

**IN THE HIGH COURT FOR ZAMBIA
INDUSTRIAL RELATIONS DIVISION
HOLDEN AT LUSAKA**

COMP NO. IRCK/436/2019

(Civil Jurisdiction)

BETWEEN:

SAMSON SABENZU

AND

ARM SAFETY SECURITY



COMPLAINANT

RESPONDENT

Coram: Before Hon. Lady Justice Mrs. M.S. Ngoma this 15th day of February, 2024.

For the Complainant: Mr. Kashumba Mutti of Messrs. Lukona Chambers

For the Respondent: Mr. D.M Bwalya of Messrs. Bwalya Sampa Legal Practitioners

JUDGMENT

Legislation referred to:

1. Minimum Wages and Conditions of Employment (General) Order, 2011.
2. The Employment Act, Cap 268 of the Laws of Zambia.
3. The Industrial and Labour Relations Rules, Chapter 269 of the Laws of Zambia.

Cases Referred to:

1. National Milling Company V Grace Simataa and Others (SCZ) Judgment No. 21 of 2000.
2. Charles Mwila V Shif Contractors & General Dealers Comp/IRD/ND/107/2017
3. Jackson Mwape and Sixty-One Others V ZCCM Investments Holding PLC Appeal No. 57 of 2012 or SCZ Judgment No. 23 of 2014

4. Khali Mohammed V The Attorney General (1982) Z.R 49
5. Zambia Railways Limited V Pauline S. Mundia, Brian Sialumba (2008) ZR 287 (S.C)

1.0 **Introduction**

By a notice of complaint filed into court on 17th October, 2019, the complainant commenced this matter seeking the following reliefs against the respondent, his former employer:

- i. September, 2019 salary;
- ii. Notice pay;
- iii. Leave days;
- iv. Benefits of two months' pay for each completed year;
- v. Damages for unfair and unlawful dismissal;
- vi. Costs; and
- vii. Any other benefits the court may deem fit.

2.0 **The Complainant's Case**

- 2.1 It is the complainant's affidavit evidence that he was verbally employed by the respondent on 28th August 2016 on full time basis as a Project Manager. That from the time of his employment, he was underpaid. To prove this, he exhibited his pay slip for the month of December, 2018 which is marked "SS1".
- 2.2 That he did not have a good working relationship with the General Manager and the Director of Commercial and that sometime in August 2019, the duo wanted to transfer him from Levy Mall where he operated from but the client intervened on the basis that he was working well.
- 2.3 That by letter dated 18th September, 2019, he was placed on suspension. The letter of suspension is shown in the affidavit and marked "SS2".

- 2.4 On the 3rd October, 2019, he called the respondent to remind them that his suspension was over. Although the respondent promised to revert to him that very day, they did not. Copy of the call record from the phone service provider was exhibited in his affidavit and marked "SS3".
- 2.5 He further averred that on 8th October, 2019, he sent a text message to the respondent's Director of Operations to inform him that he was instituting legal action against the respondent.

3.0 **The Respondent's Case**

- 3.1 The respondent filed an answer and accompanying affidavit on 30th June 2023. The affidavit was deposed to by Ms. Natasha Phiri, the respondent's Human Resource Assistant. It was her testimony that the complainant was suspended on 18th September, 2019 to pave way for investigations into payroll related offences. That the complainant was later charged with the offence of dishonest conduct for adding ghost workers on the payroll.
- 3.2 She averred that the complainant was summoned for a disciplinary hearing but he absented himself. Further, that the complainant's commencement of this action interfered with the disciplinary proceedings as the same could not go on while parties were in court.

4.0 **Complainant's Oral Evidence**

- 4.1 At the hearing of the matter held on 11th August 2023, the complainant gave oral testimony and did not call a witness. The gist of his testimony was that he was employed on an oral contract on 28th August 2016 on a full time basis as project manager. That he was suspended for two weeks on 18th September, 2019 without a fair hearing and a salary. The suspension was pending investigations but the respondent never contacted him to exculpate himself despite him reminding them by phone. To prove that he did contact the respondent, the complainant

referred to the call record attached to his affidavit in support of notice of complaint which, according to him, shows that he called the respondent's Human Resource Manager on 1st and 3rd October, 2019 to remind him about his case.

4.2 The complainant further averred that his gross monthly salary was K4000 but he was underpaid by a total of K12,000 from June 2017 to November, 2017. To support this, he produced his bank statement in a notice to produce filed into court on 17th August, 2023. He listed the salaries paid to him as follows:

- i. June 2017 - K1705
- ii. In July 2017- K1,900
- iii. August 2017- K2,850
- iv. September 2017 - K2850
- v. October 2017 -K3,069.23
- vi. November, 2017- K3,069.23

4.3 The complainant further stated that he did not go on leave for the entire period of his employment.

4.4 Under cross examination, he told the court that he did appear before the disciplinary committee composed of the Human Resources Manager only. He stated that he did not know what consists a disciplinary committee but insisted that the Human Resources Manager told him the meeting with him was a hearing before the committee.

4.5 Under further cross examination, he told the court that he accrued leave days at the rate of 24 days per year and that his claim for terminal benefits of two months' pay for each completed year of service was based on a verbal agreement with the respondent.

5.0 **Respondent's Oral Evidence**

- 5.1 The respondent's sole witness, Ms. Natasha Phiri, the human resource assistant, told the court that the complainant was employed as project manager stationed at Levy Junction. She said his duties were deployment of guards and preparation of salaries. That he was placed on suspension to pave way for investigations for adding ghost workers on the payroll.
- 5.2 It was her testimony that before the disciplinary committee could decide on the case, the complainant commenced this action. As such, the disciplinary committee dismissed the case. That the complainant did not attend hearings despite the respondent making several follow-ups via email and text messages for him to exculpate himself.
- 5.3 Ms. Phiri denied that the respondent terminated or dismissed the complainant. It was her testimony that the complainant was placed on suspension together with his colleague, Mr. Jerry Ngoma, who at the time was the payroll administrator, for the same offence. Mr. Jerry Ngoma resigned the same day their conduct was uncovered.
- 5.4 Under cross examination, Ms. Phiri told the court that there was a written contract between the parties, albeit, it had not been exhibited in her affidavit. She further stated that the suspension without pay was in line with the respondent's policies.
- 5.5 Under further cross examination, she confirmed that the number 0975261155 shown on the call record exhibited by the complainant belonged to the respondent's human resource manager.

6.0 **Parties' Submissions**

Both parties filed written submissions in support of their respective cases, which submissions I have taken into consideration in writing this judgment.

7.0 **Complainant's Submissions**

- 7.1 In the submissions filed on behalf of the complainant, counsel for the complainant, Mr. Kashumba Mutti, firstly submitted that the complainant was unlawfully and unfairly dismissed. Under this head, he referred to the case of **National Milling Company V Grace Simataa and Others** ⁽¹⁾ where the Supreme Court held that if an employer varies, in an adverse way, a basic condition or basic conditions of employment without consent of the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant or early retired as may be appropriate.
- 7.2 In line with the holding of that case, Mr. Mutti submitted that the termination of the complainant's employment was in fact a redundancy as his salary was adversely varied by the respondent without his consent. The adverse variation took the form of underpayment of salaries.
- 7.3 To buttress this submission, Mr. Mutti referred me to the case of **Charles Mwila v Shif Contractors & General Dealers**⁽²⁾ where the court defined unfair dismissal as follows:

"A dismissal is unfair if the disciplinary procedure leading to dismissal was not allowed. The procedure is that the aggrieved employee must be charged. After the employee has been charged the employee must be caused to appear before a tribunal or disciplinary committee for the hearing and the outcome of the hearing must be communicated to the employee."

In the same case, unlawful dismissal was defined as follows:

"A dismissal is unlawful if the employee has breached a statutory provision such as a provision in the Employment Act when dismissing the employee."

7.4 According to Mr. Mutti, the respondent withheld the complainant's salary for the 18 days he had worked in September, 2019. This was against the rules of natural justice, hence unfair because the charge was unsubstantiated and the respondent failed to conclude its investigations within 2 weeks. He, additionally, submitted that the withholding of the salary resulted in a redundancy situation.

7.5 Further, it was Mr. Mutti's submission that the respondent breached section 26A of the Employment Act which forbids an employer from terminating the services of an employee on grounds related to the conduct or performance of the employee without affording him an opportunity to be heard on the charges laid against him.

7.6 To substantiate the claim for notice pay and redundancy payment, reliance was placed on section 10 of Statutory Instrument No. 2 of 2011- the Minimum Wages and Conditions of Employment (General) Order 2011 which provides for one month's notice and two months' basic pay for each completed year of service.

7.7 Mr. Mutti also invited me to strike out the respondent's affidavit in support of answer for incompetence as it was not commissioned. This invitation was underpinned on Rule 55 of the Industrial Relations Court Rules which empowers this court to make such order as may be necessary for the ends of justice or to prevent the abuse of court process.

7.8 Mr. Mutti submitted that the complainant's contention that he had accumulated 74 leave days was uncontroverted. He referred me to section 15 of the Employment Act 1965 ("the Employment Act") which provides for holidays with pay at the rate of 2 days per month.

8.0 **Respondent's Submissions**

8.1 In the submissions filed on behalf of the respondent, Counsel for the respondent, Mr. D.M Bwalya, started by responding to the submission

that the affidavit in support of answer be struck out for not being commissioned. His response was that this issue came up for the first time in the complainant's submissions. As this court is a court of substantial justice, there is no room for ambush. He added that in any case, the deponent was the sole witness called by the respondent and was subjected to cross examination by counsel for the complainant.

8.2 The gist of the respondent's submissions were that the complainant is not entitled to any of the claims listed in his notice of complainant as his contract was not terminated since he was merely placed on suspension pending investigations and possible disciplinary hearing.

8.3 With regard to the claim for leave days, it was submitted that section 15 of the Employment Act provided for holidays with pay and that the same was subject to any agreement between the parties. In casu, there was no agreement providing for holidays with pay, hence the complainant could not have been entitled to leave days. That this was borne out by the complainant's pay slip marked "SS1" which showed he had accrued zero leave days.

9.0 **Determination of Issues**

9.1 I have carefully considered all the evidence before me. The issue for determination is whether the complainant is entitled to the reliefs listed in the notice of complaint. In doing this, I shall determine how the complainant's employment ended as this has a bearing on the determination of some of the reliefs sought by the complainant. Before I get to this, I wish to comment on the complainant's application to strike out the affidavit verifying answer on account of it being uncommissioned.

9.2 I have perused the record and confirm that the affidavit verifying answer is, indeed, not commissioned. I have further confirmed the respondent's submission that the deponent is the same one who was examined *viva*

voce during the hearing of the matter. Additionally, I have noted that the substance of the affidavit was repeated in examination in chief. In my view, therefore, the complainant will not be prejudiced in any way by the affidavit not being commissioned. In this regard, I find the application to set aside the affidavit, at this late stage, rather otiose and I decline to do so.

- 9.3 Facts leading to the end of the employment are not disputed in any material way. Parties are agreed that by letter dated 18th September, 2019, the complainant was suspended from duty pending investigations into matters relating to the staff payroll. The letter of suspension is exhibited in the complainant's affidavit. The 'matters relating to payroll' were said to be adding ghost workers to the payroll. It was stated in the letter of suspension that the complainant would be contacted in two weeks. The complainant contends that he was not contacted as promised, and that this prompted him to call the respondent's human resources manager to request that he be called to appear before the disciplinary committee in order to exculpate himself. When his request was not acceded to, he commenced this action.
- 9.4 The respondent, on the other hand, contends that the complainant was contacted by email and mobile phone and requested to appear before the disciplinary committee, which he never did.
- 9.5 I have examined the call record exhibited on "SS3". It contains nothing more than a list of phone numbers and dates when phone calls were placed from the complainant's phone. It does not state what the conversation was all about. As such, even if I was to accept that the complainant did indeed call the respondent's human resource manager on the stated dates that would not be proof of the conversation between them. Had the complainant been as keen to exculpate himself as he made out at the hearing, he could have written an email or a letter or

indeed gone to the respondent's office to seek a meeting with the human resource manager. A call register does not prove the contents of the conversation.

9.6 Similarly, had the respondent sent emails inviting the complainant to attend a disciplinary hearing, those emails would have been exhibited. It seems to me that after the letter of suspension was written, the respondent did not revert to the complainant until court process was served on them. Be that as it may, on the facts of this case, there is insufficient evidence that the respondent dismissed or terminated the complainant's services. Hardly, a month from the suspension, the complainant considered himself no longer an employee of the respondent as he stated, in paragraph 4 of his notice of complaint that on 2nd October, 2019, the respondent unfairly and unlawfully dismissed him.

9.7 In my view, the complainant's action to institute court proceedings on the ground that he was unfairly and unlawfully dismissed confirms that he no longer considered himself an employee. I find that the respondent neither dismissed nor terminated the complainant's services, and that the complainant left on his own. It is on the basis of this finding that I shall determine the reliefs sought, which I now proceed to do, in the order in which they are listed in the notice of complaint.

10.0 **Whether the Complainant is entitled a Salary for September 2019**

10.1 The complainant claims his pay for the 18 days which he worked for in September 2019 before he was placed on suspension as well as the half pay he was not paid during his suspension. The case of **Jackson Mwape and Sixty-One Others V ZCCM Investments Holding PLC⁽³⁾** confirmed that notwithstanding the mode of separation, an employee is always entitled to accrued rights. Accrued rights or benefits relate to all unpaid

monetary benefits that have accrued to an employee as a matter of right that cannot be taken away by statute or other supervening event. A salary for days worked and leave days, for example, are accrued rights and should be paid regardless of the manner by which the employment relationship ends.

10.2 As the disciplinary process was not concluded by 2nd October, 2019 when the complainant considered himself dismissed, I do not see any justification to withhold the September salary or half of it from the complainant. As such, I find that the complainant is entitled to his full salary for September, 2019.

11.0 **Whether the Complainant is entitled to Notice Pay**

11.1 The complainant claims payment in lieu of notice. This claim was anchored on section 21(b) of the Employment Act which provides for payment of wages and all benefits which would have been due to the employee had notice to terminate the employment been given. It was further submitted that by virtue of section 10 of statutory instrument No. 2 of 2011, the Minimum Wages and Conditions of Employment (General) Order, 2011, the complainant was entitled to one month's notice. As such, he claims the sum of K3,776.00 in respect of notice.

11.2 The respondent objects to the complainant's claim for notice pay on the ground that this payment is only made to an employee where his employment is terminated without notice. In this case, the respondent did not terminate the employment and is therefore not obligated to the complainant for the sum of K3,776.00 in respect of notice.

11.3 I agree with Mr. Bwalya's submission that notice pay is only payable to an employee whose employment is terminated without notice. As I held above, the respondent did not terminate the complainant's employment. The complainant himself did. As such, I find that he is not entitled to notice pay. Consequently, the claim for notice pay fails.

12.0 **Whether the Complainant is entitled to Underpayments**

- 12.1 It was the complainant's contention that he was underpaid from June 2017 to November 2017 by various amounts. His submission was supported by his Bank Statement which shows the credits to his account for the salaries paid. The respondent denies underpaying him and argued that had he been underpaid, he would have raised the issue with the respondent.
- 12.2 Whereas the respondent has simply made a bare denial and has not attempted to explain why the figures paid to the complainant for the months in question were less than the expected salaries, I am ever so mindful that this alone does not entitle the complainant to judgment. As held in the case of **Khali Mohammed v The Attorney General**⁽⁴⁾, "*a Plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case*".
- 12.3 I am further mindful that the burden of proof is on the party asserting a claim. This is supported by a plethora of authorities, including the case of **Zambia Railways Limited v Pauline S. Mundia, Brian Sialumba (2008) ZR 287 (S.C)**⁽⁵⁾ where it was stated that:
- " The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable".*
- 12.4 In my view, the complainant knows more than he was willing to disclose in this regard. This is because it is inconceivable that an employee at the level of manager where the complainant was, can suffer unexplained deductions, to the tune of 50% in some cases, and not raise it with his employer. It would have helped the complainant's case had he produced his pay slips for the months in question to show that although the full salaries were due to him, only the stated amounts were paid. As it is, it

may well be possible that the deductions could have been explained, for example, such as due to repayment of a loan, or an advance salary. In my opinion, the complainant has not adduced sufficient evidence to prove that the deductions were unauthorized and fall within the ambit of section 47 of the Employment Act. As such, the claim for underpayments fails.

13.0 **Whether the Complainant is entitled to Leave Days**

It was the complainant's testimony that he never went on leave for the whole period of his employment, thus entitling him to 74 leave days at the rate of 2 days per month as provided by section 15 of the Employment Act.

- 13.1 It was submitted on behalf of the respondent that section 15 of the Employment Act was subject to agreement and, in the absence of agreement between the parties providing for holidays with pay, the complainant is not entitled to leave. Further, that the pay slip exhibited by the complainant shows that he had accrued zero leave days, hence no pay is due to him.
- 13.2 Section 15 (1) of the Employment Act makes provision for holidays with full pay (paid leave) after 6 months' continuous service at the rate of two (2) days per month to be taken at such times as shall be agreed between the parties.
- 13.3 According to section 15(5) of the Employment Act, an employer may, with the agreement of the employee, pay wages to such employee in lieu of any holiday or leave due to the employee and if any leave has been accumulated by an employee whose contract has terminated, the

employer shall pay wages to the employee for the period of such accumulated leave.

- 13.4 I do not agree with Mr. Bwalya that the holidays provided for in this section can only apply where there is agreement by the parties. Clearly, this section applies unless parties have agreed a more superior condition than what is provided in this section. Mr. Bwalya's submission in this regard, therefore, is devoid of merit.
- 13.5 Much as I agree with him that the complainant's pay slip exhibited as "SS1" shows that the complainant had accrued zero leave days, I do not accept that that is sufficient evidence to prove that the complainant did not accrue any leave days. Even assuming it was the parties' agreement that leave days would not accrue, such an agreement would be less favourable to the conditions set in section 15 of the Employment Act, thus making the section applicable to the complainant.
- 13.6 Since the respondent did not rebut the complainant's contention that he never went on leave for the duration of his employment, I find that the complainant has proved, on a balance of probability, that he is entitled to leave at the rate of 2 days per month. Having served from 28th August 2016 to 2nd October, 2019, I find that the complainant is entitled to leave with full pay at the rate of two days per month as provided by section 15 of the Employment Act. This period gives a total of 74 leave days. Leave pay is calculated as follows:

$$\text{Leave benefits} = \underline{\text{FP} \times \text{D}}$$

26

Where FP = Full Pay; D = number of accrued leave days

$$\underline{\text{K4000} \times 74} = \text{K11, 384}$$

26

The complainant's full pay, according to his pay slip marked "SS1" is K4000. The claim for leave days, therefore, succeeds.

14.0 **Whether the Complainant is entitled to Benefits at the rate of two months' Pay for Each Year Served**

- 14.1 Under this head, it was submitted that the complainant is entitled to redundancy benefits by virtue of section 10 of the Minimum Wages and Conditions of Employment (General) Order, 2011 which provides for benefits of not less than two months' basic pay for each completed year of service. The basis of this claim is that the respondent adversely varied the complainant's salary without his consent.
- 14.2 What is clear is that the reduction in salary was done in 2017 and yet the complainant continued working for the respondent until 2019 when it was allegedly discovered that he was fidgeting with the payroll. If such a variation occurred, the complainant's conduct is not consistent with lack of consent to the variation. I have deliberately refrained from discussing whether the complainant was a protected employee falling under the ambit of the Minimum Wages and Conditions of Service (General) Order because, whichever way, I do not consider that any adverse variation of his conditions occurred. Hence, his submission that he was declared redundant has no leg to stand on. Consequently, the claim for redundancy benefits fails.

14.3 **Whether the Complainant is entitled to Damages for unfair and Unlawful Dismissal**

As earlier held in this judgment, the complainant was not dismissed at all. His employment ended when he himself failed to wait for due process after he was placed on suspension when he instituted this action in

which he stated in paragraph 4 of the notice of complaint that his employment ended on 2nd October 2019.

14.4 In view of the foregoing, I shall also refrain from engaging in a discussion on to what amounts to unfair and unlawful dismissal as I find it otiose since I already held that the complainant was not dismissed. The claim for damages for unfair and unlawful dismissal fails for lack of merit.

15.0 **Whether the Complainant is entitled to Costs**

15.1 Both parties urged me to condemn their opponent in costs on the ground that the opponent's conduct fell within the ambit of Rule 44 of the Industrial and Labour Relations Court Rules. It was the complainant's submission that the respondent's filing of an incompetent affidavit is not only an improper step but also an unreasonable conduct deserving condemnation in costs.

15.2 It was submitted on behalf of the respondent that the complainant should be condemned in costs as he was guilty of misconduct in terms of Rule 44. The respondent, did not, however, elaborate in what respect the complainant had misconducted himself.

15.3 I have analysed both pleas. In my view, there has been no unreasonable delay or conduct to justify me condemning either party in costs. As such, it is appropriate that each party bears its own costs.

16.0 **Conclusion and Orders**

In conclusion, the complainant has succeeded in his claim for his September 2019 salary and leave days. He has not succeeded in the rest of the claims. Judgment is entered for the complainant for the following:

- i. Salary for the month on September, 2019 in the sum of **K4,000.**

- ii. Leave days at the rate of 2 days per month for the period of his employment giving a total of **K11, 384**.
- iii. The Judgment sums shall attract interest at short term bank deposit rate from the date of the notice of complaint to the date of judgment and thereafter, at current lending rate as determined by the Bank of Zambia from the date of Judgment until full payment.
- iv. Each party shall bear its own costs.
- v. Leave to appeal is granted.



Delivered at Lusaka this 15th Day of February 2024


Hon. Lady Justice Mrs. M.S Ngoma
HIGH COURT JUDGE.