

IN THE INDUSTRIAL RELATIONS COURT
HOLDEN AT NDOLA

COMP/106/2015

BETWEEN:

ELISHA KUNDA

AND

G.S.TRUCKING LIMITED



COMPLAINANT

RESPONDENT

Before:	Hon. Judge Derrick Mulenga	-	Deputy Chairman
	Hon. J.M. Bwalya	-	Member
	Hon. G.M. Samusungwa	-	Member

For the Complainant : Mr. K. Tembo, Legal Aid Counsel, Legal Aid Board

For the Respondent : In Person

JUDGMENT

Cases referred to:

- 1. Masauso Winston Zulu v Avondale Housing Project Limited
(1982) Z R 172.**
- 2. Philip Mhango v Dorothy Ngulube & Others.**
- 3. Sutton and Shannon on Contract, 17th Edition, published by
Butterworks (London) page 321.**

The Complainant herein filed a Notice of Complaint against the Respondent on 3rd December, 2015 seeking the following relief:

- (a) Underpayment of trip bonuses and salaries;
- (b) Gratuity for the period 1st October, 2014 to 30th September, 2015;
- (c) Damages for wrongful dismissal and Napsa Contributions;
- (d) Leave days accrued, all allowances and expected income;
- (e) One month salary in lieu of Notice;
- (f) Dues for six (6) years from July 2007 to September, 2014;
- (g) Interest and costs.

The Complainant deposed through his affidavit in support of the Notice of Complaint that he was employed as a Truck Driver by the Respondent, on oral contract of employment from July, 2007 to September, 2014. The Complainant entered a fixed term contract of employment with the Respondent for a year from October to September, 2015.

The Complainant also deposed that since there were no conditions of service in place as he served the Respondent on verbal assurances, he considered himself to have been employed on permanent and pensionable basis. However, the Complainant also says that he signed a one year contract of employment with the Respondent.

The Complainant further deposed that at the expiry of the one year contract of employment with the Respondent, he worked for another two (2) months before the Respondent terminated his services.

The Respondent filed its Answer and affidavit in support on 21st December, 2015. The Respondent by its Answer aforesaid admitted having employed the Complainant from 2007 as a Truck Driver. However, it denied the Complainant's complaint and contended that it terminated the Complainant's contract of employment based on termination clause 18 in the contract.

The Respondent also denies that the Complainant was not paid his dues and contends that his complaint is baseless. As regards NAPSA contributions the Respondent says that the same are up to date.

Respondent deposed through an affidavit in support of the Answer sworn by one Gahdean Ahmed that the Complainant was employed by the Respondent as a Truck Driver on a verbal contract and all terms and conditions of employment were mutually agreed upon based on far above the statutory minimum wage.

That the Complainant was based at Mpika and was transporting fuel from there to Kasama and was paid K200.00 as trip allowance, however, the Complainant without the consent of the Respondent started drawing K500.00 per trip at Kasama thereby over paying himself.

The Respondent deposed that as a result of the Complainant's failure to comply with the rules and conditions of service the Respondent suffered loss.

The Respondent denies that the Complainant was dismissed from employment but that it only refused to renew the contract of employment, also that the Complainant had prior to the expiry of the contract of employment started reporting late for work and knocking off at any time he desired.

The Respondent also contended that the Complainant's dues were properly computed and fully paid to him less what he owed the Company.

The Complainant was the only witness for his case. In his viva voce testimony he told the Court that he was employed by the Respondent from July 2007 to September, 2014 as a Truck Driver.

The Complainant told the Court that from September 2014 to September, 2015 he was on a year contract with the Respondent, however, at the expiry of the said contract he continued working up to November 2015 when he received a letter from the Respondent of non-renewal of the contract of employment.

The Complainant averred that he was not paid for the six year service he rendered to the Respondent one month in lieu of Notice, for accrued leave days and gratuity.

In cross-examination, the Complainant told the Court that he was entitled to trip allowance and ration of K400.00 and K500.00 respectively. Further that he was entitled to K1.00 per kilometre as trip allowance.

The Complainant told the Court further that apart from the trip allowance he was also entitled to a salary of K1, 500.00 per month, Housing allowance at the rate of 30 per cent of the salary, he also received Transport and Lunch allowances, this was during the one year fixed term contract of employment.

The Complainant also stated that when he operated from Mpika to Kasama he received trip allowance of K200.00. In respect of the amount of K500.00 which the Respondent claimed the Complainant paid himself without its consent, he averred that the money was paid to him with authority of the Manager at Kasama. The Complainant denied having received K27, 832.00.

The Complainant was referred to exhibit 'GA 5' and 'GA 6', but insisted that he was never paid the amount of K27, 832.22. The Complainant also denied the signature appearing in as being his.

The Complainant admitted when it was put to him that from Ndola to Kasama he used to receive K500.00 as trip allowance for food and at the end of the month he was paid K400.00 therefore, the total amount of trip allowance was K900.00.

When it was put to the Complainant by the Respondent in cross-examination that he had obtained a loan on 15th August, 2010 and the same was reflected as a deduction on exhibit '**GA6**' in the Respondent's affidavit, Complainant said that he did not remember and that if there was his signature then he obtained the said loan.

The Respondent called four witnesses. The first Respondent witness was Gahdean Ahmed, the Director in the Respondent Company.

According to the Respondent witness one hereinafter referred to as RW1. Complainant employed from November, 2007 to 30th September, 2013 on the verbal contract, therefore, he worked as a Truck Driver for six years and ten months. The Complainant's salary was K2, 500.00 plus transport allowance of K100.00, Housing allowance of K750.00 and Lunch allowance of K120.00. He was also entitled to trip allowance.

In September, 2014 the Respondent introduced a fixed term contract of employment which was to run for a year and the same expired in October, 2015. However, the Complainant continued to work up to November, 2015 when the Respondent decided not to renew the contract of employment.

RW1 relied on his affidavit in support of the Respondent's Answer and documentary evidence filed into Court.

RW1 contended that the Complainant was not owed any monies by the Respondent as the same had been paid in full. He explained that prior to the termination of the contract of employment the Complainant had obtained some loans from the Respondent Company.

According to RW1, the Complainant had obtained loans from the Respondent. In January, 2015 the Complainant was given a car loan of K22, 500.00, he also got an advance of K3, 000.00 and he was paid K2, 322.22. The total amount owed to the Respondent by the Complainant at termination was K27, 832.22.

At the non-renewal of the contract of employment the Complainant's benefits were calculated as follows:-

1. Severance Pay = Basic Salary x the number of years of service
K2, 500 (basic salary) x 2 x 6 (years)
= K30, 000:00
2. Leave Pay = $\frac{10 \text{ (months)} \times 2 \times \text{K, 500}}{22.5}$
= K2, 222: 22
3. Gross pay = K32, 222.22

The loan which the Complainant owed the Respondent was deducted from the amount of K30, 222.22 as can be seen in exhibits 'GA 5' and 'GA 6' in the affidavit in opposition.

As regards the Complainant's under payment of trip bonuses and salaries RW1 maintained that the Complainant was paid beyond the Statutory Minimum Wage.

That the Complainant was paid a basic salary of K2,500.00 in the first contract, however the same was reduced in the second fixed term contract where he was paid K1,500.00 basic pay, K450.00 Housing allowance, K102.00 Transport allowance and K120.00 as Lunch allowance.

Further that the Complainant was being paid trip allowance of K400.00 for the trip from Mpika to Kasama and K900.00 for the trip from Ndola to Kasama.

Prominently, what came out of the cross-examination of RW1 by Complainant's advocate is that the signature which appeared on the monies paid to the Complainant was being disputed.

The other three witnesses called by the Respondent were therefore, to show that the Complainant obtained the loans from the Respondent and that he was paid all his salaries, allowance/bonuses and terminal benefits.

RW2 one Sandra Osman Ahmed told the Court that it was her who made a payment of the loan of K22,500.00 to the Complainant, in January, 2015 she maintained that when she gave the Complainant the said amount, he even signed for the same.

Under cross-examination, RW2 told the Court that as a person who was making a payment to the Complainant she was not required to sign. She denied having been the one who paid the Complainant K3, 000.00 but one Toby.

Tobias Phiri was Respondent witness Three (RW3). He told the Court that when the Complainant was out of town, it was him who used to collect the salary on behalf the Complainant and delivered the same to the Complainant's wife.

RW3 also recalled having been told by the Complainant that he obtained a car loan from the Respondent amounting to K22, 000.00. RW3 told the Court that he was aware that the Complainant in fact bought a car, a Toyota Corolla. He recalled having collected on behalf of the Complainant, the amount of K3, 031.50 and that the amount of K3, 000.00 was collected on behalf of the Complainant by one Kaonga.

RW3 maintained under cross-examination that it was him who collected the amount of K3, 031.50 on behalf of the Complainant, further that he also attended to the marking of the attendance register. In reference to exhibit 'GA 8', he told the Court that, the Complainant used to report for work and then disappear and would mark the said register 'half' on the Complainant's entry. He also marked the Complainant absent.

RW4 was Kennedy Kaonga, a book keeper of the Respondent Company. RW4 told the Court that it was him who made last payment to the Complainant. He told the Court that he made a computation sometime in October, 2015 and paid the Complainant K2, 332.22 as per exhibit 'GA 6'.

According to RW4, the Complainant's benefits were K27, 832.22. However, at a certain time the Complainant had approached RW3 for a car loan and he was referred to Management and according to the records the Complainant had obtained K22,500.00 car loan and an advance of K3,000.00, which monies he deducted from the Complainant's terminal pay.

Under cross-examination, RW4 maintained that whereas he did not sign for having worked the computation of the Complainant's benefits, it was him who prepared it and paid.

Both parties herein filed submissions and we are greatly indebted to them.

We, after carefully perused both documentary and viva voce evidence have made the following findings of facts:-

- (a) That Complainant and Respondent herein entered into a verbal contract of employment and the same ran from 2007 to September, 2014. In the said contract the Complainant was employed by the Respondent as a Truck Driver at a monthly salary of K2, 500.00.
- (b) That the Complainant and the Respondent entered into a Fixed Term of Contract of employment from 1st October, 2014 to 30th September, 2015. In the said contract the Complainant was retained as Bulk Driver by the Respondent with the following earnings:-
 - i. Basic Pay - K1,500.00
 - ii. Transport allowance – K102.00.
 - iii. Housing allowance - K450.00 the same being 30% of basic salary.
 - iv. Lunch allowance - K120.00.
 - v. Trip Bonus K1 per km up to 500km thereafter K0.80 per km with Zambia.
 - vi. That the Complainant is also entitled to gratuity of one month basic pay under clause 19 of the Fixed Term Contract.
 - vii. The fixed term contract of employment between the parties herein expired on 30th September, 2015 but the Complainant continued working up to 5th November, 2015 when the Respondent communicated through a letter that it did not intend to renew the said contract. It is this no-renewal of contract of employment the Complainant complains to be wrongful dismissal from employment.

Clearly, this Court is called upon to make determination on the following claims which we address in the order they are pleaded in the Notice of Complaint:-

1. Under Payment of Trip Bonuses and Salaries:

This claim by its own nature falls under special damages. It is provided for under clause 9 of the contract of employment between the Complainant and the Respondent (Exhibit 'EK 2').

We have critically perused both documentary and viva voce evidenced and we have not been assisted by the Complainant by specifying the trips on which he was under paid his trip bonuses neither did he specify which months the Respondent failed to pay him salaries.

We are mindful that apart from the general burden of proof as is emphasised in the case of **Masauso Winston Zulu v Avondale Housing Project Limited (1)**, there is also a requirement for the Complainant to specifically plead and prove the special damages as was decided in the case of **Philip Mhango v Dorothy Ngulube & Others (2)** that:

It is of course, for any party claiming special losses to prove that loss and to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any shortcomings in the proof of a special loss should react against the claimant.

The Complainant failed to specifically establish and prove non-payment of trip bonuses by the Respondent. In our view Respondent paid the Complainant in accordance with the agreement both the trip bonus and salaries in fact beyond the statutory minimum wage. These claims for underpayment of trip bonuses and

salaries have not been proved on the balance of probabilities by the Complainant, therefore they are dismissed for lack of merit.

2. Gratuity for the period 1st October, 2014 to 30th September, 2015

This claim emanates from the entitlement of the Complainant under clause 19 of the contract of employment between the parties herein for the period 1st October, 2014 to 30th September, 2015.

Under clause 19 of the contract of employment the Complainant is entitled on the completion of the said contract to the payment of gratuity of one month basic pay, for avoidance of doubt the same is K1, 500.00.

There is no dispute that this entitlement of the Complainant does not appear in the computation of the Complainant's benefits. Further, in his own testimony the Respondent through RW1 admitted that the same had not been paid as he was misled by the Labour Officer. We have no difficulty therefore, to find for the Complainant on the claim for gratuity, we accordingly find for him in the amount of K1, 500.00 with interest at the current lending Bank of Zambia rate from the date of notice of complaint to settlement.

3. Damages for Wrongful Dismissal and Napsa Contributions

This claim appears to us to have arisen on the understanding of the Complainant that since he had continued to work after the expiry of the duration of the fixed term contract, the non-renewal of the said contract by the Respondent amounted to wrongful dismissal from employment.

The learned Authors, **Sutton and Shannon on Contract, 17th Edition, published by Butterworks (London)** at page 321 writes as regards discharge by performance on a particular day, or within a specified time, that the contract must be performed on that day or within that time. At Common law, when a time is named for performance of the contract, e.g. within a week, performance within that time is deemed of the essence of the contract. That is to say, a stipulation as to time is a condition and goes to the root of the contract.

In the case in casu, the parties had specifically or expressly agreed that the employment contract was to run from 1st October, 2014 to 30th September, 2015. The fact that the Complainant continued to work few months after the expiry of the said contract cannot be deemed at law to be a renewal of the contract of employment, otherwise either party had during the time after expiry an option to notify the other of the intention to either renew or not.

We have also noted the argument by the Complainant that since he served under an oral contract of employment from 2007 to 2014, he therefore, deemed himself to have been serving under permanent and pensionable basis. The said argument flies in the teeth of the Complainant as he acceded to the signing of the fixed term contract of employment. We cannot, deem the Complainant's employment status to be permanent and pensionable in the circumstances.

We have therefore, come to the conclusion that the option exercised by the Respondent of non-renewal of the contract of employment, though after expiry, cannot be wrongful termination of employment of the complainant. The Complainant therefore failed to prove that he was wrongfully dismissed or terminated from employment. This portion of the Complainant's claim has failed for lack of merit and it is accordingly dismissed.

In respect of the Complainant's claim for Napsa contributions, whereas there is no evidence touching the claim, we can only discern that the Complainant is alleging that the Respondent failed to comply with the statutory obligation of remitting to NAPSA the employer/employee monthly contributions. However, as already alluded to, there is no evidence on record to show that there is non-remittance of Napsa contributions on the part of the Respondent. This portion of the Complainant's claim also fails for lack of evidence and it is dismissed.

4. Payment of accrued leave pay, all allowances and expected income

The evidence of the Respondent shows that one of the components of the computation of the of the Complainant's terminal benefits is payment for accrued leave days in the sum of K2, 222.22.

The Complainant did not adduce evidence in support of his claim for payment of accrued leave days contrary to the one computed by the Respondent.

There is also evidence on record that the Respondent did not only compute the Complainant's accrued leave days but also paid the same through RW4 one Kennedy Kaonga. The evidence of the Respondent witnesses in respect of payment of monies to Complainant collaborate.

We equally do not find any other allowances which are outstanding in favour of the Complainant neither any expected income. This portion of the Complainant's claim fails and we dismiss it for lack of merit.

5. Payment of one month salary in lieu of notice

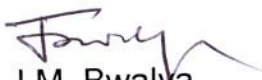
We have already made a finding of fact that the contract of employment between the Complainant and the Respondent came to an end at an agreed time the same being 30th September, 2015, therefore, termination or non-renewal of the contract was at the option of any of the parties.


The said contract having been expired there was no obligation whatsoever on any of the parties to give notice of termination to the other, whether the same was provided for or not in the conditions of the said contract. The Complainant is not entitled to the payment of one month in lieu of notice. This claim is accordingly dismissed together with any other claims.

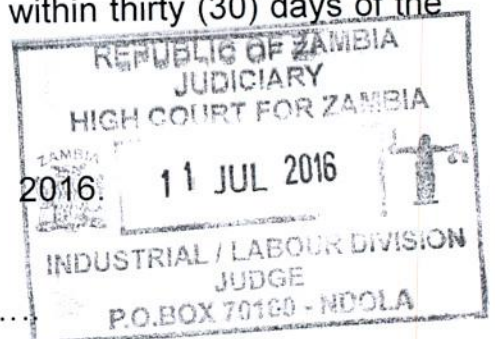
For clarity and avoidance of doubt, the sum of our decision is that all the Complainant's claims have failed and dismissed for lack of merit, except for gratuity of K1, 500.00 the same being one month basic pay, with interest at the current Bank of Zambia rate from the date of Notice of Complaint to settlement. Costs to the Complainant to be taxed in default of agreement.

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

Delivered at Ndola this day of


J.M. Bwalya
MEMBER


.....
Hon. Derrick Mulenga
JUDGE




G.M. Samusungwa
MEMBER