

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

COMP/HL/159

BETWEEN:

**BRIDGET LIWANGA
SHELLY SIMPULETI
ERNEST SIMABAMNAYA
CHRISPINE MUSIPILI
FLORENCE KANGONGWE**



**1ST COMPLAINANT
2ND COMPLAINANT
3RD COMPLAINANT
4TH COMPLAINANT
5TH COMPLAINANT**

AND

NEMCHEM INTERNATIONAL LIMITED

RESPONDENT

Before the **Hon. Mr. Justice M. Musaluke** on the 29th day of November, 2017

Appearances:

For the Complainant: Mrs. E. M. Bupe – Senior Legal Officer, National Legal Aid Clinic for Women

For the Respondent: No Appearance

JUDGMENT

Legislation referred to:

- 1. Constitution of the Republic of Zambia**
- 2. The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia**
- 3. Employment (Amended Act) 2015 Chapter 268 of the Laws of Zambia**
- 4. International Labour Organization (ILO) Freedom and Protection of the Right to organize Convention, 1948 (No. 87)**
- 5. International Labour Organization (ILO), Right to Organise and Collective Bargaining Convention, 1949 (No. 98).**

1.0 **COMPLAINANT'S CASE**

- 1.1 On 27th October, 2015, the Complainants issued a writ of summons out of the Livingstone District Registry against the Respondent herein.
- 1.2 The Complainants claimed damages for wrongful dismissal, compensation for unfair dismissal, gratuity, damages for denying them the right to belong to a Trade Union and reinstatement.
- 1.3 At trial Ms. Bridget Liwanga (**CW1**), Mr. Ernest Simabambaya (**CW2**) and Mr. Crispin Musipili (**CW3**) testified on behalf of the Complainants and gave evidence on oath.
- 1.4 The core of the evidence for Complainants was that a Manager for the Respondent went to Livingstone and summoned the Complainants alleging that one of them had sent a text message to management threatening Management to pay salary arrears by 14:00 hours on that date or face consequences.
- 1.5 The witnesses expressed shock of the message and denied knowing anything about it.
- 1.6 This prompted CW1 to report the matter to the Police so that the phone number where the alleged text message was sent from could be traced.

- 1.7 The Police proceeded to obtain a search warrant and a search was conducted at MTN Livingstone where it was discovered that the number that sent the alleged text message belonged to one Cryford Mutinta and not CW1.
- 1.8 When the Respondent was advised of the search results, CW1 was merely told not to worry.
- 1.9 A Mr. George Khwame the Administrative and Human Resource Manager for the Respondent, then traveled to Livingstone in March, 2015 and accused the Complainants of inciting fellow workers to withdraw labour.
- 1.10 On 19th March, 2015, he wrote letters charging the Complainants (see pages 7 – 12 in the Plaintiff's Bundle of Documents).
- 1.11 The charges preferred were for gross insubordination/inciting an illegal strike action, withdrawing labour and leaving workplace without permission.
- 1.12 The said charge letters gave the Complainants only up to 15:00 hours on the same day to exculpate themselves.
- 1.13 On the same day, the Complainants exculpated themselves and denied wrong doing stating that they had the right to belong to a union.

- 1.14 The following day, the Complainants were dismissed. They appealed to the Respondent's Country General Manager. The appeal was unsuccessful.
- 1.15 The Complainant's claim is that they were not given chance to be heard and that they were dismissed by exercising their right to belong to a Trade Union.
- 1.16 The 1st Complainant, Ms. Bridget Liwanga claimed a total sum of K12,440.00 as the amount due to her from the Respondent. This amount is broken down as follows:
 - (a) K7,800.00 unpaid gratuity; and
 - (b) K4,640.00 leave pay.
- 1.17 The 2nd Complainant Shelly Simpuleti claimed the sum of K10,762 broken down as follows:
 - (a) K6,180.00 unpaid gratuity; and
 - (b) K4,582.00 leave pay.
- 1.18 The 3rd Complainant Enerst Simabambaya claimed the sum of K10,900.40 broken down as follows:
 - (a) K6,180.00 unpaid gratuity; and
 - (b) K4,724.00 leave pay.
- 1.19 The 4th Complainant Mr. Chrispin Musipili claimed the sum of K10,704.00 broken down as follows:

- (a) K6,180.00 unpaid gratuity; and
- (b) K4,524.00 leave paid

1.20 The 5th Complainant Florence Kangongwe claims the sum of K5,236.00 broken down as follows:

- (a) K3,909 unpaid gratuity; and
- (b) K2,146.00 leave pay.

2.0 **RESPONDENT'S CASE**

2.1 On 13th November, 2015, the Respondent filed its Defence to the Writ of Summons.

2.2 In its defence, the Respondent denied owing the Complainants any monies as gratuities was only payable upon successful completion of one's contract which was not the case with the Complainants.

2.3 That the dismissal of the Complainants was as a result of the reasons that were contained in the dismissal letters.

2.4 That the Complainants were charged and given chance to exculpate themselves which they did. That they were afforded the right to be heard.

2.5 That upon being dismissed, the Complainants were given chance to appeal to the Country General Manager which right they exercised but their appeals did not succeed.

2.6 At trial, the Respondent nor its Counsel were present. I made a ruling that I would proceed to hear the Complainants and render Judgment based on oral evidence of the Complainants and pleadings of both parties.

3.0 **ISSUE FOR DETERMINATION**

3.1 The only issue for determining from the evidence before me is whether or not the Complainant's association to the Trade Union triggered the disciplinary process and subsequent dismissal from employment.

4.0 **OPINION**

4.1 **The Law**

4.2 The Zambia Constitution in the Bill of Rights at Article 2(11) provides that:

*“Except with his own consent a person shall not be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to any Political Party, **Trade Union** (emphasis mine) or other association or the protection of his interests.”*

4.3 Further, under section 5 of the ***Industrial and Labour Relations Act*** it is provided that:

*“Notwithstanding anything to the contrary contained in any other law and object only to the provisions of the constitution and this Act every employee **shall** have the following rights:*

- (a) The right to take part in the formation of a Trade Union;*
- (b) The right to be a member of a Trade Union within the sector, Trade Union undertaking, establishment or industry in which that employee is engaged;*
- (c) The right, at any appropriate time, to take part in the activities of a Trade Union including any activities as, or with a view to becoming, an officer of the Trade Union, seeking election or accepting appointment, and if so elected or appointed, to hold office as such officer subject only to the constitution of the Trade Union concerned;*
- (d) The right to obtain leave of absence from work in the exercise of the rights provided for in paragraph (c) and the leave applied for shall not be unreasonably withheld by the employer;*
- (e) The right not to be prevented, dismissed, penalized, victimized or discriminated against or deterred from exercising the rights conferred on the employee under this Act.*

- (f) *The right of any employee not to be a member of a Trade Union or be required to relinquish membership;*
- (g) *The right not to be dismissed, victimized or prejudiced for exercising or for the anticipated exercise of any right recognized by this Act or any other law relating to employment; or for participating in any proceedings relating thereto;*
- (h) *The right not to do work normally done by an employee who is lawfully on strike or who is locked out, unless such work constitutes an essential service, or if on request the employee voluntarily waives the right specified under this Act;*
- (i) *The right not to be dismissed, penalized or disciplined on the grounds that the employee -*
 - (i) has been or is a complainant or a witness or has given evidence in any proceedings.”*

4.4 It is clear from the Republican Constitution that the right to belong to a Trade Union is a protected right which cannot easily be taken away. These rights are protected and sacred and any infringement of these rights has to be done only in accordance with such proviso as provided in Article 21(2) of the Constitution.

- 4.5 It follows that any employer that dismisses an employee as a result of that employee exercising his/her right to belong to the Trade Union contravenes the constitution.
- 4.6 Further, Section 5(e) of the Industrial and Labour Relations Act prohibits an employee to be dismissed or victimized in the course of exercising his/her right to belong to a union of his choice. In fact section 5 (2) of the Industrial and Labour Relations Act gives the power to an employee who reasonably believes that his or her employment has been terminated for exercising any of the right connected to Trade Unions to lay a complaint before Court.
- 4.7 The **Employment (Amended Act) 2015** at section 5 (b)(4) provides that Union membership or participation in union activities outside working hours cannot be a valid reason for termination of employment contract.
- 4.8 It would appear to me that the law is very clear and no justification can be put to the termination of employment by an employer purely on the basis that an employee belongs to a trade union or is participating in union activities.
- 4.9 **Applying the law to the facts**
- 4.10 In casu, it is clear from the testimonies of the Complainants and the documents before me that the dismissal was connected to the Complainants' affiliation to a trade union.

The following events have made me to come to that conclusion:

- (a) The charge letter written to all Complainants at paragraph 2 reads: *“.....Inciting other cleaning staff to withdraw their labour and forcing them to union membership without laid down procedures.”*
- (b) In the exculpatory letters, the Complainants (pages 11-14 in the Plaintiff’s Bundle of Documents) denied charges and stated that they had right to belong to a trade union of their choice and that no strike or meeting in fact took place of at the Respondent. Further that, the Complainants never missed work as a result of belonging to a union.
- (c) In the letters of dismissal dated 20th March, 2015, the Respondent note:

“It has been found that you were collaborating with a certain union Representative in bad faith and started giving false information about the company and also misleading several employees and spreading rumours with the intent to bring the name of the Company and its officers into disrepute.”
- (d) When the Complainants appealed to the General Manager of the Respondent against their dismissal, in upholding the dismissals he wrote:

“Moreover, please be reminded that the union officials whom you are collaborating with have no recognition against with the Company as such management cannot condone this kind of attitude from its employees.”

- 4.11 It is therefore, not in dispute that the main reason why the Complainants were dismissed was their association with a trade union which I would believe was in the exercise of their constitutional rights as enshrined under **Article 21 of the Republican Constitution.**
- 4.12 The allegation in the charge letter were in fact not clear as to the details of the Union the Complainants were alleged to be collaborating with.
- 4.13 This was a clear violation of employee rights to belong to a trade union. Freedom of association entails the right of workers to join organisations of their own choosing. This is the reason that this right has been guaranteed under Article 21 of the Constitution which Article is a domestication of the **Freedom and Protection of the Right to Organise Convention and the Right to Organize and Collective Bargaining Convection of the International Labour Organisation.**
- 4.14 It is therefore, essential that all actors in the Labour Industry should respect the right to join unions and participate in their

activities as this is one of the cornerstones in enhancing a democratic system.

4.15 Since I have found that the Respondent violated statutory law, the dismissals were unfair.

4.16 I therefore, order that each Complainant be paid twelve (12) months' salary as compensatory damages for loss of employment.

4.17 The award will attract interest at short term Commercial Bank lending rates from 27th October, 2015 until the date of judgment, thereafter at the lending rates as determined by the Bank of Zambia from time to time until full settlement.

4.18 I award costs to the Complainants.

Delivered this day of 2017



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M. MUSALUKE
HIGH COURT JUDGE