

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

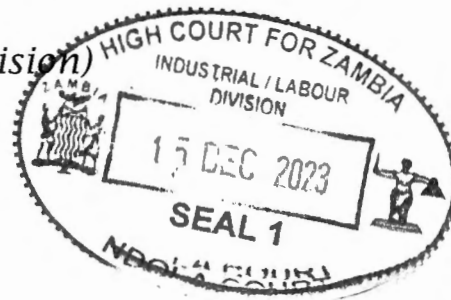
2023/HN/IR/22

BETWEEN:

DOUGLAS MUKUMA

AND

NDOLA TRUST SCHOOL LIMITED



COMPLAINANT

RESPONDENT

Before the Honourable Mr. Justice Davies C. Mumba in Chambers on the 15th day of December, 2023.

For the Complainant: Mrs. M. Domingo-Phiri, Mwenge and Co. Advocates.

For the Respondent: Mr. Lambwe Mwanza, 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. Grayson Kachikoti v TAP Bulding Products Limited, Comp. No. 33 of 1982 (H.C).
4. Edward Mweshi Chileshe v Zambia Consolidated Copper Mines (1996) S.J. (S.C.)

Legislation referred to:

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

Other works referred to:

1. W.S Mwenda, Employment Law in Zambia: Cases and Materials: UNZA Press, Lusaka, 2004.
2. Winnie Sithole Mwenda and Chanda Chungu: A Comprehensive Guide to Employment Law in Zambia: UNZA Press. Lusaka, 2021.

1.0. INTRODUCTION

1.1. By notice of complaint supported by an affidavit filed into Court on 4th April, 2023, the complainant commenced this action against the respondent seeking an order and/or a declaration that the respondent's decision to summarily dismiss him from employment was wrongful, unlawful and unfair; an order that he be paid his full benefits; damages for breach of contract and exemplary damages and/or aggravated damages for embarrassment, mental anguish, distress, inconvenience and torture he suffered on account of the abrupt termination of his employment. In the alternative, the complainant has claimed for damages for abrupt loss of employment and one month pay in lieu of notice. He has also claimed for interest on all the sums found due and any other relief the court may deem fit and costs.

1.2. The respondent opposed the complainant's claims and in doing so, filed into court its answer and an affidavit in support thereof on 24th April, 2023 sworn to by Sakubita Kalembwe, Principal/Head Teacher at the respondent's

school. It has been contended that the dismissal of the complainant was not wrongful, unfair and/or unlawful as the disciplinary procedure was correctly followed and the punishment rendered was commensurate with the offences committed. Further, the respondent stated that the complainant was paid his full severance package as provided by law as well as the various policies of the respondent. The respondent has also denied any form of discrimination towards the complainant in the disciplinary proceedings and the outcome.

2.0. THE COMPLAINANT'S EVIDENCE

- 2.1. In his affidavit in support of the complaint and at the trial, the complainant testified that he was employed by the respondent as a school Bursar on 1st August, 2001. That he served under 2-year fixed term contracts until December, 2017. That on 1st January, 2018, the respondent engaged him on a permanent and pensionable contract until his dismissal on 22nd November, 2022.
- 2.2. The complainant testified that as Bursar, his duties included, the collection of school fees, preparation of financial accounts and submission of returns to ZRA, NAPSA and Workers Compensation Fund Control Board. Other duties included human resource duties such as looking at leave days

for employees in terms of those going on leave and preparation of leave commutation.

- 2.3. The complainant claimed that he was unfairly dismissed. He explained that in 2019, the Assistant Accountant, Busuma Makoselo resigned thereby leaving him alone in the Accounts department. As a result, management put up an advertisement to employ another Assistant Accountant and a number of candidates were interviewed. Subsequently, Mrs. Latipha Makesa was recruited as the new Assistant Accountant. That she worked for about eight months and also resigned. That after she resigned, management picked Matilda Mulenga the person who had come out second during the interviews and employed her as Assistant Accountant in place of Mrs. Makesa.
- 2.4. The complainant further explained that the role of the Assistant Accountant was to receive school fees and issue receipts for the said school fees. That she was also in charge of the school tuck-shop, uniform sales and making payments to suppliers. That when Matilda Mulenga started work, management discovered that she did not have the expertise in pastel software. That after working for about three months, she was asked to do a short course in pastel accounting. That she did the course for about two weeks and started making the school entries for school fees by entering

the number of children as they appeared on the registers. That when it was noted that the work was very slow, the Group Chief Executive Officer, Enock Mwale of the Pendulum Estates Limited proposed to the Principal that since they were behind with the school audit reports for 2020 and 2021, the complainant should travel to Lusaka to sit with the Accountant from Pendulum Estates, Mr. Peter Chama and the General Manager for DGH Limited, who was an Accountant by Profession in April, 2022.

- 2.5. That when the complainant went to Lusaka, he was assigned to go to DGH Limited where he started working with Mr. Chisha, the General Manager for DGH. That he was working on the 2020 and 2021 audit reports. He started with the 2020 entries and within two weeks, did entries for over 800 pupils. That he allocated the school fees that were supposed to have been paid in the pastel software. That he also entered the payments for 2020 from all the cheque books and direct debits and credits.
- 2.6. It was the complainant's testimony that in the second week, he started working on the 2021 entries. That while doing the 2021 entries, he received a call from the Internal Auditors who told him that at the weekend of that same week, they were to travel from Lusaka to Ndola so that they could start the internal audits. He answered them that he was in Lusaka

working with the Senior Accountants but the Internal Auditors told him that they had already set out the logistics for them to travel to Ndola. That they advised him to phone the Principal or the Group Chief Executive Officer and talk to him about the trip to Ndola. That he phoned the Principal, Mr. Kalembwe and told him about the trip of the Internal Auditors. That Mr. Kalembwe wondered how it was going to be done as the complainant was in Lusaka and asked the complainant to call the Group Chief Executive Officer, Mr. Mwale. That the complainant called Mr. Mwale and explained to him that the Internal Auditors had informed him that they were travelling to Ndola to conduct an internal audit but he was still in Lusaka. That Mr. Mwale was surprised that the Internal Auditors were going to Ndola at the time the complainant was in Lusaka. That Mr. Mwale then informed him that he was going to call the Internal Auditors. Later, Mr. Mwale phoned him and told him that since the Assistant Accountant was in Ndola, the Internal Auditors could go and start with the work whilst the complainant continued with the audit reports for External Auditors in Lusaka. That he worked for almost one week in Lusaka and he was called by the Principal who advised him to go back to Ndola since the Internal Auditors were about to conclude the work.

- 2.7. The complainant testified that he went back to Ndola in the third week and worked with the Internal Auditors and the

Assistant Accountant for over a week. That when the Internal Auditors finished their work, they brought out some discrepancies that were observed in the tuck-shop and uniform accounts. The discrepancies noted were that there was an under banking of over K390,000.00 so they asked management what the problem could have been. That the response from management, after talking to Mrs. Mulenga, the Assistant Accountant, was that there were some direct purchases that she had done. That direct purchases were whereby money that was received from the tuck-shop and sale of uniforms was used to purchase products for the tuck-shop. That the Internal Auditors requested for the payment vouchers for those purchases from Mrs. Mulenga and out of the K390,000.00, she only managed to submit payment vouchers for the sum of about K233,000.00 leaving a balance of about K55,000.00.

- 2.8. According to the complainant, in the exit meeting the Internal Auditors had with management, they produced their report in which they highlighted the following: that K55,000.00 did not have payment vouchers or receipts attached; that audit reports for 2020 and 2021 were not done by the respondent; that the bank reconciliations were not properly done; that the filing system was not orderly; and that the Mitengo Farm project's records were not very clear. He stated that in the same report, the Internal Auditors mentioned that the

discrepancies that were discovered in the accounts department were committed by the other Assistant Accountants that had since left the school. That the Internal Auditors left the report with the Principal who engaged the local board.

2.9. That on 2nd August, 2022, the Principal wrote him the charge letter, 'DM8' containing three charges, that is, serious and/or gross misconduct; incompetence; and failure to follow lawful instructions, established channels or procedures to fulfill assigned duties.

2.10. That with regard to the offence of serious and/or gross misconduct, the statement of facts alleged that the internal audit report conducted on 16th May, 2021 to 3rd June, 2021 covering the period 1st January, 2019 to 31st December, 2021 revealed that there was under banking of generated income from uniforms and tuck-shop sales amounting to K390,051.00. However, after verification, only the sum of K55,833.18 remained outstanding and unaccounted for by the complainant as the Accountant and person charged with the responsibility of safeguarding the respondent's financial resources.

2.11. That with regard to the offence of incompetence, the statement of offence stated that the audit report revealed

that there was gross misfiling of accounting records in all areas, non-compliance with statutory obligations, poorly presented bank reconciliations and that the financial statements were not prepared as required.

2.12. That under the third offence of failure to follow lawful instructions, established channels or procedures or fulfill assigned duties, the statement of facts alleged that the internal audit reports revealed financial irregularities. That the complainant was in possession of the business code of conduct and the financial regulations which required that all monies collected had to be deposited within 24 hours but the complainant's failure led to the outstanding sum of K55,833.18 in the internal audit report.

2.13. The complainant stated that after receiving the charge letter, he was given seven days to exculpate himself which he did and submitted his exculpation letter, 'DM9' on 8th August, 2022.

2.14. In his exculpation letter, the complainant denied the charge of serious/gross misconduct and stated that ~~he was not the~~ one seized with the responsibility of receiving and accounting for income from the uniform and tuck shop sales. That the Assistant Account, in this case, Mrs. Matilda Mulenga was the one charged with the responsibility to manage

income from the uniform and tuck shop sales. That he was also surprised as to why he was singled out on the issue when the internal auditors had confirmed that the direct purchases were duly authorised by management. That he had further stated that the two deposits in the sums of K62,056.00 and K38,400.00 that were made on 3rd and 10th June, 2022, respectively, were made by Matilda Mulenga. Further, that the accusation that he was the one who had claimed over K100,000,00 which was in the cash box during the audit period was not correct as the fact was that Matilda Mulenga was the only person who kept cash in the cash box and the keys to the cash box.

2.15. That regarding the charge of incompetence, he pointed out the fact that he was Bursar at the respondent's school for about 21 years and he had done audit reports for 19 years. That he mentioned that for the two years for which he was called incompetent, it was as a result of about three major reasons. The first one being that the slow implementation of the pastel program was due to low staffing levels in the accounts department. Also, that from 2019 to 2022, the respondent changed two Assistant Accountants and, therefore, that disrupted the flow of work in the accounts section. That the second reason was that the Board gave instructions that no institution should do external audit reports without using the pastel software. That, therefore,

the Accounts personnel needed time to acquaint themselves with the pastel software. That the respondent had employed Assistant Accountants who were not knowledgeable in the pastel software and hence needed to be educated. That the third reason was that in 2020, there was covid-19 which slowed down the operations of not just the respondent but many more institutions.

2.16. The complainant also referred the court to page 2, paragraph 4 of his exculpatory letter, 'DM9', and stated that what he meant by stating that the issue of the tuck-shop and uniforms fell squarely within the duties of Mrs. Mulenga was that the collection of money for uniform sales and tuck-shop monies was the responsibility of the Assistant Accountant. That her responsibilities included making purchases for tuck-shop stocks and uniforms. Thereafter, making sales through the tuck-shop personnel then the tuck-shop personnel would remit the funds to Mrs. Mulenga. She was then supposed to deposit the money in the school tuck-shop bank account and also prepare an accounts statement.

2.17. The complainant testified that under the accounts section, there was an Accountant and the Assistant Accountant and he was the Accountant. That he was initially employed as the School Bursar but his title later changed to Accountant because after 2018, the Board changed the title from School

Bursar to School Accountant although there was no formal communication. He stated that he was a middle management member of staff. The complainant stated that as an Accountant, he used to prepare financial accounts for the School and he used to report to the Principal, Mr. Kalembwe. That no one used to report to him as the Assistant Accountant used to report directly to the Principal.

2.18. He testified that when he delivered his exculpatory statement to the Principal, he also sent an email copy to the Human Resource Manager in Lusaka after which he was given a date of the disciplinary hearing. That the disciplinary hearing was held at Fatmols guest house, chaired by Mr. Mofya Kapambwe who was a Board member. That the other members who were present were Mr. Peter Chama, the Group Chief Financial Officer of the Pendulum Estates and Mr. Lambwe Mwanza, the lawyer as well as Ms. Nelly Mwale, the Human Resource Manager. That according to his conditions of service, the school management was supposed to constitute the hearing committee, that is, the Principal, the two Vice Principals and the Senior Teachers. That after his case was heard, the Chairperson of the hearing committee, Mr. Mofya Kapambwe informed him about his dismissal on 23rd November, 2022. That he was informed that he was found guilty of all the three charges. That he was also informed that he had the right to appeal within seven days. That he appealed and in his letter

of appeal, he indicated that he was not happy with the decision of the first hearing committee as what he presented in his mitigation was not considered, especially that the case of gross misconduct was committed by the Assistant Accountant, Mrs. Mulenga and not himself; and he had also adequately explained the delay on the two audit reports. That there was no evidence that was produced to show that he had acted dishonestly; or to link him to the alleged dishonest conduct. That, therefore, he felt that he was treated unfairly. That after submitting his appeal, he received communication from the Board Chairman who informed him that they had upheld the decision of the first committee and that by copy of that letter, the Principal was tasked to compute his final terminal benefits. That he tried to find out from the Principal when his terminal benefits would be computed and he was told that the new Accountant would do the computation. That, however, he was not called. That he wrote an email to the Principal to inquire about the terminal benefits but he Principal did not see the email. That when he called the Principal, he was told that the money had been deposited in his account. That he was paid over K19,000.00 but after deductions, he remained with about K9,000.00 which was the amount he received.

2.19. The complainant testified that the Assistant Accountant was also charged with similar offences. That she was charged with

the offences of gross misconduct and failure to follow the laid down procedures. That the school put up a disciplinary committee and she was put on suspension. That after attending her case hearing, the responses that she was given were that on gross respondent, she was guilty. However, she was given a lesser punishment of a final warning. As for the offence of failure to follow the laid down procedures, the committee also found her guilty and she was given a written warning and asked to report back for work as she was reinstated. That the basis of her reinstatement was her mitigation responses. To that effect, the complainant referred the court to paragraph 16 of the respondents' affidavit in support of its answer and the letter, 'SK8'. He stated that he was sad because the same offence of gross misconduct with which Mrs. Mulenga was charged and found guilty was the same offence for which he was dismissed. That he wondered why he was dismissed while Mrs. Mulenga was shown leniency. That he wondered whether it was because she was a woman and he had to suffer because he was a man.

2.20. The complainant testified that following his dismissal from employment, his life had been unbearable for him. That he had to shift from where he was living to go to a cheaper place. That his children, one of whom was at ZICTA college missed examinations because he could not find money to pay for him on time. That the other child who was at a University in

Lusaka was taken out of the class room. That he did not also finish paying school fees for the first term for his child at Ndola Trust school and he had not paid the school fees for the second term.

2.21. He stated that he was unemployed due to the dent on his career and that it had been very difficult for him to look for employment.

2.22. He stated that he was claiming for an order that the decision to dismiss him was unfair and unlawful. He stated that his contract of employment was unfairly terminated by the respondent as it failed to prove the allegations that were levelled against him during the disciplinary hearing.

2.23. That considering the embarrassment that he had gone through, he wanted payment of one month's salary in lieu of notice and costs. That he also wanted terminal benefits and interest on the amounts.

2.24. He further stated that the offence of gross misconduct was committed by another officer so he felt very much aggrieved that the person to whom it was directly related, Mrs. Mulenga was reinstated while he had to be fired.

2.25. During cross-examination, the complainant confirmed that part of his duties under the position of Bursar was to prepare financial statements. That he had been preparing financial statements for 21 years. That financial statements were not the same as the audit reports. He admitted that the audit reports for 2020 and 2021 were not ready. That it was because between December, 2019 to December, 2020, the respondent changed Assistant Accountants two times and the other reason was that a pastel program was put in place to prepare accounts instead of the excel spreadsheets that were used before. That the other reason was that in that same period, there was an outbreak of Covid-19 and as a result, there was slow down of business activities. He admitted that the audit reports were not done because the financial statements were not prepared. He stated that preparing the trial balance and financial statements was his responsibility. That his failure to prepare the two affected the external audit in that the audits were not prepared on time. He stated that he was not at par with the Assistant Accountant but he was not her supervisor. That she used to prepare her own documents and work which she used to submit to the Principal of the respondent's school and he too would prepare documents pertaining to his duties. He stated that the three Assistant Accountants who had been employed earlier used to assist the Principal.

2.26. The complainant stated that he had learnt how to use pastel.

That the reason he did not prepare the financial reports despite having learnt how to use pastel was because they had to prepare them in parts. That he would prepare them from the point of the trial balance and the other parts would be done by other players in the accounts department such as the Assistant Accountant. That the hierarchy of the respondent's school was: the Principal and the two vice Principals who formed up senior management and then senior Teachers at which level he was as an Accountant followed by Teachers and other workers. He stated that he was not part of senior management.

2.27. He stated that the composition of the disciplinary committee was not as was provided in the respondent's disciplinary code. That he was not aware of any other document that governed the disciplinary process. When referred to the respondent's business code of conduct, 'DM4'; the financial regulations, 'DM5'; and the disciplinary and grievance procedures code, 'DM6', the complainant admitted having recognised the documents. He stated that the disciplinary process was conducted according to the grievances and disciplinary procedures code, 'DM6'.

2.28. He stated that his terminal benefits were not correctly computed. That the contract that he signed in 2018 was a

pensionable contract. That there was a part under which the respondent was supposed to have paid in terms of his pension. He stated that the respondent had a private pension scheme. That he did not make any contributions to the pension scheme. That he did not know the rules of eligibility for getting a pension under the scheme.

2.29. In re-examination, the complainant stated that he could not contribute to the pension fund because ZSIC, which was the provider of the pension scheme, advised that those people who were approaching 50 years would not have a direct benefit because of the number of years that they were going to serve up to 55 years.

3.0. THE RESPONDENT'S EVIDENCE

3.1. Sakubita Kalembwe, Principal at the respondent's school testified on behalf of the respondent.

3.2. In his affidavit in support of the respondent's answer and at the trial, the witness informed the court that he joined the respondent in January, 2019. That his responsibilities included supervising the whole school in the area of academics and business operations. That under the business operations, he used to supervise the accounts department;

and under academics, he used to supervise the primary and secondary schools.

- 3.3. He testified that the complainant was an employee of the respondent between 1st August, 2001 and 22nd November, 2022 when he was summarily dismissed from employment for various offences in breach of the respondent's disciplinary code and grievance procedures, as shown by the letter of dismissal, 'SK1'. That the complainant had served as School Bursar and eventually as School Accountant at the time of his dismissal. That the complainant was his subordinate under the accounts department and used to report to him directly.
- 3.4. The witness testified that it was a requirement under corporate governance that during the first 90 days of every year, the respondent had to be audited. That they had two types of audits; the internal audit and the external audit. That the internal audit helped them prepare for the external audit. That the reports of the external audits were supposed to be looked at by the Board of Directors.
- 3.5. The witness averred that between 16th May and 3rd June, 2022, Auditors conducted a financial audit of the respondent's financial records for the period 1st January, 2019 to 31st December, 2021 during which they found glaring financial

irregularities such as variances between the receipted income and the monies in the respondent's bank account; misapplication of income for various school projects; and negligent misfiling of important accounting documents, among other things, as shown by the audit report, 'SK2'.

3.6. The witness also testified that the external audits for 2020 had some delays which dragged on up to 2021. That the delay was caused by the errors in the trial balance that the complainant had submitted. That according to the External Auditors, there were errors in the trial balance as the figures were not balancing. That in view of that, the External Auditors demanded that the errors that were noted in the trial balances and brought to the attention of the complainant be rectified by the complainant before they could proceed with the audit. That unfortunately, they had a back and forth for two years to have the corrections made and the External Auditors to make progress. That the period in question was from 31st December, 2020 to 31st December, 2021.

3.7. The witness explained that the respondent belonged to a holding company called Pendulum Estates Limited which upon seeing the delay and lack of progress on the part of the External Auditors, put measures in place to help the respondent as a subsidiary. That accounting experts were sent to the respondent's school through the Group Chief

Financial Officer and another from a subsidiary called DGH poly products. That the Accountants visited the respondent's school on more than three occasions between the fourth quarter of 2021 up to the second quarter of 2022 to help the complainant submit documents that the External Auditors could work with. That apart from that intervention, the school management made internal interventions by allowing the complainant and the Assistant Accountant to undergo pastel training and this was done by a provider from Kitwe called Mahuwa. That this was made because of the demand from the holding company that all Accountants in the subsidiaries were to use pastel accounting which reduced the error margin in financial reporting. That the third intervention that was made was sending the complainant to carry all the relevant box files and accounting documents to Lusaka in April, 2022 to go and work with the same Accountants that had been visiting the respondent's school to help. That unfortunately, the interventions did not yield much result to an extent that by 16th May, 2022 when the Internal Auditors went to do the audit, the complainant was in his third week in Lusaka working to cost and construct documents that the External Auditors could use.

- 3.8. It was the witness's evidence that when the Internal Auditors did the audit, the report was not a good one as it was discovered that the respondent had under bankings due to

direct purchases. Further, that the accounts office had been misfiling important accounting documents which made them conclude that there was poor record keeping in the accounting office. Furthermore, there were missing monthly reconciliations.

3.9. The witness testified that after receiving the report, an internal audit took place from 16th May to 30th May, 2021. That because of the nature of the report, it called for an extraordinary board meeting; and the resolution of the extraordinary meeting was that the Accountants needed to work to find the missing receipts. He explained by the use of the word 'Accountants', he meant that the accounts office was headed by the Accountant (the complainant) who worked with the Assistant Accountant who would help the complainant to come up with a consolidated report.

3.10. In a nutshell, it was the witness's testimony that the money that was not accounted for was K390,000.00 which was the final figure after the sums of K262,000.00 and K100,000.00 were eventually reconciled. That when the Internal Auditors went back on 10th June, 2021, the Accountants produced some more receipts which reduced the deficit of K390,000.00. The Internal Auditors discovered that two deposits were made on 3rd and 10th June, 2021 in the sums of K62,000.00 and K38,000.00, respectively. That their

conclusion about the two deposits was that the Accountants had used the money and were just reimbursing it to reduce the deficit.

3.11. According to the witness, it was the above background that led to him charging the complainant and the Assistant Accountant, Mrs. Mulenga. That the complainant was charged with three offences as shown by the charge and disciplinary sheet, 'SK3'. That the first charge was serious/gross misconduct arising from the missing funds amounting to K55.833.18 that remained unaccounted for after a verification exercise. That the complainant was charged with the said offence because the money went missing under his charge. The second charge was incompetence, arising from the gross misfiling of accounting documents which had resulted in failure to prepare financial statements for the 2020 and 2021 financial years. The third charge was that of failure to follow lawful instructions arising from a wilful failure to follow financial guidelines to the effect that the school income had to be deposited in the respondent's bank account within 24 hours.

3.12. The witness testified that because of the level of seniority that the complainant occupied in the respondent's school, he was treated as a member of the top four senior management staff which comprised the Principal, the Vice Principal

(Secondary), the Vice Principal (Primary) and the School Accountant. That the four people who comprised senior management used to attend Board meetings. The Principal used to give two reports namely: an academic and operations reports. The financial report was submitted by the Accountant. Further, that senior management employees were paid higher than the rest; were given office space; and some of them were signatories to the respondent's bank accounts. That he and the complainant were signatories during the period in question. That as a result, the complainant's disciplinary hearing was composed of members of staff above senior management level. That a team was formed comprising one Director who had a financial background; Mofya Kapambwe who chaired the committee; the Chief Financial Officer from Pendulum Estates Limited, Mr. Peter Chama; the Group Chief CEO; Mr. Enock Mwale; and the Human Resource Manager, Ms. Mwale who was the secretary. That the Company Secretary, Mr. Lambwe Mwanza and the witness himself who was the charging officer sat to listen in.

3.13. The witness testified that the complainant's disciplinary hearing was held between 8th and 10th August, 2022 and the complainant was found guilty of all the three charges which led to his dismissal on 22nd November, 2022 as shown by the letter, 'SK5'. That the complainant appealed against the

dismissal to a higher committee which comprised the Board Chairperson, Mr. Kwalombota who chaired the appeal hearing, the Vice Chairperson, Director KwendaKwema, a Board Member, the Director Henry Sakala, and the Human Resource Manager who was the Secretary. He stated that the appeal committee excluded those that were in the first hearing but he was called to explain the charges as the charging officer. That upon hearing the appeal, the complainant's summary dismissal was upheld as shown by the letter, 'SK6'.

3.14. It was the witness' testimony that after the complainant's summary dismissal was upheld by the appeals committee, the respondent worked out his separation package which was based on the pension conditions that the complainant had signed for but unfortunately, he did not commit himself to deductions from his salary for his pension contributions. That the complainant had willfully refused to be part of the Zambia State Insurance Corporation Pension Scheme which was offered to other members of staff of the respondent. That, therefore, there was no basis for the respondent to pay him any pension benefits but leave days only which came to around K19,000.00. That after deductions of loans by the banks and micro financial institutions, a balance of K9,600.00 was paid to the complainant on 2nd February, 2023.

That the three weeks delay to pay him was due to the correspondence with the account's office.

3.15. As regards the Assistant Accountant, Mrs. Mulenga's case, the witness testified that having been part of the account's office, she was also charged with two charges, that is, gross misconduct for the missing money and failure to follow the laid down accounting procedures. That she was suspended from work; and on 16th December, 2022, her case was heard by the Chief Financial Officer, Mr. Peter Chama; the Vice Principal (Primary), Ms. Angela Mulenga; the senior Teacher (upper school), Mr. Moses Musonda; the senior Teacher (extra-curricular activities), Mr. Dominic Kakungu; the Human Resource Manager as Secretary and himself being the charging officer. That she was eventually given a verdict in February, 2023. That for the charge of gross misconduct, she was given a final written warning with an accompaniment of a financial charge to recover 50% of the money that the school had lost. As for the offence of failure to follow laid down procedures, she was slapped with a final written warning. That the decision that was reached was due to extenuating factors such as her length of employment as well as her role and responsibilities in the scandal.

3.16. During cross-examination, the witness told the court that he was a Teacher by profession. That he was a holder of a

Bachelor of Arts degree with Education obtained from the University of Zambia. That his major was Applied Linguistics and History was his minor. When asked if he had any qualifications in human resources management, the witness stated that there were components of human resources at Bachelors level in Sociology.

3.17. The witness stated that he had worked for the respondent for five years. He stated that those who were tasked to perform human resources functions were those from the senior management which comprised the Principal, the Vice Principal (Primary), the Vice Principal (Secondary), and the school Accountant. He stated that there was no single office that handled human resources. That as Principal, his duties included overseeing the overall running of the school. That he was the controlling officer. He stated that he was the one who had charged the complainant. That he charged the complainant because there were flaws noted and the final trigger was the audit report. That there were quite a number of flaws. Firstly, there were flaws in record keeping, bank reconciliations, internal controls and compliance with statutory obligations. That the audit report revealed that money had gone missing. That the findings by the Auditors pointed to management and a number of them specifically to the account's office, in particular, the complainant.

3.18. That after the audit reports and the findings, as controlling officer, the witness addressed the flaws that were noted with the specific office bearers. That he called meetings and set deadlines for addressing flaws. That the office bearers were the complainant, because most of the flaws had to do with the account's office and the two Vice Principals.

3.19. When referred to the complainant's charge form, 'DM8', the witness stated that he was the author of the said charge form. That the basis of the charge was to address the audit findings. That two officers had been charged and given similar charge forms, that is the complainant and the Assistant Accountant. That the Assistant Accountant was charged because the money that went missing was from the tuck-shop sales and uniform sales which were directly under the responsibility of the two officers. That after being charged, responses were given to management. That the responses were shared with the Board through the Group Chief Executive Officer.

3.20. He stated that there was a disciplinary hearing for the complainant and the Assistant Accountant and that both of them were found guilty. That the final verdict for the complainant was summary dismissal whereas the Assistant Accountant was given final written warnings and directed to pay back 50% of the money that had gone missing. That the

outcomes were different because the committee felt that the back had to stop at the head of the complainant.

3.21. The witness admitted that he had the respondent's disciplinary code of conduct which provided for offences and their penalties. That the committee's feeling that the back had to stop at the head of the complainant was supported by the disciplinary code of conduct. The witness referred to offence no. 11 at page 26 of the disciplinary code of conduct, 'DM6' in support of his argument. He stated that no one was charged with the offence of poor supervision. That the penalty for poor supervision, offence no.11 was written warning on first breach, then final written warning on second breach and discharge on third and last breach. That the complainant was not charged with the offence of poor supervision. That he referred the court to the offence of poor supervision because the offences the complainant was charged with were related to the said offence. That the loss of the money in question which amounted to gross misconduct was as a result of poor supervision by the complainant who was the head of department. That he did not charge the complainant with poor supervision because there were summaries in the offence of incompetence which were related to the offence of poor supervision.

- 3.22. He stated that the Assistant Accountant was charged with the offences of failing to follow procedure and gross misconduct. That the penalty for gross misconduct was summary dismissal. He stated that the money which went missing used to be kept by the Accountants in the account's office. That he was not sure who in particular used to keep the money.
- 3.23. The witness stated that the respondent had a tuck-shop Sales Lady who used to sell food at the tuck-shop; and the uniforms used to be sold by the lower school senior Teacher. That payments for the uniforms used to be made at the account's office and a receipt would be issued before collecting the stock from the store room for uniforms. That the Accountants from the account's office used to receive the payments.
- 3.24. He stated that after the complainant's summary dismissal, a report outlining the circumstances and reasons for the summary dismissal was submitted to the Labour office. He admitted that the complainant was a member of senior management but he did not enjoy the condition of 30% fuel allowance.
- 3.25. In re-examination, the witness stated that there were elements of poor supervision in the charge of incompetence

because incompetence was deemed to be either by purpose or lack of skill, training and general ability to execute.

4.0. FACTS NOT IN DISPUTE

- 4.1. I have considered the parties' affidavit and *viva voce* evidence. I have also considered the complainant's final written submissions.
- 4.2. The facts which were common cause are that the complainant was employed by the respondent on 1st August, 2001 as a School Bursar, which title eventually changed to School Accountant. From 16th May to 3rd June, 2022, Auditors conducted a financial audit of the respondent's financial records for the period 1st January, 2019 to 31st December, 2021. During their audit, they found financial irregularities such as variances between the receipted income and the monies in the respondent's bank account; misapplication of income for various school projects; and misfiling of important accounting documents, among other things, as shown by the audit report, 'SK2'. As result, the respondent charged the complainant and the Assistant Accountant, Mrs. Matilda Mulenga who were both from the accounts department. The complainant was charged with the offences of serious/gross misconduct; incompetence; and failure to follow lawful instructions, established channels or

procedures or assigned duties as shown by the disciplinary charge sheet, 'SK3' whilst the Assistant Accountant was charged with the offences of serious/gross misconduct and failure to follow lawful instructions, established channels or procedures or fulfill assigned duties.

- 4.3. The complainant was asked to exculpate himself which he did through his exculpatory statement, 'DM9'. The complainant's disciplinary hearing was held on 14th November, 2022 and he was found guilty of all the three charges. Consequently, he was dismissed from employment on 22nd November, 2022 for the offence of serious/gross misconduct as shown by the letter, 'SK5'. The complainant appealed against the dismissal but the appeal was unsuccessful.
- 4.4. As regards the Assistant Accountant, after her disciplinary hearing, she was also found guilty of the two offences she was charged with. With regard to the charge of serious/gross misconduct, she was given a final written warning with an accompaniment of a financial charge to recover 50% of the money that the school had lost. As for the charge of failure to follow lawful instructions, she was also given a final written warning.
- 4.5. During his course of employment, the complainant had subscribed to the Zambia State Insurance Corporation

Pension Scheme. However, he had opted not to be contributing to the said fund. Therefore, the respondent only paid him the sum of K19,000.00 for his accrued days, which after deductions, came to K9,600.00

5.0. ANALYSIS OF THE EVIDENCE AND THE DECISION OF THE COURT

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

5.1.1. Whether the complainant's dismissal from employment was wrongful and unfair thereby entitling him to the payment of damages.

5.1.2. Whether the complainant is entitled to the payment of full terminal benefits.

5.2. I will start with the first issue, which is whether the complainant's dismissal from employment was wrongful and unfair thereby entitling him to the payment of damages.

5.3. The complainant has claimed for a declaratory order that his dismissal from employment was wrongful, unlawful, and unfair.

5.4. In the case of **Eston Banda and Another v the Attorney General**¹, the Supreme Court 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.”

- 5.5. On the above authority, I am of the firm view that the relief that the complainant is seeking is that his dismissal from employment was wrongful and/or unfair; and I will proceed to determine his claim as such.
- 5.6. I will begin with the complainant’s claim that his dismissal from employment was wrongful.
- 5.7. 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."

5.8. 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."

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

5.10. In *casu*, it is on record that when the financial audit of the respondent's financial records for the period 1st January, 2019 and 31st December, 2021 revealed that there were gross financial irregularities in the accounts department, the complainant was placed on suspension and later charged with the offences of serious/gross misconduct; incompetence; and failure to follow lawful instructions or established channels and procedures as shown by the disciplinary charge form, 'SK3'. The complainant was also asked to exculpate himself within seven days and he submitted his exculpatory statement, 'DM9' on 8th August,

2022. A disciplinary hearing was held on 14th November, 2022 after which the complainant was found guilty of the subject offences. The offence of serious/gross misconduct attracted the penalty of summary dismissal; and the complainant was accordingly summarily dismissed from employment on 22nd November, 2022. The complainant was informed of his right to appeal which he did but his appeal was unsuccessful.

5.11. From the above, it is evident that the respondent had complied with its disciplinary procedures, the rules of natural justice and the Employment Code Act when dealing with the complainant's case. In my view, it is irrelevant that the complainant's disciplinary case was heard by the members of the board and not senior management.

5.12. On the totality of the evidence in this case, I am satisfied that the complainant was accorded all his rights to a fair hearing. In this regard, the complainant has, on a balance of probabilities, failed to prove that he was wrongfully dismissed from employment.

5.13. I now turn to the question whether the complainant was unfairly dismissed. In determining whether the dismissal was unfair, besides the usual considerations, I will also consider the issue of whether the complainant was treated in a discriminatory manner by the respondent when it dismissed him from employment.

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

5.15. 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.”

5.16. 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.

5.17. It is undisputed that the complainant was charged with the offences of serious/gross misconduct; incompetence; and failure to follow lawful instructions, established channels or procedures or fulfill assigned duties. The said offences had arisen following the financial audit of the respondent's financial records between 1st January, 2019 and 31st

December, 2021 which revealed that there were gross financial irregularities in the accounts department, among them, variances between the receipted income and the monies in the respondent's bank account; misapplication of income for various school projects; misfiling of important accounting documents as well as disregard of the financial regulations of the institution. The complainant did not dispute the findings of the audit but instead offered several explanations as to why he should not have been held responsible for the said findings.

5.18. The complainant explained that he was not responsible for the amount of K55,833.18 which was unaccounted for. That Mrs. Matilda Mulenga was the person who was seized with the responsibility of receiving and accounting for income from the uniform and tuck shop sales. That he was also surprised as to why he was singled out on the issue when the internal auditors had confirmed that the direct purchases were duly authorised by management. Further, he explained that he had done audit reports for the respondent for 19 years. That as regards the two years for which he was called incompetent, it was as a result of about three major reasons. That from 2019 to 2022, the respondent changed two Assistant Accountants and, therefore, that disrupted the flow of work in the accounts section. That the second reason was that the Board gave instructions that no institution should do external audit reports without using the pastel software. That,

therefore, the accounts personnel needed time to acquaint themselves with the pastel software. That the respondent had engaged Assistant Accountants who were not knowledgeable about the pastel software and hence needed to be educated on the pastel software. That the third reason was that in 2020, there was covid-19 which slowed down the operations of not just the respondent but many other institutions. The complainant was found guilty of all the three offences. As regards the offence of serious/gross misconduct, the respondent imposed the penalty of summary dismissal.

5.19.I have considered the above explanations that had been offered by the complainant with regard to the charges that he was facing as well as the reasons advanced by the respondent for the complainant's dismissal from its employment. With regard to the offence of serious/gross misconduct for which he was dismissed, even though the complainant denied being the immediate supervisor to the Assistant Accountant on whom he placed the blame for the unaccounted for money amounting to K55,833.18, it is my firm view that, being the head of department in the accounts department, it was the complainant's duty to ensure that the Assistant Accountant was adhering to the respondent's business code and financial regulations. He had the responsibility to ensure that the work in the department was being done in a professional and orderly manner. In my view, the respondent cannot be

faulted for having held the complainant responsible for the money that was unaccounted for. It is, therefore, clear that before the respondent dismissed the complainant, it had satisfactorily established that the complainant had committed the subject offence. Therefore, I find that there was a substratum of facts to support the disciplinary measure that was taken against the complainant.

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

5.21. 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 354 that dismissal based on any discriminatory grounds as enacted in section 108(1) of the Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia and section 5(2) of the Employment Code Act No. 3 of 2019 would amount to unfair dismissal.

5.22. The complainant testified that the Assistant Accountant, Mrs. Matilda Mulenga was also charged with similar offences, that is, serious/gross misconduct and failure to follow lawful instructions. That the respondent put up a disciplinary committee and she was put on suspension. That after

attending her case hearing, she was found guilty of both offences. However, she was given a lesser punishment of a final warning in both cases and reinstated. That he wondered why he was dismissed while Mrs. Mulenga was shown leniency. That he wondered whether it was because she was a woman and he had to suffer because he was a man or whether it was because of his employment status.

5.23. On the other hand, the respondent denied any form of discrimination against the complainant in the disciplinary proceedings and outcomes. It was argued that the reason why Mrs. Matilda Mulenga was given lesser punishments and reinstated was due to extenuating factors such as her length of employment as well as her role and responsibilities in the scandal.

5.24. I have considered the arguments from both parties.

5.25. It is not in dispute that the complainant was dismissed while his subordinate, Mrs. Matilda Mulenga was given final written warnings despite both of them having been found guilty of the same offences.

5.26. Dismissal based on discrimination is prohibited under the Industrial and Labour Relations Act, Cap. 269 of the Laws of Zambia and the Employment Code Act No. 3 of 2019. Section 108(1) of the Industrial and Labour Relations Act, Cap. 269 of the Laws of Zambia provides as follows:

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

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

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

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

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

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

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

5.29. The learned authors, Judge Dr. W.S. Mwenda and Chanda Chungu in their book entitled: **A Comprehensive Guide to Employment Law in Zambia**, based on the decisions in the cases of **Grayson Kachikoti v TAP Bulding Products Limied³**, and **Edward Mweshi Chileshe v Zambia Consolidated Copper Mines⁴**, state at page 354 that:

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

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

5.30. In the present case, it is incumbent upon the complainant to prove that the primary reason for his dismissal was discrimination. The complainant has claimed that he was discriminated against by virtue of his employment status and sex as he was dismissed from employment while his subordinate, the Assistant Accountant was just given final warnings and surcharged when the offences they were both charged with arose from the same transaction.

5.31. I have considered all the evidence in this matter. There is no evidence on record showing that the reason the complainant was dismissed was because he was a man. What appears to emerge from the answers RW1 gave in cross-examination is the fact that the complainant was the head of the accounts department. As such, the financial irregularities that were discovered by the Auditors were attributable to him being the head of department and supervisor to Mrs. Mulenga. As alluded to above, the complainant did not dispute the findings of the audit report that was conducted which gave

rise to the charges that were levelled against him. On that basis, the respondent found him guilty and imposed the appropriate punishment of summary dismissal in accordance with its disciplinary code and grievance procedures.

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

5.33. On the totality of the evidence in this matter, I find that the complainant has, on a balance of probabilities, failed to prove that he was unfairly dismissed from employment either arising from lack of substantiated facts or on account of discrimination. Further, in terms of section 52(5), the respondent has proved, to my satisfaction, that the termination of the complainant's contract of employment was for a fair and valid reason. As a result, his claim that he was unfairly dismissed from employment is accordingly dismissed.

5.34. Having found that the respondent had followed all its disciplinary procedures, the Employment Code Act and the rules of natural justice when dealing with the complainant's case; and having found that his dismissal from employment

was fair and for a valid reason, it follows that the complainant's claims for damages for breach of contract; exemplary damages and/or aggravated damages for embarrassment, mental anguish, distress, inconvenience and torture; damages for abrupt loss of employment and one month pay in lieu of notice cannot stand and are accordingly dismissed.

5.35. I now turn to the second issue for determination, which is whether the complainant is entitled to the payment of full terminal benefits.

5.36. It was the complainant's claim that his terminal benefits were not correctly computed. On the other hand, the respondent argued that the complainant's separation package was based on the pension conditions that the complainant had signed for but unfortunately, he did not commit himself to being deducted for a pension contribution. That the complainant had willfully refused to be part of the Zambia State Insurance Corporation Pension Scheme which was offered to other members of staff of the respondent. That, therefore, there was no basis for the respondent to pay him any pension.

5.37. It is on record that, in cross-examination, the complainant confirmed that the respondent had a private pension scheme to which he did not make any contributions for his pension. Further, in justifying the reason why he did not make any


contribution to the pension fund, the complainant, in re-examining himself, stated that he could not contribute to the pension fund because ZSIC, which was the provider of the pension scheme, advised that those people who were approaching 50 years would not have a direct benefit because of the number of years that they were going to serve up to 55 years.

5.38. From the complainant's answers in cross-examination and when he re-examined himself, it is abundantly clear that he had not made any contributions to the private pension scheme. Therefore, I totally agree with the respondent that there was no basis for paying him the full terminal benefits which should have included the pension benefits. In this regard, therefore, the complainant's claim for the payment of full terminal benefits is bereft of merit and is accordingly dismissed.

5.39. I make no order for costs.

5.40. Leave to appeal is granted.

Delivered at Ndola this 15th day of December, 2023.



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