

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

COMP NO.605/2016

BETWEEN:

CHIPILI MUTENGO

AND

ROAD TRANSPORT AND SAFETY AGENCY



COMPLAINANT

RESPONDENT

Before the **Hon. Mr. Justice M. Musaluke** in Open Court on the 11th day of September, 2017

Appearances:

For the Complainant: Mr. S. Mbewe of Messrs. Keith Mweemba Advocates

For the Respondent: Mr. A. Tembo – In House Counsel

JUDGMENT

Legislation 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. Lubasi Muyambango, (2009) Z.R. 22*
3. *Caroline Tomaidah Daka vs. Zambia National Commercial Bank, (2012) ZR 8 HC*

1.0 **COMPLAINANT'S CASE**

1.1 On 22nd December, 2016, the Complainant filed Notice of Complaint pursuant to section **85(4) of the Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia.**

1.2 The grounds on which the Complaint was presented were that:

- “(c) Termination of employment in a letter entitled summary dismissal and dated 14th March, 2016;*
- (b) The Complainant complains that despite the agreement to turn state witness in a criminal case of **THE PEOPLE vs. CHRISTOPHER CHAWINGA AND OTHERS** and enjoy immunity from prosecution, the Complainant was subjected to a disciplinary proceedings resulting in his summary dismissal;*
- (c) The Complainant had an agreement with the state that his suspension would be uplifted and not be subjected to any disciplinary proceedings on the basis of the agreement to testify in **CHAWINGA AND OTHERS** therefore, any further retribution taken by the disciplinary committee on the same facts was unfair, unlawful and unconscionable;*
- (d) The Complainant complains that the lifting of his suspension in a letter dated 22nd December, 2015 consummated the agreement aforesaid and that subsequent subjection of the Complainant to disciplinary proceedings and attendant dismissal was unfair and unlawful;*
- (e) That the summoning of the Complainant to attend Court on 28th November, 2016, demonstrates that the agreement not to subject the Complainant to any further retribution is still*

valid thereby making the disciplinary proceedings and attendant dismissal of the Complainant from employment unfair and unlawful.”

- 1.3 The Notice of Complaint was supported by an affidavit deposed by the Complainant.
- 1.4 At trial, the Complainant was the only witness that testified for his case and gave evidence on oath.
- 1.5 The summary of the Complainant's case is that he was employed by the Respondent on 17th November, 2011 as a Data Capture Clerk on a one-year Contract. On 29th June, 2012, the Complainant was offered employment on Permanent and Pensionable terms as a cashier.
- 1.6 On 10th December, 2015 the Complaint was charged with the offences of Gross Negligence of duty and Dishonest Conduct as per clause 18(14) and 40 of the Respondents' Disciplinary Code. He was also placed on suspension.
- 1.7 The details of the offence were that:

“The security paper for the Respondent Premium House Office serial range numbers 111013801-111013900 and 111013901-11101400 was issued to the Complainant by the Revenue officer on 1st December and 3rd December, 2015 respectively. Some of the paper issued to the Complainant with the following range 111013856 and 111013903 was allegedly used to

process fake Road Tax, which resulted in gross negligence and dishonest conduct on the part of the Complainant as that paper was found to have been used to produce fake road tax for vehicle Reg. No. ALK5459 and Motor Cycle No. ALL 7880 respectively. That the Complainant failed to secure those security paper resulting in loss of government revenue.”

- 1.8 Following the charge the Complainant wrote two (2) undated exculpatory letters (exhibit RM4 and RM5 in the Respondent's affidavit in support of Answer).
- 1.9 In both letters, the Complainant admitted that he was wrong and apologized to the Chief Executive Officer for that conduct.
- 1.10 The Complainant was then reported and was detained at the Lusaka Westwood Police Station. After giving his statement at the Police Station, the Police decided to turn him into a state witness.
- 1.11 On 22nd December, 2015, the Respondent wrote to the Complainant lifting his suspension from work and he returned to duty at Mimosa Station.
- 1.12 On 24th February, 2016, the Respondent's Disciplinary Committee sat to hear the Complainant's case. The Complainant attended the hearing.
- 1.13 The Disciplinary Committee found the Complainant guilty and recommended his dismissal from employed.

- 1.14 On 14th March, 2016, the Complainant was dismissed from employment and informed of the right to appeal to the Director.
- 1.15 On 17th March, 2016, the Complainant appealed the decision to dismiss him from employment to the Director.
- 1.16 The Appeals Committee sat and heard the appeal on 30th March, 2016 and upheld the decision of the Disciplinary Committee to dismiss the Complainant.
- 1.17 On 4th April, 2016, the Respondent wrote an "*Amendment to letter of summary dismissal*" to the Complainant. In that letter, the Complainant was being informed that due to the actions that led to his dismissal, the Respondent had to refund a sum of K39,418.00 to the Company called Seedco for the three quarters fake road licences that that were fraudulent issued by the Complainant. That the K39,418.00 would be recovered from his terminal benefits and from ICT support officer and Database Administrative. The amount to be recovered from the Complainant was therefore, K13,139.33.
- 1.18 The Complainant was asked to appeal the decision of the amended letter to the Director.
- 1.19 On 6th April, 2016, the Complainant appealed the decision to surcharge him the sum of K13,139.33 to the Director.

- 1.20 On 13th April, 2016, the Director upheld the decision to surcharge the Complainant a sum of K13,139.00.
- 1.21 It is on the basis of these facts that the Complainant sought the Court's order for a declaration that his dismissal was unfair and wrongful and as such null and void.
- 1.22 He prayed for reinstatement and other reliefs that I may deem fit.

2.0 **RESPONDENT'S CASE**

- 2.1 On 13th February, 2017, the Respondent filed its Answer and affidavit in support deposed by Mr. Rodrick Mulenga its Head Human Resources and Administration.
- 2.2 In its Answer, it stated that the Complainant was fairly and lawfully dismissed after he was found guilty of offences of Gross Negligence and Dishonest Conduct in line with clause 18(14) and (40) of the schedule of offences of the Respondent's Disciplinary Code.
- 2.3 That the Complainant was given an opportunity to exculpate himself which he did and was later dismissed.
- 2.4 At trial the Respondent's only witness Ms. Victoria Suzyo Phiri (Human Resource Officer) testified that the Complainant was charged with an offence of processing fake road tax for motor vehicle No. ALK 5459 and ALL78 for Seedco Company Limited.

- 2.5 It was her testimony that the Complainant exculpated himself in two undated letters. In one letter he admitted the offence and on the other he denied knowing what ever had happened to the said road tax licences.
- 2.6 That the Complainant was placed on suspension pending his appearance at the Disciplinary hearing.
- 2.7 That the Complainant's suspension was lifted when the Police decided to turn him into state witness. She testified that this did not mean that the disciplinary case against the Complainant was discontinued as only the suspension was lifted.
- 2.8 That on 24th February, 2016, the Disciplinary Committee sat and recommended the dismissal of the Complainant.
- 2.9 She testified that as the Disciplinary case for the Complainant was going on, Seedco Company Limited had complained to the Respondent and claimed for K39,418.00 which was misappropriated by the Complainant.
- 2.10 She told Court that the K39,418.00 was paid by the Respondent to Seedco Company Limited and the three (3) employees that were involved in the scam were surcharged whereby each was to pay back K13,139.33. Since the complainant was already dismissed, this amount was to be recovered from his terminal benefits. It was at this point when a letter of amendment to the dismissal letter was written to the

Complainant to include this aspect of deducting the K13,139.33 from his terminal benefits.

2.11 She testified that at all stages, the Complainant was afforded the right of appeal and exercised this right and that his claims had no merit and should be dismissed.

3.0 **SUBMISSIONS**

3.1 I have read the submissions filed in respect of each party to these proceedings. I will refer to them as I deem necessary in my judgment.

4.0 **COMMON CAUSE FACTS**

4.1 I find the following as undisputed facts:

- (a) The Complainant was employed as a cashier by the Respondent on permanent and pensionable terms in June, 2012;
- (b) On 10th December, 2015, the Complainant was charged with the offence of Gross negligence of Duty and Dishonest Conduct placed on suspension;
- (c) The Complainant exculpated himself in writing;
- (d) On 22nd December, 2015, the suspension was lifted;
- (e) On 24th February, 2016, the Respondent's Disciplinary Committee sat to hear the Complainant's case, after which

a recommendation for his dismissal was made. On 14th March, 2016, the Complainant was dismissed from employment;

- (f) On 17th, March, 2016, the Complainant appealed his dismissal to the Appeals Committee. On 30th March, 2016, the Appeals Committee met and upheld the decision of the Disciplinary Committee to dismiss the Complainant;
- (g) On 4th April, 2016, the Dismissal letter was amended by including a surcharge of K13,139.33 for the Complainant's role in the issuing of fake road tax for Seedco Company Limited vehicles.
- (h) The Complainant appealed, the surcharge of K13,139.33 to the Director who upheld the decision of the Disciplinary Committee to surcharge the Complainant.

5.0 **ISSUES FOR DETERMINATION**

- 5.1 (a) Whether or not the dismissal of the Complainant was unfair and wrongful.

6.0 **OPINION**

6.1 **WRONGFUL AND UNFAIR DISMISSAL**

6.2 (a) **WRONGFUL DISMISSAL**

- 6.3 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.

- 6.4 Wrongful dismissal is a common law term which in essence is a breach of Contract of Employment by the Employer.
- 6.5 When a claim for wrongful Dismissal is presented before Court, the duty of the Court is to examine if there was breach Contract of Employment by the Employer in the manner the dismissal was done.
- 6.6 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.
- 6.7 The Complainant testified that the letter of lifting his suspension had absorbed him of any further disciplinary action on the charges that he was facing. He was therefore, of the view that the Disciplinary hearing should not have gone ahead to hear his case.
- 6.8 The Respondent's witness, denied that the lifting of suspension had ended disciplinary proceedings on the Complainant. She drew the Court's attention to clause 16.7 in the Respondent's Disciplinary Code which provides for suspension of employees.

- 6.9 The clause referred to gives the Respondent an option to suspend any of its employees if he had committed some of the offences listed.
- 6.10 I agree with the Respondent's view that when a suspension was lifted that did not absorb the Complainant of wrong doing. The letter lifting suspension did not in fact state that the Disciplinary process for the Complainant would be halted.
- 6.11 In the premises I find that the lifting of the suspension did not halt the Disciplinary process.
- 6.12 That being the case, I find that the Complainant had undergone the disciplinary process and there were no flaws in the process. I find that the case for wrongful dismissal has not been made by the Complainant, I consequently dismiss this claim.
- 6.13 The Respondent was justified in dismissing the Complainant.
- 6.14 (b) **UNFAIR DISMISSAL**
- 6.15 The High Court in December, 2012 made an observation, in the case of ***Caroline Tomaidah Daka vs. Zambia National Commercial Bank***, that Unfairness is Statutory – related and is linked to protection of the Right of Employment and promotion of fair labour practices of requiring employers to terminate Contracts of Employment only on specified and

reasonable grounds, and also providing for rare remedy of reinstatement.

6.16 Unfair Dismissal, therefore, occurs when an employee's contract is terminated in breach of a statutory provision.

6.17 In casu, the Complainant did not adduce evidence to show that there was a statutory breach by the Respondent. I, therefore, find it difficult to entertain the claim of Unfair Dismissal and, consequently, dismiss it for lack of merit.

6.18 Since I have found that the claims for unfair and wrongful dismissal are not justified and have been dismissed, the Complainant is not entitled to the reliefs outlined in paragraph 5 of the Notice Complaint.

7.0 **CONCLUSION**

7.1 From the Judgment, I make the following order:

(a) The claims for wrongful dismissal and unfair dismissal fail and therefore dismissed;

(b) Each party to bear their own costs.

Delivered this day of



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M. MUSALUKE
HIGH COURT JUDGE