

**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA**

COMP/349/2015

BETWEEN:

MCLOYD NDAWA

AND

LOCAL AUTHORITIES SUPERANNUATION FUND



COMPLAINANT

RESPONDENT

Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 26th day of January, 2017

Appearances:

For the Complainant: In Person

For the Respondent: Mr. M. Lisimba of Messrs. Mambwe, Siwila and Lisimba Advocates

JUDGMENT

26th January, 2017

Authorities referred to:

1. *The Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia*

Cases referred to:

1. *Attorney-General vs. Richard Jackson Phiri (1988-89) Z.R 121*
2. *Zambia Electricity Supply Corporation Limited vs. David Lubasi Muyambango (2006) ZR 22*

Other works

1. *Simon Deakin and Gillian S. Morris "Labour Law" Butterworths Reed Elsevier (UK) 1995 351*

1.0 **COMPLAINANT'S CASE**

- 1.1 On 9th November, 2015, the Complainant filed Notice of Complaint against the Respondent.
- 1.2 The grounds upon which the Complaint was present were that the Complainant was employed by the Respondent as an Office Assistant on 7th May, 2007 and later promoted as Customer Care Assistant until his time of dismissal on 21st May, 2015.
- 1.3 On 17th April, 2015, the Complainant was charged with an offence of Dishonest Conduct and Giving False Information to a named client of the Respondent.
- 1.4 At trial, the Complainant was the only witness to testify on his own behalf (CW1).
- 1.5 The gist of his testimony was that on 17th April, 2015, he was charged by his immediate supervisor with an offence of Dishonest Conduct and Giving of False Information contrary to clause 16.5 (a) and Clause 16.5 (k) of the Respondent's Disciplinary Code of Conduct.
- 1.6 The Complainant exculpated himself on 23rd April, 2015.
- 1.7 He testified that on 12th, 13th and 19th May, 2015, the Disciplinary Committee heard his case, and after the deliberation he was dismissed.

- 1.8 He contended that the Disciplinary Committee that heard his case was not properly constituted as it did not comply with the requirements of Clause 8.3 of the Respondent's Disciplinary Code and Grievance Procedure.
- 1.9 He testified that the Clause 8.3 of the Disciplinary Code and Grievance Procedure mandated the Investigations Officer and the Charging Officer to be present at the Disciplinary Hearing.
- 1.10 It was his testimony that both the Investigations Officer and the Charging Officer were not present when his case was heard by the Disciplinary Committee. He testified that failure to abide by the provisions of the Disciplinary Code and Grievance Procedure by the Respondent rendered the outcome of the Disciplinary Committee meeting null and void. He further told Court that the failure to avail the Investigations Officer and the Charging Officer deprived him of the chance to cross examine and extract truth from them.
- 1.11 CW1 also testified that upon his dismissal, he appealed the decision as per provisions of the Disciplinary Code and Grievance Procedure. In accordance with Clause 14 (e) the appeal was to be heard within five (5) days of being lodged. He told Court that he lodged his appeal on 1st June, 2015, and the appeal was only heard on 17th June, 2015.
- 1.12 He asked the Court to find for him and order that the dismissal was wrongful, unfair, and prayed for reinstatement.

2.0 **RESPONDENT'S CASE**

- 2.1 On 26th November, 2015, the Respondent filed its Answer to the Complaint and stated that Disciplinary procedures were followed in terminating the Complainant's Employment Contract.
- 2.2 At trial, the Respondent called only one witness, **Barbara Chipasha Kasonde (Ms)**, the Assistant Human Resource and Administration Manager.
- 2.3 The substance of her testimony was that the Complainant committed an offence, was charged, exculpated himself, the Disciplinary Committee was constituted which heard his case and was thereafter, dismissed. She testified that after the dismissal, the Complainant appealed to the Appeals Committee which upheld the decision of the Disciplinary Committee.
- 2.4 Respondent's witness acknowledged in her testimony that the Charging Officer did appear before the Disciplinary Committee though not at the same time with the Complainant and denied that the requirement to have both the accused and the Charging Officer present at the same time was violated.
- 2.5 The witness also testified that the Appeal was not heard within the stipulated five days and that as a result, the Respondent breached its Disciplinary and Grievance Procedure Code. She

however, testified that the whole disciplinary process was handled in fair, equitable and just manner.

3.0 **FACTS NOT IN DISPUTE**

3.1 The Complainant was employed by the Respondent on 7th May, 2007.

3.2 On 17th April, 2015, the Complainant was charged with an offence of Dishonest Conduct and Giving False Information.

3.3 At the Disciplinary Hearing, the Charging Officer, Investigations Officer and the Complainant did not appear together as per requirements of the Disciplinary Code and Grievance Procedure.

3.4 The Complainant was found guilty and dismissed from employment.

3.5 The Complainant appealed against the decision of the Disciplinary Committee to the Appeals Committee.

3.6 The Appeal was not heard within five (5) days of its lodgment in contravention of Clause 14 (e) of the Disciplinary Code and Grievance Procedure.

3.7 The Complainant's appeal was eventually heard and the decision of the Disciplinary Committee to dismiss the Complainant was upheld.

3.8 The Complainant contended that the Respondent breached the Disciplinary Code and Grievance Procedure and therefore, his dismissal was wrongful and unfair and prayed for damages and reinstatement.

3.9 The Respondent contended that despite minor flaws in the disciplinary process of the Complainant, the process was conducted in a fair, equitable and just manner. The Respondent prayed that the Complainant's case be dismissed.

4.0 **SUBMISSIONS BY PARTIES**

4.1 I have read the submissions by both parties and I am grateful for their efforts. I will not recite the submission but will take them into consideration in my opinion.

5.0 **ISSUES FOR DETERMINATION**

5.1 Having stated the finding of facts and taking into account the submissions of both parties, the core of this case rests on whether or not the Complainant's dismissal was wrongful and unjustified.

6.0 **OPINION**

6.1 **WRONGFUL DISMISSAL**

6.2 For a claim of wrongful dismissal to succeed, the Complainant must adduce evidence and prove that the provisions of the Contract of Employment and/or Disciplinary Code of Conduct

to which he/she was a party was breached by the Respondent when he/she was dismissed.

- 6.3 Wrongful dismissal is a common law term which in essence is a breach of Contract of Employment by the Employer.
- 6.4 When a claim for wrongful Dismissal is presented before Court, the duty of the Count is to examine if there was breach Contract of Employment by the Employer in the manner the dismissal was done.
- 6.5 The breach of Contract of Employment may take the form of a flawed disciplinary process. The cases of **Attorney General vs. Richard Jackson Phiri** and **Zambia Electricity Supply Corporation Limited vs. Lubasi Muyambango** are leading authorities on this aspect.
- 6.6 In casu, evidence was led that Clause 9 (c) of the Disciplinary Code and Grievance Procedure was breached by the Respondent.

Clause 9(c) provides:

“..... The accused and the Charging Office shall both be present at the time of giving their evidence.”

- 6.7 The Complainant testified that failure to have both the accused and the Charging Officer present at the time of giving their evidence was a breach of Clause 9(c) aforesaid.

- 6.8 Respondent's witness in her testimony confirmed the fact that the Charging Officer and the Complainant were not present at time each of them was giving their evidence.
- 6.9 Further evidence was led that clause 14 (e) was breached by the Respondent.
- 6.10 Clause 14(e) of the Disciplinary Code and Grievance Procedure provides:
- "All appeals **shall** be heard within five (5) working days of being lodged or as soon as practicable but in no instance shall it be after five (5) working days".*
- 6.11 Evidence or record showed that the Appeal was heard 16 days later after the Complainant questioned why his appeal was not heard within the stipulated five days.
- 6.12 From evidence, I have established that there were numerous flaws in the manner the Respondent dealt with the disciplinary process of the Complainant. Clauses 9(c) and 14 (e) of the Disciplinary Code and Grievance Procedure were blatantly breached by the Respondent.
- 6.13 Based on the evidence before me, I find that the Contract of Employment/Disciplinary Code and Grievance procedure was breached by the Respondent.

6.14 In light of the foregoing, I have no difficulty in finding that the Complainant's dismissal was wrongful. The claim for wrongful dismissal therefore, succeeds.

7.0 **UNFAIR DISMISSAL**

7.1 There was no evidence brought to substantiate the claim for unfair dismissal. I therefore dismiss this claim.

8.0 **REMEDIES**

8.1 **REMEDIES FOR WRONGFUL DISMISSAL**

8.2 Under Section 85A (a) it is provided that:

*“Where the Court finds that the Complaint or application presented to it is justified and reasonable, the Court **shall** grant such remedy as it considers just and equitable and may award the Complainant or applicant damages or compensation for loss of employment.”*

8.3 Since I have found that the dismissal was wrongful and unjustified, it must be understood that the remedy for wrongful dismissal are damages. For wrongful dismissal, the measure of damages is limited to the amount of notice the employee would have received had the Contract been adhered to. This in essence reflects the contractual position that damages for breach of Contract should reflect the actual loss sustained.

8.4 Parties to this suit did not provide evidence as to the notice required for the termination of employment.

8.5 The learned authors of 'Labour Law'¹ had written that:

“Where a Contract of Employment is silent on the question of termination by notice, a term will normally be implied at Common Law to make provision for it.”

8.6 Based on the authority cited, I will imply that the Complainant's contract who was employed as Customer Care Assistant on pensionable terms had a termination Clause of three (3) months.

8.7 I, therefore, Order that the Complainant be paid three (3) months' salary of his last drawn salary, as compensatory damages for Wrongful Dismissal.

9.0 **CONCLUSION**

9.1 Arising from the Judgment, I make the following Orders:

- (a) The claim for Wrongful Dismissal succeeds and the Respondent is Ordered to pay the Complainant, Three (3) months' salary (as at the date of dismissal) as damages.
- (b) The Claim for unfair dismissal fails and is dismissed.

¹ Simon Deakin and Gillian S. Morris "Labour Law" Butterworths Reed Elsevier (UK) 1995 351

(c) The award in paragraph 9 (a) (for wrongful dismissal) herein will attract interest at short term Commercial Bank lending rates from 9th November, 2015 (Date of filing Notice of Complaint) until the date of Judgment, thereafter, at the current lending rates as determined by the Bank of Zambia from time to time until full payment.

9.2 I Order that the Complainant be reimbursed all expenses in connection with this suit.

9.3 Informed of the Right of Appeal.

Dated the^{26th} day of^{January}....., 2017

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M. MUSALUKE
HIGH COURT JUDGE

