU SIMELANE MNTSHALI ATTORNEYS)**