

IN THE INDUSTRIAL RELATIONS COURT  
HOLDEN AT NDOLA

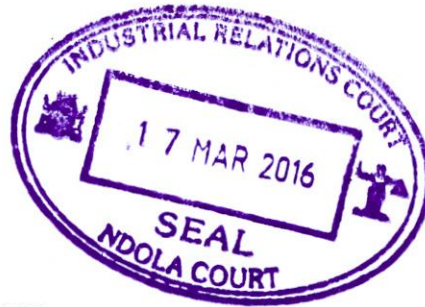
COMP/39/2015

BETWEEN:

MORTON NKETANI

AND

INDO - ZAMBIA BANK LIMITED



COMPLAINANT

RESPONDENT

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

For the Complainant: In Person

For the Respondent: Mr. M. Ndhlovu of Messrs. MRN Legal Practitioners

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## JUDGMENT

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### Cases referred to:

1. The Attorney-General v Richard Jackson Phiri (1988-1989) Z.R. 121
2. Chimanga Changa v Stephen Chipango Ng'ombe (2010) Z.R. Vol. 1, p. 208
3. Wilson Masautso Zulu v Avondale Housing Project Limited (1982) Z.R. 172

Morton Nketani (hereinafter referred to as "the Complainant") filed a Notice of Complaint against Indo-Zambia Bank Limited (hereinafter referred to as "the Respondent") on the following grounds:

- (a) The Complainant was unfairly treated by the Respondent when he was dismissed and subsequently conditionally retired on 24 March, 2015;
- (b) The Conditional retirement of the Complainant was unlawful and in contravention of the employment laws of Zambia;
- (c) The Zambian laws do not provide for conditional retirement;
- (d) The punishment preferred against him of withdrawing salary increments awarded to him over the past three (3) years was unlawful and not provided for by the Respondent's disciplinary code book.
- (e) The summary dismissal of the Complainant was unlawful as the same was not proved.

He thus seeks the following relief:

- (a) Damages for unlawful termination of employment.
- (b) Full terminal benefits for normal retirement.
- (c) Refund of three years' salary increment.
- (d) Interest and costs.

In response, the Respondent filed an Answer and avers that the Complainant was duly charged and dismissed after being found guilty pursuant to provisions of the Respondent's Grievances and Disciplinary Procedure Code for Management Staff.

It is the Respondent's further averment that the conditional retirement package availed to the Complainant was consented to by the Complainant after the Respondent exercised leniency on him pursuant to an appeal for leniency from him.

At the hearing of the complaint, the Complainant, whom we shall herein after refer to as "CW1", was one of the two witnesses in his case.

He testified that he was employed by the Respondent on 24 January, 1994 as a Clerk and rose through the ranks to the position of Assistant Accountant. He averred that his employment was terminated on 19 February, 2015 after having served the Respondent for 21 years.

CW1 further averred that the reason for his dismissal was a shortage the Respondent discovered in an automated teller machine (ATM) of K21,260. It is his testimony that this was discovered during their normal course of work at Chingola Branch.

CW1 narrated in detail what transpired after the discovery of the shortage. He basically repeated the facts that are contained in his Affidavit in Support of Notice of Complaint.

During cross-examination CW1 was referred to exhibit "CW1" in the Respondent's Affidavit in Support of Answer, namely paragraphs (i) to (ix) regarding facts leading to the four charges leveled against him. He confirmed that these were the facts leading to the four charges against him. He testified that he exculpated himself on 7 January, 2015 and on 13 February, 2015 he received a letter of dismissal.

CW1 was further referred to exhibit "CW4" in the Respondent's Affidavit in Support of Answer.



In this exhibit, CW1 was informed about the rulings of the Disciplinary Committee on charges leveled against him and the committee's decision to summarily dismiss him.

The rulings on the charges were as follows:-

**Charge 1:** Gross Negligence resulting in loss or damage as a result of disregard for procedures/systems or instruction (7.2 of Code).

**Penalty :** Summary Dismissal.

**Disciplinary Committee Ruling:** Guilty as charged.

**Charge 2:** Failure to follow established channels or procedure (1.9.3 of Code)

**Penalty :** Written Warning.

**Disciplinary Committee Ruling:** Guilty as charged.

**Charge 3:** Unsatisfactory Control and management of cash resulting into loss (5.2 of Code)

**Penalty :** Summary Dismissal.

**Disciplinary Committee Ruling:** Guilty as charged.

**Charge 4:** where it is considered that cash shortages are as a result of negligence and/or failure to follow laid down procedures (6.1 of Code).

**Penalty:** Letter of reprimand plus recovery of amount involved.

**Disciplinary Committee Ruling:** Guilty as charged.

The Complainant agreed with Counsel for the Respondent that exhibit "CW4" explained why he was found guilty and advised him about his right of appeal.

In further cross-examination, CW1 was referred to exhibit "CW5" which was his letter of appeal against summary dismissal in which he requested the Respondent to reconsider the decision of the disciplinary committee to discharge him from employment and consider a more lenient charge. He testified that pursuant to the appeal, he was accorded a disciplinary hearing at which specific details of the charges were discussed and he was asked questions which he answered. He admitted that the people who heard the appeal, namely, the Managing Director and the General Manager, were both experienced bankers.

CW1 was also referred to exhibit "CW6" which were minutes of the appeal hearing held on 24 December, 2014. He admitted that there was laxity on his part as reflected on page 2 of the minutes.

CW1 stated under further cross-examination that after his appeal was heard but before the decision of the committee was made, he submitted a request for early retirement as per exhibit "CW7".

Counsel for the Respondent referred CW1 to exhibit "CW8" which was a letter indicating the outcome of the appeal. CW1 agreed that the appeal was unsuccessful and that he was once again found guilty on all four charges. He was referred to the second paragraph in the second line wherein the Respondent informed him that following his appeal against dismissal, the dismissal was reduced to a lesser punishment of

withdrawing the salary increments awarded to him in the past three years and retirement from the service of the bank.

The letter also provided that CW1's retirement from the service of the bank was in consonance with his request for an early retirement. It was CW1's further evidence that as a result of the decision of the appeal committee, he was not eligible for a salary increment in 2015 and the salary increments awarded to him in 2013 and 2014 were withdrawn.

CW1 admitted that had the Respondent not given him a conditional retirement, he would have left with nothing. He also admitted that he signed the letter exhibited as "CW8" on 30 March, 2015 which action confirmed his acceptance of the decision by management. CW1 was further referred to exhibit "CW9" which was a letter to him showing the computations made by the Respondent following the Complainant's "conditional normal retirement." CW1 had signed the letter which at the end of it, read:-

*I accept the above entitlements and will have no further claim.*

There was no re-examination of CW1.

The second witness for the Complainant was Albert Muntanga a former Assistant Accountant at the Respondent Company. We shall refer to him as "CW2". CW2 basically repeated some of the evidence which had been given by CW1 and was already on record before the Court.



According to CW2 he was jointly charged with the Complainant and another employee, all of whom were linked to the ATM in question. He testified that there were different charges. He said he was summarily dismissed from employment but was reinstated upon appeal.

There was no cross-examination of CW2 and that marked the close of the Complainant's case.

The Respondent called one witness Christopher Wakung'uma, the Chief Manager - Human Resources, whom we shall hereinafter refer as "RW".

RW's evidence was similar to the evidence already on record before the Court and part of which had already been given by CW1 and CW2.

He however, explained the role of CW1 at the Respondent bank. He testified that on 14 November 2014, K21, 260 went missing at one of the ATM's under the charge of CW1. He averred that as per their disciplinary procedure, investigations were conducted and a report was generated.

RW explained what transpired after investigations were concluded and narrated the entire disciplinary process which CW1 went through including the appeal and the subsequent conditional retirement.

RW testified that CW1 had said during the appeal hearing that he was a custodian of the ATM and that he was not authorised to give the ATM keys to anyone else. According to RW, CW1 did not challenge the minutes of the appeal committee as evidenced by his signature on page 5 of the minutes.

It was RW's testimony that it was unorthodox for CW1 to tender a resignation before completion of the entire disciplinary process. Normally the disciplinary procedure is supposed to be taken to its logical conclusion and thereafter, if a member of staff qualifies for retirement according to the conditions of service, they may apply for retirement.

It was RW's further testimony that the letter by CW1 was written before the appeal authority made its finding or decision.

RW testified that if the Respondent had not exercised leniency on CW1, he would have walked away with only the leave days he had accumulated. It was RW's testimony that CW1 would have further owed the Respondent outstanding loans. He said the leave days less tax would have amounted to K13, 643.51. However, the total liability was K288, 115.12.

Therefore, according to RW, management was extremely kind and humane by factoring in CW1's request for early retirement which was a separate issue from the disciplinary process.

In cross-examination, RW explained that custodians are written to and are usually in management grade MS11 and known as Assistant Accountants and that any appointment of someone not in this management grade to act as custodian of an ATM has to be by prior approval of management. RW testified further that it was not the Respondent's policy to deny erring members of staff from attending disciplinary committee hearing and that at appeal stage an accused person is at liberty to be present at the hearing with his witness.



There was no re-examination of RW and this marked the close of the Respondent's case.

In considering the evidence adduced in this case we have warned ourselves that the burden of proof is on balance of probabilities and that it rests on the Complainant to prove his case against the Respondent. From the evidence adduced before this Court, we have deduced the following as material facts:-

1. The Complainant was employed by the Respondent as an Accounts Clerk on 24 January, 1994 and rose through the ranks to the position of Assistant Accountant.
2. On 6 January, 2015 the Complainant was charged with the following offences:

**Charge1:** Gross negligence of duty resulting in loss or damage as a result of disregard for procedures/systems or instructions pursuant to clause 7.2 of the Disciplinary Code.

**Charge2:** Failure to follow established channels or procedures pursuant to clause 1.9.3 of the Disciplinary Code.

**Charge 3:** Unsatisfactory control and management of cash pursuant to clause 5.2 of the Code.

**Charge 4:** Where it is considered that shortages are a result of negligence and/or failure to follow laid down procedures pursuant to clause 6.1 of the Code

3. The Complainant exculpated himself.

4. By a letter dated 13 February, 2015 the Complainant was summarily dismissed from employment.
5. On 23 February, 2015 he appealed against the summary dismissal.
6. By letter dated 10 March 2015, the Respondent reduced the punishment to withholding the salary increments awarded to the Complainant in the preceding three years and retirement from the service of the bank.
7. The Complainant signified his acceptance of the conditions set out in the letter of 10 March 2015 by signing on a copy thereof.

Having made the above findings of fact, we will now consider the grounds of complaint as laid out in the Notice of Complaint and decide on the issues we have identified as requiring resolution by the Court.

The Complainant alleges that he was unfairly treated by the Respondent when he was dismissed and subsequently conditionally retired.

Further the Complainant contends that the conditional retirement was unlawful and in contravention of the employment laws of Zambia and also, that the punishment preferred against him of withdrawing salary increments awarded to him over the past three (3) years is unlawful and not provided for by the Respondent's disciplinary code.

At the time of writing this judgment we had only received written submissions from the Complainant even though Counsel for the Respondent had indicated his desire to file submissions into Court on behalf of his client. We are grateful to the Complainant for the submissions and will refer to them if and when necessary.



We have considered the evidence on record and the written submissions by the Complainant. We have identified the issues to be resolved by this Court to be:

- (i) Whether or not the summary dismissal of the Complainant was unlawful; and
- (ii) Whether the conditional retirement of the Complainant was unlawful and in contravention of the employment laws of Zambia.

With regard to the first issue this Court is guided by the following statement made by the Supreme Court in the case of **The Attorney-General v Richard Jackson Phiri (1)**:

*We agree that once the correct procedures have been followed, the only question which can arise for consideration of the Court, based on the facts of the case, would be whether there were facts established to support disciplinary measures since it is obvious that any exercise of powers will be regarded as bad if there is no substratum of facts to support the same. Quite clearly, if there is no evidence to sustain charges leveled in disciplinary proceedings, injustice would be visited upon the party concerned if the Court could not then review the validity of the exercise of such powers simply because the disciplinary authority went through the proper motions and followed the correct procedures.*

It is our finding that in the case in casu, not only were the correct procedures followed, but there were also facts established to support the disciplinary measures taken against the Complainant.

The investigations conducted in this case included a case hearing where the Complainant himself admitted that there was laxity on his part in



delivering his duties and that he was not authorised to give the keys of the ATM to anyone apart from Muntanga who was a joint custodian with him.

The Complainant has in his submissions intimated that his summary dismissal was unlawful and not proved by the Respondent. In this regard, we draw our attention to the case of **Chimanga Changa Limited v Stephen Chipango Ngombe (2)** where the Supreme Court stated thus:

*An employer does not have to prove that an offence took place or satisfy himself beyond reasonable doubt that the employee committed the act in question. His function is to act reasonably in coming to a decision.*

In the case at hand we are of the view that the Respondent acted reasonably in coming to the decision to dismiss the Complainant. The Respondent gave the Complainant an opportunity to be heard and in so doing, followed the procedure laid down in the Grievances and Disciplinary Procedure Code for Management Staff which applied to the Complainant. He was charged in accordance with the Schedule of Offences and Penalties for Management Staff found in the Grievances and Disciplinary Procedures Code. The Complainant was also penalised in accordance with the same schedule. In the circumstances, therefore, we find that the Complainant was not wrongfully and unfairly dismissed.

We now turn to the second issue regarding the lawfulness or otherwise of the conditional retirement. It is our finding that there was nothing unlawful about the conditional retirement of the Complainant and neither was it in contravention of the employment laws of Zambia.

It is trite that the employment relationship is a contractual one between the employee and the employer. It is based, amongst other considerations, on offer and acceptance. In this case the Complainant was offered conditional retirement after his dismissal was reversed which offer he accepted by appending his signature on the letter. There was nothing illegal about this.

In any case, the Complainant himself wrote to the General Manager of the Respondent Bank on 3 March, 2015 requesting for early retirement as evidenced by exhibit number "CW7" in the Respondent's Affidavit in Support of Answer. As exhibit "CW8" shows, the Respondent retired the Complainant in accordance with his request for an early retirement.

It is our view that the Complainant should have been grateful that the Respondent exercised leniency by reducing his penalty from dismissal to withdrawing the salary increments awarded to him over the preceding three years and retiring him from the service of the bank. We concur with the Respondent's witness in this case (RW) that the Respondent was kind and humane by granting the Complainant his request to retire, albeit conditionally.


In the case of **Wilson Masautso Zulu v Avondale Housing Project Limited (3)** the Supreme Court ruled that where a plaintiff alleges that he has been wrongfully or unfairly dismissed as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations.

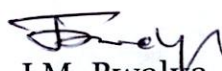
All in all, we find that the Complainant has failed to prove his case against the Respondent on a balance of probabilities and we accordingly dismiss it forthwith.

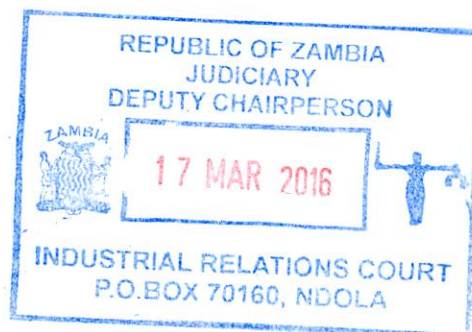
There shall be no order for costs.


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

Delivered at Ndola the 17<sup>th</sup> day of **March, 2016.**

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

  
J.M. Bwalya  
**MEMBER**



  
G.M. Samusungwa  
**MEMBER**