

IN THE HIGH COURT FOR ZAMBIA

COMP NO. IRC/SL/07/2018

INDUSTRIAL/LABOUR DIVISION

HOLDEN AT SOLWEZI

(LABOUR JURISDICTION)

BETWEEN:

JACKSON KACHINAWINA

AND

THE ATTORNEY GENERAL



COMPLAINANT

RESPONDENT

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

For the Complainant : Mrs. M. Makayi of Legal Aid Board

For the Respondent : Not in attendance

JUDGMENT

Cases referred to:

1. Wilson Masautso Zulu v Avondale Housing Project (1982) ZR 172
2. A. Roberts and Co Ltd v Leicestershire County Council [1961] 2 ALL ER 545
3. Robinson v Harman (1848) 1 Exch Rep 850

Other works referred to:

1. G. H. Treitel, The Law of Contract, 10th edition: Sweet and Maxwell at pages 8 and 16

The Complainant filed his Notice of Complaint on 15th March, 2018 with an affidavit in support of the said Complaint. The grounds upon which the

complaint is presented are that the Respondent underpaid the Complainant in his twenty-three years of service by placing him on a wrong salary scale. Further that, the Respondent has indicated that the Complainant's terminal benefits will be computed on the said wrong salary scale which will result in an underpayment.

The Complainant therefore seeks the following relief:-

- (a) An order and declaration that the Respondent should pay the Complainant his terminal benefits which are to be calculated on a salary scale of an S15 civil servant, a caretaker.
- (b) An order and declaration that the Respondent pays to the Complainant his salary arrears accrued over a period of twenty-three(23) years and the same arrears to be the difference between the salary scale of a caretaker which is S15 and the salary scale of a classified daily employee, trade tested electrician which is G6.
- (c) An order directing the Respondent to immediately locate the Complainant's missing file which said file is to be used to pay the Complainant's benefits and that the benefits be paid immediately.
- (d) Payment of leave dues.
- (e) Any other relief the Court may deem fit.
- (f) Costs of and incidental to this action and interest on the sums found due.

The Complainant vide his Affidavit in support of notice of complaint deposed that on 13th March, 1990, he was employed by the Ministry of Education as a caretaker to be based at Solwezi College of Education and he signed employment forms which are collectively marked as exhibit "KJ1". He deposed that authority to employ him as caretaker was given directly to the College by the permanent secretary via a letter marked as exhibit "KJ11". He further deposed that the salary scale for a caretaker was S/15, however, he was

erroneously placed on a salary scale of G6 which applies to classified daily employees like trade tested electricians.

The Complainant deposed that he immediately informed his supervisor who was the Principal at the said College that he had been placed on a wrong salary scale. The Principal wrote a letter to the permanent secretary so that the mistake could be rectified and the said letter is exhibit "KJ3". According to the Complainant, the error was not rectified, and he continued receiving a salary of a daily classified employee despite discharging his duties as caretaker until 5th June, 2013 when he was retired from employment. The letter of retirement is exhibit "KJ4". He deposed that the Ministry of Education did not at any point stop him from discharging his duties as caretaker, neither did they direct him to only discharge duties of a classified daily employee to correspond with his salary.

The Complainant also deposed that throughout his twenty-three(23) years of service, he wrote several complaints to the Ministry of Education so that he could be placed on the correct salary scale but all his efforts proved futile. Some of the said letters are exhibits "KJ5" and "KJ6" respectively. When he was retired, he was informed that his retirement benefits would be calculated on the salary scale of a classified daily employee and this prompted him to write another letter to the permanent secretary to rectify the mistake. (Ref to exhibit "KJ7")

The Complainant deposed that surprisingly, he received letters from the current Principal at Solwezi College of Education and the Permanent Secretary respectively alleging that at the time he was employed, the authority to employ a caretaker was not granted to the College. Further that in 2003 when the payroll management and establishment control system was introduced, his position of caretaker was not allocated to the College hence making it difficult

for the College to appoint him to that position. The said letters are exhibits "KJ8", "KJ9" and "KJ10".

The Respondent did not file an Answer to the Complainant's Notice of Complaint and despite proof of service of the Notice of hearing by way of affidavit of service, the Respondent did not attend Court on the date set for hearing. Therefore, leave was granted to the Complainant to proceed with his case as there was no reason advanced for the Respondent's non-attendance.

The Complainant was the only witness for his case and his oral evidence did not depart from his affidavit evidence except to add that from the time he was retired from employment on 5th June, 2013, he has still not been paid his terminal benefits and his personal file cannot be located at the Ministry of Education offices.

Clearly from the pleadings and evidence adduced before this Court, the issues for determination are whether there was a valid contract of employment between the Respondent and the Complainant in which the Complainant was employed as a caretaker but erroneously placed on a lower salary scale of a classified daily employee-a trade tested electrician, whether the Complainant was underpaid throughout his employment and whether he slept on his rights to have the alleged error rectified.

I must hasten to point out that it is always a challenge for the Court to decide a matter where the Respondent has not filed an Answer in defence. However, as the Supreme Court emphasized in the case of **Wilson Masautso Zulu v Avondale Housing Project**¹:-

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 may be said of the opponent's case.

The import of the above precedent is that the Complainant has a duty to prove on the balance of probabilities his complaint against the Respondent.

It is uncontroverted in this case that the Complainant was employed by the Respondent on 13th March, 1990 and he was placed on a salary scale of a trade tested electrician. On 5th, June, 2013 the Complainant was retired from employment.

What is in dispute however, is whether the Complainant was employed as a caretaker or a daily classified employee namely a trade tested electrician.

The answer to the question herein above, lies in the letter granting authority to employ the Complainant, dated 2nd May, 1990, otherwise exhibit "KJ11". The said letter is couched in the following terms:-

MHEST/CDE/1125

2nd May, 1990

*The Acting Principal,
Solwezi Teacher Training College
Box 110096
Solwezi*

RE: NEW EMPLOYEE (JACKSON KACHINAWINA)

Reference is made to your minute STTC/7/1/7 dated 27th April, 1990, in which you are employing Mr.J.K.Kachinawina as caretaker. Authority has

been obtained for you to employ as long as funds are available. His ministerial file number is MHEST/CDE/1125.

G.H.Kanyama

A/SEO

For/Permanent Secretary

Ministry of Higher Education, Science and Technology.

Clearly, it cannot be denied that authority to employ the Complainant herein as caretaker was sought and granted to the effect that the Complainant was even allocated a ministerial file number mhest/cde/1125.

In considering the issues for determination, I am alive to the principles of offer and acceptance in contract law. I am mindful of the definitions of these two terms as espoused by the Learned Author **G. H. Treitel, The Law of Contract, 10th edition at page 8 and 16** to the effect that:-

An offer is an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed, the 'offeree'.

Acceptance is a final and unqualified expression of assent to the terms of an offer.

I also apply my mind to the fact that a contract is an agreement giving rise to obligations which are enforceable or recognized by law. In the matter in casu, the evidence on record reveals that the Complainant accepted an offer of employment as caretaker by filling in and signing an agreement for service form which is exhibit "KJ1" and reads in part:-

AGREEMENT FOR SERVICE FOR CIVIL SERVICE EMPLOYEES OF
GOVERNMENT

I KACHINAWINA JACKSON KOSHITA, hereby accept offer of employment as a CARETAKER with effect from 13-03-1990 at the rate of K180=00 words ONE HUNDRED EIGHTY per month on conditions applicable to all Civil Service employees of Government.

Further evidence on record reveals that that Complainant filled in Vital Statistics Forms and a Record of Oral Contract of Service which was stamped by Solwezi Teachers Training College under the Ministry of Higher Education at the time, indicating his title of appointment as “Caretaker”.

As alluded to herein above, through a letter dated 2nd May, 1990 emanating from the Permanent Secretary's office under the Ministry of Higher Education, Science and Technology, authority was granted to Solwezi Teachers Training College to employ the Complainant as Caretaker and a ministerial file number was allocated to him. The said letter is reproduced herein above to emphasise the fact that authority to employ the Complainant as caretaker was granted

Based on the analysis of the evidence aforesaid, it is this Court's considered position that there was a contract of employment between the Complainant and the Respondent for the position of caretaker and the Complainant went ahead to perform his duties in that position.

The consideration that the Respondent was therefore supposed to give to the Complainant was a salary at the scale of a caretaker which is S15. That notwithstanding, the Respondent instead placed the Complainant on a salary scale of a trade tested electrician(G6) as can be observed from the payslip marked as exhibit “KJ2”.

I opine to state here that the conduct of the Respondent in placing the Complainant on a salary scale for trade tested electrician was an error that did not go to the root of the contract and could be rectified. I draw some comfort in the case of **A. Roberts and Co Ltd v Leicestershire County Council**² where it was held that:-

A party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or variation of that term in the knowledge that the first party believed the term to be included.

In the matter in casu, the Complainant believed that he was placed on a salary scale of S15 for a caretaker, only to discover that he had in fact been placed on a salary scale of G6 for a trade tested electrician. In a bid to persuade the Respondent to perform its obligation under the contract by rectifying the error of a wrong salary scale, the Complainant wrote several letters to the Ministry of Higher Education, both personally and through his supervisors at Solwezi Teachers Training College, but the Respondent deliberately neglected to correct that error.

The Complainant did not therefore sleep on his rights to have the error rectified as he brought it to the immediate attention of the Respondent. The Respondent cannot now be heard to argue after the Complainant worked for twenty-three years as a caretaker, that the said position was not funded and there was no authority to employ him, as this is clearly an afterthought.

I therefore find and hold that the Complainant has proved his complaint on the balance of probabilities as the Respondent breached its contractual obligations to the Complainant by placing him on a lower salary scale of a trade tested electrician, when in fact he was employed as a caretaker at a salary scale of S15, and he suffered loss.

Having found and held that the Complainant has proved his complaint that the Respondent breached the contract of employment, I must now ascertain the measure of damages due to the Complainant. It is a well settled principle that when a party proves that he has suffered some actual loss as a result of breach of contract, the amount recoverable depends on the loss sustained. This position was echoed in the case of **Robinson v Harman**³ where it was held that:-

Where a party sustains a loss by reason of a breach of contract, he is as far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.

The Complainant herein worked for 23 years on permanent and pensionable basis. However, judicial note is taken of the fact that by virtue of the omission on the part of the Respondent to place him in his substantive position of 'Caretaker, salary scale S15 in the civil service', no deductions were made for his pension contributions and remitted to the Public Service Pensions Fund. Therefore, it goes without saying that the Complainant has suffered loss of pension benefits which should have been paid to him in the ordinary course of things.

I therefore, order and direct as follows:-

1. That the Complainant having qualified for retirement is entitled to damages. The same shall be equal to the amount he should have received had he made both his monthly contributions and the employer's to the Public Service Pensions Fund.
2. In order to compute the award herein, an equivalent salary at a salary scale of S15 should be employed. In default of agreement on the computed sum, the same should be assessed by the Learned Deputy Registrar.

In relation to the Complainant's claim for payment of the difference in salaries over a period of twenty-three years between salary scale G6 which he was paid and salary scale S15 which he was entitled to having worked as a caretaker, I hold that the Complainant is entitled to the salary at scale S15 which is his accrued right. The Complainant was therefore underpaid throughout his period of service by being paid a salary of a daily classified employee. The Complainant has proved this limb of his claim on a balance of probabilities and the said claim is accordingly granted.

Considering the Complainant's claim as it relates to payment of leave dues, I opine to state that this is connected to the claim for payment of salaries the same being the difference between that of a caretaker at salary scale S15 and salary scale G6 of a daily classified employee trade tested electrician. The Complainant is therefore, entitled to accrued leave days he should have ordinarily accumulated at the substantive position of caretaker. The leave days that shall be found to have accrued to the Complainant should be commuted for cash and paid to him accordingly. The said claim is found for the Complainant.

As regards the Complainant's claim for an order directing the Respondent to immediately locate his missing employment file, I do note that due to the passage of time from when the Complainant was employed, it may not be an easy task for the Respondent to locate the file. That notwithstanding, it is the duty of every employer to put in place a systematic filing mechanism for ease of reference. I henceforth order and direct that the Respondent locates the said missing file, should there be failure to do so, the said failure should not prejudice the Complainant with regard to receipt of his benefits.

I award interest at the Bank of Zambia current lending rate on the sums of money that shall be found payable to the Complainant from the date of complaint to full payment.

Costs 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