

IN THE HIGH COURT FOR ZAMBIA

COMP NO. IRC/SL/13/2018

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT SOLWEZI

(LABOUR JURISDICTION)

BETWEEN:

FANWELL SALATI



COMPLAINANT

AND

FIRST QUANTUM MINING AND OPERATIONS LIMITED RESPONDENT

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

For the Complainant : Mr. M. Mwachilenga and Mr. M. Benwa of Messrs Mumba Malila & Partners

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

JUDGMENT

Cases referred to:

1. Wilson Masautso Zulu v Avondale Housing Project (1982) ZR 172
2. Zambia Revenue Authority v Dorothy Mwanza and Others (2010) 2 Z.R 181
3. Fitzgerald v Hall Russel and Co Ltd [1969] 3 ALL ER 1140
4. Dennis Chansa v Barclays Bank Zambia PLC SCZ/8/128/2011
5. Bank of Zambia v Kasonde (1995 - 1997) Z.R. 238 (S.C.)

The Complainant filed his Notice of Complaint with an affidavit in support of the same on 4th June, 2018. The grounds on which the complaint is presented

is that the Complainant was unlawfully and wrongfully dismissed from employment on 11th May, 2018, for a charge of a disciplinary offence that was committed under a fully performed fixed-term contract, barely a few days before commencing a new/subsequent contract on permanent and pensionable basis. The Complainant therefore seeks the following relief:-

- (a) A declaration that his dismissal from employment was null and void as the same was unlawful and wrongful.
- (b) An order for reinstatement.
- (c) Damages for unlawful and wrongful dismissal.
- (d) Damages for loss of expectation of income, embarrassment, pain and anguish.
- (e) Any other relief the Court may deem fit.
- (f) Interest.
- (g) Costs.

The Complainant's case as deposed and averred through his affidavit and oral testimony is that he was employed by the Respondent as Rigid Dump Truck (RD) operator under production department on a two years fixed term contract running from 20th January, 2016 to 19th January, 2018. It was a term under the said contract that upon successful completion of the contract, he would be given an option of either being employed on permanent and pensionable basis or continue on fixed-term contract(Ref to exhibit "FS01" in the complainant's affidavit in support of complaint).

According to the Complainant, on 17th January, 2018, which was his last day of work in his initial contract, just as he was leaving the change house and before he could go to the pit which was his work area, the Respondent's security found him in possession of a cell phone in his pockets of the work suit. According to

him, he had forgotten to leave the phone in his locker. Consequently, security took the phone and handed it over to his supervisor Mr. Chanika.

The Complainant deposed that after knocking off on that day, he commenced his three days off. On 19th January, 2018 the date when his contract was expiring, his supervisor handed over the phone and asked him to see the security manager Mr. Lecy. The said security manager asked him to write a statement about the phone incident, and he did as instructed.

The Complainant averred that he later received a letter of non-renewal of contract marked as "FS02", and was paid his dues under that contract. He reported the matter to the labour office. After a meeting at the labour office on 19th February, 2018, the Respondent was advised by the assistant labour commissioner to retain him on permanent and pensionable basis as per clause 10 of the Collective agreement between the Respondent and the Complainant's union. The Respondent admitted the err in not retaining the Complainant on Permanent and Pensionable employment basis.

On 20th March, 2018 the Respondent presented a contract of employment to the Complainant which he signed and it was with effect from 20th January, 2018.

The Complainant deposed that on 26th March, 2018 he was served with a charge sheet relating to the phone incident. He refused to sign the charge sheet as he had not committed any disciplinary offence after the commencement of his permanent contract. Further, he was charged with an offence of gross failure to observe safety regulations, procedures and managerial instructions when he should have been charged with the offence of use of a personal cell phone in a non-designated area without permission.

The Complainant further deposed that the managerial instructions issued against use of cell phones marked as “EK3” and “EK4” which the Respondent was referring to, did not apply to him as an employee of the Respondent but only applied to employees of Kansanshi Mining Plc which is a separate and distinct entity from the Respondent.

The Complainant deposed that the charge was supposed to be raised against him within 48 hours from the time of committing the offence, however, he was only charged on 26th March, 2018 which is 68 days from the date of incident.

According to the Complainant, he continued working and on 4th April, 2018 he received a notice of case hearing. He again reported the matter to the assistant labour commissioner who advised the Respondent via a letter marked as “FS05” to drop the charges against him as the phone incident happened during the fully performed fixed term contract or find an independent chairperson to preside over the disciplinary hearing.

The case hearing was scheduled for 19th April, 2018 but did not take off on that day. On 10th May, 2018, a case hearing was conducted in which the Complainant's union representatives walked out of the proceedings as they protested that the chairperson was not independent. According to the Complainant, he refused to answer to the charges against him during the hearing and on 11th May, 2018 a decision was made to dismiss him from employment. He was given two days from the date of hearing within which to appeal which meant he only had one day to appeal as he only came to know the verdict on 11th May, 2018 which was a Friday. The Complainant told the Court that he believed the Respondent deliberately did not give him appeal forms, so that he could not appeal. Further, there was no chance of an appeal succeeding as the Respondent was determined to get rid of him having been displeased with the assistant labour commissioner's advice that under the collective

agreement the Complainant qualified to be retained on Permanent and Pensionable employment basis.

In cross-examination, the Complainant maintained that he was not charged on 17th January, 2018 but on 26th March, 2018. He told the Court that he brought it to the attention of the case hearing panel that it was wrong for the Respondent to charge him for an offence that was committed in the previous contract. The Complainant admitted that he was employed to work in the pit at Kansanshi mine site which is the most dangerous place in the mine area, and an accident involving the RD machine he operated could be very grave. The Complainant averred that he was paid his full salary in January, February and March, 2018.

In opposition to the complaint the Respondent filed an Answer and Affidavit in Support on 22nd June, 2018. In answer to the Complaint, the Respondent contends that the Respondent's policies and disciplinary code formed part of the Complainant's contract of employment. On 17th January, 2018 when the Complainant was found with cell phone hidden on his personal things contrary to managerial instructions that cell phones must be left in lockers, he was duly charged for gross failure to observe safety regulations, procedures and managerial instructions under clause 5.11 of the disciplinary code. The Respondent further contends that the Complainant was given an opportunity to be heard but chose to remain silent, he was found guilty and dismissed.

The Respondent in an affidavit in support of its answer sworn by one Emmanuel KundaKampilimba a Human Resource Officer, deposed that the Complainant was employed by the Respondent as Rigid Dump Truck (RD) operator on a two year fixed term contract commencing of 20th January, 2016. The Complainant was employed at Kansanshi mine as the Respondent is a contractor under Kansanshi mine, and his employment was made permanent and pensionable on 20th January, 2018.

The Respondent deposed that on 17th January, 2018, the Complainant was found with a hidden cell phone as he tried to access the pit area contrary to written managerial instructions restricting operators from entering the pit area with cell phones. The Complainant was charged with gross failure to observe safety regulations, procedures and managerial instructions but he refused to sign the charge form. The said charge sheet is exhibit "EK5". Investigations were instituted in the matter and a report was rendered by the Respondent's security department. The Complainant also wrote a statement about the incident.

It was further deposed by the Respondent that on 10th May, 2018, a disciplinary case hearing was conducted but the Complainant refused to say anything. The Complainant was found guilty and consequently dismissed from employment and did not appeal against the dismissal.

The Respondent deposed that when the Complainant's initial fixed term contract expired on 19th January, 2018, a letter of non-renewal of contract was written to him. However, the letter of non-renewal was withdrawn upon realization that the Complainant was entitled to automatic continuation of employment on permanent terms as per clause 10 of the collective agreement between the Respondent and Complainant's union.

According to the Respondent, a letter was written to the assistant labour commissioner advising that the Complainant's service would be unbroken for all intents and purposes including disciplinary action. The said letter is exhibit "EK14". When the Complainant called for case hearing relating to phone incident, the assistant labour commissioner advised that the hearing should be

chaired by someone who was not employed by the Respondent. However, that advice was contrary to the Respondent's disciplinary procedures.

The Respondent called one witness, one Emmanuel Kunda Kampilimba, a Human Resource Officer aforesaid(hereinafter referred to only as "RW1"). RW1's evidence in chief did not depart from the affidavit evidence except to add that the Complainant operated one of the biggest machines in the mine and if an accident was caused due to his failure to adhere to safety regulations, the results would be grave.

In cross-examination, RW1 averred that the Complainant's first contract expired on 19th January, 2018 and he commenced a new contract on permanent and pensionable terms. He admitted that based on the letter of non-renewal of contract, when the fixed -term contract expired, all contractual obligations ceased. RW1 averred that the fixed term contract was not renewed because the Complainant did not satisfy the Respondent on assessment. He admitted that the Complainant's permanent contract did not provide for continuity of obligations from previous fixed-term contract.

Further in cross-examination, RW1 argued that the Complainant was dismissed for an offence which was committed on 17th January, 2018 during the expired fixed-term contract as there was unbroken service. He further argued that the charge was raised on 17th January, 2018 despite the print date on the charge form being 5th March, 2018. He admitted that an employee should be given 48hours to appeal from the date of hearing, however, the Complainant only had 24 hours within which to appeal.

Both Learned Counsel for the Complainant and the Respondent filed written submissions which I will refer to as and when necessary.

Certainly in this case, the issue for determination of this Court is whether the dismissal of the Complainant from employment by the Respondent was wrongful and unlawful considering that he was dismissed during the tenure of his permanent and pensionable contract for an offence that was allegedly committed during a fixed-term contract had expired.

It is imperative to point out, at the outset as the Supreme Court has in a number of cases emphasised such as in **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 to prove his case cannot be entitled to a judgment whatever maybe said of the opponent's case.

The burden of proof in this case therefore, is on the Complainant, to prove his complaint on the balance of probabilities.

It is uncontroverted in this case that the Complainant was employed by the Respondent as Rigid Dump Truck operator on a two year fixed term contract from 20th January, 2016 to 19th January, 2018.

It is not in dispute that on 17th January, 2018 which was his last night shift under the said contract, the Complainant was found with a cell phone in his pocket just after leaving the change house.

It is also a fact that on 20th January, 2018, a letter of non-renewal of contract was written to the Complainant, after which he was paid all his dues at the expiry of the said fixed-term term contract of employment, including gratuity and leave dues.

It is common cause that the Complainant reported the issue of his non-retention on Permanent and Pensionable contract, to the assistant labour commissioner, who on 20th February, 2018 reminded the Respondent that according to clause 10 of the collective agreement between the Complainant's union and the Respondent, the Complainant had the right to be given a permanent and pensionable contract as he had successfully completed his fixed-term contract. The Respondent conceded on 19th March, 2018 in a letter marked as "EK14" and gave the Complainant a permanent and pensionable contract with effect from 20th January, 2018.

It is also not in dispute that the Complainant was charged with gross failure to follow safety regulations, procedures and managerial instructions. The charge related to the 17th January, 2018 incident of being found with a phone in the pocket. The Complainant refused to sign the charge and argued that he could not be charged for an offence allegedly committed during the fixed-term contract which contract had expired and he had not committed any offence during the new permanent and pensionable contract. A case hearing was conducted on 10th May, 2018 as a result of which the Complainant was dismissed from employment.

Suffice to mention here that, the Complainant has raised some arguments which should not be glossed over. The first argument is that the offence he was charged with did not exist in the Respondents disciplinary code and the second is that the managerial instructions against use of cell phones only applied to Kansanshi Mining Plc employees.

After a careful perusal of the Respondent's disciplinary code, I have come to the inescapable conclusion that the offence of gross failure to follow safety regulations, procedures and managerial instructions is actually provided for under clause 5.11 of the schedule of offences. Further the managerial

instructions indicate that they applied to contractors of Kansanshi Mining Plc and the Respondent herein is one of those contractors. The aforesaid arguments by the Complainant cannot therefore be sustained.

In considering the issues for determination herein, I must hasten to state here that it is a well settled principle of law that when a contract is fully performed, both parties to that contract are discharged of their contractual obligations unless there is an agreement to the contrary.

In the matter in casu, a careful perusal of the Complainants fixed-term contract from 20th January, 2016 to 19th January, 2018 reveals that there is no provision under that contract to the effect that obligations will continue at the end of the contract. Hence to that effect, the Respondent wrote a letter dated 20th January, 2018 otherwise exhibit "FS02" which reads in part:-

January 20, 2018.

*MrSalatiFanwell
FQMO-Mining Division
SOLWEZI*

Dear Fanwell,

RE: NON RENEWAL OF FIXED TERM CONTRACT

Refer to the subject above.

This serves to inform you that your fixed term contract of employment effective 20th January, 2016 for a period of two(2) years came to an end on 19th January, 2018.

In view of the above, your last working shift was 19th January, 2018 after which all your contractual obligations with the company ceased.

The calculation of your terminal package will be as follows:

- Gratuity-two(2) month's gross salary for the contract period served*
- Commutation of all accrued leave days; and*
- Payment of all outstanding shifts, including overtime(if applicable)...*

Yours sincerely,

Mark Silimi

Human Resources Manager

FQMO-Mining Division

Kansanshi Mine Site

The letter reproduced herein above shows that all contractual obligations the Complainant had with the Respondent ceased upon expiry of the contract. I am guided by the case of **Zambia Revenue Authority v Dorothy Mwanza and Others**² where the Supreme Court held that:-

Once a contract period expired, there was no other contract to talk about as the offer of a new contract was a separate issue.

In the matter in casu, it is this Court's considered position that the Complainant's fixed term contract of employment expired by effluxion of time on 19th January, 2018 and all obligations under that contract ceased. When the Complainant commenced his permanent and pensionable contract, that was a new contract and separate obligations and benefits altogether. The Respondent's argument that there was continuity of service from fixed term to permanent contract cannot hold any water. The reason is that despite clause 10 of the Collective Agreement providing that employees on fixed term contracts will be given permanent contracts, service was broken from the time there was non- renewal of contract to the time the Complainant actually commenced his

duties under the permanent contract. I draw some comfort in the case of **Fitzgerald v Hall Russel and Co Ltd**³ where Lord Upjohn stated that:-

No doubt in many cases a break of employment will prove fatal to a claim to throw the period of continuous employment back to the period of his earlier engagement; thus if he gave notice for his own reasons, or was dismissed because he was unsatisfactory, it would no doubt be impossible for him to show that his employment was continuous from the earlier date."

In the matter herein, the Respondent cannot be heard to argue that the non-renewal of contract was withdrawn hence employment was continuous. Further, the Complainant was paid all his dues under the fixed term contract and the evidence on record is that despite the Respondent arguing that the Complainant was charged on 17th January, 2018, the print date on the charge form is 5th March, 2018 which is way after the expiry of the fixed-term contract.

I have therefore come to the inescapable conclusion that since there was no continuity of employment from fixed-term to permanent contract, the Complainant cannot under the new permanent contract be charged with gross failure to follow safety regulations, procedures and managerial instructions as a result of being found with a phone in the pocket during the tenure of an expired fixed-term contract. Further he cannot be dismissed for the said offence which was allegedly committed during the substance of a separate and expired contract. For that matter there was new contract with different terms and conditions.

I henceforth find and hold that the Complainant has proved on a balance of probabilities his claim for wrongful dismissal.

In ascertaining the damages for wrongful dismissal, I apply my mind to the guidance of the Supreme Court in the case of **Dennis Chansa v Barclays Bank Zambia PLC**⁴ where it was stated that:-

The rationale is that as global economies deteriorate, the chances of finding employment even by graduates are dimmer. There should be a progressive upward increase in damages, as it is bound to take longer to find a job in the current domestic and global economic environment.

I am also mindful that the Complainant was on a permanent and pensionable contract which would have continued for an indefinite period. Further, in the present economic environment, jobs are very difficult to come by. I therefore award the Complainant twenty-four(24) months' pay inclusive of all taxable perquisites as damages for wrongful termination of employment.

The said award shall attract interest at the short term commercial deposit rate as approved by the Bank of Zambia from the date of complaint to full payment.

In relation to the Complainant's claim for reinstatement, I must state here that reinstatement is a remedy that is only granted in exceptional circumstances. I am further guided by the Supreme Court in the case of **Bank of Zambia v Kasonde**⁵, where it was held that:-

It is trite law that the remedy of reinstatement is granted sparingly, with great care, jealousy and with extreme caution. Reinstatement is a remedy rarely granted unless special circumstances are present

In the matter in casu, it is this Court's considered position that there are no special circumstances presented to warrant an order of reinstatement, therefore the order of damages for wrongful dismissal that has already been

made will suffice. I therefore find and hold that the Complainant has not proved on a balance of probabilities his claim for reinstatement. The said claim is accordingly dismissed for lack of merit.

Costs will be to the Complainant to be taxed in default of agreement.

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