

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

IRC/ND/05/2018⁵⁵

BETWEEN:

AARON MUSUKU

AND

ZAMBIA POSTAL SERVICES CORPORATION

COMPLAINANT

RESPONDENT



Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 2nd day of March, 2022.

For the Complainant: Mrs. B. Mboloma, Legal Aid Counsel
For the Respondent: Mr. C. Musonda, In-house Counsel.

JUDGMENT

Cases referred to:

1. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172 (S.C).
2. Attorney-General v Phiri (1988-1989) Z.R. 121 (S.C).

Legislation referred to:

1. The Employment Code Act No. 3 of 2019.

Other works referred to:

1. Winnie Sithole Mwenda and Chanda Chungu: *A Comprehensive Guide to Employment Law in Zambia*: UNZA Press. 2021.

By notice of complaint supported by an affidavit filed into Court on 10th July, 2018, the complainant commenced this action against the respondent seeking the following reliefs:

1. *Damages for unlawful and unfair dismissal.*
2. *Damages for mental distress caused.*
3. *Benefits for the years served.*
4. *Leave days.*
5. *Any other relief which the Court may deem fit and just under the circumstances.*
6. *Costs.*

In his affidavit in support of the complaint, the complainant deposed that he was employed by the respondent in 2004 as a Driver. That on 30th June, 2017, he applied for local leave to go to Dar es Salaam to pick up his vehicle as shown by copies of the leave form, 'AM1' and the vehicle insurance cover, 'AM2'. That he went to Dar es Salaam and drove his vehicle up to Nakonde Border. That when he reached the Nakonde border, he received a phone call from his supervisor, a Mr. Patrick Panda, who told him that the Area Manager for the respondent company for Muchinga Province, Mr. James Lopa had instructed him to tell the complainant to take a vehicle to a client by the name of Francis Chileshe from Nakonde

Post office to Mpika post office. That due to the fact that he was unable to clear his vehicle at Nakonde border because of lack of funds and being a Driver in the respondent company, he did not decline but went ahead and did as he was instructed to do. That he later received the vehicle and drove it from Nakonde post office to Mpika post office. He averred that whilst at the Mpika post office, he received a phone call from the Area Manager to confirm if he had reached and the Area Manager further instructed him to write a delivery note so that the client, Mr. Chileshe could sign as proof that he had received the vehicle. The complainant deposed that when he returned to work after his leave, on 28th July, 2017, he received the notice of suspension, 'AM3' and the disciplinary charge sheet, 'AM4' stating that he was suspended pending an investigation on the allegation that he had carried out a clearing transaction outside ZFF operations, thereby denying the respondent revenue. That after a period of close to three months, the complainant was told to appear before a disciplinary committee where he was given a chance to explain the side of his story. That he stated that, contrary to the charge sheet, he was not the one who cleared the vehicle in question and that he was only instructed to drive the vehicle by the Area Manager, through his supervisor. That on 5th September, 2017, he was given the notice of dismissal, 'AM5', wherein it was stated that he had no documentation to prove that he had travelled to Dar es Salaam to clear his own vehicle. He stated that he was given an opportunity to appeal against his dismissal to the Director-Operations of which

he did as shown by the copy of his appeal, 'AM6a' but his appeal was unsuccessful as shown by the response to his appeal, 'AM6b'. The complainant also averred that to his shock, the Area Manager, Mr. James Lopa was not put on any suspension and he was not charged with any offence despite having been the one who gave instructions to have the car driven from Nakonde Post office to Mpika post office. Further, that Mr. Lopa continued to work for the respondent without any disciplinary action taken against him. That his dismissal from employment was unfair and unlawful.

The respondent filed an answer and an affidavit in support thereof, sworn by Lydia Mbangweta Chundu, Assistant Manager-Human Resources. She deposed that the complainant was employed by the respondent on 20th October, 2004 on permanent and pensionable basis. That on 27th July, 2017, the respondent suspended the complainant from performing his duties to pave way for investigations following revelations that he was involved in illegal activities, as shown by the suspension letter, 'LMC1'. That on 28th July, 2017, the complainant was charged with the offence of fraud, contrary to clause 16(j) of the ZAMPOST disciplinary code, as shown by the charge sheet, 'LMC2'. Thereafter, the complainant was given an opportunity to be heard during the disciplinary hearing in 17th August, 2017. That the disciplinary committee found the complainant guilty as charged and summarily dismissed him. That the complainant's dismissal was in accordance with the respondent's disciplinary code,

'LMC3'. Further, the deponent deposed that the complainant did not in any way obtain leave from the respondent and that the last time he obtained leave was on 25th August, 2015 as shown by the copy of the completed leave form, 'LMC4'.

At the trial, the complainant abandoned claim for unfair dismissal.

The complainant testified that on a date he could not remember but in the year 2017, he ordered a vehicle from Japan through be-forward, namely a Toyota town ace. When it was time to collect the vehicle from Dar-es-Salaam, he got permission from his supervisor, Mr. Patrick Panda, at Mpika Post office who requested for leave forms from Nakonde Office as they never had forms at their offices. That when he got the forms, Mr. Panda gave him the forms to fill in and they were sent to Nakonde to the Area Manager who was the authorizing officer. In addition, Mr. Panda sent an email to the Area Manager. That before the hard copies could reach him, an email was sent to him authorizing him to proceed on leave.

The complainant testified that he went to Dar-es-Salaam to pick up the vehicle and reached in Nakonde on a Sunday. However, he failed to clear the vehicle because the import duty was too high as it was pegged at K22,500.00. He then decided to go back to Mpika to raise more money to clear the vehicle. He also testified that he called Mr. Panda, who used to reside in Nakonde and would only stay in Mpika from Monday to Friday for work, and he informed

him that he was in Nakonde. Mr. Panda then informed him that there was a vehicle for a client which had stayed too long at the Nakonde office and said that he would ask the Area Manager to see if he could go with it to Mpika. The Area Manager then called the complainant and told him that they had already arranged a Driver by the name of Solomon to drive the said vehicle but since they had not prepared that Driver's night allowance and they only needed to pay the complainant lunch allowance, the complainant could go with the vehicle. Later, Solomon took the vehicle, a Mitsubishi Canter, to Limusote guest house where he was staying and also handed over the ZRA documents for the vehicle. They inspected the vehicle and found it intact. The same day on Sunday around 16:30 hours, the complainant started off for Mpika and reached at 22:00 hours. That he parked the vehicle at his house because the office had no security at the time. The following day, the complainant went with the vehicle to work at 08:00 hours. At 09:30 hours, the Area Manager, Mr. James Lopa called him to find out if he had handed over the vehicle and the complainant informed him that the client had just arrived and that they were doing the handover. The Area Manager advised that he should make the client sign a document as proof of receipt and the complainant drafted a delivery note which the client signed after confirming that the vehicle was intact. The complainant stated that he retained a copy of the delivery note because he was the one who used to receive vehicles from Nakonde and hand over to clients.

The complainant testified that about three weeks later, he received a suspension letter, citing fraud and clearing. He stated that he did not understand the contents of the letter so he called the Area Manager to inquire but the Area Manager told him that he was with a client and would call him later. However, the Area Manager never called him back and he was not picking calls when the complainant tried to call him the next day. Later, he received a phone call from the Post Master, Mr. Mutale, who informed him that he should travel to Nakonde for a disciplinary hearing. That he asked if there was anything he was supposed to go with and he was told that he could go just like that. He travelled to Nakonde and a disciplinary hearing was conducted. During the disciplinary hearing, the complainant explained everything that had happened and demanded for Mr. Lopa to be called. That Mr. Lopa was called and when the complainant asked him if he was not the one who had authorised him to get the vehicle, Mr. Lopa answered that he only asked Mr. Panda to organise for the vehicle to go to Mpika and he was not aware of the issue concerning authority. That he then asked Mr. Lopa why he had called him to ask if he had handed over the vehicle the previous day if he did not know anything about authority and also what he meant by 'fraud' in the letter of suspension but Mr. Lopa just asked Mr. Phiri, who had gone to do the disciplinary hearing, to just continue with the work and he left. After a month and a week, he received a letter of dismissal in which it was stated that if he was not satisfied with the decision,

he could appeal to the Director of Operations. That he appealed against the dismissal and after three weeks, he received a letter upholding the dismissal. He was also advised to appeal to the Post Master General, however, he did not.

Regarding the offence of fraud which he was charged with, the complainant stated that he was a Driver and that issues to do with clearing used to be done by the Clearing Agent. That there was no clearing office at their Mpika Office. He stated that according to the documents for ZRA, Collins Siamalambo was the one who cleared the vehicle and the TPIN number on the documents was for the said Collins Siamalambo. He stated that the clearing office was at Nakonde and that it used to take about two to three weeks to clear a vehicle but he only stayed at Nakonde for a day. That he did not understand the charge of fraud because driving a car from Nakonde to Mpika could not amount to fraud.

When referred to the leave form, 'AM1,' the complainant stated that he had filled in the said form on 30th June, 2017. When referred to the Insurance cover, 'AM2', the complainant stated that the same was for his personal vehicle which he had gone to collect. That the vehicle was a Toyota Town Ace and the Insurance cover was dated 18th July, 2017. When referred to the notice of suspension, 'AM3', the complainant stated that he was accused of carrying out clearing transactions outside of ZFF operations thereby denying the company and the corporation revenue, but he

did not know about the charge because his job was to drive vehicles and not to deal with cash. When referred to the disciplinary charge sheet, 'AM4', the complainant testified that he did not understand the charge of fraud because he never used to deal with money. He also stated that the allegation that he travelled with Mr. Panda to collect a vehicle on behalf of a customer on the pretext that they operated on behalf of ZFFL when in fact not was not true because he never went to Dar es Salaam with Mr. Panda. That he travelled to Dar es Salaam concerning his personal vehicle and not any other vehicle. Further, that he found the vehicle in question at Nakonde Post office where it had been for about three weeks. When referred to the notice of dismissal, 'AM5', the complainant stated that he did not know anything about what was stated in the notice, that is, that he had failed to show that he had been granted leave and also that he had connived with his colleagues to get extra income by driving the vehicle from Nakonde to Mpika thereby depriving the company of its revenue. That the only money he was supposed to be paid was K70 lunch allowance which was never paid to him. He stated that he worked according to instructions from his boss and it was something that used to happen on several occasions as he usually got instructions from his boss via the phone. He denied having taken part in clearing the vehicle and stated that he did not have a TPIN to clear the vehicle and he did not have authority to enter ZRA to start clearing vehicles. That only Clearing Agents issued with identification cards by ZRA had the authority to do so. He stated

that he did not produce documentary evidence during the disciplinary hearing to show that he had been granted leave because when he was called to go to Nakonde, he was not told to go with anything. That he had asked for permission to call his wife to send the documents by bus but they refused and said that they did not have time to wait for them. However, he was told that once in Mpika, he could take pictures of the documents and send them on WhatsApp which he did, including to the Post Master at Nakonde. That he also attached the leave form to the appeal. The complainant confirmed that he was accorded an opportunity to be heard during the disciplinary hearing and he was also informed of his right to appeal after the dismissal. He testified that the leave in 2015 was not the only leave that was granted to him. That he used to go on local leave even after 2015. That sometimes his boss just used to ask him on phone to go and pick up vehicles. Also that sometimes when he requested for leave they would tell him that there was no stationery.

During cross-examination, the complainant stated that he obtained leave from his supervisor. When referred to the leave form, 'AM1', the complainant stated that no one signed the document to approve his application for leave. That the document did not show that leave was authorised. He stated that the leave was authorised by the Area Manager from Nakonde via email but he did not have the said email. He admitted that he was in Dar es Salaam where he had gone to collect his vehicle. He also admitted

that when he reached Nakonde, he received instructions from Mr. Panda to drive a Canter from Nakonde to Mpika. However, he did not have any proof to show that the instructions came from Mr. Panda because he used a phone. He confirmed that an officer by the name of Solomon handed over the vehicle to him and he inspected the vehicle. That they used a check list which came with the vehicle from Nakonde when inspecting the vehicle. He stated that he did not have the said check list because it was handed over to the owner of the vehicle. The complainant stated that he had a delivery note to show that the vehicle was handed over. He admitted that clearance of vehicles was done in Nakonde and stated that ZAMPOST had offices in Nakonde for purposes of clearance. He stated that the vehicle was handed over to him at Limosote guest house. That the instructions to do the transaction were given by the phone. That he had a document showing that the vehicle was cleared by ZAMPOST but the same was not on the Court's record. The complainant admitted that when he reached Mpika, he parked the vehicle at his house and not ZAMPOST. That the Area manager had given him authority to keep ZAMPOST vehicles and those cleared by ZAMPOST at his house. The authority was given through a phone call which he did not record. He stated that the delivery note he referred to did not have a ZAMPOST letterhead because there was no stationery. The complainant stated that he did not have any proof to show that Mr Lopa gave him instructions concerning the clearance of the vehicle. He confirmed that clearance of vehicles could not be done within a

day and it took two to three weeks. The complainant also stated that he was not satisfied with the decision of the disciplinary committee but he did not appeal to the Post Master-General because he was confused. The reference letter was good but he did not produce it before Court because he was given after the matter was already before Court.

In re-examination, when asked why he stated that the delivery note was not on ZAMPOST headed paper because there was no stationary, the complainant stated that he had never seen any headed paper from the time he started delivering vehicles. He also stated that the email approving his leave could be found at the office on the computer. He confirmed that he went to Dar es Salaam to fetch his own vehicle. He further stated that he did not appeal against his dismissal to the Post Master-General because he was confused after receiving the same response on his first appeal.

RW1 was Christopher Phiri, Human Resource Officer in the respondent company. The witness explained to the Court that the disciplinary procedure in the respondent company. He explained that immediately an offence was committed, the immediate supervisor had to suspend the employee to pave way for investigations. Once investigations were concluded and the supervisor found the employee wanting, a charge had to be raised in line with the respondent's disciplinary code. The employee was

then asked to submit a written exculpatory statement to be submitted to the supervisor. Thereafter, a disciplinary committee would be constituted for the case hearing and if it was found that the offence was committed, a verdict would be passed on the employee. In the event that the employee was not happy with the verdict, the employee had the right to appeal to the Director-Operations and then to the Post Master-General if not happy with the decision of the Director-Operations. When referred to the complainant's letter of dismissal, 'AM5', the witness stated that the complainant was advised to appeal to the Director-Operations within 14 days and that he appealed as shown by the letter, 'AM6a'. He also stated that the Director-Operations upheld the decision of the disciplinary committee and informed the complainant of his right to appeal to the Post Master General, as shown by the Director-Operation's response to the complainant's appeal, 'AM6b'. However, the complainant did not exercise his right to appeal to the Post Master General. When referred to the complainant's application for leave form, 'AM1', the witness stated that the leave was not authorised by the head of department as per the respondent's procedure. RW1 also testified that two other men were dismissed under similar circumstances, Patrick Banda, the Post Master at Mpika and Collins Hamalambo who was a Clearing Agent at Nakonde.

During cross-examination, the witness stated that he had never worked in Mpika where the complainant was stationed. He stated

that the procedures for application for leave were the same in Mpika and Ndola as the respondent had Branch Managers in-charge. That for instance, the Branch Manager for Mpika was based at Nakonde. That the Branch Manager was the one who used to approve leave. That one had to apply for leave in Mpika and the leave had to be approved in Nakonde. He admitted that sometimes approvals were done through email. That after signing the leave forms, the supervisor had to recommend to the Branch Manager to authorise the leave. He stated that he was aware that the complainant had signed the leave forms but his supervisor did not recommend and the leave was not authorised. The witness stated that he was not aware that the leave forms had gone to Nakonde. He admitted that sometimes communication would be done online because of the distance between Mpika and Nakonde. He, however, stated that it was not possible for the approval to be done online and simply tell the applicant that the leave had been approved because the respondent had a mail van which operated from Mpika to Nakonde on a daily basis. He later admitted that leave could be approved online from Nakonde. The witness also stated that the complainant only appealed against his dismissal once to the Director-Operations and the appeal was rejected. He admitted that appealing to the Post Master-General against the decision of the Director-Operations was a matter of choice. He also stated that the respondent had not neglected to pay the complainant for his accrued leave days but that the complainant had not applied for the same.

In re-examination, the witness stated that the complainant's leave was not approved.

RW2 was Alfred Simbeye, Compliance Officer in the respondent company. The witness explained to the Court that the role of the driver in the clearing and transportation of the motor vehicle for the respondent was to facilitate the movement of the vehicle from Nakonde to Mpika. That before the driver proceeded for work outside the designated work station, he was supposed to fill in a document known as authority to travel. That in the case of the complainant, no such document was filled in. It was RW2's evidence that once the driver had collected the vehicle and arrived at the town of delivery, he was supposed to park the vehicle at the post office or if there was no security at the post office, he was supposed to notify the post office and park the vehicle at a police station. The witness also stated that once the vehicle was delivered at the post office, it was supposed to be handed over to the Post Master who would in turn hand over the vehicle to a customer.

The witness testified that in the present case, the complainant did not follow the procedure as he had parked the vehicle at his home and he never handed over the vehicle to the Post Master but handed it directly to the customer. When referred to 'AM2', the witness stated that the document was called 'Insurance in transit'

and that that type of insurance was meant to facilitate the movement of the vehicle from Tanzania to Nakonde border. That the insurance expired once the vehicle got to Nakonde. He stated that the document was not sufficient proof of ownership of a motor vehicle.

During cross-examination, the witness stated that the Area Manager was the one who used to give authority to drivers to collect goods after filling in the authority to travel. He stated that the driver could only discharge instructions from the supervisor if the correct procedure was followed. That the driver could not move from Nakonde to Mpika without authority. He admitted that drivers were conversant with the procedures. He stated that the complainant was given rules regarding transportation of motor vehicles. He stated that he could not comment on whether the complainant was given the procedures to follow but as far as he knew, the complainant was very conversant with all the procedures. That he could not talk about whether the procedures were written in the complainant's contract of employment because he was not given the said contract. He stated that in the event that a substantive holder of a position was absent to give authority to travel, someone had to act in that position. That even small towns had laid down procedures.

At the conclusion of the trial, both parties promised to file final written submissions. However, as at the time of writing the judgment, none of the parties had filed the written submissions.

The facts which were common cause are that the complainant was employed by the respondent on 20th October, 2004 as a Driver on permanent and pensionable basis until he was dismissed from employment on 5th September, 2017. The facts leading to the dismissal of the complainant were that on 30th June, 2017, the complainant had applied for local leave in order to go and collect his motor vehicle from Dar-e-salaam as shown by the application for leave, 'AM1'. On 27th July, 2017, the respondent suspended the complainant from performing his duties on the ground that he was carrying out clearing transactions outside of ZFFL operations thereby denying the company and the corporation revenue. His suspension was to pave way for investigations. On 28th July, 2017, the complainant was charged with the offence of fraud under clause 16(j) of the respondent's disciplinary code as shown by the disciplinary charge sheet, 'AM4'. He subsequently appeared before the respondent's disciplinary committee which found him guilty of the offence and summarily dismissed him on 5th September, 2017 as shown by the letter of dismissal, 'AM5'. He was informed of his right to appeal against the dismissal to the Director of Operations which he did. His appeal was unsuccessful.

The complainant has alleged that his dismissal from employment was unlawful.

In the case of **Eston Banda v The Attorney General**¹, the Supreme Court had this to say:

"We note that the terms, 'wrongful', 'unlawful', and 'unfair' termination of employment have, persistently been used interchangeably in the arguments and submissions. Needless to re-iterate that, these terms do not refer to one and the same thing.

According to Michael Jefferson, author of *Principles of Employment Law*, (2000) 4th Edition, Cavendish Publishing Limited, Sydney, Australia, 'wrongful' dismissal looks to the form of the dismissal. It refers to a situation where an employer dismisses an employee without notice or with insufficient notice. This is contrasted with 'unfair' dismissal which is said to concentrate both on procedure and substance. Halsbury's, *Laws of England*, Volume 41, 5th Edition, at paragraph 722, also provides that "... dismissal may at common law either be lawful or wrongful; and a dismissal, whether lawful or wrongful, may be challenged as being unfair by statute."

The above excerpts only go to underscore the fact that, there are only two broad categories for dismissal by an employer of an employee, it is either wrongful or unfair. 'Wrongful' refers to a dismissal in breach of a relevant term embodied in a contract of employment, which relates to the expiration of the term for which the employee is engaged; whilst 'unfair', as stated at paragraph 757 of Halsbury's *Laws of England*, refers to a dismissal in breach of a statutory provision, where an employee has a statutory right not to be dismissed.

Hence, as Michael Jefferson, further observes, 'a loose reference to the term 'unlawful' to mean 'unfair' is strictly speaking, in employment parlance, incorrect and is bound to cause confusion."

Based on the above authority, it is clear that there are only two categories of dismissal by an employer of an employee, that is, wrongful and unfair dismissal. Therefore, it was improper for the

complainant to have abandoned the claim for unfair dismissal, instead of unlawful dismissal. Nonetheless, I will proceed to determine the claim as though the claim was for that of unfair dismissal.

The learned authors, Judge 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.”

Therefore, for the complainant to succeed in his action for unfair dismissal, he must show that a specific statutory provision was breached by the respondent and that there were no justifiable reasons when the respondent summarily dismissed him.

I have also perused the employment Code Act No. 3 of 2019. According to sections 50(1) (f) and section 52(3), it is provided as follows:

50(1) An employer shall not dismiss an employee summarily except in the following circumstances:

(f) for a misconduct under the employer's disciplinary rules where the punishment is summary dismissal.

52(3) An employer shall not terminate the contract of employment of an employee for reasons related to an employee's conduct or performance, before the employee is accorded an opportunity to be heard.

In *casu*, it is on record that prior to his dismissal from work, the complainant was suspended from work to pave way for investigations, as shown by the notice of suspension, 'AM3'. He was then charged with the offence of fraud, contrary to clause 16(j) of the respondent's disciplinary code as shown by the charge sheet, 'AM4' which also contained the particulars of the charge. On 17th August, 2017, the complainant appeared before the disciplinary committee where he explained the side of his story. I note that none of the parties produced the minutes of the said disciplinary hearing. Since this is not in issue, I have accepted the fact that there was such a disciplinary hearing and the complainant was accordingly accorded an opportunity to be heard.

After the disciplinary hearing, the complainant was summarily dismissed for the said offence of fraud. The complainant was informed of his right to appeal to the Director-Operations, which right he exercised but the appeal was unsuccessful. He was also advised to appeal to the Post Master General if dissatisfied with the decision of the Director-Operations but he chose not to do so. With respect to the punishment that was imposed, a perusal of the respondent's disciplinary and grievance procedure code, 'LMC3' has shown that the penalty for the offence was summary dismissal. Based on the foregoing, it is my firm view that the respondent did not breach its own disciplinary rules or statutory

provisions when dealing with the complainant's case. However, the matter does not end there.

The respondent having complied with its disciplinary procedure and the law, it is now the duty of the Court to be satisfied that there was a substratum of facts to warrant a finding of guilt against the complainant.

In the case of **Attorney-General v Phiri**², the Supreme Court held 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. Quite clearly, if there is no evidence to sustain charges levelled in disciplinary proceedings, injustice would be visited upon the party concerned if the court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedures.”

In the present case, it is on record that sometime between June and July, 2017, the complainant travelled to Nakonde where he collected a vehicle for the respondent's client and drove the said vehicle from Nakonde to Mpika. When he arrived in Mpika, the complainant parked the vehicle at his house and handed it over to the client the next day. According to the respondent, the complainant had no authority to collect and drive the vehicle in question. It was contended that the complainant travelled to Dar

es Salaam to clear and collect the said vehicle on behalf of the respondent's customer on the pretext that he was operating on behalf of ZAMPOST Freight and Forwarding Limited (ZFFL) when in fact the transaction was done outside the ZFFL system, thereby depriving the respondent of its revenue.

The complainant, on the other hand, contended that he was not the one who cleared the vehicle in question. That he had travelled to Dar es Salaam to pick up his own vehicle but failed to clear it at Nakonde border due to the fact that the duty was high. That he only drove the respondent's client's vehicle following the instructions issued by his supervisor, Mr. Patrick Panda by phone. According to him, his supervisor was also acting on the instructions which were given to him by the Area Manager, Mr. James Lopa.

I have considered the parties' arguments and the documents that have been produced in support of their respective cases.

The complainant argued that at the time he travelled to Dar es Salaam, he had obtained leave from work and that he went to pick up his own vehicle. However, the leave form, 'AM1' shows that his application for leave was not approved. The complainant further claimed that the leave had been approved online via email but he did not produce the said email to show that his leave had been approved. The complainant also claimed that he had gone to pick

up his own vehicle, a Toyota Townace but other than the insurance cover, 'AM2', the complainant did not produce any document to show that he had bought the said vehicle. As rightly argued by the respondent, the insurance cover was not conclusive proof that he was the owner of the vehicle. The complainant had ample time between the time he was suspended on 27th July, 2017 and the time of his disciplinary hearing on 17th August, 2017 to prepare documents proving that the purpose of his travel to Dar es Salaam was to clear and pick up his own vehicle and not the vehicle in question.

From the evidence on record, it is vivid that the complainant played an active role in the collection of the vehicle in issue from Nakonde, parked it at his home and subsequently handed it over to the respondent's customer without any actual authority from the respondent. Therefore, I have no doubt in my mind that the complainant's actions were indeed fraudulent. On the totality of the evidence in this case, I am satisfied that there was a substratum of facts to support the summary dismissal of the complainant from his employment. In the result, the complainant's claim for an order that his dismissal from the respondent's employment was unfair cannot stand and is accordingly dismissed. In consequence thereof, the claims for damages unfair dismissal and mental distress have failed and are hereby dismissed accordingly.

The complainant has also claimed for payment of benefits for the years served and accrued leave days. It is settled by a plethora of authorities that even when an employee is summarily dismissed or the contract of employment is terminated in any other manner, the employee does not lose his or her accrued benefits. This common law right to accrued benefits is also provided for in section 51(1) of the Employment Code Act 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 employee up to the date of the dismissal.”

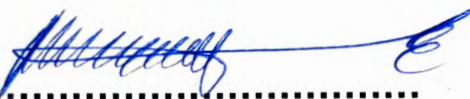
In this case, the complainant has claimed for both benefits for the years served and leave days. For the benefits, it is my considered view that the complainant needed to lead evidence specifying the type of accrued benefits and how such benefits accrued to him. Without such evidence being led, the Court finds it extremely difficult to make an open-ended award. Therefore, the complainant has, on a balance of probabilities, failed to prove his claim for payment of terminal benefits for the period that he served the respondent.

With regard to the claim for accrued leave benefits, it is my view that the claim should succeed notwithstanding the complainant's summary dismissal. Therefore, the respondent shall pay the complainant for the accrued leave days for the period he worked for the respondent, that is, from 20th October, 2004 to 5th September, 2017, less the number of accrued leave days for which

the respondent may have paid cash in respect of any commutation of accrued leave days and/or leave days taken by the complainant. The sum to be found due shall attract interest at the short-term commercial deposit rate, as determined by the Bank of Zambia, from the date of the notice of complainant to the date of the judgment and thereafter, at 10% per annum until full settlement.

I make no order for costs. Each party will bear own costs.

Delivered at Ndola this 2nd day of March, 2022.



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Davies C. Mumba
HIGH COURT JUDGE