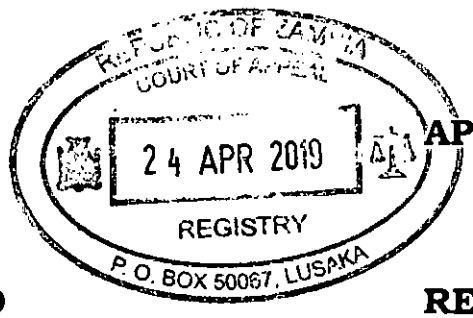
IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO 142/2018
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

OLHA DAVY DENKO **APPELLANT**



AND

EMPORER PALACE CASINO **RESPONDENT**

CORAM: CHASHI, LENGALENGA AND SIAVWAPA, JJA

On 27TH March and 24th April 2019

FOR THE APPELLANT: MR. L. YETA OF MESSRS CENTRAL CHAMBERS

FOR THE RESPONDENT: MR. G. C. MUSONDA OF MESSRS DZEKEDZEKE & CO.

J U D G M E N T

SIAVWAPA, JA, delivered the Judgment of the Court.

Cases referred to:

1. *Attorney General v Achiume (1983) ZR 1*
2. *Zambia Privatization Agency v Matale (1995-1997) ZR 157*

The Appellant herein was employed by the Respondent with effect from January 2016 as a Tables Games Inspector on a monthly salary of USD 1, 800. Her conditions of service were also contained in the email offering her the job dated 30th November 2015 and exhibited at page 26 of the Record of Appeal. Her contract of

employment was therefore, by and large oral. By letter dated 8th April 2017 exhibited at page 38 of the Record of Appeal, the Appellant was suspended from work pending investigations on a charge of fraudulent activity and bringing the name of the company into disrepute. She submitted a brief exculpatory statement on 12th April 2017 which is exhibited at page 39 of the Record of Appeal.

By letter dated 12th April 2017, she was dismissed from employment and ordered to refund to the Respondent the sum of K17, 000.00 the amount lost by the Respondent in connection to the offence. Her dues were also computed on the letter of dismissal which she was advised to collect on 18th April 2018. She was also advised to leave the country within fourteen days from 13th April 2017.

Unhappy with the development, she filed a Notice of Complaint in the Industrial Relations Division on 12th January 2018 by which she claimed as follows;

a) Notice Pay
b) Refund of monies deducted
c) Overtime
d) Compensation for working on public holidays and night times
e) Damages for unfair dismissal
f) Release letter
g) Costs and any other benefits the Court may deem fit

In his Judgment dated 12th April 2018, the learned Trial Judge found that the Appellant had admitted during cross-examination that she was paid notice pay on her dismissal and therefore, dismissed that claim. On the claim for the refund of the deducted amount, the learned Judge found that the same was properly deducted as the Appellant had unlawfully given an extra ticket to a customer who subsequently won the amount that was deducted. This claim was also dismissed. On the claim for overtime, the learned Judge considered Statutory Instrument No 2 of 2011 which stipulates a maximum 48 hour workload per week. He found that the Appellant had been working in excess of that time period and ordered that she be paid overtime in accordance with section 4 of the said Statutory Instrument.

On the claim for compensation for working during public holidays, Sundays and in the night, the learned Judge found that although section 4 of the Statutory Instrument provided for payment of twice the daily amount if the employee worked on a public holiday or Sunday, the Appellant had not shown that public holidays and Sundays did not form part of her working days.

The claim for unfair dismissal also failed on account that the Appellant had been given an opportunity to exculpate herself and later appeared before the disciplinary committee.

The learned Judge found in her favour the claim for a release letter and ordered that she be issued with one.

Dissatisfied with that outcome, the Appellant filed a Notice and Memorandum of Appeal raising five grounds of appeal.

In ground 1, it is contended that the learned Judge erred in law and in fact by holding that the Appellant was not entitled to notice pay when the evidence on record clearly showed that notice pay was not part of the terminal benefits paid to the Appellant.

It was further argued that the finding made by the learned Judge at page 12 of the Record of Appeal that the Appellant in cross-examination admitted to have been paid notice pay was not supported by the evidence. We have perused the record of proceedings in the court below and we can only agree with the Appellant that the record does not show any such admission by the Appellant. This finding of fact was therefore, erroneous and we find that this is a proper case in which to reverse a finding of fact by the trial court as per the case of Attorney General v Achiume[1].

The issue however, is whether the Appellant was entitled to notice on termination which if not given then entitled her to pay in lieu of notice. The Appellant has argued at length through counsel that payment in lieu of notice was available. Reliance was placed on the case of Zambia Privatization Agency v Matale[2] in which the Supreme Court of Zambia stated as follows;

> **"The payment in lieu of notice was a proper and lawful way of terminating the Respondent's employment on the basis that in the absence of express stipulation every**

contract of employment is determinable by reasonable notice."

We however, wish to state that the Matale case is clearly distinguishable on two fronts firstly, Mr. Matale was serving under a written contract and secondly his contract was terminated without notice and hence the payment in lieu of notice. On the other hand, the Appellant herein was not on a written contract and she was terminated by way of summary dismissal following a disciplinary process. We however, note that under section 20 of the Employment Act, there is provision for termination by notice whereas section 21 provides termination by payment.

Section 25 provides for summary dismissal with a requirement that where the dismissal is effected without due notice or payment of wages in lieu of notice, the employer is required to deliver a report to the labour officer within four days of such dismissal. Failure to comply with the provisions of section 25 is an offence under section 27 of the Act. It is therefore, our considered view that the Appellant, having been terminated by summary dismissal, is not entitled to any payment in lieu of notice.

We therefore, find no merit in this ground and dismiss it accordingly.

In ground two, it is contended that the learned Judge erred in law and fact by holding that the Appellant was not entitled to a refund of monies deducted without first establishing findings of fact as to

whether the Appellant was indeed guilty of gross negligence and whether the Appellant consented to such deduction as required by law. The argument by the Appellant is linked to the submission in ground one that the Appellant committed no offence and therefore, the deduction was unlawful. In view of our finding on the dismissal, this argument falls away.

The other limb of the argument is that for a deduction to be effective, it should be with the written consent of the employee. We were referred to section 45 (1) (b) and (d) of the Employment Act which provides as follows;

> **Notwithstanding any other provisions of this Act, an employee may make deductions from the wages payable to an employee in respect of –**
>
> **(b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of any employer occasioned by the willful default of the employee, if such amount and its deduction are duly accepted in writing by such employee**
>
> **(d) subject to the written consent of the employee, an amount equal to any shortage of money arising through the negligence or dishonesty, not amounting to a criminal offence, of an employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money;**

The first issue that arises relates to the applicability of this provision of the law to an employee who has been dismissed. In this case the deduction was made after the Appellant was dismissed and therefore, she was no longer an employee of the Respondent. It is also very clear from the title to part VII of the Employment Act to which section 45 belongs that the part is dedicated to the protection of the wages of an employee. It has nothing to do with recoveries made by an employer from a dismissed employee's terminal benefits.

Secondly, paragraph (d) makes it clear that such a consent only applied to an employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money. There is no evidence that receipt, custody and payment of money were part of the Appellant's job description. The act of issuing extra tickets, which is admitted by the Appellant, to a losing client does of course give such a client an extra chance to win. In this case the said client indeed did win the equivalent of the amount deducted. The Appellant's act amounted to nothing but dishonesty and punishable accordingly. The argument by the Appellant that others did the same does not make the conduct right.

We therefore, do not find this provision of the law applicable to the Appellant for which reason this ground must also fail for lack of merit.

The third ground attacks the learned Judge's finding that the Appellant was not entitled to compensation for working on public holidays and Sundays on account that she did not show that public holidays and Sundays did not form part of her working days. The learned Judge accepted that section 4 (2) of Statutory Instrument No. 2 of 2011 provided for double hourly rate pay to an employee who works on a public holiday or a Sunday if Sundays were not part of normal working days. He however, dismissed the claim on account that the Appellant did not demonstrate that public holidays and Sundays were not part of her normal working days.

In the first place, it is clear that the learned Judge misapprehended that provision to the extent that for public holidays, the same did not have to form part of the working days. All an employee needed to show was that a working day fell on a public holiday to earn a double hourly rate. On the other hand, if Sundays formed part of the working days, then the employee would have no claim for double hourly rate for working on Sundays.

Considering the fact that the Appellant's work schedule provided for only one off day in a seven day week, it follows that public holidays and Sundays were part of her normal working days except that she could take any of the seven days as her day off. In essence, therefore, she would be entitled to the double hourly rate for all the public holidays she worked on but not for the Sundays.

Having said the foregone, we took keen interest in finding out if Statutory Instrument No 2 of 2011 applied to the Appellant. Our reading of the Statutory Instrument has revealed that this is a piece of subsidiary legislation intended to cover specific categories of employees who are not represented and not on written contracts of employment.

The Statutory Instrument is intended to cover general workers and not those in management structures, lower, middle or upper. We have taken time to consider the position of the Appellant in relation to this law and we are of the view that as a Tables Games Inspector, she was above the level of a general worker. She did not fall in any of the categories of employees to which the Order applies as

specified in the schedule pursuant to section 3 namely; general worker, cleaner, handy person office orderly or orderly. We further note that section 2 (1) (e) specifically excludes employees in management.

It is therefore, our considered view that on the basis of non-applicability of the Statutory Instrument relied upon by the Appellant, this ground of appeal must equally fail and we dismiss it for lack of merit.

Ground four contends that the learned trial Judge erred in law and in fact for disallowing the claim for damages for unfair dismissal. In view of our dismissal of ground two, this ground cannot succeed. We dismiss it accordingly.

With ground five having been abandoned, this appeal fails on all the four grounds and we dismiss it with costs to the Respondent.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE