

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT NDOLA
(Industrial Relations Division)

IRC/ND/11/2020

BETWEEN:

LOVEMORE GUMBO

AND

STANDARD CHARTERED BANK



COMPLAINANT

RESPONDENT

Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 16th day of December, 2022.

For the Complainant: Mr. V.N. Michelo, Messrs V.N. Michelo & Advocates.

For the Respondent: Mr. K. Wishimanga, Messrs AMW & Company.

JUDGMENT

Cases referred to:

1. Chilanga Cement v Venus Kasito, Appeal No. 86 of 2015.
2. Grayson Kachikoti v TAP Bulding Products Limied, Comp. No. 33 of 1982.
3. Edward Mweshi Chileshe v Zambia Consolidated Copper Mines (1996) S.J. (S.C.)

Legislation referred to:

1. The Industrial and Labour Relations Act Chapter 269 of the Laws of Zambia.
2. The Employment Code Act No. 3 of 2019.

Other works referred to:

1. W.S Mwenda, Employment Law in Zambia: Cases and Materials: UNZA Press, Lusaka, 2004.

2. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. Lusaka, 2021

By notice of complaint supported by an affidavit filed into Court on 4th February, 2020 the complainant commenced this action against the respondent. On 8th September, 2020, the complainant applied for leave to amend the notice of complaint and to file a further affidavit. By consent of the parties, the complainant's application was granted by the Court on 9th October, 2020 and, therefore, the complainant filed into Court an amended notice of complaint on 15th October, 2020. The complainant is seeking the following reliefs:

1. A declaration that he was discriminated against by virtue of his job as Branch Manager as his subordinates facing similar charges like his were given a penalty of final warning letter valid for 12 months as against his dismissal when they all served under the same Disciplinary code.
2. A declaration that he was wrongfully and unfairly dismissed
3. An order for damages for wrongful dismissal.
4. In the alternative a declaration that he be deemed to have retired under voluntary separation.
5. Further alternatively, that he be reinstated to his position.
6. Interest on the amount found due.
7. An order that he be deemed to have separated with the respondent under the voluntary separation scheme.
8. Legal Costs.

In his affidavit in support, the complainant deposed that he joined the respondent company on 22nd February, 1993 as a Bank Clerk and rose through the ranks, the last appointment being that of Branch Manager, Kitwe branch. That he was dismissed by the respondent on 22nd November, 2019 on the charges of abuse of authority; dishonest conduct; fraud/embezzlement; and falsification of staff imprest claims. He deposed that he was charged together with his subordinates namely: Sheila Zulu, Teller; Makazo Mundia, Teller; Reuben Chilufya, Teller; Lucy Chileshe, Teller; and Mirriam Mbao, Branch Operations Manager. That he had challenges in getting the charge letters and final decision letters from his subordinates on their disciplinary action because they feared being victimised by the respondent. That he only managed to get part of the final decision on the disciplinary action taken from one of his subordinates exhibited as "LG6". That the charges that he faced were similar to the charges his subordinates faced as disclosed in paragraph 9 of the affidavit in support of the notice of complaint. That the background to the charges he and his subordinates faced arose from similar transactions and facts namely payment of dinner allowance for working beyond 19.30 hours. That dinner allowance accrued when one worked beyond 19.30 hours. That during investigations it was discovered that dinner allowance was paid to his subordinates despite not working beyond 19.30 hours. That the approval of the dinner allowances in the system was done by the Branch Operations Manager after her

subordinates filled in the claim forms. That the beneficiaries of the money were his subordinates and that he did not get anything from the said money and the issue of embezzlement did not arise. That he was the only one dismissed whilst his subordinates were given final warning letters. That the complainant felt that he was unfairly treated and discriminated against by virtue of his job as Branch Manager in that his subordinates facing similar charges arising out of the same transactions or facts were given final warning letters. That he felt that he was unfairly treated and discriminated against by virtue of his job as Branch Manager in that his subordinates facing similar charges arising out of the same transactions or facts were given final warning letter whilst he alone was dismissed. That he had earlier on applied for voluntary separation but the respondent being malicious decided to dismiss him so as to save money when he ought to have been treated like his subordinates by being given a similar penalty of final warning. That he was praying for a declaration that he was discriminated against by virtue of his job as Branch Manager; and that he was wrongfully and unfairly dismissed. That he was claiming for damages for wrongful dismissal and in the alternative, to be deemed to have retired under voluntary separation.

In his further affidavit in support of the notice of complaint filed into Court on 15th October, 2020, the complainant averred that there was an on-going Voluntary Severance Scheme (VSS) at the

respondent company whereby those willing to separate with the respondent were invited to make applications. That he submitted his application, 'LG1' to go on the voluntary severance scheme. The complainant also produced the Voluntary Severance Scheme Policy and Guidance, 'LG2'.

On 12th February, 2021, the respondent filed into Court an amended answer and an affidavit in support of the said amended answer, sworn by one Mutinta Mbonga Habulembe, Employee Relations Specialist in the respondent company.

In the affidavit, the deponent averred that the complainant was, among others, subject to the respondent's Group code of conduct, 'MMH1', the Fair Accountability Treatment Processes and Procedures (FADP), 'MMH2'; and the Collective Bargaining Agreement (CBA), 'MMH3'. That it was not true that the complainant was charged with his subordinates namely Sheila Zulu, Teller; Makazo Mundia, Teller; Reuben Chilufya, Teller; Lucy Chileshe, Teller; and Miriam Mbao, Branch Operations Manager. It was averred that while the respondent admitted the contents of paragraphs 9 to 13 of the complainant's affidavit in support, the complainant and his subordinates were individually accountable and charged as such. That the complainant, in trying to "*manage*" a situation proposed that his subordinates make a claim for dinner allowances even when they did not work passed the time allowed for them to make such claims. That in breach of

his duty to the respondent, the complainant approved the payment of the dinner allowance knowing very well that none of the employees were entitled to the said dinner allowance; and that the payment of the said dinner allowance (to which there was no entitlement) to the said employees resulted in the respondent suffering a loss of funds. That the complainant was a very senior member of the respondent company and failed to lead by example of complying with the contract of employment and other policies applicable to him and the other employees. That the complainant's dismissal was additionally premised on the establishment of the fact that it was in fact the complainant that approved the claims for the dinner allowance under the circumstances. That during investigations into the matter, the subordinate employees confirmed that the complainant approved the dinner allowance as per exhibit, "MMH4". That in any case, the complainant in fact readily admitted having initiated the idea of paying a dinner allowance when the same was not due. That contrary to his belief that he was discriminated against due to his job as Branch Manager, the respondent's position was that there was nothing improper with a senior member of staff being punished more severely than others.

It was averred that the complainant had breached his duties and/or obligations as indicated in paragraph 12 of the affidavit in support of the amended answer.

That in breach of his employment contract and the respondent policies and procedures as aforesaid, the complainant failed to discharge and perform his duties and/or obligations. That in complying with its policies and procedures, the respondent did on the 30th day of September, 2019, issue a show cause letter to the complainant in order to accord him a chance to explain why disciplinary action could not be taken against him as per exhibit, "MMH5". That on the 1st day of October, 2019, the complainant responded to the aforesaid letter in which he admitted to having acted in breach of the contract and further asked the respondent for leniency as it deliberated upon his case as per the exhibit, "MMH6". That following the complainant's admission of his guilt, the respondent proceeded to issue the complainant with a notification for the disciplinary meeting, 'MMH7'; and the charge sheet dated 8th October, 2019. That the complainant was charged with the offences of abuse of authority under clause 1.3.k.; dishonest conduct under clause 1.4.f.; fraud, embezzlement under clause 1.4.1; and falsification of staff imprest claims under clause 1.5d of the Fair Accountability Treatment Processes and Procedures (2016), exhibit "MMH2".

The deponent averred that subsequently, a disciplinary hearing was constituted in accordance with the respondent's policies and procedures. That the said disciplinary hearing was convened on 14th October, 2019 as shown by the minutes of the disciplinary hearing, exhibit, "MMH8". That following the conclusion of the

hearing and by the letter dated 22nd November, 2019, the complainant was notified that having been found guilty, he was summarily dismissed as shown by exhibit, "MMH9". That the complainant appealed against the respondent's decision by his letter dated 25th November, 2019, exhibit, "MMH10". That subsequently, an appeal hearing was held on 3rd December, 2019 and the appeal tribunal upheld the decision of the respondent to summarily dismiss the complainant as per exhibit, "MMH11". It was deposed that the respondent followed the correct disciplinary procedure and rules in handling the complainant's case without any prejudice or compromise; and that in dealing with the complainant's case, there was no intention of treating him unfavourably and/or discriminating against him on grounds of the position that was held by him as Branch Manager. That the complainant was dismissed because he failed to abide by the respondent's policies and procedures given his level of responsibility. That the complainant was the most senior employee of all other employees charged by virtue of which he had a higher responsibility which the tribunal took into account. That the punishment meted out against the complainant was commensurate to the offences committed by him and the respondent had the power to punish him as it did.

With regard to the issue of voluntary separation, it was averred that the complainant applied to go on voluntary separation on

the 16th November, 2019 after he was already charged by the respondent for breach of his employment contract as evidenced by his application letter, "MMH12". That the contents of paragraph 7 of the further affidavit were denied as the respondent did not discriminate against the complainant. That furthermore, the voluntary separation scheme was being administered by a body completely separate from the one that determined the complainant's disciplinary action. That in any case, there was a set criteria for the award of the voluntary separation which the complainant would have had to satisfy had he continued in employment. That the approval of the voluntary separation was, therefore, not automatic as alleged by the complainant. That, in the premise, all of the complainant's allegations were false. That the respondent had the relevant disciplinary powers and exercised the same properly. That the complaint lacked merit and, therefore, the complainant was not entitled to any of the reliefs sought.

At the trial, the complainant testified that in 2019, he used to work for the respondent as Branch Manager at Zambia Way branch in Kitwe. That he had worked for the bank for 26 years until he was dismissed on 22nd November, 2019. He testified that he was dismissed on four charges as contained in the notification of summary dismissal letter, "LG5". That the charges were abuse of authority, contrary to clause 1.3.k; dishonest conduct, contrary to clause 1.4.f; fraud, embezzlement, contrary to clause

1.4.i; and falsification of staff imprest forms, contrary to clause 1.5.d. of the Fair Accountability Treatment Processes and Procedures (2016) handbook.

He explained that the number of Tellers was reduced from 5 to 3 when he took over office because the model of the bank had changed due to digitalisation. That because most of the clients were not yet conversant with digitalisation, pressure mounted in terms of traffic of clients in the branch. That due to the said pressure, the Teller Services Manager, Petwe Chimpusa approached him on how they were going to motivate the Tellers who were so much under pressure as out of the three Tellers, one got sick and he remained with two Tellers. That Petwe suggested to him that since the Tellers used to knock off around 19.00 hours and that their dinner allowance used to be due at 19.30 hours, they could ignore the 30 minutes and allow them to claim dinner allowances. That before he could authorise, he called for a meeting where everyone could brainstorm the idea. At that meeting, the participants were Petwe Chimpusa and five Tellers namely: Sheila Zulu, Reuben Chilufya, Lucy Chileshe and two others. After discussions, it was resolved that they should be paying the Tellers dinner allowances at the rate of K100.00 per member of staff for the period March to April, 2019. That the complainant went on leave in mid-June, 2019. That his immediate boss, Maximillian Matongo called him and informed him that there was going to be a voluntary severance scheme

(VSS) for employees who wanted to leave the respondent and he asked him if he was interested in the scheme. That the complainant told Mr. Matongo that he wanted to go on voluntary separation.

That when Management learnt about the payment of dinner allowances, investigations were instituted. After the said investigations, the complainant was charged with the subject offences together with all those who were involved in implementing the same, that is, Sheila Zulu, Mirriam Mbao, Petwe Chimpusa, Reuben Chilufya, and Lucy Chileshe.

The witness testified that his colleagues, who included the Branch Operations Manager, were all slapped with the offences of fraud, embezzlement, falsification of staff imprest claims, dishonest conduct, and failure to report any irregularity or an offence relating to a financial loss.

In reference to the letter of his summary dismissal, 'LG5', the complainant testified that the difference between his charges and those of others was that the others were not charged with the offence of abuse of authority and the offence of failure to report any irregularity or offence relating to a financial loss. That the others were just given the sanction of final warning letter except for Mr. Petwe Chimpusa who resigned before the case could be concluded. That the penalty for dishonest conduct was

summary dismissal. That his subordinates were also charged with the offence of dishonest conduct. That the penalty for the offence of fraud, embezzlement was summary dismissal. That his subordinates were also charged with the same offence. That the offence of falsification of staff imprest claim which he faced together with his subordinates also attracted the penalty of summary dismissal. That the offence of abuse of authority attracted first warning and demotion for the first offender, and summary dismissal for the second offender.

He complained that he was discriminated against by virtue of being the Branch Manager because whereas he was dismissed, his subordinates who were charged with similar offences were given final written warnings and retained in employment. He testified that the charges they all faced were dismissible but his dismissal was maliciously done to deny him the VSS package.

Under cross-examination, the complainant stated that the employees for whom he had approved the dinner allowances were entitled to the allowance but that the same was supposed to be claimed at 19.30 hours. That instead of telling him to approve transport allowance which was due at 19.00 hours, the Teller Services Manager told him to approve dinner allowances. That the Tellers were not entitled to receive dinner allowances at 19.00 hours but transport allowance. That when he was charged with the subject offences, he admitted liability. When referred to

exhibit "MMH6" in the affidavit in support of the amended answer, the complainant confirmed that he had admitted all the four charges because it was an administrative error as they were managing the situation. He confirmed that because of his error, the bank lost out on some money. That according to the disciplinary code, the offence of abuse of authority warranted the penalty of a final warning letter whilst the penalty for the other three offences was summary dismissal. He denied having admitted that the respondent had the right to dismiss him just because he admitted liability on all the charges but when pressed, the complainant admitted that the respondent could summarily dismiss him because of his admission of liability on all charges. He confirmed that he was the most senior of all the employees that were charged. That he was, therefore, required to set the tone for his subordinates and lead by example. He stated that he had the authority to pay dinner allowances before 19.30 hours because he had sought prior authorisation from his immediate boss, Mr. Matongo before they could make any payment. That his boss gave him verbal authority to pay the dinner allowances.

When referred to the minutes of the meeting, exhibit 'MMH4f' between the complainant and the investigators, the complainant confirmed that Mr. Matongo was not aware of the dinner allowance claims; and that according to the minutes, Mr. Matongo did not give him any authority. After being referred to various

minutes, exhibits 'MH4a', 'MMH4b', 'MMH4c', 'MMH4d', 'MMH4e', and 'MMH4f'; the complainant denied any mention of a meeting in the minutes. He stated that he was not aware that according to the said minutes, all the employees that attended the meeting pointed to him as the person that approved the payment of the dinner allowances. He stated that Mr. Matongo called him over the issue of VSS but he had no proof of their conversation. The complainant confirmed that he had only applied for the VSS on 16th November, 2019 because that was when it was floated. That there was no VSS before 16th November, 2019.

He confirmed that he was charged together with his subordinates and he had one copy of their charge sheet, 'LG6'. That it was a final warning letter which was addressed to one of his subordinates who had removed the names from the letter because they were still in employment and they feared being victimised. The complainant affirmed that the letter 'LG6' had no name of the addressee but insisted that the name could be confirmed with the Human Resource department as this was a specific case. He conceded that the letter did not show that it was from the respondent because it did not bear its name. In reference to exhibit 'MMH2', the complainant stated that cases were looked at differently depending on the gravity of each case. That the bank had the mandate to decide on what penalty it could mete out. That the schedule of offences was not exhaustive as to the penalties the respondent could mete out as it did in this

case. With reference to exhibit 'MMH13', the witness confirmed that the VSS was open as from 15th to 25th November, 2019; and that the decision as to who was successful could only be made after 25th November, 2019. That, in his case, he was dismissed on 22nd November, 2019 before consideration of his application for VSS could be made.

In re-examination, the complainant stated that before they could authorise the payment of the dinner allowances, he had informed his supervisors, in particular Mr. Matongo. That Mr. Matongo agreed and gave him a go ahead although he knew that it was not authorised but it was like a gentleman's agreement. That, that was how he informed his Branch Operations Manager, Mirriam Mbao. That even though he had produced exhibit "LG6", the other charge sheets were not before Court because the affected employees were not dismissed but were just given final warning letters. That the charge letters were addressed to specific staff who were involved in the case.

RW1 was Mutinta Mbonga Kabulembe, Employee Relations Specialist in the respondent company. She informed the Court that she was placing reliance on her affidavit in support of the amended answer filed into Court on 12th February, 2021.

Under cross-examination, RW1 stated that she had been with the respondent since June, 2019 and that she had been a Human

Resource Practitioner for 15 years. She admitted that, according to paragraph 5(a) of the amended notice of complaint, the complainant was discriminated against by virtue of his job as Branch Manager as his subordinates facing similar charges were given a penalty of a final warning while he was dismissed. That the four subordinates were Mirriam Mbao, Reuben Chilufya, Makazo Mundia and Lucy Chileshe. That they were charged with the offences of fraud, falsification, dishonesty and failure to report. She confirmed that the offence of dishonest conduct and fraud, embezzlement were common to the complainant and the subordinates. She stated that the offence of falsification of staff imprest and failure to report any irregularity or an offence relating to a financial loss were not the same. She stated that the penalty for abuse of authority was dismissal but a final warning letter and demotion on first breach; and summary dismissal on second breach. She denied that the complainant was serving under any prior warning but stated that there was context that was applicable in determining disciplinary outcomes. The witness confirmed that the penalty for dishonesty conduct, and fraud, embezzlement was summary dismissal. That the penalty for failure to report an irregularity relating to a financial and falsification of staff imprest was also summary dismissal. That of the four offences the complainant was facing, three were dismissible while one attracted a final warning. That all the offences the complainant's subordinates faced were dismissible offences. That they were charged under the same disciplinary

code as the complainant. She admitted that, in general, there ought to be fairness and consistency in all disciplinary processes. But that that did not have to be necessarily so with the respondent company. That taking into consideration the aspect of seniority depended on the company's policies. The witness confirmed that the complainant's subordinates were given final written warnings. That according to the policy statement at page 40 of the code of conduct, 'MMH2' the offences in the disciplinary code were not to be read in isolation but in conjunction with the other provisions of the entire document. That the group code of conduct, 'MMH1' at page 13 implied that a senior employee could receive a stiffer punishment compared to that of junior employees. That there was additional responsibility with regard to Managers. That between the disciplinary code and the code of conduct none was superior to the other. The witness denied that the complainant was punished more severely because of his seniority. She stated that much more was expected from the complainant in line with the provisions of the code of conduct. She denied that the complainant was discriminated against because of his seniority. She confirmed that the complainant's subordinates returned to work after being given the final warning letters but others had since left. She stated that the complainant was paid his terminal benefits. That he was not paid for his service period. She admitted that the event that led to the complainant's dismissal

was the same event that led to others being given final written warnings.

In re-examination, the witness explained that what she meant by stating that *there was context applicable in determining disciplinary outcomes* was that each case was to be looked at based on its own merits and demerits. Further, that the code of conduct, 'MMH2' at page 55 guided that the list of offences was not exhaustive and that the respondent reserved the right to administer outcomes as it deemed fit as provided for in exhibit 'MMH3'. That although the concepts of 'fairness and consistency' were general principles, there were variations in different organisations and for the respondent, the group code of conduct provided further guidance around the treatment of and expectations from Managers.

In response to the question why the complainant's subordinates had different outcomes as compared to the complainant, the witness explained that the complainant was the most senior person at the branch and the first line of defence in managing conduct and financial risks on behalf of the respondent. That by approving the payments to which his subordinates were not entitled, he had exposed the respondent to financial risks. The witness reiterated that the complainant was not discriminated against as he was given a fair chance to be heard and to respond to the allegations. Further, that he was given the right of appeal

which he exercised and in coming up with the verdict, the respondent considered all the information that was available to it, and the complainant's own admission of guilty.

RW2 was Maxwell Mambo, Banker. He informed the Court that he was one of the panelists that sat to hear the complainant's case. He testified that it was correct that out of all the people that were implicated, the complainant was the only one that was dismissed due to the fact that he was the Controlling Officer at the branch where the incident occurred. Further, that other than being the Controlling Officer, all the other staff who were involved referred to the complainant as having advised them to make the same claims and he approved accordingly. With regard to the punishment meted out against the complainant, the witness testified that in meting out the punishment, the respondent relied on its process called the Fair Accountability and Disciplinary Process (FADP).

That the FADP gave guidance on the charge that could be given on a particular case and the would-be result based on the charge given by the Line Manager. That it gave leeway to give out the charge best suited to the case being heard. The witness referred the Court to page 3 of 'MMH2' and stated that according to that policy statement, the respondent reserved the right to take any disciplinary action as it deemed appropriate as per the case being heard. The witness stated that he was also on the hearing

panel of the cases for the members of staff that were charged with the complainant. The witness referred the Court to page 17 of 'MMH2', and stated that the charges on the schedule of offences were not exhaustive and that the hearing panel was allowed to give the final verdict for the charge given.

He explained that the complainant was dismissed based on the fact that he directed the members of staff to claim the allowances they obtained from the respondent which they were not supposed to obtain and he approved the same allowances. That the respondent did not dismiss the other employees on the basis that they referred to the Controlling Officer who was the complainant to have authorised them to make the claims. That the respondent saw it fit to award the other employees final written warning letters; and to summarily dismiss the complainant.

During cross-examination, the witness admitted that he was a Banker; and that someone working as a Human Resource Manager in a bank could also qualify to be called a Banker. That he was a Loan Processing Manager. He stated that 5 or 6 of the complainant's subordinates were involved in the matter of allowances and they were all charged with dismissible offences. That the offences were: fraud and embezzlement, dishonest conduct, failure to report irregularities or an offence relating to financial irregularity. He stated that he did not have any

documents to show that the subordinates had reported to management about the failure to report irregularities and he was not aware at all if they had reported to management. He admitted that even the offences with which the complainant was charged were all dismissible just like for the other six employees. That he did not know who was the senior most among the other six employees. That Miriam Mbao was the Branch Operations Manager and was reporting to the Branch Manager. That she was not at the same level with the complainant but they both carried the same title of 'Manager.' He denied that Mirriam Mbao used to report to the Head Office and explained that the respondent had matrix reporting lines so at the branch, she used to report to the Branch Manager who was the complainant, with a dotted line into head office for operations governance. That by dotted line, he meant that Mirriam Mbao was specifically under the complainant and in terms of approvals and everything in the system, as well as assessment of performance, she used to report to the complainant. That the dotted line came in because one is not your full time line Manager where you get to report and the other dotted line came in for governance only. That that meant that one had other reporting responsibilities other than to the line Manager.

He stated that he did not have Mirriam Mbao's report to the head office over this matter. That he was also not aware if Mirriam Mbao was fully aware about the issue of allowances but never

reported to the head office. He denied that in an ideal situation, Mirriam Mbao was supposed to report the payment of the allowances to head office. He stated that he was not aware if Mirriam Mbao approved the allowances. He admitted that the same tools of discipline, the disciplinary code and other policies and rules were supposed to apply to everyone. That it would not necessarily be discriminatory if the rules were applied differently to different people. He explained that there were exceptions that had to be taken into consideration when looking at the charges as the disciplinary code clearly stated that it was not exhaustive but provided guidance on how to handle matters. That the document did not provide that a senior person had to be punished more than the juniors. He denied that the complainant was punished more than the junior employees because of his rank. That the complainant and the juniors did not receive the same punishment as the juniors were given final written warnings while the complainant was dismissed for the same dismissible offences. That between final written warning and summary dismissal, the latter was the harsher punishment. He denied that the complainant was dismissed because of being a Branch Manager. That the complainant was dismissed because he was the Controlling Officer of the Branch. He stated that discrimination was treating a person differently. He admitted that the complainant was treated differently from the other five. When referred to paragraph 5 of the amended notice of complaint, the witness stated that he was not comfortable with

the removal of the words 'Controlling Officer' and replacing them with Branch Manager as the statement did not provide the circumstances in which the verdict was provided. He stated that the Human Resource must have issued a dismissal letter to the complainant. That the witness did not have sight of the dismissal letter. When referred to the dismissal letter, 'MH9', the witness stated that the letter did not indicate that the complainant was dismissed because he was the Controlling Officer and the others were let scot free because they were not Controlling Officers. He stated that did not come across the suspension letters for the other employees and that they were not produced to the Court.

In re-examination, the witness stated that Mirriam Mbao was not expected to report to the head office as the first point of reporting was the Line Manager. He stated that the complainant approved the allowances claimed by the staff. He stated that the complainant was treated differently based on the facts of the matter in which he was supposed to protect the assets of the respondent bank such as money and the allowances that were paid out.

I have considered the affidavit and *viva voce* evidence from both parties. I have also considered the final written submissions filed by both parties.

The facts which were common cause are that the complainant was employed by the respondent as a Bank Clerk on 22nd February, 1993 and he rose through the ranks to the position of Branch Manager, Kitwe branch, a position he held until he was dismissed on 22nd November, 2019. The events leading to his dismissal were that the complainant proposed to his subordinates, Tellers named: Sheila Zulu, Makazo Mundia, Reuben Chilufya and Luchileshe who used to knock off around 19.00 hours to make claims for dinner allowance which was only due to the Tellers if they knocked off at or after 19.30 hours. That this was done in order to motivate the Tellers as they were working under a lot of pressure owing to understaffing. Upon making the said claims for dinner allowances, the complainant approved the payments. When it was discovered that the complainant had approved the payment of the dinner allowances to his subordinates which dinner allowances they were not entitled to, the respondent wrote the letter, 'MMH5' dated 20th September, 2019 to the complainant wherein he was asked to show cause why disciplinary action should not be taken against him. In response to that letter, the complainant wrote the letter, 'MMH6' dated 1st October, 2019, wherein he did not dispute having allowed the Tellers to claim for the dinner allowances, he regretted his action and appealed to the respondent to exercise leniency to him. The complainant was then charged with the offences of abuse of authority; dishonest conduct; fraud, embezzlement; and falsification of staff imprest claims in

accordance with the Fare Accountability Treatment Processes and Procedures, 2016 handbook while his subordinates were charged with the offences of dishonest conduct; fraud, embezzlement; falsification of staff imprest claims; and failure to report irregularities. A disciplinary hearing was held on 14th October, 2019 after which the complainant was found guilty on all charges and summarily dismissed with effect from 22nd November, 2019. On the other hand, his subordinates were given final written warnings. The complainant appealed against his dismissal but his appeal was unsuccessful.

From the evidence on record, the questions for determination are:

1. Whether the complainant's dismissal from employment was wrongful and unfair thereby entitling him to the payment of damages.
2. Whether the complainant is entitled to an order for reinstatement, in the alternative.
3. Whether the complainant should be deemed to have been retired or separated with the respondent under the voluntary separation scheme.

I will begin with the complainant's claim that his dismissal from employment was wrongful.

It is settled that for an employee to successfully bring and maintain an action for wrongful dismissal, it must be shown that the employer breached the disciplinary procedures under the contract of employment, the rules of natural justice and/or indeed the procedure outlined under the Employment Code Act no. 3 of 2019. Hon. Dr. Judge W.S. Mwenda, learned author of the book entitled **'Employment Law in Zambia: Cases and Materials'** states at page 18 that:

"The concept of wrongful dismissal is the product of common law. When considering whether a dismissal is wrongful or not, the form, rather than the merits of the dismissal must be examined. The question is not why, but how the dismissal was effected."

Further, in the case of **Chilanga Cement v Venus Kasito¹**, the Supreme Court held that:

"The concept of wrongful dismissal is essentially procedural and is largely dependent upon the actual terms of the contract in question."

The above authorities have provided enough guidance as to what amounts to wrongful dismissal.

In *casu*, it is on record that when it was discovered that the complainant had approved the payment of dinner allowances for his subordinates which dinner allowances they were not entitled to, the respondent charged him and asked him to exculpate himself to show cause why disciplinary action should not be taken against him. In response to that letter, the complainant

wrote the letter, 'MMH6', wherein he explained the reasons why he had allowed his subordinates to claim for dinner allowances. The complainant was later charged with the offences of abuse of authority; dishonest conduct; fraud, embezzlement; and falsification of staff imprest claims contrary to clauses 1.3.k, 1.4.f, 1.4.i and 1.5.d, respectively. A disciplinary hearing was held on 14th October, 2019 and at the conclusion of the hearing, the complainant was found guilty of the subject offences and summarily dismissed from employment on 22nd November, 2019. The complainant was informed of his right to appeal which he did but his appeal was unsuccessful.

From the above facts, it is evident that the respondent had complied with its disciplinary procedures, the rules of natural justice and the Employment Code Act when dealing with the complainant's case. On the totality of the evidence in this case, I am satisfied that the complainant was accorded all his rights to a fair hearing. In this regard, the complainant has, on a balance of probabilities, failed to prove that his summary dismissal from employment was wrongful. Therefore, his claim in this respect is accordingly dismissed.

I now turn to the question whether the complainant's dismissal from employment was unfair. In determining whether the dismissal was unfair, besides the usual considerations, I will also take into account the issue whether the complainant was treated

in a discriminatory manner by the respondent when it dismissed him from employment.

The learned authors, Judge Dr. W.S. Mwenda and Chanda Chungu in their book entitled: **A Comprehensive Guide to Employment Law in Zambia**, state at page 241 as follows:

“Unfair dismissal is dismissal that is contrary to the statute or based on unsubstantiated ground. For unfair dismissal, the Courts will look at the reasons for the dismissal for the purpose of determining whether the dismissal was justified or not. In reaching the conclusion that the dismissal is unfair, the Court will look at the substance or merits to determine if the dismissal was reasonable and justified.”

On the basis of the above authority, for the complainant to succeed in his action for unfair dismissal, he must show that the respondent based his dismissal on unsubstantiated grounds or that his dismissal was in breach of statutory provisions.

Further, the learned authors referred to above in the same book: **A Comprehensive Guide to Employment Law in Zambia**, state at page 354 that dismissal based on any discriminatory grounds as enacted in section 108(1) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia and section 5(2) of the Employment Code Act No. 3 of 2019 would amount to unfair dismissal.

Firstly, I will determine whether the dismissal of the complainant was based on unsubstantiated grounds so as to amount to unfair dismissal.

It is undisputed that the complainant was dismissed from employment for the offences of abuse of authority; dishonest conduct; fraud, embezzlement; and falsification of staff imprest claims. It is not in issue that the complainant in his capacity as Branch Manager for the respondent's Kitwe branch, admitted having approved the payment of dinner allowances to his subordinates despite knowing very well that they were not entitled to the said dinner allowances. It is, therefore, clear that before the respondent dismissed the complainant, it had satisfactorily established that the complainant had committed the subject offences. Therefore, I find that there was a substratum of facts to support the disciplinary measure that was taken against the complainant.

The second limb of the unfair dismissal is whether the respondent had treated the complainant in a discriminatory manner when it dismissed him.

The complainant has claimed that he was discriminated against by virtue of his position as Branch Manager because his subordinates, who were also charged with similar offences, were just given final warning letters valid for 12 months while he was

summarily dismissed. That the offences he and his subordinates were charged with arose from the same transaction and facts, that is, the payment of dinner allowances which had not accrued to them. That, therefore, he was unfairly treated and discriminated against by virtue of his senior position of Branch Manager.

On the other hand, the respondent denied that the complainant was treated in a discriminatory manner when it summarily dismissed him but gave final warning letters to his subordinates. That the complainant was the only one that was dismissed due to the fact that he was the Controlling Officer at the branch where the incident occurred. That in meting out the punishment, the respondent had complied with the Fair Accountability Treatment Processes and Procedures, 'MMH2'. That according to that policy document, the respondent reserved the right to take any disciplinary action as it deemed appropriate based on the circumstances of each particular case. It was argued that the complainant was dismissed based on the fact that he had directed the members of staff to claim the allowances which he had approved. That the respondent deemed it fit to award the other employees final warning letters and to dismiss the complainant. That the complainant was a senior member of staff but he failed to lead by example by failing to comply with the terms of his contract and other policies that were applicable to him and other employees. It was the respondent's argument that

the complainant was not discriminated against as there was nothing improper about a senior member of staff being punished more severely than the others and the punishment was commensurate with the offences that he had committed. That the complainant was dismissed because he failed to abide by the respondent's policies and procedures.

I have considered the arguments from both parties.

Dismissal based on discrimination is prohibited under the Industrial and Labour Relations Act, Cap.269 of the Laws of Zambia and the Employment Code Act No. 3 of 2019.

Section 108(1) of the Industrial and Labour Relations Act, Cap. 269 of the Laws of Zambia provides as follows:

"No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or status of the employee".

Section 5(2) of the Employment Code Act provides that:

"An employer shall not, in any employment policy or practice discriminate, directly or indirectly, against an employee or a prospective employee—

(a) on grounds of colour, nationality, tribe or place of origin, language, race, social origin, religion, belief, conscience political or other opinion, sex, gender, pregnancy, marital status, ethnicity, family responsibility, disability, status, health, culture or economic grounds; and

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment."

Further, section 52(4) (d) of the Employment Code Act provides that:

“An employer shall not terminate a contract of employment of an employee based on reasons relating to a discriminatory ground under section 5.”

The learned authors, Judge Dr. W.S. Mwenda and Chanda Chungu in their book entitled: **A Comprehensive Guide to Employment Law in Zambia**, based on the decisions in the cases of **Grayson Kachikoti v TAP Bulding Products Limied**,² and **Edward Mweshi Chileshe v Zambia Consolidated Copper Mines**³, state at page 354 that:

“For any litigant to succeed with a claim for unfair discrimination, he or she must prove that the dismissal could not have been effected had there not been discrimination on any of the grounds stipulated in section 108(1) of the Industrial and Labour Relations Act.

It is worth noting that a dismissal can occur for a variety of reasons. Where this occurs, the employee will have to prove that the primary reason for the dismissal was discrimination.”

In the present case, it is incumbent upon the complainant to prove that the primary reason for his dismissal was discrimination. The complainant has claimed that he was discriminated against by virtue of his position as Branch Manager, as he was dismissed from employment while his subordinates were just given final warning letters when the offences they were all charged with arose from the same transaction.

I have perused the minutes of the complainant's disciplinary hearing, 'MMH8' and the summary dismissal letter, 'MMH9'. None of these documents show that the reason the complainant was dismissed was because he was the Branch Manager. From the evidence, it has clearly emerged that the complainant admitted having committed all the offences that he was charged with. On that basis, the respondent found him guilty and imposed the appropriate punishment of summary dismissal in accordance with the Fair Accountability Treatment Processes and Procedures handbook, 'MMH2'.

Therefore, I have no doubt in my mind that the complainant was dismissed primarily because of the offences he had committed and that his dismissal was not based on any of the grounds for discrimination. In this regard, I am quite satisfied that the respondent validly exercised its powers when it dismissed the complainant.

On the totality of the evidence in this matter, I find that the complainant has, on a balance of probabilities, failed to prove that his dismissal from employment was unfair either arising from lack of substantiated facts or on account of discrimination. As a result, his claim is accordingly dismissed.

The complainant having failed to prove his claim that his dismissal from employment was wrongful and unfair, it follows that his claim for reinstatement has also failed.

I now come to the complainant's claim that he should be deemed to have been retired or separated with the respondent under the voluntary separation scheme. In opposing this claim, the respondent stated that the voluntary separation scheme, 'MMH13' was open from 15th to 25th November, 2019; and that the decision as to who was successful could only be made after 25th November, 2019. That, in the complainant's case, he was dismissed on 22nd November, 2019 which was before the consideration of his application for VSS could be made.

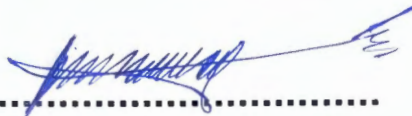
It is not in dispute that the complainant had applied for VSS by his letter, 'LG1' dated 16th November, 2019 exhibited to his further affidavit in support of the notice of complaint. According to the document on VSS offer, 'MMH13', the VSS offer was open from 15th to 25th November, 2019 and management was to evaluate the respondent's employees' applications and communicate to them the outcome of their applications by 1st December, 2019. The respondent's management team reserved the right and had the discretion to select the final individuals to be offered the VSS. Before the complainant's application for VSS was subjected to such an evaluation, he was dismissed from employment on 22nd November, 2019. As such, he ceased to be

eligible to be considered for VSS as he was no longer an employee of the respondent. Therefore, his claim to be deemed to have been retired or separated from the respondent under VSS has failed and is accordingly dismissed.

I make no order for costs.

Leave to appeal is granted.

Delivered at Ndola on the 16th day of December, 2022.


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Davies C. Mumba
HIGH COURT JUDGE