

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

2023/HN/IR/08

BETWEEN:

SOLOMON ZULU

AND

NSANSA SCHOOL INTER-EDUCATION
TRUST

COMPLAINANT

RESPONDENT



Before the Honourable Mr. Justice Davies C. Mumba in Chambers on the 30th day of November, 2023.

For the Complainant: In Person.

For the Respondent: Ms. N.M. Mulenga, Messrs Isaac and Partners.

JUDGMENT

Cases referred to:

1. George Chisenga Mumba v Telecel (Zambia) Limited, SCZ Appeal No. 156 of 2005.

Legislation referred to:

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

Other work referred to:

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

1.0. INTRODUCTION

- 1.1. By notice of complaint supported by an affidavit filed into Court on 9th February, 2023, the complainant commenced this action against the respondent seeking an order that he was unfairly dismissed from employment. The complainant also sought damages for loss of employment and any other relief the Court may deem fit.
- 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 25th April, 2023 sworn to by Esther Sulamoyo, Head Teacher at the respondent's school.
- 1.3. The respondent contended that the complainant was found drunk on duty on 11th November, 2022 by the Head of the science department. That the respondent duly investigated the incident and obtained medical test confirmation that the complainant was drunk upon having tested him for alcohol. That the complainant was charged and heard during a disciplinary hearing after which he was dismissed. That the complainant appealed against the dismissal but the appeal was unsuccessful. It was contended that the complainant was not entitled to any relief or damages as the respondent dismissed him fairly for the charges that were levelled against him and in accordance with the respondent's disciplinary and grievance procedure code; and the law.

2.0. THE COMPLAINANT'S EVIDENCE

- 2.1. In his affidavit in support of the notice of complaint and at the trial, the complainant testified that he was employed by the respondent on 24th February, 2017 as a Teacher on a two-year fixed term contract. That the said contract was renewed three times, the last one having commenced on 23rd October, 2021 and was supposed to expire on 23rd October, 2023. He stated that the contract was terminated by the respondent on 18th November, 2022 as shown by the termination letter, 'SZ1' on the ground that he had reported drunk on duty, which was not the case.
- 2.2. The complainant explained that on 10th November, 2022, the day before his contract was terminated, he was not feeling well. That he had some chest problems and a cough. That around 22.00 hours, he took some paracetamol and a medicated drink called '*sansamukeni*' to relieve his chest pains.
- 2.3. It was the complainant's testimony that the next day on 11th November, 2022, he went to the respondent's school to ask for a day off in order to seek medical attention. That he explained to Mr. Chanda (RW3), who was the Head of Department in Natural Sciences and also his immediate

supervisor about the experience with his chest pain but RW3 denied him permission. That RW3 instead accused him of having taken some alcohol. That the complainant showed RW3 the medical report, 'SZ2' which had been issued to him at the hospital about two weeks earlier when he complained of chest pains but RW3 insisted that he was smelling of alcohol and suggested that they go and do an alcohol test. That they were given a request form from the Head Teacher's office to go to Ndola Teaching hospital to do the test. That when they reached Ndola Teaching hospital, a clinical examination was conducted on him by a Doctor but it did not show any intoxication. That RW3 then suggested that they go to Lancet Laboratories.

- 2.4. The complainant testified that they went to Lancet laboratories where some urine and blood samples were taken from his body to test for alcohol content in his body. That the complainant requested for the results but they were told that the samples had to be taken to Lusaka and that they had to wait for four days. That they were told to go back on 15th November, 2022. Thereafter, they went back to the school.
- 2.5. The complainant testified that when he reported for work on Monday, 14th November, 2022, he was given the charge form, 'ES5' for the offence of being drunk on duty on 11th November, 2022. That he denied the charge and he was told

not to report for work for four days as they waited for the results from the lab to be ready.

- 2.6. The complainant informed the court that when the results came from Lusaka, he and RW3 went to the lab to collect the results and RW3 submitted them to the Headteacher. That the said results, 'ES13' indicated that there was 0.130% ethanol in his blood, which according to the said results, was from the serum levels. That the results also indicated the paracetamol he had taken.
- 2.7. It was the complainant's evidence that later on, received the letter of summary dismissal, 'SZ1'. That he was advised to appeal within 14 days which he did but the appeal was unsuccessful. The complainant stated that he was not given an opportunity to be heard. That he was unfairly treated because he was not drunk on duty. That the laboratory report showed that he was not drunk. That there was also no clinical report from a Doctor showing that he was intoxicated. That he was unfairly dismissed.
- 2.8. During cross-examination, when referred to the letter, 'SZ3', the complainant confirmed that the letter was from a Medical Doctor of Ndola Teaching hospital. He admitted that the said letter, 'SZ3' and the laboratory report, 'ES13' confirmed that there was ethanol in his blood. He stated that he was aware

of the respondent's disciplinary code, and that the respondent had a zero-tolerance policy to being drunk at the school. That the respondent did not allow Teachers to report for work with alcohol levels in their blood. The complainant stated that he was taken to Ndola Teaching hospital where he was found not to be drunk but he did not have the medical report to that effect. He admitted having testified that he had chest pains the day before 10th November, 2022. When referred to his medical report, 'SZ2', the complainant stated that it was the medical report he had referred to in his evidence in chief and that it was dated 27th October, 2022. That on 11th November, 2022, he went to school around 7.30 hours to seek permission to go to the hospital. That the normal reporting time was 07.15 hours. He confirmed having denied being drunk after he was charged. That he was given a chance and did write an exculpatory letter, 'ES6' dated 15th November, 2022. That he wrote the letter after receiving the charge form, 'ES5' on 14th November, 2022. He confirmed that he was only dismissed after the laboratory results came out on 18th November, 2022. The complainant stated that during the time he was teaching at the respondent's school, he used to teach and supervise children aged between 12 and 18 years. He admitted that he was in charge of minors. He stated that he worked at the respondent's school for about five years. That he never had any other incident in relation to being found drunk on duty. He recalled that on 17th October,

2022, he had an experiment in the lab with his grade eight pupils and he was charged with the offence of negligence on duty. That he exculpated himself over the said charge. When referred to 'ES18' and 'ES19' and 'ES20' he admitted that the documents were his charge letter and exculpatory letter, respectively. He recalled that in November, 2021, he was accused of smelling of beer. That he was given chance to write the exculpatory letter, 'ES15'.

3.0. THE RESPONDENT'S EVIDENCE

- 3.1. RW1 was Esther Sulamoyo, Head Teacher at the respondent's school.
- 3.2. In her affidavit and at trial, the witness stated that the complainant was a Teacher at the respondent's school. That he was employed by the respondent on 23rd October, 2017 and worked up to 22nd November, 2022. That the complainant was employed on various two-year fixed term contracts, the last one having commenced on 23rd October, 2021 and was to expire on 23rd October, 2023. The witness referred the court to the complainant's contracts, 'ES1', 'ES2' and 'ES3' for the periods 23rd October, 2017 to 23rd October, 2019; 23rd October, 2019 to 23rd October, 2021; and 23rd October, 2021 to 23rd October, 2023, respectively. She stated that the third contract was terminated on 25th November, 2022 because the

2022, he had an experiment in the lab with his grade eight pupils and he was charged with the offence of negligence on duty. That he exculpated himself over the said charge. When referred to 'ES18' and 'ES19' and 'ES20' he admitted that the documents were his charge letter and exculpatory letter, respectively. He recalled that in November, 2021, he was accused of smelling of beer. That he was given chance to write the exculpatory letter, 'ES15'.

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complainant breached the contract. That the complainant had read and signed the respondent's disciplinary code, 'ES4' on 24th October, 2017 to show that he had read and understood its contents.

- 3.3. The witness testified that the reason the complainant left employment was because he had committed offence no. 15 in the respondent's disciplinary code. That on Friday, 11th November, 2022 around 9.00 hours, the witness was informed by the Deputy Head Teacher for the secondary school, Mr. Kamukwamba and the Head of Department for Sciences, RW3, that the complainant had reported for work drunk as he was smelling of beer but he had denied the allegation. That because the complainant had denied being drunk, she asked them to go to the hospital for a test. That she gave them the letter, 'ES12' to go to Ndola Teaching hospital to test for alcohol content in his blood. That, however, Ndola Teaching hospital did not have the facilities to do the test for the alcohol content so they went to Lancet laboratories. That she received the results, 'ES13' from Lancet laboratories on 18th November, 2022 and the said results indicated, at pages 2-3, that the level of ethanol in the complainant's blood was 0.130%, which was higher than the legal limit of 0.05%. That that confirmed that the complainant was intoxicated. That the respondent also requested for an interpretation of the said results of the blood test at Ndola

Teaching hospital and she received a response via the letter, 'ES14' dated 30th November, 2022 which confirmed that there was alcohol and paracetamol in the complainant's blood.

- 3.4. The witness testified that on 14th November, 2022, the complainant was charged for being drunk on duty by the Head of Department, RW3 as shown by the charge form, 'ES5'. That the complainant was also advised to stop reporting for work for the next four days from 14th November, 2022. That on 15th November, 2022, the complainant submitted his exculpatory letter, 'ES6'.
- 3.5. The witness testified that when the results, 'ES13' came out on 18th November, 2022, they were submitted to her by RW3 who also explained to her what they meant. She then wrote the letter of summary dismissal, 'ES7' and advised the complainant to stop work on 25th November, 2022. That in the dismissal letter, the complainant was informed of his right to appeal within 14 days. That the complainant appealed to the Head Teacher as shown by his letter of appeal, 'ES8'. That the witness then wrote the memorandum, 'ES9' to the Teachers' interim disciplinary committee Chairperson on 24th November, 2022. That she asked the committee to hear the complainant on the appeal against his summary dismissal. That the hearing took place on 25th November, 2022 and after the hearing, the committee

submitted the minutes of the hearing, 'ES10' to her. She explained that the summary dismissal was upheld. That according to the findings of the committee at clause 5.2 of the minutes, the dismissal was based on the medical findings of the Ndola Teaching hospital after analysing the laboratory result from Lancet laboratories. That, thereafter, the witness wrote to the complainant the letter, 'ES11' informing him that the summary dismissal had been upheld.

3.6. The witness testified that prior to the incident in question, the complainant had, on some occasions, been informed that he was smelling of beer. That one such incident was on 23rd November, 2021 when he was told that he was smelling of beer and he exculpated himself, as shown by his letter, 'ES15'; the report from the Deputy Head Teacher, 'ES16' dated 23rd November, 2021; and the letter from the Head of Department, 'ES17'. That the complainant had requested to be taken to the hospital and they went to Ndola Teaching hospital. However, Ndola Teaching hospital required an official request in writing for a medical test to be carried out on the complainant but both the Head Teacher and the Deputy Head Teacher were out of the office.

3.7. The witness stated that there were yet other incidents. The first being where the complainant was charged with negligence on duty while conducting a science experiment in

the lab on 14th October, 2022 in which a female pupil was affected by chemicals. That the complainant was asked to exculpate himself by 11.30 hours on 23rd October, 2022. That the complainant was also given another charge where a female pupil complained about his behavior towards her when he told her to remain behind alone in the lab whilst he was on duty. To that effect, the witness referred the court to the charge form, 'ES18' and stated that the complainant exculpated himself on 17th October, 2022 through the exculpatory letters, 'ES19' and 'ES20' where he explained what had transpired. The witness further testified that there were other complaint letters, 'ES21' and 'ES22' dated 14th October, 2022 from two children whom he had asked to remain with him in the laboratory. That he was verbally warned by the Head of Department and the Deputy Head Teacher over the same.

- 3.8. The witness stated that the respondent had a strict policy against being drunk on duty and in February, 2020, it had various meetings and talks regarding the same. That an official memorandum, 'ES23' was written and pasted on the school staff room notice board. That all the teaching staff including the complainant were fully aware of the strict policy and the repercussions of being drunk on duty.

- 3.9. She stated that the complainant was not unfairly treated. That he was fairly dismissed for reporting to work drunk and was duly charged in accordance with the respondent's Disciplinary Code, given a chance to exculpate himself and heard before he was dismissed. That he was also informed of his right to appeal which he did but his appeal was dismissed on 29th November, 2022. That the complainant was taken care of, counselled and written to. That he was also charged and he challenged the decision and took the matter to court.
- 3.10. During cross-examination, the witness stated that she did not have a clinical examination report. She stated that the medical report, 'ES13' indicated that it was not acceptable for medical or legal purposes because it showed that ethanol was present in the complainant's blood. She stated that the respondent based the complainant's dismissal on the ethanol level in his blood. That the ethanol level in the blood was high enough for the complainant to be drunk. She stated that being drunk involved drinking beer.
- 3.11. RW2 was Taylor Bulaya, a Medical Doctor and Physician from Ndola Teaching Hospital. She informed the court that she had a Masters of Medicine in internal medicine, Bachelors in Human Anatomy and Bachelors in Medicine and Surgery. She also informed the court that she had been working as a medical professional for 15 years.

- 3.12. The witness testified that she recalled interpreting laboratory results, 'ES13' in respect of the complainant. That the laboratory reports were done by Lancet laboratories in respect of the complainant's blood sample collected on 11th November, 2022 following a request from Ndola Teaching hospital. That the final report was done on 18th November, 2022. She explained that a request for a blood sample was called a toxicology sample and a number of tests for various drugs were done.
- 3.13. That the first test that was done was for serum phenobarbitone. That the result was less than 10 meaning that there was no phenobarbitone in the complainant's blood. That the second drug that was tested for was serum s-tricyclic antidepressant. That the result was less than 40, meaning that it was also negative. That the third drug that was tested for was serum ethanol Barbiturate and the value of the result 0.130%.
- 3.14. The witness explained that the interpretation of the result was based on the reference range from the lab that did the test. That in this case, there was, at the bottom of the report, 'ES13', an interpretation range of the results. That when there was no ethanol present, the range would be less than 0.01%. That the legal limit of ethanol in blood was supposed to be

less than 0.05% and when it was potentially toxic, the level would be more than 0.1%. That critical levels of ethanol would be more than 0.25%. That in reference to the blood results of the complainant, the value of ethanol was 0.130% which was falling in the potentially toxic level.

3.15. Further, the witness explained that normally, ethanol was not found in blood or any body fluid. That depending on the level of alcohol detected in blood, a scale had been laid. Based on that scale, the level of ethanol had been graded from what was considered legal to what was potentially toxic. That the sample collected from the complainant was whole blood but when running the test, blood serum was used as well. That serum was fluid in blood without cells. That it did not alter the results but made the positivity of the results higher.

3.16. The witness testified that another drug was tested for was S-barbiturate but nothing was detected. That the last drug that was tested for was paracetamol and the value was 86.9%. That the result was positive for the presence of paracetamol in serum.

3.17. The witness testified that according to the results on the report, 'ES13', on the day of the blood test, the complainant had intoxication of alcohol in his blood. That based on the

scale, it was potentially toxic levels which meant that he had very high alcohol levels in his blood.

3.18. Furthermore, the witness referred the court to the drink called *sansamukeni*, and explained that according to the label on the said drink, it was a 350mls gingered flavoured wine with alcohol percentage of 16%. That it was a local brew manufactured in Lusaka. That if one took the drink, they would have a high alcohol intoxication. RW2 explained that looking at the metabolism of alcohol in the body, the half life of alcohol was 6-8 hours and the levels detected after 6-8 hours would not exceed toxic levels. That if the levels detected are above the legal limit, the possibility would be that someone either continued drinking so the levels in blood were not dropping or the level of alcohol taken was a lot such that it still persisted even after 8 hours. That in the case of the complainant who had stated that he had taken the drink around 22.00 hours the previous night and the test was done around midday, the duration was too long to have such levels because after 8 hours, the limit would have fallen to lower than potentially toxic. That, however, she could not tell whether the complainant drunk in the morning on the day of the test or it was the ethanol from the day before which had left to such levels. That she could only confirm that the levels were quite high. The witness testified that she was asked to do an interpretation of the results on the report, 'ES13' and

she did the medical report, 'ES14' on 30th November, 2022 to that effect. That her interpretation was that paracetamol was positive, aspirin was negative and alcohol was at 0.13% which meant that it was potentially toxic levels. That the complainant was intoxicated with alcohol and high paracetamol levels.

3.19. The witness stated that she did not examine the complainant on the day of the test but he was seen by the junior Doctors on call. That the most objective way of testing for alcohol was through a blood test as was done with the complainant. The witness produced the drink into evidence and it was marked as 'R1'.

3.20. During cross-examination, when referred to page 2 of the report, 'ES13', the witness stated that she did not understand the note that stated that *'This test is NOT acceptable for medico-legal purposes'*. She stated that clinical examination was the information that was obtained on the day that the person had gone for examination, both history and physical examination. She stated that the complainant's clinical examination must have been documented but she did not have the document. She stated that the test was done in serum which was generally higher than levels measured in whole blood. However, there was a key for interpretation on the results which had been interpreted. She stated that the

term 'medical purposes' meant when a patient went to the hospital for a clinical evaluation and a blood sample was taken. She stated that for toxicology purposes, the blood test was the only qualitative test that she knew to confirm whether someone was positive or negative. That potentially toxic meant that the person was drunk. That if the level was 0.1%, it meant that the person was drunk. She admitted that toxic meant poisonous. That the level in the complainant's blood was potentially toxic. She stated that she was not the Doctor that examined the complainant but she only interpreted the results based on the report, 'ES13'. That she did not know of any other test that could be used as evidence other than the report, 'ES13'.

3.21.RW3 was Beri Chanda, Head of department in the science department at the respondent's school.

3.22.He testified that he had worked with the complainant for about three years at the respondent's school from 2020 to 2022. That the complainant was a Teacher of science and he used to teach integrated science to grade 9s; and chemistry and physics to grade 10s.

3.23.The witness testified that on 11th November, 2023, the complainant reported for work around 07.55 hours instead of 07.15 hours. That the witness met the complainant in the

science lab preparing for a lesson to go and teach the 8B class. That when he greeted the complainant, the witness immediately observed that the complainant was not in good state as he was drunk. That the complainant's eyes were red, he smelt of beer, his speech was uncoordinated and in a high-pitched voice. That he told the complainant that he should not go to class because he was drunk and in response, the complainant told him that he was not drunk and called him a liar. That the witness then asked the complainant to go with him to the Deputy Head Teacher's office so that the Deputy Headteacher could also observe him. That the complainant accepted to go the Deputy Head Teacher's office but asked for some time. That the complainant then went to the tuck-shop, bought cream doughnuts and went back to him. That the complainant ate the cream doughnut, drunk some panado with water and chewed some substance which the witness could not recognise. After the complainant was done, they went together to the Deputy Head Teacher's office. That the Deputy Head Teacher observed the complainant and other Teachers were called in to also make some observations. That they concluded that the complainant was drunk but he continued to say that he was not drunk. That since the complainant was insisting that he was not drunk, the Head Teacher decided to engage a third party, in this case, the hospital and he wrote the request, 'ES12' to Ndola Teaching

hospital for an alcohol test to which the complainant was agreeable.

3.24. The witness testified that he went to the hospital with the complainant and another Teacher named Mr. Kaunda. At the hospital, the complainant was attended to by a female Doctor who opened a file and started examining the complainant. That she asked the complainant some questions after which she wrote that 'mild intoxication' on the card and referred them to the laboratory. She also mentioned to them that Ndola Teaching hospital did not have the reagents for the type of examination they needed to do and referred them to Don lab. That at Don lab, they were told that they did not have enough reagents so they referred them to GRIZ which did not also have enough reagents. That they were then referred to Lancet laboratories.

3.25. At Lancet laboratories, a blood sample was taken from the complainant and they were told that the results would be ready after a week. That they went back to the Doctor at Ndola Teaching hospital and reported that the results would be available after five days. That after ~~five~~ days, they collected the results, 'ES13' from Lancet laboratories which were given to the complainant. That after going through the results, the complainant saw somewhere where it was written that 'no alcohol' and started calling the witness a liar. That

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they took the results to Ndola Teaching hospital to the same female Doctor who had attended to the complainant and after going through the results, she told them that the level of alcohol in the complainant's blood was high at the time of the test. That the intoxication was at a level at which they did not allow someone to drive. That the complainant disputed the results so the witness requested that a report about the interpretation of the results be written to the respondent. That the junior Doctor told them that the report could only be done by a senior Doctor and asked them to wait for some days. That the Doctor called them back after some days and told them to go and collect the report. That the report was signed by the senior Doctor, RW2. The witness referred the court to the said report, 'ES14' and stated that it was issued on 30th November, 2022.

3.26. The witness testified that before they received the report, 'ES14' from Ndola Teaching hospital, they had submitted the results from Lancet laboratories to the Head Teacher on 18th November, 2022. That because of the evidence according to the lab results, the witness charged the complainant for being drunk on duty. The witness referred the court to the charge form, 'ES5' dated 14th November, 2022. That the complainant was suspended from work pending his exculpation and more investigations. That the complainant exculpated himself through the letter, 'ES6' dated 15th November, 2022

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addressed to the Head Teacher. Subsequently, the complainant was dismissed from employment but he was given a chance to appeal against the dismissal.

3.27. Further, the witness testified that on 14th October, 2022, the complainant was teaching the grade 8B class when the witness, who was in the staff room with other Teachers, saw a girl go to the staff room crying. That the girl went straight to a Teacher named Ms. Sampa. That when Ms. Sampa asked why she was crying, the girl explained that the complainant had been trying to be closer to her. That he had been teasing her and it was not the first time. That even her classmates began asking her what was there between her and the complainant. That the same day, they received a report that there was an incident of an explosion in class during the complainant's lesson and the pupils scampered. That the witness and the Deputy Head Teacher asked the complainant and the pupils who were there to write reports of what had transpired. That one child said that the chemical had landed on her skin and the skin was itching. The witness referred the court to the complainant's exculpation, 'ES20' dated 17th October, 2022 where he explained what had transpired. He also referred the court to the report, 'ES21' from the girl who had complained about how the complainant had been treating her. He further referred the court to the report, 'ES22' from the girl who reported that when an experiment

exploded, the chemical went on her skin and it started itching.

3.28.RW3 stated that he had charged the complainant with the offence of negligence on duty while conducting an experiment in the lab and for his behavior towards another girl on 14th October, 2022 as shown by the charge form, 'ES18'. That there had been another incident on 23rd November, 2021 involving the complainant where there was a report circulating that he had gone to the school drunk and the witness was asked by the Deputy Head Teacher to go and check on his state. That the witness went to see the complainant and confirmed that he was drunk. That there was no charge relating to that particular incident despite having gone to the hospital because there was no evidence from the hospital. That the witness had taken the complainant to the supervisor, Mr. Kamukwamba, Deputy Head Teacher, where other Teachers smelt beer from him. That they had had taken the complainant to the hospital and Mr. Kamukwamba had written the report, 'ES16' about what had transpired. That the witness had also written the report, 'ES17' on 24th November, 2021 relating to the complainant smelling of beer on duty. The witness testified that they could not charge the complainant of the two incidents in October and November because, for the incident in October, they failed to take him to the hospital as he ran away. That

the incident happened on a Friday and the complainant only showed up on a Monday. That as for the incident on 23rd November, 2021, they had taken the complainant to the hospital but they could not be attended to because they did not have a request from the respondent's school. That when they went back to get a request from the Head Teacher, she was not around so they did not have evidence to charge him.

3.29. During cross-examination, the witness confirmed that the complainant had shown him the document, 'SZ2' stating that he needed to go to the hospital but it was after they had complained to him that he was drunk. That the complainant had not gone to school to seek permission to go to the hospital but he had gone to work. The witness stated that the pupils were learning on 11th November, 2021. He stated that the complainant was charged with the offence of negligence on duty for not providing first aid although he was not a first aider. That the girl reported to them that the complainant had chased her out of class because she was disturbing the class and not because he wanted her to go and get fresh air or to avoid the other pupils getting affected. That the incident was related to him being drunk because one of the girls had reported that he was drunk as shown by the report, 'ES21', though she misspelt the word 'drunk' as 'drug'. When referred to the report, 'ES16', the witness stated that Mr. Kamukwamba said he did not pick any smell of beer but other

witnesses like Ms. Sampa picked up the smell. He denied that Ms. Sampa was influenced by what he had said as she had initially said she did not smell the alcohol. The witness stated that the document from the hospital showed that the level of alcohol in the complainant's blood was high. He stated that the complainant was dismissed after the results of the test came out. That when the Doctor stated that the results were positive, the complainant disputed the results and that was when the Doctor said the hospital would generate a report. That the complainant grabbed the record from the hospital relating to the clinical examination where the Doctor had written that he was smelling of beer. That the witness could not do anything because the complainant was drunk and aggressive. That the reports, 'ES13' and 'ES14' were proof that the complainant was drunk and that the witness and other people, including the pupils had observed that he was drunk.

3.30. In re-examination, the witness stated that when they went to the Deputy Head Teacher's office, Mr. Kamukwamba, observed that the complainant was drunk. That because the complainant denied being drunk, Mr. Kamukwamba called some Teachers to go and observe him. That he could not remember the names of the Teachers that had been called to observe the complainant. The witness referred the court to the report, 'ES16' and stated that others who were mentioned

in the report as having observed the complainant drunk were Ms. Moonga and Ms. Sampa. He stated that the complainant only produced the medical document stating that he was sick and had gone to seek permission to go to the hospital after being asked to go to the hospital for the alcohol test. Further, that the document was dated 27th October, 2022 and not November.

4.0. FACTS NOT IN DISPUTE

- 4.1. I have considered the parties' affidavit and *viva voce* evidence. I have also considered the respondent's final written submissions.
- 4.2. The facts which were common cause are that the complainant was employed by the respondent as a Teacher. He was employed on 23rd October, 2017 on various two-year fixed term contracts, the last one having commenced on 23rd October, 2021 and was to expire on 23rd October, 2023. When the complainant reported for work on 11th November, 2023, he was suspected of being drunk but he denied being in that state. The complainant was, therefore, taken to Ndola Teaching hospital for an alcohol test. Because Ndola Teaching hospital did not have the reagents for the type of test that was supposed to be conducted, they went to Lancet laboratories where a blood sample was taken from the

complainant for the test. They were then informed that the results would be ready after five days.

- 4.3. On 14th November, 2022, RW3 charged the complainant with the offence of being drunk on duty as shown by the charge form, 'ES5'. By the aforesaid charge form, the complainant was asked to exculpate himself and he did so through the letter, 'ES6' dated 15th November, 2022. The complainant was also suspended from work for four days. On 18th November, 2022, the laboratory results, 'ES13' were issued by Lancet laboratories. The said results indicated that there was 0.130% of ethanol in the complainant's blood. On the same date, the complainant was summarily dismissed from employment as shown by the letter, 'ES7' for the offence of being drunk whilst on duty. He was given a chance to appeal against the dismissal which he did but his appeal was unsuccessful.

5.0. ANALYSIS OF THE EVIDENCE AND DECISION OF THE COURT

- 5.1. The question for determination in this matter is whether the complainant's dismissal from employment was unfair thereby entitling him to the payment of damages for loss of employment.

5.2. 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.”

5.3. On the above authority, unfair dismissal is one where a specific statutory provision has been breached by an employer when dismissing an employee or one where a dismissal has been based on unsubstantiated reasons.

5.4. Pursuant to section 52(5) of the Employment Code Act No. 3 of 2019, the employer bears the evidential burden of proving that the dismissal of an employee from employment was fair and for a valid reason.

5.5. In the present case, the complainant was charged and dismissed for the offence of being drunk on duty, which was offence no. 15 in the respondent's disciplinary code of conduct, 'ES4'. The complainant has claimed that he was unfairly dismissed because he was not given an opportunity to be heard; and that he was not drunk on duty as alleged.

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- 5.6. On the other hand, the respondent argued that the complainant was not unfairly treated. That he was fairly dismissed for reporting to work drunk and was duly charged in accordance with the respondent's disciplinary code, given a chance to exculpate himself and heard before he was dismissed. That he was also informed of his right to appeal which he did but his appeal was dismissed on 29th November, 2022.
- 5.7. I have considered the arguments from both sides.
- 5.8. Regarding the complainant's claim that he was not given an opportunity to be heard, there is evidence on record that after being charged with the offence of being drunk on duty, the complainant was advised to exculpate himself and he did so through the exculpatory letter, 'ES6'.
- 5.9. In the case of **George Chisenga Mumba v Telecel (Zambia) Limited**¹, the Supreme Court observed that:

"We have pronounced ourselves before on this matter and we shall say it again that the employee is given an opportunity to be heard on the charges levelled against him when he is charged and asked to exculpate himself. There is no format on what an exculpatory statement should take but it is anticipated that the employee concerned will explain fully what transpired in relation to the allegations levelled against him with a view to vitiating those allegations."

5.10. In *casu*, it is not in dispute that the complainant was formally charged of the offence for which he was dismissed and he was asked to exculpate himself and he did so. Therefore, I am satisfied that the complainant was sufficiently informed of the charges against him and he was accorded an opportunity to be heard. In the result, the complainant's claim that the respondent did not give him an opportunity to be heard cannot stand and is accordingly dismissed.

5.11. Regarding the complainant's argument as stating that he was not drunk on duty, it is not in dispute that the results, 'ES13' of the blood sample that was taken from him on 11th November, 2022 to test for alcohol content in his blood indicated that there was 0.130% ethanol in his blood.

5.12. According to the laboratory results interpretation of the report related to the reference value, the value of 0.10% was classified as potentially toxic. As stated above, the ethanol that was found to be present in the complainant's blood was 0.130% which was in excess of 0.10%. These were the same results on which the respondent based its decision to summarily dismiss the complainant, as shown by the letter of summary dismissal, 'ES9'.

5.13. To show that the decision to dismiss the complainant was fair and for a valid reason, the respondent requested RW2 to

interpret the laboratory results, 'ES13'. In her letter, 'ES14' dated 30th November, 2022, RW2 confirmed that that percentage of 0.130% ethanol in the complainant's blood was potentially toxic. Further, in her evidence in chief, she explained that the legal limit of ethanol in the whole blood was supposed to be less than 0.05%. To her, on the day of the blood test, the complainant had very high alcohol levels in his blood.

5.13. Reverting to the complainant's argument that the clinical examination that was conducted on him by a Doctor at Ndola Teaching hospital did not show any intoxication, I find that argument to be baseless. This is so because the blood alcohol test which was a more reliable and objective test revealed that there was alcohol in the complainant's blood on the material date and I have no any reasonable cause to reject such medical test results. His argument that he had taken a medicated drink called '*sansamukeni*' to relieve the chest pain the previous night does not help him because according to the evidence on record, the said drink contained 16% alcohol. There was no evidence on record showing that the said drink was approved as medicine for chest pains by any health authority.

5.14. On the whole evidence in this matter, I find that the respondent's disciplinary authority cannot be faulted for

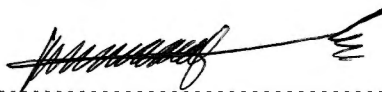
having found the complainant guilty of the offence of being drunk on duty, which offence carried the penalty of summary dismissal. In this regard, therefore, the respondent properly exercised its disciplinary powers to dismiss the complainant from employment. Consequently, the complainant's claim that his dismissal was unfair is bereft of merit and is accordingly dismissed.

5.15. Having found that the complainant's dismissal from employment was fair and for a valid reason, it follows that the complainant's claim for damages for loss of employment cannot stand and is accordingly dismissed.

5.16. I order no costs. Each party shall bear own costs.

5.17. Leave to appeal is granted.

Delivered at Ndola this 30th day of November, 2023.


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Davies C. Mumba
HIGH COURT JUDGE