

IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

COMP/49/2015

BETWEEN:

CHANSA NG'ONGA

AND

ALFRED H. KNIGHT (ZAMBIA) LIMITED



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

For the Complainant: Mr. K. Msoni of Messrs. J.B. Sakala & Company

For the Respondent: Mr. K. Bota of Messrs. William Nyirenda & Company

JUDGMENT

Cases referred to:

1. Konkola Copper Mines Plc v Greenwell Mulambia SCZ Appeal No. 053/2013
2. Priscilla Ngenda Simvula Kalisilira v Zambia National Commercial Bank Plc SCZ Judgment No. 8/2015
3. Zambia China Mulungushi Textiles Limited (Joint Venture) v Mwami (2004) Z.R. 244
4. Ridge v Baldwin (1964) AC 40
5. Zambia Airways Corporation Limited v Gershom B.B. Mubanga (1990 - 1992) Z.R.149

Works referred to:

De Smith and Brazier, Constitutional and Administrative Law 6th Edition, (Penguin Books) 1989

This is a complaint presented by Chansa Ng'onga (hereinafter referred to as "the Complainant") on 16 July, 2015 on the ground that his dismissal from employment by the Respondent on 20 May, 2015, on grounds of sub-standard performance was malicious, wrongful and unfair.

Consequently, the Complainant seeks the following relief:

- (i) An order and declaration that the Respondent's decision to dismiss the Complainant from employment was wrongful, unfair and unlawful;
- (ii) An order and declaration that the Complainant be paid damages for wrongful termination of employment;
- (iii) Interest on (ii) above from the date of dismissal to date of full payments;
- (iv) Costs of and incidental to the proceedings: and
- (v) Any other relief the Court may deem fit.

Alfred H. Knight (Zambia) Limited (hereinafter referred to as "the Respondent") on its part filed an Answer wherein it averred that the termination of the Complainant's employment was neither malicious, wrongful nor unfair but that the Respondent was entitled to terminate the Complainant's employment on grounds clearly outlined to him during the disciplinary process. That the Complainant was verily charged and given a hearing prior to his dismissal. That in the premises, the

Complainant is not entitled to the relief he seeks in his complaint and the same should be dismissed with costs.

In support of his complaint, the Complainant filed an Affidavit wherein he deposed that he was employed as Sectional Leader in the Lubricants Testing Department of the Respondent Company on 4 April, 2009 and on 5 October, 2012 was promoted to the position of Lubricant Testing Manager.

The Complainant deposed further that on 20 May, 2015 he was dismissed from employment on grounds of alleged substandard performance after he failed to report for work for five days. His dismissal was preceded by a letter of suspension dated 8 May, 2015.

It was the Complainant's further averment that although he was called for a disciplinary hearing, the Respondent did not raise any formal charge in writing as required by clause 4 (i) (3) of the Disciplinary Rules and Procedures of the Respondent. According to the Complainant, the Respondent's decision to dismiss him came to him with a sense of shock because the reasons for termination of his employment were at variance with the reason advanced for his suspension.

The Complainant averred that the first issue raised in his dismissal letter was that of perpetual absenteeism, an offence for which he was not charged prior to termination of his employment. The second issue was failing to assist in marketing, an allegation which the Complainant denied as he had not been disciplined for such offence prior to his dismissal and had in fact been commended by the Respondent for his good work in

marketing as per exhibit "CN16 (d)" in the Certificate of Exhibits attached to his Affidavit in Support of Notice of Complaint. The third issue was failing to follow management instructions - an allegation which the Complainant claimed to be a fabrication which he had addressed after he was given a warning for the same in May, 2013.

The fourth issue was the alleged overall poor performance against company expectations of managers, which offence the Complainant claims he was not charged for prior to his dismissal. The Complainant averred that his dismissal was based on fabricated reasons since his suspension was based purely on the allegation that he had absconded from work for five days without authorisation.

The Complainant deposed that his work was not substandard as his performance was exceptional and as proof he was promoted to be head of department barely two years after being employed and a few months later he was promoted to Lubricants Testing Manager.

The Complainant averred further that his salary was regularly adjusted in 2011/2012 due to the satisfactory service he provided to the Respondent and was awarded yearly bonuses while in employment due to his good performance. The Complainant averred that on several occasions the Respondent's Chief Executive Officer expressed satisfaction and commended him for his excellent performance as could be seen from the e-mails exhibited as "CN 26" to "CN 37" in his affidavit.

The deponent further averred that contrary to the Complainant's deposition, he was verily charged in writing as per exhibit "SM1" in her affidavit, which is a copy of the suspension letter where the charge against the Complainant is clearly discernible as being that of absenteeism. In addition, the Complainant did not at all material times deny having been absent for five days without authorisation. The deponent further averred that the reasons given in the letter of dismissal were valid as the Complainant verily had a poor record as evidenced by exhibits "SM3" to "SM5" of the affidavit, being email chains and record of non-performance during June, 2015, respectively.

It was the deponent's further averment that the letter of dismissal summed up the circumstances which aggravated the Complainant's absenteeism. The Complainant proved not to be up to the standard required of a senior person in the company. His performance was not exceptional as he was a problem employee notwithstanding his position in the company. Further, his general conduct gave rise to a series of verbal and written warnings against him including the warnings of 16 May, 2013 and 9 October, 2014.

At the hearing, the Complainant testified on oath. We shall hereinafter refer to him as "CW". Most of the evidence given by CW is already in the Affidavit in Support of Notice of Complainant and shall not be repeated here. However, CW testified that on 29 April, 2015 he wanted leave to go to South Africa to attend to some issues pertaining to his first born son (a different child from the one with autism). Since the Chief Executive Officer (CEO) by the name of Noel Holland was not in office, he went to see the Human Resources Manager, Mrs. Mainda.

Mr. Holland was in the office the following day but could not see CW who had gone to inform him about the leave. He left for field work and had no opportunity to see Mr. Holland again. It was CW's testimony that Friday 1 May, 2015 was a holiday and so no one worked. CW received calls from his wife in South Africa to the effect that the autistic child was ill and that he should travel to South Africa. He travelled to South Africa by road and arrived there on Tuesday 5 May, 2015.

It was CW's testimony that he communicated with the Human Resources Department on Tuesday to explain what happened. On Wednesday, the Human Resources Manager contacted him and told him that he was suspended for two weeks for being absent from work. He asked the Manager to send the suspension letter to his e-mail and she was agreeable to the request but to CW's surprise, he did not receive the suspension letter and upon enquiring from her, he was told that he needed to travel back to Zambia to get the suspension letter.

Upon his return to Zambia he was handed the letter of suspension on 8 May, 2015. CW identified the letter of suspension as exhibit "CN8" in his Affidavit in Support of Complaint. The letter clearly stated that he was suspended for being absent from work for five days. A disciplinary hearing was held after which his services were summarily terminated. According to CW, an appeal was denied because he was a senior employee in the company and in this regard drew the attention of the Court to the last paragraph of the dismissal letter, exhibit "CN7" where

Mr. Holland, the CEO stated that the verdict was final because of CW's position in the company.

It was CW's further testimony that when he read the letter of dismissal, he found that there were other reasons cited for the dismissal as follows:

1. *Perpetual absenteeism - you are seldom at work and often leave site without communication with your manager leading to poor management of the lab.*
2. *Business Marketing - you do not assist as expected of you resulting in poor performance of the lab and business stagnation.*
3. *Failure to follow management instructions - there has been poor communication between us as you have had to be reminded to send you BSC and other reports.*
4. *Overall - Poor performance against company expectation of managers.*

CW testified that prior to the dismissal he never received any complaint that he was seldom at work and was not charged for any of the four alleged offences.

Regarding the accusation of not helping with business marketing, CW testified that this allegation was contrary to the documents filed into Court where the CEO was praising him for doing a good job in marketing.

CW's response to the allegation of failure to follow management instructions due to poor communication and having to be reminded to submit the Balanced Score Card (BSC) was that he was charged with failure to submit the BSC in 2013 and according to the Company's Disciplinary Code the said charge expired a year later. After that, he did not receive any other charge of failing to submit a BSC.

According to CW, in exhibit "CN10" which contained penalties for breaches of discipline, the first offence of failing to obey lawful instructions attracted a penalty of written warning; the second offence attracted a final warning and the penalty for the third offence is dismissal.

CW referred the Court to exhibit "CN11", where under clause 8 of the Disciplinary Rules dealing with 'Duration of Offence' it provided that "All warnings will be held with the employees personnel records for a period of 1 (one) year. Thereafter, such warning will be destroyed and no further reference to the warning may be made". According to CW, the warning in respect of the BSC expired in 2014 in accordance with clause 8 of the Disciplinary Rules and Procedures.

It was CW's evidence that the allegation of poor performance against company expectation of managers was contrary to the externally conducted quality audit documents he filed in Court which clearly showed that there was a significant improvement regarding the quality of operations of the department under his supervision. He testified further, that he had exhibited documents which showed that he was receiving performance - based bonuses. For quality audits, CW referred the Court to exhibits "CN38" to "CN40". According to the documents, in September, 2010 there were nine deficiencies or non-conformances compared to seven deficiencies discovered in 2012.

According to CW, exhibit "CN43" showed that his department, Lubricant Testing, had one non-conformance compared to others which had as many as twenty five. As far as CW was concerned the allegations of poor performance against him were mere allegations devoid of evidence.

CW testified that exhibits "CN19" to "CN 25" showed salary adjustments which were made due to his contribution to the company and the bonuses he was awarded over a period of time.

It was CW's contention that his dismissal was not in accordance with the Disciplinary Code because the person who sat as case administrator was his boss, the CEO, Noel Holland and when he went for the case hearing, he went to hear the case of absenteeism. He only came to learn about the other accusations through the letter of dismissal which also said the verdict was final and therefore he could not appeal. According to CW, this was contrary to the Disciplinary Code which in part 3 (e) dealing with principles stipulates that at every stage the employee has the right of appeal.

CW testified that his dismissal was unfair as the company had no regard to the provisions of the Disciplinary Code which provided that for the offence of absenteeism of less than ten days, the penalty is written warning with suspension from work for five days without pay. For the second offence the penalty is final warning with dismissal for the third offence. According to CW, the Company never complained about absenteeism in relation to him.

In cross-examination CW, admitted that he had a senior and fairly responsible position in the company and had about eighty employees under his supervision and other staff in the company who looked to him for leadership, proper conduct and discipline. He denied going away for five days without leave. He said he told his boss verbally that he would go on leave.

In further cross-examination, CW conceded that he had not filled in leave forms and had committed the offence of absenteeism. CW stated that it was his understanding that the letter of suspension was for the offence of absenteeism. The letter also informed him about a hearing for the offence of absenteeism which was to be held at a later date.

CW admitted that he was absent from Monday 4 May, 2015 but said he did not plan to be absent and that if his child had not been sick he would have reported for work on Monday to formalise his leave.

CW testified in further cross-examination that the CEO who was his supervisor is the one who chaired the disciplinary hearing and dismissed him. He said he did not appeal against the dismissal because he was not given a chance to do that.

CW reiterated his evidence given in examination-in-chief that the last paragraph in his letter of dismissal had indicated that the verdict was final and that even though the Application for Appeal Form, exhibited as "CN16" was available, it was on condition that you were allowed to appeal, which was not the case with him.

CW admitted in further cross-examination that if everything was done fairly and reasonably in the way the company executed the provisions of the Disciplinary Code, it could use its discretion not to strictly apply the terms of the disciplinary procedure as per paragraph 7 (b) of the Code.

In re-examination, CW stated that no disciplinary warning was valid at the time he was dismissed and that the letter of dismissal was very clear that the verdict was final. Further, that the dismissal was with immediate effect and final. He also reiterated that even if the appeal form was available, the chance to appeal was not there for him.

CW also stated that the purpose for the leave he was seeking was the family problem he had in South Africa which had to do with school for his other son and not sickness. He said he also made it clear that he wanted only three days' leave because he wanted to be in in South Africa to sign some forms for school.

CW stated in further re-examination that at the time he was asking to go to South Africa there was no assignment given to him and from the evidence he had provided to the Court, it was clear that as an employee he was performing to the expectation of the company.

This marked the end of re-examination and the close of the Complainant's case.

The Respondent's sole witness was Shirley Mainda, the Human Resources Manager (hereinafter referred to as "RW").

It was RW's testimony that the Complainant was heard on 20 May, 2015 and dismissed from employment for the reasons given in the dismissal letter. It was her testimony that the Complainant was charged as could be seen from the letter of suspension. He was charged for absenteeism for five days which he acknowledged at all times.

According to RW, the Complainant went to her office twice on 29 April, 2015 and it was on the second occasion that he asked her when the CEO would be in office as he wanted to take leave the following week. RW identified exhibit "SM7" in the Affidavit in Support of Respondent's Answer as a warning letter written by the CEO to the Complainant on 9 October, 2014 warning him against neglect and misuse of company vehicles.

It was RW's evidence that the Complainant had a lot of problems in his conduct according to his boss, so when the latest offence of absenteeism happened, the letter was still in force as per the Disciplinary Code.

RW testified that the Complainant was a senior manager in the Respondent Company and when he went away from work without permission, he rendered himself incapable of doing the work for which he was employed because when he left without permission, no one was appointed to take over his work. According to RW, what attracted the attention of management to the complainant's absence was a senior management meeting which was held every Monday where managers gave their reports about how far they had gone in collecting debts from clients. Ordinarily if the Complainant had permission to go on leave, his Technical Advisor would have represented him in the meeting and given

a report on his behalf, but when asked about the Complainant, the Technical Advisor did not know where in was.

RW testified that being a senior manager in the Company, the Complainant was expected to perform above mediocrity. According to RW, all the charges against the Complainant were aggravated by his perpetual absenteeism. The Complainant was promoted with the aim of developing him into a good manager. Thus despite making a lot of mistakes, the CEO's aim was not to put the Complainant down but to affirm him in order to develop him into a good manager, hence the occasional praise.

It was RW's testimony that as per the provisions of paragraph 7 (b) of the Disciplinary Code, each case is dealt with on its own merits. Therefore, the Respondent was entitled to use its discretion and exceed the penalties in the Code. In this case the dismissal of the Complainant for absenteeism was within the Company's rights.

In cross-examination, RW said that a verbal charge was given to the Complainant because he was not around to be given a written charge. When referred to exhibit "CN 13" which was a Complaint Form, RW said that in normal circumstances it formed part of the Disciplinary Code. She also confirmed that under normal circumstances exhibit "CN 14" - a Statement Form, "CN15" - Disciplinary Record Card and "CN16" - Application for Appeal formed part of the Disciplinary Code. She admitted that they were in fact part of the Disciplinary Code.

RW further admitted that the Respondent did not raise a complaint from but did give the Complainant an opportunity to give a statement albeit not in writing as required by the Disciplinary Code. RW admitted that the Company did not give the Complainant an opportunity to appeal. She however, denied breaching the Disciplinary Code.

RW testified under further cross-examination that the circumstances did not allow for the handing over of a complaint form to the Complainant as he was given the letter of suspension due to his absence from the country. RW said that a verbal complaint is not invalid. She admitted that the Complainant was verbally charged with the offence of absenteeism followed by a letter of suspension. She admitted that the Complainant was dismissed for absenteeism.

When referred to exhibit "CN7", RW stated that the dismissal letter did not indicate the number of days the Complainant was absent. She reiterated that he was dismissed for absenteeism aggravated by the other offences in the letter. She denied the allegation that the Complainant was dismissed for substandard performance.

Although RW admitted that there was nothing filed to show the Complainant's perpetual absenteeism. She, however, stated that he was given verbal warnings by the CEO on numerous occasions for leaving the site without permission.

RW admitted that there was no Disciplinary Record Card before the Court to show the perpetual absenteeism warnings given to the Complainant.

She did not think it was unfair to dismiss the Complainant for absenteeism in the absence of any record.

When asked by Counsel for the Complainant, RW confirmed that the Disciplinary Code did apply to the Complainant and that according to exhibit "CN10" which dealt with penalties, the penalty for the offence of absenteeism from work without permission for less than ten days was written warning with five days suspension with no pay for the first offence; final warning for the second offence and dismissal for the third offence. She admitted that the Complainant was not given any final warning letter.

In further cross-examination, RW said that the Complainant was warned for not assisting in business marketing. She also said that the Complainant was written to once but was verbally warned about failure to follow management instructions. However, the record of how many times he committed the offence was not filed in Court.

RW testified that the SMART objectives which the Complainant filed showed poor performance on his part. She said that the company had the discretion to disregard the punishment prescribed in the Disciplinary Code because of the seniority of the Complainant.

It was her further evidence that the Disciplinary Code allows the Company to act outside the prescribed penalties depending on the circumstances of the case.

In further cross-examination, RW stated that there was nothing before the Court to show the audit period for the non-conformances.

She admitted that the issue of misuse of company vehicles was not in the letter of dismissal.

In re-examination, RW reiterated her earlier evidence that the Complainant was dismissed for absenteeism. When referred to exhibit "SM3" she identified it as an e-mail where the Complainant's boss had said he noted that the Complainant was seldom at work.

This marked the end of the re-examination of RW and the close of the Respondent's case.

We have considered the evidence on record and the written submissions of Counsel and in our view the issues for resolution by this Court are as follows:

- (a) Whether or not the Complainant's employment was terminated in accordance with the Respondent's Disciplinary Rules and Procedures.
- (b) Whether or not the Complainant was given an opportunity to defend himself on the other charges other than absenteeism, contained in the dismissal letter.

The answers to these two questions are critical as they will assist us in determining whether or not the Complainant is justified in his claim of wrongful dismissal.

It is not in dispute that the Complainant was absent for five consecutive days without due authorisation. However, Counsel for the Complainant submits that whereas the letter of suspension merely raised one issue of being absent from work for five days without authorisation, the letter of dismissal brought new allegations against the Complainant. Further, Counsel submitted that the Complainant attended a disciplinary hearing in order to be heard on the charge of absenteeism as communicated to him. This Court has taken cognisance of the said facts.

Counsel for the Respondent has requested the Court to determine whether or not accumulation of wrong doing on the part of the Complainant, inclusive of the period of absenteeism warranted the dismissal of the Complainant and whether or not the manner in which the Complainant was dismissed was lawful.

According to Counsel the Respondent has adduced documentary evidence showing that the Complainant was issued with letters of warning relating to his failure to submit monthly reports as instructed and his neglect of company property prior to his absenteeism.

Counsel for the Complainant has drawn the Court's attention to exhibit "CN10" in the Complainant's Affidavit in Support of Complaint which outlines the types of offences and applicable penalties. The exhibit shows that the penalty for the offence of being absent from work without permission for less than 10 days which the Complainant was charged with, suspended and faced disciplinary proceedings for, is written warning and five days suspension with no pay for the first offence; final

warning for the second offence and outright dismissal for the third offence.

We agree with Counsel for the Complainant that as regards the allegation of perpetual absenteeism in the letter of dismissal, what came out during the hearing is that there was not even a single time when the Complainant was charged with the said offence. It is clear that for the offence of absenteeism the Respondent did not follow its own Disciplinary Rules and Procedures.

We wish to state here that we do not agree with RW's contention under cross-examination that the Respondent had the discretion to disregard the punishment prescribed by the Disciplinary Code because of the seniority of the Complainant.

Counsel for the Complainant has referred the Court to a Supreme Court judgment in the case of **Konkola Copper Mines Plc. v Greenwell Mulambia (1)** where the Court referred to the case of **Priscilla Ngenda Simvula Kalisilira v Zambia National Commercial Bank (2)** as follows:

In the case of Priscilla Ngenda Simvula Kalisilira and Zambia National Commercial Bank Plc in which the appellant questioned her dismissal from the Respondent Company, we found that the appellant was guilty of desertion and accordingly substituted the penalty of a dismissal with that of a discharge as provided for in the Respondent's Disciplinary Code of Conduct.

In the Kalisilira case cited above the Supreme Court gave guidance that the penalty for an offence should be as provided for in the Respondent's Disciplinary Code of Conduct. In the case in casu, the Disciplinary Rules

and Procedures did not provide for dismissal on first breach for the offence of absenteeism. The appropriate sanction should have been a written warning with five days suspension with no pay.

Therefore, in accordance with the Supreme Court's decision cited above, we are substituting the penalty of dismissal with that of a written warning with five days suspension with no pay.

At this juncture, we turn to the offences outlined in the letter of dismissal marked as exhibit "CN7" in the Complainant's Affidavit in Support of Complaint.

The Respondent has not availed any proof before this Court that the Complainant was charged with the offences that were brought to his attention in the letter of dismissal. It would therefore be a miscarriage of justice for the Complainant to be dismissed for offences for which he was not given an opportunity to be heard.

This is contrary to the rules of natural justice. De Smith, the learned author of Constitutional and Administrative Law 6th edition has stated at page 557 that:

The rules of natural justice are minimum standards of fair decision making imposed by common law on persons or bodies that are under a duty to act judicially. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right or interest of individuals where a reasonable citizen would have a legitimate expectation that the decision making process would be subject to some rules of fair procedure... All that is fundamentally demanded of the decision maker is that his decision in its own context be made with due

regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case.

In the case of **Zambia China Mulungushi Textiles Limited (Joint Venture) v Mwami (3)**, which was an appeal against the decision of the High Court in favour of the respondent in which the High Court found that the Respondent was wrongfully demoted by the appellant and ordered that he be reinstated to his former position, the Supreme Court ruled inter alia that:

Tenets of good decision making import fairness in the way decisions are arrived at. It is certainly desirable that an employee who will be affected by an adverse decision is given an opportunity to be heard.

Similarly in **Ridge v Baldwin (4)** Lord Reid in discussing the principle of natural justice in a case of dismissal from office observed that there was:

An unbroken line of authority to the effect that an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation.

In view of the evidence before the Court and taking into consideration the cases cited herein, it is our view that the Complainant's dismissal from employment was wrongful as it was done in violation of the Respondent's Disciplinary Rules and Procedures and was also against the tenets of natural justice.

Therefore, judgment is entered in favour of the Complainant. Having substituted the penalty of dismissal with that of a written warning with five days suspension with no pay, we shall not, however, make an order

of reinstatement as that has not been pleaded by the Complainant and authorities abound to the effect that orders of reinstatement are made sparingly and only in exceptional circumstances.

In the case of **Zambia Airways Corporation Limited v Gershom B.B. Mubanga (5)**, the Supreme Court held that for the Court to order that a Complainant be paid full salary and arrears from the date of the purported dismissal, there must be evidence called to show that the respondent had actually suffered damages to the extent of his former full salary. The Court further held that it was the duty of the respondent to mitigate his loss following the dismissal. In the absence of evidence to justify the payment of a full salary and arrears, it was held that the Court must do the best it can to award the respondent fair recompense.

In the case of **Konkola Copper Mines Plc v Greenwell Mulambia (1)**, cited earlier in this judgment, the Supreme Court noted that the respondent did not adduce any evidence to justify an award equivalent to the full extent of his salary. The Court observed that the record was also silent on whether or not he found alternative employment after termination. It went on to substitute the order of retirement with full benefits with an order for damages equivalent to three months' salary and perquisites.

In the case in casu, no evidence was adduced by the Complainant to show that he suffered damages to the extent of his former full salary. He has also not adduced any evidence to show that he has mitigated his loss by looking for alternative employment. For these reasons, we are of the view that fair compensation for Complainant would be damages

equivalent to three months' salary and perquisites. We award him accordingly.

We also award the Complainant interest at the Bank of Zambia lending rate up to the date of payment.


Costs are awarded to the Complainant to be taxed in default of agreement.

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

Delivered at Ndola this **9th** day of **May, 2016.**


Judge (Dr.) W.S. Mwenda
DEPUTY CHAIRPERSON


J.M. Bwalya
MEMBER


G.M. Samusungwa
MEMBER