

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

Comp No. IRCLK/175/2022

BETWEEN:



VINCENT MANDO

COMPLAINANT

AND

GARDA WORLD ZAMBIA LIMITED

RESPONDENT

Coram: Chigali Mikalile, J this 27th day of February, 2024

For the Complainant: In person

For the Respondent: No appearance

JUDGMENT

Legislation referred to:

1. The Employment Code Act No. 3 of 2019
2. Statutory Instrument No. 71 (Shop Workers) Order, 2018

Cases referred to:

1. Robert Simeza (Executor) v. Elizabeth Mzycche (2011) Z.R Vol. 3
2. Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 178
3. Jennifer Nawa v. Barclays Bank Zambia Plc, SCZ Judgment No. 1/2011

The delay in the delivery of this judgment is deeply regretted. This was due to inadvertence in diarizing the matter.

Introduction

1. The complainant commenced this action by Notice of Complaint and supporting affidavit on 9th March, 2022 seeking the following reliefs:

(a) Underpayment of salary

(b) Underpayment of leave days

(c) Gratuity

(d) Uniform bond refund

(e) Any other benefits the court may deem fit and costs

Complainant's case

2. In his affidavit in support of the complaint, the complainant deposed that he was employed by the respondent as a Fleet Mechanic under Ursa Security International (Zambia) limited on probation on 8th February, 2021. Exhibited to the affidavit and marked "VM1" is a copy of the three-month contract of employment. After three months, he was confirmed as per letter dated 19th May, 2017 (erroneously dated 2106) exhibited as "VM2".

3. On 21st November, 2018, the company name changed to GardaWorld (Zambia) Limited. Exhibited to the affidavit as "VM3" is a letter addressed to the complainant regarding the change.

4. According to the complainant, he was underpaid in total disregard of the minimum wage law. On 21st January, 2022, he tendered his

resignation effective 21st February, 2022. The letter of resignation is exhibited as "VM4".

5. The complainant made a claim for his benefits but he was told that he would only receive leave pay. This is contrary to paragraph 14 of the Company Employment Policies, the extract of which is exhibited as "VM5". Dissatisfied with the respondent's response, he launched this claim.
6. At the hearing, the complainant testified that in accordance with the Minimum Wage law of 2018, and according to his qualification, he belongs to grade 6. He said he is a qualified Automotive Mechanic. In support of this assertion, he produced his Craft Certificate in Automotive Mechanics and it was admitted in evidence as "VM1a". He contended that he should have been getting a basic pay of K 2,167.50 and not K 1,486.15. He produced 2 pay slips for January and February, 2022 and these were admitted in evidence as "VM2a" collectively.
7. It was his evidence that he is owed K 28,616.70 calculated as K 681.30 x 42 months (September, 2018 to February, 2022).
8. On housing allowance, it was his evidence that the law states that he was entitled to K 650.25 but the respondent was only giving him K 445.85. His claim totals K 8,584.80 calculated as K 204.40 x 42 months.

9. As for lunch allowance, the law relied on says an employee is entitled to K 180.00 but his pay slip reveals that he was not getting anything. Thus, he is owed K 7,560.00. According to the complainant, the total salary owed is 44,761.50.
10. On leave pay, it was the complainant's testimony that he was underpaid as the calculation was based on the wrong salary.
11. On gratuity, he implored court to consider the Employment Code Act, 2019.
12. As for uniform bond, the complainant abandoned the claim having realized that the respondent made the payment on his final pay slip.

Respondent's case

13. The respondent filed an Answer wherein it simply denied all claims. The respondent neither filed an affidavit nor did it appear at the hearing. I proceeded in its absence as there was proof that it was well aware of the hearing date. I was fortified by the case of **Robert Simeza v. Elizabeth Mzyeche**⁽¹⁾ which holds that no procedural injustice is occasioned when a party who is aware of the proceedings does not turn up.

Analysis and decision

14. I have considered the complainant's affidavit and oral evidence. I remind myself that he who alleges must prove. In the case of **Wilson Masauso Zulu v. Avondale Housing Project**⁽²⁾ the Court stated that a plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case.
15. From the evidence, I find as a fact that the complainant was employed as a Fleet Mechanic on 8th February, 2017. His contract of employment terminated on 21st January, 2022 by way of resignation.
16. What I ought to determine is whether or not he was underpaid in terms of monthly salary and leave pay and whether or not he is entitled to gratuity as claimed.

Salary underpayments

17. The complainant is relying on the Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011 as amended by Statutory Instrument No. 71 of 2018. This S.I has 8 categories of workers and the complainant has placed himself at Grade VI which has Audio visual equipment repairer and machine operator. This category provides for a basic pay of K 2,167.50, housing allowance of K 650.25, transport allowance of K 153.60, and lunch allowance of K 180.00 giving a gross pay of K 3,151.35.

18. The exhibited pay slips show a basic salary of K 1,486.15, housing allowance of K 445.85, transport allowance of K 200.00 and a site allowance of K 868.00.
19. Indeed there are discrepancies between the pay as per S.I relied on and the pay that the complainant was actually getting. But the question is, does this S.I apply to the complainant?
20. A reading of the Minimum Wages and Conditions of Employment (Shop Workers) Order, 2011 as amended in 2018 reveals the categories of workers covered and these are: Handy person; Office orderly; Driver; Sales assistant or Packer; Assistant bicycle assembler; Assistant dispatch clerk; Bicycle assembler; Check-out operator; Typist; Dispatch clerk; Sales person; Audio visual equipment repairer; Machine operator; Credit controller; Supervisor and Qualified Book keeper.
21. As established, the complainant was employed as a Fleet Mechanic. I have perused his contract of employment and particularly clause 4 on the duties assigned to him. These included ensuring proper maintenance and storage of all tools and equipment, carrying out routine maintenance on all company vehicles and generators, ensuring that all vehicles were periodically monitored to ensure good working condition and providing weekly vehicle inspection reports.

22. The job title and job description clearly do not fit into any category outlined above. In light of this, I hold the firm view that S.I. 71 of 2018 (Shop Workers) relied on by the complainant does not apply to him. In fact the case of **Jennifer Nawa v. Barclays Bank Zambia Plc**⁽³⁾ underscores the fact that the Ministerial Orders made in terms of the repealed Minimum Wages and Conditions of Employment Act (though the orders are still in force) do not apply to every employee in Zambia.
23. Thus, in the absence of an authority to the effect that an Automotive mechanic is a protected worker in accordance with the Ministerial Orders, I am disinclined to make a finding that the complainant was underpaid in terms of the monthly salary. As such the claim is dismissed.

Leave days underpayment

24. The complainant is basing this claim on the fact that his gross pay, upon which the leave pay was calculated was lower than the gross pay in S.I. 71 (Shop Workers) Order, 2018. However, as found above, the Order does not apply to him.
25. The January pay slip shows that the complainant had accumulated 78 days and the February pay slip shows that he was paid K 9,000 in leave days. The complaint's last gross pay was K 3,000.00 which means that the leave pay was properly calculated. There was, therefore, no underpayment.

26. As such, the claim for leave pay underpayment fails too.

Gratuity

27. The learned authors of Labour Law in Zambia, An Introduction (2nd edition) state as follows at page 84:

Under the previous regime, payment of a gratuity was either at the employer's discretion or a benefit for certain protected groups of employees under the statutory instruments made pursuant to the Minimum Wages and Conditions of Employment Act. The Employment Code Act makes payment of a gratuity mandatory for all employees on long term contracts,...

(underlining mine for emphasis)

28. The complainant's contract of employment did not provide for gratuity. This means that before May, 2020, when the transition period for enforcement of the Employment Code Act ended, the complainant was not entitled to gratuity. However, from May, 2020, the Code Act applies and as seen above, it makes the payment of gratuity mandatory.

29. Gratuity is provided for under section 73 of the Code as follows:

(1) An employer shall, at the end of a long-term contract period, pay an employee gratuity at a rate of not less than twenty-five percent of the employee's basic pay earned during the contract period.

(2) Where an employee's contract of employment is terminated in accordance with this Code, the employee shall be paid gratuity prorated in accordance with the period of employment.

30. The authors of the book go on to state that gratuity, as per the above provision, is limited to those employees on long term contracts meaning contracts for a period of 12 months or more. The evidence is clear that the complainant's contract was long term, therefore he is entitled to gratuity at the rate of 25% of the basic pay earned during the contract period.

31. As found, the complainant worked for a total of 20 months under the new law. As such, his gratuity is $K 1,486.15 \times 20 \text{ months} \times 25\% = \mathbf{K 7,430.75}$.

Lunch allowance

32. The complainant did not claim this allowance in his notice but testified on it at the hearing. He said he was not paid at all. However, his contract did not provide for lunch allowance and as established, he cannot rely on the Shop Workers Order to claim entitlement. The claim is accordingly dismissed.

Costs

33. The respondent did not attend trial. This, in my view, is unreasonable conduct envisaged by Rule 44 of the Industrial Relations Court Rules. Thus, it is only proper that the respondent be condemned in costs for and incidental to this action.

Conclusion and order

34. The complainant has proved on a balance of probabilities that he is entitled to gratuity for a period of 9 months, that is, from May, 2020, when the Employment Code Act that made payment of gratuity mandatory came into being, to 21st February, 2022 when he resigned. He has however failed to prove that he was underpaid in term of the monthly salary and leave pay.

35. As such, and for the avoidance of doubt, I make the following orders:

(i) The respondent shall pay the complainant the sum of **K 7,430.75**. as gratuity.

(ii) The judgment sum shall attract interest at short term bank deposit rate from the date of filing of notice until Judgment and thereafter at current lending rate as determined by Bank of Zambia until full settlement.

(iv) The complainant is awarded cost to be agreed or taxed in default of agreement.

Parties are informed of their right to appeal.

Delivered at Lusaka this 27th day February, 2024.

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Mwaaka Chigali Mikalile
HIGH COURT JUDGE