

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

COMP NO. IRCK/768/2022

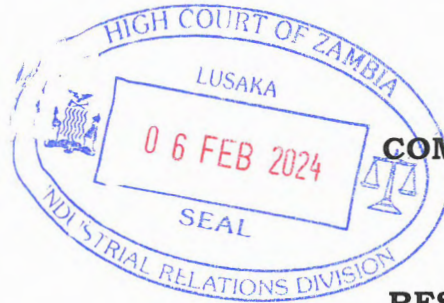
(Civil Jurisdiction)

BETWEEN:

JANOTA SOKO

AND

LUSAKA PAN BRICK FACTORY



COMPLAINANT

RESPONDENT

Coram: Before Hon. Lady Justice Mrs. M.S. Ngoma this 6th day of February, 2024.

For the Complainant : *In Person*

For the Respondent : *In Person*

JUDGMENT

Legislation referred to:

1. Minimum Wages and Conditions of Employment (General) Order, 2011 as amended in 2012 and 2018.
2. The Employment Code Act, No. 3 of 2019.
3. The Employment Act, Cap 268 of the Laws of Zambia.
4. The Minimum Wages and Conditions of Employment Act Cap 276 of the Laws of Zambia.

1.0 **Introduction**

In a notice of complaint filed into court on 26th September, 2022, the complainant seeks to recover from the respondent the following reliefs:

- i. Leave days;
- ii. Gratuity
- iii. Severance Pay
- iv. Compensation
- v. Benefits for the years worked
- vi. Costs; and any other benefits the court may deem fit.

2.0 **The Complainant's Case**

- 2.1 In his affidavit in support of complaint, the complainant averred that he was verbally employed by the respondent as a supervisor on permanent basis on 28th April 2009.
- 2.2 He further averred that on 30th December, 2019, he went on Industrial break and when he reported back to work, the respondent instructed him to return home saying he could not work due to the COVID-19 pandemic prevailing at the time. He was never called back. A year later, he called the respondent to enquire about his job and he was told that the COVID-19 pandemic was still raging, hence he could not work. When he enquired about his dues, he was offered K6000 which amount he refused because it was too little. He subsequently instituted this action.

3.0 **The Respondent's Case**

- 3.1 The respondent filed an answer and affidavit in support thereof on 12th January 2023. The affidavit was deposed to by Mr. Stephen Sefu whose testimony it was that the complainant was a general worker and not a supervisor as claimed in his notice of complaint and affidavit in support thereof. He stated that the complainant was a seasonal worker as the respondent closed its operations before the onset of the rains and reopened after the rainy season.

3.2 Mr. Sefu denied that the respondent offered the complainant the sum of k6,000. He averred that the complainant was paid gratuity at the end of each season. Hence, he was not entitled to any of the reliefs claimed.

3.3 He urged me to dismiss the action for lack of merit.

4.0 **Hearing**

4.1 At the hearing of the matter held on 11th October 2023, the complainant told the court that his relationship with the respondent started in 2008 when he was engaged by the respondent to do some piece work for 8 months at the end of which he was employed on a permanent basis as assistant supervisor and tasked with the responsibility of counting bricks which were loaded for transportation to buyers.

4.2 He testified that sometime in 2010, he got injured at work and sustained a big cut. Mr. Fu, his then boss, took him to a Chinese clinic where he was attended to for months and was able to return to work after 3 months when the wound healed. Upon his return, he was first assigned to work at the gate, and later he worked as a supervisor. His duties included counting incoming and outgoing bricks, as well as maintaining a register of workers.

4.3 He concurred with Mr. Sefu's testimony that in the rainy season workers were sent home as it was not possible to make bricks when it was raining. He, however, always remained to do general work. He testified that he did not go on leave from the time he was employed by the respondent. It was only in 2015 that the respondent started paying him gratuity and leave pay.

4.4 He repeated the contents of his affidavit with regard to how his employment ended. That in December 2019 his employer instructed him to go on industrial break and when he returned, he was told to stay home as there were no works going on because of the Covid-19 pandemic. Sometime in January, 2020, he called the respondent to enquire when he could return to work and was told to keep waiting as

the Covid-19 pandemic had not ended. Six months later, he visited the respondent company's premises and was surprised to find his colleagues working. When he enquired why he had been left out when his colleagues were recalled, he was told that the ones working were only doing temporary works. A year passed and he had not been recalled. He again went back and this time he demanded that he be told the truth as to whether he still had a job or not whereupon a Mr. Fu, one of the Chinese bosses, told him that he would not be recalled to work as the respondent company's business was not doing well. It was his testimony that Mr. Fu then offered him K2,000 and K6,000 worth of bricks as his terminal benefits, which he rejected, as he considered it paltry considering the number of years he had worked for the respondent.

- 4.5 It was his testimony that his demands for payment of his benefits were never accepted and the respondent, to his utter shock, said he was just a piece worker and not a permanent employee.
- 4.6 He testified that his last salary was K1,800 per month. He also got a monthly allowance of K300 as supervisor allowance. His leave days from 2009 to 2014 were not paid.
- 4.7 In addition to terminal benefits, the complainant claims compensation for the injury he sustained while in employment. He mentioned that the respondent refused to compensate him at the time stating that there was no obligation to do so as he was still in employment.
- 4.8 Under cross examination, the complainant told the court that the general work he performed during the rainy season when the respondent factory closed included taking pan bricks to Kenneth Kaunda International Airport and to Chifwema as well as planting oranges.
- 4.9 The complainant closed his case and did not call any witness.
- 4.10 The respondent was represented by Mr. Stephen Sefu, who told the court that he was a director and shareholder of the respondent

- 5.4 Similarly, the complainant's testimony that he returned from industrial break in January 2020 and was not allowed to resume work due to the Covid -19 pandemic was uncontroverted. I again take judicial notice of the fact that the month of January falls within the rainy season in this country. If the complainant was a seasonal worker, he would not have been attempting to return to duty in the middle of the rainy season.
- 5.5 In view of the foregoing, I am of the view that he was indeed a permanent employee of the respondent from 28th April, 2009 to 30th December 2019.
- 5.6 Before I consider the individual reliefs claimed by the complainant in the notice of complaint, it is imperative to determine the conditions of service under which the complainant served. Although he was a supervisor, the nature of his duties, according to his testimony, included counting pan-bricks made by his fellow workers, checking incoming and outgoing trucks laden with bricks. This can hardly be the duties of someone in management. I am fortified in this conclusion by the respondent's witness who testified at trial that the complainant was a general worker. As there is no evidence on record of there being a union at the respondent company, I hold that the complainant was a protected worker as provided by the Minimum Wages and Conditions of Employment Act, Cap 276 of the Laws of Zambia. I further hold that he was covered by the Minimum Wages and Conditions of Employment (General) Order, 2011 as amended in 2012 and 2018. It is significant to note that even though the Minimum Wages and Conditions of Employment Act, was repealed by section 138(1) of the Employment Code Act, No.3 of 2019, the ministerial orders enacted pursuant to the same were not repealed and are still applicable until expressly repealed. Thus, the General Order 2011 as amended by the 2012 and 2018 Orders, applied to the complainant during his employment.
- 5.7 Having made the above finding, I shall now proceed to determine the individual reliefs claimed in the notice of complaint.

5.8 **Whether the Complainant is entitled to Leave Pay**

5.9 Paragraph 5(1) of the Minimum Wages and Conditions of Employment (General) Order of 2011 provides for leave at the rate of two (2) days per month. Having completed six months' continuous service with the respondent, the complainant was entitled to leave with full pay at the rate of two days per month. The complainant worked for the respondent from 28th April 2009 until 30th December, 2019. His testimony that he never went on leave since he was employed was uncontroverted. He, however, told this court that he was paid leave pay save for the period 2009 to 2014. According to my calculation, the total number of leave days for this period, at the rate of 2 days per month, is 136. Leave pay is calculated using the formula in the fifth schedule to the Employment Code Act No. 3 of 2019 as follows:

$$\text{Leave benefits} = \frac{\text{FP} \times \text{D}}{26}$$

26

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

$$\frac{\text{K1, 800} \times 136}{26} = \text{K9, 415}$$

26

The claim for leave days, therefore, succeeds.

5.10 **Whether or not the Complainant is entitled to Gratuity**

5.11 The complainant claims gratuity for the period 2010 to 2014. He told the court that the respondent only started paying him gratuity in 2015, hence it owed him gratuity for the earlier years. I must say the complainant provided minimal evidence to substantiate his claim for gratuity. He was, however, aided by the respondent's witness who testified at trial that gratuity was paid to the complainant from 2010 onwards. This testimony answered one question, which is, whether the complainant was entitled to gratuity at all. The answer, by the respondent's own admission, is in the affirmative. The defence to this

find it pointless to discuss its provisions with respect to severance pay or any other benefits which would have been payable to the complainant had he come within its ambit.

- 5.15 At trial, the complainant alluded to the fact that he needs to be compensated as he was declared redundant. It was his testimony that a Mr. Fu told him that he would not be recalled to work because the respondent company was facing financial challenges. No further evidence was led to substantiate the claim that he left the respondent in a redundancy situation. Section 26B of the Employment Act, Cap 268 of the Laws of Zambia, now repealed, provides as follows:

“(1) The contract of service of an employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to

(a) the employer ceasing or intending to cease to carry on the business by virtue of which the employee was engaged; or

(b) the business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged and the business remains a viable going concern.”

- 5.16 As the complainant has not proved that the termination of his services fell within the ambit of the above provision, I do not see the basis upon which it can be held that the termination of his services was by way of redundancy.

- 5.17 I am alive to the provisions of paragraph 8 of the Minimum Wages and Conditions of Employment (General) Order, which provides as follows:

“An employee who has served with an employer for not less than ten years and has attained the age of fifty-five years, shall be entitled to three months basic pay for each completed year of service: Provided that where an employer has

established a pension scheme approved by the Minister, the retirement benefits shall be paid in accordance with such pension scheme, and this paragraph shall not apply”.

5.18 This provision lays down the following two conditions that must be fulfilled before an employee can be entitled to the benefits stated therein:

- i. An employee must have served the employer for not less than ten years; and
- ii. The employee must have attained the age of fifty –five years.

5.19 As the record shows, the complainant was engaged on 28th April 2009 and his services were terminated in December 2019. Evidently, the complainant served the respondent for more than ten years, and thus fulfills the first condition. It was the complainant’s testimony at trial that he is 34 years old. Clearly, he falls short of the second condition as he has not yet attained the age of fifty five. This means he does not qualify for the terminal benefits provided for in that paragraph. Consequently, I find that the complainant’s claim for severance pay fails for lack of merit.

5.20 **Whether the Complainant is entitled to Compensation**

5.21 In his notice of complaint and affidavit in support thereof, the complainant did not specify the nature of the compensation sought under this head. In his oral evidence at trial, he made reference to an injury he incurred in 2010 and claimed compensation saying he was never compensated for the injury when he was still in employment.

5.22 As with the rest of the reliefs sought, the complainant bears the burden of proving the claim for compensation due to injury. The respondent did not lead any evidence to controvert the complainant’s assertion that he suffered an injury while in the employ of the respondent. As such, I am

prepared to accept that he did, indeed, suffer an injury. However, the nature of the injury and the circumstances in which the injury was sustained were not made known. It was not alleged that the said injury was as a result of the respondent's negligence. The long-term effects of the injury were also not disclosed. As a result, it is my considered opinion that the complainant has failed to discharge his burden of proving that he is entitled to compensation for the injury suffered. This claim is dismissed for lack of merit.

5.23 **Whether the Complainant is entitled to Any Other Benefits the Court may Deem Fit**

5.24 It was not disputed that the complainant's services were terminated without notice. Section 20 (2)(c) of the Employment Act provided for 30 days' notice to terminate a contract of employment where the contract is for a period of one week or more. Section 21(b) of the same Act provided for payment of wages, and all benefits, in lieu of notice. The complainant having had his services terminated without notice, he is entitled to one month pay together with K300 supervisor allowance.

I do not see any other relief that the complainant may be entitled to.

6.0 **Conclusion and Orders**

In conclusion, the complainant has succeeded in his claim for leave days and gratuity. Judgment is entered for the complainant for the following:

- i. Leave days at the rate of 2 days per month from 28th April 2009 until 2014, giving a total of **K9, 415**.
- ii. 10% gratuity for the years 2010 to 2014 at the basic salary of K1, 800, giving a total of **K10, 800**.
- iii. One month salary in respect of notice pay in the sum of K1,800 plus supervisor allowance of K300 giving a total of **K2,100**.

- iv. 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.
- v. Each party shall bear its own costs.
- vi. Leave to appeal is granted.

Delivered at Lusaka this 6th Day of February 2024

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

