

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

COMP/IRCLK/543/2021

BETWEEN:

HUMPHREY MUSHILI

AND

NATIONAL SAVINGS AND CREDIT BANK ZAMBIA

Before The Hon. Mrs. Justice T.S.Musonda

For the Complainant : In Person

For the Respondent : Mr. Y. Silomba of Equitas Legal  
Practitioners



COMPLAINANT

RESPONDENT

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JUDGMENT

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Legislation referred to:

1. *The Employment Code Act, No. 3 of 2019*
2. *Industrial and Labour Relations Act, CAP 269*
3. *The Employment Code (Commencement) Order, Statutory Instrument No.29 of 2019*

Cases referred to:

1. *Wilson Masauso Zulu V Avondale Housing Project Limited, (1982) ZMSC 21*
2. *Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa, (1986) ZMSC 17*

OTHER WORKS REFERRED TO

1. *Halsbury's Laws of England (4<sup>th</sup> Edition)*
2. *W.S.Mwenda and Chanda Chungu, A Comprehensive Guide to Employment Law in Zambia (University of Zambia Press, 2021)*

INTRODUCTION

1. By a Complaint dated 5<sup>th</sup> October, 2021, the Complainant, Humphrey Mushili claimed that he was an employee of the Respondent from 1<sup>st</sup> November, 2015 until 2<sup>nd</sup> June, 2020 when he was dismissed by the Respondent. He sought the following reliefs:

- (i) An order directed at the Respondent for payment of the sum of K324,300.00 being subsistence allowance for the period of 18 months;
- (ii) Payment of K30,000.00 being wages for April and May 2020;
- (iii) In the alternative to the payment of K68,325.48 being six months basic salary, plus K16,800.00 being 28 days of subsistence allowance to find accommodation as per the collective agreement;
- (iv) Punitive and exemplary damages for unfair treatment and for the willful and deliberate refusal to pay him his accrued benefits plus wages when the Respondent was fully aware of the law pertaining to payment following dismissal;
- (v) Damages for inconvenience, mental anguish and distress;
- (vi) Any other order or award as the Court may consider fair in the circumstances of the case;
- (vii) Interest on any sums found due at the commercial bank lending rate; and
- (viii) Legal costs

2. By an Answer dated 5<sup>th</sup> April, 2022, the Respondent claimed that the Complainant was not entitled to any of the reliefs claimed on the basis of grounds stated in the Answer. The Answer was supported by an affidavit of even date.

SUMMARY OF EVIDENCE LED

3. The Complainant adduced evidence for himself, whilst the Respondent adduced evidence from Pius Jere, Manager-Industrial and Employee Relations of the Respondent.

The Complainant's case

4. The Complainant opted to rely on his Complaint and its supporting affidavit.

5. The Complainant in his affidavit averred as follows:

- (i) That at the time of his engagement his salary was K74,400.00 per annum plus other benefits and incentives which formed part of his conditions of service contained in the collective agreement.
- (ii) That he was entitled to K600.00 per night as subsistence allowance and K300.00 for the day of return payable when travelling out of station on authorized Bank Business as per exhibit, "HM2", Copies of the Collective Agreements applicable up to the point of his dismissal.
- (iii) That he reported for duty in Mwense on or about 1<sup>st</sup> November, 2015 and was within the same months instructed to travel to Lusaka on authorized Bank Business by the Human Resource Officer at the time, Mr. Kasawa Mwale.
- (iv) That he was instructed to work in Lusaka until the Mwense Branch would be operational.

- (v) That he reported to Lusaka on or about 17<sup>th</sup> November, 2015 and reported at the Respondent's Lusaka Main Branch where he worked until sometime in March, 2016.
- (vi) That he was transferred to the Respondent's Head Quarters where he worked up to June, 2017 when he was instructed to return to his duty station in Mwense.
- (vii) That he made several requests for payment of his subsistence allowance for the 18 months away from his duty station and was given verbal assurances that his subsistence allowance was going to be paid but no action was taken until his dismissal on 2<sup>nd</sup> June, 2020. He was never paid until his dismissal on 2<sup>nd</sup> June, 2020.
- (viii) That he received his letter of dismissal for missing work for a consecutive period of 10 days as per exhibit, "HM3".
- (ix) That prior to his dismissal he was never charged nor subjected to any disciplinary hearing of any sort by the Respondent.
- (x) That his dismissal was wrongful and or unfair.
- (xi) That upon his dismissal the Respondent indicated that he was only entitled to the value of his accrued leave days and nothing more, contrary to the clear provisions of the law in this jurisdiction on wages and benefits accrued.
- (xii) That he was entitled to be paid his full benefits upon his summary dismissal from employment.
- (xiii) That pursuant to clause 32.0 of the Respondent's Disciplinary Code, he was entitled

to his full terminal benefits where his termination was due to desertion which was the reason given by the Respondent in the letter of dismissal.

(xiv) That he was removed from the payroll as of April, 2020 by the Respondent before he was formally dismissed from employment on 2<sup>nd</sup> June, 2020, resulting in suffering, distress and anguish.

(xv) Those efforts to resolve the matter amicably failed.

(xvi) That the Complainant felt he had been unfairly treated by the Respondent in the manner his case had been handled. This was on account of the Respondent's failure to pay what was due to him after 4 years of service.

6. The Complainant's responses under cross-examination were as follows:

7. He maintained that the Respondent's Mwense Branch was not operational at the time he reported on 1<sup>st</sup> November, 2015.

8. He conceded that he had no evidence on record to prove that he was instructed by the Human Resources Officer, to travel to Lusaka from Mwense on authorized Bank Business.

9. He conceded that he had no evidence that he was instructed to work in Lusaka for an unspecified period until the Respondent's Mwense Branch was operational.

10. He conceded that he had no evidence to prove that he worked in Lusaka from 17<sup>th</sup> November, 2015 until March, 2016.

11. He conceded that he had no evidence to prove that he was moved to the Respondent's Head Office where he worked up to June, 2017.

12. He conceded that he was not dismissed, but rather his contract was terminated.

13. He denied having been convicted and sentenced to a term of 18 months.
14. It was his position that he was not reporting for work because he was remanded for seven months on account that Courts were closed.
15. He conceded that he had no evidence to prove that he notified the Respondent that he was facing criminal charges and had been remanded in custody.
16. It was his position that after he communicated with the Respondent, he was notified that the Respondent would wait for him until his release.
17. He conceded that according to Clause 25.1.4 of the Grievance and Disciplinary Code, an employee who was convicted was deemed to be incapable of executing his duties.
18. It was his position that although he was fined and found liable, he was never convicted.
19. He conceded that the reason his contract was terminated was because of desertion and that the penalty for desertion was a discharge.
20. He conceded that there was no evidence on record to demonstrate that he had been granted permission to be away from work.
21. He denied ever sending his wife to present a sick note, "PJ4", to the Respondent to explain his absence, because at that time he was remanded in custody.
22. He denied having gone to UTH for treatment.
23. He admitted that he obtained a loan from the Respondent which he never liquidated at the time of termination of his contract.
24. He denied the suggestion that he was not paid his accrued benefits because he still owed the Respondent.

25. Under re-examination, it was his position that he had no evidence to prove that he was instructed to work from Lusaka because instructions were issued through phone calls.

The Respondent's case

26. RW1 Pius Jere, informed the Court that he would adopt the contents of the affidavit and Answer as part of his witness statement. He augmented his affidavit evidence with oral testimony.

27. It was his position that the Complainant was serving as a Bank Clerk in the employ of the Respondent at the time of his termination of employment.

28. According to RW1, the Complainant never got any permission to be away from work from March, 2020 until he received his letter of termination of his contract of employment whilst detained at the Kamwala Remand Prison.

29. During the time of his absence from duty, the Respondent made frantic efforts to contact the Complainant. His phones were off and the Complainant made no effort to communicate his absence.

30. The Complainant's wife availed the Respondent with a sick note and explained to RW1 that the Complainant was unwell at home and scheduled for an operation at the University Teaching Hospital (UTH).

31. RW1 suggested visiting the Complainant in view of the fact that he never communicated his absence. The Complainant's wife adamantly refused to allow RW1 to visit the Complainant and stated that she was busy and would notify him when it would be appropriate to see the Complainant.

32. The Respondent decided to investigate the authenticity of the sick note and the UTH submitted a report in which it

stated that no doctor from the institution had written the sick note.

33. The Respondent's Security Manager was then instructed to find out the whereabouts of the Complainant. It was then reported that the Complainant had been convicted for 18 months and this development led to the termination of the Complainant's contract of employment on a charge of desertion pursuant to the Respondent's Grievance Procedure Code.
34. In response to the Complainant's claim for subsistence allowances, RW1 stated that the claim had no merit on the ground that when one was assigned on business travel, they were paid their allowances. The Complainant was never instructed to work at the Respondent's Head Office for 18 months without any allowances.
35. It was also RW1's evidence that it was not true that the Complainant was posted to the Respondent's Mwense Branch at the time the building was incomplete. The correct position was that the Branch was operational when the Complainant was posted.
36. In terms of the affidavit evidence, the RW1 averred as follows:
  - (i) That the Collective Agreement referred to by the Complainant was not the one applicable to him at the time of his employment.
  - (ii) The Collective Agreement that was applicable at the time of termination of the Complainant's employment was the 2019 to 2020 Collective Agreement, exhibit, "PJ1".
  - (iii) That the contrary to the Complainant's assertions, he was not based in Lusaka from 2015 to 2017. He was further paid his entitlement per diem upon his relocation from



Lusaka to Mwense on 9<sup>th</sup> May, 2016 amounting to K3,500.00.

- (iv) That contrary to the Complainant's assertions, his contract of employment was terminated because of absenteeism from work for a period of more than ten days and for dishonest conduct as provided for under the Respondent's Grievance and Disciplinary Code of 2018 as the letter of termination, exhibit, "PJ2" demonstrates.
- (v) That the Complainant was neither charged nor subjected to disciplinary hearing because the Respondent terminated the Complainant's employment pursuant to Clause 25 of the Respondent's Grievance and Disciplinary Procedure Code of 2018, exhibit, "PJ6", which provided for dismissal or discharge of employees convicted of any offence and sentenced to a term of imprisonment.
- (vi) That contrary to the Complainant's assertion that his termination was unfair and unlawful, the Respondent acted within his rights when it terminated the Complainant's employment on the basis of absenteeism as provided for under its Grievance and Disciplinary Procedure Code.
- (vii) That contrary to the Complainant's contention that he was entitled to full benefits upon termination, only employees who served the Respondent for a continuous period of ten years were entitled to benefits under the conditions of service prevailing at the time of the termination of the Complainant's employment.

- (viii) That it was true that the Complainant was removed from the Respondent's payroll and the reason was that an employee could only be paid for services rendered.
- (ix) That contrary to the Complainant's assertions, the Respondent had been responsive to his demands for terminal benefits, unpaid wages and allowances, as exhibit, "PJ7", a letter to the Complainant's Advocates demonstrates.
- (x) That the Complainant was advised that he was only entitled to accrued leave days and unpaid wages at the time of termination, which position was also confirmed by the Ministry of Labour, as per the copy of the letter from the Ministry of Labour, exhibit, "PJ8".
- (xi) That at the time of termination of his employment, the Complainant was owing the Respondent the sum of K45,454.46
- (xii) That contrary to the assertion that he was unfairly treated, the Respondent merely exercised its contractual right as contained in its Grievance and Disciplinary Procedure Code of 2018 when it terminated the Complainant's services.

37. RW1's responses were as follows under cross-examination.

38. He maintained that the Collective Agreement that was exhibited in the Respondent's affidavit in support of Answer was the one applicable to the Complainant at the time of his dismissal.

39. He denied the Complainant's assertion that he was entitled to subsistence allowance.

40. He conceded that he was not in the Respondent's service at the time the Complainant was instructed to move to Lusaka.
41. He stated that he was in a position to confirm the correct position from the Respondent's records.
42. He stated that the Complainant's contracted was terminated because of his desertion from duty.
43. He conceded that no disciplinary proceedings were conducted in the Complainant's case.
44. He denied that the assertion that the Complainant was unfairly dismissed without being given an opportunity to be heard.
45. He conceded that according to Clause 1.2 in the Disciplinary and Grievance Code, procedures were to be followed.
46. He maintained that the Complainant was not entitled to terminal benefits.
47. He conceded that according to exhibit, "HM4", the Complainant was not paid benefits.
48. He conceded that the Respondent did not provide proof the Complainant's conviction and exhibit, "PJ4", the Report was never given to the Complainant.

The Complainant's case in reply

49. The Complainant in his affidavit in reply dated 14<sup>th</sup> April, 2022 averred as follows:
  - (i) That contrary to the Respondent's assertions, the subsistence allowance due was governed by the 2015, Collective Agreement and he reiterated that he was owed the said payment for a period of 18 months.
  - (ii) That he reiterated his position that at the time of his deployment to the Respondent's

Mwense Branch, the branch was not operational at the time he reported.

- (iii) That he was instructed to report back to Lusaka and his claim was pursuant to the 2015 and 2016 Collective Agreement and he was entitled to K600.00 and K300.00 per night on the day of his return.
- (iv) That contrary to the Respondent's contention, Article 8.2 to 8.16 of the Grievance and Disciplinary Code, provides a disciplinary process for any offence including the purported charge that was used to dismiss the Complainant's from employment.
- (v) That contrary to the Respondent's contention, the Complainant was still an employee of the bank until his termination from employment. He was accordingly, entitled to payment of his salary.
- (vi) That contrary to the Respondent's assertions, the Complainant's phone was on throughout his purported jail sentence, and Article 1.2 of the Respondent's Grievance and Disciplinary Code did not provide any exceptions and all procedures had to be adhered to by the Respondent.
- (vii) That following the failure by the Respondent to adhere to the Grievance and Disciplinary Code in terminating the Complainant's contract of employment, the termination was rendered unfair and wrongful.
- (viii) That contrary to the Respondent's contention, the Complainant worked for almost five years and was thus pursuant to Article 32 (d) of the

Respondent's Grievance and Disciplinary Code entitled to full benefits.

- (ix) That it was on the basis of non-payment of his benefits that he filed the Complainant before Court.
- (x) That the advice from the Ministry of Labour was contrary to Article 32 (d) of the Respondent's Grievance and Disciplinary Procedure Code and section 50 and 51 of the Employment Code Act No.3 of 2019.

#### SUBMISSIONS

50. At the close of the Respondent's case, the parties informed the Court that they would file written submissions. The Complainant was directed to file his submissions by 25<sup>th</sup> July, 2022, whilst the Respondent through Counsel was directed to file its submissions by 2<sup>nd</sup> August, 2022. The record shows that no submissions were filed by the Complainant. The Respondent's submissions were filed out of time, on 17<sup>th</sup> August, 2022 without leave of Court. I therefore will not consider the said submissions, which I expunged from the record as having been filed out of time filed without leave.

#### FINDINGS OF FACT

51. I carefully considered the evidence of the Complainant and RW1 including responses given in cross-examination. I also carefully perused through the affidavit evidence of the parties.

52. I find the following issues not in dispute:

- (i) That the Complainant was offered employment in the position of Bank Clerk in the Respondent Bank on 14<sup>th</sup> October, 2015.

(ii) The said appointment was with effect 1<sup>st</sup> November, 2015 until the termination of the Complainant's contract by letter dated 2<sup>nd</sup> June, 2020 with effect 16<sup>th</sup> March, 2020.

(iii) That the Complainant stopped reporting for work from 16<sup>th</sup> March, 2020 without any permission and never communicated his whereabouts to the Respondent.

53. That the Respondent conducted investigations which revealed that the Complainant had been incarcerated in prison.

54. The main issue for determination is whether the Complainant is entitled to the reliefs sought.

#### ANALYSIS AND DETERMINATION

55. It is trite that the burden of proof lies on he who asserts the existence of facts. In civil matters, the standard is satisfied on a burden of probabilities. As indicated in the *Halsbury's Laws of England (4<sup>th</sup> Edition)* at paragraph 19, 'a party bearing the legal burden of proof must (1) satisfy a Judge of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and (2) adduce evidence sufficient to satisfy them to the required standard of degree of proof.'

56. The aforementioned standard of proof, applies in employment disputes. (See *Wilson Zulu V Avondale Housing Project Limited (1)*).

57. It is evident from the facts of this case that the Complainant's employment was terminated without notice. In law, the termination of a contract without notice is deemed a summary dismissal which is governed by section 50(1) of the Employment Code Act. This position is supported by the learned authors, Judge W.S. Mwenda and Chanda Chungu, who

in their book, 'A Comprehensive Guide to Employment Law in Zambia', state as follows at page 252:

"As long as the employer does not give notice as required by the Employment Code Act or the contract, this amounts to summary dismissal. This is only justified where the employees conduct falls short of the faithful discharge of his duties and/or is so serious that it undermines the trust and respect in the employment relationship."

58. For avoidance of doubt, section 50 (1) provides as follows:

"An employer shall not dismiss an employee summarily except in the following circumstances:

- (a) Where an employee is guilty of gross misconduct inconsistent with the express or implied conditions of the contract of employment;
- (b) For willful disobedience to a lawful order given by the employer;
- (c) For lack of skill which the employee, expressly or impliedly, is warranted to possess;
- (d) For habitual or substantial neglect of the employee's duties;
- (e) For continual absence from work without the permission of the employer or a reasonable excuse;
- (f) Or for a misconduct under the employer's disciplinary rules where the punishment is summary dismissal.

Whether the Complainant's termination by way of summary dismissal was unfair and wrongful

59. According to the learned authors of "A Comprehensive Guide to Employment Law in Zambia", on page 228, where termination is not carried out in line with the law, or where the employer terminates employment without giving a reason, such termination will be referred to as unfair termination and termination that is contrary to the contract of employment is called wrongful termination.
60. On the facts of this case, it will be cardinal for this Court to examine the Respondent's Grievance and Disciplinary Code which was applicable to the Complainant at the time of his termination.
61. Under Clause 8.1 titled "Disciplinary Procedures", there are various procedures that are outlined and were to be followed by the Respondent. In particular, Clause 8.3 provides for the charging of an employee who may have committed an offence and further, Clause 8.12, requires the presence of an employee before the determination of a disciplinary case.
62. In this case as admitted by the Complainant when cross-examined, his contract was terminated pursuant to Clause 9 of the Schedule of Offences, which provides for discharge for an employee who is found guilty of desertion or absenteeism of 10 days or more. This is clearly seen from the letter of termination of employment dated 2<sup>nd</sup> June, 2020 reproduced below:

2<sup>nd</sup> June 2020

Mr. Humphrey Mushili,  
C/O NATSAVE  
P.O.Box 60999  
LIVINGSTONE



Dear Mr. Mushili,

**SUBJECT:TERMINATION OF EMPLOYMENT WITH NATSAVE**

With reference to the above subject.

It was reported by your Supervisor that you have been away from work from 16<sup>th</sup> March,2020 to date without permission. An investigation was constituted to ascertain your whereabouts as you had not reported for work and no communication was made by yourself to your Supervisor or the Branch Manager for Livingstone.

On 15<sup>th</sup> April 2020 a lady who identified herself as Ms. Faith Nakamba claimed to be your wife submitted a certificate of admission slip and a letter from the surgery department at UTH and she claimed you were sick at home in Chalala.

Further investigations done with UTH Management on the documents that were submitted revealed that the documents were not genuinely issued by UTH authorized medical personnel. This as it is, a violation of the Grievance and Disciplinary Code clause 39 (dishonest conduct).

Now,it has come to the banks attention that your absence from work is as a result of you serving a prison sentence for a period of 18 months from 18<sup>th</sup> March,2020 the date of your Conviction in Kafue District and you were sentenced to prison at Lusaka Central Prison on 19<sup>th</sup> March,2020.

In this regard, we wish to advise you that your Contract of employment with NATSAVE bank has been terminated with effect from 16<sup>th</sup> March, 2020 under clause 9 of the schedule of offences and penalties (Desertion) of the Grievance and Disciplinary code.

Your dues at the time of termination will be paid to you as follows:

1. Leave days accrued at the time of Dismissal- less loan Deduction.

Our records show that you owe the bank K45,454.46 in outstanding loans which you obtained from the Bank. Kindly indicate to the Bank within seven days of receipt of this letter how you will offset this amount.

By copy of this letter Finance and Credit Department are advised accordingly.

Your sincerely,

Joshua Milinga  
HEAD-HUMAN CAPITAL AND ADMINISTRATION

63. The undisputed evidence on record shows that the Complainant was absent from work from 16<sup>th</sup> March, 2020 without any permission or justifiable reason.
64. Further, in response to the Respondent's assertions of his absence from duty without any communication, the Complainant alleged that his phone was reachable during the time he was allegedly incarcerated. He, therefore in effect disputed the Respondent's assertion that efforts to communicate with him had proved futile.
65. The Complainant's assertion that his phone was reachable throughout his alleged incarceration, only goes to support the Respondent's position that the Complainant failed to communicate his absence from duty. He in effect placed the burden of communication on the Respondent and absolved himself of any wrongdoing.
66. In its decision to terminate the Complainant's contract, further, the Respondent placed reliance was on the Report regarding his conviction and serving of prison sentence, exhibit "PJ3".
67. The said Report revealed that investigations were carried out by the Manager Security Services for the purposes of establishing the Complainant's whereabouts.
68. It was discovered that he had been convicted in Kafue on 18<sup>th</sup> March, 2020 for two criminal offences and admitted to the Lusaka Central Prison on 19<sup>th</sup> March, 2020.
69. According to the Report, the Manager Security Services met the Complainant at the Lusaka Central Prison on 19<sup>th</sup> May, 2020 who confirmed that he had been convicted and serving a prison sentence for two offences.
70. The Complainant never directly disputed the contents of the Report in his evidence in chief or affidavit in

reply. His only concern during his cross-examination of RW1 was that he was never availed the report.

71. The Complainant further challenged the Respondent's assertion that he had been convicted. Indeed, apart from the Report, there is no independent evidence that was adduced by the Respondent to prove that the Complainant was indeed convicted by the Kafue Subordinate Court and sentenced to a term of 18 months imprisonment.

72. However, confirmation of the Complainant's conviction came from the Complainant himself. When cross-examined, he conceded that he was remanded in custody and had been fined. It is common knowledge, that before the Complainant could be fined, he first had to be convicted. The Complainant's contention that he was never convicted, accordingly, has no merit.

73. I shall not comment much on the sick note that was allegedly taken to the Respondent for the purposes of explaining his absence from duty. According to the Report he admitted that he was the one who sent Ms. Faith Nakamba to submit the subject sick note to the Respondent. I note that the author of the Report was never called to testify. Accordingly, the truthfulness of the Complainant's alleged admission was never tested, in light of the fact that he denied ever sending anyone to take the said document to the Respondent as he was incarcerated at the time.

Whether the termination of the Complainant's contract of employment by way of summary dismissal was unfair

74. The focus of this Court when assessing the fairness of a termination of contract, should be on the material that was before the Respondent when taking the decision to terminate the contract of employment. The Court will then decide on that evidence, on an objective basis, whether the termination by way of summary dismissal was fair or unfair.

The question is, *what would have been done in light of the basic and underlining facts.*

75. On the facts and evidence before this Court, the reason why the Complainant's contract of employment was terminated is very clear. It was his absence from duty from 16<sup>th</sup> March, 2020 and failure to communicate the said absence, which led to the termination of his contract. This was aggravated by his conviction. It is clear from the evidence that the Complainant made no effort at all to communicate his incarceration to the Respondent.

76. I recognize that, the Complainant was never charged. He was further never given an opportunity to be heard.

77. I stand guided by the principle set out in Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (2), to the effect that if an employee committed a dismissible offence and he has been dismissed, the fact that there is failure to comply with a procedure prescribed for dismissing him does not make the dismissal ipso facto invalid.

78. I therefore find that the termination of the Complainant's contract of employment was for a valid reason, namely his absence from duty without permission and communication from 16<sup>th</sup> March, 2020, which culminated into desertion. Although he was never formally charged, he committed an offence which formed a ground for summary dismissal pursuant to section 50 (1) (e) of the Employment Code. It thus cannot be argued by the Complainant that the termination of his contract by way of summary dismissal was unfair.

Whether the termination of the Complainant's contract of employment by way of summary dismissal was wrongful

79. It is trite that in determining whether the termination of a contract of employment was wrongful, the

focus is on 'how' the termination was carried out. A termination that is carried out in a manner contrary to the procedure for dismissal in the contract of employment, would constitute wrongful termination.

80. On the facts of this case, it is not in dispute that the Complainant was dismissed without being given an opportunity to be heard as I have established above.

81. Considering the circumstances of this case, I shall rely again on the principle set out in Zambia National Provident Fund V Chirwa to the effect that where it is not in dispute that an employee committed an offence for which the appropriate punishment is dismissal, and the employer dismisses him without following down laid down procedure prior to the dismissal laid down in a contract of service, no injustice is done to the employee by such failure to follow procedure, and he has no claim on that ground either for wrongful dismissal, or for a declaration that the dismissal was a nullity.

82. I find on the facts of this case, that the Complainant committed the offence of desertion whose sanction was discharge at first instance. It is my view, therefore, the termination of his contract of employment by way of summary dismissal without any disciplinary hearing, could not have caused him any injustice. The Complainant's termination of employment by way of summary dismissal, cannot therefore under the circumstances of this case be deemed to have been wrongful.

Whether the Complainant was entitled to the reliefs sought and outlined in paragraph 1 above

(i) An order directed at the Respondent for payment of the sum of K324,300.00 being subsistence allowance for the period of 18 months

The onus was upon the Complainant to adduce cogent evidence to substantiate the claim under this head. As can be noted from the cross-examination of the Complainant, he admitted that he had no evidence to prove that he was assigned to work from Lusaka during the subject period of 18 months at the material time. His explanation under re-examination was that he received the instructions from the Human Resources Officer through phone calls. This evidence is in my view insufficient and cannot form the basis of cogent proof that he indeed worked away from his station for 18 months and was entitled to the sum claimed under this head. This claim accordingly fails and is dismissed.

(ii) Payment of K30,000.00 being wages for April and May 2020;

Section 51(1) of the Employment Code, provides as follows:

*"An employer who summarily dismisses an employee under section 50 shall pay the employee, on dismissal, the wages and other accrued benefits due to the employer, up to the date of the dismissal."*

The letter dated 2<sup>nd</sup> June, 2020 which has been reproduced substantially in this judgment, clearly states that the Complainant's termination of employment was with effect 16<sup>th</sup> March, 2020 and not 2<sup>nd</sup> June, 2020. Perhaps the Complainant did not address his mind to the effective date of termination of his contract. Section 51(1) of the Employment Code, clearly states in summary dismissal, the wages and accrued benefits are to be paid up to the date of dismissal. In this case, he was to be paid wages and

accrued benefits due up to 16<sup>th</sup> March, 2020, the effective date of termination of contract. The Complainant is accordingly not entitled to the amount of K30,000.00 being wages for the months of April and May, 2020. This claim is accordingly dismissed.

(iii) In the alternative to the payment of K68,325.48 being six months basic salary, plus K16,800.00 being 28 days of subsistence allowance to find accommodation as per the collective agreement;

As in paragraph (i) under this head, the Complainant adduced no cogent evidence to support his claim. He did not explain his basis for the claim for the sum of K68,325.48. I have already highlighted that there is no evidence that was adduced by the Complainant to justify his entitlement to the payment of subsistence allowance. This claim accordingly fails and is accordingly dismissed.

(iv) Punitive and exemplary damages for unfair treatment and for the willful and deliberate refusal to pay him his accrued benefits plus wages when the Respondent was fully aware of the law pertaining to payment following dismissal

The learned authors of, 'A Comprehensive Guide to Employment Law in Zambia,' at page 427, stated as follows:

"Exemplary damages are punitive and awarded when the conduct of the employer deserves punishment for acting in a manner that disregards the rights of the employee. The objective is to deter such conduct from employers in the future. These damages are awarded where the Court desires to mark its disapproval of the employer's conduct

towards the employee by awarding the employee damages beyond the amount which would be adequate compensation for his loss or injury. Therefore, when deciding the amount of damages, the Court takes into consideration three main points, namely, the manner in which termination of employment was conducted, the level of inconvenience caused and the loss of future employment opportunities.

It is clear from the facts of this case that the Complainant's contract was neither unfairly nor wrongfully terminated by way of summary dismissal. The Complainant has under the circumstances of this case, no legal basis for a claim for exemplary and punitive damages. There is in other words nothing to justify the payment of punitive and exemplary damages. This claim is accordingly dismissed.

- (v) Damages for inconvenience, mental anguish and distress;

Following the dismissal of the Court's finding that the Complainant's termination of employment by way of summary dismissal was neither unfair nor wrongful dismissal, this Court finds no basis for the award of damages for inconvenience, mental anguish and distress. It is instead the Respondent who was put to great inconvenience following the Complainant's failure to communicate his whereabouts. This claim is accordingly dismissed.

- (vi) Any other order or award as the Court may consider fair in the circumstances of the case;



Save for the Complainant's entitlement to payment of any unpaid leave days as at 16<sup>th</sup> March, 2020, the Complainant is not entitled to any other relief this Court may deem fit. I will not delve into the issue of the Complainant's outstanding loan of K45,454.46 as this amount was not specifically pleaded as a counter claim by the Respondent.

The Complainant is not entitled to severance pay on the ground that the entitlement for severance pay under section 54 (1)(c) of the Employment Code, did not have retrospective effect. It only became due for payment to those eligible, when Statutory Instrument No.29 of 2019, the Employment Code (Commencement) Order was promulgated to operationalise the Employment Code on 10<sup>th</sup> May, 2020 and when the transition period within which to comply with the Employment Code Act expired. The Complainant's contract was in this case terminated with effect 16<sup>th</sup> March, 2020, before the commencement date of the Employment Code.

The Complainant also claimed terminal benefits pursuant to Clause 32.0 of the Grievance and Disciplinary Code. I perused through the Collective Agreements that were exhibited by the parties. I could not find any basis for the payment of terminal benefits that were never specified by the Complainant. He accordingly did not adduce any evidence or details of what terminal benefits were due to him. The onus was on the Complainant to demonstrate his entitlement to terminal benefits by specifically stating what was due. In the absence of any evidence over what terminal benefits were due, I am unable to grant the Complainant his claim for terminal benefits.

- (vii) Interest on any sums found due at the commercial bank lending rate;

The leave days that the Complainant is entitled to, if unpaid shall attract interest at short term bank deposit rate from the date of the notice of complaint, 5<sup>th</sup> October, 2021 to the date of Judgment and thereafter at the current lending rate as determined by the Bank of Zambia until full payment.

- (viii) Legal costs

Rule 44 of the Industrial Relations Court Rules, provides for payment of costs where a party has been guilty of unreasonable delay, or of taking improper, vexatious or unnecessary steps in any proceedings, or of other unreasonable conduct. Having considered the circumstances of the case, I find nothing that justifies an order for payment of costs. Each party shall accordingly, bear their own costs.

83. Leave to appeal is hereby granted.

DATED THIS 13<sup>TH</sup> DAY OF SEPTEMBER, 2022

  
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T. S. MUSONDA

JUDGE

