IN THE HIGH COURT FOR ZAMBIA **IRC/SL/09/2018**

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT SOLWEZI

(*LABOUR JURISDICTION*)

BETWEEN:

DANNY SHIKU **COMPLAINANT**

AND

FIRST QUANTUM MINERALS **RESPONDENT**

Before: **The Honourable Mr. Justice D. Mulenga this 27th day of July, 2018.**

For the Applicant : In Person

For the Respondent : Mr. H. Pasi of Messrs Pasi Advocates

JUDGMENT

Cases referred to:

1. **Wilson Masautso Zulu v Avondale House Project (1982) Z R 172**
2. **Marshall v Harland & Wolff Ltd and Another (1972) volume 2 – ALLER, 715**

The Complainant presented his Notice of Complaint with an affidavit in support on 5th April, 2018.

The grounds upon which the Complaint is presented is that his contract of employment was terminated through redundancy despite his being on treatment of a brain condition. That the Complainant had been sick, having suffered epilepsy on duty and that he had been on medical treatment for which he had not been discharged.

The Complainant therefore seeks compensation for the brain condition suffered whilst in the employment of the Respondent in the sum of K650,000.00 and or an order that he be discharged from employment on medical grounds, interest and costs.

The Complainant by his affidavit in support of the Notice of Complaint deposed that he was employed by the Respondent on 1st March 2015, as a ADT Machine Operator, the said employment was on a fixed term to 29th February, 2016 as per exhibit "***DS1***"

It appears from exhibit "***DS1***" that the contract of employment between the Complainant and the Respondent of 2015 to February, 2016 was renewed by one which extended from 1st March, 2016 to 28th February, 2017 when the Complainant was retained by the respondent, on permanent and pensionable basis as per exhibit "***DS3***".

The Complainant avers that at the time he was being employed, he had undergone silicosis examination or test and he had a certificate of fitness for Mine operations or work from the Occupational Health and Safety Institute (Ref "***DS2***").

The Complainant deposed that on 6th November. 2017, he was diagnosed with a Brain Condition as indicated in exhibit '***DS4***" the same is a medical history of the Complainant prepared by Dr. Donovan Bam dated 6th November, 2017. The

said medical history report shows that the Complaint had presented with first time seizure attack. Further that he again underwent some tests, at Medcross Hospital that revealed that he had moderate generalized epileptic activity as per exhibit "***DS7***".

The Complainant avers that he had been on treatment by the Respondent's hospital and was due for next appointment on 6th July, 2018 as recorded on exhibit "***DS8***". However, despite the said condition and appointment for an on-going treatment at the Respondent's hospital, his employment contract was terminated by the Respondent on 31st March, 2018, by way of redundancy.

The Complainant was the only witness for his case, he is hereinafter referred to only as CW1. CW1's evidence is that in November, 2017, he worked as usual on a ADT machine in the afternoon shift and knocked off, but as he was walking towards the Boom gate, he felt dizzy and collapsed. He was rushed to Mary Begg Hospital where he was admitted and treated for four days and discharged. However, he stayed at home for a week prior to his being referred to Lusaka to see a specialists at Fairview and Medcross Hositals.

The Complainant was treated for a week and later sent back to Mary Begg Hospital where he was advised that they were waiting for results of medical tests which were done in Lusaka. However, the Doctor at Mary Begg wrote to the Respondent's Management advising that the Complainant should not be working on the machines due to his medical condition. The Complainant was accordingly redeployed at Safety Department.

In December, 2017, the Complainant was advised by the Human Resources department that he should go back to Marry Begg Hospital and upon reporting there, he was again referred to the medical facilities in Lusaka, namely Medcross and Optimal Hospital where he went and was attended to for four

days. On his return the Doctor at Mary Begg who had referred him to Lusaka, again advised the Respondent's Management that the Complainant should not work on the machine. The Complainant continued to do light duties at safety department as he also attended Marry Begg Hospital for review.

The Human Resources officer again went to inform him that he was required at Merry Begg Hospital. The Complainant was gain referred to the Specialist Medical Practitioner at Lusaka, where he was attended to for three days and on his return Mary Begg Hospital advised the Respondent Management that the Complainant should not work on the machine for the next six months, however, the next appointment was on 6th July, 2018 at Mary Begg Hospital.

The Complainant, however, in March, 2018 was called and informed by Human Resources that his employment would be terminated by way of redundancy on 31st March 2018 and that he was required to stop reporting for work.

According to the Complainant he had a problem with the said redundancy, therefore he went to the Human Resources department to query because the Doctor had not cleared him or discharged him on his medical condition. The Complainant contended that the Human Resources officer did not give him a satisfactory answer.

The Complainant testified further that he complained about the redundancy to the National Union for Miners and Allied Workers (NUMAW) did not receive any assistance from the said Union.

The Complainant also raised an issue that on the Machine which he operated, there were two other employees who operated the same and one of the two by the name of Mukuka Kabwe also suffered the same condition like his and was being treated at Mary Begg.

In cross examination by Learned Counsel for the Respondent, the Complainant told the Court that for all previous employment contracts he performed with Respondent, he had been paid in full and did not have any issue with the same. He also confirmed that as regards the Redundancy package he was equally paid.

The Complainant admitted that he was not the only employee who was declared redundant by the Respondent during the period in issue.

As in respect to his health condition, Complainant admitted that he was referred to Lusaka for specialised treatment and there was no recommendation from the doctors that he be medically discharged from employment. That prior to suffering the said brain disorder or epilepsy, he was not involved in any accident or suffer any physical injury while in the employment of the Respondent.

The Respondent called only one witness, one Lillian Menshi Zulu, a Senior Human Resources officer in the Respondent Company. She is hereinafter referred to only as 'RW1'.

RW1, in additional to her oral testimony relied on the affidavit filed by the Respondent in support of its Answer. By the said affidavit in support of the Answer, there is no dispute that the Complainant served on fixed term contracts of employment prior to his being retained on Permanent and Pensionable basis from 1st March, 2017.

The Respondent by the affidavit in support of the Answer deposed that, it is a Contractor engaged by Kansanshi Mining Plc to carry out mining works under its mining department and projects, under its Roads department at Kansanshi Mine at Solwezi. However some works on contractual projects that were being

undertaken by the Roads Department reduced due to completion by November, 2017 and that necessitated reduction in the Respondent's workforce as it became apparent that there were no new projects forthcoming. For reasons aforesaid, the Respondent was left with no option but to reduce its workforce by declaring about one hundred and twenty (120) of its employees redundant, in November, 2017 and March 2018. Accordingly, by letters dated 12th February, 2018 and 16th February, 2018 the office of the Assistant Labour Commissioner was notified of the imminent redundancy exercise and the response respectively (ref to "***LZ5***" and "***LZ6***").

RW1, admitted on behalf of the Respondent that the Complainant had a medical condition for which he was undergoing treatment, nevertheless, the Respondent did not terminate his contract on medical grounds as there was no recommendation to that effect by a qualified Medical Practitioner.

The Respondent also contends that the Complainant did not suffer from any work-related injury nor contracted an occupational disease which could have entitled him to Medical compensation.

In cross-examination RW1 told the Court that the Complainant was declared redundant despite his undergoing medical treatment because there was no recommendation to place him on hold until medical investigations were concluded.

RW1, denied any knowledge of any other employee who operated the same machine which the Complainant worked, to have suffered the same condition for which he was being treated just like the Complainant.

RW1, further testified that it is the responsibility of the Respondent to care for its employees, therefore every employee like the Complainant received medical treatment at its expense regardless of the medical condition suffered not being work or occupational related.

I hasten to state here that in accordance with the guidance of the Supreme Court made in a plethora of its decisions, one which is that of **Wilson Masautso Zulu v Avondale Housing Project**[1], that:-

> ***Where a plaintiff alleges that he has been wrongly or unfairly dismissed, as indeed in any other case where he makes an allegation, it is for him to prove those allegations. A plaintiff who has failed his case cannot be entitled to a judgment whatever may be said of the opponent's case.***

Clearly, in this case the facts are common cause, except that the Complainant's position is that having suffered a brain condition whilst in the employment of the Respondent and still undergoing medical treatment, his termination from employment by the Respondent by way of redundancy is unfair. On the other hand, the Respondent contends that the Complainant's medical condition notwithstanding, there was no recommendation from a qualified Medical Practitioner to terminate the Complainant's employment on medical reasons neither was there any, to place him on hold until medical investigations were concluded. The said dispute between the Complainant and the Respondent is the subject of this Court's determination.

I have observed that redundancy is a creature of the Collective Agreement between the Complainant's Union (NUMAW) and the Respondent for the period 1st January, 2017 to 31st December, 2019. Clause 12.2 of the said Collective Agreement provides:-

> ***Redundancy Benefits shall be paid at 1 month of gross salary per each completed year of service plus an additional 1 month gross salary e.g. if an employee works for 5 years, he or she will be paid 6 months' pay of gross salary***

The above provision is hook, line and sinker as regards the package payable under medical discharge under Clause 12.3 of the said Collective Agreement except that, under the medical discharge Clause, there is a further provision to the effect that:-

> ***Employees medically discharge due to "job related" accident will be given medical coverage after the discharge of service for a period to be determined by a registered Medical Practitioner(s).***

Clear, from the above provisions of the collective agreement, the Complainant cannot be said to have been denied any benefit for not being medically discharged from employment as there is no evidence that he had suffered from a medical condition which is job related (occupational injury) or that the said medical condition was caused by a job related accident.

There is no argument or complaint as regards the manner in which the redundancy process was carried out or implemented, but just that the Respondent ought not to have declared the Complainant redundant considering the fact that he was still undergoing treatment for a medical condition of Brain Disorder or Epileptic Seizures. The argument of the Complainant is therefore, that he could not be declared redundant whilst suffering from a Brain Disorder or Epilepsy and undergoing treatment at the Respondent's Medical Facility.

I find the facts of the case herein similar to those in the case of **Marshall v Harland & Wolff Ltd and Another[2],** decided by the National Industrial Relations Court of England. The brief facts of the case are that;-

> ***Marshal had been employed by Harland & Wolff Limited since 1946. Under his contract of employment he was not entitled to sick pay although it was not the policy or practice of Harland Limited to terminate their employees' contracts of employment because of sickness. Marshal became ill in October, 1969 and was thereafter absent from work because of his illness. There was no evidence as to how long he might be incapacitated from work. During the period of his absence from work he received no wages. Harland Limited did nothing to terminate his contract of employment until 1st April, 1971. By a letter of that date Harland Limited informed Marshal that their London Works were to close down at the end of June, 1971. That although he had been off sick for a considerable time he would now be given four weeks' notice (together with four weeks pay) to terminate his contract of employment and that although he did not qualify for a redundancy payment he would be given an ex-gratia payment of £50 in appreciation of his years of service. Marshall gave notice under Section 6(1) of the Redundancy Payment Act 1965 of his intention to claim a redundancy payment. The Industrial Tribunal found that Marshal's contract of employment had been terminated by frustration prior to 1st April, 1971 owing to the length of his illness, alternatively that due to his ill-health, Marshal's contract of employment, or the relationship of the employer and employee, had been varied by tacit agreement so that the relationship had become that of ex-employer and ex-employee coupled with an understanding that, should he recover, Marshal would not be re-employed in the further alternative that Marshal's dismissal had not been attributed to redundancy but sickness. Marshal appealed. On appeal it was held:-***
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> > ***Marshal's dismissal had been wholly or mainly attributed to redundancy and the appeal would be allowed, for the following reasons:-***

i. ***….. Moreover there had been no medical evidence that Marshal was permanently incapacitated or as to the duration of his future incapacity.***

ii. ***A person who could no longer work could in some circumstances be made redundant and the tribunal had misdirected itself on the test to be applied in such a situation…..***

The importance of Marshal's case to the case in casu is that even a person who could no longer work because of illness could in some circumstances be made redundant and in this Court's considered view one of such circumstances is where there has been no recommendation by a Registered Medical Practitioner under Section 36 (2) of the Employment Act, Chapter 268 of the Laws of Zambia, to the effect that where owing to sickness or accident an employee is unable to fulfill a written contract of service, the contract may be terminated on the report of a Registered Medical Practitioner.

Having considered the provisions of the Complainant's conditions of Service and the authorities referred to herein above, I have come to the inescapable conclusion that the Complainant has failed to establish and prove his complaint on the balance of probabilities, therefore, this complaint is dismissed for lack of merit.

However, let me take this opportunity to state that I have observed a certain trend where employees employed by the Mining Companies as Machine Operators are developing a medical condition of brain disorder or epileptic seizures. This observation is made at the backdrop of another case of *Frazer Semu v Lumwana Mining Company Limited – COMP. No. IRD/ND/85/2017* in which case, the Complainant was also employed as Machine Operator and suffered a Brain Disorder, otherwise Epileptic Seizure, just like the Complainant herein.

In this case, the Complainant in his oral testimony stated that there were other two employees who also operated the same machine which he worked and that one of the other two employees by the name of Mukuka Kabwe suffered the same condition and was treated at Mary Begg.

In *Frazer Semu's* case, exhibit ***"PCP10"*** in the Respondent's affidavit in Support of Answer therein, there is another person namely, Golden Muluka who was also said to have suffered the same medical condition.

In exercise of this Court's inherent jurisdiction under the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia, I do hereby Order and Direct that the Occupational Health and Safety Institute and the Mines Safety Department should thoroughly investigate and establish what may be the cause of the health condition (epilepsy or epileptic seizures) of employees engaged as Machine Operators in the Mines.

Each Party herein shall bear own costs.

Informed of Right of appeal to the Court of Appeal within thirty (30) days from the date hereof.

Delivered at Solwezi this **27th day** of **July, 2018.**

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Hon. Justice D. Mulenga

JUDGE