

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA**

2009/HP/961

(CIVIL JURISDICTION)



BETWEEN:

ROBERT MUSONDA

PLAINTIFF

AND

VORTEX REFRIGERATION LIMITED

RESPONDENT

Before: E. M. Hamaundu, J

For the Plaintiff : Mr G.J. Kalokoni, Messrs Kalokoni & Co

For the Defendant : Messrs Isaac and Partners

JUDGMENT

Authorities referred to:

G. H. L. Fridman: The Modern Law of Employment, (Steven & Sons, London.1963)

The plaintiff seeks:

- (i) Damages for wrongful dismissal**
- (ii) Damages for procurement of breach of contract of employment with Intercontinental Hotel**

- (iii) Refund of expenses which the plaintiff incurred whilst on company duty**
- (iv) Damages for mental torture and anguish.**

According to the plaintiff's averments in his statement of claim, he was employed by the defendant on 1st February, 2008. In the month of September, 2008, the defendant sent him on duty to the Copperbelt and Northwestern Provinces. The defendant instructed him to use his own money for meal and out of pocket expenses; this was on the understanding that the money would be refunded when he returned to Lusaka. When he asked for a refund, upon his return to Lusaka, an argument ensued between him and his boss, the defendant's Managing Director. The latter dismissed him from employment, on the spot.

The appellant, subsequently, was offered employment by Intercontinental Hotel. However, the defendant maligned the plaintiff by informing the Hotel's management that the plaintiff had been dismissed because he was a criminal. Acting on that information, the Hotel terminated the plaintiff's contract of employment. Hence this action.

According to the averments in the defence, the plaintiff's meal allowances were paid by his supervisor at the construction site while the out of pocket allowance was paid in accordance with the defendant's policy. The defendant denied the allegation that it maligned the plaintiff. The defendant further averred that, upon leaving employment, the plaintiff did not handover tools valued at K1,365,000(unrebased).

The defendant also averred that the plaintiff failed to account for electrical items known as phase failure relays, which had been entrusted to him. These were valued at K9,800,000 (unrebased). The defendant counter-claims the value of the tools and the phase failure relays.

In defence to the counter-claim, the plaintiff denied failing to account for the electrical components alleged. As for the tool box, he stated that the same was taken away by the defendant when it dismissed him.

The plaintiff's testimony at the trial was as follows:

He was employed by the defendant on 1st February, 2008. On 5th September, 2008 he was sent to the Copperbelt and Northwestern

Provinces to service generators and air conditioners. He was not paid his subsistence allowance, but was told to use his own money and then he would be re-imbursed upon his return. He came back on 10th September, 2008 only to find another trip to Ndola lined up for him. The following day, he prepared himself for the trip to Ndola. He then asked the Managing Director for re-imburement of the personal money that he had used on the previous trip; and also for subsistence allowance for the current trip. The Managing Director told him to use his money again. An argument between the two then ensued. The Managing Director called him to his office where he verbally dismissed him from employment. The Managing Director told him to take off his work suit. He then ordered the security guard to take the tool box and the work suit away.

The plaintiff found other employment with intercontinental Hotel, who were one of the defendant's clients. He was offered a job on 1st October, 2008. When the defendant's Managing Director became aware of the plaintiff's new employment, he called the Chief Engineer at Intercontinental Hotel and told him to dismiss the plaintiff because he had stolen something from the defendant. The Chief Engineer called the plaintiff and told him what had transpired.

He gave the plaintiff two weeks to resolve the issue with his former employers. The plaintiff, instead, decided to resolve the dispute through the police. He went to report the matter at Central Police Station. The defendant's Managing Director was summoned. The latter, instead, came with police officers from Emmasdale Police Station. The plaintiff was then driven to Emmasdale Police Station. The issue was not resolved. He went back to Intercontinental Hotel who told him to obtain a clearance letter from his former employers. He went instead to Emmasdale Police Station for the clearance letter. The officers refused to give him one. Then he met a former workmate of his at the defendant company who had, similarly, left to join Intercontinental Hotel. The former workmate told him that the defendant's Managing Director had caused Intercontinental Hotel to terminate his employment as well. The two of them sued the defendant's Managing Director in the Local Court. The police also decided to detain and charge them with a criminal offence concerning the theft of phase failure relays and work suits. The court eventually acquitted them. As far as he was concerned, he did install the voltage failure relays under the supervision of his supervisor; and the affected coldrooms were commissioned and handed over to the client.

He was never questioned regarding the failure to account for these components when he was still in the defendant's employ.

Cross-examined, the plaintiff's responses were these: When he was employed by the defendant, he made between three to six trips outside Lusaka. On each trip there was always a supervisor. During the trips he was only entitled to upkeep allowance since the employer paid for lodging. The allowance was K25,000 per day. He was offered employment by Intercontinental Hotel on 26th September, 2008. He had applied for the job when he was still in employment with the defendant. One of his jobs was to assemble control panels. The voltage comparator, also known as the phase failure relay, was a component of the control panel. Between March, 2008 and July, 2008, he had assembled control panels for Intercontinental Hotel, Medical Stores Limited and Zambia Revenue Authority in Chirundu. He was part of the team that assembled them. The defendant did not tell him that the control panels that they had assembled had malfunctioned.

That was the case for the plaintiff.

The sole witness for the defendant was Navendra Varland, the Managing Director. He testified thus:

The plaintiff was employed as an electrician by the defendant in February, 2008. The plaintiff left employment in September, 2008.

The witness explained the defendant's policy with regard to employees going to work out of town. He said that, in such a case, the defendant paid all expenses relating to transport, accommodation and food. He said that the employees were, however, entitled to an allowance for being out of town. For this, the employees signed a slip when they came back and, then, the allowance was added to the salary at the end of the month. The witness referred the court to spreadsheets in the defendant's bundle of documents which showed the employees' salaries and allowances for various months. The details concerning the plaintiff were also shown on the spread sheets.

He went on to explain that on 10th September, 2008, his company had received a phone call from Bank of Zambia in Ndola, one of its clients, reporting a major breakdown in its currency office. The witness told his Chief Engineer to prepare to leave for Ndola the next day and liaise with the plaintiff who was being expected that

evening from another assignment outside town. Arrangements were made for the plaintiff to travel to Ndola. However, the Chief Engineer came back the following day and informed the witness that the plaintiff did not want to travel to Ndola. He called for the plaintiff to come to his office. The plaintiff came. The witness asked the plaintiff why he was disobeying instructions to go to Ndola. The plaintiff said that he would not go to Ndola because he had just come from Northwestern Province; and that he had some other issues to attend to in Lusaka. The plaintiff was adamant. The witness then terminated his services. He then instructed the storekeeper to retrieve the tool box from the plaintiff. When the tool box was opened, it was found that a number of tools were missing; these were, an arm probe, a tong tester, a socket set, flat spanners and a set of insulated screw drivers. The plaintiff was told of the missing tools.

The witness said that he had had no knowledge about the plaintiff's employment at Intercontinental Hotel. He denied being involved in the plaintiff's dismissal by Intercontinental Hotel.

The witness continued as follows: Between March and July, 2008, the defendant company had contracts to supply coldroom equipment and associated electrical items. The team that assembled

the control panels was headed by the plaintiff. The plaintiff designed the circuit for the panels. The circuit was also assembled by the plaintiff, after conferring with the witness to ensure that all the components were there. The plaintiff drew the components, namely phase failure relays, from the stores. These were reflected on the gate passes. The jobs were performed on the sites. However, complaints were received from all three clients indicating that their equipment was constantly breaking down. It was discovered that the faults on the equipment at the Zambia Revenue Authority, Medical Stores Limited and Inter-continental Hotel was the same. The voltage comparators, also known as phase-failure relays were missing. The defendant then sent letters to the plaintiff and another worker named Kennedy Bwalya, telling them that they were responsible for the missing components. Upon receipt of the letter, Kennedy Bwalya just absconded from work. Only a person who knew the circuit could have by-passed it and still made the system work. The total value of the phase-failure relays was K9million (unrebased). The total value of the tools missing from plaintiff's tool box was K13million (unrebased).

The witness was not cross-examined on account of the absence of the defendant and that of its advocates who had withdrawn. The

plaintiff had no objection for me to close the matter and reserve it for judgment.

It is not in dispute that the plaintiff was employed by the defendant in February, 2008. It is also not in dispute that on the 11th September, 2008, the defendant summarily terminated the plaintiff's contract, without notice or salary in lieu thereof. Those are the initial findings of fact. I will make further findings as I consider the particular aspects of the action.

The first claim in this action is for damages for wrongful dismissal. That claim can only succeed if it is found that the defendant breached the employment contract in the manner in which it terminated the plaintiff's services. I will examine the facts surrounding the termination of the employment. It is not in dispute that on the 10th September, 2008, the plaintiff had come back from an assignment that he had been given by the defendant to carry out in North Western Province. It is also not in dispute that, on that very day, the defendant had received an urgent plea from one of its clients in Ndola, The Bank of Zambia, for urgent attendance to its cold rooms. It is not in dispute that the nature of the work in Ndola was in the plaintiff's field of expertise. It is also not in dispute that the

defendant assigned the plaintiff to go to Ndola to attend to the fault. It is not in dispute that the plaintiff refused to go to Ndola. It is not in dispute that the plaintiff had a meeting with his employer at which the plaintiff communicated his refusal. It is, finally, not in dispute that, upon the plaintiff's refusal to go to Ndola, the defendant dismissed him, there and then.

I find the foregoing as facts.

The only issue in dispute surrounding the termination of employment is the reason for the appellant's refusal to go to Ndola. According to the plaintiff, he refused to go to Ndola because the defendant wanted him to go without any upkeep allowance: He explained that on his previous trip to North Western Province, the employer had not paid him any upkeep allowance but had requested him to use his own money, promising to refund him upon his return. He went on to explain that, upon his return, his employer did not refund him the money but, instead, ordered him to go to Ndola using his own money again as upkeep. He said that this time around he did not have money. Hence his refusal.

According to the defendant, however, all expenses for accommodation and food were paid for by the company through

money which was carried by the supervisor of each team that worked out of town. The defendant's position was that the only money employees such as the plaintiff were entitled to was the out of pocket allowance which the defendant used to pay together with the salary at the end of the month in which the work had been carried out.

According to the defendant, the reason which the plaintiff gave for refusing to go to Ndola was that he had just come from North Western Province; and that he had personal issues to attend to in Lusaka.

I have considered the two versions. The defendant referred to the salary spreadsheets which it had produced to support its version. I have examined the spreadsheets. They, indeed, show that allowances such as out of pocket used to be paid to the salary. Further the plaintiff admitted in cross-examination that food and accommodation used to be paid for by the employer. Therefore, it is unlikely that the defendant requested the plaintiff to use his own money. In the circumstances, I accept the defendant's version that the plaintiff refused to go to Ndola because he had just come from North Western Province the previous day; and that he had personal issues to attend to. I find the foregoing as a fact.

It can now be said that, the plaintiff was dismissed for refusing to go and perform his duties in Ndola. There cannot be any issue that the plaintiff was not given any right to be heard because the dismissal occurred at an occasion where the plaintiff was called upon to explain why he did not want to go to Ndola. Was that termination, therefore, in breach of contract?

G.H.L Fridman, in *The Modern Law of Employment*, discussing the duties of an employee writes:

“Apart from such duties as are expressly provided for by the terms of the contract, the law implies certain duties into the relationship the breach of which justifies instant dismissal... The relation of master and servant implies necessarily that the servant shall be in a position to perform his duty duly and faithfully and if by his own act he prevents himself from doing so, the master may dismiss him”. (page 446).

On the same subject, *Fridman* goes on:

“(iii) Disobedience

Refusal to obey the employer’s orders is wrongful and justifies instant dismissal. However, the orders must be lawful: an employee cannot be dismissed for refusing to obey unlawful or improper orders.” (pages 448 – 449).

In this case, one of the plaintiff's conditions of employment provided:

**“Working Hours : 07.00 hours to 12.30 hours
 13.00 hours to 17.00 hours
 Mondays through Saturdays
 You will be required to work longer hours
 and/or weekends as well as public holidays
 depending on the work load”**

It is clear from this term that the plaintiff was required to work awkward hours and schedules, depending on the work-load. In view of that term, it was not unlawful, or outside the contract, to require the plaintiff to go to Ndola to attend to the fault that needed urgent attention; even though he had come from North Western Province the previous day. His refusal to go to Ndola was, therefore, a clear-wilful disobedience of a lawful order by the employer. In the circumstances, the defendant was justified in instantly dismissing the plaintiff from employment. The claim for damages for wrongful dismissal fails.

The next claim is for damages for procurement of breach of contract of employment with Intercontinental Hotel. In this claim, the plaintiff contends that his new employer, Intercontinental Hotel, terminated his services at the instigation of the defendant's Managing Director. This was denied by the defendant's Managing Director, who

said that he did not even have knowledge of the plaintiff's employment at Intercontinental Hotel.

The letter of termination of employment, written by Intercontinental Hotel, does not make any suggestion that the termination may have arisen as a result of the defendant's intervention. The plaintiff adduced no other evidence and called no witness to support his contention. I am, therefore, not satisfied that he has proved this claim. It fails as well.

The third claim is an order for the refund of all the expenses that the plaintiff incurred whilst on company duty. To begin with, the plaintiff did not provide particulars of this claim in his pleadings. Secondly, I have accepted the defendant's version and made findings of fact that; whenever employees of the defendant, the plaintiff included, were sent to work outside town, the defendant paid for all expenses concerning accommodation and meals; and that upkeep allowances were paid to the salary. In the light of those findings of fact, this claim cannot succeed.

The fourth claim is for damages for mental torture and anguish. This head of damages can only be considered where a claim for breach of contract has succeeded. In this case, the claim for wrongful

dismissal has failed. Therefore, this head of damages does not even arise.

I now turn to the defendant's counter-claim. There is a claim for K1,365,000 (unrebased) being the value of the tools which the plaintiff allegedly did not handover upon leaving employment. In its pleadings, the defendant did not set out particulars of the tools and their respective values. This left the plaintiff with no idea of the tools that he needed to give an explanation on. An attempt was made by the defendant's Managing Director, during his testimony, to give particulars of the tools; even then, no values were given for each of them. In any case, at that stage it was too late for the plaintiff to put forward a meaningful defence. I am not, therefore, satisfied that the defendant has proved this claim. It fails.

The second claim is for a sum of K9,800 (unrebased) for allegedly unaccounted-for phase-failure relays. The evidence on record shows that the defendant also wrote a letter to another employee Kennedy Bwalya, accusing him of being responsible for the missing phase-failure relays together with the plaintiff. In a case where the plaintiff was not the only suspect there was need for stronger evidence which would show that it was more likely than not

that it was the plaintiff who took the phase-failure relays and not Kennedy Bwalya. In this case, there was only evidence of suspicion. Therefore, I am not satisfied that the defendant has proved this claim as well.

To sum up, the plaintiff's claim has failed; and so, has the defendant's counter-claim. However, this action was about the plaintiff's claim. It stands dismissed, with costs to the defendant.

Dated the ...12th..... day ofOctober..... 2017.



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E. M. Hamaundu
JUDGE