

JACQUES CHISHA MWEWA

v

ATTORNEY GENERAL

INDUSTRIAL RELATIONS COURT

MULONGOTI, J., MAZUNDA, AND MWALE.,

25th JULY, 2011.

IRC Comp. No 95/08

[1] Employment law - Renewal of a contract - Failure of an employer to respond to a request for the renewal of the contract - Effect thereof.

The complaint was made pursuant to section 85(4) of the Industrial and Labour Relations Act. The facts of the case were that the complainant was employed by the Ministry of Education as a class Teacher at Mable Shaw High School, in Luapula Province for three consecutive contracts, from January, 1996, to August, 2006.

The first contract was from 1996 to 1998. And the second one was from 2000 to 2003. And the third contract was from 2002 to December, 2004.

After the expiry of the third contract, the complainant applied for a renewal of the contract. The complainant never obtained a response from the respondent, until August, 2005, when he was abruptly removed from the payroll. The complainant contended that the manner in which the termination was done was unfair, and unlawful.

Held:

1. Where one by his words or conduct, with the intention that the belief which is induced should be acted upon, causes another to believe in the existence of a certain state of things, and induces him to act on that belief, the former is precluded from averring against the latter a different state of things as existing at that time.

2. The respondent is therefore barred by the doctrine of estoppel from disputing, or denying the extension of the complainant's contract by its conduct.

3. The respondent was under a duty to inform the complainant that his contract would not be renewed after he applied for renewal.

Cases referred to:

1. Freeman v Cooke [1848] 2 Exch. 654.
2. Felthouse v Bindley [1862] 11 CB (NS) 869.
3. Zambia Consolidated Copper Mines Limited v Matala (1995-1997) Z.R. 144.

Legislation referred to:

1. Industrial and Labour Relations Act, cap 269 s. 85 (4).
2. Employment Act, cap 268 s. 24(5).

Complainant: In person.

C. Mulenga State Advocate in the Attorney General Chambers; for the respondent.

MULONGOTI, J.: delivered judgment of the Court. The complaint was presented by Jacques Chisha Mwewa, hereinafter referred to as the complainant against the Attorney General, hereafter referred to as the respondent.

The complaint was made pursuant to section 85(4) of the Industrial and Labour Relations Act, cap 269 of the laws of Zambia. The complaint was supported by an affidavit sworn by the complainant in which he deposed that he was employed by the Ministry of Education as a class teacher at Mable Shaw High School, in Luapula Province, for three consecutive contracts from January, 1996, to August, 2006.

The first contract was from 1996 to 1998, and the second one from 2000 to 2003. The third contract was from 2002, to December, 2004, respectively. After expiry of the third contract, he applied for renewal. He never got any response from the respondent till August, 2005, when he was abruptly removed from the payroll. The complainant contended that the manner in which the termination was done was unfair, and unlawful. He said the respondent always allowed him to work beyond expiry dates, and gave him contracts later.

For its part, the respondent filed an Answer which was supported by an affidavit sworn by one Ireen Nayame Chirwa, an Assistant Director Administration in the Ministry of Education. The respondent averred that the complainant was employed as a secondary school teacher on contract in 1996. Upon expiry of his first three year contract, the Ministry of Education renewed it for another three years, as per exhibit "JCM1". The second contract was also renewed as per exhibit "JCM2". This contract expired on 31st December, 2001. He was then given a third contract which expired in December, 2004. Before expiry of this contract, he applied for renewal in August, 2005. He asked for a 4th contract for another three years, but this was not renewed. The respondent paid his dues, but deducted the salaries he had received illegally for eight months from January, 2005, to August, 2005, because he had continued working without a contract. The respondent further stated that the complainant was actually owing it K297,280.00.

The complainant was his sole witness. He testified that in January, 1996, he was employed as a teacher at Mable Shaw secondary school on a three year contract. Upon expiry, he was given a second contract from January, 1999, to 31st December, 2001. Then a third contract was entered into between the parties from January, 2002, to 31st December, 2004. In August, 2004, the complainant applied for a fourth contract but got no response. He continued working after expiry of the third contract, in December, 2004.

The Court heard that when schools re-opened in January, 2005, the complainant was assigned work by the headteacher. He worked up to December, 2005, although the respondent removed him from the payroll in August, 2005. When he inquired from accounts, he was told that his contract was not renewed. He worked up to December, 2005, as he was involved in marking Grade 12 examinations.

It was the complainant's testimony that he lodged a claim for payment of benefits including gratuity on all three contracts, leave pay and three months salaries for October, November, and December, 2003, plus what he worked for from September to December, 2005. After intervention of the Investigator General, the complainant was paid his benefits, less salaries for January, 2005, to August, 2005, on grounds that the 4th contract was not renewed, and he had illegally been paid. Leave and three months salaries for 2003, were paid.

The Court heard that the contracts were always renewed way beyond the expiry dates. The practice was that the complainant would continue working, and receive letters of renewal later. He said on expiry of the first contract, he applied for renewal three months before expiry i.e. August, 1998, and he only got a response approving renewal on 21st October, 1999. He drew the attention of the Court to exhibit "JCM2," which was a response to the application of the third contract. He testified that he applied in August, 2001, then made a follow-up on 29th April, 2002, and only got a response in August, 2002, for a contract running from January, 2001, to December, 2004.

Under cross-examination, the complainant admitted that his contracts were verbal, and were renewed by letter such that he did not know the terms of the contracts, but he was verbally told that he would be paid leave, and gratuity. That was the case for the complainant.

The respondent have submitted that it was at liberty to accept or not accept the complainant's offer, when he applied for the fourth contract in August, 2004.

It is the respondent's submission that the case of *Felthouse v Bindley* (2), was instructive on the point that an offer must be accepted unconditionally. It is contended that the respondent herein did not respond to the application for a fourth contract, and the offer was thus never accepted.

The respondent further submit that the complainant was not entitled to gratuity as the same was not provided for in the contract.

The complainant's claim is for the following: Gratuity, Leave pay, three Months unpaid salaries, costs, and any other relief the Court deems fit.

The issues that arise for determination are whether the respondent was justified in deducting eight months salaries from the complainant's benefits. Further, whether the withholding, and refusal to pay three months salaries from September, 2005, to December, 2005, was equally justified in light of the fact that the complainant rendered his services to the respondent. Was the complainant's contract renewed for the fourth time? If so, was it unfairly, and unlawfully terminated?

It is not disputed that the complainant was employed by the respondent on three consecutive three year contracts. It is a fact that before expiry of the third contract in December, 2004, the complainant applied for renewal in August, 2004, and got no response. It is a fact that he then continued working up to December, 2005.

The complainant contended that he applied for renewal in August, 2004, but never heard from the respondent until September, 2005, when he was removed from the payroll. It is clear from the evidence that, the complainant was always allowed to work beyond his expiry dates, and then get a renewal later. Sometimes, he would work for a year without a contract before the respondent would inform him that he had been given a further three year contract, as the documents before us show.

On the facts and evidence before us, we are inclined to find and hold that it was unfair for the respondent to deduct the eight months salaries from the complainant's benefits. It is also our considered view that withholding the three months salaries for September, 2005, to December, 2005, was equally unfair. The respondent set a precedent with the complainant where he was allowed to work after the expiry dates of his contracts, and then notified him later by giving him a new contract.

It is noteworthy that the complainant applied for renewal in August, 2004, and never heard from the respondent. He was even assigned work by the head teacher in January, 2005. He was actually teaching an examination class which he said he could not abandon abruptly. The complainant also continued working up to December, 2005, because he was involved in the marking of examinations, despite being removed from the payroll in August, 2005.

It is our considered view that the respondent extended the contract after expiry in 2004, by its previous conduct of renewing late. We opine that the respondent is barred by the doctrine of estoppel from disputing or denying extension of the complainant's contract by its conduct. In the case of *Freeman v Cooke* (1), it was held:

"Where one by his words or conduct, with the intention that the belief which is induced should be acted upon, causes another to believe in the existence of a certain state of things, and induces him to act on that belief the former is precluded from averring against the latter a different state of things as existing at that time".

As already noted, the complainant's contracts were always renewed late. He believed that he would get a new contract later, as usual and worked beyond the expiry date. Furthermore, the respondent assigned him work during that period, it is now saying he worked illegally. We opine that the respondent is barred by estoppel. We order that the complainant be refunded his eight months salaries, and that he be paid for the three months he worked without pay.

We are also inclined to find and hold that the contract was unfairly and unlawfully terminated by removal from the payroll. The respondent actually had a duty to inform the complainant that his contract would not be renewed after he applied

for renewal in August, 2004.

In the case of Zambia Consolidated Copper Mines Limited v Matala (3), commenting on the jurisdiction of this honourable Court, the Supreme Court observed that: "there is nothing in the Act (Industrial and Labour Relations Act) to stop the Court from delving behind the reasons given for termination in order to redress any real injustice that may be discovered". We are also fortified in our decision that the respondent acted unfairly in deducting the eight months salaries, and withholding the three months salaries by our mandate to do substantial justice as provided in the Industrial and Labour Relations Act cap 269.

Regarding the claim for gratuity, the complainant admitted in cross-examination that he had no proof of a written contract between him, and the respondent. He testified that it was a verbal agreement that gratuity would be paid to him.

It is trite that the Government does pay gratuity to employees on contracts, and currently it is at 100% of the basic. Further, according to section 24 (5) of the Employment Act:

"Where any dispute arises as to the terms and conditions of an oral contract other than a contract for the employment of a casual employee, and the employer fails to produce a record of such contract made in accordance with the provisions of this section, the statement of the employee as to the nature of the terms and conditions shall be receivable as evidence of such terms and conditions unless the employer satisfies the Court to the contrary".

Accordingly, we find and hold that there were oral contracts between the complainant, and the respondent. The respondent has not produced any record of such contracts as required by the Employment Act section 24 (5) above. We thus take as evidence the complainant's testimony that gratuity was agreed upon. We order that the respondent should pay gratuity on all the three contracts at the applicable rate at the time of each contract. We order that the complainant be paid the monies due with interest at Bank of Zambia short-term deposit rate, from date of filing the complaint till judgment, and thereafter at lending rate, till full payment. We also award costs to the complainant to be taxed in default of agreement. Informed of the right to appeal to the Supreme Court within thirty (30) days.

Complaint allowed.