

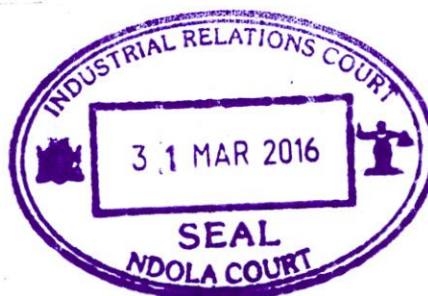
IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

COMP/25/2015

BETWEEN:

PATRICIA MUKUKA

AND



COMPLAINANT

HIPPOCRATIC SERVICES LIMITED (otherwise known as Company Clinic) RESPONDENT

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

For the Complainant : Mr. H. Chinene of Messrs Lumangwe Chambers

For the Respondent : Mrs. J. Ndovi of Messrs Kaite Legal Practitioners

JUDGMENT

Cases referred to:

1. Khalid Mohamed v Attorney General (1982) Z.R. 49 (SC)
2. Zambia National Provident Fund v Yekweniya Chirwa (1986) Z.R. 70

Publications referred to:

Astra Emir, *Selwyn's Law of Employment* 17th Edition (Oxford University Press, 2012)

Patricia Mukuka (hereinafter referred to as "the Complainant") filed a Notice of Complaint against Hippocratic Services Limited (otherwise

known as Company Clinic), (hereinafter referred to as “the Respondent”) on the grounds that the termination of her employment contract by the Respondent on 4 September 2015 was unfair, wrongful, unreasonable and unlawful.

She thus seeks the following relief:-

- (1) An order that the Complainant’s termination of employment by the Respondent was unfair, wrongful , unreasonable and unlawful;
- (2) Payment of damages equivalent to twenty four (24) months salary or payment of damages for any such period as the Court deems appropriate.
- (3) Damages for mental torture and stress.
- (4) Interest on such sums of money as are found to be due and payable.
- (5) Costs.

The Complainant filed an Affidavit in Support of Complaint and gave oral testimony which was basically a repeat of the facts she deposed to in her affidavit.

For convenience’s sake we shall hereinafter refer to the Complainant as “CW”. CW testified that she was initially employed by the Respondent as Secretary but later became an Administrator - Human Resource. Her duties included general secretarial work that is, dealing with in-coming and outgoing correspondence, debt collection for the Respondents, general maintenance duties and many other duties as outlined in exhibit 6 in the Respondent’s Bundle of Documents.

It was CW's testimony that following the retirement of the Administrator due to illness she became the Administrator - Human Resource Officer. She averred that her duties did not change. However, according to CW, she was now reporting to the Chief Medical Officer. She testified that she worked for the Respondent for 25 years, that is, from 14 May, 1990 to 2 September, 2015.

CW narrated in detail the events leading to the termination of her contract. She recalled that on 31 July, 2015 in the afternoon, the driver came to her and wanted to fill a company vehicle with fuel. He reported to her that the account with the Filling Station had run out of money. The driver gave her an invoice and due to the fact that it was getting late and the signatory of the cheque was about to knock off and further it being a weekend, she quickly prepared a cheque and took it to the Chief Medical Officer Dr. Neeru Verma who was seated at the Nurses Bay. She gave the cheque to the Chief Medical Officer who checked the supporting documents and noticed two invoices attached to the cheque for petrol which were drawn two days apart.

According to CW, when the Chief Medical Officer saw the two invoices, she snapped and wanted an explanation on why they had to fill diesel frequently in the generator.

CW averred that she was not given a chance to explain. According to her, Dr. Verma rubbished everything and told her there was nothing she could explain, that she did not think and was useless. Since there were other

members of staff and patients, CW asked Dr. Verma if they could go to her office and discuss the matter further.

CW testified that as they were going to Dr. Verma's office, the latter kept shouting and calling her names. It was CW's testimony that they went to Dr. Verma's office where she continued using the same senseless words such as, that she was useless.

It was CW's evidence that being human she also got upset and that is how a quarrel ensued and they could not compromise. CW testified that Dr. Verma requested her to call Mr. Kaluba, the accountant, which she did.

CW testified that Dr. Verma continued rubbishing her in the presence of the accountant. According to CW she left the office and then Dr. Chisela the Medical Officer called her to his office to find out what the noise was all about. CW said she explained to Dr. Chisela what had happened and left his office. Later the accountant came to her with the same cheque which had since been signed by Dr. Verma.

CW testified further that on a Tuesday a week after the incident, she received a phone call from the Board Vice Chairperson, Mr. Elijah Banda to go and see him at his office with her personal file at 10.00 hours and she did as instructed. They waited for the Board Chairman Mrs. Nancy Kalikeka Phiri who eventually came. Mr. Banda then told her that they received a report about her wanting to hit Dr. Verma. Mr. Banda told her that Dr. Verma had gone to see him in tears and complained to him about her. She was given a chance to explain her version of the event. After giving them her explanation about the incident, both the Chairperson and

her vice told her that she should not have reacted in the manner she did to her boss.

It was CW's testimony that she told them that she is human and has feelings. Further, she told them that by virtue of being a junior in the company did not mean that she should be subjected to what she went through.

It was CW's further evidence that the following day she received a letter of charge and suspension from Dr. Chisela with 48 hours' notice to leave the office and handover her duties to the accountant. The letter was dated 5 August, 2015. After 48 hours she cleared her office and left.

She was later served with a letter dated 4 September, 2015 (exhibit "PM2" in the Affidavit in Support of Complaint). It was CW's evidence that before this there was a letter advising her to appear for a case hearing on 4th September, 2015 and she appeared for the same. According to her, the case hearing lasted a few minutes and the panel comprised of Dr. Chisela, Mr. David Banda and Mrs. Chishimba. CW testified that she was asked by Dr. Chisela whether she had anything to add or subtract from her exculpation letter. She said she responded that everything was in her letter. CW said Dr. Chisela concluded the case hearing and she left.

CW averred that she later received a letter informing her that she was being retired with effect from 1st September, 2015 because of the gravity of the case or seriousness of the charge.

CW averred that she was unfairly treated because she was not given a chance to be heard and the panel did not follow the grievance procedure of the Company Clinic Code of Conduct which stated that first one must be given a verbal warning, then a recorded warning on second breach.

CW further stated that she reached retirement age of 55 years and that she continued working because according to the Company's pension rules an employee at reaching 55 has an option to withdraw from the Fund and collect benefits or continue working up to the age of 70 years. She opted to continue working up to 70 years. She averred that the authorities were aware that she had reached retirement age but allowed her to continue working.

In cross-examination CW conceded that the Chief Medical Officer has the discretion to allow someone to continue working after 55 years. She also admitted that there was no letter of her appointment as Administrator-Human Resources Officer and that the only letter available was the one appointing her as secretary and confidential secretary.

In further cross-examination, CW alluded to the poor working relationship between her and Dr. Verma, which relationship she said was cordial at first.

CW testified further that she did not know at what point she threatened violence. She said that she usually speaks with her hands and did not know why she would be charged with threatening violence.

That marked the close of the Complainant's case.

The Respondent called two witnesses whom we shall hereinafter refer to as "RW1" and "RW2", respectively.

RW1 was the Chief Medical Officer, Dr. Neeru Verma. She testified that on the material day CW approached her with a cheque book for her to sign a cheque which was meant for a filling station where they draw petrol. She said she was told the cheque was urgent because it was for fuel to put in the generator.

According to RW1, when she was going through the invoices of fuel drawn for the generator on three dates, 24, July, 27, July and 29 July, 2015 they were all for K500 each. She said she queried the amount to put in and wanted to know how much fuel was used by the machine and whether it was switched on all day and night.

It was RW1's evidence that she felt it was too much to put K500 worth of diesel every alternate day and asked CW to explain how many hours the generator was being used. She said CW became very upset with her and told her she could not explain this and started yelling that she was not eating the fuel.

RW1 said she told CW to put the cheque on her table in her room and to call Mr. Kaluba, the accountant to explain the expenditure to her. According to RW1, CW was very upset and asked whether she thought Mr. Kaluba was more intelligent than her and could explain the issue better.

RW1 testified that CW and Mr. Kaluba entered her consulting room. She was seated on one side of the table when CW entered with Mr. Kaluba who sat opposite her.

It was RW1's further testimony that CW was standing at the door talking to Mr. Kaluba. She said she told CW to leave the office. She also told her that she would discuss the issue with Mr. Kaluba and that if she was satisfied, she would sign the cheque. CW refused to leave the room and insisted that RW1 discuss with Mr. Kaluba in her presence. RW1 stood up and said she would not sign the cheque until CW left the room.

RW1 averred that CW came running and charging at her saying "I can hit you for that". She said CW came with her elbow very close to her face and wanted to hit her with it. According to RW1, at that point the accountant who was also in the room jumped to his feet and held CW back. He had to use force to drag CW out of the room. As the accountant dragged CW out of the office, she was still trying to get to RW1 saying she was making her angry. CW did not apologise for her behaviour.

RW1 testified that CW came back to the room after ten minutes and suggested they talk about the issue. It was RW1's evidence that she told her she did not want to discuss anything. According to RW1, CW said she was making her angry again and left after that. RW1 averred that she narrated the incident to Mr. Elijah Banda, the Vice Chairman of the Board.

It was RW's testimony that she really felt insulted to go back to the Clinic the following day because everyone was aware of this incident. She testified that she did not accuse CW of stealing fuel but only wanted an explanation.

During cross-examination RW1 conceded that she did not make a written report regarding the incident. She said the Board did not ask her to put her complaint in writing and that if they had she would have put it in writing. She testified that she had nothing to gain by making up a story.

RW1 confirmed that she worked with CW for 18 years as a secretary and during that period their working relationship was normal. She also intimated that it was not the first time she asked CW for an explanation before signing a cheque as she had done it many times. She said she always asks to see invoices before signing cheques and if she is satisfied with the answers, she does not sign the cheque.

RW1 stated in further cross-examination that she did not ask CW for an exculpation but the Board of Directors did. She admitted that she was the Chief Executive Officer of the Company Clinic but she was also an employee. She admitted further that as CEO she would adjudicate over matters involving other employees but in her case the Board told her to stay out of the matter. The Board decided everything. RW stated that it was not necessarily true that CW would have continued in employment if it was not for this issue as the Company would have evaluated her case.

RW1 admitted that she had power to extend the retirement age of an employee and that CW had already gone beyond retirement.

In re-examination RW1 asserted that operations at the clinic did not come to halt before she signed the cheque and the generator did not stop functioning during that period.

RW2 was Mr. Kaluba Mbunda, an accountant at the Respondent Company who testified that when he joined the Company Clinic he noticed that cheque writing was being done by CW and that she was raising most of the cheques and payment vouchers. According to RW2, CW consulted with him on most payments but not all.

RW2 testified that CW sued the Clinic for wrongful termination arising from the fuel issue. CW wanted to have a cheque signed but the figures did not agree so he was called to offer clarification. Unfortunately when he was called, the discussion had escalated.

RW2 testified further that on the material day he was at the reception consulting the receptionist on a different matter. After he had finished he went back to his office. While still at the reception he saw CW talking to RW1. Shortly thereafter RW2 was called by Patricia who told him that he was wanted by RW1. CW told RW2 in Bemba that he, the knowledgeable one, was wanted by RW1.

RW2 went to RW1's office and was followed by CW. RW1 tried to ask RW2 about the fuel but CW started talking as well, trying to justify the whole issue. At that point RW1 said CW should leave. According to RW1, CW left for a few seconds and walked right back in without knocking. She was talking on top of her voice and then charged towards RW1 and lifted her

right forearm saying she could hit RW1. At that point, RW2 stood up, held CW and walked out of the office. CW took some steps towards RW1 but RW2 restrained her and she obliged.

It was RW2's testimony that at that point, RW1 was not in a state to discuss the fuel issue again. Thus he took the papers and fuel cheque with him.

During cross-examination RW2 admitted that he was still employed by the Respondent but denied that being a witness put his job on the line. He said he would have agreed to be CW's witness had she asked him to and he would not have feared for his job. He testified that he was in Court on a professional level.

RW2 conceded in further cross-examination that CW did not hit Dr. Verma (RW1). He said that she charged towards her but did not hit her. He agreed that the atmosphere was charged on both sides.

It was RW2's testimony in further cross-examination that RW1 was upset over the consumption of the generator but she did not vent her anger on the Complainant. He testified that RW1 was equally upset with him over the consumption of fuel by the generator. He conceded that it was in CW's job description to counter-check the consumption of fuel by the generator.

In re-examination RW2 stated that CW raised cheque requisitions for fuel purchases. He also said that when he entered RW1's office, she was alone. CW followed him into the office.

This marked the close of the Respondent's case.

At the close of the case both parties expressed their desire to file written submissions. We have received submissions from both the Complainant's and the Respondent's Counsel. We are indebted to both Counsel for the submissions and will refer to them if need be.

The undisputed facts as we see them are as follows:-

1. The Complainant was employed by the Respondent as secretary on 14 May, 1990 and rose to the position of confidential secretary on 10 April, 1992.
2. At the time she was deemed to have retired from the Company on 4 September, 2015 she was working as secretary to the Chief Medical Officer.
3. On 5 August, 2015 the Complainant was charged with the offence of insubordination and threatening violence contrary to clauses 8.1 and 8.2 of the Company Clinic Code and Handbook and was suspended from work pending a case hearing.
4. A case hearing was held and on 4 September, 2015 the Complainant was informed that the charges of insubordination and threatening violence had been proved. However, in consideration of her long service and the fact that she had reached and exceeded the retirement age, the Respondent resolved to deem the Complainant as retired from the service of the Company Clinic with effect from 1 September, 2015

We shall begin our consideration of the case before us by examining the grounds of complaint as laid out in the Notice of Complainant.

The Complainant alleges that the termination of her employment contract by the Respondent was unfair, wrongful, unreasonable and unlawful.

Having considered the evidence on record, we find that the issues to be resolved by this Court are:-

- (1) Whether or not the termination of the Complainant's employment was unfair, wrongful, unreasonable and unlawful.
- (2) Whether or not the Complainant is entitled to the relief she is claiming.

It is trite law that he who alleges must prove. In this regard the case of **Khalid Mohamed v Attorney General** (1) cited by the Respondent supports this proposition. In this case the Supreme Court stated that a plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment.

Similarly the Complainant in the case before us must prove that on a balance of probabilities her termination was unfair, wrongful, unreasonable and unlawful in order for her to be entitled to the relief she seeks in her Notice of Complainant.

Claim for unfair dismissal

We concur with the submission by Counsel for the Respondent that unfair dismissal is a creature of statute and that since the aim of the provision is to provide further protection to the employee by promoting fair labour practices, it requires employers to terminate contracts on specified grounds. It is also correct that where a party alleges unfair dismissal, that

party is asking the Court to examine the merits of the dismissal and make a decision that the reasons are unjustified.

Since the burden of proof lies on the Complainant, she must prove that there was no justifiable reason in terminating her employment.

The evidence before this Court shows that the Complainant was charged with insubordination and threatening violence contrary to clauses 8.1 and 8.2 of the Company Clinic Code and Handbook following the events of 31 July, 2015.

It is not in dispute that an altercation took place between the Complainant and the Chief Medical Officer (RW1) following the latter's refusal to sign a cheque for fuel for the generator which was being used at the Clinic. The Complainant did allude to that fact in her examination in chief. However, she testified that she got upset due to RW1's abusive language towards her.

On the other hand, the evidence of Dr. Verma (RW1) which showed that the Complainant did threaten violence against her and was guilty of insubordination by refusing to leave the office when she was ordered to do so by her superior was corroborated by the evidence of RW2.

Both witnesses were unshaken under cross-examination. For these reasons we find and hold that the charging and indeed deeming of the Complainant to have been retired were justified.

Claim for wrongful dismissal

Unlike unfair dismissal which is concerned with the merits of the dismissal, wrongful dismissal is concerned with the form. The concept of wrongful dismissal is thus essentially procedural. As the learned author of Selwyn's Law of Employment, 17th Edition, rightly stated at page 429 one way in which wrongful dismissal may occur is when an employer terminates the employment of an employee without carrying out the disciplinary procedure which was incorporated into the employee's contract.

Counsel for the complainant submitted that clause 8.4 dealing with Disciplinary Procedures in the Company Clinic Employee Manual provides that before an employee is warned or dismissed, the Chief Medical Officer or Supervisor dealing with the matter shall investigate the facts as fully as is practicable and as soon as possible, if necessary, in consultation.

Counsel submitted further that we have a scenario where one employee ran to the Board of Directors who took her story as gospel truth after shedding crocodile tears and the other employee was quickly admonished and threatened with dismissal before the episode of events and matter was fully investigated to establish the facts. He submitted that the procedure was not followed as outlined in clause 8.4. According to Counsel, this was a case of "she said this" and the other one says "she said this" with no corroborative evidence and therefore, a case of threatening violence and insubordination cannot be established.

Contrary to the submission by Counsel for the Complainant, we are of the view that the evidence of RW1 was corroborated by the accountant, RW2 who witnessed the whole episode and was thus able to corroborate RW1's evidence.

We are satisfied on the evidence before us that the procedure relating to disciplinary proceedings was followed in the case in casu. The Complainant was charged and given the opportunity to exculpate herself. She was heard during a disciplinary hearing where she was even asked at the end of the hearing as to whether she had anything to add to or subtract from her evidence to which she answered in the negative.

Further, we are of the opinion that even if the procedure had not been followed, which is not the position we take, the Supreme Court ably guided in the case of **Zambia National Provident Fund v Yekweniya Mbiniwa Chirwa (2)** that:

Where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with procedure in the contract and such an employee has no claim on that ground for wrongful dismissal or declaration that the dismissal is a nullity.

In view of the foregoing, we find and hold that the Complainant has failed to discharge her burden of proving on a balance of probabilities that she was wrongfully dismissed.

Findings and Holding

All in all we find and hold that the Complainant's employment was neither unfairly, wrongfully, unreasonably or unlawfully terminated and we


accordingly dismiss all her claims. We also take cognizance of the fact that whereas the Respondent could have summarily dismissed the Complainant for insubordination and threatening violence, it decided to deem the Complainant to have retired from the service of the Company Clinic. In doing so, the Respondent considered the Complainant's long service with the Company and the fact that she had already reached retirement age. By deeming the Complainant as retired instead of summarily dismissing her, she was able to receive all her pension benefits in accordance with existing Company Policy and Pension Rules.

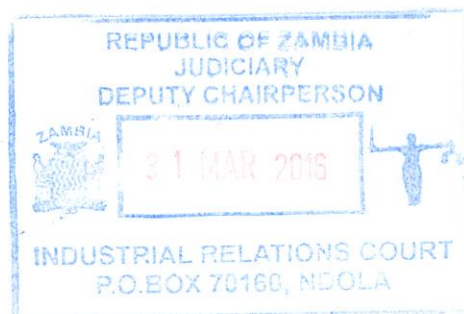
We make no order for costs.


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

Delivered at Ndola...st31 day of **March, 2016.**


Judge W.S. Mwenda (Dr)
DEPUTY CHAIRPERSON


J.M. Bwalya
MEMBER




G.M. Samusungwa
MEMBER