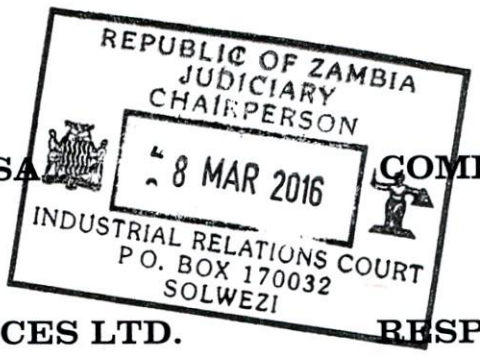
Registry

IN THE INDUSTRIAL RELATIONS COURT **COMP/10/2016**
HOLDEN AT SOLWEZI

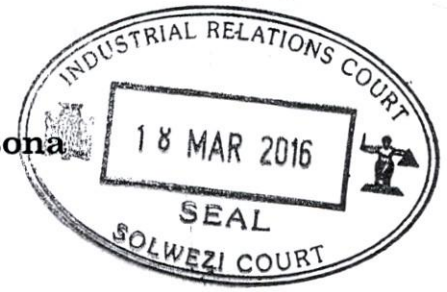


BETWEEN:

HARRISON FWALO CHIKASA **COMPLAINANT**

AND

CHANTETE MINING SERVICES LTD. **RESPONDENTS**



BEFORE:

Hon. Judge E.L. Musona

MEMBERS:

1. **Hon. W.M. Siame**
2. **Hon. J. Hasson**

For the Complainant : In person

For the Respondent: Mr. F. Chibwe of Messrs ECB Legal Practitioners

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JUDGMENT

Date : 18th March, 2016

Cases Referred to:

1. **Kitwe City Council v William Nguni (2005) ZR**
2. **Ridge v Baldwin, (1963) 2 ALL ER**
3. **Miyanda v The Attorney General (1985) ZR**
4. **Chilanga Cement v Kasote Singogo (2009) ZR**

Statutes referred to:

1. **Act No. 15 of 2015**
2. **Section 13 of the Employment Act Cap 268 of the Laws of the Republic of Zambia**
3. **Statutory Instrument No. 2 of 2011 and Statutory Instrument No. 47 of 2012.**
4. **Act No. 30 of 1997**

This Complaint was filed by M/Harrison Fwalo Chikasa against Chantete Mining Services Ltd. We shall, therefore, refer to M/Harrison Fwalo Chikasa as the Complainant and to Chantente Mining Services Ltd as the Respondents which is what the parties to this action actually were.

The Complainant's claim is for the following relief:

1. Payment of monthly salaries as if I am in employment until the settlement of either redundancy/termination (severance) package.
2. Payment of termination (severance) for redundancy package not less than two months basic pay for each completed year of service.
3. Payment of repatriation allowance for transportation of myself, the family and my household goods from Solwezi to Chililabombwe.
4. Payment of subsistence allowance on repatriation/Statutory Instruments No 2 of 2011 and 2012 (General Orders).
5. Payment of any other relief which this Honourable Court may deem fit.

The duty for this court is to ascertain whether or not the Complainant has proved his claims. The Complainant's evidence was that he was employed by the Respondents in Chililabombwe on 14th September, 2011 as a Health and Safety Manager. He was then relocated to Kansanshi in Solwezi. He completed his probation successfully.

On 1st November, 2013 the Project Manager walked into the Complainant's office holding two (2) documents. That Project Manager told the Complainant that the Complainant had worked to the satisfaction of management and that management was then willing to offer the Complainant permanent employment backdated to the time when the Complainant was employed. When the Complainant requested to peruse the documents the Project Manager told the Complainant that there was no need especially that the documents were in favour of the Complainant. The Complainant was asked to sign on every copy of the document and told that the document would be brought back to him at a later date. The document was, however, never taken back to the Complainant. The Complainant only saw that document again when the Respondents filed their Answer to the Notice of Complaint in this case.

In September, 2015, the Complainant sued a fellow employee, that matter is still pending in another court.

The Complainant's employment was later terminated. During cross examination the Complainant stated that he sued Mr. Lee who was a fellow employee and feels, that is the cause of the termination of employment because he declined to withdraw the case when the Respondents requested him to do so.

The Respondents called M/Humphrey Mambwe as their only witness. We shall refer to that witness only as RW. RW is Human Resources Manager for the Respondents.

The evidence for RW was that the Complainant was Health and Safety Manager for the Respondents. RW stated that the Complainant was shown his contract and signed it. Being Health and Safety Manager he was conversant with the disciplinary code because among his duties was to enforce safety standards and to administer disciplinary matters.

RW further stated that the Complainant was not filing the periodical safety reports as required of his job. The employment of the Complainant was terminated under the notice clause because the Respondents did not want to subject the Complainant to disciplinary proceedings and because the Respondents had respect for the Complainant and, therefore, did not want to hinder his future prospects such as his political intentions which the Complainant confided in RW that he wanted to contest parliamentary elections in Kasempa. If dismissed for insubordination or refusal to carry out lawful instructions the Complainant's reputation would be

tainted. During re-examination, RW referred to e-mails which showed that the Complainant was not responding to superior orders and that there was rudeness on the part of the Complainant depicted in those e-mails.

We have gone through the whole of the evidence in this case.

We have found that the Respondents were faulty in many instances.

We have also found that the Complainant too was equally faulty in many instances.

Each party, therefore, had its own good deeds and bad deeds bound together.

The Complainant was at fault in the following instances:

a. He differed with a work-mate. Although that was a personal matter between the two (2) employees, we have noted that it arose at the place of work and in the course of executing their official duties. The Complainant accused his fellow employee of having insulted him. This dispute reached a crescendo when the Complainant sued that fellow employee in the Solwezi Local Court. The impasse between the Complainant and his fellow employee who both were managers degenerated into acrimony and rivalry between them at the place of work. This is what compelled the Respondents to intervene.

Following the intervention by the Respondents, the Complainant demanded a written apology and promised to travel to Local Court to withdraw the matter upon receipt of the apology. That apology was tendered and accepted by the Complainant. It was then thought that the matter was settled and that the same would be withdrawn as promised by the Complainant. Believing that the case was going to be withdrawn, that employee who was defendant did not travel to Local Court. The Complainant travelled to Local Court but did not withdraw the case. This resulted in the Local Court issuing a bench warrant. This led to more acrimony and grave apprehension of the status of the court case as well as the working relationship between the two (2) rival managers. The Respondents were worried because the rivalry between these two (2) employees embroyed in a private matter was now filtering through to their place of work and affecting their work, particularly because both of them were in management. The Respondents felt cheated because the Complainant had promised that he would withdraw the court case if the colleague apologized. His colleague apologized accordingly and the Complainant accepted the apology but did not withdraw the court case.

b. There is also evidence that the Complainant was not filing safety returns as required of his job. Repeated reminders from his superior were not adhered to by the Complainant. The Complainant then became rude and rather sarcastic to his

superior. All these are evidenced by e-mails which were produced and exhibited as "HM6 (b)".

The Respondents were faulty in the following respects:

a. When the Complainant refused or failed or neglected to file safety returns they could have charged him under their disciplinary code but they did not.
b. When the Complainant exhibited rudeness they could have charged him under their disciplinary code but they did not.

Respect for the Complainant, or the protection of the Complainant's reputation and his political ambition as RW stated is not justification for failure by the Respondents to invoke the requisite provisions of the disciplinary code.

c. The facts of this case show that the reason for termination of the Complainant's employment were:

i. his refusal or failure or neglect to file safety returns;
ii. his rude language as shown in the e-mail which is exhibited "HM6 (b)". These are not in dispute because they were admitted by RW.

d. The above show that the termination of the Complainant's employment was based on those allegations that he refused to withdraw a court case, did not file safety returns and was rude to his superior.

Termination clause must not be used as a substitute to dismissal. An offending employee must be charged and if the offence is proved he may be dismissed. This is what should have happened. The Complainant must have been charged and if the offences were proved he should have been dismissed

e. The Respondents were wrong to invoke the termination clause when infact the facts show that their intention was to dismiss the Complainant.
f. We have looked at the letter of termination. That was produced as exhibited "HFC3". It is dated 7th December, 2015.

We are alive to the law. On 7th December, 2015, **Act No. 15 of 2015** had already taken effect, it was law. That Act prohibits employers from terminating the employment of an employee without giving reason to the employee. But we must add, our addition is that the reason must be valid enough to warrant termination of employment. We have looked at that letter of termination of employment. It gave no reasons for the termination of employment. That was unlawful because it breached the statutory provisions of **Act No. 15 of 2015** which requires the giving of reason(s). Any contract of employment which is inconsistent with any statutory provisions is void to the extent of the inconsistence. To the extent that the Respondents' contract is inconsistent with statutory provisions of employment law as envisaged in Act No. 15 of 2015, we declare it void, but only to the extent of its inconsistency.

For the avoidance of doubt we shall now look at the specific relief claimed by the Complainant.

1. Payment of monthly salaries as if I am in employment until the settlement of either redundancy/termination (severance) package

The claim for salaries fails because a person cannot be paid for a period not worked for. In the case of **Kitwe City Council v. William Nguni (1)** it was held that:

> **"It is unlawful to award a salary or pension benefit, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment."**

As to redundancy payment, the claim also fails because there was no redundancy in this case. Redundancy arises where the employer ceases or intends to cease the business for which the employee was employed, or scaling down on its operations. Redundancy also arises when an employer varies a basic condition of service without the consent of the employee, then the contract of employment terminates and the employee must be deemed redundant on the date of such variation. None of these arose in this case to entitle the Complainant to redundancy package.

Payment of termination (severance) package also fails because we have noted from the letter of termination that the Respondents discharged all their contractual obligation. That letter of termination was produced and exhibited as "HFC3". The

Complainant did not prove that he was not paid the monies tabulated in exhibit "HFC3". He did not also prove that he was entitled to other payments other than those tabulated in exhibit "HFC3".

2. Payment of termination (severance) for redundancy package not less than two (2) months basic pay per each completed year of service

We have already said that there was no redundancy in this case. So, this claim fails.

3. Payment of repatriation allowance for the transportation of the Complainant, the family and household goods from Solwezi to Chililabombwe

There is no dispute that the Complainant was recruited from Chililabombwe and then assigned work in Solwezi.

The law on repatriation is clear. The law is expounded in Section 13 of the **Employment Act, Cap 268 of the Laws of the Republic of Zambia**. The law requires the employer to repatriate the employee to the place from which he was brought.

We order that the Respondents provide reasonable travelling expenses supported by quotations at current market value for the transportation of the Complainant, his family and household goods from Solwezi to Chililabombwe, and

subsistence expenses or rations during the journey. The Respondents shall choose whether to pay cash or provide actual transport which must consist of a vehicle to carry the household goods and a vehicle to carry the Complainant and his family, plus subsistence expenses during the journey from Solwezi to Chililabombwe at the rate provided by the Respondent's current conditions of service. If no such conditions exist, then four (4) nights subsistence allowance at the rate of division one (1) Government officers.

4. Payment of subsistence allowance on Repatriation Statutory Instrument No. 2 of 2011 and 2012.

We have adequately dealt with this claim in 3 (above) what we have discussed in 3 (above) applies here, that is why we cannot repeat. We have also looked at **Statutory Instrument No. 2 of 2011** including the **Statutory Instrument No. 47 of 2012**. The Complainant having served on a written contract in a managerial capacity, the Statutory Instrument which he has wished to rely upon does not apply to him. These Statutory Instruments specifies persons who the law intended to protect and excludes persons in management. These Statutory Instruments do not apply to persons such as the within Complainant where the employee and employer relationship is governed by a contract of employment. We have seen the contract of employment in this case which the Complainant attempted to dispute. We have seen no reason to doubt it and have accepted it.

5. Payment of interest on payments due.

We have no reason to deny the Complainant interest on what we have adjudged as payments due to him. We order that the within awards shall carry interest at the current Bank of Zambia rate from 1st February, 2016 when the Complaint was filed until full payment, except payment in respect of repatriation and subsistence allowance because these will, where cash payment will be made, be paid at the current market price.

6. Payment of costs for this action.

There is no doubt that the Complainant has succeeded only on some claims. He has lost on other claims. He has not gained an absolute win. We shall, therefore, not award him any costs. Put simply, we shall not make any order for costs.

7. Payment of any other relief which this court may deem fit.

Ordinarily, a court may not grant any relief unless such relief is specifically pleaded and proved. This court, however, has power to grant such remedy as it considers just and equitable.

This power is derived from **Section 85 (A) of Act No. 30 of 1997 of the Industrial and Labour Relations Act, Chapter 269** which reads as follows:

> **"Where the court finds that the Complaint or application presented to it is justified and reasonable, the court shall grant such remedy as it considers just and equitable and may:**
>
> a. **award the Complainant or Applicant damages or compensation for loss of employment.**
> b. **make an order for reinstatement, re-employment or re-engagement.**
> c. **deem the Complainant or Applicant as retired, retrenched or redundant or**
> d. **make any other order or award as the court may consider fit in the circumstances of the case.**

We have looked at this complaint and have found it fit in the circumstances of this case to award damages for wrongful and unfair dismissal. This is because the termination of the Complainant's employment under the Notice Clause was infact precipitated by some allegations. We have already discussed those allegations. It is clear then, that when the Respondents invoked the notice clause to terminate the employment of the Complainant the Respondents were infact dismissing the Complainant under the guise of termination provided by the notice clause. This was wrongful because the procedure for dismissing an employee was not followed. It was unfair because the Complainant was not accorded an opportunity to be heard and to defend himself on those

allegations against him. It does not matter, even where it is properly thought that the employee is fully aware of what is alleged against him, and even where there is undisputable evidence against the employee this procedure must be followed. We have already discussed the procedure. Suffice to state that it is mandatory and not optional to adhere to the procedure.

We have looked at a plethora of authorities, among them is the case of **Ridge v Baldwin (2)** where the House of Lords held that the Baldwin's Committee violated the doctrine of natural justice when the accused was not afforded an opportunity to be heard. And in the case of **Miyanda v The Attorney General (3)** the Supreme Court upheld the Appellant's submission concerning his accrued rights not to be dismissed without according him an opportunity to be heard.

Throughout our employment law there is one principle regarding dismissal of an employee, that is, an employee who will be affected by an adverse decision must be given an opportunity to be heard.

Turning to the award of damages, we have looked at the case of **Chilanga Cement v Kasote Singogo (4)** where the Complainant was awarded six (6) months' salary for wrongful and unfair dismissal. We have looked at the circumstances of this case and are satisfied that two (2) months basic salary for wrongful and unfair

dismissal shall suffice and so we do order with interest as we have already herein ordered.

In default of agreement on the awards and interest due, same shall be referred to the Deputy Registrar of the Industrial Relations Court for assessment.

Leave to appeal to the Supreme Court within 30 days from today is granted.

Delivered and signed at Solwezi this the 18th day of March, 2016.

Hon. E.L.Musona
JUDGE

Hon. W.M. Siame
MEMBER

Hon. J. Hasson
MEMBER