

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

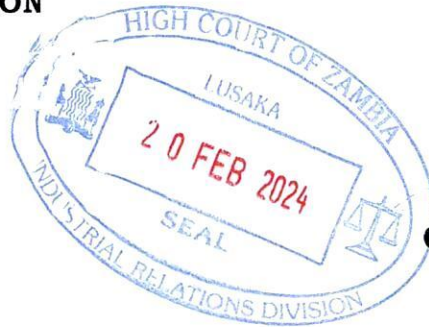
COMP/IRCLK/283/2021

BETWEEN:

DANSIANO PHIRI

AND

**AFRONET TRADING LIMITED
(T/A FRESH DREAM BAKERY)**



COMPLAINANT

RESPONDENT

Coram: Chigali Mikalile, J. this 20th day of February, 2024

For the Complainant: In person

For the Respondent: No appearance

JUDGMENT

Legislation referred to

1. The Employment Code Act No.3 of 2019
2. The Industrial Relations Court Rules, Chapter 269

Cases referred to:

1. Lubunda Ngala & Another v. Anti-Corruption Commission, Selected Judgment No. 4 of 2018
2. Anderson Mwale & 2 Others v. Zambia Open University, 2021/CCZ/001

Text referred to:

Winnie Sithole Mwenda and Chanda Chungu, A Comprehensive Guide to Employment Law in Zambia (2021) UNZA Press

Introduction

1. The complainant commenced this action on 27th May, 2021 for the following reliefs:
 - i. *Payment for 240 leave days from June, 2011 to April, 2021*
 - ii. *Payment of terminal benefits*
 - iii. *salary arrears for some months in 2013, 2014, 2017, 2018 and 2021 as follows:*
 - *2013: for 2 and half months*
 - *2014: for 2 months*
 - *2017: for 3 months*
 - *2018: for 3 months*
 - *2021: for 2 months*
 - iv. *Payment of salary from date of resignation to date of payment of benefits*
 - v. *Costs, interest and any other relief the Court may deem fit*

Complainant's affidavit

2. The complainant deposed that he was verbally engaged by the respondent on 10th June, 2011 as a Chef under the company called Fresh Dreams Bakery and was promoted to the position of Bakery Supervisor, the position he held until his last working day.
3. On 26th February, 2020, he was suspended for the alleged offence of failure to report for work and he exculpated himself. On 16th March, 2020, he wrote a resignation letter and his

suspension was immediately lifted. Exhibited to the affidavit as “DP1 to DP3” are the suspension letter, letter of resignation and the letter lifting his suspension. On 15th June, 2020, the respondent confirmed his appointment as Chef effective the same date as per exhibit marked “DP4”.

4. On 22nd March, 2021, he tendered his 30 days’ notice to resign (exhibit “DP5”) and on 21st April, 2021, the respondent accepted his resignation (exhibit “DP6”). In the letter of acceptance, it was stated that management had instituted investigations into the running of Fresh Dream Bakery two months prior to his resignation. It was further stated that should the investigations find the complainant a guilty party, he would be liable to punitive measures. However, to date, the respondent has not communicated the results of the alleged investigations.
5. According to the complainant, from the date he was engaged to the date of resignation, he never went on leave and the respondent never paid leave days. Further, he never received salaries as outlined in the Notice of Complaint. At the time of resignation, the respondent did not pay his benefits. He made a demand on 28th April, 2021 via a letter exhibited to the affidavit as “DP7” but the respondent never responded to his letter.

Respondent’s Answer

6. The respondent, instead of filing an Answer in accordance with Rule 11 of the Industrial Relations Court Rules, Cap 269 and particularly form IRC 10, decided to write a letter addressed to

the Judge's Chambers dated 10th June, 2021. The letter was authored by the Managing Director (M.D), Mr. Charles Chibwika

7. In the letter, the respondent admitted to engaging the complainant in 2011 as Chef at Fresh Dream Bakery. He was confirmed in the position on permanent basis under Afronet Trading on 15th June, 2020. The complainant's performance was not satisfactory as per expectation of the employer and management instituted investigations to establish whether the unsatisfactory performance was the cause of the bakery's losses. The complainant resigned during the period of investigations on 22nd March, 2021. While his separation dues were being considered, the complainant wrote to management demanding his separation dues and eventually took out the court action.
8. According to the M.D, the available records show that the complainant had accumulated 235 leave days at the point of exit calculated at K 107.70 per day, the last salary having been K 2,800.00 giving a total K 25,307.70. With respect to his gratuity, it was submitted that the complainant was employed on permanent basis, as such gratuity did not apply to his terms of employment. With respect to salary arrears, it was submitted that the respondent was still determining the actual amount owed and this is because some of the claims indicated relate to the period when Fresh Dream Bakery was under a different management (Fajikal Zambia Limited) and therefore documents were still being compiled. The respondent undertook to avail the moneys once the exercise was fully exhausted.

Trial course

9. The matter came up for hearing on 14th February, 2024 and only the complainant was in attendance. I proceeded in the respondent's absence upon being satisfied that a notice of hearing was served upon the respondent and was received by one Thomas Mwansa on 19th May, 2023. The complainant gave evidence on his own behalf and called no other witness.
10. The complainant testified in line with his affidavit evidence. He added that when he clocked 10 years in service, he noticed a change in the respondent's attitude. They started looking for a fault in him. Consequently, he decided to put in his resignation on 21st March, 2021. Following his stoppage of work, he demanded his benefits but his requests fell on deaf ears hence commencing this action.
11. As proof of the leave days owed, the complainant produced a computation document allegedly authored by the respondent (admitted in evidence as "DP8"). The document shows 235 leave days and when asked to clarify, he admitted that he was owed 235 days and not 240 days as he took 5 days leave. The complainant also clarified that the arrears shown on the computation document were the correct ones.

Considerations and decision

12. I have carefully considered the evidence on record. Facts not in dispute are that the complainant was employed by the respondent on 10th June, 2011 as a Chef. According to a letter

with the reference 'confirmation offer letter of appointment as a chef' dated 15th June, 2020, the complainant was confirmed in his appointment on permanent basis. The employment contract was terminated by resignation. The complainant's last day of work was 21st April 2021. The last salary was K 2,800.

13. The complainant's contention is that upon termination of the employment relationship, he was not paid what was due to him in terms of leave pay, terminal benefits and salary arrears. He is demanding an order that the respondent pays him his salary from date of resignation to the date the benefits shall be paid.

14. I will now address the individual claims.

Leave pay

15. The respondent does not deny owing the complainant leave pay. In the letter authored by the Managing Director on 10th June, 2021, it was stated that the respondent was only owing 235 days' worth of leave pay. This fact was admitted by the complainant at trial as he recalled that he took 5 days leave at some point. In the circumstances, judgment is entered in favor of the complainant for 235 leave days' pay in the sum of K 25,307.69 (calculated as K 2,800 x 235 days /26 days

Salary arrears

16. From the respondent's letter to the Court, it is clear that the respondent admits owing the complainant salary arrears. The only contention was that the salary arrears were still being

compiled. However, it appears this exercise was concluded and I make this conclusion based on the computation document produced by the complainant in evidence (DP8). I have no qualms accepting this document as authentic despite it not being on the company's letter head and this is because the signature appended to this document is the exact signature of the Managing Director appended on the letter to Court.

17. The complainant having admitted that the salary arrears indicated on the computation document are a true reflection of the arrears owed him, I do hereby enter judgment in his favour in the sum of K 25,750.00.

Terminal dues

18. It was the respondent's contention that it does not owe the complainant gratuity as he was employed on permanent basis.

19. I have had recourse to the Employment Code Act, 2019 and particularly section 54 on severance pay. It provides in relevant part only as follows:

(1) An employer shall pay an employee a severance pay, where the employee's contract of employment is terminated or has expired, in the following manner:

(a) ...

(b) ...

(c) Where a contract of employment of a fixed term duration has been terminated, severance pay shall be a gratuity at the rate of not less than twenty-five percent of the employee's basic pay earned during the contract period as at the effective date of termination.

20. Indeed what is provided for in the foregoing clause is a contract for a fixed term duration. However, I am of the firm view that this applies to a contract on permanent basis for the reason that this contract is determinable at a known date, that is, when the employee attains age of retirement. Thus, the period of employment is fixed.

21. I am fortified by the learned authors of A Comprehensive Guide to Employment Law in Zambia who at page 290 opine that:

Section 54(3) of the Employment Code Act stipulates that the severance pay under section 54 shall not be paid to a casual employee, a temporary employee, those engaged on long-term contracts and those serving a period of probation. This essentially means these provisions only apply to those on short-term, seasonal and permanent contracts.

22. In light of the above, I am satisfied that the complainant, having been a permanent employee, is entitled to severance pay, in accordance with section 54(1)(c) of the Act. He is entitled to gratuity at a rate of not less than twenty-five percent of his basic pay earned during the contract period as at the effective date of termination.

23. It should be noted that the entitlement to severance pay was not available to employees until the enactment of the Employment Code Act. It is well established that the law does not operate retrospectively. Thus, the entitlement only begun to accrue to employees from May, 2020 when the transition period to comply with the Act came to an end. This then means that the

complainant cannot claim severance pay from 10th June, 2011, when he was employed. Computation only covers the period May, 2020 to April, 2021 which is 12 months in total.

24. According to the evidence from both the complainant and the respondent, the complainant's last salary was K 2,800.00. Nowhere in the documents on record is it indicated whether this was basic or full pay and if it was full pay, there is nothing to show what the basic was. As such, for purposes of computation, the very K 2,800.00 shall be used.

25. Severance pay is therefore $K\ 2,800 \times 12\ \text{months} \times 25\% = K8,400.00$.

Payment of Salary from date of resignation to date of payment of benefits

26. The complainant contends that he ought to have continued receiving his salary from 21st April, 2021, the date he resigned until payment of his benefits. It is not immediately clear what the basis of this claim is. It appears that he is relying on the Constitution, Cap 1 as amended in 2016. However, the Constitutional Court has provided guidance on who is entitled to be retained on payroll whilst awaiting terminal benefits. This guidance is found in the cases of **Lubunda Ngala & Another v. Anti-Corruption Commission**⁽¹⁾ and **Anderson Mwale & Others v. Zambia Open University**⁽²⁾. In the latter case it was stated thus:

It follows that for an employee to be retained on the employer's payroll under Article 189(2) of the Constitution, the pension benefit which is not paid to an employee on the last day of work should be a pension benefit granted by or under the relevant pension law or other law applicable to that employee's service.

27. The above authorities guide that not all terminal benefits should be considered or interpreted to be the same as a pension benefit simply because they arise from the termination or coming to an end of the employment contract.

28. Thus severance pay granted under section 54 of the Code Act is not a pension benefit as envisaged by the Constitution. As such, the claim for salary arrears pending payment of benefits cannot be sustained.

Costs

29. As stated earlier in the judgment, the respondent did not appear at the hearing despite being aware of the hearing date. This, in my view, is unreasonable conduct envisaged by Rule 44 of the Industrial Relations Court Rules. Thus, it is only proper that the respondent be condemned in costs for this action.

Conclusion and Orders

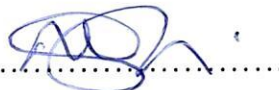
30. All in all, the complainant has proved on a balance of probabilities that he is entitled to leave days, salary arrears and severance pay. For the avoidance of doubt, hereunder are my final orders.

The respondent shall pay the complainant:

- (i) severance pay in the sum of **K 8,400.00**
- (ii) leave pay in the sum of **K 25,307.69**
- (iii) Salary arrears in the sum of **K 25, 750.00**
- (iv) The total amount due shall attract interest at short-term bank deposit rate from the date of complaint to the date of judgment and thereafter, at the current bank lending rate as determined by the Bank of Zambia until full settlement.
- (v) The complainant is awarded costs to be agreed or taxed in default of agreement.

Parties are informed of their right to appeal.

Delivered at Lusaka this 20th day of February, 2024



Mwaaka Chigali Mikalile

HIGH COURT JUDGE