



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

HELD AT MANZINI

SWMB 158/15

In the matter between:-

IRENE P.MKHONTA

APPLICANT

And

HUPIE LEROUX

RESPONDENT

CORAM:

Arbitrator : Ms K. Manzini

For Applicant : Mr. E. Dlamini

For Respondent : Mr. M. Dube

ARBITRATION AWARD

{09-02-17}

1. PARTIES AND REPRESENTATION

1.1. The Applicant is Ms. Irene P. Mkhonta, a Swazi female adult, and resident of the Mantjolo area, Mbabane, Hhohho Region. The Applicant was represented by Mr. Ephraim Dlamini, a Labour Consultant.

1.2. The Respondent is Ms. Huipie Le-Roux , a female adult and resident of Pine Valley area, Mbabane ,Hhohho Region. Mr Mbuso Dube , a Labour Consultant represented the Respondent in these proceedings .

2. ISSUES IN DISPUTE

2.1 The dispute at hand relates to the alleged non-payment of terminal benefits that the Applicant deems were due to her upon the termination of her employment relationship with the Respondent . The Applicant claims the following:-

- | | |
|-------------------------------|---------------------|
| 1) Additional Notice | = E 3,750.00 |
| 2) Severance Allowance | = E9,375.00 |
| 3) Leave Pay | =E1,125.00 |

The Applicant herein claims that she was compelled by health reasons to discontinue her employment relationship with the Respondent, and

therefore resigned without due notice to the employer (see Certificate of Unresolved Dispute No. 337/15).

3. SURVEY OF EVIDENCE

Each of the parties led one witness to substantiate their respective cases, and a number of documents were submitted as evidence.

3.1 THE APPLICANT'S CASE

THE TESTIMONY OF MS. IRENE PHILA MKHONTA

3.1.1 The Applicant testified under oath that she was employed by the Respondent as her domestic worker as from October, 1997 up until March, 2014. She stated that she used to be the Respondent's house keeper, and sometimes stayed in her house when the employer was away, and also tended to the garden. She stated that she earned a sum of E1000.00 at the time that her employment relationship with the Respondent came to end. According to the Applicant she worked for five days per week.

3.1.2 The Applicant testified that the reason that led to her decision to resign from employment was that she was suffering from arthritis, which made it very difficult for her to perform her job, and to walk from her place of residence to work because this

illness affected her mobility . She stated that she had made several visits to the hospital, and the employer had also given her money to go to a pharmacy to get medication for her condition. The Applicant testified that finally in March, 2014 she informed the Respondent that she could no longer continue working for her because she was too ill to perform her duties. She stated that she did this first thing in the morning just after she had reported for duty. According to the Applicant the employer asked her what they could do about the predicament that she was referring to? The Applicant testified that she told the employer that she needed to stop working, so that she could remain at home and seek medical attention for her illness.

3.1.3 The Applicant testified that her employer had asked her to reduce her proposition into writing and handed her a pen and paper. She referred to a letter dated 25th February, 2014 and confirmed that the letter had been written and signed by herself. She confirmed that it was a letter of resignation. The Applicant stated that although her intention had been to resign with immediate effect, her employer had asked her to stay for an extra week because she was going away and needed someone to stay in her house whilst she was away. She acknowledged that there was discrepancy between her evidence that she stopped working in March, 2015 and the date on the letter of resignation.

3.1.4 The applicant further referred to a Letter which she wrote to the Respondent (dated 21st April, 2015) wherein she requested the Respondent to pay her the following :-

- i) Additional Notice
- ii) Severance Allowance
- iii) Leave pay (Calculated at the rate of 1 day per month for the duration of the term of employment)

The Applicant explained that by writing this letter she was desirous of being paid monies relating to long service, Overtime and leave she stated that the employer did not respond to this letter despite the fact that one of her children personally hand-delivered the letter to her. The Applicant stated that even her numerous phone calls to the Respondent did not yield any positive fruit. She explained that this is what prompted her to report a dispute with CMAC because the Respondent was evidently refusing to pay her.

3.1.5 The Applicant referred to a letter which had been written by the Respondent , and addressed to her and dated 22nd October, 2014 in which the Respondent categorically informed her that she would not pay her the monies which she claimed. She stated that the employer in the letter, disputed her right to the monies claimed on account of the fact that she had given the employer only a few days notice of her resignation from employment. The Applicant pointed out that however , the Respondent did send her an amount

of E600.00 which she used to purchase crutches (E 340.00), and also to cater for any other medical expenses with the remaining funds.

3.1.6 The Applicant testified that she is currently unemployed , and since she is suffers from arthritis she cannot perform any kind of work which would help her earn money. She stated further that she used to sew tidvwaba (traditional skirts) but due to her affliction she is unable pursue this trade.

3.1.7 During cross-examination the Applicant confirmed that during the entire period of her employment she and the Respondent had a good relationship, and confirmed that apart from having to work in the garden as well, she deemed her working conditions to be favorable. She further confirmed that she resigned from work and did not afford her employer a notice period of 30 days, despite having worked for the Respondent since 1997. She stated however, that since she was ill, she had felt compelled to do this . She stated that it had been her wish to remain in the Respondent's employ until the employer eventually left Swaziland, but her illness rendered this impossible.

3.1.8 The Applicant was asked why she believed that she is entitled to terminal benefits? The Applicant stated that she had been told by the Respondent on her last day at work that she would prepare some money to pay her , but did not specify the amount. She stated that she deduced that the employer was referring to

terminal benefits. The Respondent's representative asked the Applicant whether or not she realized that the E 600.00 which was sent to her by the employer was the amount the Respondent had been referring to ? The Applicant stated that she did not deem this to be correct because she did not think that the Respondent would cheat her out of the entire amount which she claimed . The Respondent's representative put it to the Applicant that she is not entitled to the payment of terminal benefits because she resigned from her place of employment voluntarily and without giving sufficient notice to her employer. The Applicant stated that her employer had been aware of her illness, and pointed out that the Respondent had even sent her to her own doctor (one Dr. Stephens) for treatment.

3.1.9 The Applicant was asked about her claim for leave, and she pointed out that she did not take any leave during the entire period of employment. She later on clarified that she would normally take two or three days off during the Festive holidays, but if the Respondent was out of the country she was expected to stay and look after the employer's home. The Respondent's representative also put it to the Applicant that she had, according to his instructions, been allowed to take time off to go and purchase materials to sew traditional skirts in Manzini . The Applicant denied that this is the case , and stated that due to her illness her employer then cut her working days to 4 days per week . She stated that this was effective as from the year 2008 . She stated that from 2005 to 2014 she only worked 4 days per week. She did

not accept that this was part of her leave and maintained that the Respondent had not told her that these days off constituted part of her leave entitled.

3.1.10 The Applicant was referred to the letter dated the 22nd of October, 2014 which the Respondent wrote to her to tell her that she is not by law entitled to terminal benefits. The Respondent's representative put it to the Applicant that the Respondent had not ignored her demands for payment. The Applicant acknowledged this, but insisted that the employer had promised to pay her the said terminal benefits. The Applicant was asked what the Respondent had said exactly. The Applicant stated that the employer promised to pay: "her money". It was put to her that the employer made no mention of terminal benefits being payable to her at all, and that the money referred to was the E 600.00 which the employer graciously paid her to cater for medical expenses.

3.1.11 The Applicant was asked why it had taken her so long to make the claim for terminal benefits from the Respondent in any event seeing that she resigned in February, 2014, but only made the claim in April 2015? The Applicant gave an incomprehensible response, and stated that the letter was written on her behalf by an employee of CMAC, but it was on her instruction. She was asked why she did not sign it, as the letter simply bore her name the Applicant insisted that she had indeed signed it, and then in the

same breath she stated that she had asked the CMAC employee to sign the letter on her behalf.

3.1.12 During re-examination the Applicant confirmed that she had written the letter of resignation after the verbal deliberations between herself and the employer. The Applicant further reiterated that when the employer undertook to pay her some money, she had believed that it was for her long service, overtime and leave pay. She insisted that she had been required to work during the festive season, and only took the 25th and 26th of December of in each year. She stated that when she resigned from work, the employer had not asked her to serve any notice.

3.2 THE RESPONDENT'S CASE

THE TESTIMONY OF MS. HUIPIE LE ROUX

3.2.1 The Respondent testified that she is indeed the former employer of the Applicant. She explained that on the 25th of February, 2014 the Applicant returned to work on a Tuesday morning after the weekend, and the time was approximately 8:45 am when she reported for work. She stated that the Applicant had carried one of her grandchildren on her back, as well as a bag, containing the baby's paraphenelia all the way from her place of abode in Mantjolo to the Pinevalley where the Respondent resided. She stated that the Applicant left her baggage in the outside room, and came to see her, as she was about to leave for Mhlambanyatsi.

She stated that the Applicant informed her that she was resigning from work with immediate effect.

3.2.2 The Respondent explained that the Applicant told her that the pain in her knees and other joints was so bad that she could no longer work, so her intention was to stay at home. She stated that although she had been well aware of the Applicant's swollen knee and arthritic condition for years, she was not provided with a letter from a medical practitioner which stated that the Applicant was certified as being totally unfit to work. The Respondent stated that it therefore came as a surprise to her that the Applicant felt she could no longer carry on working. She stated that she then asked the Applicant to write down what she had told her verbally.

3.2.3 The Respondent testified that since she had already planned to go to Mhlambanyatsi to work there for a few days, she then asked the Applicant not to leave immediately and to remain at her residence until she returned from there. The Respondent testified that she had actually enquired from the Applicant as to why she had reached the decision to resign at that point in time, and yet she had actually warned the Applicant to desist from carrying her grandchild on her back to and from the workplace because this was not good for her already ailing joints, but the Applicant insisted on bringing the baby along with her to work. She stated that although she had insisted that the Applicant should not bring her grandchild to work, the Applicant had been adamant, and very defensive about this, and

had done so in any case. The Respondent stated that the Applicant, despite her questioning the decision to resign at that point , proceeded nonetheless to write the letter of resignation, and submitted it .

3.2.4 The Respondent stated that she had persuaded the Applicant to stay at least until the end of the week, and when she returned on that very Friday, the Applicant then left the workplace for good . She stated that she did not at any point promise the Applicant that she would pay her terminal benefits. The Respondent stated that she did not even know about these and their existence as she is not knowledgeable in the Law . The Respondent stated that she had merely undertaken to pay the Applicant her salary for that month of February, 2014.

3.2.5 The Respondent stated that she had given the Applicant a lift from work on that Friday morning, and at no point had she undertaken to pay her "terminal benefits". She stated that after dropping the Applicant off she had proceeded to go to the Department of Labour to ask for advice. The Respondent testified that at the Labour Department she was provided with the government gazette (she stated that she could not recall which one), and was informed about **Section 33** of the **Employment Act, 1980** which is a Law that relates to periods of Notice. The Respondent testified that she was advised that the Applicant was not entitled to her February Salary, and also that she did not qualify to be paid terminal benefits because she had not afforded her with

a month's notice prior to the termination of her employment with the Respondent .

3.2.6 The Respondent stated that she had however, decided to pay the Applicant the salary due for the month of February although she may not have been entitled to it. She stated that she felt compassionate towards the Applicant's plight and paid her this salary. The Respondent testified that the Applicant was not entitled to leave at all. She pointed out that although she had not been formal about the manner in which she did things at her home, the Applicant had been afforded leave in that she only worked for four out of five days per week and this was paid leave. She testified that even during the festive holidays she would afford the Applicant leave unless she was away from the home during that period. She stated that however, the Applicant would alternate with the Gardner, and take some days off whilst the Gardner remained at the workplace during that period. She stated that as far as she is concerned the Applicant was not owed any leave pay at all.

3.2.7 During the cross-examination it was put to the Respondent that it had not been the Applicant's intention to resign without giving notice. The Applicant's representative put it to the Respondent that the Applicant had felt compelled to do this when the Respondent took issue with her when she told the employer of inability to perform her duties. The Respondent stated that the

Applicant had not told her this at all, but had stated that it was intention to stop working immediately. She stated that she had indeed been upset by the Applicant's persistence in carrying her grandchild on her back, yet she complained of pain in her knees. She stated that she had previously informed the Applicant not to bring the baby to work with her, but this fell on deaf ears. The Respondent stated that she had not been angry at the time, and merely listened to the Applicant when she told her that she was leaving and that she could no longer carry on working.

3.2.8 The Respondent during cross-examination clarified that she had actually consulted with the labour officials on the Thursday which is a day before the Applicant's last day at work. She stated that she had already been informed that the Applicant was not entitled to terminal benefits and to her salary for that month, but she decided to pay her the salary. She pointed out that although she may not have informed the Applicant of what she had been advised, but she could not have promised the Applicant to pay her the terminal benefits as the Applicant alleged in her testimony.

3.2.9 It was put to the Respondent that she had not asked the Applicant to serve her notice period in full because she had been keen to get rid of her. The Respondent disputed this, and stated that she had merely accepted the Applicant's decision to resign with immediate effect.

4. ANALYSIS OF EVIDENCE

4.1 The Applicant's case herein is that she resigned of her own volition in the month of March, 2014. She did cite health reasons as being the cause of her decision to resign. It is trite that she did not afford her employer any notice, as according to her letter of resignation, this was with immediate effect. The legal question that arises therefore is whether she is entitled to the claims that she makes regarding Additional Notice pay and Severance Allowance.

4.2 The payment of Additional Notice is governed by **Section 32**, whilst **Section 34** of the **Employment Act, 1980 (as amended)** governs the payment of Severance Allowance. According to Section 33 (1) the period of Notice to be afforded to an employee by the employer who elects to terminate the services of that employee is a period of one month. This obligation is reciprocal, as an employee is also required to afford the employer a similar period of notice where it is the employee who terminates the employment relationship (see Section 33 (3) and (5))

4.3 The issue of Severance Allowance is regulated by Section 34 (1) which reads as follows:-

“34(1)... [I]F the services of an employee are terminated by his employer other than under the provision of Section 36 (a) – (J), the employee shall

be paid, as part of the benefits accruing under his contract of service, a severance allowance amounting to ten working days 'wages for each completed year in excess of one year that he has been continuously employed by that employer."

4.5 It is clear that the law lays down the circumstances under which a severance allowance becomes payable. The law states that the employer is liable under **Section 34** to pay severance allowance only where he terminates the services of the employee without a lawful cause as sanctioned by **Section 36 of the Act**. The same can be said of Additional Notice which too is payable when an employee is unfairly dismissed, and not when the employment relationship is terminated by the employee's own hand (**see also Samuel Zikalala v Jomar Investment (PTY) Ltd t/a Shamrock Butchery IC Case No 672/06**).

4.6 The Applicant further made a claim of E1,125.00 for leave pay allegedly owed to her by the employer. She stated in her evidence in chief that she had never taken leave in the entire period of her employment with the Respondent. The position of the law however, in terms of **Section 76(2)** of the **Industrial Relations Act, 2000 (as amended)**, is that a dispute may not be reported to the Commission of

more than eighteen (18) months has elapsed since the issue giving rise to the dispute arose.

4.7 In casu therefore, only those claims which fall within the eighteen month period, will be considered. The Applicant and the Respondent in their respective testimonies highlighted that the Applicant only worked for four (4) days per week, as she was only expected to work from Tuesday, to Friday in each working week. It was an undisputed position that the Applicant's earnings were in no way affected by this arrangement.

4.8 Section 5 of the Wages Regulation (Domestic Employees) Order, Notice, 2010 provides that the normal working week of an employee shall consist of six (6) days. The same gazette provides that an employee shall be entitled to one day of rest, which shall be agreed upon by the employer and employee (**see Section 14**). The law in the same instrument further provides that each domestic employee shall be accorded an annual leave of not less than twelve (12) working days after, the completion of twelve (12) continuous services with employer,(see Section 7).

4.9 In casu, the Applicant effectively worked 16 days per month as opposed to the gazetted 26 days per month. That being

the case, the difference of ten (10)days off per month, more than compensated the Applicant for the twelve (12) days leave per year which the law afforded her. The Applicant can therefore not legitimately make any claim for leave pay, because none was owed to her.

5. AWARD

5.1 Having heard the evidence and arguments of both parties the claims of the Applicant are hereby dismissed in their entirety.

**THUS DONE AND SIGNED AT MBABANE ON THIS
.....DAY OF FEBRUARY, 2017.**

**KHONTAPHI MANZINI
CMAC
ARBITRATOR**