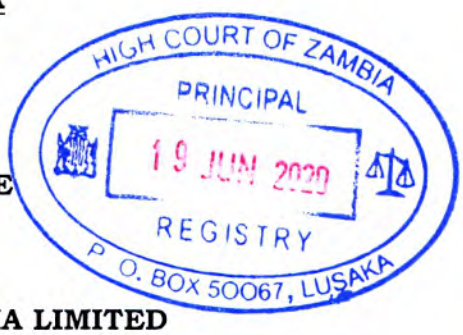
IN THE HIGH COURT FOR ZAMBIA **2017/HP/1066**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



Between:

GLADYS SIFUNGAYAMBE **PLAINTIFF**

AND

FEDEX EXPRESS ZAMBIA LIMITED **DEFENDANT**

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 19TH JUNE, 2020 - IN CHAMBERS

For the Plaintiff : *Mr. G. Cornhill – Messrs. Wilson & Cornhill*

For the Defendant : *Mr. J. Ngisi – Chibesakunda and Company*

JUDGMENT

CASES REFERRED TO:

1. *Rodgers Chama Ponde and 4 Others v Zambia State Insurance Corporation Limited (2004) ZR 151*
2. *Jacobs v Batavia and General Plantations Trust (1924) 1 CH 287 @page 295*
3. *Attorney General v Jackson Phiri (1988/89) ZR 121*
4. *Zambia National Provident Fund v Chirwa (1986) ZR 70*
5. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172*
6. *Attorney General v Phiri (1988/89) ZR 121*
7. *W. Davis & Sons V Atkins*
8. *Agholor v Cheesebrough Ponds (Zambia) Limited (1976) ZR 1*
9. *Laws v London Chronicle (Indicator Newspaper) Limited (1959)2 ALL ER 285*
10. *Holmes Limited vs Buildwell Construction Company Limited (1973) ZR 97*
11. *ZESCO v Muyambango (2006) ZR 22*
12. *Attorney General v Phiri (1988-89) ZR 121*
13. *Livingstone v Rawyards Coal Co. (1880) 5 App Cas. 25 @ 39*
14. *Musanje v Family Health Trust Registered trustees (SCZ) No. 27 of 2017*[14]
15. *Kitwe City Council v William Nguni (2005) ZR 57*
16. *Undi Phiri v Bank of Zambia, Appeal No. 198/2005/SCZ Judgment No. 21 of 2007*

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *Section 26 Employment Act, Chapter 268 of the Laws of Zambia*
2. *Smith and Woods Employment Law*

In this matter commenced by writ of summons and statement of claim filed into court on 6th July, 2017, the plaintiff seeks the following reliefs:

1. *An order that her dismissal from employment by the defendant was wrongful and unfair;*
2. *Damages for wrongful and unfair dismissal;*
3. *One month's salary in lieu of notice;*
4. *Unpaid commissions for the period August to November, 2015 in the sum of K287, 010.61;*
5. *Terminal benefits at three months' salary for the period May, 2001 to 30th November, 2012;*
6. *Interest and costs.*

According to the statement of claim, the plaintiff was employed as Manager District Sales on 1st May, 2001. The contract of employment contained the following conditions:

1. *Gross pay per month of K14,455.00;*
2. *Two days leave days per month;*
3. *Commission of K500.00 for a minimum target of K230,000; K800.00 for a maximum target of K240,000.00 and 8% above target.*

It was further stated that the commission was calculated by the defendant's regional headquarters in South Africa and paid together

with the monthly emoluments without any input from the plaintiff. For the period August to November, 2015, the plaintiff was entitled to the following commission: K80,609.49 for September, K80,609.80 for October, K88,346.31 for November, and K104,104.79 for December, bringing the total to K353,671.30. The plaintiff was paid her commission for the month of August, 2015 in the sum of K80,609 in September, 2015, but a sum of K60,298.28 was reversed on the ground that it comprised sales to Barclays Bank Zambia Plc and Airtel Zambia Plc. Subsequently, the defendant stopped paying the plaintiff her commission.

Further that on two occasions the defendant's security team questioned the plaintiff for communicating with the previous director, Katen Parmer, which the plaintiff readily admitted. In November, 2015, the plaintiff was suspended. The charges of gross leadership failure, using proprietary information for personal gain and gross misconduct, applying non commissionable payments for personal benefits, were preferred against her. The offences do not appear in the disciplinary code.

During the disciplinary hearing held on 11th November, 2015, it was alleged that the plaintiff had company information which she used for personal gain and that she had authorized payments of commissions to the payroll without authority, which enabled the plaintiff to benefit from commissions with respect to Barclays Bank Zambia Plc and Airtel Zambia Plc sales. At the material time the

plaintiff had no access to the information system relating to commissions known as ACCPAC and played no role in the computation of commissions, which was done in South Africa. In any case there was no agreement that sales to Barclays Bank Zambia Plc and Airtel Zambia Plc were not subject to commission and she personally secured the sales.

The plaintiff was purportedly dismissed by letter dated 3rd December, 2015 effective 30th November, 2015 on the ground that she had committed fraud by applying non commissionable payments to herself for gain during the months of August and September, 2015. The letter indicated that the plaintiff would be paid her salary up to November, 2015 together with her terminal benefits.

The defendant reversed the plaintiff's commissions from sales to Barclays Bank Zambia Plc and Airtel Plc for the months August, 2015, payable in September, 2015 and October, 2015 in the sums K60,298.28 and K34,261.23, respectively. On 31st December, 2016, the defendant transferred the sum of K57,233.91 into the plaintiffs account being payment for commissions and salary, with no payment of notice and terminal benefits, and unexplained deductions.

The defendant's defence filed into court on 20th July, 2017 was that the commission was calculated on the basis of the submissions

from the plaintiff. The plaintiff was only entitled to the following commissions: K20,311.21 for September, K46,348.57 for October, K43,047.00 for November and K44, 347.00 for December, bringing the total to K154,053.78. Further that the plaintiff was erroneously paid the sum K80,609.49 as commission for September 2015 and on discovery of the fact, the sum of K60,298.28 was deducted from her October commission as was agreed by the parties. The plaintiff was paid the commission earned for November and December.

It was further stated that the defendant would show at trial that the investigations proved that the plaintiff has access to company information which she used for her personal gain and had authorized payments of commissions to payroll without authority which enabled her to benefit from commissions with respect to Barclays Bank Zambia Plc and Airtel Zambia Plc sales. The plaintiff did play a role in the computation of commissions as she had to submit the accounts upon which commission was payable. It was within the knowledge of the plaintiff that sales to Barclays Bank Zambia Plc and to Airtel Zambia Plc were not subject to commission. It was denied that the plaintiff secured the sales to these accounts. The plaintiff admitted that she overclaimed the commission in the sum of K60,298.28 which was paid in September and further agreed to have this deducted from her salary. The K60,298.28 was offset against the plaintiff's commission that was payable in October, leaving the amount of K13,949.71 still owing to the defendant. The plaintiff was paid all outstanding commission as correctly

calculated, accrued leave days and her November, 2015 salary. The plaintiff was paid the sum of K11, 183.60 in December, 2015.

At trial, the plaintiff gave evidence on oath. It was her testimony that she was employed by the defendant on 2nd May, 2001 as an Accounts Executive and rose to the position of District Sales Manager in charge of Zambia and Mozambique. She produced her contract of employment on page 1 of the plaintiff's bundle of documents. Her gross pay was K12,788,683.16 (unrebased) and was entitled to commission as stated in the statement of claim. There was no limitation on commission on sales.

There was a takeover of the company by Fedex Corporation. Prior to the takeover, the plaintiff reported to Katen Parmar, Regional Director, Zambia, Malawi and Mozambique.

Before the takeover, Accounts Department would populate the debtor's book from the system, that is, Accounts would print a data book from the system which had figures for that month and customer base (per client). Based on these revenues and one's customer base, they would input these figures on an excel sheet which was then sent to accounts for verification of figures and calculations of final commission to be paid. Payments were effected and transferred to payroll. Each Accounts Executive had to go and look for customers bring them on board and earn commission from customers, they brought on board. Alternatively, if an employee left

and a new one came in, they would take over the customers of the previous Accounts Executive.

If the customer base was too big then they were at liberty to surrender some customers to other Accounts Executives that were not performing well. There was no control or limitation on which customer accounts would earn commission. The biggest accounts were Airtel, Barclays, FNB, Finance Bank and Zambia Sugar. Prior to the takeover, the plaintiff was earning commissions on all these accounts except for Barclays and Airtel, which were under the Director's discretion owing to the volumes of figures that would come in. The Director decided what commission to give on these accounts. The plaintiff was entitled to 8% of whatever she made over and above her target. She was the one who procured Barclays and Airtel as clients. She initiated the business contact.

After the takeover, the computation and payment of the commission was system generated from South Africa. All they did as Accounts Executives was submit the client list.

After the takeover she started reporting to the Sales Director, Mr. Sammy Bosama and then Eser Sezek who was in charge of the Southern region and still to Ketan Parmer who was on the ground in Zambia. When Fedex Corporation took over, there was a huge customer base. For customer mapping purposes, they divided

Zambia into regions as they had done in South Africa. All accounts had to be allocated to Accounts Executives.

The plaintiff identified the system generated report that South Africa used to calculate commissions on page 99 of the defendant's bundle of documents. Barclays and Airtel were her clients and thus fell under her name.

The plaintiff was paid commission for the month of August, 2015 which was computed in the month of July. She confirmed that the amount paid for August was correct. Commissions for September were not paid because they fell in October. They were not paid because that is when Eser told the plaintiff that she was not to receive commission from Barclays and Airtel. She was told that it was wrong for her not to have brought it to anyone's attention that she was getting commission for Barclays and Airtel. She admitted that she erred not to have told anyone but insisted that she earned the commission. She told Eser that they could reverse the commission if she was paid in error. This she said to safeguard her job. She showed the court an email on page 40 which she wrote to Eser immediately after their discussion. She was paid her commissions in January, but not for Airtel and Barclays.

A week after their discussion she received a suspension letter (on page 15 of the plaintiff's bundle of documents) asking her to attend a disciplinary hearing. She pointed out the part of the letter which

read *"further, this suspension is without pay and without payee benefit."*

It was her testimony that there is no charge for breach of trust and abuse of power in the disciplinary code. The particulars of this particular charge were said to be use of proprietary information for personal gain. She had no idea what information she was alleged to have used. She explained that there was a system called Zambia 50 and in that system she only had access to each Accounts Executives' sales commission and her own commission because the system was made in such a way that to access anything else, you had to be unblocked because all other parts of the systems were blocked.

On the second charge of fraud, application of funds (non-commission payments) for purpose of benefitting without authorization, she said she had no input to the computation as it was done in South Africa.

At this point the plaintiff had funds which she had been paid, sitting on her bank account. She reiterated that she was entitled to these commissions as her contract of employment provided for commissions on certain clients.

Concerning the second part of the second charge stating "repeated breach of compulsory rules, policies and procedures", it was her

testimony that there were no written rules, policies or procedures at the time. However, there was a document that was being worked on.

The outcome of her disciplinary hearing was that her employment was terminated. She read out the third paragraph of her letter of termination as follows:

> *"You are hereby given notice of termination of your contract of employment, you will be paid up to and including 30th November, 2015. Terminal benefits will be paid to you as is legislated."*

On page 34 of the plaintiff's bundle of documents, the plaintiff pointed out an email she sent to Human Resource Department, to which she said there was no response. She showed her pay slip for 30th November on page 38 of the plaintiff's bundle of documents. She told the court that her basic pay was about K14,500. She further showed the court the pay slip for 31st January, 2016, on page 40 where the basic pay shows as K5,148.00 and the commission of K73,444.00. It was her testimony that there is no breakdown showing the months for which it was earned. She further showed the court the document on page 41 which she said came from South Africa. She pointed out that she was entitled to the commission which included Barclays and Airtel, September- K80,609.49, October- K80,609.80, November- K88,346.31 and December- K104,104.79.

In cross examination, she denied that she was responsible for making submission on which the South African office based its calculations. She also denied being told that the Barclays and Airtel accounts were not commission based. She was referred to page 20 of the plaintiff's bundle of documents.

She confirmed that she was summarily dismissed following the disciplinary hearing. She refused when asked whether the contract provided for summary dismissal. When referred to page 11, to read clause 17.6 of the contract, she denied signing the contract. She told the court the contract she has with the defendant is the one on page 1 of the plaintiff's bundle of documents. When asked where the contract provided for terminal benefits, her response was that it was not in the contract.

In re-examination, she clarified that initially they would compute commission from Zambia based on client base, submit it to Finance who would verify, remove any taxes and then submitted to the Director for Approval for final payment.

An exercise came up where South Africa wanted to demarcate Zambia. They were asked to look at the total client base for Zambia because it included closed and dormant accounts. They cleaned up and ensured that each account had an Accounts Executive. When that was submitted to South Africa, it was not communicated that the unit was to be used for commission calculations. As far as she

was concerned, she had no direct input in computation of commissions. Her submissions as she understood, were for geographical demarcations. There was no communication about any accounts from which she could not draw commission.

She pointed to page 32 of the plaintiff's bundle of documents where it was stated that the terminal benefits would be as legislated.

The defendant's witness was Tanya Antonio Ferreira Richards, a Senior Human Resource Specialist, Fedex Express, South Africa. She testified that the plaintiff was responsible for merging sales accounts in Fedex Zambia and then monitor the activities of the Sales team which would include monitoring performance indicators and sales visits on Fedex customers.

Her testimony was that the dispute concerns allocations of Airtel and Barclays accounts to the plaintiff and the subsequent commissions paid out in these accounts. Commissions were erroneously paid out due to certain customers; Barclays and Airtel, who were classified as non-commission earning accounts. The commission was erroneously paid out because the plaintiff allocated them to her name. Originally, they were not in her name. These accounts were listed under non-commission or were listed under the previous Manager, Ketan Parma, which were not for earning commission.

After the plaintiff allocated the clients to herself, it was not communicated to her Manager Eser to confirm. Investigations commenced to find out why the clients were allocated to the plaintiff. The suspension letter was drawn up with charges and also a notice to attend the hearing. She pointed the court to page 17 of the defendant's bundle of documents. The plaintiff was dismissed after the hearing. The plaintiff was paid off in accordance with the tabulation on page 96 of the defendant's bundle of documents. Deductions of the commissions erroneously paid were made.

In cross examination, ***DW1*** confirmed that the plaintiff's contract did not have any provisions stating accounts that would not attract commission. Further that there was no other document to that effect. When asked which accounts in Zambia did not attract commission, she said she did not know as she was not in sales. When asked whether they could be written somewhere, she expressed ignorance. She however pointed out that page 206, Supreme Furnitures was one of the non-commission accounts and CAMCO and Willy Mwale Film Foundation. She could not confirm the author of the document nor whether all non-commissioned accounts would be indicated on the document on page 209. It was her position that the document would show if an account attracts commission or not. She explained that it shows the accounts with Accounts Executives, and for the other accounts it is written non-commission.

When asked about Mr. Ketan Parma, she said he was the Manager of Fedex who left in 2015, and the plaintiff managed his accounts when he left. When referred to pages 183 to 184 of the document, she told the court that the Barclays account did not state non-commission. She could not say whether there was any correspondence to the plaintiff to state that she would not be earning commission on the accounts that she had taken over from Mr. Ketan Parma. She could not point to any correspondence from Mr. Eser, either.

She confirmed that the concern was about the magnitude of the commission earned.

On the specific charge that the plaintiff used confidential company information, she was asked on what the propriety of the information was. Her answer was that the list of customers for Fedex, systems and any information available that belonged to the company in her position. However, she could not point out anything in that regard.

She further confirmed that the plaintiff's dismissal was in retrospect. She further confirmed that there is no payment in lieu of notice indicated on the computation of terminal benefits on page 41 of the plaintiff's bundle of documents. She could not explain what 'terminal benefits would be paid as legislated' meant.

In re-examination, ***DW1*** told the court that Ketan was not receiving a commission under the Barclays account. She reiterated that she was not aware whether the plaintiff was aware of any correspondence to the effect that Barclays was a non-commission account.

The parties filed written submissions.

It was submitted on behalf of the plaintiff that the issues that are cardinal for determination are, entitlement to commissions, wrongful dismissal and damages or remedy. It was their submission that the plaintiff was entitled to commission as stated in the contract of employment and that this was admitted by the defendant.

Concerning the defendant's averment that the sales to Barclays and Airtel were not subject to commission, it was submitted that the jurisprudence of the court is to confine the parties within the four corners of the document they have chosen to enshrine in their agreement, neither party may adduce evidence to show that his intention was misstated. Counsel cited the case of ***Rodgers Chama Ponde and 4 Others v Zambia State Insurance Corporation Limited (2004) ZR 151***[1] where it was held that:

> ***"Since payment of gratuity was strictly limited to the number of years served, which did not include parts of those years, we can clearly tie the attempt by the appellants through their parol testimony to add, vary or***

contradict clause 29.4 as stipulated in the Zimco conditions of service. On the totality of the evidence as contained in the record of appeal, the appeal has no merit and is dismissed."

I was further referred to the case of ***Jacobs v Batavia and General Plantations Trust (1924) 1 CH 287 @ page 295***[2] where Laurence J was held that:

"It is firmly established as a rule of law that parol evidence cannot be admitted to add to, vary or contradict a deed or other written instrument. Accordingly, it has been held that... parol evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties."

It was thus submitted that the efforts to suggest that there was no commission for sales to Barclays and Airtel is parol evidence as it is not contained in the contract.

It was pointed out that Barclays does not appear as a non-commission account unlike Supreme Furnishers, CAMCO and Willy Mwale Foundation on page 206 of the defendant's bundle of documents. It was submitted that the provision of the contract on commission cannot be altered by the defendant's parol evidence. ***DW1*** in her testimony alluded to the fact that the plaintiff took over the accounts after Parma left, this corroborates the plaintiff's evidence that she managed the Airtel and Barclays accounts. It follows that the plaintiff is entitled to the commission in the sum of

K287,010.61 less the sum of K73,444.29 paid on 31st January, 2016.

On wrongful dismissal, I was referred to the definition by the learned authors of ***Smith and Woods Employment Law*** as follows:

> *"Essentially an action for breach of contract. The action typically alleges that some procedural term of the employment contract such as a notice provision has been breached. It can however involve a breach of a term relating to permissible reasons for dismissal in the rare instance where a contract specifies such reasons...*
>
> *More typical however is a case where the employer dismissed the employee with no or inadequate notice, or purported to dismiss him for cause where the facts did not justify such action."*

I was further referred to the case of ***Albert Mwanaumo and Others v Africa Mining Plc and Another [2006/HK/385]***, where my learned sister, Justice Kaoma, quoting the case of ***Attorney General v Jackson Phiri (1988/89) ZR 121***[3] stated the following:

> ***"In determining whether the facts supported the dismissal for cause the court will not interpose itself as an appellate tribunal but shall look at whether there was power to discipline and the power was used correctly and the relevant facts taken into account."***

Further citing the case of ***Zambia National Provident Fund v Chirwa (1986) ZR 70***[4] the court in that case held as follows:

"If it is proven that an offence has been committed for which the appropriate punishment is dismissal no injustice arises from failure to comply with laid down procedure."

It was submitted that the plaintiff was charged with offences from which she exculpated herself and a hearing was conducted. It cannot therefore be reasonably contested that there was procedural default on the part of the defendant. The contest is whether the dismissal is supported by facts. Although there are two charges, a perusal of the minutes of the hearing shows that the focal issue in the disciplinary proceedings was that the plaintiff claimed and earned commission on sales to Barclays and Airtel resulting in huge commissions for the months of August and September, 2015.

It was submitted that it is wrongful and a complete affront to logic and justice to dismiss an employee for claiming what was due to her expressly in a contract of employment. If the defendant wished at any material time to amend the contract with respect to the provisions for commission, the defendant should have opened dialogue with its employees and amended the contract.

On remedies, it was submitted that damages are available to an employee whose employment has been wrongfully dismissed.

I was referred to cases in which it was said that the Supreme Court has varied its award of damages depending on the difficulty in securing employment and the callousness or cruelty of the

employer. In the case of ***Chitomfwa v Ndola Lime SCZ No. 28 of 1999***, the court granted 24 months because the plaintiffs were security guards with no formal skills; where as in the case of ***Kasote Singogo v Chilanga Cement SCZ No. 13 of 2009*** the court awarded 24 months as punitive damages due to the callous manner in which the termination was implemented.

It was contended that in the letter of termination itself, the defendant sought to pay the defendant her terminal benefits as legislated. Terminal benefits were not paid. The plaintiff was only paid her salary and commissions less commissions for sales to Airtel and Barclays.

It was further brought to my attention that since the contract was effectively terminated by the letter of dismissal, I should apply the wording of the dismissal as quoted. It was submitted that it is clear that the defendant desired to terminate the contract of employment by way of notice and payment of the terminal benefits pursuant to ***Statutory Instrument No. 2 of 2011***, as amended by ***Statutory Instrument No. 46 of 2012. Section 8 of the SI no. 2 of 2011*** provides for a payment of 3 months basic pay for each completed year of service. Alternatively, I was invited to consider damages of 12 months considering the plaintiff was dismissed for accessing a contractual right.

It was submitted on behalf of the defendant that the claim for unfair dismissal is incompetent and must fail. Counsel contended that the

claim for unfair dismissal in accordance ***with section 108 of the Industrial and Labour Relations Act*** envisages that the termination of the plaintiff's contract was on the basis of discrimination on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status of the employee.

It was further stated that on the claim for wrongful dismissal that the plaintiff was dismissed without just cause, the burden of proof to show that the plaintiff's dismissal was unlawful or wrongful lies on her. I was referred to the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172***[5] where Ngulube DCJ, as he then was, stated the following:

> ***"...There is one observation I wish to make before leaving this subject. Mr. Phiri's general approach has been to allege that the respondent has not adduced evidence in support of the allegations in the dismissal letter. I have found that the respondent did in fact adduce such evidence. In this process, however, I have also pointed out the deficiencies in the appellant's own evidence. It appears that the appellant is of the view that the burden of proof lay upon the respondent and it is on this that I would like to say a word. I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes an allegation, it is generally for him to prove these allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."***

I was further referred to the case by my learned sister Kaoma J, as she then was, in the case of ***Samson Katende and Crosby Bernard v NCF***

Africa Mining Plc [2009/HK/286] HC 2011 where the statement of Justice Ngulube in the ***Wilson Masauso Zulu*** case, above, was followed.

It was submitted that the burden lies on the plaintiff to proven that the defendant wrongfully dismissed her. To prove that the plaintiff ought to have shown either that there was no basis for the defendant to dismiss her or that the defendant did not adhere to its own disciplinary procedures. The latter ground being dependent on whether it is unclear if the plaintiff committed the offence. I was gain referred to the case of ***Attorney General v Phiri (1988/89) ZR 121***[6], where Ngulube CJ, stated:

> ***"It was pointed out that, in accordance with the procedures laid down, the charges were preferred and the plaintiff given every opportunity to be heard in his own defence. We agree that once the correct procedures have been followed, the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since it is obvious that any exercise of powers will be regarded as bad if there is no substratum of fact to support the same."***

It was submitted that the plaintiff did not show that the defendant did not follow procedure when dismissing her, but instead it is evident that the plaintiff was accorded a fair hearing where she was found guilty of the allegations levelled against her. The Phiri case has given guidance that there must exist a substratum of facts that lead to the dismissal.

It was further pointed out that this court does not consider this case as an appellate body ***(Attorney General v Phiri).***

It was contended that the former Regional Director of the defendant company, Mr. Katen Parmar, was initially allocated the Airtel and Barclays accounts but was not receiving any commission for them as per company practice. That upon Mr. Katen Parmar leaving the defendant, the plaintiff allocated the Airtel and Barclays accounts to herself. She proceeded to submit to the Head Office in South Africa accounts on which commission was to be paid, these included the Airtel and Barclays accounts for which she submitted that commission was to be paid to her. That through an email to Eser Sezek, the plaintiff confirmed that she erred by not informing him that she had submitted the Airtel and Barclays accounts for commission when she was aware that they were non-commission accounts. She was thus charged with fraud for causing the application of funds from non-commission accounts to be paid to herself without authorization.

On damages for wrongful and unfair dismissal, it was submitted that the claim is incompetent in the circumstances of this case, as firstly, an employer has the right to discipline its employees for offences such as theft and/or fraud as was recognized by the Supreme Court in the case of ***Zambia Electricity Supply Corporation Limited v David Lubasi Muyambango (2006) ZR 22.*** It was submitted that the allegations were not false. The record shows that the plaintiff

admitted that she erred by adding non-commission accounts to her commission pay-out despite being informed that revenues from non-commission accounts were only to be used to pay salaries (page 20 of the defendant's bundle of documents).

On one month's salary in lieu of notice, it was submitted that according to the plaintiff's contract of employment on pages 9 to 16 of the defendant's bundle of documents, clause 17.2 shows that payment in lieu of notice is payable as an alternative to cases where a party does not give one month's notice of termination. Further that as per clause 17.6 of the contract of employment, the parties agreed that it could be terminated summarily provided the contractual requirements and law are followed. Counsel pointed out that in casu the plaintiff was summarily dismissed following a disciplinary hearing that found her guilty of the charges levelled against her. It was submitted that the plaintiff is not entitled to payment in lieu of notice which would arise if she was terminated by notice. Despite the plaintiff not being legally entitled to payment in lieu of notice, the defendant inadvertently proceeded to pay her a December, 2015 salary (page 41 of the plaintiff's bundle of documents, on summary of payments). The record will show that the plaintiff was summarily dismissed on 3rd December, 2015, backdated to 30th November, 2015.

It was the defendant's position that it has been shown that the plaintiff was informed on numerous occasions that the status quo

was to be maintained in so far as non-commission accounts were concerned, more specifically, that the Barclays and Airtel accounts were non-commission accounts to which the plaintiff was not to claim. It has further been shown that not only did the plaintiff acknowledge the receipt of the said information, but she further admitted having been in error once it was discovered that she had included these accounts in her commission pay-out submissions sent to the Head Office, in South Africa. It is clear that the computation of the amount of ZMW287,010.61, as set out from paragraphs 5 to 7 of the statement of claim is a commission computation inclusive of the non-commissionable Barclays and Airtel accounts. It was submitted that it has been established that the plaintiff was paid all outstanding commission as correctly calculated, rightly excluding the Barclays and Airtel account which were non-commission accounts, and thus this claim should fail.

Finally, that the terminal benefits at three months' salary for the period May, 2001 to 30th November, 2015 cannot stand. The notice of dismissal (on page 76 of the defendant's bundle of documents) stated 'the terminal benefits will be paid through to you as legislated.' The applicable law was the ***Employment Act, Cap 268 of the Laws of Zambia and the Minimum Wages and Conditions of Service, Cap 276 of the Laws of Zambia.*** It was submitted that neither of these laws entitle a non-protected employee to terminal benefits. At trial the plaintiff confirmed that she was in a senior management position in the defendant's company and therefore she was not a protected

employee. She was unable to point to the part of contract of employment which entitles her to terminal benefits. Counsel submitted that the plaintiff was not entitled to terminal benefits.

It was their prayer that the plaintiff's claims be dismissed in their totality with costs to the defendant in consideration of the circumstances in this case, whereby the plaintiff abused company information by awarding herself with unauthorized commission and later filing a frivolous claim before the court.

I am highly indebted to Counsel for these helpful submissions.

In this case it is not in disputed that the plaintiff was dismissed for allegedly allocating to herself and collecting commissions from non-commission accounts. In her own words, ***DW1*** put it this way in court:

> *"The dispute concerns allocations of Airtel and Barclays accounts to the plaintiff and the subsequent commissions paid out in these accounts. Commissions were erroneously paid out due on certain customers, Barclays and Airtel, who were classified as non-commission earning accounts. The commission was erroneously paid out because the plaintiff allocated them to her name. Originally, they were not in her name. These accounts were listed under non-commission or were listed under the previous Manager, Ketan Parma, which were not for earning commission."*

The plaintiff was charged with two offences which appear on page 18 and 24 of the plaintiff's bundle of documents, also contained in

the defendant's bundle of documents. The charges were gross misconduct and gross leadership failure. Under gross misconduct it was allegedly that the plaintiff fraudulently applied funds (non-commission payments) to herself for the purpose of benefitting without authorization. The particulars of which was that between September and October, 2015 the plaintiff submitted payment of commission for non-commissionable accounts for personal gain without authorization to payroll. Secondly, that she had repeatedly breached company's rules, policies and procedures resulting in serious consequences.

Under the charge of gross leadership failure, where breach of trust and abuse of power was alleged, it was stated that the plaintiff had used propriety information for personal gain.

I am guided by the case of ***Attorney General v Jackson Phiri (1988/89) ZR 121*** and I have taken care not to impose myself as an appellate tribunal.

This case is a case of unfair dismissal and the task before me is to determine whether the plaintiff was unfairly dismissed.

In the case of ***Undi Phiri v Bank of Zambia, SCZ Judgment No. 21 of 2007,*** it was held that, quoting the case of ***West Midlands Cooperative Society V Tipton (1986) 1 RNLR 112*** in which Lord Bridge quoting from a judgment by Viscount Dillard in ***W. Davis & Sons V Atkins***[7] said:-

"Failure to follow a procedure prescribed in the code may lead to the conclusion that a dismissal was unfair."

In the case, there is no issue concerning the procedure for termination as has been rightly pointed out by the plaintiff that the contract was effectively terminate by the letter of dismissal. The plaintiff urged me to consider, and rightly so, to apply the wording of the dismissal.

These words are contained on page 32 of the plaintiff's bundle of documents, in a letter dated 3rd December, 2015 and reads, in part, as follows:

> *"Based on the review of the sanction outcome, dated 30th November, 2015, it has therefore been decided to summarily terminate your services from the company effective 30th November, 2015."*

The employment relationship between by the plaintiff and the defendant was governed by a contract of employment. The contract was exhibited on page 1 of the plaintiff's bundle of documents, dated 26th April, 2001. The Supreme Court has given guidance on when the court can find that a plaintiff was unfairly dismissed in cases where employment is governed by contracts, in a number of authorities. In the case of ***Agholor v Cheesebrough Ponds (Zambia) Limited (1976) ZR 18*** the court held, inter alia, that:

"It is trite law that a master can terminate a contract of employment at any time, even with immediate effect and for any reason. If he terminates outside the provisions of the contract then he is in breach thereof and is liable in damages for breach of contract."

As to whether the defendant's termination of the plaintiff's contract was done in breach of the contract of employment, as stated in the case of ***Laws v London Chronicle (Indicator Newspaper) Limited (1959)2 ALL ER 285[9]:***

"...since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that the question must be if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."

Moreover, in the case of ***Holmes Limited vs Buildwell Construction Company Limited (1973) ZR 97[10]***, the court held that:

"Where parties have embodied the terms of their contract in a written document extrinsic evidence is not generally admissible to add, vary or subtract from a contradict the terms of the written contract. Exception to the rule is where extrinsic evidence is meant to show that the written instrument was not intended to express the whole agreement between the parties."

I have perused the contract of employment and note that clause 16, captioned *'Period'* provides for commencement and termination of the contract of employment. It provides concerning termination that:

"The employment shall be terminable either on full calendar month's written notice by either party.

This agreement may be terminated summarily by the company without compensation or payment in lieu of notice if you commit material breach of any of your obligations under this agreement in any circumstances justified by law."

As stated above the plaintiff was summarily dismissed following a charge of, in summary, of allocating to herself and drawing commission from non-commission accounts, that is Barclays Bank and Airtel, an act which the defendant finds fraudulent. The plaintiff labored in her testimony to show that she was entitled to these commissions. It was her testimony that she had acquired these customers and hence her entitlement to the commission.

In the plaintiff's testimony she told the court that prior to the takeover, she was earning commissions on certain accounts, except Barclays and Airtel. She testified that Barclays and Airtel were under the Director's discretion owing to the volumes that came in. It was further testified that the Director decided what commission to give these accounts. It was further her testimony, which she even confirmed in re-examination that Mr. Ketan never used to receive commission on these accounts.

I am mindful of the plaintiff's submission on parol evidence, but I am of a firm view that the determination as to whether the plaintiff was aware or not that Barclays and Airtel accounts were non-commission accounts is not reading anything into the contracts. In

my view, the question is not whether or not she ought to have known but rather whether or not she knew that Barclays and Airtel accounts were non-commission accounts. The answer to the latter question is in the affirmative as testified by the plaintiff herself. That is why she conceded that she erred by claiming commission on the two accounts. This is especially that she also knew that there were certain accounts on which commission could not be collected. The plaintiff argues in most of her correspondence in the bundle that the statement that business would continue 'as usual' was an ambiguous term. I don't see anything ambiguous as the plaintiff herself explained that after the takeover there was an attempt to restructure the management of accounts geographically but it was not successful and therefore decided to leave the structure as before.

It was stated in the case of ***ZESCO v Muyambango (2006) ZR 22***[11] that inter alia:

> ***"The duty of the court is to examine if there was the necessary disciplinary power and if it was exercised properly.***
>
> ***Where it is not in dispute that the employee has committed an offence for which the appropriate punishment is dismissal and he is so dismissed, no injustice arises from failure to comply with the laid down procedure in the contract and the employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal was a nullity."***

As already stated, the plaintiff did not take issue with the procedure for dismissal, what is left for me is to decide whether on the facts before me the disciplinary measures against the plaintiff are justified. In the case of ***Attorney General v Phiri (1988-89) ZR 121***[12], already cited above, the court held, inter alia, that:

> ***"Once the correct procedures have been followed the only question which can arise for the consideration of the court, based on the facts of the case, would be whether there were in fact facts established to support the disciplinary measures since any exercise of powers will be regarded as bad if there is no substratum of fact to support the same."***

In this case, I opine that the defendant had substratum for terminating the summarily dismissing the plaintiff. It is clear that the plaintiff collected commission on a non-commission account, knowing very well she could not. Even if she said she did not know that she was supposed to notify the Director, it was her testimony that Barclays and Airtel accounts were under the discretion of the Director. One wonders how she thought she could now override the Director on those same accounts. She could have at least sought the Director's discretion for her to apply the commission on these two accounts. However, she decided to treat them like ordinary accounts under her portfolio. I cannot find any reason for faulting the defendants for finding the plaintiff's action warranting summary dismissal. I am not convinced that the plaintiff has discharged her burden of proof that she was unfairly dismissed.

Concerning damages for wrongful dismissal and unfair dismissal, the authors of Mc Gregor on damages have stated that the object of an award of damages is to give the plaintiff compensation for damage, loss or injury he has suffered. I quote the speech of Lord Blackburn in an old case of ***Livingstone v Rawyards Coal Co. (1880) 5 App Cas. 25 @ 39***[13] where he stated:

> ***"The measure of damages is that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is not getting his compensation or reparation."***

More recently, the Supreme Court has quoted the same words of Lord Blackburn in the case of ***Musanje v Family Health Trust Registered trustees (SCZ) No. 27 of 2017***[14] as follows:

> ***"The principle of compensation is the sum of money which will put the party who has been injured or suffered, in the same position as he would have been in, if he had not sustained the wrong from which is now getting compensation or reparation."***

In this case the plaintiff has not suffered any injury, the claim of unfair or wrongful dismissal having failed, she is, therefore, not entitled to any damages.

On unpaid commissions, according to the plaintiff, she was paid commission for the month of August, in the sum of K80,609, though a sum of K60,298.98 was reversed on the ground that it comprised

sales to Barclays. It is on record that the plaintiff agreed to the reversal, but now claims commissions for September, October, November and December, 2015.

In paragraph 19 of the statement of claim, the plaintiff avers that on 31st December, 2015, the defendant transferred a sum of K57, 233.91 into the plaintiff's account being payment for commissions and salary, without payment of notice and terminal benefits.

I have seen the tabulations of the amounts due to the plaintiff in terms of commission on pages 94 to 98 defendant's bundle of documents. The claim for commissions is based on the belief that she is also entitled to the commissions from Barclays and Airtel accounts. I have already established above that the plaintiff was not entitled to this. The plaintiff was, therefore, already paid her correct commission excluding the Barclays and Airtel accounts, unless, even disregarding the commissions earned on Barclays and Airtel accounts the plaintiff was underpaid, which evidence was not before me.

I also agree with the defendant that since the plaintiff was paid her December, 2015 salary which she did not work for, she cannot turn back and claim that she was not paid one month's pay in lieu of notice. This is in line with what was held in the case of the case of ***Kitwe City Council v William Nguni (2005) ZR 57***[15] that:

> ***"It is unlawful to award a salary or pension benefits, for a period not worked for because such an award has not been earned and might properly termed as unjust enrichment."***

Furthermore, my considered view is that a person whose contract of employment has been summarily terminated is not entitled to terminal benefits.

Counsel for the plaintiff referred me ***S.I No. 2 of 2011, Minimum Wages and Conditions of Employment (General) Order as amended by S.I. No. 46 of 2012 Minimum Wages and Conditions of Employment (General)(Amendment).***

As rightly pointed out by Counsel for the defendant, this law excludes employees in the position such as the plaintiff held. Paragraph 2 of S.I. No. 2 of 2011 provides that the S.I does not apply to employees in management. The S.I. No. 46 of 2012 as amended did not alter this position.

Furthermore, the ***Employment Act, Chapter 268 of the Laws of Zambia,*** provided in ***section 26*** that:

> *"Where an employee is summarily dismissed, he shall be paid on dismissal the wages and other working or other allowances due to him up to the date of such dismissal."*

In the case of ***Kitwe City Council v William Nguni (2005) ZR 57,*** cited above, the Supreme Court affirmed the observation by the trial court which stated that:

"...we also agree that he decided to resign in the face of admissible disciplinary charges against him in order to get some terminal benefits, which he would not have been entitled to had he been dismissed."

Similarly, in the case ***Undi Phiri v Bank of Zambia, Appeal No. 198/2005/SCZ Judgment No. 21 of 2007***[16] the court observed the following:

"The plaintiff only pleaded for leniency and was successful in that the summary dismissal punishment was substituted with a discharge enabling the plaintiff to get his terminal benefits."

Clearly, the above authorities confirm that there are no terminal benefits for anyone whose contract of employment has been summarily terminated.

In view of this, I dismiss the plaintiff's action in its entirety for lacking merit.

I make no order as to costs.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 19TH DAY OF JUNE, 2020.

G.C. CHAWATAMA
HIGH COURT JUDGE