

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

COMP/389/2016

BETWEEN:

STATON TEMBO

AND

NATIONAL BREWERIES PLC



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. A. Tembo of Messrs. Tembo Ngulube & Associates

JUDGMENT

26th January, 2017

Authorities referred to:

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

1.0 COMPLAINANT'S CASE

1.1 On 30th November, 2015, the Complainant, **Mr. Staton Tembo** filed a Notice of Complaint against the Respondent **National Breweries Plc.**

- 1.2 The Notice of Complaint was supported by an Affidavit.
- 1.3 The grounds on which the Complaint was filed were that in January, 2007, the Complainant was employed by the Respondent as a Sales Man. In 2012, he was appointed as a Dispatch Clerk.
- 1.4 The employment relationship was governed by a Collective Agreement executed between the Respondent and the National Union of Commercial and Industrial Workers where the Complainant belonged.
- 1.5 On or about 27th November, 2014, the Complainant was suspended from work by the Respondent as it was alleged that the Complainant had failed to reconcile beer transfer from packaging to dispatch.
- 1.6 On 3rd March, 2015, the Complainant was given 48 hours in which to exculpate herself for failure to reconcile transfers from packaging to Dispatch resulting in a loss of 150 cases of packed beer.
- 1.7 The Complainant exculpated himself and was dismissed on 10th April, 2015.
- 1.8 The Complainant claimed that in breach of the Respondent's Disciplinary Code of Conduct, he was not given an opportunity to be heard on appeal against his dismissal, and that this was in contravention of Clauses 5.2.8 and 5.2.9 of the said Code.

1.9 He claimed that it was on that basis that he deemed his dismissal to be unlawful, wrongful and unfair.

1.10 The Complainant sought the following reliefs:

- (a) A declaration that the Complainant's dismissal was wrongful, unfair and unlawful;
- (b) Damages for wrongful, unlawful and unfair dismissal;
- (c) Damages for mental distress and anguish;
- (d) Interest on all sums of relief the Court may deem fit.

1.11 On 18th April, 2016; 2th August, 2016 and 21st September, 2016, trial was held.

1.12 The Complainant was the only witness to testify on behalf of his case. He gave evidence on oath.

1.13 It was his testimony that in November, 2014, he was suspended for loss of 768 beer cases. His suspension was for four weeks. After serving the suspension, he was yet again suspended in February, 2015 and later charged with an offence of Gross Negligence for the loss of 768 cases.

- 1.14 In the letter of suspension, he was asked to exculpate himself and he did so as per exculpatory letter produced in his Affidavit in support of Notice of Complaint (**exhibit 'ST3'**).
- 1.15 A Disciplinary Hearing was, thereafter, held which the Complainant attended in the company of a Union Official and he was given a chance to state his case.
- 1.16 After the Disciplinary Hearing, the Complainant was dismissed on 10th April, 2015. (Letter of dismissal is exhibit '**ST6**').
- 1.17 It was his testimony that he appealed against the Disciplinary Committee's verdict to the Appeals Committee within the stipulated time allowed in the Conditions of Service (**Exhibit 'ST10'** is the purported letter of appeal).
- 1.18 The Complainant testified that his Appeal had not been heard up to the time the case came to Court and, therefore, claimed that the Respondent breach the provisions of the Disciplinary Code by failing to hear his Appeal.
- 1.19 During cross-examination, the Complainant testified that he was given chance to give his side of the story concerning the allegations that were labeled against him.

2.0 **RESPONDENT'S CASE**

- 2.1 On 7th April, 2016, the Respondent filed its Answer supported by an Affidavit.

- 2.2 The Affidavit in support of the Answer was deposed by one **Deborah Bwalya** the Respondent's Legal Counsel. It was her averment that the Complainant was a Dispatch Clerk in the employ of the Respondent before his dismissal.
- 2.3 That between 24th November, 2014 the Respondent lost 768 cases of beer stock valued of K26,880, and that the Complainant was identified as the one that was failing to record the stock which led to this loss.
- 2.4 That the Complainant was thereafter suspended to allow for investigations. After investigations were completed, the Complainant was asked to exculpate himself which he did and a Disciplinary Committee was constituted to hear his case. The Complainant was found guilty and was dismissed.
- 2.5 At trial, the only witness for the Respondent was Ms. Monde Nyumbu Chicha, the Human Resources Business Partner at Zambia Breweries Plc.
- 2.6 She testified that she was the Human Resource Personnel in charge of the Respondent.
- 2.7 It was her testimony that she was not in employment at the time the case of the Complainant was being handled, but from the records, she found, the correspondence concerning the Complainant, and these were: the Charge Letter, Exculpatory Letter and the Letter of Dismissal.

- 2.8 She testified that from the record she found, she believed the Complainant was given chance to exculpate himself before the decision to dismiss him was reached.
- 2.9 She stated that once an employee is dismissed, he was accorded a chance to appeal that decision. The affected employee was required to appeal using an Appeal Form and that was to be filed in within seven days from the date of dismissal.
- 2.10 It was her testimony that once the Appeal Form was submitted to the Human Resource Department, the person receiving the Appeal Form would sign on the Form and puts a date so that it could be evidence that the Appeal was lodged within the required seven days period.
- 2.11 She testified that from the record she found, there was no evidence that the Complainant had appealed his dismissal. She further told Court that, Exhibit '**ST10**' in the Complainant's Affidavit in support of Complaint was a purported letter written by the Complainant appealing the decision of the Disciplinary Committee.
- 2.12 She went on to state that she observed that the purported Letter of Appeal was neither signed off nor stamped 'Received' by one from the Human Resource Department. Further, the Appeal was not filed on a prescribed form.

- 2.13 It was her testimony that the purported Appeal was never done by the Complainant within the prescribed time frame and Form.
- 2.14 Under cross-examination, the Respondent's witness stated that she only saw the purported Letter of Appeal in Court as there is no such record of the Respondent.

3.0 **SUBMISSION BY PARTIES**

- 3.1 I have looked at submissions by both parties. I will not recite them here but will take note of them in my opinion.

4.0 **FINDING OF FACTS**

- 4.1 The Complainant was employed by the Respondent in January, 2007 as a Sales Man and later on as Dispatch Clerk.
- 4.2 On 27th November, 2014, the Complainant was suspended from work as the Respondent was conducting investigations on alleged failure by the Complainant to reconcile beer transfer from packaging to dispatch.
- 4.3 On 3rd March, 2015, the Complainant was asked to give an Exculpatory written statement showing why disciplinary action should not be taken against him.
- 4.4 The Complainant exculpated himself.

- 4.5 On 13th March, 2015, the Complainant was charged with Gross Negligence of duty in accordance with Clause 16 of Appendix 2 of the Collective Agreement between the Respondent and NUCAIW.
- 4.6 On 30th March, 2015, the Disciplinary Committee heard the case of the Complainant and he was given chance to explain verbally his side of the story.
- 4.7 On 10th April, 2015, the Complainant was dismissed and was given seven (7) days in which to appeal the dismissal.
- 4.8 The Complainant did not file his appeal on a prescribed Form and his Appeal was never seen by the Respondent.
- 4.9 The Complainant contended that the Respondent breached its own Disciplinary Rules by failing to hear his Appeal within the stipulated seven days from the date of Appeal.
- 4.10 The Respondent contended that the Complainant did not appeal the decision to dismiss him as he did not file any appeal on a prescribed Form and that it only saw his purported Letter of Appeal in Court, and further that the Complainant sat on his right not to appeal as required. That the Complainant had no cause of action.

5.0 **ISSUE TO DETERMINE**

5.1 Following the finding of facts, the main issue for determination is whether:

(a) The Complainant had lodged an Appeal or not;

(b) If it is found that he had lodged an Appeal, was the Respondent in breach of its Disciplinary Regulations by failing to hear the Appeal? And what were the consequences of the Respondent's action?

6.0 **OPINION**

6.1 **Whether the Complainant had lodged an Appeal**

6.2 The issue on whether the Complainant had lodged an Appeal against his dismissal is a finding of fact that will depend on my valuation of the witnesses' testimonies.

6.3 I had the benefit of observing the demeanor of witnesses for both sides in this matter.

6.4 The Complainant testified that he had on 17th April, 2015, appealed against his dismissal to the Director of the Respondent with copies of the Appeal to the Human Resource Business Partner and the Distribution Controller.

6.5 Exhibit '**ST10**' in the Complainant's Affidavit in support of the Notice of Complaint is the purported Appeal Letter.

- 6.6 The said letter is not signed by the Complainant and there was no evidence adduced during trial as to which Officer the Appeal was handed to.
- 6.7 The Respondent's witness testified that she was seeing the said Appeal Letter for the first time in Court and that it was in fact not on a prescribed Form.
- 6.8 It is my finding that the Complainant had purported to appeal his dismissal using a letter after he could not do so within the seven (7) days period he was given. This was indeed an afterthought by the Complainant. There is no evidence on record to support his claim that he had appealed as he even failed to state to which Officer he had given the Appeal Letter.
- 6.9 The Respondent's witness had testified that she was only seeing the Appeal Letter in Court. In cross-examination, the Complainant did not even bother to question the Respondent's assessment on this aspect.
- 6.10 On totality of evidence before me and assessing the demeanor of the witnesses that were before me, I am inclined to believe the Respondent's testimony that the Complainant did not appeal his dismissal.
- 6.11 It is my finding that the Respondent did not breach any of its Disciplinary Regulations as it did not have any Appeal before it. The purported Appeal by the Complainant was an afterthought.

I, therefore, dismiss the Complainant's Claims.

6.12 Since I have found that there was no Appeal lodged by the Complainant, I will not discuss what happens when an employer fails to hear an Appeal lodged within required time frame.

7.0 **CONCLUSION**

7.1 Arising from the Judgment, I make the following orders:

- (a) The Claims for wrongful dismissal unfair dismissal and unlawful dismissal are dismissed.
- (b) Each party to bear their own costs.

Dated the 26th day of January, 2017

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M. MUSALUKE
HIGH COURT JUDGE

