



**CONCILIATION MEDIATION AND ARBITRATION COMMISSION
(CMAC)**

HELD AT MBABANE

SWMB 24/14

In the matter between:-

CELIWE MASHININI

Applicant

And

FIDELITY SECURITY SERVICES

Respondent

ARBITRATION AWARD (31-03-17)

DATE OF ARBITRATION: 18th July 2016

VENUE: CMAC Offices, 1st Floor, Mbabane House

1. PARTIES AND HEARING

The Applicant is Ms. Celiwe Mashinini of P. O. Box 2877 Mbabane. She shall be referred to herein as the Applicant, the employee or simply as Ms. Mashinini

The Respondent is Fidelity Security Services, a Company duly registered in accordance with the Companies Act of Swaziland. They will be referred to as the Respondent or the employer.

2. REPRESENTATION

Mr. Selby Dlamini appeared on behalf of the Applicant, whilst Mr. Sabela Dlamini from Magagula & Hlophe Attorneys represented the Respondent.

3. ISSUES IN DISPUTE

This matter relates to the alleged unfair dismissal of the applicant by the respondent. The Applicant alleges that her employment contract was automatically unfairly terminated by the respondent and that the dismissal was not in accordance with our law.

The respondent denies that the applicant's services were unfairly terminated and argues that the applicant's services were terminated in a fair manner.

4. BACKGROUND INFORMATION

The applicant was employed by the respondent on the 19th August 2011 as a Security Guard. The services of the applicant were terminated on the 4th November 2013.

The applicant reported the dispute to the Commission in terms of Sections 77 and 78 of the Industrial Relations Act of 2000, as amended, on the 17th January 2014.

The matter was conciliated upon and declared unresolved on the 12th February 2014 and Certificate of Unresolved Dispute no. 076/14 was issued.

On the 17th March 2016, the Industrial Court referred the matter back to CMAC for arbitration, and it is common cause that I was subsequently appointed to arbitrate the matter.

According to the Applicant's representative, the dismissal of the applicant was automatically unfair due to what happened between the Applicant and the Respondent in 2013, prior to the dismissal of the Applicant.

The respondent's representative argued that the dismissal of the applicant was both procedurally and substantively fair. The respondent submitted that the applicant had two valid written warnings and the desertion of her post was a breach of her employment contract.

5. SURVEY OF EVIDENCE AND ARGUMENTS

The Applicant called their witness, who is the Applicant herself. I shall refer to Ms. Mashinini as AW 1. The witness testified under oath that she was employed by the Respondent as a Security Guard on the 13th August 2013 and was dismissed 4th November 2013 following a disciplinary hearing where she was charged with Poor work performance in that on the 16th September 2013, she left her post at the gate behind Shoprite unattended and without authority.

The Applicant submitted that following her dismissal, she lodged an appeal against the dismissal. She was not called to an appeal hearing, but instead was called by the Respondent to collect her letter relating to the appeal.

The Respondent objected to the submission of the letter on the grounds that the Applicant had stated that her bundle of documents consists of documentation used during the Industrial Court case and the said letter was not part of the pleadings. The Arbitrator allowed the submission of the letter.

The Applicant submitted that she was dismissed because she left her post for 10 minutes to answer the call of nature. Upon her return from the toilet, she found there were cars at the gate awaiting admission into the premises.

The Applicant stated that her supervisor told her that she must report the following day at the office for a hearing. The hearing was held at Matsapha and the sanction was dismissal.

It is the evidence of the Applicant that notwithstanding that at the Industrial Court, she submitted that she had no previous warnings; this was due to the fact that she was not aware she had to sign a warning after a hearing.

The Applicant further submitted that her relationship with the Respondent was difficult, after she refused to sign a contract of employment after she had worked a whole year without one. Due to this anomaly, the Applicant successfully challenged the Respondent at the Industrial Court. The Court ruled in favor of the Applicant. It was then when she started receiving written warnings. However, the Assistant Manager, Ms. Connie Shabangu, stated that she would have the last laugh. Shabangu thereafter constantly made the Applicant to sign written warnings.

Of her personal circumstances, the Applicant submitted that it took her more than a year to secure alternative employment, She is married and has four minor children all of school going age, and an unemployed husband.

The Applicant prayed that she be compensated for automatically unfair dismissal computed as follows:

Notice Pay	E 1 700-00
Additional Notice	E 523-07
Severance Allowance	E 884-00
Compensation for Automatically unfair dismissal	E 40 800-00
TOTAL	E 43 907-07

Under cross examination, the Applicant submitted that her grounds of appeal were that the reasons for her dismissal are unclear because she went to the toilet. Her cell phone had no battery neither did she have airtime to communicate with her supervisors that she was going to the toilet.

The Respondent sought clarification from the Applicant on the grounds of her appeal, those stated in her letter of appeal are not the same as those submitted before the Commission, as her grounds of appeal were that prior to dismissal, she had no written warnings.

The Applicant stated that she was made to sign the warnings without a hearing and admitted that she understood that her submission that she had no prior warnings was a contradiction of her evidence in chief. She insisted that the warnings she had were unprocedural although she did not appeal against any of the warnings.

The Applicant submitted that her problems with her employer started prior to her dismissal, but in March 2013 when she refused to sign her employment contract. The Applicant submitted that prior to 11th March 2013, she had no warnings.

The Respondent put it to the Applicant that prior to March 2013, she did have written warnings, to which the Applicant responded that those warnings were not for the offence for which she was dismissed. The Applicant submitted that at the time of her dismissal, she was based at the Swazi Plaza rear parking gate and that she was given instructions to always be at the gate, with the exception that she can rush to the toilet if there was no car requiring admission into the premises.

The Applicant stated that on the day in question, she had a stomach ache. She left her duty station to attend to the call of nature and did not take long to return to her post.

The Respondent's representative submitted that Mr. Vusi Dlamini, who is the Applicant's supervisor, will testify that in the event a guard leaves their duty station, they have to radio a colleague to stand in for them. The Applicant responded by saying she did not have a walkie talkie and was therefore unable to contact her colleagues.

The Applicant acknowledged that the instruction from her supervisor was to either call him or any of the guards on duty. When asked whether she conceded that she had a duty to report, the Applicant failed to respond. She however stated that the reason she had to

report was to ensure that operations continue smoothly in the absence of the guard who is not at their duty station.

When asked which toilet she used, the Applicant stated that she used the one near Tandori Restaurant. The Respondent's representative submitted that he had instructions that there was a guard near the Applicant's station, one Gcwala Magagula, who was stationed near Affordable Car Hire. Applicant was asked why she did not contact Gcwala before leaving her post. The Applicant stated that she looked for Gcwala and did not find him as she was able to see him from her post.

The Respondent put it to the Applicant that her evidence is untrue, as she did not call out to Gcwala and left her station unattended for so long that three cars were unable to enter the premises due to the length of time she took. The Applicant responded to say she took only about ten minutes to go to the toilet.

The Respondent enquired from the Applicant why she did not contact another guard, Cabangile or the other guard stationed at the Shoprite exit. The Applicant submitted that Cabangile was far from her as she was stationed near Clicks ATMs. She further stated that she does not remember whether there is another guard near the Shoprite exit. Her duty was to park cars at the Shoprite entry point and there was no other security guard with her.

The Respondent referred the Applicant to annexure 8, which was the Applicants, Job description. The Applicant confirmed that the contract bore her signature on page ten.

The Respondent put it to the Applicant that by leaving her post unattended, she breached her employment contract as she signed the contract and agreed to its provisions. The Contract provides on page eight that the guard is not to leave their station unattended. The Applicant submitted that she does not know the contents of the contract and that it was the first time to breach the said contract, therefore the sanction of dismissal was too harsh as the Respondent had not given her a warning prior to the present case.

The Respondent submitted that the toilet the Applicant referred to next to Tandor Restaurant is always locked, whereas Applicant submitted in her evidence that this is the toilet she used. The Applicant agreed that the toilet was locked but she went and collected the keys from the Security guard stationed at the Building Society ATM next to Furniture Warehouse as she had a running stomach and urgently needed the toilet.

When asked whether she contacted Gcwala and Cabangile on her way, the Applicant stated that Cabangile said she was unable to leave her post. When asked further whether she contacted Cabangile, as her earlier submission was that she did not see Cabangile, the Applicant recanted and said she did not contact Cabangile.

The Applicant was referred to annexure 5, which is a statement written by the Applicant. The Applicant admitted that she wrote the statement on the 17th September 2013 a day after the incident. The Respondent pointed out to the Applicant that in her statement, she did not state that she did not see Gcwala or Cabangile, to which she replied in the affirmative.

The Respondent put it to the Applicant that her submission before the commission are a fabrication and that Applicant was asleep, as the Supervisor asked Gcwala to look for her and she could not be found. The Applicant maintained that she was not asleep but was at the toilet.

The Respondent referred to page one of the Respondent's bundle, which was a written warning issued to the Applicant. The Applicant admitted that she signed for the warning after being called to the office to sign it.

The Respondent referred to annexure two of their documents, which is a warning dated 25th July 2013. This warning was valid for six months and had not expired when the Applicant was dismissed. In addition, the Respondent referred to annexure three, which is a counseling letter for the Applicant, who was found sitting instead of patrolling during her shift.

The Applicant submitted that she was being victimized for taking the company to CMAC and all this happened after her reinstatement. The Applicant submitted that she was made to sign the warnings by force, or else she was not going to be assigned any work.

The Respondent referred that Applicant to annexure six and seven of their bundle, which was the charge sheet and the confirmation that the disciplinary process was procedurally fair, which the Applicant confirmed bore her signature.

The Applicant submitted that she was not asleep at the time she was not at her duty station, and that upon her return, she found three vehicles waiting to be admitted. Applicant submitted that the incident occurred in the evening and that there was a lot of traffic flowing during that time and she could therefore not sleep at such a time.

The Applicant's representative did not re-examine his witness and thereafter closed their case.

The Respondent called their first witness Mr. Vusi Dlamini, who testified under oath. I will refer to him as Mr. Dlamini or RW1. The Witness submitted that he is Vusi Jimmy Dlamini, employed by the Respondent as the Swazi Plaza Supervisor since the year 2000. RW1 submitted that the Applicant is known to him, she was his subordinate stationed at the Swazi Plaza.

Rw1 submitted that the Applicant is no longer in the Respondent's employ as she was dismissed after leaving her post unattended and she did not report that she was leaving her station. Applicant left with the keys for the gate and did not ask for relief from the other guards, notwithstanding the fact that the other guards are within shouting distance of her post.

RW1 submitted that he arrived at the scene and found three vehicles at the gate awaiting admission into the premises, with the Applicant nowhere in sight. He enquired from the other guards on her whereabouts and they said they had not seen her.

Mr. Dlamini stated that the gate was locked and there was no way to admit the vehicles at the gate. The Applicant resurfaced after thirty minutes.

The Respondent informed the witness that it is the evidence of the Applicant that she was at the toilet. RW1 refuted the claim by the Applicant as the time she took to return to her workstation is not consistent with a visit to the toilet. In addition, the guards on duty did not see her as she would have to pass the posts of the other guards when going to the toilet.

RW1 testified that the toilet they were assigned by the Swazi Plaza Management was the one near Sales House there is another one near Tandori Restaurant but it is always locked. The keys are kept by personnel from The Specialist who leaves work at 6pm daily. The incident occurred just after 7pm therefore the toilets near Tandori were locked.

When asked on the Applicant's performance, RW1 submitted that the Applicant would complain that at the Plaza, they were not allowed to sit whilst on duty, whereas she had undergone an operation and could not stand for extended periods.

The witness was asked on the internal rules regarding leaving a post unattended and he submitted that the standard is that a guard does not leave a station unattended, to enable the smooth flow of traffic and so that clients are not inconvenienced.

It is the evidence of RW1 that he had on previous occasions warned Applicant on sitting down whilst on duty and chatting with her friend at a nearby post. As a consequence, the Applicant was given a written warning for her conduct. The witness submitted annexure 1 as part of his evidence. This being the written warning to the Applicant and Vuyisile for chatting whilst on duty. The Applicant signed acknowledgement of receipt of the warning.

When asked whether the Applicant wrote a report on the current issue, RW1 stated that the Applicant did write a report and identified

annexure 5 as the statement written by the Applicant, who said she had a stomachache and went to the toilet nearby.

RW1 submitted that he did issue written warnings to the Applicant without a hearing but this was done when the Applicant was found to be doing something which is against the regulations.

The witness submitted that he has no personal grudge against the Applicant as he has warned the staff at the Plaza not to leave their stations unattended and chat with their friends as this would have negative repercussions as they would lose their jobs.

Under cross examination, RW1 was asked whether he recalls the incident where the Applicant was dismissed and reinstated in March 2013. The witness submitted that he was not aware of the incident as this had not happened while he was Applicant's Supervisor as he assumed the duties of a supervisor sometime in 2013.

The Applicant's representative referred to annexure 2 of the respondents bundle and enquired from the witness whether the Applicant was afforded a hearing prior to be given the warning, the witness responded that the Applicant was not charged but he spoke to both the Applicant and Vuyisile.

The Applicant's Representative asked the witness whether he was at the scene on the 17th September 2013. RW1 submitted that he was there and upon the return of the Applicant, she found him at her station, which she had abandoned. He further confirmed that the post is within shouting distance of other posts.

The Applicant's representative submitted that the Applicant would sometimes be assigned to help at the car park. The Witness responded by submitting that at the time of the commission of the offence, she was not stationed there. She would assist with the allocated parking. Her function was to open the gate and admit vehicles.

The Applicant's representative put it to the witness that the other posts were not within shouting distance, as one was near the shoprite exit the second one is behind Clicks. The witness submitted that there

are three guards stationed within that vicinity and maintained the posts are within shouting distance.

The Applicant's representative submitted that the Applicant had undergone an operation and was unable to stand for long periods of time; he asked the witness what attempts were made by the employer to minimize her discomfort. RW1 submitted that they had no alternative plan as her duties included being on her feet during her shift.

RW1 was questioned on annexure 2, which he submits was issued to the Applicant during a parade. The witness stated that he know the document referred to by the Applicant's representative, but that it is not true that Applicant was forced to sign the warning letter. RW1 stated that the warning letters were signed where he found the Applicant.

The Respondent's representative did not re-examine the witness.

The Respondent called their second witness, Connie Shabangu, whom I shall refer to as RW2, the witness or simply as Ms. Shabangu.

RW2 testified under oath that she is employed by the Respondent as Operations Manager and has been in the employ of the Respondent since 1st December 1995. RW2 stated that the Applicant is known to her. She was employed by the Respondent based at Mbabane and Matsapha. The witness further confirmed that Mr. Vusi Dlamini, the Plaza Supervisor, is known to her. RW2 submitted that she did not interact directly with the Applicant as she was under Mr. Dlamini's portfolio.

The Respondent's representative submitted that it was the evidence of the Applicant that RW2 harassed and threatened her. He asked the witness if this was the case. RW2 submitted that as part of Management, she would interview the Applicant if there were issues. The witness was requested to elaborate on the issues, to which she informed the Commission that she would attend to complaints raised by clients and complaints raised by the Applicant.

RW2 stated that she has had to deal with the Applicant on three occasions where she would be counseled and given a warning to improve her performance. RW2 referred to Annexure 2 which was a warning letter issued by her office as the Applicant would sit down whilst on duty, claiming that the office is aware of her condition. The witness confirmed that the Applicant signed for the warning issued on the 25th July 2013 and also the counseling letter on page 3 of the respondent's bundle. This letter, the witness said, was issued because the Applicant would sit whilst on duty whereas the Client stressed that they wanted visible guards we may lose the contract. The contract is for provision of 37 guards at E 98 000-00 per month

RW2 testified that the act of leaving a post was a serious offence and this was explained to the employees. They were given a document containing the regulations. The Witness referred to page 8 of the respondent's bundle, which was the Applicants employment contract, containing the provision not to leave a station unattended. The witness confirmed that the Applicant signed the contract.

In addition to the contract, the Swazi Plaza house rules were given to the Applicant, wherein page 13 -14 provide that the staff will not engage in any activity that will jeopardize the operations.

RW2 when asked of her relationship with the Applicant, she stated that she has no personal problem with the Applicant as she hardly interacted with her.

Under cross examination, the witness was asked on the measures taken to address the Applicant's situation, to which RW2 responded by stating that the Applicant made no mention of her operation, but said the office knows she is sickly. The Applicant only stated that she cannot be on her feet for 12 hours. When Applicant said this, the RW2 submitted that she told the Applicant she can give her unpaid leave to recuperate.

The Applicant's representative enquired from the witness whether she knew of the Applicant's condition, as in his evidence RW1 submitted that he told his superiors about the Applicant's condition. He put it to

the witness that she is not telling the truth when she said she did not know of Applicant's condition. The witness stated that Mr. Ngubeni is senior to her and that they are usually not in the office at the same time. She personally did not know of the issue.

The Applicant's representative submitted that there is evidence that RW2 harassed the Applicant. RW2 responded by stating that this could not be, as she did not have much contact with the Applicant as she was not even part of the parade.

The Applicant's representative stated that on the 24th July 2013, the Applicant was given a warning for sitting down during duty. He enquired why the Applicant was not charged. RW2 submitted that intervention had been tried by RW1 to no avail. The ripple effect of her actions were that the client may lodge a complaint and in that case, Vusi Dlamini would have been disciplined.

The Applicant's representative referred to annexure 1 and 2 and asked the witness how their company executed their disciplinary code. The witness responded that the two warnings were for two different charges; poor work performance and unsatisfactory performance.

The witness conceded that the warnings were issued without a formal hearing and were issued by her office. With regard to the Applicant's dismissal letter, it was signed by Mr. Sifiso Mhlanga.

It was put to the witness that she is the author of the dismissal letter and not Mr. Mhlanga. RW2 stated that this is incorrect, as the minutes of the hearing indicate that she came as a witness and did not participate any further in the proceedings.

The witness was further questioned on the letter of the 19th August 2013, wherein the Applicant was not counseled beforehand but told to sign the warning letter. The witness submitted that during the counseling sessions, the employee's reasons for poor performance are first discussed. This particular session took one week before the letter was issued.

The Applicant's representative enquired on the discrepancies on the dates for signature by the witness and the Applicant. The witness

stated that the Applicant would not have signed if the counseling did not take place.

The Applicant's representative asked the witness whether she knew that the warnings are null and void, to which the witness responded in the negative.

The Respondent's representative re-examined the witness and asked whether the Applicant denied the charges preferred against her. Rw2 submitted that the Applicant did not deny the charges.

The Respondent thereafter closed their case.

In their closing arguments, the applicant's representative argued that the dismissal of the applicant was automatically unfair, as the Applicant was dismissed as an act of victimization by the Respondent's Assistant/ Operations Manager one Connie Shabangu and her subordinate Supervisor Vusi Dlamini because the Applicant successfully contested the Respondent's decision to engage her on a fixed term contract, whereas she had become a permanent employee following her service with the Respondent for one year without signing a fixed term contract.

The Applicant's representative submitted that the action of the two employees of the Respondent fell within the ambit of Section 2(d) of the Industrial Relations Act of 2000, as amended, which defines victimization as

...that the employee took action or indicated an intention to take action against the employer by:

(a) Exercising any right conferred by this Act'

It is the submission of the Applicant's representative that the Applicant was harassed, rebuked, ill treated and threatened with dismissal and given allegedly illegal warnings as a result of exercising her rights by challenging the Respondent's action of unilaterally converting her employment status to a fixed term contract.

The Applicant's representative further argued that the Applicant was victimized by the Respondent through the issuance of allegedly illegal,

unlawful, null and void warnings without being called for disciplinary hearings. This was confirmed by both RW1 and RW2 during the hearing.

Mr. Dlamini submitted further that the evidence of RW2, Connie Shabangu should be disregarded as it was untrustworthy. This, Mr. Dlamini submitted was because RW2 denied writing Applicant's Annexure 1 but admitted to writing Respondent's Annexure 2 and 3. Mr. Dlamini submitted that the handwriting on all three documents is the same and surmised that the author was RW2.

It is the submission of the Applicant's representative that the Applicant was automatically unfairly dismissed as no appeal hearing was convened before she received correspondence from the Respondent that her dismissal was upheld.

In conclusion, the Applicant's representative argued that the Applicant was victimized by RW1 and RW2 because she was reinstated on the 22nd March 2013 by the Industrial Court. Mr. Dlamini submitted that RW2 was the key player in the Applicant's automatically unfair dismissal and prayed that the Applicant be granted relief as per the Certificate of unresolved dispute.

The Respondent's representative in closing argued that the Applicant proved to be an unreliable witness and that her evidence was neither credible nor reliable. Mr. Dlamini argued that the Applicant failed to challenge the warnings issued against her and therefore waived her right to challenge the validity of the warnings.

Mr. Dlamini further submitted that their witness RW2, rarely interacted with the Applicant and as she was not Applicant's immediate supervisor. In addition, the Respondent submitted a Counseling letter, which Applicant acknowledged signing.

The Respondent's representative argued that there was no evidence to prove the Applicant's victimization.

Respondent submitted that the Applicant was dismissed in terms of Section 36 (a) or alternatively, (l) of the Employment Act of 1980, as amended and prayed that that the Applicant's case be dismissed.

6. ANALYSIS OF EVIDENCE AND ARGUMENTS

I will be unable deal with all the arguments advanced during the hearing, but I will confine myself to the relevant issues relating to the decision.

It is not in dispute that the applicant is an employee to whom Section 35 of the Employment Act no. 5 of 1980, as amended, applies. The applicant was charged with Poor Work Performance in that on the 16th September 2013, she left her post at the gate behind Shoprite Mbabane unattended and without authority.

The respondent has argued that the dismissal of the applicant was both procedurally and substantively fair, whereas the applicant's representative argued that the dismissal was automatically unfair.

Section 2 of the Employment Act defines automatically unfair dismissal as;

Dismissal where the reason for dismissal is-

(d) that the employee took action, or indicated an intention to take action against the employer by -

(i) exercising any right conferred by this Act

Applicant is represented by Mr. Selby Dlamini, a seasoned Legal Practitioner, who insisted that the Applicant's claim is for automatically unfair dismissal.

In order to determine whether the dismissal of the Applicant was automatically unfair, one has to examine the elements of automatically unfair dismissal and ascertain whether the dismissal of Applicant falls within this category.

John Grogan, in Dismissal 2nd Edition, Juta & Co, page 87 writes:

'When automatically unfair dismissal is alleged, the sole factual inquiry is to establish the true reason for the dismissal, and the only legal

issue is whether the reason so identified by one or other of the provisions of section 187''In our law, it is Section 2 (d)

Grogan, in page 87 of the same publication says:

*Automatically unfair dismissals are identified by the **reasons** that prompted the employer to dismiss the employee.....A further problem arises in circumstances in which the employee is dismissed for a valid reason, but an impermissible reason plays a secondary role....In such cases, the correct approach is to assess the extent, if any, to which the impermissible reason contributed to the decision to dismiss the employee. If the prohibited reason was of secondary consideration, and if dismissal was justified by the primary reason, the dismissal would be fair''*

In casu, The Applicant alleges that she was dismissed for having successfully lodged an application at the Industrial Court, challenging the Respondent under Case no. 109/13 for dismissing her for refusing to sign a fixed term contract whereas she has worked for the Respondent for a continuous period of one year without a fixed term contract, thereby rendering her permanently employed. Thereafter, the Respondent reinstated her.

The Respondent on the other hand, through the evidence of RW1, Mr. Vusi Dlamini, and RW2, Ms. Connie Shabangu, submitted that the Applicant was dismissed for poor work performance as she left her work station unattended and this resulted in three customers of the client having to wait in their cars unattended and unable to enter the client's premises.

RW2, Ms Connie Shabangu, submitted that the client has requested that the Respondent provide visible guards or else they faced losing a contract valued at E 98 000-00 per month.

In addition, RW2 testified that the act of leaving a post unattended is a serious offence and that the Applicant was aware of this rule. The Applicant signed an employment contract stating these regulations.

The Applicant, under cross examination, acknowledge that she was aware of the rule that she was not to leave her post unattended without reporting to her supervisor. It is the evidence of the Applicant that on the day in question, she did not have a battery on her cell phone to call her supervisor.

The Applicant, in her evidence in chief, testified that she left her work station to answer the call of nature, as she had a stomach ache on that day. Under cross examination, the Applicant gave conflicting responses when asked why she did not alert the other guards on duty that she was leaving her station. Initially, the Applicant testified that one Cabangile was stationed a distance from her post, so she was unable to alert her. Later during cross examination, Applicant testified that she did contact Cabangile, who said she was unable to leave her post. Applicant then changed her account of the events, stating that she did not see Cabangile.

During Cross examination, the Applicant testified that she was being victimized for taking the Respondent to CMAC and that her dismissal was as a result of her exercising her rights. However, the Applicant failed to explain why she breached the terms of her employment, by leaving her work station unattended, to the inconvenience of three of Respondent's clients, who were unable to gain access to the client's premises, due to the Applicant's absence from her work station. RW1, who is the Applicant's supervisor, submitted that he arrived at Applicant's post and did not find her there. Applicant had left with the keys to the gate and he was unable to admit the three cars which were at the gate. It is the evidence of Mr. Dlamini that the other guards were within shouting distance of the Applicant's post, but she failed to alert them that she was leaving her post. RW1 further testified that he asked the other guards on the Applicant's whereabouts, none had seen her.

RW1 further testified that the evidence of the Applicant that she was in the toilet is not true, as the other guards would have seen her pass their stations, when going to the toilet and they said they had not seen her. In addition, the absence of the Applicant is inconsistent with time to go to the toilet, as Applicant took longer than the ten minutes she alleges she took, as during her absence, three cars were awaiting admission at the gate.

Under cross examination, RW1 testified that he was not aware of the incident wherein the Applicant was dismissed and later reinstated, as he was not Applicant's Supervisor then. The witness further testified that the Applicant had been given warnings for sitting while on duty.

The witness conceded that the warnings issued to the Applicant were not preceded by hearings. The witness further testified that although the Applicant complained that she was unable to stand for extended periods, due to an operation, the Company had no alternative duties they could assign

her. The witness submitted that the warnings which were issued to the Applicant were signed by her and she was not forced to sign.

In determining substantive fairness, the following guidelines were set out in Workplace Law, Grogan, 8th Edition, Juta & Co, at 146 as follows:

' Any person who is determining whether a dismissal for misconduct is unfair should consider

- a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace,*
 - b) If a rule or standard was contravened, whether or not-*
 - (i) the rule was a valid or reasonable rule or standard*
 - (ii) the employee was aware, or could have reasonably expected to have been aware of the rule or standard*
 - (iii) the rule or standards been consistently applied by the employer; and*
- dismissal was an appropriate sanction for the contravention of the rule or standard*

In casu, the respondent submitted the Applicant's contract of employment, which Applicant confirmed she had signed, which contained the rule against leaving one's post unattended. Applicant contravened this rule, which was known to the Applicant, as she confirmed and the Respondent through RW1 submitted that he warned the Applicant and other guards against contravening the rule.

RW2 submitted that the client's contract was valued at E 98 000 00-00 per month. In addition, the client had requested for visible guards.

The Applicant presented herself as an unreliable witness. During cross examination, she gave contradicting evidence. Her demeanor during cross examination leads me to assume that her version of the chain of events on the 16th September 2013 are not to be trusted, she would at times not answer questions put to her by the Respondent's representative. In addition, the Applicant in her evidence submitted that she had no warnings at the time of her dismissal, but under cross examination, she testified that she did have prior warnings, though she was not subjected to a disciplinary before the warnings were issued.

In SFTU v President of the Industrial Court, ILC 011/97, and the Court impressed the importance of the right of an applicant to be heard. In the case at hand, the *audi alteram partem* rule was not applied.

The Respondent failed to hold disciplinary hearings before the Applicant was issued with warnings. In addition, the Respondent failed to hold an appeal hearing, once the Applicant lodged her appeal. Instead, the Respondent wrote to the Applicant, informing her that her appeal was unsuccessful.

The Respondent have argued that the Applicant's failure to challenge the validity of the warnings mean she waived her right to challenge the warnings and they are therefore deemed to be valid. Respondent cited the Industrial Court case of Sonny boy Ndzinisa v Cadbury Swaziland Industrial Court Case 168/2002, where the Court held that where an employee fails to challenge or appeal against a warning, the employee is taken to have acquiesced to the warning and thereby waived his right to challenge it at a later stage.

Section 42(2) of the Employment Act of 1980, as amended provides that

The services of an employee shall not be considered as having been fairly terminated unless the employer proves –

a) that the reason for the termination was one permitted by Section 36- and that, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee

As aforementioned, for a claim for automatically unfair dismissal to succeed, the primary reason for the dismissal should be impermissible and that if the impermissible reason is secondary, then the dismissal is fair.

The Applicant was dismissed for poor work performance, because she had on various occasions breached the terms of her employment, either by sitting down while on duty, or chatting to friends. RW2 testified that interventions were made to counsel the Applicant and even offer her to go on unpaid leave to recuperate.

In addition, RW2 and RW1's submissions on the conduct of the Applicant were not rebutted by the Applicant's representative.

Section 42(2) of the Employment Act of 1980, as amended, provides that

The services of an employee shall not be considered as having been fairly terminated unless the employer proves –

(a) that the reason for the termination was one permitted by Section 36

Section 36 of the Employment Act of 1980, as amended, provides that

It shall be fair for an employer to terminate the services of an employee for any of the following reasons-

(a) because the conduct or work performance of the employee has, after written warning, been such that the employer cannot reasonably be expected to continue to employ him.

And

(l) for any other reason which entails for the employer or the undertaking similar detrimental consequences to those set out in this section

I have failed to establish that the primary reason for Applicant's dismissal is that she exercised her right against the employer. Instead, it has been established that the Applicant breached terms and conditions of employment, which she was aware of and were contained in her employment contract, which Applicant signed. The Respondent has successfully articulated that the primary reason for the Applicant's dismissal poor work performance and that Applicant's behavior, which resulted in her being counseled, breach has a potential of substantial monetary loss for the Respondent. The Respondent has satisfied the provisions of Section 36 (a) and/or (l) of the Employment Act no. 5 of 1980, as amended.

The Applicant has failed to prove her claim for automatically unfair dismissal. She has failed to prove that she was victimized by the Respondent and proved to be an unreliable witness, who gave contradictory accounts of the events resulting in her dismissal.

7. THE AWARD

Pursuant to the above, having taken into account the evidence and circumstances of the case,

1. I hereby find that the Applicant has failed to prove her dismissal was automatically unfair and therefore dismiss her application.

DATED AT MBABANE ON THIS THEDAY OF MARCH 2017

PHINDILE ZANELE SIKHONDZE

ARBITRATOR