



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

HELD AT MANZINI

SWMB 266/15

In the matter between:-

NOKUTHULA DLAMINI

APPLICANT

And

PICADILLY FAST FOOD & GROCERY

RESPONDENT

CORAM:

Arbitrator : Ms K. Manzini

For Applicant : Mr. E. Dlamini

For Respondent : Mr. H. Nhleko

ARBITRATION AWARD

1. PARTIES AND REPRESENTATION

1.1. The Applicant herein is Ms Nokuthula Dlamini, a Swazi female adult who is resident in the Ntontozi Area, within the Manzini Region. The Applicant was represented by Mr. Ephraim Dlamini, a Labour Consultant.

1.2. The Respondent is Picadilly Fast Food & Grocery, a business concern, trading along Betfusile Street, Mbabane in the Hhohho Region. The Respondent was represented by Mr. Hezekial Nhleko, a lawyer from the office of Dunseith Attorneys.

2. ISSUES IN DISPUTE

2.1. The Applicant reported a dispute of alleged unfair dismissal. According to the Certificate Unresolved Dispute filed herein (No. 405/15) the Applicant alleges that her services were terminated by the Respondent because she reported a case against the Respondent for underpayments. The Respondent on the other hand, denies the Applicant's claims, and maintains that she was

dismissed in a fair manner, after she been subjected to a disciplinary hearing.

2.2. The Applicant herein makes the following:-

- i. Notice pay = E1,235.85
- ii. Additional notice = E1, 330.84
- iii. Severance pay = E3, 327.10
- iv. Off days (18 months) = E3, 422.16
- v. Leave pay = E885.54
- vi. Underpayments = E9, 645.30
- vii. Maximum compensation for unfair dismissal = E29, 652.00

3. SURVEY OF EVIDENCE

3.1. The Applicant was the only witness, who testified in support of her case, whilst the Respondent's representative called Ms Bongiwane Kunene and Mr. Farooqi Bari Qamrul. Both parties submitted a number of documents as part of their evidence.

3.1 THE APPLICANT'S CASE

3.1.1. THE TESTIMONY OF MS NOKUTHULA DLAMINI

3.1.1.1. The Applicant testified under oath that she was employed by Mr. Farooqi Bari Qamrul, the proprietor of the Respondent on the 12TH December,

2006. She stated that she was employed to cook at the restaurant. The Applicant stated that she performed the duties attendant to the position until the year 2012 when she fell ill and had to be away from work for a period of about three months. According to the Applicant the employer had undertaken to pay her E900.00 as her monthly salary for her work as a cook at the Respondent's restaurant.

3.1.1.2. The testimony of the Applicant was to the effect that her employer was made aware of her illness as she had informed her Supervisor, Mr. Musa Dvuba. She stated that she further submitted to him the letters that had been written by the doctors at the Mbabane Government Hospital that confirmed that she had been ill and had been admitted and treated as an in-patient at the said hospital. She stated that after she felt better, she had obtained a further medical certificate that confirmed that she was fit to resume her duties at her place of employment. The Applicant stated that Mr. Farooqi had been reluctant to accept the contents of the medical report, because, according to the Applicant,

he was not convinced that she was well enough to perform her cooking duties.

3.1.1.3. The Applicant referred to the documents that are contained in the bundle of documents that were submitted as part of her evidence to support her submissions. She further referred to page 4 of the said bundle in particular, which contained a handwritten letter, dated 16th of January, 2015 wherein she complained to her employer of alleged unfair treatment, and further pointed out that the employer failed to give her any days off work, leave days, and did not observe any public holidays as per the Government Gazettee.

3.1.1.4. The Applicant testified that the letter had been written by her after she experienced some unfair treatment at the hands of the employer. She explained that her employer had originally agreed to pay her E900.00 per month for her cooking duties, but under took to increase her salary after a few months after the commencement of their working relationship. She explained further that after she had returned from her period of illness, she and her employer had agreed on a different working schedule

for her. She stated that Mr. Farooqi had opined that she did not look well enough to resume her cooking duties, and had assigned her to clean the grocery. She stated that she had agreed to these new duties, and the different working schedule which entailed that she worked only half the day, and knocked off work at 12:00 noon each day. She testified that the employer had reduced her salary to E700.00 per month, and this was done unilaterally since she did not agree to the said reduction.

3.1.1.5. The Applicant stated that she had been quite disgruntled about all of this, and had only registered this with Mr. Farooqi. She stated that Mr. Farooqi had told her that he had taken her back to work after her illness, only as a favour since he had already filled her position, and also pointed out that she only worked for half the day, so this entailed a reduction in the amount of money that she earned.

3.1.1.6. The Applicant testified that the employer had illtreated her because she had lodged her dissatisfaction by writing the letter to him. She stated that she had proceeded to lodge a dispute with CMAC but this had only made the employer to treat her in

an even harsher manner. She stated that he would often scold her for no apparent reason, and even went to the extent of calling her stupid, to which she had taken issue. She stated that she had told the employer that she was not stupid.

3.1.1.7. The Applicant stated that on the occasion that led to her dismissal, Mr. Farooqi had given her an instruction to clean the grocery shop and the said instruction had been delivered at about 11:45 a.m. She stated that her usual knocking off time was 12:00 noon, so she decided not to clean the grocery shop on that day. She stated that she had opined that she would do it the following day because it was already late when she received the instruction from Mr. Farooqi. The Applicant stated that Mr. Farooqi had actually directed her to clean both the restaurant and the grocery shop, and yet as a norm, her duties were restricted to just the grocery. The Applicant stated that this instruction was given to her in the presence of Bongiwe Kunene who is a cashier at the Respondent's place.

3.1.1.8. The Applicant stated that the following day she was suspended from work, and was charged with

the offence of "FAILURE TO TAKE INSTRUCTION". The Notice to Attend Disciplinary Hearing was dated the 18th of February, 2015, and the said hearing was scheduled to take place on the 24th of February, 2015. She stated that the said suspension took place even before she could perform her duties for the day. The Applicant testified that the hearing had taken place, and Bongiwe had been called as her witness to the fact that the instructions to clean the premises had been issued when she was about to knock-off for the day on the 17th of February, 2015. She stated that she had not received the determination that was made by the chairperson of the disciplinary hearing until she lodged another dispute at CMAC against the employer. The Applicant stated that she had merely been issued with a letter of dismissal, without an explanation about why the employer had failed to communicate this decision soon after the disciplinary hearing.

3.1.1.9. The Applicant stated that she is currently unemployed and prayed for reinstatement, or to be paid her claims as stated in both the certificate of unresolved dispute, as well as the report of dispute form.

3.1.1.10. During cross-examination the Applicant confirmed that she had been away from work for about three months whilst she was ill, and that she had been told by Mr. Farooqi that he had not received any kind of notification, and/ or letters from a medical practitioner that she had been hospitalized. She stated that she had handed all the pertinent documents to Musa Dvuba, who had been her supervisor at the time. She acknowledged that Mr. Farooqi had said that he had not been aware of her illness, and hospitalization, but she had not taken the time to go and get the documentation pertaining to her hospitalization from the Mbabane Government Hospital. She maintained that she had surmised that it sufficed that she had handed Musa the sick-sheet. It was further stated under cross-examination by the Applicant that the said Musa is no longer employed by the Respondent. The Applicant was asked if she would be willing to go and get the documentation from the said hospital, but she said that her hospitalization had been quite some time ago, so she was not certain if the documents were still available at the hospital.

3.1.1.11. The Applicant further clarified that the employer had required her to undergo a further medical certificate at the Municipal Council of Mbabane on the 15th of May, 2013 and she had collected the certificate which declared her fit for duty the very next day (16th May, 2013). She was asked how she had managed to receive her results so quickly, yet the process was usually a long one. She stated that she thought this was because she did not find a long queue of people from other shops who needed the same report. The Applicant referred to the Medical Report for Food Handlers – Municipal Council of Mbabane (page 2 in her bundle of documents).

3.1.1.12. She stated that after she returned from her illness she had started working for the Respondent in January, 2013. The Respondent's representative enquired why this date did not tally with the date of the medical report (16th of May, 2013) yet she had alleged that the employer had required her to undergo the said medical examination before she resumed work? The Applicant insisted that she had resumed work in January, 2013, despite this. She further could not explain why the letter on page 3 of

the Applicant's bundle, and dated 4th of June, 2013 was asking the employer to reinstate her to her former job, and made reference to the employer's requirement that she obtain a medical certificate which declared her fit to start work? Whilst the Applicant admitted that she had written the letter when she was first asked, she continued to change her answer two more times, in that she denied that she had authored it, but later settled on an admission to being the person who wrote it. It was put to her that she was not being honest with the Arbitrator, hence her need to change her answer several times. The Applicant remained silent, and did not provide an explanation about the inconsistency in the dates. She conceded also under cross-examination that she had not referred to this letter in her evidence in chief, but had confined her testimony to the handwritten letter (page 4 of the bundle, and dated the 16th of January, 2015).

3.1.1.13. The Respondent's representative referred the Applicant to the letter on page 3 (dated 4 June, 2013) and pointed out that the letter stated that the Applicant was willing to present herself for work anytime as she was available. He pointed out that

this signified that she had not resumed work at the time. He also referred to the handwritten words that were printed at the bottom of the letter which required the employer to respond "swiftly and within seven days" and asked the Applicant to explain how this could be reconciled with her testimony that she had already resumed work at the time? The Applicant denied that she had written the words at the bottom of the letter, she stated that she believed that the words had been written by her representative. The Respondent's representative asked the Applicant when she had secured the services of her representative? She stated that she had engaged him when she lodged the current dispute at CMAC, in or about February, 2015 and could not explain how he could have possibly written the said words on the letter dated 4th June, 2013. She stated that she believed that she had written the letter to try and prompt Mr. Farooqi to reinstate her to her cooking duties.

3.1.1.14. The Respondent's representative put it to the Applicant that the employer did not have obligation to accept her back into her old position because she had for all intents and purposes absconded for

months on end, and had failed to provide Mr. Farooqi with the medical certificate that showed that she had indeed been hospitalized for a prolonged period. The Applicant maintained that she had handed over the sick sheet from the doctor to her former supervisor. The Respondent's representative referred the Applicant to page 1 of the Applicant's bundle and asked her if she had submitted this document as evidence to support her case. The Applicant stated that the document was her laboratory report which has been prepared at the Mbabane Government Hospital, and was indeed a part of her evidence. She stated that it was proof that she had been treated at the hospital and had been declared fit for work. The Respondent's representative pointed out to the Applicant that the said laboratory report stated that on its face that it pertained to a patient named; Siphilwe Khumalo, and that it did not pertain to her at all. The Applicant stated that she was not aware of how this report had ended up in her bundle of documents, but did acknowledge that she had provided the said document to her representative so that it could be included in her bundle of documents. She also explained that she had not asked for the

hospital's documents that proved that she had been hospitalized, but had only asked for a sick-sheet.

3.1.1.15. The Applicant was also asked about her claim that she had been under paid and the basis for the said claim. She referred to the Wages Regulation, Legal Notice No. 176 of 2012 (Retail Industry) and pointed out that as a General Labourer she had been entitled to a monthly salary of E1, 235.85. The Respondent's representative put it to the Applicant that she had only worked for half the day, so she could not claim to be entitled to a salary which was to be paid to a General Labourer who worked for an entire day. She maintained that the employer had unilaterally decided that she should work for only a few hours. It was put to her that since she was only required to clean the grocery shop, she certainly could not expect to be at work the entire day. The Applicant insisted that she could have worked more hours, but maintained that she had expected the employer to redeploy her, and take her back to her cooking duties after a while, but he had failed to do this. She denied that she had accepted the clearing duties as being her permanent job. She acknowledged that she performed the job, and had

further accepted the payment of E700.00 from 2013 to 2015, but maintained that she had all the while been nursing the hope that Mr. Farooqi would increase her salary and take her back to her cooking duties. She maintained that she had not agreed to the reduction of her salary from E900.00 to E700.00.

3.1.1.16. The Applicant was asked to clarify what the time had been when Mr. Farooqi instructed her to clean the premises on the 17th of February, 2015. The Applicant stated that Mr. Farooqi had issued a directive for her to clean the premises at or about 11:45 a.m., and she had decided to clean the next day because it was almost time for her to leave for the day at 12:00 noon. The Applicant was asked whether she was aware that there were cameras at the Respondent's workplace, which captured the goings on at the grocery shop as well as the restaurant? She confirmed that she is well aware that the cameras were in place at the Respondent's premises. She denied, however that she had been shown the video footage.

3.1.1.17. The Respondent's representative proceeded to show the Applicant scenes of the incident when Mr.

Farooqi told her to clean the grocery shops from the video footage captured on the day in question. The Applicant agreed that the scenes depicted in the footage were a correct reflection of what had taken place on that day in that Mr. Farooqi had called her as well as Bongiwe Kunene so that he could instruct her to clean the grocery floors. She identified the employer (Mr. Farooqi) as well as Bongiwe on the videos footage, and admitted that the correct date of 17 February, 2015 was shown on the footage as well. The Applicant however, vehemently disputed the time which was reflected as being 10:36 a.m. She maintained that the employer had instructed her to clean the shop at about 11:45 a.m., even though she acknowledged that the scenes on the footage were a correct reflection of the events of that day, and that Mr. Farooqi had only called her, as well as Bongiwe on a single occasion on the day in question. She averred that the cameras timing device must have been manipulated, even though she did not explain how this was so. She only argued that the time did not seem to stop as the clock kept on ticking. The Respondent's representative stated that the time would certainly not stop because the camera recorded on-going events at the shop and was

operational throughout the day and night. The Applicant adamantly maintained that the clock's failure to stop was a sure indication that the employer had manipulated the time, even in the face of the assertions of the Respondent's representative that it was not possible to manipulate the time.

3.1.1.18. The Respondent's representative put it to the Applicant that the time had indeed been 10:35 a.m. when she was instructed to clean the shop, and this did not justify her failure to carry out the instruction, as she was only due to knock-off at 12:00 noon. He put it to the Applicant that his instructions were that she had been habitually insubordinate hence the employer had always needed to call Bongiwe whenever he issued an instruction to her to ensure that he had witnesses to what he had told her to do. The Applicant acknowledged that Mr. Farooqi would often call Bongiwe whenever he gave instructions to her, but denied that she was insubordinate.

3.1.1.19. The Respondent's representative put it further to the Applicant that she was insubordinate, and this could be seen in her refusal to even sign the notice to appear at the disciplinary hearing, which

had been handed to her the following day (18/02/15). The Applicant acknowledged that she had refused to sign the notice, but stated that her refusal had stemmed from her failure to understand why there was even a need to charge her of the said offence, since she had decided to clean, not on the day that the instruction was issued, but on the next day. She maintained that she did not refuse to do the work, but had only postponed the execution of the assigned work.

3.1.1.20. The Applicant was referred to page 7 of her bundle of documents (a letter dated 18/05/15) which she acknowledged to having been authorized and signed by herself. She explained that at the time she had not been made aware of the outcome of the disciplinary hearing, hence her reference to her inordinately long suspension from work without pay.

3.1.1.21. The Respondent's representative put it to the Applicant that she had not availed herself to collect the outcome of the disciplinary hearing and the employer's letter of dismissal. The Applicant maintained that the employer had her phone number, so he could have called her. She went on to say the employer had told her that he would hand the

outcome over to one Thandi Makhubu, but he had not done so. The Respondent's representative put it to the Applicant that she had not raised any of this in her evidence in chief, and suggested that these were all afterthoughts on her part. The Applicant admitted that she had not revealed this in her evidence in chief and acknowledged further that she had not even informed her own representative of any of this.

3.1.1.22. The Respondent's representative referred the Applicant to her Report of Dispute Form. He asked her why she had testified that she had been paid a salary of E700.00, and yet she had written in clause 3.4 of the form that she earned E900.00. The Applicant stated that she had written the amount that she had been paid before she fell ill and left work. She admitted that this figure was not correct because she had in fact been paid a salary of E700.00 per month.

3.1.1.23. The Respondent during re-examination pointed out that she had not been shown the video footage at the internal disciplinary hearing. She further stated that she had submitted all the documents that pertained to the time of her illness to

Musa Dvuba who had been her Supervisor at the time. She insisted that it had been Mr. Farooqi who had informed her to that she would always refer all such documents to her Supervisor. She further denied that she had been habitually insolent and disrespectful to Mr. Farooqi during the period between 2014 and 2015. She maintained that she had not deserted her employment, but had been ill, hence the time she spent away from work.

3.2. **THE RESPONDENT'S CASE**

3.2.1. THE TESTIMONY OF MS BUSISIWE KUNENE

3.2.1.1. The witness testified under oath that she is currently employed as a cashier at the Respondent's establishment. She stated that she is based at the grocery shop. She stated that she worked with the Applicant when she returned from a bout of illness. The witness stated that she was aware that the Applicant used to be employed as a cook, but she had been away from work for a long time, and had returned later on, and had told her that she had been ill.

3.2.1.2. The witness testified that when the Applicant returned from her illness she had been asked by the employer to get a medical clearance that confirmed

that she was fit to work. The witness referred to Medical Examination Report for Food Handlers from the Mbabane Municipal Council (dated 16/05/13). The witness stated that the Applicant had submitted the said report to Mr. Farooqi who had not been satisfied with the finding that she was fit for work since he said that she looked weak. She explained that Mr. Farooqi had then asked her to accompany the Applicant to the Mbabane Municipal Council so that they could examine her again.

3.2.1.3. The testimony of the witness was to the effect that when they arrived at the Municipality the Health Inspectors there had examined the Applicant, and also consulted with her for a while. She stated that she and Applicant had been told by the Inspectors, after the consultation that the Applicant should not work where she had to prepare food that was meant for public consumption, and that she was not fit to resume her cooking duties at the Respondent's restaurant.

3.2.1.4. The witness stated that when Mr. Farooqi received this report, he had then decided that the Applicant should be redeployed to the grocery shop

where he assigned her cleaning duties. She testified that when they went together (the Applicant and herself) to the Municipality for the re-evaluation, the Applicant had not as yet resumed her duties because she had just returned from her period of absence from work. She explained that Mr. Farooqi had been reluctant to put her back to work since she did not look well, hence the request that she secure clearance from the Municipality's Health Inspectors. She stated that she could not, however, recall the exact of all these events.

3.2.1.5. The witness testified that she also recalled that on the 17th of February, 2015, Mr. Farooqi had asked her to be present when he issued instructions to the Applicant because he needed a witness. According to the witness, Mr. Farooqi had instructed the Applicant to clean the grocery and not to keep loitering around the till area where she was stationed (Ms Kunene). She stated that she had then left Mr. Farooqi and the Applicant whilst they were still talking so that she could attend to some customers who were waiting by the till. According to the witness all of this had taken place at approximately 10:30 a.m.

3.2.1.6. The witness stated that she was aware that she had made a mistake about the time of the instruction before because she had earlier on made a statement that the instruction had been issued some time just before 12:00 noon. She stated that at the time she had not seen the video footage. She stated that she had told Mr. Dumsani Mabuza that it had been just before 12:00 noon when he come to speak to her at her place of work.

3.2.2. The Respondent's representative asked the witness what else, besides the video footage assisted her in finally remembering the exact time? She went on to explain that on the day in question she had not taken her 10:00 a.m. break, so she had been very hungry. She explained that the person who was supposed to relieve her at the till had not turned up for work, so in her mind it had been very late when the employer issued the instruction to the Applicant. She explained that she eventually asked someone else to relieve her at about 11:00 a.m., and at the time, the instruction to clean had already been issued to her. The witness stated that the Applicant continued to stand near the deep freezer until

12:00 noon, and then she knocked off and went home for the day.

3.2.3. The witness stated that she was aware that the Applicant did not perform the duties that had been assigned to her by Mr. Farooqi on that day. She stated that it was not true that Mr. Farooqi had assigned her the cleaning duties at or around 11:45 a.m. on that day. It was put to the witness that the Applicant had testified earlier that she had been told by Bongiwe to leave the cleaning until the next day since it was almost time for her to go home. The witness vehemently denied all of this. She stated that after Mr. Farooqi instructed the Applicant to clean, she had not had the opportunity to speak to the Applicant due to the fact that she stood quite a distance away, near the deep freezer, and did not come near the till until her time to knock-off.

3.2.4. During cross-examination the witness was asked if she knew who Musa Dvuba was, and what his position at the workplace was? She stated that she knew Musa to be one of the employees, and he had worked at the Restaurant. She was asked if she was a Supervisor there? She explained that as far as she was aware Musa

had been an ordinary employee since no one had ever told her he held a Supervisory position.

3.2.5. The witness was asked to give her own opinion of how the Applicant look in terms of the state of her outward appearance when she returned after her period of absence. The witness stated that the Applicant had looked quite unwell because she seemed to be weak and was unsteady on her feet. She confirmed that she had been present when the Health Inspector at the Mbabane Municipal Council re-evaluated the Applicant and told her that she was not fit to resume her cooking duties. She said the Applicant was categorically told that she should not work where she would be near food that was meant to be served to members of the public.

3.2.6. The witness was asked why she had been confused about the time when she testified earlier that the Applicant had been instructed to clean the grocery shop. The witness stated that she had been extremely hungry as she had started working at 6:00 a.m. that day, and to her it had seemed that a long time had passed and that is why she had believed that the time was around 11:45 a.m. she stated that she was later

shown the video footage, and this is when she then realized she had made a mistake.

3.2.7. The witness explained further that she had not attended the disciplinary hearing, but had merely spoken to Mr. Dumsani Mabuza who had been instructed to her by Mr. Farooqi sometime after the Applicant had been given the instruction to clean (she stated that she could not recall the dates well). She stated that she and Mr. Mabuza had left the till – area, and stood near the fridge, where he asked her to relate to him what had happened on the day in question. She stated that she and Mr. Mabuza had been alone, and no one else had been present. She stated that she had never attended a formal meeting or hearing where all the other parties (Mr. Farooqi and the Applicant) had been present.

3.2.8. The witness was referred to the Minutes of the Disciplinary Hearing (page 7 of the Respondent’s bundle of documents) where her name appeared on the list of people who were present at the hearing on the 2nd of March, 2015. She explained that she had not been at work on the day of the disciplinary hearing, and only Thuli Makhubu (another employee of the Respondent) had been in attendance. She explained that the

disciplinary hearing had been held on a Monday, and Mr. Mabuza had come to speak to her the following day. She explained that she could not recall the dates very well, but insisted that she was relatively certain about the events that took place. The witness was referred to page 8 of the minutes, and was asked if she was certain that she had not made the statements contained therein at the disciplinary hearing. Ms Kunene insisted that although she had indeed stated that she was not aware of the discussions between the Applicant and Mr. Farooqi when he asked her to accompany him when he was going to issue instructions to the Applicant. She also confirmed that she had said the time had been around 12:00 noon, however, she had told all of this to Mr. Dumsani Mabuza when he came to see her at the workplace, and not at the disciplinary hearing.

3.2.9. THE TESTIMONY OF MR. FAROOQI BARI QAMRUL

3.2.9.1. The witness testified under oath that he is the proprietor of the Respondent establishment. According to Mr. Farooqi he had employed the Applicant in the year 2008. He explained that she had worked for him as a cook until the year 2012 when she just disappeared from work, and there was no

word from her. Mr. Farooqi testified that the Applicant had disappeared in September, 2012, and they had suffered hardships at the workplace because they were rendered understaffed. It was the testimony of the witness that he had only replaced her in November, 2012 after waiting for her to contact him, but to no avail. He testified that the Applicant had resurfaced in May, 2013 and had sought to resume her duties. The witness stated that the Applicant had told him upon her return that she had been ill, and indeed she had looked quite ill, and he opined that she looked like she would collapse at any time.

3.2.9.2. It was put to the witness that the Applicant had testified that she had been hospitalized, hence her inability to report for work. Mr. Farooqi stated that he had not received any kind of documentation from the Applicant about this alleged hospitalization. He stated that he had asked the Applicant to provide him with the documents from the hospitals to confirm her story, but she had never done this. He stated that because she had looked unwell to him, he had asked her to go and get a medical certificate from the Mbabane City Council that confirmed that she was fit

to work. He stated that although he was aware that this kind of medical report usually took no less than 3 or 4 days, the Applicant had returned with the certificate after only about 4 hours. He stated that he had doubted the authenticity of the medical certificate because the time that it had taken to acquire it had been too brief, and yet the entire procedure was involved since blood tests and x-rays had to be performed and the results of these examinations did not return, as a norm, within a matter of hours.

3.2.9.3. The witness stated that even the Applicant's co-workers had complained to him about her appearance, and they even said that they would not eat food that had been prepared by her. He stated that he had feared that he would lose customers, hence he and Bongiwe Kunene had accompanied the Applicant to the Municipality where they met with the Health Inspector. He stated that the Health Inspector had re-examined the Applicant, and they had all been told that the Applicant was not in a fit state of health to work in the food department of his establishment (restaurant and bakery). The witness stated that the

Applicant had implored him to give her a job since she was in financial dire straits.

3.2.9.4. The witness stated that he offered to assist her by purchasing airtime stock for her so she could become an airtime vendor, but she had refused this offer. He testified that he had decided that it would be best that she should be stationed at the grocery shop where she was assigned cleaning duties. The witness lamented that the Applicant did not perform the work she had been assigned to do very well, and she often become very rude and defiant, hence he would ask Bongiwe to assist because of the Applicant's bad attitude.

3.2.9.5. The witness went on to testify that the Applicant had been specifically instructed not to serve customers at the grocery directly, but to take whatever goods they needed to the till. Mr. Farooqi stated that the Applicant deliberately disregarded his instructions and would hand the items straight to the customers. He stated that he had undertaken to pay her E25.00 per day for her cleaning services, and this was due to the fact that he felt sorry for her. He stated that he had opted for the daily payments because she had looked so ill that he had not been

certain that she would be able to report for work everyday. He confirmed that she had worked for only half the day, as she knocked off at 12:00 noon daily. He lamented that he had first determined that she should work for 6 hours, but he had later on reduced it to 4 hours because she had not performed the cleaning tasks very well. He pointed out that the Applicant had taken it upon herself to knock-off at 12:00 noon as she had generally been a law unto herself in that she rarely accepted instructions from him.

3.2.9.6. The witness referred to page 15 of the Respondent's bundle of documents, to a letter written by the Applicant (dated 4 June, 2013). He stated that he had taken exception to the tone of this letter as it was dictatorial, in that he was instructed to respond swiftly and within seven days, and yet she had been the one to desert her employment, so he did not understand why she was demanding to be put back to work. He pointed out that as far as he was concerned, she had terminated her own employment, and it had merely been his benevolence that had led him to taking her on as a cleaner. He stated that he did put her back to work in or about June, 2013, and

she did not complain about her salary up until sometime in August, 2014. He stated that the Applicant became increasingly disrespectful and arrogant towards him especially when he asked her to desist from handling cigarettes and handing them directly to customers. He stated that this was a problem because sometimes the said customers would fail to pay for the cigarettes, and at the end of the day his business suffered shrinkages not only of stock, but also in cash.

3.2.9.7. The witness testified that the Applicant's attitude to him was so bad that he had tried to avoid speaking to her when he was alone with her, hence on the 17th of February, 2015 he had asked Bongiwe to be present when he issued instructions to the Applicant. According to the witness he had stopped Bongiwe from leaving for her tea break so that she could be present when he asked the Applicant to clean the grocery as well as the upstairs since the lady who normally cleaned there was away. He stated that he had often issued instructions to the Applicant, but she would not perform the assigned tasks, and that is why he had needed Bongiwe to be present. He stated that he had spoken to the Applicant in

Bongiwe's presence, and it had barely taken three minutes. He stated that the Applicant had blatantly defied him, and had told him that "I am not a stupid". He state that when he tried to leave, she had blocked his path with her hand which she placed against the wall, and he had asked her to drop her hand, so that he could go.

3.2.9.8. The witness stated that the Applicant had notto clean the premises and had defied his instructions on that day. He stated that the time had been around 10:30 a.m., and she had stood illy until 12:00 noon, when she finally left to go home for the day. The witness stated that he had proceeded to charge the Applicant with the failure to follow his instructions the following day. He stated that he had asked the Applicant to sit down and read the notice to attend the disciplinary hearing together with Bongiwe, and to thereafter sign it, but she refused to do this.

3.2.9.9. The witness stated that the disciplinary hearing was convened on the 26th of February, 2015. According to Mr. Farooqi, Mr. Dumsani Mabuza had been the chairperson, whilst Thuli Makhubu had been

the Applicant's representative. He explained that the hearing had proceeded, but had been adjourned because Bongiwe had been on leave. According to the witness, the disciplinary hearing had resumed on the 2nd of March, 2015 when Bongiwe testified. He explained that the Applicant was accorded all of her rights. He pointed out that Bongiwe and the Applicant had testified that he had issued the instruction to the Applicant at around 11:45 a.m. He stated that after the conclusion of the hearing he had shown the video footages to the chairperson, Mr. Mabuza, and it was then the Mr. Mabuza realized that the testimonies of both the Applicant and Bongiwe had contained falsehoods in as far as the time was concerned because the footage clearly revealed that the time had been 10:35 a.m. He confirmed that he had not in any way manipulated the timing device on the camera. He pointed out that he had no clue how to do this in any event as he was not very good with highlydevices.

3.2.9.10. The witness stated that the chairperson had recommended a dismissal in his findings which he issued after the hearing, and he had duly written a letter of dismissal. He stated that he was unable to

serve the letter on the Applicant because he made herself scarce, and had sent someone else to collect her final salary payment. He pointed out that he refused to give the "messenger" the Applicant's salary and told the person to ask the Applicant to come personally so he could give her both the letter of dismissal and the salary. He stated that the Applicant did not come to the workplace, and it was only when she sent him a letter (dated 18th May, 2015) that he was able to then send the findings of the Chairperson and the letter of dismissal to the address she had given in the letter she wrote to him. He explained that he had been reluctant to call the Applicant on her mobile phone because he did not want to subject himself to her abusive language, but he was content to send the letter of dismissal and a response to the letter of the Applicant dated the 18th of March, 2013 wherein she enquired about her employment status, by registered post so that he could be sure that she received it.

3.2.9.11. During cross-examination the witness was referred to the letter dated 18th May, 2015. The Applicant's representative enquired why the Applicant had needed to write the letter if she had been made

aware of the decision to terminate her services? Mr. Farooqi reiterated that the Applicant had been told to return for the verdict a few days after the hearing, but she had failed to do so. He acknowledged that the letter made reference to a notice of motion that had been filed by the Applicant at the Industrial Court, but had believed that she should have started by collecting her letter of dismissal beforehand. He stated that he was aware of a previous postal address that had been used by the Applicant, because she changed her postal addresses quite often (he referred to the letter of page 15 of the Respondent's bundle which bore a Mbabane postal address, and yet the one on page 16 bore a Lobamba address).

3.2.9.12. The Applicant's representative put it the witness that he had been instructed that the Applicant had personally collected her salary on the 4th of March, 2015. Mr. Farooqi stated that he must have received the Chairperson's report (findings as recommendation) after this date, otherwise he would have served her with the letter of dismissal as well as her salary. The Applicant's representative put to the witness that he had also been instructed that the

Applicant had felt unwanted at the workplace Mr. Farooqi stated that he had tried to treat the Applicant with compassion because she was sickly, but she, in turn, had been rude and disrespectful towards him. He stated that he particularly did not like that she did this in full view of the other workers, and this created an atmosphere of ill-discipline at the workplace.

3.2.9.13. The witness was asked if the Chairperson had been shown the video footage in the presence of the Applicant, or her representative, Thuli Makhubu? The witness stated clearly that he had why shown it to the Chairperson. He added that Bongiwe was also shown the footage. He was referred to the minutes of the disciplinary hearing where Bongiwe was recorded to having said that she had not heard the discussion between Mr. Farooqi and the Applicant on the 17th of February, 2015. The witness stated that Bongiwe had been wrong about this, just as she had been mistaken about the time when he issued the instruction to the Applicant. He stated that it was only when the footage was played to Bongiwe that she realized her mistake. He insisted that the Applicant had said that she was not stupid in response to his instruction, in Bongiwe's presence.

3.2.9.14. Mr. Farooqi was asked if the Applicant had been given particulars of employment when she was employed? He stated that he had issued such particulars to her. Mr. Farooqi was asked if indeed Mr. Musa Dvuba had been the Applicant's Supervisor? He stated that Mr. Dvuba had introduced him to the Applicant, but he had not held a supervising position, save for that he had been instrumental in securing her employment at the Respondent's establishment. He pointed out that the Applicant had left before Musa Dvuba when she disappeared from work, and he had left about three months later. He denied that Musa had ever submitted to him any of the documents that the Applicant alleged she had left him with regarding her being away from work on account of illness. He stated that Musa had not informed him even verbally that the Applicant was sick during the time of her disappearance from work. Infact, according to the witness, Musa had denied that he had been aware of her illness at all, and the Applicant had not bothered to call Musa as her witness at the Arbitration proceedings. He was asked why he had failed to charge the Applicant with absenteeism when she returned? Mr. Farooqi stated

that he had merely accepted that she had opted to leave his employ, and he pointed out that when he asked the Applicant to provide him with the hospitalization documents, she had failed to do so.

3.2.9.15. It was put to the witness that his failure to provide the Applicant with written particulars of employment actually justified the Applicant in assuming that she was continuing with her former position as a cook. The witness vehemently denied this and pointed out that the Applicant had terminated the first contract of employment herself and had no basis for believing that she was continuing with it. It was also put to the witness that Bongiwe had denied that she had testified at the disciplinary hearing. Mr. Farooqi stated that Bongiwe had been mistaken about this as well. He pointed out that it had taken him sometime to realise that the video footage might of assistance, hence his decision to ask the Chairperson to visit the workplace premises to view it, and to speak to Bongiwe as well. He maintained that he had not tampered with the footage in anyway, but acknowledged that it was never shown to the Applicant.

3.3. **ANALYSIS OF EVIDENCE**

3.3.1. The dispute at hand requires a determination on the issue of alleged automatically unfair dismissal of the Applicant. She alleged that she was dismissed in a manner that was automatically unfair because she was dismissed after she had reported a case against the Respondent for underpayment.

3.3.2. The gist of the Applicant's case is that she was dismissed by the employer on the 4th of March, 2015 after a disciplinary hearing, but this was all a guise for the employer's intent to get rid of her because she had written a letter to him (dated 16th of January, 2015) wherein she claimed that she was being ill-treated since her return from illness, and had obtained a medical opinion that stated that she was fit to resume work. She stated therein that she was giving the employer seven days within which to decide whether he needed her at the place of employment, and further highlighted that she was not being afforded off-days, leave days and public holidays. In her evidence the Applicant stated that she had been dismissed after a disciplinary hearing, however, she had not committed the alleged offence of failing to follow the instruction of the employer because although she had not performed the clearing duties on

the day they were assigned, she had fully intended to comply with the instruction the following day.

3.3.3. She further stated in her evidence that she had earned a monthly salary of E700.00, and was disgruntled since she had originally been employed as a cook at a monthly remuneration of E900.00. She stated that she had worked seven days per week, and had performed clearing duties, whilst knocking off at 12:00 noon on each day because Mr. Farooqi had not been convinced that she was well enough to work in the kitchen and restaurant area.

3.3.4. One of the key issues to be determined herein is whether the employment contract between the Applicant and the Respondent which commenced in December, 2006 (where she was employed as a cook) still subsisted at the time of her dismissal in March, 2015. The Applicant alleged that she had fallen ill and had been hospitalized for a protracted period between 2012 (she was unclear about the precise date), but according to her testimony she returned to work, and began working in January, 2013. This testimony contained various discrepancies because she stated her employer insisted that she obtain certification that she was fit to resume

work, and the document which she obtained from the Mbabane City Council is dated the 16th of May, 2013. In her testimony she stated that she had submitted all documents that related to her illness and hospitalization to her “supervisor”, Mr. Musa Dvuba and she did not see why she had to go any further to submit copies of these to Mr. Farooqi when he told her that he had not been aware of her illness, and had never received the said documents. Even during the arbitration she was unwilling tothese documents and/or to call Mr. Musa Dvuba as a witness when challenged to do so by the Respondent’s representative. The case of the Respondent is to the effect that she had deserted her employment and her failure to communicate her whereabouts had effectively terminated her employment contract.

3.3.5. From the evidence adduced in this case, it is clear that this is a case where the employee terminated her own employment with the Respondent when she disappeared without a trace in 2012 only to return in 2013. The Court in ***Alpheous Thobela Dlamini vs Dalcrue Agricultural Holdings (Pty) Ltd (I.C. Case No. 382/04)*** stated that:-

“Absenteeism differs from absconding or, as it is more often described, desertion from work.

Absenteeism is merely an unexplained and unauthorized absence from work, whereas desertion means unauthorized absence from with the intention never to return..... desertion is a repudiation of the contract. In other words, the employee's desertion manifests his intention no longer to be bound by his contract of employment. This repudiation does not itself bring the employment to end. The employer has an election whether to accept the repudiation and to bring the contract to an end, or hold the employee to the contract". (see page 9-10 para 24).

3.3.6. It is clear from this statement of the law that it is the act of the employer who elects to accept the repudiation that brings the contract to an end. The Court in the same case, also stated at page 10 paragraph 25 that the intention of the employee of never returning to work, must be determined from the surrounding circumstances. The Learned Judge President in this case stated that the employee must exhibit a "deliberate and unequivocal intention no longer to be bound by the employment contract (*see: also the case of Street v Dublin 1961 (2) SA (W) at page 10, as well as Christie: The Law of Contract (4th edition) page 401*).

3.3.7. In casu it is clear that the Applicant did manifest an unequivocal, and deliberate intention to terminate her own employment by disappearing from work in the year 2012, only to resurface in or about May, 2013. She further compounded the issue by neglecting and/ or refusing to furnish the employer with the documents which related to her alleged illness and hospitalization. It is also clear that Mr. Farooqi accepted her desertion and consequent repudiation of her contract in that he proceeded to employ someone else to fill the vacancy that had been left by the Applicant's desertion. I am not inclined to believe that the Applicant returned to work in January, 2013 as it is evidenced by the report from the Municipality of Mbabane that it was only in May in that year that she solicited this report because Mr. Farooqi was reluctant to put her to work without it.

3.3.8. It is therefore my finding that the parties later on concluded a second contract of employment, the terms of which entailed that she was to be a cleaner, and that she was to work for only half the day. It was the undisputed testimony of Mr. Farooqi that he had determined to pay the Applicant a daily remuneration of E25.00 which amounts to E700.00 per month. Although

it is the position of the law that an employee ought to be issued with the Statutory Standard Form 22 which shows the terms and conditions of the Applicant's service with certainty, however in this case there does not seem to have been an uncertainty about these terms and conditions of employment.

3.3.9. According to the case of ***France Dlamini v A to Zee (I.C. Case No. 86/02***, Nderi Nduma (the Court President as he then was) held that where an employer fails to maintain such a record (of the statutory employment form), and there is a dispute as to the terms and conditions of service of the employee, the onus then shifts to the employer to rebut the terms of employment as asserted by the employee. This case was cited with approval in the cases of ***Mandla Mhlongo v Swaziland Meat Wholesalers: Maximus (Pty) Ltd (I.C. Case NO. 270/02)*** as well as ***Patrick Masondo v Emalangení Foods (I.C. Case No. 45/04)***. In casu, it was clear from the evidence of both parties that the Applicant was a cleaner and earned a remuneration of E700.00 per month, as well as that she knocked off work at 12:00 noon each day. There is no uncertainty at all about this, seen as the Applicant herself insisted that she did not comply with the instruction to clean the

grocery store because she believed that she was entitled to knock off at 12:00 noon, and the instruction (according to her) had been issued just before this time. As it has already been established, her earlier contract of employment which commenced in 2006, ended or was terminated, by the Applicant's own hand in 2012. This is when she disappeared from work, and thereby deserted her job, and repudiated this contract of employment. The one the parties concluded upon her return was totally new, and had different, and distinct terms and conditions of service.

3.3.10. The key issue to be determined herein is whether the dismissal of the Applicant was substantively fair. The evidence that was adduced by both parties was quite a "mixed bag" of contradictions. On the one hand, the Applicant stated that she had been told by Mr. Farooqi to clean the shop at or about 11:45 a.m., and according to her, this was too close to her knocking-off time which was 12:00 noon. She stated that she then determined, all on her own to postpone the performance of the task until the next day. Nowhere in her evidence did she make any mention of informing her employer that she would clean the shop the following day because of the "lateness" of the hour.

3.3.11. It was further the evidence of the Respondent that the said instruction was issued, not at 11:45 a.m., but at 10:35 a.m. It was clear from the video footage, retrieved from the security cameras that the date and time was indeed 10:35 a.m. The version of the Applicant that the time had been manipulated because the clock did not stop cannot be accepted because it stands to reason that the events on the footage were on-going, therefore there would be no possibility of the clock stopping. She did acknowledge that the events unfolded exactly as they appeared on the footage, and that the employer had called both herself and Bongiwe only once on the given date (which was also acknowledged by the Applicant), so it cannot be deduced that any other occurrence was happening when the images were captured by the security camera.

3.3.12. It is true that Bongiwe at the disciplinary hearing had testified that she did not hear when the instructions were issued, and that the time was actually 11:45 a.m. At the arbitration proceedings, she recanted this version, and actually denied that she had testified at the disciplinary hearing, whereas the minutes reflect that she did. The Applicant in her own testimony under cross-examination actually put it clearly that Bongiwe had

testified at the hearing. This was backed up by Mr. Farooqi's testimony. It is not entirely detrimental to the Respondent's case that the said footage was not shown to the Applicant at the disciplinary hearing, and this can be said to be understandable as Mr. Farooqi testified that it was only after the disciplinary hearing that he realized that the time of the instruction could be ascertained with certainty from the security cameras.

3.3.13. Bongiwe at the arbitration proceedings did acknowledge that she had given a contrary statement beforehand, and she attributed this state of confusion to her extreme hunger at the time the instruction had been issued to the Applicant. She stated that she later saw the video footage, and realized her mistake. She also acknowledged that she had indeed heard the instruction being issued to the Applicant, and that she had witnessed the Applicant's failure to comply with the said instruction, when she stood idly by the deep freezer until it was time for her to leave for the day. Mr. Farooqi's own testimony corroborated this position. All of these witnesses gave testimony under oath at the arbitration proceedings.

3.3.14. Regardless of what took place at the disciplinary proceedings, the position of the law that the Industrial

Court (and by extension the Arbitrator) does not sit as a Court of Appeal or review of internal disciplinary hearings holds true. It conducts its own enquiry on the allegations, and makes its own findings of fact (**see *Central Bank of Swaziland v Memory Matiwane Case No. 110/93 ICA***). The same can be said of an Arbitrator who is not tasked with the responsibility of determining the fairness of the employer's decision, based on the evidential material that was before the employer at the disciplinary hearing (**see: *County Fair Foods (Pty) Ltd CCMA & Others (1999) 20 ILJ 1701 (LAC) 1707 (paragraph 11)***).

3.3.15. It was the argument of the Applicant's representative in his closing submissions that the failure to follow an instruction or use the offence of insubordination falls within the purview of Section 36 (a) of the Employment Act, 1980 (as amended), and therefore could be defined as poor work conduct. The gist of the argument being that it would only be fair to terminate the services of the Applicant after a written warning (he cited the case of ***Thuli Nkambule vs Juries Manufacturing I.C. Case No. 176/08***). I find that I am not convinced by this argument since the position was clarified by the authoritative case of the ***Industrial Court of Appeal in Almon Dladla vs***

Swaziland Meat Industries (Pty) Ltd Case No. 3/2010 (ICA). In the latter case the Court went to great lengths to point out that insubordination, and failure to follow instructions (lawful) fall squarely within the ambit of Section 36 (J) which reads thus:-

"For any other reason which entails for the employer or the undertaking similar detrimental consequences to those set out in this section".

The above being a fair reason to terminate the services of an employee.

3.3.16. The testimony of Mr. Farooqi which stood unchallenged even under cross-examination was to the effect that the Applicant's attitude and behavior which reflected clear insubordination brought about an atmosphere of ill-discipline at the work place. He stated that the Applicant defied his instruction and stood idly, in full view of the other employees whilst deliberately and insolently failing to carry out the instruction he had given her. According to him she had actually stated that "she was not stupid" hence she was not going to perform the assigned task. Whether or not this was said by the Applicant is most as Bongiwe did not corroborate this. What comes out clearly is that the Applicant did not

perform the task, and neither did she tell her employer be believed that the instruction was issued at 11:45 a.m., which is clearly incorrect in view of the time reflected on the security footage.

3.3.17. It is my finding that the dismissal of the Applicant was substantively fair since she did is actual fact defy her employer is failing to carry out his lawful instructions. It is an unfortunate situation that the Applicant did not make a case for procedural fairness (let alone report such a case). It is clear from the evidence of all of the witnesses of the Respondent that serious procedural breaches took place when the Chairperson, in the absence of the Applicant and her representative, went on to view the video footage, and also to speak to Mr. Farooqi as well as Bongiwe about the case before he issued his verdict. **(see: *Graham Rudolph vs Mananga College and Leonard Nxumalo N.O. I.C. Case No. 94/07*).**

3.3.18. It is my finding that the Applicant was dismissed in a manner that was substantively fair, and this is not an issue of “Automatic Unfair Dismissal” since she did commit the offence that she was charged with. She was not dismissed for enforcing her rights against the

employer (***see: Section ...Industrial Relations Act, 2000 (as amended)***).

3.3.19. The Applicant has made claims for off-days and leave days. She also made claims for underpayments as she alleged that she was entitled to receive a minimum remuneration of E1,235.85 as a ***General Labourer (according to Legal Notice No. 101 of 2014 for the Retail Industry)***. I am not inclined to award her the claim for underpayments as she only worked for half a day, and therefore cannot be entitled to the same remuneration that would be earned by a General Labourer who worked for an entire day (being 8 hours). The only claim that the Applicant is entitled to is that of leave, whilst that of off-days remains moot.

Leave pay

3.3.20. The above-cited Legal Notice at section 7 (1) provides that the Applicant who commenced work for the Respondent in or about May, 2013 is entitled to annual leave as she had completed twelve months in employment. The said provision states that she is entitled to twelve days leave per annum.

The Applicant's daily rate can be calculated as being half of $E700 \div 26 \text{ days} = E13.46$. The Applicant is therefore entitled to leave pay of $E13.46 \times 12 \text{ days} = E161.52$

Off days

3.3.21. The said Legal Notice provides in Section 5 that the normal hours of work of an employee consists of forty-eight hours per week. In casu the Applicant who worked only half the day, only for a total of twenty-eight hours at most. The said Legal Notice, despite thorough perusal, does not cover, or make provision for off-days in the case of an employee who worked for only 28 hours as is the case in the Applicant's situation. For this reason I am unable to award the Applicant this claim.

4. AWARD

4.1. Having heard the evidence of both parties, it is hereby ordered that the claim of unfair dismissal is dismissed in its entirety.

4.2. The Respondent is however, ordered to pay the Applicant her leave pay which amounts to E161.52. The said amount is to be paid to the Applicant not later than the 31st of January, 2016 at the Mbabane CMAC Offices, Asakhe House.

**THUS DONE AND SIGNED AT MANZINI ON THIS
.....DAY OF JANUARY, 2016.**

**KHONTAPHI MANZINI
CMAC ARBITRATOR**