

CLIFFORD BESA AND ZAMBIA STATE INSURANCE CORPORATION LIMITED

SUPREME COURT
CHAILA, CHIRWA, LEWANIKA, JJS
1ST DECEMBER, 1998 AND 9TH MARCH, 2000
SCZ No. 14 OF 2000

Flynote:

Employment Law - Desertion

Headnote:

This was an appeal by the appellant against a decision of the High Court refusing a declaration that the appellant was still in employment of the Respondent company from 7th March. The Appellant was in employment of the Respondent company as Transport Clerk. Disciplinary action was taken against the Appellant. He was offered an opportunity to exculpate himself. He was first placed on suspension and was put on half pay with effect from 25th March 1993. On 10th September 1993, the Appellant received a letter of dismissal from employment. The Appellant appealed to the Appointment and Disciplinary Committee. Through a letter dated 24th February, 1994, the Appellant was reinstated on demotion. The Appellant was not happy with the demotion although he accepted the decision to be reinstated. The Appellant wrote to the Respondent through his Advocate on 8th March, 1994 and sought clarification on the issue of demotion before he could report for work. The Appellant was reinstated on demotion and kept the same salary, but appellant refused or failed to report for work. Ten days elapsed and appellant was treated as having absented himself from duty and the reinstatement was withdrawn. In his judgment, the learned trial Judge ruled that the appellant after being reinstated in a lower position, absented himself for more than 10 days and became a deserter. He concluded that the appellant was properly dismissed with effect from 7th March, 1994 and not September 1993 and the learned trial Judge ordered that the Appellant should be paid up to the date he was considered a deserter which was 7th March, 1994. The learned trial Judge further declined to give a declaration which the appellant sought.

Held:

That the Respondent Company was right and was entitled to invoke the provisions relating to persons who go on desertion.

Appeal dismissed.

For the Appellant: Mr. W.E. Mwale and Musonda Associates, Ndola
For the Respondent: Mr. K. Musongo of York Partners, Ndola

JUDGMENT

Chaila, JS, delivered the judgment of the Court.

This is an appeal by the appellant against a decision of the High Court (Sakala, J) refusing a declaration that the appellant was still in employment of the respondent company from 7th March 1994. **Mr. Clifford Besa** (the appellant) was in employment of the respondent company as Transport Clerk. Disciplinary action was taken against the appellant. He was offered an opportunity to exculpate himself. He was first placed on suspension and was put on half pay with effect from 25th March, 1993. On 10th September, 1993, the appellant received a letter of dismissal from employment. The appellant appealed to the Appointment and Disciplinary Committee. Through a letter dated 24th February, 1994, the appellant was reinstated on demotion. The appellant was not happy with the demotion although he accepted the decision to be reinstated. The appellant wrote to the respondent through his Advocate on 8th March, 1994 and sought clarification on the issue of demotion before he could report for work. The appellant was reinstated on demotion and kept the same salary, but appellant refused or failed to report for work. Ten days elapsed and appellant was treated as having absented himself from duty and the reinstatement was withdrawn. In his judgment, the learned trial Judge ruled that the appellant after being reinstated in a lower position absented himself for more than 10 days and became a deserter. He concluded that the appellant was properly dismissed with effect from 7th March, 1994 and not September 1993 and the learned trial Judge ordered that the appellant should be paid up to the date he was considered a deserter which was 7th March, 1994. The learned trial Judge declined to give a declaration, which the appellant sought.

The appellant has appealed upon the following grounds:

1. The learned trial Judge erred both in law and fact when he found that there was nothing wrong with the appellant being reinstated on demotion.
2. The learned trial Judge further erred both in law and fact when he found that the respondent's withdrawal of the offer of employment after being reinstated was justified on the ground that the appellant had absented himself from employment for a period of ten days and was therefore a deserter.

Before the appeal was argued, counsel for the appellant made an application to us to produce further documents. The other side had no objection and the documents were admitted. These documents are: (1) a calendar - January, February, March, April, 1994 and (2) a copy of the Collective Agreement made between the **Zambia State Insurance Corporation Ltd.** and the **Zambia Union of Financial Institutions and Allied Workers**. Mr. Mwale in support of the first ground of appeal has submitted that when the Appeals Committee decided to reinstate the appellant, it meant that the appellant would remain a Clerk although he could be deployed in other departments. The counsel argued further that the learned trial Judge misdirected himself by relying on document "**MKH 1**" which did not reflect the decision of the Appeals Committee. This is a document which was signed by the Managing Director endorsing that the appellant be demoted.

On the second ground, the counsel argued that the appellant was served with a letter reinstated on 24th February, 1994 and according to him the period of dismissal should have

not started on 7th March, 1994 since he was still in correspondence with the respondent company. He contended that the appellant was not in desertion for 10 days but only for 8 days and the learned trial Judge should have not found that his client had deserted for more than 10 days. He argued that the appellant was still making representation on the issue of demotion and the respondent company should have not withdrawn the reinstatement.

For the respondent company, the learned counsel Mr. Musongo relied in his reply mainly on his written heads of argument. He argued that the management decision to reinstate the appellant on demotion was consistent with the decision of the Disciplinary Committee. The counsel argued that the decision to reinstate the appellant on demotion was correct and that the employer was entitled to demote an employee as long and it was done fairly. The learned counsel argued that from the evidence on record it was proper for the committee to recommend to the Managing Director and that the Managing Director was correct in recommending a demotion.

On desertion the learned counsel submitted that from the record the appellant deserted from work for more than ten days and that the learned trial Judge was perfectly right in concluding that the respondent company was entitled to withdraw the reinstatement.

There is no doubt that a disciplinary action was taken against the appellant. He was first suspended. He was put on half pay. He was subjected to disciplinary proceedings which initially ended in dismissal of the appellant. The appellant not happy with the decision, appealed to the Appeals Committee. The evidence shows that the disciplinary Appeals Committee found him still guilty but then on humanitarian grounds, the Committee decided to demote him instead of dismissal. That was perfectly within the conditions of service prevailing in the organisation. The appellant was demoted in rank but kept the same salary. The evidence shows that the appellant stayed away longer than it was required by the condition. The respondent company then decided to withdraw or to terminate the reinstatement with effect from the date the appellant was required to have reported for work. The learned trial Judge found that the employers were right to do so. The appellant from the evidence on record, having accepted the reinstatement, should have reported for work and then should have fought the demotion while on duty.

We have found, having regard to the facts of this case, that the respondent company was right and was entitled to invoke the provisions relating to persons who go on desertion. The appeal cannot therefore succeed on this ground. We further uphold the learned trial Judge's decision that the separation should be from 7th March, 1994. The appeal is therefore dismissed. As to costs, we feel that each party will pay his own costs. We make this order because we take note that the appellant was an employee of the respondent company.

Appeal is dismissed and each party to bear its own costs.