ZAMBIA AIRWAYS CORPORATION LTD v GERSHOM MUBANGA (1990 - 1992) Z.R. 149 (S.C.)

SUPREME COURT
NGULUBE, AG. C.J., GARDNER, AG. D.C.J., LAWRENCE, J.S.
30TH APRIL, 1992 AND 4TH SEPTEMBER, 1992
(S.C.Z. JUDGMENT NO. 5 OF 1992)

Flynote

Employment - Wrongly dismissed - Reinstatement - Exceptional circumstances.
Damages - Wrongful dismissal - Reinstatement duty to mitigate.

Headnote

The respondent was employed by the appellant as a purchasing and stores manager. On 1st August, 1986 he was suspended from his employment and on 27th January, 1987 he received a letter from the industrial relations manager of the appellant purporting to terminate his employment with effect from the date of his suspension. He issued proceedings claiming wrongful dismissal on the grounds *inter alia* of improper procedures. On the basis of the evidence, the High Court came to the conclusion that he had been wrongly dismissed and that there had been a vendetta against him. It ordered reinstatement.

The defendants appealed and having revisited the facts the Court concluded as follows:

Held:
(i) The totally unjustified charges indicated that there was a vendetta against the respondent. This, together with the fact that the person responsible for the dismissal was no longer with the employing organisation, constituted exceptional circumstances justifying the order for reinstatement.
(ii) A reinstated employee has a duty to mitigate the damage suffered as a result of dismissal.

Case referred to:
(1) Francis v Municipal Councillors of Kuala Lumpur [1962] 3 All E.R. 633.

For the appellant: A.G. Kinariwala, Principal Corporation Counsel, Legal Services Corporation.
For the respondent: G.M. Zulu, Patrick Zulu and Co.

Judgment

GARDNER, AG. D.C.J.: delivered the judgment of the Court.

This is an appeal against an order of the High Court declaring that the respondent had been wrongly dismissed and ordering his reinstatement by the appellant.

The facts of the case are that the respondent was employed by the appellant as Purchasing and Stores Manager. On 1st August, 1986 the respondent was suspended from his employment and on 27th January, 1987 he received a letter from the industrial relations manager of the appellant purporting to terminate his employment

with effect from 1st August, 1986.

The respondent issued proceedings claiming that he had been wrongly dismissed on the grounds, *inter alia*, that the disciplinary code and grievance procedure governing his employment had not been correctly followed

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in that the charges both original and additional were not in the prescribed form and were not made by his immediate supervisor but by the managing director, who was the appellate authority, and the dismissal was backdated to the date of suspension.

The appellant filed a defence alleging that the respondent had been properly dismissed without notice on the grounds of his misconduct, a number of instances of which were set out. At the trial evidence was called in support of the respondent's allegations that the disciplinary procedure had not been followed and further that two of the members of the appellant's management who sat on the disciplinary committee were interested parties and justice had not been seen to be done. There was further evidence that none of the accusations contained in the charges against the respondent was well founded and that any minor irregularities could not justify the summary dismissal of the respondent.

The evidence from witnesses called on behalf of the appellant, although intended to support the charges made against the respondent, failed to justify such charges. The learned trial judge believed the evidence of the respondent and found that the disciplinary code, which should have been strictly followed, was not so followed and that the participation of interested parties in the disciplinary procedure showed that the principles of natural justice was not adhered to. The learned trial judge also found that none of the charges against the appellant had been substantiated nor did the evidence support the appellant's counterclaims against the respondent. The learned trial judge found that the conduct of the appellant's management indicated a vendetta against the respondent and that the circumstances warranted the exceptional order that the respondent should be reinstated in his former employment. The learned trial judge accordingly made an order for reinstatement and for payment to the respondent of his full salary, arrears and other benefits and entitlement that had accrued to him. The appellant appealed against this judgment and order.

Mr *Kinariwala* on behalf of the appellant argued that although the Disciplinary Code had not been strictly followed the appellant followed the procedure in substance and in spirit. He pointed out that the charges and additional charges had been put to the respondent and that the supervisor had drawn the respondent's attention to them; that a hearing had been held at which the respondent was present and the result had been communicated to the respondent who had been advised that he had the right to appeal within five days. Mr *Kinariwala* said that, although in fact a person in the respondent's position should have 14 days within which to exercise his right of appeal, no injustice had been caused to the respondent because his appeal had in fact been properly heard. As to the respondent's complaint that two of the members of the disciplinary committee were interested parties, Mr *Kinariwala* pointed out that Mr Kibour, who was one of the members, had previously written to the respondent charging him in respect of a number of matters because Mr Kibour was the respondent's supervisor and, although Mr Kibour was the respondent's supervisor from day to day, it was suggested by Mr *Kinariwala* that there was no evidence that

he had personal knowledge of the respondent and there was no reason why he should not have been a member of the disciplinary committee. Mr *Kinariwala* also argued that the respondent

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had not complained about the inclusion of Mr Kibour and the auditor, Mr Peirera, in the disciplinary committee.

As to the counterclaims Mr *Kinariwala* said that a claim in respect of failure to deliver linen to the airline had been made against the respondent because a firm in which the respondent's wife was a partner had failed to make a delivery of linen which had been paid for. Mr *Kinariwala* pointed out that in his evidence the respondent had said that he accepted overall responsibility for everything connected with his duty and therefore the respondent was liable. Mr *Kinariwala* also said that a counterclaim for K10,884 was in respect of a loss sustained by the appellant when the respondent ordered some cutlery from different suppliers without the authority of the appellant.

Finally, Mr *Kinariwala* argued that the order for reinstatement should not have been made. He argued that there was provision for termination of the respondent's contract of employment by not less than 90 days' written notice on either side and, consequently, that if it were found that the respondent had been improperly dismissed, he was entitled to not more than an order for damages amounting to three months' salary. In answer to a question by the Court, Mr *Kinariwala* maintained that the evidence disclosed no vendetta and no unfairness against the respondent, but he conceded that gross unfairness in the dismissal of an employee could be a special circumstance justifying the making of an order for reinstatement. He also agreed that the Court, in considering the propriety of an order for reinstatement, could take judicial notice of the fact that the managing director who had been responsible for the respondent's dismissal was no longer part of the management of the appellant corporation.

On behalf of the respondent Mr *Zulu* pointed out that the first charge and additional charges against the respondent were not in proper form as required by the Disciplinary Code and that in this connection, clause 6.1 of such code stated:

> ''There are no exceptions to this particular rule however obvious the offence may be.''

He further argued that the charges against the respondent were altered when he gave an exculpatory statement, that the managing director was not the person who should have charged the respondent in accordance with the Disciplinary Code and that the letter of dismissal gave as reasons for dismissal charges different from the ones which are contained in the supervisor's notice of charges. As to the participation by Mr Kibour and Mr Peirera in the hearing, Mr *Zulu* pointed out that Mr Kibour, as supervisor, had been responsible for one list of charges against the respondent, that Mr Peirera was the auditor who had raised queries against the appellant in his audit and that two of the appellant's witnesses had said that they were present on the disciplinary committee in order to explain the individual charges against the respondent.

It was pointed out that the charge relating to the sale of a vehicle to an unauthorised person was answered by the respondent in his uncontradicted evidence that the original person to whom the vehicle should have been sold failed to collect it with the

result that the vehicle was deteriorating and was being vandalised. The respondent sold it for the same price

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to another person to prevent further deterioration. The evidence as to the state of the vehicle was not contradicted and one of the appellant's witnesses confirmed that the proper price was received for it and accounted for by the respondent. As to an allegation that the respondent had used the appellant's aircraft for the carriage of some of his goods free of charge, Mr *Zulu* pointed out the uncontradicted evidence that the appellant himself, as soon as he knew that no charge had been made, drew attention to the fact that he should have been charged for the freight, and having urged that such charge be made against himself, paid the charge. As to the suggestion that in respect of this consignment of goods the respondent had used the appellant's telex facilities, Mr *Zulu* pointed out that the respondent in his evidence had maintained that others used the telex facilities, an allegation which was not contradicted, and that the use of such facilities could not justify summary dismissal.

Mr *Zulu* pointed out that no one of the allegations of misconduct against the respondent had been substantiated and that there was in fact evidence from the witnesses called by the appellant that, in connection with the itemised cases, the respondent had done nothing wrong.

With regard to the counterclaims Mr *Zulu* pointed out that the order for linen from a firm in which the respondent's wife was interested was made with the full knowledge of the appellant's management and that there was evidence that even after the alleged failure to deliver the linen the same firm was still called upon to supply some items. Mr *Zulu* pointed out that the respondent had not accepted responsibility for failing to check on the supply of one consignment of linen, but had pointed out that he had left it to his junior staff to check. Mr *Zulu* argued on behalf of the respondent in connection with the alleged non-delivery of linen that if there had been a non-delivery, which was never proved and never admitted, no counterclaim could lie against the respondent for a default of a firm in which his wife was interested. As to the counterclaim in respect of K10 884 for the amended order for cutlery, Mr *Zulu* pointed out correspondence from the technical services director to the effect that the order was totally cancelled and no loss as alleged was incurred. As to the alteration of the order allegedly made without authority, it was drawn to our attention that the respondent in his capacity as purchasing and stores manager in fact did have the authority to change the particular order as he did.

Having considered the arguments put before us and considered all the evidence before this Court and the Court below, we are satisfied that the learned trial judge correctly found that the appellant failed to comply with the correct procedure in the purported dismissal of the respondent. Despite Mr *Kinariwala's* argument it cannot be accepted that the correct procedure was followed in substance and in spirit. We find that the learned trial judge did not misdirect himself in this respect at all nor was he wrong in finding that the inclusion of two interested parties in the disciplinary committee showed that the principles of natural justice were not followed. The arguments by Mr *Kinariwala* with regard to all the allegations against the respondent have not succeeded in indicating that the learned trial judge fell into error when he found that they were not proved against the respondent. We also find that neither of the items

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referred to in the counterclaim was substantiated and the learned trial judge correctly so found.

With regard to the question of whether or not there are exceptional circumstances for ordering reinstatement having regard to principles followed by this Court as set out in *Francis v Municipal Councillors of Kuala Lumpur* (1). We note that the learned trial judge took into account the necessity for there being special circumstances before making an order for reinstatement. The facts of this case certainly indicate that a number of unsubstantiated charges were brought against the respondent which could only have been so brought if there were some animosity against the respondent which was not justified by his conduct as an employee. We also note that the managing director responsible for the vendetta against the respondent is no longer with the appellant organisation. We agree that the learned trial judge in exercising his discretion in this case was not wrong in principle. There is no ground at all to interfere with his decision.

As to the order that the respondent should be paid his full salary and arrears from the date of his purported dismissal, we note that no evidence was called to the effect that the respondent had actually suffered damages to the extent of his former full salary. It was the duty of the respondent to mitigate his loss and we have heard from his counsel, though not as evidenced, that the respondent has in fact been engaged otherwise since the dismissal. In the absence of any evidence to enable any court to calculate the losses, if any, which have accrued to the respondent the award in this respect was not justified.

In the absence of such evidence this Court must do the best it can to award the respondent fair recompense. It would be unrealistic to award full salary for the time that has elapsed since the wrongful dismissal. The respondent should have mitigated his loss by obtaining alternative employment within a reasonable period. We regard a reasonable period for a person in the management position of the respondent as 12 months. Accordingly we allow the appeal against the order that the respondent be paid his full salary since the date of dismissal and order that the respondent be paid his full salary and other entitlement arrears from 1st August 1986, the date of his suspension, to 27th January, 1987, the date of his dismissal, together with damages of 12 months' salary and other entitlements which should include pay for any leave that would have accrued during the periods referred to. In all other respects the appeal is dismissed and we confirm the order for reinstatement. Costs to the respondent.

Appeal dismissed.