

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

IRC/ND/67/2021

BETWEEN:

FRANCIS PHIRI

AND

LUANO TOWN COUNCIL



COMPLAINANT

RESPONDENT

Before the Hon. Mr. Justice Davies C. Mumba in chambers on the 6th day of December, 2022.

For the Complainant: Mr. H. Chinene, Messrs Lumangwe Chambers.

For the Respondent: Mrs M. Mupeso, In House Counsel.

JUDGMENT

Cases referred to:

1. Eston Banda and another v The Attorney-General, Appeal No. 42 of 2016.
2. Chilanga Cement v Venus Kasito, Appeal No. 86 of 2015.
3. Bank of Zambia v Joseph Kasonde (1995-1997) Z.R. 238.
4. Martin Nguvulu and 34 Others v Marasa Holdings Limited (T/A Hotel Intercontinental), Appeal No. 108 of 2016.

Legislation referred to:

1. 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 17th December, 2021, the complainant commenced this action against the respondent seeking the following reliefs:

1. Re-instatement or in the alternative, damages for unfair dismissal, wrongful dismissal and unlawful dismissal from employment
2. Payment in lieu of notice.
3. Payment for accrued leave days.
4. Payments of any accrued statutory benefits.
5. Interest on sums due.
6. Costs.
7. Any other relief the Court may deem fit.

In his affidavit in support of the notice of complaint, the complainant deposed that he was employed by the respondent as a Council Police. That he applied for three months leave from 1st October, 2019 to February, 2020 which was approved by the respondent as shown by the application for leave form, 'FP1'. The complainant deposed that during his absence from work, on 9th October, 2019, the respondent made allegations against him, among them, that he was carrying out illegal construction of a house and suspended him from work as shown by the suspension letter, 'FP2-3' dated 20th November, 2019. That in his exculpatory letter, 'FP5-6' dated 27th November, 2019, the complainant denied all the allegations and informed the respondent that he was building on his plot which he had purchased as evidenced by the sale agreement, 'FP4'. He stated

that the respondent replied to his exculpatory letter of 27th November, 2019 and proceeded to arrange for a disciplinary hearing of the matter without any charges as shown by the letter, 'FP7- and 'FP8' dated 2nd December, 2019 and 1st June, 2020, respectively. The complainant averred that on 22nd June, 2020, the respondent wrote the letter, 'FP9-10' by which he was discharged from employment. That his union wrote the letter, 'FP11-14' dated 23rd September, 2020 to the respondent on his behalf and he also wrote his letter of appeal, 'FP15-16' against his discharge from employment but his appeal was dismissed as shown by the letter, 'FP17-18'. The complainant further deposed that his advocates wrote the letter, 'FP19' to the respondent demanding for his re-instatement.

On 29th March, 2022, the complainant filed into Court a further affidavit in support of the notice of complaint wherein he filed his letter of offer of employment, 'FP1-2' dated 23rd October, 2015 and his pay slips for July, 2019, 'FP3' and October, 2021, 'FP4'.

On 1st April, 2022 the respondent filed an answer and affidavit in support thereof sworn by Chali K. Mwansa, Chief Human Resource Officer for the respondent. He averred that the complainant had denied all the allegations against him; and informed the respondent that he was building on his plot which he had purchased, but that he was issued with a stop order, 'CKM1' dated 9th October, 2019. He deposed that prior to exculpating himself on charges levelled against him to the effect

that he had contravened the Local Government Service Conditions of 1996, the respondent had advised the complainant to do so as shown by the charge letter, 'CKM2' dated 12th November, 2019. That the complainant, through his letter dated 27th November, 2019, exculpated himself and in its response to the said letter, 'CKM3' dated 2nd December, 2019, the respondent indicated to the complainant that his exculpation could not amount to a discharge of the charges leveled against him. He stated that the complainant was discharged from employment after a tribunal sitting of 11th June, 2022 that found him guilty of the offence of abusive, provocative language and persistent refusal to obey lawful instructions as shown by the letter of discharge from employment, 'CKM4'. That during the tribunal sitting, the complainant had union representation thereby upholding the natural justice principal of *audi alteram partem* and *nemo judex in causa sua*. He admitted that the complainant's union wrote to the respondent the letter dated 23rd September, 2020 on behalf of the complainant; and that the complainant appealed against his discharge from employment on 24th September, 2020. That response was given to the complainant after a Council's decision under Minute Number FHRGPC/33/02/2021 which upheld the decision dismissing the complainant from employment as shown by the letter 'CKM5'. The deponent also admitted that the complainant's advocates wrote the letter, 'FP19' dated 14th December, 2021 to the respondent demanding for the complainant's reinstatement. In its letter, 'CKM6' dated 22nd December, 2021 addressed to the

complainant's Advocates, the respondent stated its position regarding the complaint.

On 5th September, 2020, the respondent filed into Court a further affidavit in support of its answer also sworn by Chali K. Mwansa, who deposed that the respondent had received a complaint of the complainant's unruly behaviour and insubordination from the Social Economic Planner in the memorandum, 'CKM1' dated 11th October, 2019. That upon receipt of the said complaint and further inquiry, the respondent charged the complainant with the offence of abusive or provocative language, insubordination and persistent refusal to obey lawful instructions in the letter, 'CKM2' dated 12th November, 2019. That in the said letter, the complainant was called upon to exculpate himself within seven days to which there was no response. That the respondent further issued a suspension letter dated 20th November, 2019 to the complainant and further requested him to exculpate himself in writing to which the complainant responded in his letter dated 27th November, 2019. The deponent further averred that the complainant was on record of having been previously charged with similar offences under section 42.2(iv) and (vii) of the conditions of service, that is, refusing to obey lawful instructions without reasonable excuse, failure to comply with Council instructions and insubordination, among other offences, as shown by the final warning letter, 'CKM3' dated 14th August, 2017. He reiterated that the respondent had discharged all its obligations to the complainant and he was not entitled to reinstatement and/or damages for unfair, wrongful and unlawful

dismissal from employment, and that it had acted according to its laid down procedure in dismissing the complainant.

At the trial, the complainant testified that he was employed by the respondent on 28th October, 2015 as a Council Police Officer. That on 6th October, 2019, he applied for 90 days' vacation leave from 1st October, 2019 to 7th February, 2020 which was approved as shown by the leave form, 'FP1'. Whilst on leave, he began constructing a house on a plot which he had bought from a Mr. Musonda Nyendwa. That on 9th October, 2019 whilst building the house, senior employees from the respondent Council visited the site and mentioned that the place was under an unplanned area for the Council. That he told the Social Economic Planner that he had just bought the land in question from Musonda Nyendwa and he left them there and went back home. He then went to visit his parents in Chibombo and whilst in Chibombo, he received the suspension letter, 'FP2-3' on 20th November, 2019. That on 22nd November, 2019, he received another suspension letter which indicated that he was put on half salary. The complainant also referred the Court to the land sale agreement, 'FP4' between him and Musonda Nyendwa dated 11th September, 2019. He testified that on 27th November, 2019, he responded to the letter, 'FP2' through his exculpatory letter, 'FP5-6' and the respondent responded to his exculpatory letter on 2nd December, 2019 through the letter, 'FP7'. That on 1st June, 2020, he received the letter, 'FP8' inviting him to attend a disciplinary hearing. On 11th June, 2020, an ad hoc disciplinary committee sat at 10.00 hours to hear his case. That during the disciplinary hearing, the letter

of complaint from the Socio-Economic Planner and the charge letter were read to him by the Human Resource Officer. The complainant referred the Court to the stop order, 'CKM1' and the charge letter, 'CKM2' and stated that he was seeing the documents for the first time in Court. He stressed that during the disciplinary hearing, he did not see both documents as they were just read to him. That after the disciplinary hearing, he received a letter of discharge from employment, 'FP9'-'FP10' dated 22nd June, 2020.

The complainant testified that he was not paid anything after he was discharged from employment. That he was claiming for reinstatement or in the alternative, damages for wrongful, unfair and unlawful dismissal as well as payment in lieu of notice, payment for accrued leave days, payment of statutory benefits, interest and costs.

During cross-examination, the complainant stated that he had obtained vacation leave for 90 days which was supposed to end on 7th February, 2020. He stated that he did not receive any salary during the period he was on leave. He confirmed that he was still an employee of the respondent whilst on leave and was still subject to the conditions of service of the respondent. That whilst on leave, he was visited by senior employees of the respondent at his plot. That he had not yet commenced constructing at the time they visited the site but the land was not bare. He admitted that he had done some form of construction on the plot in old Mkushi but he did not have approved building

plans for the construction. He stated that he was not aware that any form of construction had to be approved by the Local Authority before starting the construction despite having worked for the respondent for six years. That when the Socio-Economic Planner visited the site, he requested for any documents showing that the plot had been approved and the complainant showed him the sale agreement. He stated that he did not know how many times the Socio-Economic Planner had visited the site. He also stated that he did not do anything when he received a stop order from the Socio-Economic Planner. When referred to the stop order 'CKM1', the complainant reiterated that he saw the document for the first time in Court. That it was addressed to the Chief Human Resource Officer and it was written by the Social Economic Planner. He admitted that the document was not meant to be received or responded to by him. That he also did not receive the charge letter, 'CKM2'. That in his letter, 'FP5' dated 27th November, 2019, he was responding to the suspension letter. When referred to his exculpatory letter, 'FP2-3' the complainant stated that he exculpated himself in writing upon receipt of the said letters. He admitted that it was the same offence that was read to him during the disciplinary hearing. He confirmed that the letter, 'FP7' reaffirmed that he was charged and that he exculpated himself in writing. He stated that he had raised the issue of not being charged during the disciplinary hearing. He admitted having given a response to the disciplinary hearing and also having been heard. He admitted that the charge letter, 'CKM2' was read to him during the disciplinary hearing. That he had mentioned to the disciplinary committee that he was seeing

the document for the first time. That he heard that he had been charged for use of abusive language for the first time during the hearing. He confirmed that he had exculpated himself before the disciplinary hearing.

When further cross-examined, the complainant stated that the Provincial Union Chairperson and the Union Treasurer as well as the Branch Union Chairperson had appeared with him during the disciplinary hearing. That he had defended himself during the disciplinary hearing. He also admitted having appeared before the Police. That he was asked about the details of the plot and he produced the sale agreement. When referred to the suspension letter, 'FP2', the complainant denied using unacceptable language to his supervisor. He denied saying that he could even insult the Council Secretary because he was on leave. He denied that it was an afterthought when he said that he was never charged.

RW1 was Chali Kotati Mwansa, Chief Human Resource Officer for the respondent. The witness testified that from 2018 to 2019, the respondent embarked on a program to sensitise the community on the need for them to get planning permission from the respondent before embarking on the construction of any projects in the central business district. That in 2019, inspections were conducted concerning those who were constructing in the district without approval from the respondent. That whilst doing the exercise, the complainant, who was one of the employees of the respondent, was found constructing a structure suspected to be a house near the Catholic Church in the district. That the

Social Economic Planner, who was conducting the exercise, called the complainant to his office and asked the complainant to stop the construction because it was illegal as he had no approval from the respondent. That at the same meeting, the complainant was asked to wait for the District Planning Officer who had gone out for other duties to return to the office. However, the complainant left and went to the site where he was constructing the house and instructed the workers to continue constructing the house. That he did not heed the advice of the Social Economic Planner. That the Socio-Economic Planner again approached the complainant with a stop order after finding out that he had not stopped the construction but even after being served with the stop order, the complainant instructed his workers to continue with the construction. That at that point, the Socio-Economic Planner reported the matter to the Police and went to the site with the Police. That they also took advantage of the opportunity to sensitise the community on the need to get approval from the respondent before constructions. Then the complainant, together with his wife and his wife's friend started using unpalatable language. That the witness later received the letter of complaint, 'CKM1' from the Socio-Economic Planner over the unruly behaviour and insubordination of the complainant. That after receiving the complaint, the witness called the complainant's immediate supervisor who was the Human Resource Officer at the time. That based on the said report from the Social Economic Planner, the Human Resource Officer charged the complainant with the offence of use of abusive or provocative language, insubordination and persistent refusal to

obey lawful instructions; and the charge letter, 'CKM2' was served on the complainant. That the complainant was asked to exculpate himself within seven days but he did not do so as per the report from the Human Resource Officer. Thereafter, the suspension letter, 'FP2', dated 20th November, 2019 was served on the complainant in which it was indicated that the complainant needed to respond in writing within 7 days. That the complainant exculpated him and after his exculpation, the witness wrote to him the letter, 'CKM3' informing him that the charges were not dropped as his exculpatory letter was not convincing enough to drop the charges. After that letter, the complainant was called to appear before the disciplinary hearing which comprised of heads of departments for the respondent. That the complainant was represented by three representatives from his union, the Zambia United Local Authorities Workers Union. That two were from the Province while one was local. That during the disciplinary hearing, being the person in charge of staff, the witness pulled the complainant's confidential file and on the said file, there was a final warning letter which was served to the complainant on 14th August, 2017. That the offences for which the complainant was given the final warning were similar to the offences he was facing as shown by the letter, 'CKM3' in the complainant's further affidavit. That when the disciplinary committee looked at the warning letter, the charge letters and the disciplinary code, it arrived at the decision to recommend the complainant for dismissal. That the recommendation went to the Council Secretary who later issued the complainant with the letter of discharge from employment, 'CKM4' on 22nd June, 2020

and communicated to the complainant. That the complainant was given 14 days within which to appeal to the Council which he did but the appeal was unsuccessful as shown by the letter, exhibit 'CMK5' dated 30th September, 2020.

During cross-examination, when referred to the sale agreement, 'FP4', the witness stated that the plot was not legally acquired. That Mr. Nyendwa, who sold the property to the complainant did not legally acquire it. That the action that was taken by the respondent was that the complainant who was the purported owner of the land was informed and advised to normalise the acquisition of the property. That he could not remember the date when the complainant was informed to normalise the acquisition of the land in issue. He stated that he did not know what the remedy for building without permission was because he was not a planning expert. That the sanction that was taken against the complainant for building without any planning permission was the issuance of the stop order by the Socio-Economic Planner. That if a stop order was disobeyed, the action to take was either to report the matter to the Police or in case of an employee, apply the conditions of service such as charging them for failure to obey lawful instructions. When referred to the letter of discharge, 'FP9', the witness stated that the letter was written by the Council Security to the complainant. When referred to the letter, 'FP2' dated 20th November, the witness admitted that that was the letter of suspension which was referred to in the letter of discharge, 'FP9'. That it was written by the Chief Human Resource Officer. When referred to the charge letter, 'CKM2'

dated 12th November in the respondent's further affidavit, the witness stated that the letter was written by the Human Resource Officer. That the letter was served on the complainant. That he had no proof to show that it was served on the complainant. He stated that the complainant joined the respondent in 2015 and he worked for the respondent until he was discharged. He stated that he was familiar with the labour laws, in particular, the Employment Code Act. 3 of 2019. He stated that the complainant was not paid a severance package in accordance with the Act.

In re-examination, the witness stated that the suspension letter, 'FP2' came about after the complainant was charged but never responded to the charge letter. That the respondent went ahead and suspended him. That the complainant was not paid a severance package because it did not apply to employees who were dismissed on disciplinary grounds.

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

The facts which were common cause are that the complainant was employed by the respondent as Council Police on 23rd October, 2015. On 1st October, 2019, the complainant went on vacation leave which was to end on 7th February, 2019. Whilst on leave, he began constructing a house within Luano township boundary. On 9th October, 2019, the respondent's Socio-Economic Planner and other senior officers approached the complainant

and advised him that he was constructing illegally as he had not obtained planning permission prior to constructing the house since the land in question was situate in an unplanned settlement area. Later, the complainant was suspended from work on allegations that he had continued with the construction of the house even after being advised to stop and being issued with a stop order notice; and also that he had used unpalatable language to his superiors who had advised him to stop the construction. A disciplinary hearing was held on 11th June, 2020 after which the complainant was dismissed from employment upon being found guilty of the offence of '*use of abusive or proactive language, insubordination and persistent refusal to obey instructions*', contrary to section 42.2 of the 1996 Local Government Conditions of Service. The complainant appealed against his dismissal from employment but his appeal was unsuccessful.

From the evidence, the following are the issues for determination:

1. Whether the dismissal of the complainant was wrongful and unfair thereby entitling him to reinstatement or damages.
2. Whether the complainant is entitled to the payment for accrued leave days; payment of a salary in lieu of notice and any other accrued statutory benefits.

I will start with the first issue, which is whether the dismissal of the complainant was wrongful and unfair thereby entitling him to reinstatement or damages.

The complainant has claimed that his dismissal from employment was unfair, wrongful, and unlawful.

The Supreme Court in the case of **Eston Banda and Another v the Attorney General**¹, has guided 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 a term for which the employee is engaged; whilst ‘unfair’ refers to a dismissal in breach of a statutory provision where an employee has a statutory right not to be dismissed. A loose reference to the term ‘unlawful’ to mean ‘unfair’ is strictly speaking, in employment parlance, incorrect and is bound to cause confusion. The learned author, Judge W.S. Mwenda, clarifies on the two broad categories, in her book *Employment Law in Zambia: Cases and Materials*, (2011), revised edition UNZA Press, Zambia at page 136. She opines that, in our jurisdiction, a dismissal is either wrongful or unfair, and that wrongful dismissal looks at the form of the dismissal whilst unfair dismissal is a creature of statute.”

On the above authority, I am of the view that the relief that the complainant is seeking is that his dismissal from employment was wrongful and unfair, and I will proceed to determine the claim as such.

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 Kasito**², 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 before he was dismissed from employment, the complainant was suspended from work on 20th November, 2020 in accordance with section 40.5 (iv) of the 1996 Local Government Conditions of Service for '*use of abusive language or provocative language, insubordination and persistent refusal to obey lawful instructions*,' as shown by the suspension letter, 'FP2-3'. In the said letter, it was alleged that the complainant was called to the office of the Socio-Economic Planner and advised to stop the construction of his house as the area where he was constructing was an unplanned settlement area and the said construction was deemed to be an illegal

development. That the complainant adamantly refused the instruction to stop the construction which forced the Socio-Economic Planner to issue a stop order. That, however, the complainant continued with the construction. The complainant was also alleged to have used unacceptable language to his superiors and when cautioned, the complainant indicated that he could even insult the Council Secretary. In response to that letter, the complainant wrote an exculpatory statement, 'FP5-6' wherein he stated that he and the Socio-Economic Planner did not agree on whether or not to stop the construction but he was told that they were going to have another meeting when the District Planning Officer returned from Chibombo where he had gone to attend a meeting. He also stated that he had stopped the construction of his house after receiving the stop order. He also intimated that the person who may have used abusive or provocative language to his superiors was Mrs. Nyendwa, the wife to Mr. Nyendwa, whom he bought his plot from. On 1st November, 2020 the complainant was invited to attend a disciplinary hearing which he attended on 11th June, 2020 and defended himself. In his evidence in chief, the complainant stated that during his disciplinary hearing, the Human Resources Officer read to him the letter of complaint from the Socio-Economic Planner and the charge letter, 'CKM2'.

From the foregoing, I am satisfied that even though the complainant may not have been physically served with the charge letter as per his claim, he was made aware of the charges that were levelled against him and he adequately answered to

those charges through his exculpatory letter and during the disciplinary hearing. It is evident that the complainant was charged for the offence for which he was dismissed from employment and he was given an opportunity to be heard before his dismissal. It is my firm view that the respondent had complied with the rules of natural justice and statutory provisions when dealing with the complainant's case. Therefore, the complainant's claim that he was wrongfully dismissed from employment cannot stand and is accordingly dismissed.

I have also to determine whether the complainant's dismissal from employment was unfair.

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.

According to the complainant, whilst on leave, he started constructing a house on his plot. That senior employees of the

Council, among them, the Socio-Economic Planner visited the site and informed him that the place was under an unplanned settlement area. That he told them that he had just bought the plot from a Mr. Nyendwa and then left them and went home. In his evidence at trial, the complainant denied having been served with the stop order, 'CKM1'. He denied having used unacceptable language to his supervisors.

On the other hand, the respondent contended that while the respondent's planning department was conducting inspections concerning those who were constructing in the district without approval from the Council, the complainant was found constructing a house without planning permission from the Council. That the complainant was called to the office of the Socio-Economic Planner and he was advised to stop the construction. However, the complainant did not heed that advice and continued building. That the Socio-Economic Planner approached the complainant again with a stop order but the complainant still continued constructing. That the Socio-Economic Planner then reported the matter to the Police and when he went to the site with the Police, the complainant, his wife and his wife's friend started using unacceptable language. The Court was informed that the complainant had been previously warned over a similar offence in August, 2017.

I have considered the arguments from both parties.

It is not in dispute that the complainant was dismissed from employment after the respondent's disciplinary committee found him guilty of the offences of abusive or provocative language and persistent refusal to obey lawful instructions.

Regarding the complainant's alleged use of abusive or provocative language, the respondent merely contended that the complainant used unpalatable language against his superiors. The actual words that the complainant is alleged to have uttered were not mentioned so as to enable the Court to determine if indeed what he had uttered amounted to unpalatable language. Therefore, I find that the allegation that the complainant had used unpalatable or inappropriate language to his superiors was not substantiated.

Further, it is not in issue that the complainant was charged with the offence of insubordination and persistent refusal to obey lawful instructions for allegedly refusing to stop the construction of his house in an unplanned settlement area for which he had no planning permission from the respondent Council; and despite having been advised to stop and a stop order issued in that regard.

It is clear from the evidence on record that the complainant's alleged refusal to stop the construction of his house was purely outside his normal course of duties and as such, his conduct was not related in any way to the performance of his duties in the course of his employment relationship with the respondent. That

being the case, there was no justification whatsoever by the respondent to base its charge of insubordination and persistent refusal to obey lawful instructions on his alleged refusal to stop the construction of his house despite being issued with a stop order. I am of the firm view that the respondent ought to have treated the complainant like any other ordinary person who may have infringed the provisions of the Urban and Regional Planning Act No. 3 of 2015, which Act has provided for adequate enforcement mechanisms and appropriate penalties for any person who fails to comply with the provisions of the said Act. Based on the foregoing, I find that the reasons given by the respondent for the dismissal of the complainant were not substantiated. In the circumstances, therefore, I hold that the complainant's dismissal from employment was unfair.

Having found that the complainant was unfairly dismissed from employment, I have to now determine the appropriate remedy. The complainant has claimed for reinstatement or in the alternative, payment of damages for unfair dismissal which claim has succeeded.

As regards reinstatement, the Supreme Court in the case of **Bank of Zambia v Joseph Kasonde**³ stated that:

"It is trite law that the remedy of reinstatement is granted sparingly, with great care and jealousy and with extreme caution."

Further, in the case of **Martin Nguvulu and 34 Others v Marasa Holdings Limited (T/A Hotel Intercontinental)**⁴, the Supreme Court stated that:

“Because of the far reaching consequences reinstatement has on the relations of the parties, as well as the financial implications it carries, it is a remedy that is rarely and exceptionally granted. We have stated time and again in numerous case authorities, some of which learned Counsel for the parties have referred to, that reinstatement will only be ordered in special circumstances.”

In the same case of *Nguvulu*⁴, the Supreme Court provided further guidance as follows:

“We also should stress that reinstatement will not be a viable option where there has been such a loss of trust and confidence that it would not be feasible to reestablish the pre-existing harmonious employer/employee relationship.”

Considering the circumstances of this case, it is clear from the evidence that the mutual trust and confidence between the complainant and the respondent's management had been gravely eroded. Even during trial, I could vividly deduce that an acrimonious relationship between the parties had developed. It is my strong belief that the complainant cannot enjoy a good and healthy work environment if he were to go back. For the aforestated reasons, I am not persuaded to order reinstatement of the complainant. I am of the firm view that awarding the complainant damages would be an adequate recompense for the unwarranted loss of his employment.

Having considered all the circumstances of this case, I find that this is a deserving case to award the complainant damages

beyond the normal measure of damages I am satisfied that the complainant lost employment in an abrupt manner and for no reason at all. Therefore, I award the complainant damages equivalent to 24 months of his last basic salary plus allowances. The quantum is to be agreed by the parties and in default of such agreement, the same to be assessed by the learned Deputy Registrar.

I now turn to the second issue which is whether the complainant is entitled to the payment for accrued leave days; payment of a salary in lieu of notice and any accrued statutory benefits.

I will start with the complainant's claim for the payment in respect of his accrued leave days.

The complainant did not lead any evidence to show to the Court the number of accrued leave days and whether or not he had taken any leave either by way of commutation or proceeding on leave. However, his entitlement to leave days, being an accrued right, cannot be ignored. Therefore, I hold that the complainant is entitled to the payment for accrued leave days, if any. There being no evidence as to the number of leave days that could have accrued to the complainant at the end of his employment, I refer this matter to the learned Deputy Registrar for the assessment of accrued leave days and the amount payable to the complainant in respect of accrued leave days, if any.

With regard to the complainant's claim for one month's pay in lieu of notice, I find that the complainant is not entitled to the payment of one month's salary in lieu of notice since he was dismissed from employment and not simply terminated.

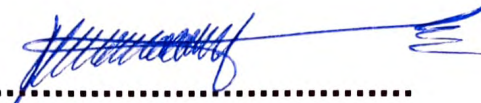
Regarding the claim for the payment of 'any accrued statutory benefits', the complainant did not lead any evidence to show the type of statutory benefits that he had intended to claim. It is noteworthy that there are a variety of statutory benefits that may accrue to an employee during the employment relationship. It is, therefore, the duty of the claimant to lead cogent evidence in proving those claims. I have noted that learned Senior Counsel for the complainant, through his final written submissions, made reference to sections 53 and 54 of the Employment Code Act in his attempt to specify what may have been meant by statutory benefits. This was a wrong approach as submissions are simply meant to augment the evidence of a witness, and based on such evidence, assist the Court in arriving at a judgment. Therefore, in the absence of the complainant's evidence proving his claim, the claim has failed and is accordingly dismissed.

In summary, the complainant has succeeded in his claims for damages for unfair dismissal and payment for accrued leave days. The total sum to be found due and payable to the complainant 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.

Costs are for the complainant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Ndola this 6th day of December, 2022.


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