

**IN THE HIGH COURT FOR ZAMBIA**

**COMP NO. IRD/ND/61/2016**

**INDUSTRIAL/LABOUR DIVISION**

**HOLDEN AT NDOLA**

**(LABOUR JURISDICTION)**

**BETWEEN:**

30 OCT 2017

**BRIAN MWAMBA AND OTHERS**

**COMPLAINANTS**

**AND**

**E C MINING LIMITED**

**RESPONDENT**

**Before: The Honourable Mr. Justice D. Mulenga this 30<sup>th</sup> day of October, 2017.**

For the Applicant : Mr. V. Michelo of Messrs V.N. Michelo & Partners  
For the Respondent : Ms Kaunda of Mmems K. N. Kaunda & Advocates

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## **JUDGMENT**

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**Case referred to:**

1. Wilson Masautso Zulu v Avondale House Project (1982) Z R 172
2. The Attorney General v Richard Jacks Phiri (1988-1989) ZR 121
3. Kanda v Government of the Federation of Malaysia (1962) AC 322
4. Kabwe v BP (Zambia) Limited (1995-1997) Z.R. 218 (SC)
5. Swarp Sinning Mills Plc v Sebastian Chileshe (2002) Z R 23

The Complainants herein filed their Notice of Complaint and an affidavit in support of the same on 20<sup>th</sup> June, 2016, on the grounds that they served the Respondent on Pensionable Conditions of Service and or contracts, that they were all dismissed from employment by the Respondent following their demands for payment of the 13<sup>th</sup> cheque or Christmas Bonus pursuant to their conditions of service, and that they were charged by the Respondent with an offence of leaving the work place without permission which offence carried a penalty of verbal warning, however, the Complainants' dismissal letters, read an offence of '*Inciting Constitutional Industrial Action*', the offence the Respondent never charged the Complainants.

For reasons in the said grounds of Complaint, the Complainants seek the following relief:-

- (a) A declaration that their dismissals were unfair, wrongful, null and void,
- (b) Payment of all the Complainants of the 13<sup>th</sup> cheque or Christmas Bonus,
- (c) A declaration that they were never charged of the offence of inciting unconstitutional industrial action,
- (d) Damages for breach of contract,
- (e) A declaration that they were discriminated against as Darius Kasongo who was facing a similar charge with the Complainants was reinstated to work,
- (f) In the alternative, reinstatement to their respective positions, and
- (g) Costs.

The Complainants vide their affidavit in support of the Notice of Complaint sworn by one Brian Mwamba, deposes that they were all charged with an offence of "leaving Company premises without official permission on 21<sup>st</sup> December, 2015 and were asked to exculpate themselves within two working days as per exhibit marked "**BM1**". That the following day, the 22<sup>nd</sup> December, 2015 without allowing the Complainants to make formal replies to the charge of '*leaving the work place without permission*' they were all dismissed from employment on the said charge alongside a charge of '*inciting unconstitutional industrial action*', a charge which they were not charged.

The Complainants avers that the events leading to the leaving of company premises were to seek counsel from the Labour office as regards Respondent's Management's refusal to pay them the 13<sup>th</sup> cheque or Christmas Bonus as per their Conditions of Service. The Complainants contends that there was no justification for the Respondent to deny them the 13<sup>th</sup> cheque or Christmas Bonus which was provided for by their conditions, otherwise, the unilateral withdrawal of the condition for a 13<sup>th</sup> cheque or Christmas Bonus by the Respondent, amounted to a fundamental change to the Complainants' Conditions of Service and consequently, the Respondent ought to have declared them redundant or that their employment were terminated.

The Complainants also argues that the offence of '*leaving the place of work without permission*' had the penalty of '*a verbal warning*' and not dismissal. (refer to exhibit "*BM6*"). Further that at no time were the Complainants ever charged with the offence of unconstitutional industrial action (refer to "*BM2*").

The Respondent opposes the Complaint and to that effect filed the Answer and an affidavit in support of the same on 11<sup>th</sup> July, 2016.

The Respondent contends that the Complainants protested over the payment by the Respondent of the 13<sup>th</sup> cheque or Christmas Bonus, which the Respondent had expressed to be payable upon the Respondent's Group of Companies reach a sales target of US\$30, 000, 000.00 a condition which was published by written memorandum dated the 23<sup>rd</sup> January, 2015 to all the employees of the Respondents including the Plaintiffs herein.

The Respondent avers that the Complainants were advised by the Group Director of Finance that the Respondent and the Group of Companies had not as at 17<sup>th</sup> December, 2016 reached the sales target of US\$30,000,000.00 and therefore it was premature to comment on the payment of the 13<sup>th</sup> cheque, according to the Respondent, it was at that point the Complainants decided to down tools and left work.

According to the Respondent, the payment of the 13<sup>th</sup> cheque was not a basic Condition of Service for the Complainants but that the same was only an incentive paid out of the Respondent's and the Group Companies' good will and payable only in accordance with what is expressed in the written

memorandum dated 23<sup>rd</sup> January, 2015, which the Complainants were always aware of until their services were terminated in December, 2015.

Further, the Respondent contends that the Complainants were rightfully charged with the offences of '*leaving the place of work early and inciting unconstitutional industrial action*' through formal charges and were heard through formal disciplinary procedures and were all summarily dismissed in the first instance. That the Complainants were notified of their respective rights of appeal against their summary dismissals in their letters and some of them did not appeal while others appealed and were heard in accordance with the Disciplinary and Grievance Procedure Code whereupon, the summary dismissals were upheld except for one person whose case justified reinstatement.

The Respondent deposes through an affidavit in support of the Answer to the Complaint, sworn by its Human Resources Manager one Martin Mutono that the Complainants were employed by the Respondent and or its Group of Companies in different capacities in the Engineering Department as per letters of offer of employment (the same being exhibits "**MM1**" to "**MM42**").

That only the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup> and 13<sup>th</sup> Complainants were employed by the Respondent and that the conditions of employment for the Complainants herein are spelt out in the contracts of employment exhibited ("**MM1**" to "**MM2**").

The Respondent contends that the entitlement to Christmas Bonus or the 13<sup>th</sup> cheque was not a basic Condition of Service of the Complainants and that previously the same was paid as an added incentive of all employees out of the goodwill of the Respondent.

The Respondent avers that it and its Group of Companies is involved in the business of supplying and servicing heavy mining equipment and parts imported from specialised manufacturers from overseas. However, following the decline in the value of the Kwacha to major convertible currencies, the Respondent's sales as well as that of the Group of Companies declined in the year 2014. The Respondent on the 23<sup>rd</sup> January, 2015, published a Notice to all of its employees and those of the Group of Companies to the effect that the 13<sup>th</sup> cheque would be paid upon the Respondent reaching a sales turnover of US \$30,000,000.00 at the end of the year (refer to "*MM3*").

The Respondent further contends that the Complainants were always aware of the Notice and continued working from the date of publication of the said notice until December, 2015.

According to Respondent, on the 17<sup>th</sup> December, 2015 the Complainants requested the Group Finance Director to state the position as regards payment of the 13<sup>th</sup> cheque and he advised them that the Respondent had not yet reached a sales turnover target of US\$30,000,000.00, whereupon the Complainants made an unlawful assembly at the Respondent premises and after lunch they resolved to leave work and did in fact leave work.

On the same day, the 17<sup>th</sup> December, 2015 the Respondent received a letter from Labour Office seeking clarification on the payment of the 13<sup>th</sup> Cheque and a response was made by letter dated 18<sup>th</sup> December, 2015 to the effect that payment of the 13<sup>th</sup> cheque would be dependent on the Respondent achieving a sales turnover of US\$30,000,000.00 which had not been reached (refer to "*MM44*" and "*MM45*").

The Respondent also avers that on the 17<sup>th</sup> of December, 2015, the Complainants were all charged with the offence of leaving the place of work early and Inciting unconstitutional Industrial Action, by formal complaint made by the Pumps Manager through the prescribed Complaint Form as per exhibit "*MM46*" to "*MM59*".

The Respondent also deposes that the Complainants between 18<sup>th</sup> and 21<sup>st</sup> December, 2015, all gave statements in relation to the charges against them as specified in the Complaint Forms (refer to "*MM60*" to "*MM78*"). Further that on 21<sup>st</sup> December, 2015, the Complainants were invited to give further exculpatory letters (refer to "*MM79*" to "*MM92*").

However, the Respondent, further relied on other statements from other employees on the events of the material day (refer to "*MM93*" to "*MM104*").

The Respondent argues that the Complainants were subjected to formal disciplinary hearing which they all attended and they were summarily dismissed from employment, in the first instance and they appealed except for one Clement Mpundu who declined (refer to "*MM121*" to "*MM134*"). The summary dismissals were all confirmed on first appeal and the Complainants appealed further, except for Derrick Ngosa, Grasper

Mayumbelo and Wilson Mate who declined to appeal further. The second appeals were heard and summary dismissals upheld, except for one Jack Chineva who was reinstated for having shown full remorse for his actions. (Refer to "*MM138*" to "*MM145*").

The Respondent avers that the Complainants were properly summarily dismissed in accordance with the Disciplinary and Grievance Procedure Code. Also that the Complainants were all paid their dues including terminal benefits (Ref to "*MM191*" to "*MM124*"), and pension as per established pension scheme ("*MM125*" to "*MM156*").

At the hearing of the case herein the Complainants called two witnesses hereinafter referred to only as CW1 and CW2.

CW1 was Brian Mwamba, whose testimony is that he was first employed by the Respondent on yearly contract as a Fitter, from 9<sup>th</sup> January, 2012 and was retained on Permanent and Pensionable basis in 2015. He explained that at the time he was retained on Permanent basis some of his Co-Complainants were already on Permanent and Pensionable employment.

CW1 told the Court that they worked well with the Respondent. However things changed from good to bad when the Human Resources Manager left and a new one came in. They used to enjoy interest free loans and mid-month pay, but when the new Human Resources Manager came in, all that changed without proper communication from management.



According to CW1, when they tried to find out about something in respect of their conditions of service, they were suppressed.

CW1, testified that, 18<sup>th</sup> December, 2015 was a day which was set for the Complainants to proceed on an industrial break, though those from the Engineering Department did not completely close as the employees therein used to alternate going on break. It was for the said reason that on 17<sup>th</sup> December, 2015 when they were having a morning briefing they called the Financial Director to address them on the issue of certain incentives which the Respondent used to give, such as the 13<sup>th</sup> cheque and Christmas hampers/ vouchers.

CW1 told the Court that they had heard nothing about the said incentives hence the calling of the Respondent's Financial Director.

CW1 averred that, the Financial Director informed them that they were not going to receive the 13<sup>th</sup> cheque that time around. Also that prior to the 17<sup>th</sup> December, 2015 briefing, they had been advised that for them to qualify for payment of the 13<sup>th</sup> cheque they were supposed to reach a certain sales turnover mark or target.

The 13<sup>th</sup> cheque used to be paid in December, every year, which meant the Complainants receiving double their salaries in December. According to CW1 in reference to a clause of the letter of offer of employment of one Boniface Musonda (exhibit "*MM24*"), there is provision for payment of the 13<sup>th</sup> cheque, equivalent to one month's gross pay payable in December. CW1, argued that there was no any other condition which was attached to payment of the 13<sup>th</sup> cheque.

After being told by the Financial Director that the Respondent had not yet reached the requisite sales turnover of US\$30,000,000.00 to entitle the Complainants to the 13<sup>th</sup> cheque, the Complainants went out of the company premises where they resolved to go and seek the opinion of the Labour officer.

According to CW1 the Christmas hampers and vouchers were not provided for in the conditions of service like the 13<sup>th</sup> cheque but were given to the Complainants by the Respondent as an incentive at Management's discretion.

CW1 also testified that there was no Union at the Respondent's Company, therefore the Complainants did have any Union representation. After consultations with the Assistant Senior Labour officer, the Complainants returned to the Respondent's work place around 16.40 hours when there was no activity at the Company premises as people had already knocked off.

On 18<sup>th</sup> December, 2015 when the Complainants went to board the bus for work, they found Company security guards who told them that they were under instructions from the Human Resources Manager not to allow anyone who had left the company premises the previous day to be allowed to board the bus, therefore the Complainants found their own way to the Respondent's Company premises. The Complainants were not allowed entry into the Respondent's premises by the security guards who only advised them to wait to be addressed by the Human Resources Manager Mr. Martin Mutono.

CW1 explained that, a letter from the Labour office was then served on the Human Resources Manager through the security guards, therefore on 18<sup>th</sup> December, 2015, they were not addressed by the said Human Resources Manager. However, when the Complainants reported for work on Monday 21<sup>st</sup> December, 2015 they were handed letters asking them to exculpate themselves and were advised to do so within forty-eight hours, as per exhibit marked "**MM79**" in the Respondent's affidavit in support of the Answer.

CW1 also referred to exhibit "**MM92**" the letter addressed to Jack Chineva, which had the same allegations like the ones levelled against him by the Respondent.

CW1 further testified that he was not allowed to record his own exculpatory statement but that the Respondent's Human Resources Manager, Mr. Mutono recorded the same on their behalf. CW1 testified that he was threatened by the said Human Resources Manager who wanted him to name the ring leader.

CW1 argued that they were charged with an offence of '*leaving place of work without permission*' and not the one under Clause 3.8 (e) which is '*leaving place of work without permission during strike action*', which is a dismissable offence. It is the contention of CW1 that one Jack Chineva was charged with an offence just like the rest of the Complainants and that is the reason why on appeal Jack Chineva was only given a written Final Warning for the period of six (6) months.

CW1, also averred that he and his co-complainants signed the disclaimer Form because they were being paid their December salary and leave dues.

In cross-examination by learned Counsel for the Respondent, CW1 told the Court that he was employed by E C Mining which according to him is the same with ECM Engineering as they are in a Group of Companies.

In reference to exhibit "**BM3**", CW1 told the Court that the same is a Disciplinary Code and Grievance Procedure of the Respondent Company.

CW1 explains that whereas exhibit "**MM1**" shows that he was employed by ECM Engineering Company, "**MM3**" shows that Joseph Mulenga was employed by E C Mining Limited and Chanda Chilufya Grant ("**MM9**") employed by E C Grifo Zambia Limited the Companies formed a Group of Companies under the same Management.

Further that whereas his appointment did not provide for payment of the 13<sup>th</sup> cheque, all the Complainants were entitled to payment of the 13<sup>th</sup> cheque and had received the same in the past.

It became clear from the testimony of CW1 in cross-examination that certain Complainants' contracts of employment had provided for payment of the 13<sup>th</sup> cheque, however, others had none and CW1, insisted that they all received the said payment.

In reference to exhibit "**MM43**" (the Notice to all Employees - ECM Group - 13<sup>th</sup> cheque) CW1 told the Court that it was the said memorandum which indicated that they were not going to be paid the 13<sup>th</sup> cheque unless a sales turnover of US\$30,000,000.00 was achieved.

CW1 denied ever going on strike or downed tools but that they went to see the Labour officer as they had a number of issues they were not happy about such as the 13<sup>th</sup> cheque and the conduct of the Human Resources Manager.

CW1 insisted that they were treated differently from one Jack Chineva who the Respondent reinstated, later on the second appeal. However, there are some of the Complainants who refused to appeal against the dismissals as per exhibit "**MM135**", "**MM136**" and "**MM137**".

The second Complainant's Witness is Derrick Kaluba (CW2).

CW2 told the Court that he joined the Respondent as an Hydraulic Mechanic on 13<sup>th</sup> December, 2013. Whereas his letter of offer of employment is from E C Grifo Zambia Limited, the termination letter was written by ECM Engineering Limited (ref "**MM28**" and "**MM118**").

CW2 also told the Court that he was charged with an offence of leaving place of work without permission and the penalty under exhibit **BN3**, Clause "**G2**" is Verbal Warning.

CW2 further averred that there was no difference between the offence he was charged with the one Jack Chineva faced, however, Jack was reinstated later to his position.

In reference to "*MM54*", CW2 insisted that the offence of leaving the place of work early is the same to one of leaving the place of work without permission. Further that the prescribed penalty for the said offence is verbal warning and not summary dismissal.

In cross-examination by Learned Counsel for the Respondent, CW2 told the Court that at no time was he informed of the change from E C Grifo Company to E C Mining Limited.

CW2 admitted that whereas he and his Co-Complainants were employed by either E C M Engineering, E C Mining Limited and or E C Grifo Zambia Limited they were dismissed from employment by E C M Engineering Limited and the Company they sued is E C Mining Limited.

In Reference to Clause 3.1 (f) of the Disciplinary Code and Grievance Procedure otherwise exhibits "*MM165*", CW2 admitted that the guideline of penalties is such that depending on the circumstances of the case, an offence may warrant a more or less severe penalty than that laid down.

The Respondent called one witness one Martin Lombe Mutono, Human Resources Manager of the Respondent Company herein.

The gist of the testimony of RW1 is that, on 17<sup>th</sup> December, 2015 the Complainants left the place of work and incited others to take part in an unconstitutional Industrial action.

The background to the Complainant's action of leaving the place of work as given by RW1, is not different from the Complainants' account of the events of 17<sup>th</sup> December, 2015 and thereafter.

According to RW1, on 17<sup>th</sup> December, 2015, the Respondent's Finance Director was requested to be part of the workshop's morning briefing in order for him to answer some queries in respect of the payment of the 13<sup>th</sup> cheque. At the said briefing the Director of Finance informed the employees who included the Complainants herein that at the time the Respondent had not reached the sales target of US\$30,000,000.00 therefore, the condition precedent for payment of the 13<sup>th</sup> cheque had not been made, though two weeks was still remaining before the end of the year.

The Complainants, on the material date after lunch went to the change house and changed from the work attire into their ordinary clothes and left the work place. RW1, averred that the fact that only few employees remained on duty on the material date and time when the Complainants left, work was disrupted. The Complainants only returned for work the following day with a letter from Labour office, the same was asking the Respondent's position as regards payment of the 13<sup>th</sup> cheque (refer to exhibit "*MM44*").

RW1 testified that the Respondent's position is that the Complainants were advised through a memorandum dated 23<sup>rd</sup> January, 2015 (exhibit "*MM43*") That all employees of ECM Group effective the year 2015, Christmas Bonus (13<sup>th</sup> cheque) was to be paid after achieving a sales turnover of US\$30,000,000.00 at the end of the year.

The response to the Labour officer by the Respondent is by letter dated 18<sup>th</sup> December, 2015.

RW1 told the Court that, some of the Complainants were charged with '*leaving the place of work*' and others with '*leaving the place of work and inciting to strike or an unconstitutional industrial action*'. The Complainants according to him were made to submit statements to the charges which is accordance with procedure, the Human Resources officer recorded on a prescribed form. The said charge forms and statements are exhibit marked "*MM46*" to "*104*" in the Respondent's Affidavit in support of the Answer.

RW1 testified that the Complainants were served with letters asking them to exculpate themselves as per exhibit "*MM97*" to "*MM92*". After which case hearings were held for each Complainant and they were subsequently found guilty of the offences charged whereupon, they were summarily dismissed from employment. RW1 explained that the Complainants were informed of their right to appeal against summary dismissals and did appeal except for the three Complainants, namely William Mate, Derrick Ngosa and Gasper Muyambelo.



The Complainants' appeals were all dismissed at the first and second level except one of the employees who was reinstated, one Jack Chineva.

RW1 referred this Court to exhibit "**MM157**" which is the E C M Disciplinary Code and Grievance Procedure for Non-Management Employees - October, 2014 specifically clause 3.8.1 (e) which reads '*leaving place of work without permission during strike action*' - the sanction of which is '*summary dismissal*'.

There is however, a dispute as regards the use of clause 3.8.1 (e), and I shall revert to this argument in due course in this judgment. The Respondent through RW1, averred that the Complainants' action fell within the meaning of **Clause 4.4.9 of the Disciplinary Code**, aforesaid which defines the strike action/leaving place of work during strike action as:

*Any concerted action by two or more employees to withdraw their labour, or go slow, 'work to rule' or otherwise interfere with normal operations of the Company in furtherance of a trade dispute or with the object of compelling management to take any specific action, where the matter or matters in dispute have not been processed through all relevant procedures set out in the Disciplinary Code, relating to the settlement of industrial dispute and grievances.*

The Respondent therefore argues that the Complainants were in breach of their contractual terms of employment when they took an unconstitutional action.

In cross-examination by learned counsel for the Complainants RW1 told the Court that there are three companies in plot 5293/5294. The three companies aforesaid have the same Managing Director and Directors.

In order to demonstrate the link of the three Companies RW1, was referred to the letter of offer of employment of one Dominic Kaluba (exhibit "*MM28*"). The said letter is on the headed paper of E C Grifo Zambia Limited, but it was under the hand of Managing Director of E C Mining Limited, one Iain Anderson Slight. RW1, told the Court that the said position where, the offer letter was on the Headed Paper of E C Grifo and yet it was signed by the Managing Director of E C Mining Limited, was an error, which was later corrected.

Further, that there was no charge that emanated from E C Grifo against Dominic Kaluba.

RW1 admitted in cross-examination that the Complainants were charged with '*Leaving place of work without permission*' and there was no phrase '*during strike action*' which was included.

According to RW1, there was only one Disciplinary Code for E C Mining Limited and that E C Grifo and E C M Engineering had no Disciplinary Code of its own.

RW1, also admitted that the offence which was cited in the letters of dismissals of the Complainants, did not include the phrase '*during strike action*'.

As regards Jack Chineva, RW1 told the Court that, he was reinstated on second appeal because he had pleaded for leniency and was sorry about the offence committed. However, other employees who pleaded for lenience like Joseph Mulenga were not reinstated.

RW1 admitted in cross-examination that the conditions of the 13<sup>th</sup> cheque provided for in Clause 5 or 6 of the letter of employment of the Complainants, is not discretional nor made under any condition precedent.

At the close of hearing of oral testimonies, both learned counsel for the Complainants and Respondent filed written submissions.

Clearly the pleadings and the evidence adduced in the case herein, shows that the Court is called upon to make a determination on each of the following claims:-

- (a) Whether the Complainants' dismissals from employment by the Respondent were unfair, wrongful, null and void.
- (b) Whether the Complainants are entitled to payment by the Respondent of the 13<sup>th</sup> cheque or Christmas Bonus.
- (c) Whether to declare that Complainants were not charged/with offences of inciting unconstitutional industrial action.
- (d) Whether the Complainants were discriminated against considering that one Jack Chineva who was facing a similar charge with the Complainants, was reinstated.

I shall address the issues herein in the order they are presented above.

1. Unfair/Wrongful Dismissal

In considering this claim the Court herein is directed by the Supreme Court as it was held in the case of **Masautso Zulu v Avondale Housing Project**<sup>1</sup>, that:-

*Where a plaintiff alleges that he has been wrongly or unfairly dismissed, as indeed in any other case where he makes an allegation, it is for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to a judgment whatever may be said of the opponent's case.*

The import of the above authority is that the onus to prove the claims in this case lies on the Complainants to prove their complaints on the balance of probabilities.

Learned Counsel for the Complainants has submitted that there are two competing Disciplinary Codes produced by the parties. The Complainants have produced and relied on exhibit **BM3** in the affidavit in support of the Notice of Complaint whereas on the other hand the Respondent has produced and relied on exhibit "**MM157**" up to "**MM190**".

Clearly, the argument of the Complainants as submitted by their Learned Counsel is that under the Disciplinary Code Exhibit "**BN3**" which affects E M. Mining Limited, E C Grifo Zambia Limited and David Brown Zambia Limited and any other subsidiary Companies, there are offences which falls under '*Absenteeism and poor time keeping*'. The offence the Complainants were charged with, of leaving place of work without permission, I surmise that according to them is one of leaving work early under which the levels

of sanctions are for the first level is verbal warning, second level is written warning and third and final level is discharge from employment.

The Respondent, however relies on the Disciplinary Code and Grievance Procedure for non-management employees October, 2014. The said Disciplinary Code is for E C Mining Limited.

According to Respondent, the Complainants were charged with an offence of leaving place of work during strike action which falls under the heading "*Unconstitutional Industrial Action*".

In order to ascertain as to which of the two Disciplinary Codes and Grievance Procedures is applicable to the Complainants herein, I address my mind to the status of the Companies herein.

The status of the Companies which employed the Complainants herein can be deduced from the documents produced in evidence. Exhibit "*MM43*" the Notice to all Employees of E C M Group - 13<sup>th</sup> cheque, reads in part:

*That this is to advise all employees of ECM Group.....*  
*For purposes of this payment, ECM Group comprises EC Mining Limited*  
*and ECM Engineering Limited.....*

Further, the letters of offer of employment of one Dominic Kaluba under the letter head of E C Grifo Zambia Limited, the same was signed by Iain Anderson Slight, Managing Director of E C Mining Limited, also that in the body of the said letter there is reference to E C Mining Limited (refer "*MM28-29*").

Lastly, the Disciplinary and Grievance Handling Procedure Code of E C Group otherwise exhibit "**BM3**" provides under Part 1, that:-

*This Code may be cited as the Disciplinary and Grievance Handling Procedure Code for E C Mining Limited, E C Grifo Zambia Limited, David Brown Limited and any other subsidiary companies that will be incorporated from time to time.*

The above documentary evidence, by content, clearly shows that the Companies namely E C M Engineering, E C Mining Limited, E C Grifo Zambia Limited and David Brown Limited are part of E C Group of Companies, therefore, the Disciplinary and Grievance Handling Procedure Code applicable is one produced by the Complainants exhibit "**BM3**".

Further that I do not find anything wrong or unlawful by the Complainants' choice to bring the action herein against the E C Mining Limited as the Respondent and that the decision herein will affect all the concerned Companies in the group.

Perusal of the complaint forms otherwise exhibit **MM46** to **MM59** shows that all Complainants were charged with an offence of leaving place of work without permission except for Brian Mwamba, Grant Chanda, Derrick Ngosa and Clement Mpundu whose complaint forms apart from the offence of '*leaving place of work without permission*' also included '*inciting employees to unconstitutional action*'.

Clearly, the offence charged of leaving place of work without permission is not found hook, line and sinker in the Disciplinary and Grievance Handling Procedure of the E C Group of Companies and the Complainants

argues that the only offence closer to the offence aforesaid is 'Leaving work early' which attracts verbal warning for the first breach, written warning for the second breach and a discharge for the third breach, the same is under Category G (2).

There is also the offence of 'Incitement of strike or violence or riotous behaviour' under Category type of offences D (1), whose sanction on first breach is summary dismissal but for which the Complainants were not charged neither were they dismissed from employment based on the same.

This Court is mindful of the caution of the Supreme Court given in its decision in the case of **The Attorney General v Richard Jacks Phiri**<sup>2</sup>, that:-

*We agree once 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 in fact facts established to support disciplinary measures since it is obvious that any exercise of power will be regarded as bad if there is no substratum of facts to support the same.*

In the case in casu, I have noted that apart from the fact that the Complainants were charged with an offence whose sanction has three stages as alluded to herein above, the Respondent by Letters dated 21<sup>st</sup> December, 2015 to the Complainants, asked them to exculpate themselves.

It should be emphasised here that the Exculpatory letters (exhibit "MM79" to "MM92"), gave the Complainants two (2) working days in which they had to exculpate themselves as to why disciplinary action could not be taken

against them. However, before the expiry of two working days, the following day on 22<sup>nd</sup> December, 2015 the Respondent purported to have summarily dismissed the Complainants from employment following the disciplinary hearing held on that very day.

The Court is alive to the observation made in the case of **Kanda v Government of the Federation of Malaysia**<sup>3</sup>, that:-

*If the right to be heard is to be a right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him, and then he must be given a fair opportunity to correct or contract them.*

Considering the authorities cited herein and the facts that the Complainants were employees who did not have a Union at their place of work, I find and hold that the Respondent did not treat them fairly in the manner it summarily dismissed them from employment before the expiry of two working days in which the Complaints had to exculpate themselves. Further, the offence the Respondent charged the Complainants with and dismissed them for, from employment was one which has three levels of sanction as alluded to herein above. Further, the Complainants had a serious issue which affected their conditions of service with the Respondent. I do not find anything to suggest on the facts of the case, that the Complainants incited others to go on an unconstitutional industrial action nor to strike. The Complainants being persons who are not represented by any Union at their work place went to Labour office to seek his/her intervention, an act which I do not find to be wrongful or illegal. In the circumstances therefore, I do not find the Complainant's dismissal



from employment to be justified especially that it was carried out before the expiry period in which the Complainants were called upon to exercise their right to exculpate themselves. The Respondent summarily dismissed them from employment on 22<sup>nd</sup> December, 2015. I therefore, find and hold that the Complainants have proved their case on the balance of probabilities on their claim for damages for wrongful/unfair dismissal from employment.

The issue of award of damages shall be addressed in due course in the judgment herein.

## **2. The 13<sup>th</sup> cheque or Christmas Bonus**

The Complainants have claimed payment of the 13<sup>th</sup> cheque or Christmas Bonus, suffice to state herein that the condition of serve for payment of the 13<sup>th</sup> cheque or Christmas Bonus is expressly provided for in the letters of offer of Employment for Joseph Mulenga, William Mate, Chanda Chilufya Grant, Bornface Musonda Jnr, Gasper Mayumbelo and Elias Mwansa, However, as regards the rest of the Complainants it was not expressly provided for except that they also used to be paid.

The Respondent argues in its affidavit in support of the Answer that whereas it paid the 13<sup>th</sup> cheque to all employees, the same was not a basic condition of service, but an added incentive and was paid out of its goodwill.

The Respondent issued a Notice dated 23<sup>rd</sup> January, 2015 to the effect that effective 2015, Christmas Bonus (13<sup>th</sup> cheque) was to be paid after achieving a sales turnover of US\$30,000,000.00 at the end of the year and

that in the event that sales turnover is US\$36,000,000.00 and above, a two (2) months Bonus was to be paid. No payment of Christmas Bonus was to be paid if the sales turnover is not achieved.

The dispute between the Complainants and the Respondent arose when it became apparent that there was not going to be payment of Christmas Bonus (13<sup>th</sup> cheque in December, 2015)

In determining the status of the effect of the Respondent's Notice dated 23<sup>rd</sup> January, 2015 which brought about the condition precedent to be fulfilled before payment of the Christmas Bonus (13<sup>th</sup> cheque), the Supreme Court, in the case of *Kabwe v BP (Zambia) Limited*<sup>4</sup>, asked, '*what is the effect or consequence of an employer varying or cancelling a basic condition or basic conditions of service without the employee's consent?*'

It held:-

*We respectfully agree with the decision (Marriot v, Oxford and District Co-operative Society Limited (NO.2) (1970) 1 QB 186) that if an employer varies a basic condition or basic conditions of employment without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service do provide for such payment. We would add here that if the conditions of service provide for early retirement and not redundancy then the employee should be deemed to be on early retirement. The fact that the appellant continued working after his salary was reduced cannot be said that he had accepted the new condition.*

In the light of the decision in the case of **Gondwe v BP (Zambia) Limited**, and the facts of the case as regards the following Complainants, Joseph Mulenga, William Mate, Chanda Chilufya Grant, Bornface Musonda Jnr, Gasper Mayumbelo and Elias Mwansa, that the Christmas Bonus (13<sup>th</sup> cheque) was expressly provided for in the offer letter of employment. I do not agree with the Respondent's argument that Christmas Bonus (13<sup>th</sup> cheque) was not a basic condition of service but a mere incentive given at the goodwill or discretion of the Respondent. However, as in respect of those Complainants whose offer letters of employment did not expressly provide for Christmas Bonus (13<sup>th</sup> cheque) the same cannot be said to be a basic condition of service, in the circumstances therefore, only those whose offer letters of employment expressly provided for payment of the Christmas Bonus (13<sup>th</sup> cheque) were required to consent to the new condition precedent for the payment of the same.

I therefore, find and hold that the Complainants whose offer letters of employment expressly provided for payment of Christmas Bonus (13<sup>th</sup> cheque) in December, are entitled to the said payment for December, 2015. The said Complainants have proved their claim, for payment of Christmas Bonus on the balance of probabilities and I accordingly find for them.

In making an award of damages for wrongful and unfair dismissal from employment to the Complainants, I am mindful of the guidance given by the Supreme Court in the case of **Swarp Sinning Mills Plc v Sebastian Chileshe**<sup>5</sup>, I therefore award all the Complainants six (6) months salary inclusive of all taxable monthly allowances as damages for wrongful and unfair dismissal from employment. Further, and for the avoidance of

doubt only employees (Complainants) whose offer letters of employment expressly provided for payment of the 13<sup>th</sup> cheque or Christmas Bonus are entitled to said payment for the year 2015, in addition to damages for wrongful and unfair dismissal.

**3. Whether to declare that the Complainants were not charged with an offence of inciting unconstitutional industrial action and or that the Complainants were discriminated against**

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As regards these claims, it is this Court's considered view that having dealt with the issue of wrongful and unfair dismissal from employment, and the 13<sup>th</sup> cheque (Christmas Bonus) there is no need to address them separately as their failure or success will not in any way affect the outcome herein

The Complainants are also awarded interest on monies that will be found payable to them, at the lending Bank of Zambia rate from the date of the Notice of Complaint to full payment. The Complainants shall have costs, to be taxed in default of agreement.

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

Delivered at Ndola this **30<sup>th</sup>** day of **October, 2017.**

.....  
Hon. Justice D. Mulenga  
**JUDGE**