

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

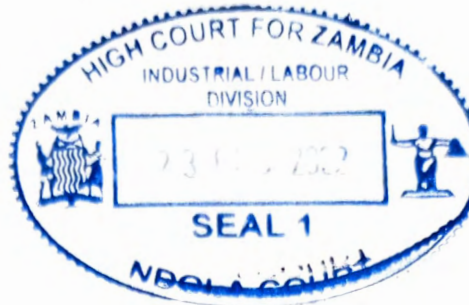
IRC/ND/16/2021

BETWEEN:

ZIBAO HARRY JUMA

AND

**FIRST QUANTUM MINING & OPERATIONS
LIMITED - ROADS DIVISION**



COMPLAINANT

RESPONDENT

Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 23rd day of February, 2022.

For the Complainant: In Person

For the Respondent: No appearance

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 3rd March, 2021, the complainant commenced this action against the respondent seeking the following reliefs:

1. ***A declaration that his dismissal from employment was unfair.***
2. ***Damages for unfair dismissal.***
3. ***Payment of service benefits and accrued leave days.***
4. ***Damages and/or compensation.***

In his affidavit in support of the complaint, the complainant deposed that on a date between 1st and 30th November, 2020, he received a letter from the respondent notifying him of the termination of his employment by reason of redundancy effective 30th November, 2020, as shown by the said letter of redundancy, 'ZHJ1'. That the said letter itemised his benefits package as follows:

- Redundancy pay: 5 months gross salary (4 months gross plus 1).
- Repatriation: K4,000.00.
- Commutation of all outstanding leave days.
- 13th cheque pro-rata.
- Payment of all outstanding shifts.
- Less any money owed to the company.

The complainant deposed that on a date between 1st November, 2020 and 4th December, 2020, he was intercepted at one security boom check point whilst in possession of one packet of black tiedown cable clips valued at \$6 and one canister multi-purpose spray (penetrating oil) valued at \$2.48; and was immediately charged with an offence of removal of company property and

theft. The complainant produced the security investigations report, 'ZHJ2' to that effect. He deposed that on 30th November, 2020, he was summarily dismissed as shown by the letter of dismissal, 'ZHJ3'. It was the complainant's contention that the offence he was charged with was contradictory to what was stated in the investigations report which clearly stated that he had taken the company properties without a gate pass or permission and not removal of the company properties without a gate pass or permission. That there were two separate clauses that addressed the type of penalty that could be meted out. That the investigations report was clear as to which clause in the disciplinary code and schedule of offences, 'ZHJ4' was applicable, that is, clause 4.5 and not clause 4.4. He stated that the respondent breached its own guidelines enshrined in its disciplinary code and schedule of offences as to which clause was applicable based on the recommendation in the investigations report. That under clause 4.5, there were three stages of punishment, namely, written warning, final warning and dismissal, as opposed to summary dismissal under clause 4.4 which the respondent preferred for its own convenience. The complainant also deposed that when he appealed against his dismissal, he was denied audience by the officer who was chosen to hear his appeal. That his appeal was silently decided by the respondent and a letter issued to him without any sitting contrary to the FQMO's disciplinary code and schedule of offences guidelines. That based on the foregoing, the complainant felt that his constitutional rights were deliberately

denied to his disadvantage. That as a direct consequence of the respondent's conduct, he lost his benefits.

The respondent filed an answer and an affidavit in support thereof, sworn by Tinozi Chisunka, Human Resources Superintendent. It was deposed that the complainant was employed by the respondent as a Mechanic with effect from 20th September, 2016 on a permanent and pensionable contract having previously served under fixed term contracts, until 30th November, 2020 when he was summarily dismissed from employment. The deponent exhibited the copy of the fixed term contract of employment, 'TC1' and the notice of renewal of the said contract on permanent and pensionable basis. It was deposed that on 12th November, 2020, the complainant was searched and found in possession of a pack of tie clips and a can of multi-purpose spray as he tried to exit the mine premises using the sentinel mine boom gate at Kalumbila mine during a routine search conducted by security guards at the said gate. That the incident was reported to the security department which instituted investigations and produced the security investigations report, 'TC3'. That following the said incident and investigations, the complainant was charged with the offence of unauthorised removal of company property and theft by his immediate supervisor, which offence and correspondent sanction were provided for under clause 4.4 of the respondent's disciplinary code and schedule of offences, 'TC2' and clause 8 of his fixed term contract, 'TC4'. The deponent deposed that in response to the charge, the complainant

exculpated himself through a hand written exculpatory statement, 'TC5', in which he admitted having removed the items in question, which were the property of the respondent, for his personal use without authorization. A disciplinary hearing was held on 30th November, 2020 at which the complainant was heard and he was represented by a representative of his choice. The deponent produced the minutes of the said disciplinary hearing, 'TC7'. It was deposed that following the disciplinary hearing and the complainant having admitted the charge, he was found guilty as charged and summarily dismissed in accordance with the respondent's disciplinary code and schedule of offences; and the contract of employment. That the complainant was informed of his right to appeal against his dismissal and he appealed to the Project Manager but the appeal was unsuccessful. It was deposed that the complainant was fairly and lawfully dismissed.

When the matter came up for trial on 7th February, 2022, the respondent's Counsel was not in attendance neither was there any representative from the respondent company. I was satisfied that service was effected on the respondent as shown by the affidavit of service filed into Court on 31st January, 2022. There was no reason that had been advanced by the respondent for their absence. Therefore, I proceeded with the trial.

The complainant indicated that he was relying substantially on the affidavit in support of the complaint. In addition, he gave very brief *viva voce* evidence in support of his case.

The complainant testified that he was employed by the respondent in Kalumbila district on 20th September, 2016. On 30th November, 2020, he was dismissed by the respondent for the offence of unauthorised removal of company property and theft. Thereafter, he appealed against his dismissal but his appeal was not heard. Hence, this action.

I have considered the affidavit evidence from both parties and the *viva voce* evidence from the complainant.

The facts of the case which were common cause are that the complainant was employed by the respondent on permanent and pensionable contract on 20th September, 2016. Prior to that, the complainant served under fixed term contracts until 19th September, 2016 as shown by the notice of the renewal of contract dated 14th September, 2014 in which it was stated that all the terms and conditions of his employment remained unchanged.

On 1st November, 2020, the respondent wrote to the complainant the letter, 'ZJH1' notifying him of the termination of his employment by reason of redundancy effective 30th November, 2020. He was entitled to a redundancy pay of five months' gross salary; repatriation of K4,000.00; payment of commutation of all outstanding leave days; payment of the 13th cheque pro rata; and payment of outstanding shifts. The payments were to be subject

to the deduction of any money the complainant owed the respondent.

On 12th November, 2020 around 06:00 hours as the complainant was exiting the respondent's mine premises through the sentinel mine boom gate, he was searched by Security Guards who were manning the said gate and was found in possession of a pack of tie clips and a can of multi-purpose spray. Thereafter, the respondent's security department instituted investigations and produced a security investigations report, 'TC3' in which it was concluded that the complainant took the company properties without a gate pass or permission from any senior officer and that there was overwhelming evidence against him to that effect. Following the said investigations, the complainant was, on 27th November, 2020, charged with the offence of unauthorised removal of company property and theft under clause 4.4 of the disciplinary code and schedule of offences, 'TC2' and clause 8 of his fixed term contract of employment. The disciplinary charge form has been exhibited as 'TC4'. On the same date of 27th November, 2020, the complainant rendered his exculpatory statement, 'TC5' in which he admitted that he was found with a pack of cable tie clips and a tin of MPS (Multi-purpose spray). Further, he stated that his intention was not to steal the cable ties and MPS (multi-purpose spray) but rather wanted to use the said items on his personal vehicle and, thereafter, return to the respondent whatever would have not been used. A disciplinary hearing was held on 30th November, 2020 at which the complainant

was accorded an opportunity to defend his case. In defending his case, the complainant submitted that the items in question were entrusted to him by the respondent. That the said items were to be kept in his tool box and used whenever he was on a shift. That it was his intention to use part of the items whilst he was on leave and to return them when he resumed his duties. It was his contention that he should have been charged under clause 4.5 of the disciplinary code and schedule of offences which provided for the offence of taking or use of company property without authority as opposed to clause 4.4. He pleaded for leniency considering that he had served the company for a number of years without any disciplinary issues.

After considering the evidence before it, the respondent's disciplinary committee summarily dismissed the complainant from his employment with effect from 30th November, 2020. He was advised of his right to appeal to the Project Manager within two working days as shown by the minutes of the disciplinary hearing, 'TC7'. By the disciplinary appeal form, 'TC9' of the same date, the complainant launched an appeal against the decision to summarily dismiss him arguing that the decision to dismiss him was severe and his intention when he took the items was overlooked by the committee when it arrived at its decision. On 3rd December, 2020, the respondent wrote a letter to the complainant informing him that his dismissal had been upheld. Therefore, the decision was final.

I have considered the parties' evidence and the documents that have been produced in support of their respective cases. From the evidence on record, the issue for determination in this matter is whether the complainants' summary dismissal by the respondent was unfair.

As is the case in all civil matters, the onus is upon the party alleging to prove his/her case on a balance of probabilities. In the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**¹, the Supreme Court held that:

"It is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case."

In the present case, the complainant has alleged that his dismissal from employment was unfair. 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."

For the complainant to succeed in his action for unfair dismissal, therefore, he must show that a specific statutory provision was breached by the respondent or that the dismissal was based on unsubstantiated reasons.

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 after finding the complainant with the tie clips and multi-purpose spray belonging to the respondent, the respondent instituted investigations into the matter after which it was found that he took the property in issue without the respondent’s authority. The respondent subsequently charged the complainant with the offence of unauthorised removal of company property and theft aforesaid. Following his exculpation, the complainant appeared before the disciplinary committee where he did not dispute having taken the respondent’s property for his own personal use without authority. Consequently, he was summarily dismissed for the offence of unauthorised removal of company property and theft, contrary to clause 4.4 of the disciplinary code and schedule of offences, ‘TC2’.

Although the complainant has argued that he should have been charged for the offence of taking or use of company property without authority under clause 4.5 of the disciplinary code and schedule of offences, I do not accept such an argument because the offence the complainant committed also amounted to unauthorised removal of company property and theft. It was within the discretion of the respondent to charge the complainant either under clause 4.4 or 4.5 of the disciplinary code and schedule of offences. Therefore, I am satisfied that the clause under which the complainant was charged was the proper one for the offence that he committed. In this regard, the respondent cannot be faulted in any way.

With respect to the punishment that was imposed, a perusal of the respondent's disciplinary code and schedule of offences has shown that the penalty for the offence under clause 4.4 was summary dismissal. Accordingly, it is my firm view that the respondent did not breach its own disciplinary rules. Further, it is in evidence that the respondent had accorded the complainant an opportunity to be heard before his employment was terminated for the offence for which he was found guilty in compliance with the provisions of section 52(3) of the Employment Code Act. However, the matter does not end there.

The respondent having complied with its disciplinary procedure and the statutory requirements, 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 not controverted that the complainant took the property in issue which belonged to the respondent for his own personal use without authority. His argument that he intended to use part of the items whilst on leave and return the remainder for the respondent's official use defeats logic and sense; and I reject it. I am satisfied that the complainant took the respondent's property for his personal use without its authority with a view to permanently deprive it of its property. On the totality of the evidence in this case, I am satisfied that there was, therefore, 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 claim for

damages and/or compensation for unfair dismissal has failed and is hereby dismissed accordingly.

The complainant has also claimed for payment of service benefits 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.”

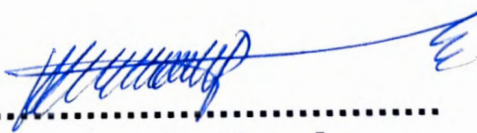
In this case, the complainant has claimed for both service benefits and leave days. For service benefits, it is my considered view that the complainant needed to lead evidence specifying the type of accrued service benefits he was claiming and how such benefits accrued to him. Without such evidence being 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 service benefits.

With regard to the claim for accrued leave benefits, it is my view that the claim should succeed notwithstanding the complainant's summary dismissal. According to clause 5(a) of the fixed term contract of employment, 'TC1', as read with the notice of renewal of contract dated 14th September, 2016; the complainant was

entitled to 24 days annual leave. Therefore, the respondent shall pay the complainant for the accrued leave days for the period he worked for the respondent, that is, from 20th September, 2016 to 30th November, 2020 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 quantum shall be agreed by the parties or in default of such agreement, the same shall be assessed by the learned Deputy Registrar. 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 complaint 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 23rd day of February, 2022.


.....
Davies C. Mumba
HIGH COURT JUDGE