

IN THE HIGH COURT FOR ZAMBIA  
INDUSTRIAL RELATIONS DIVISION  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

COMP NO. IRC LK/367/2016

BETWEEN:

BERNARD FUNGMWANGO

COMPLAINANT

AND

AFRICA BANKING CORPORATION ZAMBIA  
LIMITED

RESPONDENT



CORAM:

Hon. E. MWANSA Esq : JUDGE

**APPEARANCES:**

For the Complainant : Mr. M. Nzonzo – Messrs. ICN Legal Practitioners

For the Respondent : Ms. M. Simachela – Messrs. Nchito & Nchito

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**JUDGEMENT**

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**Statutes Referred to:**

1. *Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia.*

**Case Referred to:**

1. *The Attorney General –V- Richard Jackson Phiri (1988/1989) ZR 121.*
2. *Kambatika –V- ZESCO Ltd Appeal No. 186/2000 unreported.*
3. *Zambia Consolidated Copper Mines –V- Matale(1995-97) ZR 144.*
4. *Care International Zambia Limited –V- Misheck Tembo Appeal No. 57/2016 also of selected Judgment No. 56 of 2018.*



5. *Daka -V- ZCCM Appeal No. 12 of 2004.*
6. *Attorney General -V- Mpundu (1984) ZR 6.*
7. *Kafue District Council -V- James Chipulu (1995-97) ZR 190.*

**Other Authorities Referred to:**

1. *Spack, John, Employment Law and Practice, 1<sup>st</sup> Edition (2007), London; Sweet & Maxwell.*

The Complainant reached this Court by way of a Notice of Complaint filed on 5<sup>th</sup> August, 2016. He seeks damages against the Respondent for wrongful and or unfair dismissal, interest on the sums found due as well as costs of the action.

Brief facts attending to the claim are that the Complainant was, prior to his being separated from the Respondent Bank, a permanent employee and branch team leader of the Respondent Bank.

On June 13<sup>th</sup>, 2016, the Complainant was charged for gross negligence. It was alleged that the Complainant had failed in his duties to ensure that ATM transactions were reconciled and reported daily, thus resulting in the Bank having a potential loss on K209, 809.09. In the other instance, he is alleged to have delayed in sorting out coins which were carelessly placed in the vault and failed to render a report of a shortage of K17,888.45 on the same coins.

The Complainant exculpated himself and attended a disciplinary hearing.



Consequent upon which he was dismissed from employment on 21<sup>st</sup> June, 2016. An appeal to the Acting Managing Director against the dismissal was not favourable to him.

I had occasion to hear both parties. It was the Complainant's story that as regards the first charge on ATM reconciliations, the reports expected of him on a daily basis could not be done as there were challenges country wide. That the electronic journals that were necessary as input for such reports were not being provided. This fact the Respondent acknowledges. The exhibits under BF7 – emails relating to the failure to Access ATM electronic journals were handy.

The Complainant was not the custodian of ATMs, a fact also acknowledged by the Respondent. That being so, the Complainant could not be linked to the potential loss of K200,000.00 which was as a result of breach of controls under ATM Management.

On the second charge of gross negligence regarding the coin shortage that occurred in 2015, the Complainant with his witness, Mr. Wanga Manda who once worked as Cash Manager in the Respondent Bank, and supervised the Complainant, testified that the Bank of Zambia had stopped accepting coin deposits from Commercial Banks, leading to a build up of coins in the Respondent's Bank that were stacked in tanks in an old vault. The Bank vault was small and the coin counting machines were faulty. This witness had also been charged over the same but the



charge was withdrawn, while others in different branches with similar problems as the Complainant were simply warned in writing.

The Respondents only witness, Ms. Constance Zyambo acknowledged that she was not familiar with the procedures regarding ATMs but that she was aware of various correspondences on the unavailability of journals from the Information Technology Department that were needed to complete ATM reconciliations. She stated that she was aware of problems with ATM reconciliations in the Bank generally.

From the evidence of both the Complainant and the Respondent, it is common cause:

- 1. That there were problems in the Respondent Bank relating to the ATM reconciliations, which problems were known to the Respondent but did little or nothing to address that.**
- 2. That the other charge of negligence regarding coins was also known to the Respondent as the problem of the coin counting machines had been communicated to management.**
- 3. That the Complainant had been charged and made to go through the Disciplinary process.**



The question that immediately comes to the fore is could the dismissal be termed wrongful and or unlawful?

In ***Care International Zambia Limited -V- Misheck Tembo***<sup>4</sup>, the Supreme Court, quoting Sprack John in the book, ***Employment Law and Practice, 1<sup>st</sup> Edition*** page 117 stated thus:

***“Wrongful dismissal..... essentially is a dismissal which is contrary to the contract and its roots lie in the common law. The remedy is usually limited to payment for the notice period.....(In Contrast) Unfair dismissal is dismissal contrary to Statute .....”***

The Supreme Court, in the same case further quoted the learned authors of ***Tolley's Employment Handbook 11<sup>th</sup> Edition*** page 574 where wrongful dismissal is defined to be where an employer dismisses an employee and in so doing acts in breach of his contractual obligations. To succeed in defending this claim, it must be shown by the employer that ***they had a valid reason to justify the dismissal and also that they acted reasonably. (Emphasis Mine).***

In the present case, there is evidence of various correspondences between the Complainant and his employer, Respondent, as well as from CW2 and the Respondent's only witness. There is agreement that the problems of the unavailability of journals from the Information Technology department that were needed to complete ATM reconciliations



was well known to the Bank's management. And that the issue of ATM reconciliations in the Respondent Bank was a general problem all over the country.

This being so, the Respondent cannot put the blame on the Complainant, who had consistently, as shown by the many correspondences, communicated the problems as well as the solutions needed to address those problems.

The case of *Kambatika -V- Zesco Limited Appeal No. 186/2000*; cited by the Respondent is handy. I quote:

*"As we have said in many cases in the past, it is not the function of the Court to interpose itself as an Appellate Tribunal within domestic disciplinary procedures to review what others have done. The duty of the Court is to examine if there was necessary disciplinary powers and if this had been exercised in due form. Where natural justice is expected, the Court examines if this was satisfied. Of course, the Court will also be concerned to see that the disciplinary procedures were properly invoked that is to say that there was in fact a sufficient substratum of fact to support their invocation since otherwise, the exercise of disciplinary powers will be regarded as bad". (Emphasis mine).*



reminded of such problems (the coins case); and goes ahead to charge him for negligence and gross negligence.

Just what was Complainant expected to do in order for him to stay clear of such charges? Was it not enough to write several correspondences (e-mails) complaining of the lack of journals which were a pre-requisite for him to perform this role that was an issue here? Was it not enough to move management of the Respondent that other employees all over the country also complained of having the same problems as did the Complainant, and yet nothing was seemingly done to correct the situation?

My very strong take on this is that the Respondent did not have a valid reason to justify charging the Complainant let alone dismiss him. They equally did not act reasonably. If anything, it is the Respondent that was grossly negligent in addressing the deficiencies that most of its employees brought to its attention.

The effect of this is that the dismissal was wrongful hence null and void and reinstatement could have been feasible but for the strict principles associated with this remedy. So compensatory damages would be appropriate. In ***Daka -V- Zambia Consolidated Copper Mines Limited***<sup>5</sup>, the Supreme Court awarded 24 months salary as damages for wrongful dismissal. But this was in 2004. Fifteen (15) years later (In 2019); considering the difficulties associated with finding jobs especially at a high level the Complainant seemed to have worked; and in the Banking sector, which is one of the professions known for



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The quoted words are by the Supreme Court of Zambia in the case of ***Care International Zambia Limited -V- Misheck Tembo<sup>4</sup>***.

It is common cause that the Complainant was charged, he exculpated himself and was heard in a disciplinary hearing duly constituted. But would it be proper to say that the Respondent had a valid reason or that they acted reasonably in the circumstances of this case? Just what is an employee, in the shoes of the Complainant, required to do in these circumstances?

Here is an employee who writes the employer, not once, not twice, but several times about the deficiencies in the course of him performing the proper functions of his office. And he is not the only one who does so. Many other employees do the same. But management takes no steps, which they are normally required to do, to address or remedy that. Instead, management turns around, in one case, after one year of having been so



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being strict in professionalism; an award of thirty six (36) months gross salary would be considered not excessive and I award that.

***"It is now settled that the Court can give damages for mental upset and distress caused by the defendant conduct in breach of contract"*** These are the words of the Supreme in ***Attorney General -V- Mpundu***<sup>6</sup> which was upheld in ***Kafue District Council -V- James Chipulu***<sup>7</sup>.

So, under the general Head, "Any other relief the Court may deem fit", it is also justifiable and befitting to order damages for mental anguish which can clearly be seen to have been occasioned by the Respondents dismissing the Complainant. Here an award of damages in form of ten (10) months gross salary is considered not excessive.

The total sum due will be subjected to interest at the Bank of Zambia short term lending Rate and thereafter at 6% till the final amount is liquidated. I so Order with costs to be taxed in default of agreement.

Delivered this.....day of ..... 2019.

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E. MWANSA  
JUDGE

