

IN THE SUPREME COURT FOR ZAMBIA

HOLDEN AT LUSAKA

(Civil Jurisdiction)

APPEAL NO. 14 OF 1995

BETWEEN: Zambia National Provident Fund Board Appellant

and

Rowlands Musukwa Respondent

Coram: Gardner A.C.J., Sakala A.D.C.J., and Challa J.S.,

15th June, 1995 and 12th October, 1995.

U.S. Free Legal Counsel, ZAPF appeared for the appellant.

The respondent appeared in person.

JUDGMENT

Gardner A.C.J., delivered the judgment of the court.

Cases referred to:-

- (1). ~~Hapeza~~ ^{Hapeza} v Zambia Oxygen, SCZ Judgment No. 25 of 1999.
- (2). Francis v. Municipal Council of Kuala Lumpur, (1992) 3 All E.R. 633.
- (3). Aubanga v Zambia Airways Limited SCZ Judgment No. 5 of 1992.

This is an appeal against a decision of the Industrial Relations Court ordering the reinstatement of the respondent in his employment.

The facts of the case are that the respondent was employed by the appellant and, during the course of his employment, as an active union member, engaged in union activities. On two occasions letters were written concerning the respondent's taking part in union activities to the detriment of his duties as an employee. There were also complaints that the respondent, after being given permission to absent himself from work for personal reasons, over-stayed the period given to him for his absence, and reported late for duty.

Generally, the evidence of the appellant's witness was that the respondent was an un-satisfactory employee. Finally, on the 4th of September, 1992 a letter was written to the respondent in the following terms:-

ZAMBIA NATIONAL PROVIDENT FUND

4th September, 1992

ZMPF CONF. 1/18/6392

Mr. Rowland Musukwa
Registry Clerk
Provident House
LUSAKA

Dear Mr. Musukwa

NOTICE OF DISCHARGE

I am writing to give you notice of discharge from the services of the Board with effect from today's date, 4/09/92 but that you will be given a month's pay in lieu of this notice.

This notice is served on you in accordance with Regulation 16 of the Board's Conditions of Service Regulations which govern your employment and the relevant Section reads as follows:-

"16.2 The Director may dispense with the services of an established employee in addition to his right to invoke the provisions of the Articles 18, 21, 22, 23, 25 and 26 on the following grounds and shall give the employee one month's notice in writing if the.....

16.2(b) employee's removal is likely to facilitate improvements in the department to which he is posted
....."

In accordance with Section 16.3 of the Board's Conditions of Service Regulations under reference, you may appeal to the Board against my decision to discharge you from the service of the Board within a period of 14 days from the date hereof.

Yours faithfully

D A K Mulwila (Mrs)
DIRECTOR

cc Personnel and Training Manager
cc Operations Manager
cc Financial Controller

/Ins."

The respondent complained to the Industrial Relations Court that he had been wrongly dismissed, and that court, having heard the evidence, found that the complaints about the respondent's conduct were contradictory and that therefore he must have been dismissed for taking part in Union activities contrary to the provisions of section 5 (ii) of the Industrial Relations Act which reads as follows:-

- "(ii) no employer or any person acting on his behalf shall:
- (a) prevent, dismiss penalise or discriminate against or deter an employee from exercise of any of the rights conferred on him by subsection (i);"

Section 5(i) provides that every employee shall have the right at any appropriate time to take part in the activities of a trade union and to absent himself without leave for the sole purpose of taking part in such activities. As a result of such finding the Industrial Relations Court nullified the appellant's decision to give notice to the respondent and directed the re-insertment of the respondent with payment of all arrears of pay and other benefits. The appellant has appealed against that finding and order.

Mr. Inou on behalf of the appellant said that, under section 108 of the Industrial Relations Act the Industrial Relations Court has power to re-instate an employee who was dismissed because he was discriminated against for certain reasons. He argued that taking part in Union activities was not one of the reasons for discrimination referred to in the Act and that consequently the Industrial Relations Court had no power to order re-instatement in this case. The respondent in reply argued that he agreed with the decision of the Industrial Relations Court but was unable to answer the appellant's argument that re-instatement could not be ordered in the circumstances of this case.

Mr. Then further argued that, under section 5(5) of the Act a penalty of a fine was provided for a breach, and under the principle set out by this court in the case of *Hapeeza v Zambia Oxygen*, (1) re-instatement could only be ordered if it were found that the case was an exception to the rule that re-instatement is very rarely ordered by the courts.

We agree with counsel for the appellant and confirm that there is no statutory power to order re-instatement for breach of section 5(ii) of the Act. As we said in *Hapeeza v Zambia Oxygen*, there is no automatic power to order re-instatement when a statute has been breached.

The only statutory power for the Industrial Relations Court to order re-instatement is under the provisions of section 103 of the Act where there has been discrimination for any of the reasons set out in that section. In any other circumstances this court has on many occasions indicated that we accept the principle laid down in *Francis v Municipal Council of Kuala Lumpur*, (2) that is to say, that re-instatement, even when it is found that there is no power for a dismissal, will not be ordered unless there are exceptional circumstances. The only exceptional circumstances that this court has found has been in the case of *Mubang v Zambia Airways Limited*, (3) in which we found that, where a dismissal was grossly unfair because of a vendetta carried out by an employer's manager against the plaintiff, and where management of the defendant company has since changed, re-instatement could be appropriate.

In this case there are no exceptional circumstances. The respondent was given one month's pay in lieu of notice in accordance with the contract of service and no other remedy is available to him.

For the reasons we have given the appeal is allowed and the order for re-instatement and payment of arrears of pay is set aside.

We make no order as to costs of this appeal.

S/.....

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J. T. GALLER
ACTING CHIEF JUSTICE

.....
E. L. SAKALA
ACTING DEPUTY CHIEF JUSTICE

.....
A. S. CHILLA
SUPREME COURT JUDGE