

IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

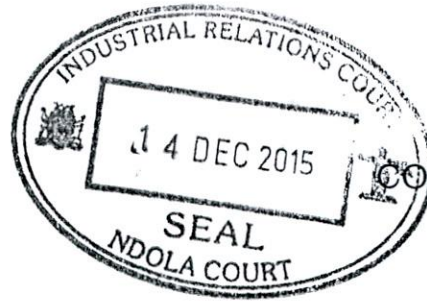
COMP/61/2014

BETWEEN:

GODFREY KAMBILI

AND

MOPANI COPPER MINES PLC



COMPLAINANT

RESPONDENT

BEFORE: JUDGE Dr. W. S. MWENDA - HON DEPUTY CHAIRPERSON
HON. J.M. BWALYA - MEMBER
HON. G.M. SAMUSUNGWA - MEMBER

For the Complainant : In person

For the Respondent : Mr. H. Pasi, Legal Counsel, Mopani Copper
Mines Plc

JUDGMENT

Cases referred to:

1. Kunda v Konkola Copper Mines Plc. S.C.Z. Appeal No. 48 of 2005

Legislation referred to:

The Employment Act, Chapter 268 of the Laws of Zambia.

This action was commenced by Godfrey Kambili (hereinafter referred to as "the Complainant") against Mopani Copper Mines Plc (hereinafter referred to as "the Respondent").

The grounds upon which the Complainant brought this action are that he was unfairly and wrongfully discharged on medical grounds on 27 March, 2014.

The Complainant desires that the medical discharge be declared null and void by the Court and seeks the following relief:-

(a) Re-instatement as Deputy Chief Fire Officer

(b) Underpayment of the following from 22 August, 2012 to 27 March, 2014:-

- i. Basic salary
- ii. Sunday bonus
- iii. Standby allowance
- iv. Transport allowance
- v. Uniforms (monetary form)

(c) Compensation

(d) Interest and costs

The Respondent has denied the complaint and filed Heads of Arguments in Support of its action. The Respondent avers that the Complainant is not entitled to any of the relief he is seeking, for the following reasons:-

(a) The Complainant was not a Deputy Chief Fire Officer at the time of his discharge because he had been demoted to the position of Tipper Driver following disciplinary proceedings that took place in July and August, 2014.

(b) The underpayment referred to in the complaint relates to the difference in the wages between the position of Deputy Chief Fire Officer and the position of Tipper Driver which the Complainant is not entitled to as he was demoted on 22 August, 2012.

(c) The above claims all emanate from the Complainant's demotion following disciplinary proceedings that took place in the year 2012.

The Court heard sworn oral evidence from the Complainant (hereinafter referred to as "CW") that he was employed on 26 April, 2005 as a Fireman. It was CW's testimony that he started working and served the Respondent diligently as a Fireman.

CW averred that he rose through the ranks to Deputy Chief Fire Officer until around June or July, 2012 when the Chief Fire Officer lost his child and left him in charge.

It was the Complainant's evidence that during the time he was left in charge, he signed a completion certificate for a project which involved the installation of fire gadgets. When the Chief Fire Officer returned he told him that he should not have signed on his name. According to CW this was the issue that sparked the bad relationship with his boss.

CW testified that his boss told him that he would demote him. He contended that his boss the Chief Fire Officer, effected the demotion and placed Twaambo Njunga who was his junior to now act as Deputy Chief Fire Officer.

CW testified that when he went to inquire from his boss as to why he did such a thing, he ordered him to get out of his office. It was CW's testimony that he pleaded with the Chief Fire Officer that they talk but that incensed him and he charged at him to throw him out of his office. CW averred that he had gout and his right leg was swollen. His boss stepped on it and

fearing a battery from his boss he pushed him away from him. CW further averred that he was accused of having assaulted his boss.

CW gave a detailed account as to what happened thereafter leading to a disciplinary process wherein he was laid off and told to wait for a case hearing. It was CW's testimony that he attended the case hearing and was consequently dismissed. He averred that he appealed against the dismissal twice and succeeded on the second attempt.

CW testified that after succeeding in his appeal he was surprised when the manager told him that the Superintendent would look for a place for him. He said he accepted everything because he was glad to be reinstated.

According to CW after being re-instated he was posted to the mine siding section where he met a Mr. Mwanza. CW testified that Mr. Mwanza who was in charge of the place told him that they would consider training him as a tipper driver.

CW lamented that he was a professional fireman who had never driven a tipper truck before and had no tipper driver's licence. He averred that he served the Respondent for one and a half years doing miscellaneous jobs until he started experiencing illness in his body.

It was CW's testimony that he went for an audiometric test where he was told that his ears were not well and he was consequently put on medication. According to CW, the situation never improved and he was referred to Kitwe Central Hospital where there were Ear, Nose and Throat (ENT) experts.

CW explained in detail how he was given medicine and later given a letter from Kitwe Central Hospital which he took to Dr. Mutamfya, the Medical Superintendent, who referred him to University Teaching Hospital (U.T.H).

CW testified that he went to UTH on several occasions and brought a report to Dr. Mutamfya who wrote a letter which he took to Beit Cure Hospital in Lusaka. It was his further testimony that at Beit Cure Hospital he underwent audiometric tests again. On 27 March, 2014 he went to Wusakili Hospital and was later told that they had separated him from company services. He averred that he was given a certificate of service and paid his dues for medical discharge based on the position of Tipper Driver.

CW testified that he felt mistreated by the Respondent through the process he underwent to be finally medically discharged. He felt that it was not genuine and good to him because he suffered psychologically, mentally and physically. He felt abused and todate still feels abused because he is a qualified fireman and could have been relegated through the ranks that he rose through. He felt that the Respondent could have maintained his profession through a demotion by taking him to Mufulira if they thought that his boss, Mr. Phiri was his arch rival whom he could not work with.

Consequently he sought the intervention of the Court and filed a complaint on 20 June, 2014.

CW testified further that on 2 of April, 2015 he went back to Beit Cure where they found that there was an improvement in his hearing. CW referred the Court to document 1 in the Notice of Intention to Produce Documents filed on 14 April, 2015. CW also referred the Court to document 2 in the Notice to Produce, which is the Disciplinary Code and Grievance Procedure for MUZ represented Employees, section 3.6.1 which deals with demotion. The section provides that you can only be demoted in cases of persistent poor work performance which, according to CW, was not the case with him. He testified that he performed his duties diligently and this led to his promotion as Deputy Chief Fire Officer. CW felt that the Respondent could at least have maintained his profession. It was therefore CW's prayer that he be reinstated and the medical discharge be nullified especially that there is a letter which states that he has improved following the medication that the Respondent was giving him. He also wants to be compensated in the fire service, with uniform and transport as prayed for in paragraph 5 (b) of the Notice of Complaint.

Before CW could be cross-examined, Counsel for the Respondent drew the Court's attention to their observation that the Complainant had two causes of action, going by his pleadings and testimony. The first one pertained to the disciplinary proceedings which happened and were concluded between June and August. 2012. According to Counsel, from this cause of action, CW was seeking certain relief as contained in paragraph 5 of the Notice of Complaint. It was Counsel's view that CW's testimony mainly tended to support this cause of action.

The second cause of action pertained to the medical discharge that happened in March, 2014. Counsel for the Respondent submitted that the issue they were raising was that the first cause of action was clearly out of time. Counsel subsequently prayed that the Court makes a ruling on whether the first cause of action was out of time before proceeding as this would determine how they proceeded.

The Complainant averred that there was an earlier ruling on the same issue which the Court passed indicating that the first cause of action was not out of time.

Counsel for the Respondent explained to the Court that the earlier application was to dismiss the matter entirely because it was based on matters that took place in mid 2012. According to Counsel the ruling of the Court was that the Complainant had also claimed unfair discharge on medical grounds on 27 March, 2014 as a ground for the complaint. It was Counsel's submission that they were making an application to strike one cause of action. He argued that this was different from their earlier application to dismiss the complaint entirely because the Complainant, having adduced his evidence, it was clear that he was trying to sneak in a cause of action which was time barred. According to Counsel, the Complainant was trying to ride on another cause of action which was within time. It was therefore Counsel's prayer that the Court makes a ruling whether the first cause of action was competently before the Court in order for the Respondent to know or make a decision on how to proceed in the presentation of its case.

The Court ruled that there was only one cause of action before Court arising out of the medical discharge of 27 March, 2014 and therefore the question of whether a cause of action based on disciplinary proceedings which were concluded between June and August, 2012 was competently before the Court did not arise.

On 27 July, 2015 hearing of the matter proceeded and CW was cross-examined by Counsel for the Respondent.

During cross examination CW confirmed that he was discharged on medical grounds after he was found to have a problem with hearing. He testified that the doctors recommended his medical discharge.

CW admitted attending medical examinations at Occupational Health Institute. He said they did not find him with hearing loss there. He however, averred that the findings were not conclusive and that he was found with a problem in one of the ears.

CW also confirmed during cross-examination that he was found with a problem in his ear at both Kitwe Central Hospital and at Beit Cure Hospital. CW was referred to exhibit "GK7" in the Complainants Affidavit in Support of Notice of Complaint which was a letter from Beit Cure Hospital to Dr. Mutamfya. In the said letter it stated that CW had sensory neuro hearing loss in both ears, moderate hearing loss in the right ear and profound deafness in the left ear.

CW agreed that Kitwe Central Hospital recommended that he be given light duties.

CW was referred to exhibit "KS10" at page 3 in the Affidavit in Support of the Respondent's Answer which was an Assessment of Disablement Claim Form from Workers Compensation Fund Control Board which showed that he had noise induced hearing loss of 41.5% and recommended that he be medically discharged. CW admitted that he was assessed and was not satisfied with the assessment but did not write to anyone to show his dissatisfaction.

Asked whether he was moved from one work area to another because of complaining, CW responded that he was not moved but there were attempts made to find him alternative employment.

CW admitted that he was given the money for medical discharge, leave days and repatriation. He was referred to exhibit "GK15" in the Affidavit in Support of Notice of Complaint which was his payslip. The payslip reflected a payment of K55,837.02 as medical discharge; leave days of K2,798.23, repatriation of K3,395 and one month's pay in lieu of notice amounting to K3,450.99. According to CW he got the money but he was not satisfied.

During further cross-examination CW was referred to exhibit "KS3" in the Affidavit in Support of the Respondent's Answer, which was a letter informing him of his demotion to the position of Tipper Driver and a copy of Reclassification and Transfer Advice which had he signed. CW averred that he was made to sign under duress and nothing was read to him. It was

put to him by Counsel that he did not raise this issue with the Respondent. CW testified that he raised it several times including at the last appeal. During further questioning CW confirmed that he was reinstated and demoted after the last appeal. CW admitted under further cross-examination that he brought the issue of demotion more than two years after it happened. He averred that he wanted the Court to order that he goes back to work especially that there was a letter declaring that he was fit.

In re-examination CW referred the Court to exhibit "KS5" in the Affidavit in Support of the Respondent's Answer and drew the Court's attention to the fact that attempts were made to find him an alternative place of work. He stated that communication was made to almost all sections but the Respondent failed. He lamented that for a demotion the Respondent was quick to find him a place but for his ear problem all sections had no place for him.

That marked the closed of the Complainant's case.

The Respondent called three witnesses in support of its case. The first witness whom we shall hereinafter refer to as "RW1", was Kelvin Sovi, a Senior Human Resources Advisor in the Respondent Company. He explained his duties and outlined the procedure followed when an employee goes for an audiometric test.

RW1 referred the Court to exhibit "KS4" in the Affidavit in Support of the Respondent's Answer which was a memorandum to him from Dr. Mutamfya requesting him to consider redeploying the Complainant to a

low noise worksite on medical and safety grounds. The hearing problem was confirmed by the Occupational Health Institute which recommended that the Complainant be redeployed to a low noise area.

RW1 testified that they took time to try and find a place for the Complainant. It was RW1's testimony that after privatisation most of the areas of low noise were no longer under the Respondent's responsibility. He said they had limited areas, which included, schools, hospitals and central offices, central training and part of transport yard.

According to RW1, it was not easy to find a place for the Complainant. However, a scientific analysis was done to determine the suitability of work places and the transport yard where the Complainant was operating from was found to be a low noise area and therefore, a suitable place for him.

According to RW1, when the Complainant appeared before the Medical Discharge Committee for the second time he was informed that he could go back for work because the area (transport yard) was suitable and he was given a fitness certificate, meaning he was fit to work in that area.

It was RW1's testimony that the Complainant came back to his office the following day after appearing before the Medical Discharge Committee, and tried to renegotiate with him but he did not entertain him. RW1 testified that they could not take him to other areas because they were not available. He said that the time that passed between the time they received a letter and the time the Complainant was discharged was almost seven months, therefore they made tremendous efforts to find him a place.

RW1 averred that he later got a call from a doctor that the Complainant had resurfaced with a complaint. According to RW1, it became clear that the Complainant was not willing to work in the area they had recommended. In line with the procedural requirement of the law, the doctors had to make a recommendation to discharge him.

RW1 testified that in the mining industry proper hearing is very cardinal to the safety of the miner himself and for others, which means if a miner develops hearing loss he becomes a danger to himself and others.

After failing to find a place for the Complainant and due to his hearing loss, the doctors recommended his medical discharge. RW1 referred to the communication exhibited as "KS5" in the Affidavit in Support of the Respondent's Answer which was an e-mail from one Bridget Kasanga to a number of officers informing them about the request for the Complainant to be redeployed on medical grounds. The exhibit includes various responses from the addressees. RW1 testified that it was on the basis of the negative responses obtained from various sections that they wrote to the hospital to inform it accordingly. He said that the Respondent is always reluctant to lose qualified persons unless the case becomes difficult as was the case with Mr. Kambili.

RW1 further testified that he did not entertain Mr. Kambili when he came to his office after the committee met because in the determination of hearing loss the equipment which is available is subject to human manipulation. The person being examined can actually cheat the instrument. It was RW1's testimony that they had sought advice from

Occupational Health Institute to explain to them whether someone with profound deafness can actually recover medically and the response they got was that it was not possible because the hairs in the ear wear out and it leads to loss of hearing.

According to RW1, the machine for testing hearing is in a cubicle and the person being tested indicates when he hears a click but a person can pretend that he/she has not heard the click. He said that the people he has met who were discharged on account of deafness are still very deaf. RW1 testified that for him it is flabbergasting that a person who is profoundly deaf can have a normal conversation because it goes against what the experts say. RW1 told the Court that they dismissed one employee who admitted that he did not have a problem but was merely pretending to be deaf when he went for a hearing test.

It was RW1's further testimony that there are instances where employees just want to go on medical discharge. They use loss of hearing and backache as an excuse to do so. The Respondent discovered that social issues such as indebtedness are underlying causes of the deception. RW1 testified further that there is no policy that a person who is medically discharged should be re-employed. He, however said that they can be re-engaged in a place where the problem will not recur. In the case of Mr. Kambili, he had no right to be re-employed since there was no vacancy.

It was RW1's further testimony that employees who have been medically discharged can be re-employed in competition for existing vacancies and if Mr. Kambili desires to go back to the company, it would have to be on a new contract and in a position that would not cause the problem to recur.

According to RW1, it is not the company's desire to see anyone on the street. The company would like people to be in gainful employment and has a very rigorous process before a person is discharged. Doctors have to recommend and the company sends the same to the Occupational Health Bureau for confirmation.

Commenting on the issue of compensation, RW1 testified that the Complainant's disability was one that could be compensated for by Workers Compensation Fund Control Board. According to RW1, the Complainant's details are already at Workers Compensation Fund Control Board. He was assessed for compensation and the compensation is pending because he was supposed to submit a list of beneficiaries which he has not done.

In cross-examination RW1 testified that the Workers Compensation Fund Control Board is still waiting for the documents from the Complainant and if he has been declared fit, he should inform the Board so that the claim is withdrawn. He reiterated that any redeployment has to have a vacancy and that there is no vacancy for the Complainant due to budgetary constraints. RW1 stated in further cross-examination that the Bureau said that the Complainant should be redeployed to a low noise area. They did a scientific assessment of the place where he was taken and it determined that the place was a low noise area. The fire station on the other hand is a noisy area.

The second witness for the Respondent whom we shall refer to as "RW2" was Mulenga Katongo Kaluba, a Senior Employee Relations Advisor for the Respondent.

RW2 testified about the events that led to the Complainant's dismissal and subsequent reinstatement after the second appeal. According to him, the Complainant admitted at the final stage of the appeal process to having assaulted his supervisor. The Complainant appealed against the sentence and pleaded for leniency. RW2 further testified that just before the final appeal stage the Complainant communicated with his supervisor through a text message, apologising and asking the supervisor to withdraw the case from RW2's office.

It was RW2's testimony that the final appeal stage went in favour of the Complainant. The final appeal was heard by the Engineering Manager Mr. Ronald Kambalati. RW2 averred that Mr. Kambalati accepted the plea from the Complainant and decided to reinstate him on humanitarian grounds and transferred him from fire section to rail transport section. He also demoted him from his pay grade which was MS6, to MS7.

It was RW2's further testimony that his role during the proceedings was to ensure that the case was handled well and the decision made by the administering official was made in accordance with available evidence. According to RW2, the Complainant was happy with final appeal verdict because he had admitted at the final appeal that he was wrong and asked for leniency.

RW2 testified that after some time the Complainant used to come to his office to ask if he could be taken back to Fire Department. However, RW2 advised him to continue working where he was as the verdict had already been given.

It was RW2's testimony that the Complainant used to say that as a qualified person he was not happy working at the transport yard. RW2 averred that his honest reaction was that the Complainant did not appreciate what the Respondent did by reinstating him.

Commenting on the Complainant's claim of underpayment, RW2 testified that from 22 August, 2012 the Complainant was aware that his salary was reduced. It was RW2's testimony that all of the Complainant's claims were unfounded.

In cross-examination RW2 confirmed that the Complainant had been dismissed for disorderly behaviour and assault which fell in category 3 of the Respondent's Disciplinary Code and was a dismissible offence.

It was RW's testimony that the person who was assaulted went to the First Aid Clinic where he was examined and found with a swollen eye. The Medical Officer on duty made a report to that effect as it happened at the work place.

RW2 averred that there was no report from Zambia Police because according to Mopani Police it was enough that they had statements from two witnesses and the Complainant who were interviewed separately. According to RW2, the evidence available was pointing to the fact that the Complainant had truly punched his supervisor.

RW2 stated that the Complainant appealed against the findings at the first appeal but appealed for leniency at the second appeal.

When shown exhibit "GK4", RW2 identified it as a letter of reinstatement which did not mention demotion. He said that the letter of demotion was written separately on the same day, 22 August, 2012 and was exhibited as "KS3" in the Affidavit in Support of Respondent's Answer.

RW2 stated that the Complainant committed a category 3 offence which was dismissible but the administering official re-instated him on humanitarian grounds.

Under re-examination, RW2 confirmed that the Complainant had signed the Reclassification and Transfer Advice to acknowledge that he was aware of the demotion that was effected.

The Respondent's third and final witness whom we shall hereinafter refer to as "RW3" was Boniface Zulu, Senior Medical Officer, Occupational Health, at the Respondent Company.

RW3 explained his role at Mopani Copper Mines and indicated that he had worked for the Mines in general for 25 years and Mopani in particular, for the last two years.

RW3 basically repeated the evidence already given by the Complainant and RW2 regarding the events that culminated in the Complainant's discharge on medical grounds.

It was RW3's testimony that the Complainant was referred to Kitwe Central Hospital a government hospital for consultation at the ENT Clinic.

He had complained of dizziness and pain in the ears. RW3 averred that the report from Kitwe Central Hospital suggested to them that they had limitations so they referred the Complainant to UTH's ENT Clinic.

RW3 further testified that the report form UTH indicated that their audiogram was inconclusive in determining whether the Complainant had hearing loss and as to the cause of his dizziness.

According to RW3, the Complainant was later referred to Occupational Health and Safety Institute in Kitwe for diagnostic purposes. He said that the report from Occupational Health and Safety Institute showed that the Complainant had a profound noise induced hearing loss in both ears. Based on that report the Medical Superintendent proceeded to write to the Respondent's Human Resources Department to move the Complainant from high noise area of the mines to low noise area.

It was RW3's further testimony that after a long time the Human Resources Department wrote back to the Medical Superintendent stating that there was no suitable job for the Complainant in the low noise area of the mine.

RW3 testified that further to the Report from UTH, the Complainant was referred to Beit Cure Hospital in Lusaka for a test only available at that institution. According to him the report from Beit Cure Hospital where they did an audiogram showed that the Complainant had profound hearing loss in the ears. Based on the report from Occupational Health Institute and the report from Human Resources Department that there

was no suitable place for the Complainant a decision was made to discharge him on medical grounds due to noise induced hearing loss.

RW3 further explained in detail what happens when an audiometric test is being conducted. He testified that the test is very subjective and could be manipulated. He said for example, if one wanted to deliberately show that he had not heard any sound when he did, he would simply not press the button.

It was RW3's testimony that what was important to them was the Report from Occupational Health Institute indicating that the Complainant had bilateral sensory neural deafness. He said the Institute advised them to deploy the Complainant permanently in a low noise area. They declared the Complainant to be not fit to work in noisy areas.

RW3 explained that sensory neural deafness which the Complainant was reported to have is damage to the nerves in the hearing organ. It is a permanent disability which upon such advice they remove the miner to a low noise area to preserve his hearing. According to RW3, this condition is a permanent irreversible damage and there is no treatment for it.

RW3 explained to the Court that according to their findings, the initial audiogram report was unresponsive. According to him, initially the Complainant was deliberately not responding when he was being tested. It was RW3's testimony that it was during the last audiograph at Beit Cure that the Complainant responded truthfully to the test. It was therefore, his conclusion that it appeared that the Complainant had deliberately failed the initial test.

RW3 testified that his experience with the Complainant was that all he wanted when he was initially tested was to leave employment on medical grounds. According to RW3, the Complainant showed him his certificates for other qualifications. It was RW3's view that the Complainant wanted to demonstrate to him that he had other qualifications which he could use to find a job elsewhere if he left the Respondent Company. It was RW3's further testimony that the Complainant came to his office asking him (RW3) to assist him leave employment.

RW3 testified that after they discharged the Complainant they proceeded to convene a workmens' compensation panel which recommended that he be compensated by the Workers Compensation Fund Control Board based on the percentage of disability which was arrived at Occupational Health Institute.

RW3 averred that the medical discharge was not unfair in that the correct procedure was followed in discharging the Complainant. He testified that the discharge was based on medical evidence that they had received from Beit Cure Hospital as well as the Occupational Health Institute in Kitwe. In addition, according to RW3, Human Resources Department had reported to them that they had failed to find an alternative suitable work place for the Complainant.

RW3 testified that the assessment done on the Complainant showed that he had a 41.5% hearing loss which was a very high disability in one ear because the highest mark is 50% in one ear. The Complainant was eligible for compensation in addition to the medical discharge package from the

Respondent. The proper procedures in terms of medically discharging the Complainant were all followed based on medical evidence they received from Beit Cure Hospital as well as the Occupational Health Institute in Kitwe.

In cross-examination RW3 reiterated that the medical charge was based on the reports from Beit Cure Hospital and Occupational Health Institute. He further testified that the new report showing complete reversal of initial reports was unattainable.

Asked by the Complainant why he put him on medication, RW3 responded that this was because of the symptoms of dizziness and pain in the ear which indicated that he needed to see an ENT Specialist.

As regards the exit medical examination, RW3 explained that the Complainant should have presented himself at Occupational Health Section so that the Respondent could obtain medical data on his health condition. RW3's conclusion was that there was nothing else they could do for the Complainant as far as noise induced hearing loss was concerned.

This marked the close of the Respondent's case.

Learned Counsel for the Respondent indicated that he would file written submissions and did in fact do so. We wish to register our appreciation to learned Counsel for the comprehensive submissions he filed.

We have critically analysed the documentary and viva voce evidence before us, and in our opinion, the following are our findings of fact:

- i) The Complainant was employed by the Respondent on 26 April, 2005 as a Fireman and rose through the ranks to the position of Deputy Chief Fire Officer until he was demoted to Tipper Driver with effect from 22 August, 2012 following disciplinary proceedings.
- ii) Prior to the demotion the Complainant was summarily dismissed from the service of the company with effect from 25 July, 2012 and reinstated following a successful second appeal and demoted.
- iii) Following a recommendation from Occupational Health Institute the Complainant was deployed to a low noise area.
- iv) The Complainant was medically discharged by the Respondent with effect from 27 March, 2014 and paid his terminal benefits.
- v) Further, the Complainant was assessed by Workers Compensation Fund Control Board and found to be eligible for compensation but has not submitted a list of beneficiaries and for that reason has not been paid his compensation by the Board.

In our opinion the issues to be determined in this matter are the following:-

- (i) Whether the medical discharge of the Complainant was unfair and wrongful; and
- (ii) Whether the Complainant is entitled to reinstatement as Deputy Fire Officer and the claims in paragraph 5(b) and (c) of the Notice of Complaint.

We will now deal with the issues as identified:-

(i) Whether the medical discharge was unfair and wrongful.

In our opinion the Complainant's discharge on medical grounds was neither unfair nor wrongful. Counsel for the Respondent has ably given reasons for the same which support our position. We will repeat some of them as follows:-

- (a) The Occupational Health and Safety Institute certified that the Complainant had profound bilateral hearing loss.
- (b) The hearing loss was confirmed by two independent hospitals that is, Beit Cure Hospital and University Teaching Hospital.
- (c) The Respondent made efforts to find alternative employment in low noise areas but could not find any; and
- (d) The medical discharge was at the recommendation of a qualified medical practitioner.

It is trite law that he who alleges must prove his allegations, as per the Supreme Court's decision in the case of **Kunda v Konkola Copper Mines Plc (1)**. We concur with the submissions by learned Counsel for the Respondent that the Complainant in this case has failed to adduce evidence to prove that his medical discharge on 27 March, 2014 was unfair and wrongful.

We also concur with the submission by Counsel for the Respondent that the medical discharge was done in accordance with section 36 (2) of the Employment Act which provides:

Where owing to sickness or accident an employee is unable to fulfill a written contract of service, the contract may be terminated on the report of a registered medical practitioner.

In accordance with the above provision, the Respondent discharged the Complainant on 27 March, 2014 following clinical recommendations of the Medical Superintendent as per exhibit "GK 10" of the Affidavit in Support of Notice of Complaint

In view of the foregoing, we find and hold that the medical discharge was neither unfair nor wrongful as it was based on medical advice and evidence and also due to non-availability of a suitable work area for the Complainant. We accordingly dismiss the claim of unfair and wrongful discharge as it lacks merit.

- (ii) Whether the Complainant is entitled to reinstatement as Deputy Chief Fire Officer and the claims in paragraph 5(b) and (c) of the Notice of Complaint

We concur with the view expressed by Counsel for the Respondent that although the Complainant has not explicitly presented his demotion following disciplinary proceedings of July, 2012 as one of the grounds upon which the Complainant is based, he has adduced substantial evidence concerning the same and has based his claim for underpayment of wages on the same.

As this Court found in its Ruling of 12 May, 2015, there is only one cause of action before this Court and that is the claim of unfair, wrongful

discharge on medical grounds on 27 March, 2014 which the Complainant desires the Court to declare null and void. Nowhere in the Notice of Complaint are demotion or disciplinary proceedings concluded between June and August, 2012 given as grounds for the complaint.

Having found that the Complainant's medical discharge was not unfair or wrongful the relief being sought by the Complainant under paragraph 5 (a) and (b) must fail for the reasons given hereunder.

It is clear from the evidence before us that at the time of his medical discharge, the Complainant was not a Deputy Chief Fire Officer as he had been demoted to the position of Tipper Driver, the position he held from 22 August, 2012. The Complainant is therefore asking this Court to reinstate him to a position he no longer held, a prayer which this Court finds untenable.

As learned counsel for the respondent correctly submitted, the complainant's claim for underpayment from 22 August, 2012 to 27 March, 2014 contained in paragraph 5 (b) relates to the difference in wages and allowances between the position of Deputy Chief Fire Officer and the position of Tipper Driver which the Complainant was demoted to. As we have already stated, the Complainant was demoted to the position of Tipper Driver on 22 August 2012. As a consequence of the demotion his pay grade was down graded from MS6 to MS7 as RW2 testified. The down grade meant a lower salary and loss of benefits attendant to the post of Deputy Chief Fire Officer. The Complainant is, therefore, not entitled to the alleged underpayments referred to in paragraph 5 (b) as he was not underpaid as he claims.


As regards the Complainant's claim for compensation in paragraph 5 (c) of the Notice of Claim, having found that his medical discharge was neither unfair nor wrongful, this claim too must fail. There is evidence that the Complainant was paid all his benefits and is also entitled to compensation by the Workers Compensation Fund Control Board.

For the reasons aforesaid, the Complainant's claims fail in toto and we accordingly dismiss them for lack of merit.

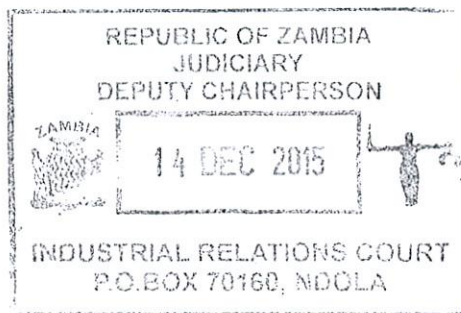
We make no order for costs.


Informed of Right of Appeal to the Supreme Court within thirty (30) days of the date hereof.

Delivered at Ndola this 14th day of December, 2015.


Judge (Dr) W.S. Mwenda
DEPUTY CHAIRPERSON


J.M. Bwalya
MEMBER




G.M. Samusungwa
MEMBER